U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

July 16, 1997

97-18A
ERISA SEC. 407(d)(3)(C), 407(d)(9)

Mr. Steven J. Sacher
Kilpatrick & Cody
Suite 800
700 13th Street, N.W.
Washington, D.C. 20005

Dear Mr. Sacher:

This is in response to your request on behalf of the Butler Manufacturing Company (the Company) for an advisory opinion concerning the application of section 9345(a)(3) of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) (the grandfather provision) to the proposed implementation of a provision in the Company's stock bonus plan permitting participants to diversify their accounts in investments other than the Company's common stock (the Company Stock).

You represent that the stock bonus plan (DC Plan) and a defined benefit plan (DB Plan) together make up a floor-offset arrangement (the Arrangement) that was established before December 17, 1987.[1] The DC Plan has more than 50% of its assets invested in Company Stock. The annuity values of accounts in the DC Plan serve as offsets with respect to benefits provided under the DB Plan.

You further represent that, on August 25, 1989, the Company amended the DC Plan to provide that the Plan's Administrative Committee (the Committee) may permit Plan participants to direct the reinvestment of Company Stock allocated to their individual accounts. Under the amendment (the Amendment), the Committee, in its sole discretion, may determine the investment options available to participants, the percentage or amount of a participant's account that may be invested in assets other than Company Stock, and the frequency of permitted elections. The Amendment has not yet been implemented.

You state that the Committee has determined to implement the Amendment and permit participants to direct the reinvestment of their individual account assets now invested in Company Stock. The Committee proposes to authorize participants to direct the sale of Company Stock allocated to their individual accounts and to direct the reinvestment of the proceeds of such sales into a diversified fund managed by outside investment managers and invested in a variety of domestic and international stocks and bonds. Participants who elect to liquidate Company Stock and reinvest in the diversified fund will not be permitted to liquidate their diversified fund holdings and reinvest in Company stock.

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[1] The Arrangement was the subject of Advisory Opinion 89-11A (July 13, 1989). In that opinion, the Department concluded that, under the circumstances therein presented, the application of the OBRA '87 grandfather provision would not be affected by the proposed modification of the DC Plan to satisfy technical requirements of section 4975(e)(7) of the Internal Revenue Code and the proposed merger of six defined benefit plans into the current DB Plan. Specifically, it was represented that benefits would be provided at the highest level offered by any of the six defined benefit plans and no substantive changes would be made to the Arrangement.

You indicate that under the current Arrangement, the participants' benefits are primarily covered by the assets in the DC Plan, with Company Stock representing over 50% of the assets of the DC Plan and of the Arrangement itself. The potential volatility of this single asset makes it difficult to predict the value of the portion of the retirement benefit payable from the DC Plan. You state that under the Committee's proposal, the existing floor-offset arrangement will be retained and the pension benefits provided under the DB Plan will continue to be offset by the annuity value of the account balances in the DC Plan, but that the volatility of values of account balances in the DC Plan will almost certainly be significantly lessened if participants choose the investment diversification option.

You have requested an advisory opinion that the proposed Amendment to the DC Plan will not render the grandfather provision of section 9345(a)(3) of OBRA '87 inapplicable to the Arrangement.

Section 406(a)(1)(D) of the Employee Retirement Income Security Act of 1974 (ERISA) prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he or she knows or should know that such transaction constitutes a direct or indirect acquisition on behalf of the plan of any employer security or employer real property in violation of section 407(a). Section 406(a)(2) of ERISA provides that no fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he or she knows or should know that the holding of such security or real property violates section 407(a).

Section 407(a) provides, in part, that (1) a plan may not acquire or hold any employer security which is not a qualifying employer security, and (2) a plan may not acquire any qualifying employer security if immediately after such acquisition the aggregate fair market value of employer securities held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

Section 407(b)(1) of ERISA, however, provides, in part, that the 10 percent limitation of section 407(a) shall not apply to the acquisition or holding of qualifying employer securities by an eligible individual account plan.

Section 407(d)(3)(A) of ERISA defines "eligible individual account plan" to include an individual account plan which is (i) a profit-sharing, stock bonus, thrift or savings plan, (ii) an employee stock ownership plan, or (iii) a money purchase plan which was in existence on the date of enactment of ERISA and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of the Code. Section 407(d)(3)(B) provides that, notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer securities only if such plan explicitly provides for the acquisition and holding of qualifying employer securities or qualifying employer real property. Section 407(d)(3)(C) of ERISA, as added by section 9345(a)(1) of OBRA '87, provides that the term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the benefits payable to a participant under any defined benefit plan.

Section 407(d)(9) of ERISA, as added by section 9345(a)(2) of OBRA '87, provides that, for purposes of section 407, an arrangement which consists of a defined benefit plan and an individual account plan shall be treated as one plan if the benefits of such arrangement are taken into account in determining the benefits payable under such defined benefit plan.

Section 9345(a)(3) of OBRA '87 provides that sections 407(d)(3)(C) and 407(d)(9) shall apply with respect to arrangements established after December 17, 1987. Thus, sections 407(d)(3)(C) and 407(d)(9) of ERISA do not apply to floor-offset arrangements established on or before December 17, 1987.

You have represented that the Amendment to permit individuals to direct the sale of Stock held in their individual accounts and the reinvestment of the proceeds into a diversified fund will not alter the existing floor-offset Arrangement or the benefits provided under either plan. In addition, for participants who so choose, the Amendment will almost certainly reduce the volatility of their individual account balances due to diversification. On the basis of the facts and representations contained in your submission, it is the opinion of the Department that the proposed implementation of the Amendment to the DC Plan to permit participants to diversify their accounts in investments other than the Company Stock, with the existing floor-offset arrangement being retained, would not render the grandfather provision contained in section 9345(a)(3) of OBRA '87 inapplicable to the Arrangement.

This letter deals only with the issues arising under section 407(d)(3)(C) and 407(d)(9) of ERISA. The Department has not considered the effect of any other provision of ERISA or the Internal Revenue Code as they may relate to your request.

This letter is an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Section 10 of the Procedure explains the effect of an advisory opinion.

Sincerely,

Bette J. Briggs
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations