

**U.S. Department of Labor**

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



Reply to the Attention of:  
Charles Humphrey  
(202) 523-8971

A.O. 81-69

JUL 28 1981

Ms. Kathleen K.O. Conahan  
Conahan & Conahan  
Suite 1500  
745 Fort Street  
Honolulu, Hawaii 96813

Re: Conahan & Conahan, Attorneys at Law, A Law Corporation Defined Benefit  
Pension Plan  
Identification Number: F-1621

Dear Ms. Conahan:

This is in reply to your letter of June 19, 1980, in which you requested a ruling that the contribution by an employer of an option to a defined benefit plan does not violate section 4975 of the Internal Revenue Code. For purposes of our reply, all references to the Code contained in your letter will be treated as references to corresponding provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

You request that Conahan & Conahan, Attorneys at Law, A Law Corporation (the Employer) established the Conahan and Conahan, Attorneys at Law, A Law Corporation Defined Benefit Pension Plan (the Plan) and that the Plan received a favorable determination letter from the Internal Revenue Service in July 1970. The Plan is a defined benefit plan. The Employer holds an option to purchase a residential condominium unit which it acquired from James P. Conahan and Kathleen K.O. Conahan, the apparent owners of the unit. As part of its corporate contribution to the Plan, the Employer wishes to make a contribution of the option to the Plan.

Section 406(a)(1)(A) of ERISA provides that a fiduciary with respect to a plan shall not cause a plan to engage in a transaction, if he knows or should know that such a transaction constitutes a direct or indirect sale or exchange between a plan and a party in interest. Section 3(14)(C) provides that a party in interest means an employer any of whose employees are covered by the plan. An employer assumes with respect to a defined benefit plan an obligation to make contributions to fund promised benefits. The contribution of the option by the Employer to the Plan constitutes a discharge by the Employer of its legal obligation to make the contribution for

that year. In effect, the Plan is exchanging its legal right to payment of the contribution for property other than cash. Accordingly, the contribution of the option by the Employer is a prohibited sale or exchange of property between a plan and a party in interest under section 406(a)(1)(A) of ERISA.

You argue that section 406(c) of ERISA compels the conclusion that only encumbered contributions of real or personal property by an employer are prohibited by section 406(a)(1)(A). Section 406(c) provides that a transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or lien which the plan assumes or it is subject to a mortgage or similar lien which a party in interest placed on the property within the 10 year period ending on the date of the transfer (emphasis added). Following the private foundation rules of the tax law applicable to gifts of property to private foundations, this rule prevents a party in interest from circumventing the section 406(a)(1)(A) prohibition on sales or exchanges by getting a loan on the property and donating it to a plan which must either pay off the loan or give up the property. See Conference Report 93-1280, 93rd Congress, 2d Sess., at 308. The applicability of the rule is limited to voluntary transfers of property which Congress considered to be sales or exchanges and no inference should be drawn from the rule that a contribution of property by an employer, in discharge of its legal obligation to contribute, would be permissible.

In addition, you should be aware that based on your letter, it appears that the exercise of the option by the Plan might also constitute a violation of section 406(a)(1)(A) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976). Accordingly, it 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  
Pension and Welfare Benefit Programs