ERISA OPINION

AO 81-90A
408(b)(2), 406(b)

MAR 25 1981

Mr. Howard J. Moore
Fulbright & Jaworski
800 Bank of the Southwest Building
Houston, TX 77002

Re: VanCaspel & Co., Incorporated Pension Plan (the Plan)
Exemption Application No. D-1791

Dear Mr. Moore:

On February 22, 1980, you filed on behalf of the Plan an application for exemption from the prohibitions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1954 (the Code). 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 and exemptions under section 4975 of the Code, with certain exceptions not here relevant, has been transferred to the Secretary of Labor.

The transactions involve the receipt of brokerage commissions by VanCaspel & Co., Incorporated (VanCaspel), the Plan sponsor, resulting from mutual fund investments made by the Plan.

VanCaspel is a licensed stock brokerage firm which is a member of the Pacific Stock Exchange. Venita VanCaspel is the sole shareholder of VanCaspel and the sole trustee of the Plan (the Trustee). The Trustee is specifically authorized under the trust agreement to employ on behalf of the Plan suitable agents for the purpose of assisting the Trustee in the performance of her duties. The Trustee has determined that it would be in the best interest of the Plan to make purchases and sales of mutual fund investments for the Plan utilizing the brokerage services of VanCaspel in order to minimize Plan expenses. VanCaspel has agreed to perform services for the Plan without compensation.

In certain brokerage transactions involving mutual fund investments the brokers commission is an integral part of the purchase or sale price and cannot be waived by the broker. In such transactions VanCaspel has agreed to receive and hold such commissions as agent for the Trustee on behalf of the Plan and to pay the commissions to the Plan within thirty (30) days after receipt

by VanCaspel. This arrangement will be formalized by an executed agreement. In no event will VanCaspel retain any compensation for services rendered to the Plan.

The prohibited transaction provisions of section 406(a) of the Act provide, in relevant part, as follows:

(a) Except as provided in section 408:

(1) A fiduciary with respect to the plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect…

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of plan; ….

The term "party in interest" with respect to a plan is defined in section 3(14) of the Act and includes the following relevant provision: "… (C) an employer any of whose employees are covered by such plan…." Accordingly, based on the facts and representations of your application VanCaspel is a party in interest with respect to the Plan.

Section 406(b) of the Act provides as follows:

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving assets of the plan.

Section 3(21)(A)(i) of the Act defines the term fiduciary to include anyone who exercises discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. Therefore, Venita VanCaspel is a fiduciary with respect to the Plan based on her role as the trustee of the Plan.

Section 408(b)(2) of the Act exempts from the prohibitions of section 406(a) a payment by a plan to a party in interest, including a fiduciary, for a service (or a combination of services) if: (1) such service is necessary for the establishment or operation of the plan; (2) such service is furnished under a contract or arrangement which is reasonable; and (3) no more than reasonable compensation is paid for such service. Regulations issued by the Department clarify the terms "necessary service" (29 CFR section 2550.408b-2(b)), "reasonable contract or arrangement" (29 CFR section 2550.408b-2(c)) and "reasonable compensation" (29 CR section 2550.408c-2) as used in section 408(b)(2) of the Act.

It should also be noted that the provisions of section 404(a) of the Act impose certain general fiduciary duties with respect to the management of plan assets. Specifically, "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries" and "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

The questions of what constitutes a necessary service, a reasonable contract or arrangement and reasonable compensation are inherently factual in nature. Section 5.01 of ERISA Advisory Opinion Procedure 76-1 (ERISA Proc. 76-1, 41 FR 36281, August 27, 1976) states that the Department generally will not issue opinions on such questions. The appropriate fiduciaries with respect to the plans must determine, based on all the relevant facts and circumstances, whether the conditions of section 408(b)(2) are satisfied.

It should be noted that section 408(b)(2) and the regulations promulgated thereunder do not provide an exemption from the prohibitions of section 406(b) of the Act. However, 29 CFR 2550.408b-2(e)(3) of the Department's regulations states that if a fiduciary provides services to a plan without the receipt of compensation or other consideration (other than the reimbursement of direct expenses properly and actually incurred in the performance of such services), the provision of such services does not, in and of itself, constitute an act described in section 406(b) of the Act.

It is the opinion of the Department that to the extent brokerage commissions received by VanCaspel (and indirectly by Venita VanCaspel) for a transaction involving Plan assets are held by VanCaspel as an agent for the Plan and no right, title or interest in the commission proceeds passes to VanCaspel, and provided such brokerage commissions are returned to the Plan in the ordinary course of business and VanCaspel does not benefit in any manner from the holding of such monies, the receipt of such commissions by VanCaspel would not be considered a violation of section 406 of the Act.[1] Whether the gratuitous holding of brokerage commissions by

[1] The Department's disposition of this matter should not in any manner be construed as suggesting that your proposal with respect to sales commissions for the purchase of mutual fund shares is necessarily consistent with the provisions of the Investment Company Act of 1940, in particular, section 22(d) of that Act (15 U.S.C. § 80a-22(d)). The Department expresses no

VanCaspel in non-income producing accounts or property for a period of up to thirty (30) days is a prudent exercise of fiduciary responsibility, or whether in any way it (or the use of VanCaspel as a broker for the Plan) benefits a party in interest (including a fiduciary) with respect to the Plan, are inherently factual questions. As previously indicated section 5.01 of ERISA Proc. 76-1 states that the Department generally will not issue opinions on such questions.

This letter constitutes an advisory opinion under ERISA Proc. 76-1. Accordingly, this letter is issued subject to the provisions of the Procedure, including section 10 thereof relating to the effect of advisory opinions.

To the extent that relief is available under the statutory exemption of section 408(b)(2) and the regulations issued thereunder and through the issuance of an advisory opinion, no administrative relief is necessary. Accordingly, the file of your application for exemption will be closed by the Department without further action. Should you have any questions, please contact Mr. Paul R. Antsen of the Department, telephone (202) 523-6915.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs

---

opinion on that question, which is a matter within the jurisdiction of the Securities and Exchange Commission.