

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



July 21, 1994

94-28A
PTE 80-26

Mr. Kenneth W. Ruthenberg, Jr.
Chang, Hallisey, Ruthenberg
Crawford & Long
8880 Cal Center Drive
Suite 250
Sacramento, CA 95826

RE: Hilltop Homes, Inc. Profit Sharing Plan
Identification Number: C-9138

Dear Mr. Ruthenberg:

This is in response to your request, on behalf of Mr. Robert McAdam, for an advisory opinion regarding the application of Prohibited Transaction Exemption 80-26 (45 FR 28545, April 29, 1980) (PTE 80-26).

You represent that Hilltop Homes, Inc. (Hilltop) is a California corporation whose sole shareholder is Mr. McAdam. Mr. McAdam is also the sole trustee of the Hilltop Homes, Inc. Profit Sharing Plan (the Plan), a defined contribution plan sponsored by Hilltop. The only participants in the Plan are Mr. McAdam and his ex-wife, Charlotte McAdam. You represent that, although Mrs. McAdam is no longer an employee of Hilltop, she is still a Plan participant entitled to benefits under the Plan.¹

You indicate that, pursuant to the McAdams' divorce proceeding, the Superior Court of Contra Costa County California intends to issue a qualified domestic relations order (QDRO) as defined in section 206(d)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA).² You represent that the proposed QDRO will require the transfer of cash from Mr. McAdam's account under the Plan to an individual retirement account (IRA) established by Charlotte McAdam. According to the terms of the proposed QDRO, the Plan administrator has confirmed that Mr. McAdam's account balance exceeds the amount to be paid to Mrs. McAdam.

In his capacity as Plan trustee, Mr. McAdam has determined that the Plan may not have enough cash to make the payment required by the QDRO because the Plan does not contain sufficient liquid assets. Consequently, Mr. McAdam proposes to make a loan to the Plan in an amount sufficient to cover the required payment.

PTE 80-26 provides that the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of ERISA and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

¹ For purposes of this letter, we assume, without deciding, that the Plan is covered by Title I of ERISA.

² We further assume, for purposes of this letter, that the domestic relations order you describe in your submission is a QDRO that satisfies the requirements of section 206(d)(3) of ERISA.

a. No interest or other fee is charged to the plan and no discount for payment in cash is relinquished by the plan in connection with the loan or extension of credit;

b. The proceeds of the loan or extension of credit are used only:

- (1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract; or
- (2) For a period of no more than three days, for a purpose incidental to the ordinary operation of the plan;

c. The loan or extension of credit is unsecured; and

d. The loan or extension of credit is not directly or indirectly made by an employee benefit plan.

Although you represent that the terms of the proposed loan satisfy each of the above requirements, you request confirmation that the Department agrees that the payment of benefits in accordance with the requirements of a QDRO is considered a payment of benefits in accordance with the terms of a plan.

Section 206(d)(3)(A) of ERISA requires that every pension plan provide for the payment of benefits in accordance with the applicable requirements of any QDRO. Section 206(d)(3)(B) defines a QDRO, in part, as a domestic relations order which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan. Section 206(d)(3)(J) of the statute further states that, for purposes of any provision of ERISA, an alternate payee under a QDRO shall be considered a beneficiary under the plan.

Accordingly, it is the view of the Department that PTE 80-26 is applicable to a loan to a plan which is used solely for the payment of benefits to a beneficiary of such plan in accordance with the terms of a QDRO, provided all of the other conditions of the exemption are met.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10, relating to the effects of an advisory opinion. We note that pursuant to section 5 of ERISA Procedure 76-1, this advisory opinion relates solely to the proposed transaction described in your letter.

Sincerely,

Ivan L. Strasfeld
 Director
 Office of Exemption Determinations