U.S. Department of Labor

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

Reply to the Attention of:
Daniel Brown
(202) 523-8971

OPINION NO. 81-78A
SEC. 3(14)(c)

OCT 29 1981

Mr. Bruce Alan Miller
Legal Division
W.R. Grace & Co.
Grace Plaza
1114 Avenue of the Americas
New York, N.Y. 10036

Re: W.R. Grace & Co.
Identification Number: F-1849

Dear Mr. Miller:

This is in response to your letters dated February 11, 1981, and April 8, 1981, requesting an advisory opinion under the provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1954 (the Code) as to whether W.R. Grace & Co. (Grace) or a subsidiary thereof is a party in interest with respect to the Profit Sharing Plan of Contractors Service & Rentals, Inc. (the Plan). Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

You represent that the Plan is sponsored by Contractors Service & Rentals, Inc. (Contractors). Among the assets held in the Plan's trust is the headquarters office building of Contractors (the Building) which the Plan acquired sometime after the effective date of ERISA.

Grace proposes to acquire substantially all the assets of Contractors in a type "C" reorganization under the Code. As a result of the proposed reorganization, it is contemplated that certain employees of Contractors will become employees of Grace. However, Grace will not assume, adopt, or maintain the Plan or its underlying trust after the proposed reorganization and has not maintained or contributed to the Plan in the past. For purposes of this advisory opinion only, you

have asked us to assume that Grace does not have any relationship under ERISA section 3(14) to the Plan other than under subsection (C), which is the subject of your request.

Grace desires to purchase or lease the Building from the Plan. You request an advisory opinion whether Grace will become a party in interest with respect to the Plan solely by reason of the proposed reorganization and whether the proposed purchase or lease of the Building from the Plan will be a prohibited transaction under section 406 of ERISA.

Section 406(a)(1)(A) and (D) of ERISA prohibits a plan fiduciary from causing the plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest; or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 406(b)(1) of ERISA further prohibits a plan fiduciary from dealing with the assets of the plan in the fiduciary's own interest or for the fiduciary's own account.

The term "party in interest" 'is defined in section 3(14)(C) of ERISA as an employer any of whose employees are covered by the plan. However, the definition of an employer under section 3(14)(C) should be viewed in light of the overall statutory framework of ERISA, including section 3(5) thereof. This section provides, in relevant part, that the term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan. Based on your assertions that Grace had no relationship with the Plan in the past and will not assume, maintain, or adopt the Plan or its accompanying trust after the proposed reorganization, it is the view of the Department that Grace will not be a section 3(14)(C) party in interest with respect to the Plan upon its acquisition of substantially all the assets of Contractors.

Even if the purchase or lease of the Building by Grace from the Plan is not a sale or lease between the Plan and a party in interest and therefore does not violate ERISA section 406(a)(1)(A), there could be a violation of sections 406(a)(1)(D) and 406(b)(1) of ERISA. This could occur, for example, if as part of a single arrangement the Plan were to receive less than fair market value for the sale of the Building while Contractors received more than fair market value in the exchange of its assets. In this instance, the plan fiduciary would be using plan assets for the benefit of a party in interest (Contractors). Of course, the determination whether the sale or lease of the Building would be a use of plan assets in violation of sections 406(a)(1)(D) and 406(b)(1) of ERISA would depend on the particular facts and circumstances surrounding the case.

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

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