

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 80-01A
407(a)(4)

JAN 2 1980

Kenneth Foster, Esquire
Ice Miller Donadio and Ryan
111 Monument Circle
Indianapolis, Indiana 46204

Re: Identification Number F-1419

Dear Mr. Foster:

This is in reply to your letters of October 10, 1979 and November 30, 1979 in which you request an advisory opinion that no divestiture of employer securities by the Baldwin & Lyons, Inc. Employees Pension Plan (the Plan) is required by December 31, 1979 under section 407(a) (4) of the Employee Retirement Income Security Act of 1974 (ERISA) and the regulations thereunder issued by the Department of Labor (the Department).

The following representations are included in your submission:

1. The Plan, which is a defined benefit pension plan, presently holds 15,000 shares of the common stock of Baldwin & Lyons, Inc., an employer of participants covered by the Plan. These shares are "qualifying employer securities" within the meaning of section 407(d)(5) of ERISA. At all times since January 1, 1975 the fair market value of the qualifying employer securities held by the Plan has exceeded ten percent of the fair market value of the assets of the Plan. The Plan owns no qualifying employer real property.
2. For the purposes of the formula of 29 CFR 2550.407a-4(c)(1) the Plan has (a) selected January 3, 1975 as the "valuation date" and (b) decided that the actuarial estimate of the fair market value of the assets of the Plan as of December 31, 1984 shall be deemed to be the fair market value of the assets of the Plan on the valuation date.
3. On January 3, 1975, the fair market value of the employer securities held by the Plan was \$148,125. The Plan estimates that, as of December 31, 1984, the fair market value of the assets of the Plan will be \$3,229,011.

Under section 407(a)(3) of ERISA, a defined benefit plan may not hold, after December 31, 1984, qualifying employer securities or qualifying employer real property (or both) whose aggregate fair market value exceeds ten per cent of the fair market value of the assets of the plan. Various dates are specified for determining fair market value for this purpose. Section 407(a)(4) of ERISA mandates that the Secretary of Labor prescribe regulations having the effect of requiring plans to divest by December 31, 1979 one-half of the securities which such plans are required to divest by December 31, 1984.

In this regard, §2550.407a-4(c)(1)(i) of the regulations issued by the Department under section 407(a)(4) states:

A plan which would be required to divest qualifying employer securities or qualifying employer real property before January 1, 1985, pursuant to section 407(a)(3), and which has not met the requirements of that section by December 31, 1979, will be in compliance with the requirements of section 407(a)(4) of the Act and this section if the plan divests by December 31, 1979, qualifying employer securities and qualifying employer real property which have, on any date between December 31, 1974 and January 1, 1980 (hereafter referred to as the "valuation date"), a fair market value equal to 50 percent of the amount by which such qualifying employer securities and qualifying employer real property exceed 10 percent of the fair market value of plan assets as of the valuation date. For purposes of this section, the fair market value of plan assets on the valuation date shall be deemed to be an amount equal to:

- (A) The fair market value of the assets of the plan on the valuation date, or
- (B) An actuarial estimate of the fair market value of the assets of the plan on any date between December 31, 1979 and January 1, 1985. The actuarial estimate under paragraph (c)(1)(i)(B) of this section must be made in good faith and its basis must be set forth in writing.

Section 5.02(p) of ERISA Procedure 76-1 (copy enclosed) explains that the Department ordinarily will not issue opinions relating to section 407(a)(2) and (3) and (c)(1), with respect to whether the value of any particular security or real property constitutes fair market value. In this regard, as we indicated to you in our letter of October 31, 1979, the Department will not issue an advisory opinion confirming the accuracy of an actuarial estimate of the fair market value of plan assets. We assume, therefore, for purposes of this letter, that (1) the fair market value of qualifying employer securities held by the Plan as of January 3, 1975, was \$148,125, and (2) the actuarial estimate, set forth above, of the fair market value of the assets of the Plan on December 31, 1984, was made in good faith. We do not, however, express any opinion regarding the foregoing.

In making the computation described in §2550.407a-4(c)(1)(i), the Plan has chosen to utilize an actuarial estimate of the fair market value of the assets of the Plan on December 31, 1984 in

determining the fair market value of the assets of the Plan as of the valuation date selected by the Plan, January 3, 1975. Ten per cent of the fair market value of the estimated total Plan assets as of December 31, 1984 is \$322,901. On January 3, 1975, the valuation date selected by the Plan, the fair market value of the employer securities held by the Plan was \$148,125. Therefore, the fair market value of the qualifying employer securities held by the Plan on the valuation date does not exceed ten per cent of the fair market value of Plan assets as of the valuation date, because, pursuant to §2550.407a-4(c)(1)(i)(B), the Plan has utilized the actuarial estimate method of computing the fair market value of the Plan's assets on the valuation date.

Accordingly, based on your representations, and subject to the limitations set forth above, it appears that the Plan need not divest itself by December 31, 1979 of any qualifying employer securities held by it in order to be in compliance with section 407(a)(4) of ERISA and the regulation 29 CFR §2550.407a-4 issued by the Department thereunder.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and 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