

**U.S. Department of Labor**

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



Reply to the Attention of:  
Frederic Burke  
(202) 523-7901  
Pension and Welfare Benefit Programs

OPINION 81-60A  
SECTION 4(a), 3(2), 3(3), 104

JUL 21 1981

Mr. Homer L. Elliott  
Drinker Biddle & Reath  
1100 Philadelphia National Bank Building  
Broad and Chestnut Street  
Philadelphia, Pennsylvania 19107

Dear Mr. Elliott:

This is in reply to your letter of December 3, 1979, requesting an advisory opinion concerning the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Phoenix Steel Corporation Plate Division Retirement Fund (the Plan). Specifically, you request an opinion that the Plan is not subject to the provisions of title I of ERISA.

You represent that the Plan was established in September 1950 pursuant to an agreement between Central Iron and Steel Company, a predecessor of the Phoenix Steel Corporation (the Company), and the United Steelworkers of America (the Union) to provide pension benefits for employees at the Harrisburg plate division plant. On October 31, 1955, Central Iron and Steel Company was consolidated with another company to form the Company, and the name of the Plan was changed. By agreement approved on December 31, 1960, the Company permanently closed its Harrisburg plate division plant and discharged most of the persons employed at that plant. With respect to such closing, the Plan was amended to provide that the Plan would continue to operate for the purpose of paying retirement benefits, but upon 60 days' written notice to the Company and the Union, the Company's Retirement Board (the Pension Board) could authorize the Plan trustees to liquidate the Plan's assets, and use the proceeds (net of expenses) to purchase annuity contracts as may be provided by the equitable share of the assets allocable to each plan participant or beneficiary who is then entitled to benefits under the Plan.

In 1978, the Pension Board directed the Plan trustee to liquidate the Plan's investments and to purchase a group annuity contract. On October 10, 1978, pursuant to a court order, the Plan trustee, First Pennsylvania Bank, N.A. (Bank), was authorized to purchase, and has purchased, fully-paid annuities from the Travelers Insurance Company (Travelers). The annuity contract

requires Travelers to apply an amount of single premium equal to that portion of the premium paid sufficient to purchase for each employee the amount of retirement annuity applicable to him. Payment of the retirement benefits is made directly by Travelers to the employee. Further, Travelers is contractually obligated to provide each employee with the full amount of his retirement benefit. Certificates describing the benefits under the annuity contract with Travelers have been distributed to each employee entitled to receive benefits.

ERISA title I, section 4(a) specifies that ERISA title I applies to any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce, or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce, or (3) by both, except for plans specifically exempt under section 4(b).

ERISA section 3(2)(A) defines "employee pension benefit plan" to mean "... any plan, fund, or program ... 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, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan."

ERISA regulation 29 C.F.R. §2510.3-3(b) provides that the term "employee benefit plan" does not include, for purposes of title I, any plan in which no employees are participants covered under the plan, as defined in regulation section 2510.3-3(d).

Regulation section 2510.3-3(d)(2)(ii) provides:

An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if (A) the entire benefit rights of the individual (1) are fully guaranteed by an insurance company ... and are legally enforceable by the sole choice of the individual against the insurance company ...; and (2) a contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual ....

On the basis of your submissions, and provided also that the Bank, pursuant to proper instructions of the Pension Board, effectively waives, or has so waived, any rights it may have as the owner of the contract to the extent necessary to assure that the annuitants' benefit rights are legally enforceable by their sole choice against the insurance company, it is the Department's position that the Plan would not be an employee benefit plan within the meaning of section 3(3) of ERISA.

In your letter, you advance the argument that the Plan is not covered by title I of ERISA because the Plan has not been "maintained" by the Company since the effective date of ERISA,<sup>1</sup> or, alternatively, because the Plan has been terminated and all assets distributed therefrom. We do not agree that, merely because an employee pension benefit plan has not provided for post-ERISA contributions, the plan would not be subject to title I. Cf. section 301(a)(5) of ERISA, which provides an exception to coverage by the minimum funding standards for such plans. Nor do we agree with your alternative argument, if the conditions of regulation section 2510.3-3(d)(2)(ii), noted above, are not met.

You also have asked, in the event that the Department is unable to conclude that the Plan is not subject to title I of ERISA, for an opinion that the Plan is exempt from the reporting and disclosure provisions of title I or, alternatively, that it qualifies for the limited relief from the reporting and disclosure requirements of title I provided by regulation 29 C.F.R. §2520.104-44. That section provides relief from, among other things, the requirement that a plan engage an independent qualified public accountant to conduct an examination of the financial statements and schedules of the plan, and is available in the case of a pension plan the benefits of which:

... are provided exclusively through allocated insurance contracts or policies which are issued by, and pursuant to the specific terms of such contracts or policies benefit payments are fully guaranteed by an insurance company or similar organization which is qualified to do business in any State, and the premiums for which are paid directly by the employer or employee organization from its general assets or partly from contributions by its employees or members: Provided, That contributions by participants are forwarded by the employer or employee organization to the insurance company or organization within three months of receipt and, in the case of a plan that provides for the return of refunds to contributing participants, such refunds are returned to them within three months of receipt by the employer or employee organization.

Since the opinion rendered above, with respect to coverage of the Plan under title I, is qualified, we have considered your alternative request. You base your argument that the reporting and disclosure requirements of part 1 of title I should not apply to the Plan on the assertion that the Plan has no "participants." As is discussed above, if none of the annuitants are "participants," the Plan would not be subject to any part of title I of ERISA. Assuming that the Plan is subject to title I, however, it is the Department's opinion that the relief provided by regulation section 2520.104-44 would be available to the Plan in connection with reporting and disclosure requirements relating to Plan years subsequent to the year in which the Bank made final payment to Travelers of the premium described above.

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<sup>1</sup> In this regard, you characterize the Plan as having been "in the process of liquidation since December 31, 1960." Although we do not concede the possible relevance of such a fact, it appears, as is noted above, that the Pension Board's direction that the trust assets be liquidated was not made until 1978, well after the effective date of ERISA.

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  
Pension and Welfare Benefit Programs