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

SEP 28 1988

88-14A
Sec. 403(c)(1), 404(a)

Linda G. O'Brien, Esq.
Xerox Corporation
P.O. Box 1600
Stamford, Connecticut 06904

Re: Identification Number: F-3603A

Dear Ms. O'Brien:

This is in response to your letter of February 18, 1987, and subsequent letter of February 3, 1988, requesting an advisory opinion on behalf of Xerox Corporation (the "Company") regarding the application of sections 403(c)(1), 404(a), 406(a)(1)(D), and 406(b)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") to a proposed merger of the Company's Long-Term Disability Income Plan (the "LTD Plan") and Medical Care Plan (the "Medical Plan") (collectively, the "Plans").

According to your representations, the Plans are "employee welfare benefit plans" as that term is defined by section 3(1) of ERISA. The same classes of employees are eligible to participate in each plan and the Plans are administered by the same plan administrator. You have further indicated that the actual participants in each plan are identical. The LTD Plan provides continuing income to eligible employees who become disabled for a period exceeding 5 months and are unable to work. The Medical Plan provides payments for medical expenses incurred by eligible employees, including employees who are receiving disability benefits from the LTD Plan. A trust has been established under each plan and each trust has been determined to be exempt from Federal income tax under section 501(c)(9) of the Internal Revenue Code of 1986. Contributions to the trusts are made solely by the Company; no contributions by participants are permitted. The LTD Plan provides that the Company will contribute to the trust "from time to time such sums as may be deemed advisable to fund the benefits under the Plan as determined by actuarial evaluation." The Medical Plan provides that the Company will contribute to the trust "from time to time such sums as are approved by the Plan Administrator based upon amounts necessary to pay all expenses of the Plan as they fall due." The plan documents provide that the Company has reserved the right to amend or terminate the Plans and the related trusts.

You further represent that the level of funds in the LTD Plan greatly exceeds the estimates of funding needed under that plan for the foreseeable future. The Medical Plan is not funded beyond the amounts necessary to pay current benefits and expenses. The plan administrator has proposed a merger of the Plans to enable funds presently held in the LTD Plan to be used to pay medical expenses incurred in the future by plan participants of the merged plan. Prior to the merger, each plan will be amended to contain identical provisions. You represent that all of the assets of the existing plans will become assets of the new plan after the merger and, therefore, no plan assets will be returned to the Company. You further represent that the merger will not relieve the Company of any existing liability or obligation to make contributions. The merged plan will provide the same benefits, and will contain the same provisions with respect to employer contributions as the former plans, and those individuals who are currently receiving long-term disability benefits will continue to receive those payments in accordance with the provisions of the original LTD Plan. Following the merger, the new plan will be subject to Title I of ERISA, and it is intended that the related trust will be exempt from Federal income tax under section 501(c)(9) of the Internal Revenue Code.

As you are aware, section 403(c)(1) of ERISA provides, in part, that the assets of a plan shall not inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. Section 404(a)(1)(A) of ERISA similarly requires that fiduciaries of a plan discharge their duties solely in the interest of the participants and beneficiaries of the plan, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable plan administration expenses. In addition, sections 404(a)(1)(B) and (D) of ERISA require plan fiduciaries to act prudently, and in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA.

Section 406(a)(1)(D) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know that the transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Section 406(b)(2) provides that a fiduciary with respect to a plan shall not in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries.

The provisions of Title I do not expressly prohibit or limit mergers of welfare plans. Thus, in the Department's opinion, violations of section 403(c)(1) and 404(a)(1) would not occur merely because assets and related liabilities are transferred from one welfare plan to another in connection with a valid merger.

On the basis of your representations, it is the opinion of the Department that the provisions of ERISA sections 403(c)(1) and 404(a)(1) would not be contravened merely because the assets and related liabilities of the LTD Plan and Medical Plan are being transferred to the merged plan. Furthermore, in the opinion of the Department, neither ERISA section 406(a)(1)(D) nor 406(b)(2) would be violated based solely on the transfer described above.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Acting Director of Regulations and Interpretations