

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION 81-5A  
407(d)(5)

JAN 2 1981

David E. Gordon, Esquire  
O'Melveny & Myers  
611 West Sixth Street  
Los Angeles, California 90013

Re: Identification Number F-1398A

Dear Mr. Gordon:

This is in reply to your request for an advisory opinion on behalf of the Santa Anita Realty Enterprises, Inc. and Santa Anita Operating Company Thrift Plan for Employees (the Plan) concerning the application of sections 404(a)(2) and 407(b)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the shares of common stock of Santa Anita Realty Enterprises, Inc. (Realty) and Santa Anita Operating Company, Inc. (OC), as evidenced by "back-to-back" stock certificates (the Paired Shares), constitute "qualifying employer securities" within the meaning of ERISA section 407(d)(5) with respect to the Plan. You further ask whether the Plan's holdings of the common stock of Realty and OC violate ERISA section 404(a)(2) or 407.

The following representations are included in your submissions. The Plan is a contributory profit sharing plan qualified under section 401(a) of the Internal Revenue Code (the Code) and an "eligible individual account plan" within the meaning of ERISA section 407(d)(3)(A). Prior to January 1, 1980 the Plan (then named the Santa Anita Consolidated, Inc. Thrift Plan) covered the employees of Santa Anita Consolidated, Inc. (SAC) and two of its subsidiaries, Los Angeles Turf Club, Inc. (LATC) and Santa Anita Development Corporation (SDC). Pursuant to a corporate reorganization effective December 31, 1979, SAC transferred all of the common stock of LATC and SDC to a newly organized subsidiary, Santa Anita Operating Company, Inc. (OC), in exchange for all of the common stock of OC. SAC then merged into Santa Anita Realty Enterprises, Inc. (Realty), a newly organized real estate investment trust, and SAC's stockholders (including the Plan, which owned approximately 10,835 SAC shares) exchanged their SAC stock certificates for Realty stock certificates. Immediately after the merger, Realty distributed its OC shares to Realty's stockholders (including the Plan) on the basis of one OC share for each share of Realty stock held. Concurrently with the reorganization Realty and OC each adopted the Plan

with respect to their own employees. The employees of LATC and SDC continue to participate in the Plan.

The Paired Shares of Realty and OC, which are transferable and tradeable only as a unit, are traded in the over-the-counter market. On April 4, 1980 the closing bid price was \$21.50 per Paired Share. Of that amount, \$.45 was attributable to OC stock and \$21.05 was attributable to Realty stock. As of that date, the Plan owned approximately 11,000 Paired Shares, comprising approximately 50% of the assets of the Plan, so that OC stock comprised approximately 1% and Realty stock comprised approximately 49% of the assets of the Plan. The Plan intends to acquire additional Paired Shares in the future.

ERISA section 404(a)(2) provides that, in the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of ERISA section 404(a)(1)(C) and the prudence requirement of ERISA section 404(a)(1)(B), to the extent that it requires diversification are not violated by the acquisition or holding of qualifying employer securities. The term “eligible individual account plan” is defined in ERISA section 407(d)(3) to include a profit sharing plan.

Under ERISA section 407(a) a plan may not acquire or hold any employer security which is not a qualifying employer security, except as otherwise provided in ERISA sections 407 and 414. ERISA section 407(b)(1) exempts the acquisition or holding of qualifying employer securities by an eligible individual account plan from the restrictions of section 407(a). As defined in ERISA section 407(d)(5) and regulation 29 CFR 2550.407d-5, the term “qualifying employer security” includes stock issued by an employer of employees covered by a plan or by an affiliate of such employer within the meaning of ERISA section 407(d)(7). Section 407(d)(7) provides, in part, that an “affiliate” of an employer is a member of any controlled group of corporations of which the employer who maintains the plan is a member, as defined in Internal Revenue Code section 1563(a)(except that “applicable percentage,” meaning 50 percent or a lower percentage prescribed by Department regulation, is to be substituted for that Code section’s “80 percent”). However, your submissions do not indicate that Realty and OC are “affiliates” within the meaning of section 407(d)(7), and we assume, for purposes of this letter, that those two corporations are not affiliated within the meaning of that section.

In general where the employees of two or more employers (whether or not affiliated within the meaning of section 407(d)(7)) are covered by a single plan, the securities issued by each employer (or by an affiliate thereof, as defined in section 407(d)(7)) would ordinarily constitute “qualifying employer securities” within the meaning of ERISA section 407(d)(5) if the applicable requirements under that section are satisfied. Accordingly, if the Plan is in fact a single plan and continues to be maintained as one plan by Realty and OC for their own employees, the common stock of both employers, Realty and OC, would each constitute “qualifying employer securities” for the purpose of applying the provisions of sections 404(a)(2) and 407 of ERISA to the Plan. On the basis of the information you have provided, the fact that

the outstanding shares of each employer are transferable and tradeable only in combination would not affect this conclusion.

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 thereof relating to the effect of advisory opinions.

Sincerely,

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