

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



OPINION 80-62A
407(d)(3)

OCT 28 1980

Mr. William A. Kelley, Jr.
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102

Re: Vipond & Vipond, Inc. Employees' Stock Ownership Plan
Identification No. F-0247

Dear Mr. Kelley:

On May 10, 1978, you filed, on behalf of the above-referenced plan (the Plan), a request for an advisory opinion regarding a proposed transaction which you believed was subject to the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you sought an opinion that the purchase by the Plan of Vipond & Vipond, Inc. common stock would not violate the prohibited transaction rules of section 406 of ERISA by reason of the statutory exemption contained in section 408(e).

On July 23, 1978, the Department of Labor (the Department) responded to your request in the form of an information letter. That letter indicated that the Department was unable to rule whether the Plan is an eligible individual account plan under section 407(d)(3) of ERISA, and thus whether the stock purchases are covered by section 408(e), until certain issues within the jurisdiction of the Internal Revenue Service were resolved.

Subsequently, you indicated your continued desire to obtain an advisory opinion and provided the Department with documents and information relating to the application of the Plan for a determination of its status under section 401(a) of the Internal Revenue Code of 1954. In a phone conversation with Mr. Antsen of this Office, you decided to narrow your original request to the issue of whether the Plan satisfies the conditions of section 407(d)(3) of ERISA, which defines the term "eligible individual account plan." Therefore, this opinion addresses only that issue, and the Department expresses no opinion regarding other aspects of the transactions described in your opinion request.

The term "individual account plan" is defined in section 3(34) of ERISA as a pension plan which provides for an individual account for each participant and for benefits based on solely upon the amount contributed to the participant's account and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. In this regard, the Plan provides that separate accounts are to be maintained for each participant and that, on each allocation date, the separate accounts will be credited with such amounts as permitted by the experience of the Plan and by any forfeitures which occurred during the period covered by the allocation date, based on a share allocation formula. The Plan also states that, upon eligibility, a participant shall be entitled to receive the balance in his account. Assuming that any benefit due under the Plan is limited to the participant's account balance, it is the opinion of the Department that the Plan is an "individual account plan", as defined in section 3(34) of ERISA.

Section 407(d)(3) of ERISA, in pertinent part, defines an "eligible individual account plan" as an individual account plan which is a stock bonus plan or an employee stock ownership plan, and which explicitly provides for the acquisition and holding of qualifying employer securities.

Section 407(d)(5) of ERISA defines the term "qualifying employer security" to mean an employer security which is stock or a marketable obligation. Section 407(d)(1), in pertinent part, defines the term "employer security" to mean a security issued by an employer of employees covered by the plan. Under section 3(20) of ERISA, a "security" has the same meaning as such term has under section 2(1) of the Securities Act of 1933. Since Vipond & Vipond, Inc. is an employer of employees covered by the Plan, and the Vipond & Vipond, Inc. common stock is a security, as defined in section 2(1) of the Securities Act of 1933, such stock is a "qualifying employer security" within the meaning of section 407(d)(5) of ERISA.

In a letter to the Department dated November 16, 1978, you indicated that the Internal Revenue Service (the Service), on August 28, 1978, issued a favorable determination letter with respect to the Plan's status as a qualified plan under section 401(a) of the Internal Revenue Code, and you also indicated that, in the application for determination that was filed with the Service on behalf of the Plan, the Plan was identified as a stock bonus plan. In addition, the Plan provides that the amount to be distributed to a participant or beneficiary shall be in shares of stock, and that cash shall be distributed to a participant only in lieu of fractional shares or to the extent the plan trustee is unable to acquire shares of stock with the proceeds of the vested portion of the participant's account that does not consist of shares of stock.

On the basis of your representations and the materials included with your submissions, we have concluded that the Plan is a stock bonus plan because it is an individual account plan that provides a definite predetermined formula for allocating the contributions made to the Plan among the participants and for distributing the funds accumulated under the Plan (in the manner described above), and because it provides for benefits that are distributable in stock of the employer.¹ In addition, it appears that the Plan expressly provides for the acquisition and holding of qualifying employer securities because, under Article III of the Plan, contributions may be made in the form of Vipond & Vipond stock, (which, as discussed above, is a qualifying employer security described in section 407(d)(5) of ERISA) and because under Article IV, the Trustee is obligated to apply cash contributions to the purchase of additional shares of such stock. Therefore, the Plan appears to be an eligible individual account plan described in section 407(d)(3) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs

¹ This conclusion is consistent with the Treasury Regulation that describes the term "stock bonus plan." See Treas. Reg. §1.401-1(b)(1)(iii).

We also note that, in your request for an opinion, you suggest that the Plan is an employee stock ownership plan which is among the kinds of plans described in section 407(d)(3)(A) of ERISA. However, since we have concluded that the Plan is a stock bonus plan, it is not necessary to consider whether it also is an employee stock ownership plan.