

U.S. Department of Labor

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



MAY 5 1987

87-03A

Sec. 407(d)(1), (5) & (7), 3(20)

Mr. Kenneth M. Hart
Townley & Updike
Chrysler Building
405 Lexington Avenue
New York, NY 10174

Re: Jaguar Cars, Inc.
Identification No. F-3262A

Dear Mr. Hart:

This is in response to your letter on behalf of Jaguar Cars, Inc. (Jaguar), a wholly-owned subsidiary of Jaguar plc, a corporation organized under the laws of the United Kingdom, regarding the provisions of sections 404, 406, 407 and 408 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1986 (the Code).¹ Specifically, you request an advisory opinion that depository shares for Jaguar plc common stock, evidenced by American depository receipts (ADRs), constitute "qualifying employer securities" under section 407(d)(5) of ERISA.

Jaguar has established a profit sharing plan (the Plan) for its United States employees which, you represent, constitutes an "eligible individual account plan" under section 407(d)(3) of ERISA. The Plan document and trust agreement provide that the assets of the Plan must be invested exclusively in shares of Jaguar plc common stock (Ordinary Shares), either directly through ownership of Ordinary Shares or indirectly through ownership of depository shares (Depository Shares) evidenced by ADRs.

Company contributions to the Plan may be made in cash, Ordinary Shares or Depository Shares. The Plan document provides that the trustee must use cash contributions to purchase Ordinary

¹ Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

Shares or Depositary Shares on the open market within 30 days of receipt of the cash. Distributions must be made in Ordinary Shares or Depositary Shares, with cash distributions being made in lieu of fractional shares.

Ordinary Shares are traded on the London Stock Exchange in English pounds sterling. They are neither registered under the Securities Act of 1933 nor traded in the United States. To create a market for, and to facilitate trading in, Jaguar plc stock in the United States, Jaguar plc has entered into a depositary agreement with the Bank of New York (the Depositary) for the creation and issuance of Depositary Shares to be traded in the United States.²

Jaguar plc Depositary Shares are registered under the Securities Act of 1933 and are traded in U.S. dollars on the National Market of the National Association of Securities Dealers Automated Quotations System (NASDAQ) under the name Jaguar. Each Depositary Share represents one Ordinary Share deposited with the Depositary. Owners of Depositary Shares are issued ADRs for their Depositary Shares and the Ordinary Shares they represent. Each ADR sets forth a detailed summary statement of the respective rights and obligations of Depositary Share owners, Jaguar plc and the Depositary.

The substantive rights and benefits of ownership of Ordinary Shares are passed through to owners of Depositary Shares. Whenever dividends or distributions (in English pounds sterling or Ordinary Shares) are made with respect to Ordinary Shares deposited with the Depositary, the Depositary converts such dividends or distributions into U.S. dollars or Depositary Shares and distributes these to the owners of the Depositary Shares.

You represent that ownership of Depositary Shares is the functional equivalent of ownership of Ordinary Shares. Thus, owners of Depositary Shares are entitled to (1) direct the voting of Ordinary Shares deposited with the Depositary, (2) receive notices and reports furnished to owners of Ordinary Shares, and (3) demand delivery at any time of the Ordinary Shares their Depositary Shares represent. Moreover, in the event owners of Ordinary Shares are offered

² You state that without a favorable advisory opinion, the Plan would be compelled to invest in, acquire (by receipt of contributions or otherwise) and distribute to beneficiaries Ordinary Shares rather than Depositary Shares. Unlike Depositary Shares, Ordinary Shares are not listed on an established securities exchange in the United States and, therefore, are not readily marketable. This means that whenever the Plan wanted to acquire shares or a beneficiary wanted to sell shares distributed to him, they would be compelled to either (1) buy or sell Ordinary Shares on the London Stock Exchange using English pounds sterling or (2) deposit the Ordinary Shares with the Depositary in accordance with the provisions of the Depositary Agreement and be issued Depositary Shares that could then be traded on the NASDAQ National Market. In addition, dividends and distributions would be made in Ordinary Shares and English pounds sterling.

special rights (such as the right to subscribe for additional Ordinary Shares), equivalent rights (or proceeds from the sale of such rights) are made available to the owners of Depositary Shares.

You request an advisory opinion that the Depositary Shares constitute "qualifying employer securities" for purposes of section 407(d)(5) of ERISA so that: (1) the Plan will not violate section 407(a) of ERISA by receiving contributions in the form of, or otherwise acquiring and holding, Depositary Shares; (2) neither the contribution of Depositary Shares to the Plan nor the holding of Depositary Shares by the Plan will constitute a prohibited transaction under section 406(a) of ERISA; and (3) the Plan trustee will not contravene the diversification requirement of section 404 of ERISA by investing the assets of the Plan exclusively in Depositary Shares.

Section 407(a) provides, in pertinent 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. Regulation section 2550.407a-2 indicates that an acquisition subject to the limitation of section 407(a) includes an acquisition by purchase and an acquisition by the contribution of such securities to the plan. Section 407(b)(1) of ERISA, however, provides, in pertinent 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 if, pursuant to section 407(d)(3)(B), the plan explicitly provides for acquisition and holding of qualifying employer securities.

Section 407(d)(1) of ERISA defines the term "employer security", in pertinent part, to mean a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. Under section 407(d)(7) of ERISA, a corporation is an affiliate of an employer if it is a member of any controlled group of corporations of which the employer who maintains the plan is a member. 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 406(a)(1)(A) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing of any property between the plan and a party in interest.

Section 3(14) of ERISA defines the term "party in interest" to include a 50 percent or more owner of an employer any of whose employees are covered by the plan. Jaguar plc is a party in interest with respect to the Plan because it is the 100 percent owner of Jaguar, an employer of employees covered by the Plan.

Section 406(a)(1)(E) of ERISA prohibits, in pertinent part, the acquisition on behalf of the plan of any employer security in violation of section 407(a). Further, section 406(a)(2) provides, in pertinent part, 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 if he knows or should know that holding such security violates section 407(a).

Section 408(e) of ERISA states, in pertinent part, that:

Sections 406 and 407 shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)) -

- (1) if such acquisition or sale is for adequate consideration,
- (2) if no commission is charged with respect thereto, and
- (3) if the plan is an eligible individual account plan (as defined in section 407(d)(3))

Section 404(a)(1)(B) of ERISA, in pertinent part, requires a fiduciary to discharge his duties with respect to a plan with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

Section 404(a)(1)(C) of ERISA, in pertinent part, requires a fiduciary to diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Section 404(a)(2) of ERISA provides, in pertinent part, that, in the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of section 404(a)(1)(C) and the prudence requirement of section 404(a)(1)(B), only to the extent that it requires diversification, are not violated by the acquisition or holding of qualifying employer securities, as defined in section 407(d)(5).

Section 3(20) of ERISA defines "security" as having the same meaning as the term has under section 2(1) of the Securities Act of 1933. Depository shares evidenced by ADRs are securities within the meaning of section 2(1) of the Securities Act.³ Thus, Depository Shares are securities within the meaning of section 3(20) of ERISA.

³ Section 2(1) of the Securities Act defines the term "security" to mean, among other things, a certificate of interest in, or any receipt for, stock. Moreover, Rule 405 promulgated under the Securities Act (17 CFR §230.405 (1984)), defines a "depository share" as "a security, evidenced by an American Depositary Receipt, that represents a foreign security or a multiple or fraction thereof deposited with a depository."

ERISA does not define the term "issuer" as used in section 407(d)(1), and the Department has not to date promulgated regulations defining this term. However, the federal securities laws provide guidance as to what constitutes an "issuer". Where, as here, a foreign corporation sponsors the creation and issuance of depositary shares by entering into a depositary agreement with a United States bank, the "issuer" of the depositary shares for United States securities laws purposes is the foreign corporation and not the depositary bank. Form F-6, the Securities and Exchange Commission (SEC) form used to register depositary shares evidenced by ADRs, provides that where the issuer of securities deposited under a depositary agreement sponsors the ADR arrangement, the registration statement must be signed by the issuer of the deposited securities as the issuer of the depositary shares. The Form F-6 instructions further provide that although the depositary bank may also sign the statement on behalf of the legal entity created by the agreement for the execution and delivery of the ADRs, it shall not be deemed to be an "issuer."⁴ Moreover, before depositary shares evidenced by ADRs can be listed on an established securities market in the United States (such as the NASDAQ National Market), the issuer of the deposited securities is required to register the deposited securities under the Securities Exchange Act of 1934 on Form 20-F, which provides potential investors with information about the issuer of the deposited securities. Therefore, under federal securities laws, Jaguar plc would be the issuer of the Depositary Shares for Jaguar plc Ordinary Shares.

Since Jaguar is an employer under section 3(5) of ERISA and since, as a wholly-owned subsidiary, Jaguar is also an affiliate of Jaguar plc under section 407(d)(7) of ERISA,⁵ it is the Department's position that the Depositary Shares evidenced by ADRs constitute "employer securities" within the meaning of section 407(d)(1) of ERISA.

The term "stock" as used in section 407(d)(5) of ERISA is not defined in ERISA, and the Department has not, to date, promulgated regulations defining that term. However, based on the facts and representations contained in your submissions, including your representation that the

⁴ You represent that on October 25, 1985, Jaguar plc and the Depositary jointly filed a Form F-6 registration statement for the Depositary Shares with the SEC. That registration statement was executed by Jaguar plc as the "issuer" of the Depositary Shares.

⁵ With respect to the question of whether Jaguar plc would be considered a member of a controlled group of corporations under section 1563(b)(1)(A) of the Code by reason of section 1563(b)(2)(C), the Department has previously stated that the status of a foreign corporation under section 1563(b)(2)(C) is not relevant for purposes of determining whether a corporation is a member of a controlled group of corporations under section 407(d)(7) of ERISA. See ERISA Advisory Opinion No. 85-28A (copy enclosed).

substantive rights and benefits of ownership of Ordinary Shares are passed through to owners of Depositary Shares, it is the opinion of the Department that the Depositary Shares evidenced by ADRs constitute "qualifying employer securities" within the meaning of section 407(d)(5) of ERISA.

Based on your representation that the Plan is an eligible individual account plan and our determination that Depositary Shares evidenced by ADRs constitute "qualifying employer securities", the Department has concluded that the acquisition and holding of Depositary Shares by the Plan would be exempt under section 407(b)(1) of ERISA from the 10 percent limitation of section 407(a). Moreover, section 408(e) of ERISA would apply to the acquisition or sale by the Plan of Depositary Shares provided that the other conditions of the statutory exemption are met.

Additionally, assuming the Plan is an eligible individual account plan, section 404(a)(2) exempts from the diversification requirement of section 404(a)(1)(C), and the prudence requirement of section 404(a)(1)(B) only to the extent it requires diversification, the investment by the Plan exclusively in Depositary Shares, as provided for in the Plan documents. We wish to point out, however, that such investments would be subject to the general requirement that a plan fiduciary discharge his duties with respect to a plan with care, skill, prudence and diligence.

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. This letter relates only to those issues that you expressly raised in your request.

Sincerely,

Elliot I. Daniel
Associate Director for Regulations and Interpretations

Enclosure