U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 82-8A
SEC. 3(32), IRC §4975

FEB 1 1982

Mr. Gary W. Maeder
Kindel & Anderson
Twenty-sixth Floor
555 South Flower Street
Los Angeles, California 90071

Dear Mr. Maeder:

This is in reply to your letter of December 31, 1980, on behalf of Mitchell Rubber Products, Inc. (the Company). You have requested an opinion (1) that three Individual Retirement Accounts (collectively referred to as "the IRAs") are not pension plans within the meaning of section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA) and accordingly are not subject to title I of ERISA, and (2) that loans from the IRAs to the Company are not prohibited transactions under section 4975 of the Internal Revenue Code of 1954 (the Code).

You represent that the Company is a California corporation, 100 percent of the capital stock of which is held by four siblings: Raymond B. Mitchell, Chester L. Mitchell, Lawrence A. Mitchell, and Mildred M. Levan. The four hold 45, 40, 10, and 5 percent interests in the Company, respectively. In 1976, the Company terminated its tax qualified profit sharing and savings plan and each of the participants in the plan, including the three brothers, received a distribution of the full amount credited to his account under the plan. Each voluntarily transferred those portions of the distributions considered to be contributed by the Company to individual retirement accounts described in section 408(a) of the Code. Each IRA was established by means of the execution of an adoption agreement to the ADP Master Individual Retirement Account. No provision of the plan and no other agreement, written or oral, required them to roll over into IRAs, and/or to lend to the Company, all or any portion of their distributions at any time. You represent that the Company has had, and will continue to have, no part in establishing or operating the IRAs. The brothers, under the directed account provisions of their plans, intend to direct the trustee of their IRAs to lend up to 100 percent of their accounts to the Company.

The first issue raised in your request is whether the proposed IRAs would constitute employee pension benefit plans as defined in section 3(2), title I of ERISA. This opinion concerning the status of the IRAs under title I is limited to considering questions you raise concerning the IRAs as though all Code section 408(a) requirements had otherwise been met with respect to the IRAs. Section 3(2)(A) provides, in pertinent part, that an employee pension benefit plan is any plan, fund, or program established or maintained by an employer or by an employee organization, or by both, which provides retirement income to employees. An employee pension benefit plan is, with certain specified exceptions, covered by the provisions of title I of ERISA.

Regulation 29 C.F.R. §2510.3-2(d) issued by the Department of Labor (the Department) clarifies the definition of employee pension benefit plan with regard to individual retirement accounts. Regulation section 2510.3-2(d)(1) provides:

> For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that –
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> (i) no contributions are made by the employer or employee association,
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> (ii) participation is completely voluntary for employees or members;
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> (iii) the sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
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> (iv) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

Based on the facts and representations you have submitted and assuming for the purposes of this discussion that the IRAs you have described are individual retirement accounts within the meaning of section 408(a) of the Code, the Department has determined that the IRAs meet the requirements of regulation section 2510.3-2(d) and, therefore, that the IRAs are not pension plans covered by title I of ERISA.

The second issue raised in your request is whether loans from the proposed IRAs to the Company would be prohibited transactions pursuant to section 4975(c) of the Code. Under Reorganization Plan No. 4, 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(c) of the Code has been transferred, with certain exceptions, to the Secretary of Labor. One such exception is contained in section 102(a)(iii) of the Reorganization Plan, which reserves for the Secretary of the Treasury the authority to issue "exemptions with respect to transactions that are exempted by subsection 404(c) of ERISA from the provisions of Part 4 of the Subtitle B of Title I of ERISA." However, because you have requested an advisory opinion rather than an exemption, and because, as noted above, the proposed IRAs are not covered by title I of ERISA, the exception contained in section 102(a)(iii) of the Reorganization Plan is not applicable, and the authority to issue the opinion you have requested rests with the Secretary of Labor.

With respect to the issue of whether the loans to the Company would be prohibited as a result of the Company's status as a disqualified person with respect to the IRAs, section 4975(c)(1)(E) of the Code prohibits a fiduciary from dealing with the income or assets of a plan in his or her own interest or for his or her own account. Section 54.4975-6(a)(5) of the Pension Excise Tax Regulations characterizes transactions described in section 4975(c)(1)(E) as involving the use of authority by fiduciaries to cause plans to enter into transactions when those fiduciaries have interests which may affect the exercise of their best judgment as fiduciaries. Section 4975(c)(1)(D) prohibits any direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Each of the brothers is, under section 4975(e)(2)(A) and section 4975(e)(3)(A), a fiduciary in the exercise of the authority contained in his respective IRA to direct investment. The Mitchell brothers also have substantial ownership interests in the Company. Therefore, the Company is a party in whom the brothers have an interest that might affect their best judgments as fiduciaries. Accordingly, a prohibited act of self-dealing under section 4975(c)(1)(E), or an indirect transfer of plan assets to, or a use of plan assets for the benefit of, a disqualified person under section 4975(c)(1)(D), is likely to result if one of the brothers directed his IRA to loan funds to the Company. In light of this conclusion, we find no reason to address the issue of whether the Company is a disqualified person.

This letter constitutes an advisory opinion under ERISA Procedure 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.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs