

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-24A

3(1), 3(2)

FEB 26 1981

Mr. David T. Mitzner
Holme Roberts & Owen
1700 Broadway, Suite 1800
Denver, Colorado 80290

Dear Mr. Mitzner:

This is in reply to your letter of October 17, 1980, concerning the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). You request an advisory opinion regarding the applicability of ERISA to the Deferred Compensation Plan of Petro-Lewis Corporation (the Plan). Specifically, you request an advisory opinion that the Plan is not covered by title I of ERISA.

The following representations are made in your submission. Petro-Lewis Corporation (the Company) adopted the Plan on August 1, 1980, as the successor to the Company's Deferred Compensation Performance Plan (Performance Plan). Participation in the Plan is limited to two employee groups: employees who are in the Company's Executive Grade Levels I through VII, which cover employees having executive and managerial responsibilities, and those employees who were participants in the Performance Plan but who do not fall within Executive Grade Levels I through VII. One hundred and thirty-six employees are eligible to participate in the Plan; seventy-four employees actually participate in the Plan. Under the Plan a participant may elect to defer a portion of his or her annual base salary for a limited period. "Base salary" is defined in section 1 of the Plan as the regular salary excluding bonuses that the participant is scheduled to earn during the plan year. The minimum amount of base salary that may be deferred in a single plan year is \$500. The maximum amount of base salary that may be deferred is a percentage based upon the length of service with the Company. Specifically, a participant with less than 4 years of employment may defer up to a maximum of 40 percent of base annual salary, 4 through 9 years of employment up to 50 percent of base annual salary, and 10 or more years of employment, up to 60 percent of base annual salary.

Distribution of the amount deferred during a plan year will begin approximately the 45th day after the beginning of the following year. The amount deferred will be distributed with interest over a 4 year period in quarterly installments. The Plan does not provide that a participant may elect to postpone the distribution of the amounts deferred beyond the year following the year of

deferment. Thus, the longest possible deferment under the terms of the Plan is 5 years and 45 days.

A participant will forfeit all of his or her deferred compensation not yet distributed if he or she is discharged from the Company for cause. "Cause" is defined in section 5 of the Plan as: (i) theft or willful destruction of property of the Company or property of an affiliate of the Company having more than insignificant value; (ii) willful disclosure of the Company's or an affiliate's secrets; (iii) competition with the Company or its affiliates without the consent of the Company or its affiliates; or (iv) conviction of a felony or conduct constituting an attempt to accomplish such thefts, destruction, disclosure, or competition. If a plan participant terminates his or her employment for any reason other than cause, the plan participant may maintain his or her interest in the Plan, which will be adjusted to take into account the amounts actually contributed to the Plan during the year in which the employee terminates employment. If a plan participant dies before his or her entire interest has been paid out, the distributions will be made to the beneficiary designated by the participant.

The term "employee benefit plan" is defined in section 3(3) of ERISA as "... an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." The term "employee welfare benefit plan" is defined in section 3(1) of ERISA as "... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Inasmuch that the Plan provides plan participants the opportunity to defer a portion of their annual base salary, and benefits that result from a deferred salary are not among the benefits listed in section 3(1), the Plan is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA as "... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -- (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond"

Because the Plan does not condition distribution of the amount deferred upon termination of employment, retirement, or any other circumstances other than the passage of a fixed period of

time, the Plan is not by its express terms an employee pension benefit plan within the meaning of Section 3(2)(A) of ERISA.

Under section 3(2)(A), a plan may be an employee pension benefit plan as a result of surrounding circumstances. Under the instrument establishing the Plan, furnished with your submission, a substantial amount of the annual salary of a participant may, at the participant's discretion, be deferred for a period of up to 5 years and 45 days. If the operation or administration of the Plan were to result in the deferral of income for employees extending to the termination of covered employment or beyond, the Plan could be an employee pension benefit plan as a result of surrounding circumstances. As a determination of whether a plan is an employee pension benefit plan as a result of surrounding circumstances is inherently factual in nature, this letter takes no position on that issue. See section 5 of ERISA Procedure 76-1.

This letter constitutes an advisory opinion as defined in ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of such procedure, including section 10 thereof relating to the effect of an advisory opinion.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs