

**U.S. Department of Labor**

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



Reply to the Attention of:  
Dan O'Neil  
(202)523-8368

OPINION NO. 82-55A  
Sec. 406(a)(1)(C), 406(b)(1)

OCT 15 1982

R. Philip Steinberg, Esq.  
Drinker, Biddle & Reath  
Philadelphia National Bank Building  
Broad and Chestnut Streets  
Philadelphia, Pennsylvania 19107

Re: The Vanguard Group, Inc.  
Identification Number: F-2173A

Dear Mr. Steinberg:

This is in response to your letter of November 3, 1981, requesting, on behalf of The Vanguard Group, Inc. (Vanguard Group), an advisory opinion concerning the application of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1954 (the Code) to the situation described in your letter.

You represent that Vanguard Group is a business corporation owned by 14 publicly held investment companies (the Vanguard Funds). It acts as a service company for the Vanguard Funds providing the funds with corporate management, marketing and administrative services on an at-cost basis. Vanguard Group has filed an application with the Pennsylvania Department of Banking to establish a trust company under Pennsylvania law to be known as Vanguard Fiduciary Trust Company (the Trust Company). Vanguard Group will be the sole shareholder of the Trust Company.

You further represent that the Trust Company will act as trustee with investment discretion for employee benefit plans qualified under section 401(a) of the Code and as a nondiscretionary trustee (or custodian) for individual retirement accounts, under master or prototype plans and for tax sheltered annuity plans under section 403(b)(7) of the Code. Although the Trust Company will maintain its own officers and staff to carry out its duties as a fiduciary with respect to the employee benefit plans for which it acts as trustee, Vanguard Group will perform certain administrative and other services for the Trust Company. These services will include accounting

and financial, legal, regulatory and evaluation services. The Trust Company will not delegate any of its fiduciary responsibilities to Vanguard Group.

You also represent that the provision of services by Vanguard Group to the Trust Company will not affect the fees charged by the Trust Company to the plans for which it acts as trustee, and will not result in the imposition of any additional fees. The Trust Company will inform the fiduciaries of the plans which retain the Trust Company, and the individuals who designate the Trust Company as trustee (or custodian) of individual retirement accounts, that it will obtain certain services from Vanguard Group, and will disclose fully to these fiduciaries the basis of any reimbursement from the Trust Company to Vanguard Group for these services.

You request an advisory opinion to the effect that the retention by the Trust Company of Vanguard Group to provide certain services to the Trust Company in the Trust Company's capacity as a fiduciary to employee benefits plans is exempt from the prohibitions of section 406 of ERISA and section 4975(c) of the Code by reason of section 408(b)(2) of ERISA and section 4975(d)(2) of the Code, and, further, that the retention of Vanguard Group by the Trust Company does not constitute an act of self-dealing in violation of section 406(b)(1) of ERISA.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 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.

Section 406(a)(1)(C) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that the transaction constitutes a direct or indirect furnishing of goods, services or facilities between the plan and a party in interest with respect to the plan.

Section 3(14)(H) of ERISA, in relevant part, makes a person who is, directly or indirectly, a 10 percent or more shareholder of a person who provides services (such as trust services) to a plan, a party in interest with respect to that plan. Since the Trust Company is a wholly-owned subsidiary of Vanguard Group, Vanguard Group will be a party in interest with respect to the employee benefit plans for which the Trust Company acts as trustee or custodian.

According to your representations, Vanguard Group will not be performing any services for the employee benefit plans for which the Trust Company acts as a fiduciary but, rather, will perform certain services for the Trust Company. Consequently, the retention of Vanguard Group to provide services to the Trust Company would not be a transaction between the plan and a party in interest. As a result, it does not violate section 406(a) of ERISA.

Section 406(b)(1) of ERISA prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. While regulations under section 406 have not been issued, the regulation under section 408(b)(2) of ERISA (section 2550.408b-2(e)(1) provides that a

fiduciary is self-dealing when, for example, he uses the authority, control or responsibility which makes him a fiduciary to cause the plan to pay an additional fee to him (or a person in which he has an interest which may affect the exercise of the fiduciary's best judgment as a fiduciary) to provide a service.

Based upon the representations contained in your submission, in this situation the Trust Company would not exercise the authority that makes it a fiduciary to deal with plan assets for the benefit of itself or Vanguard Group. Therefore, the appointment of Vanguard Group to provide services would not constitute an act in violation of section 406(b)(1) by the Trust Company.

This letter is 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