U.S. Department of Labor

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

Reply to the Attention of:
John S. Hunter
(202) 523-8671

OPINION NO. 82-5A
Sec. 403(c)(1)

JAN 27 1982

Mr. George G. Short
Alef, Short & Grunfeld
190 North Canon Drive, Fourth Floor
Beverly Hills, California 90210

Re: Southern California Rock Products and Ready Mixed Concrete Industries
Identification Number: F-2004

Dear Mr. Short:

This letter is in response to your request for an advisory opinion under the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA) regarding a proposed transfer of surplus plan assets involving the following plans:

a. Southern California Rock Products and Ready Mixed Concrete Industries Welfare Benefits Plan (the "Welfare Plan").

b. Southern California Rock Products and Ready Mixed Concrete Industries Machinist and Laborer Employees' Retirement Plan.

c. Southern California Rock Products and Ready Mixed Concrete Industries Operating Engineer Employees' Retirement Plan.

d. Southern California Rock Products and Ready Mixed Concrete Industries Teamster Employees' Retirement Plan.

e. Southern California Rock Products and Ready Mixed Concrete Industries Electrician Employees' Retirement Plan.

Your letter contains the following representations. The Welfare Plan is an "employee welfare benefit plan" as defined by ERISA section 3(1) and the other four plans (collectively the "pension plans") are "employee pension benefit plans" as defined by ERISA section 3(2). All of the plans are "multi-employer plans" as defined by ERISA section 3(37)(A). Each plan is administered by the Southern California Rock Products Association and the Southern California Ready Mixed Concrete Association (collectively the "Plan Administrator").

The Welfare Plan presently has surplus funding of approximately $1,100,000 caused by the elimination of salaried employees from eligibility for participation. The Plan Administrator has calculated the portion of the surplus attributable to each contributing employer. All of the employers contributing to the Welfare Plan also contribute to one or more of the pension plans. The pension plans have unfunded liabilities in excess of $1,100,000. The Plan Administrator has calculated each contributing employer's share of these unfunded liabilities.

The Plan Administrator has determined that it would be in the best interest of participants and beneficiaries to transfer the surplus funds in the Welfare Plan to the pension plans to reduce the unfunded liabilities. You advise that this could be accomplished by a direct transfer of money from one fund to the other, accompanied by appropriate bookkeeping entries crediting each employer with its share of the Welfare Plan surplus and then, in turn, charging the amount of this credit against that employer's share of the pension plan's unfunded liability.

The only ERISA provision you have addressed in your letter is the prohibited transaction provision of section 406(a)(1)(D). This section prohibits a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. In our view, the primary ERISA provision to consider in relation to the proposed transfer of assets is section 403(c)(1). This section provides in relevant part that, except as provided in certain other provisions, the assets of a plan shall not inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and defraying reasonable expenses of administering the plan. Based on the representations in your letter, it is our opinion that the proposed transfer would constitute an inurement of the Welfare Plan's assets for the benefit of each employer whose pension plan liabilities would be reduced thereby, as well as a use of plan assets for purposes other than those specified in section 403(c)(1). Therefore, the transfer would violate section 403(c)(1), unless one of the stated exceptions would apply. In this regard, you might note that one of the exceptions is section 403(d)(2), which provision governs the distribution of a welfare plan's assets upon termination of the plan. While a transfer of a welfare plan’s assets such as you have described may comply under certain facts and circumstances with section 403(d)(2), it is clear from the representations in your letter that the Welfare Plan did not terminate when the salaried employees were excluded[1] or at any time thereafter.

In a situation where a transfer of plan assets would constitute such a violation of section 403(c)(1), there normally would also be one or more violations of the general standards of fiduciary conduct under ERISA section 404(a) and of the prohibited transaction provisions of section 406. While ERISA section 408(a) authorizes administrative exemptions from the prohibitions of section 406, no such administrative relief is authorized regarding the requirements of sections 403(c)(1) and 404(a).

[1] It is possible that the exclusion of salaried employees could be considered to have resulted in a partial termination of the Welfare Plan. However, in the absence of a regulation under section 403(d)(2), we are unwilling to opine on whether, or under what circumstances, that section would apply to a partial plan termination.

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

Sincerely,

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