

U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210



APR 10 1985

85-17A

Sec. IRC 4975(e)(2)(c)

Andrea M. Ramsay, Esquire
Hall, Turner and Pike
Post Office Box 1179
Wichita, Kansas 67201

Re: Preston D. Huston Individual Retirement Account (the IRA)
Identification Number: F-2932A

Dear Ms. Ramsay:

This is in reply to your letter of June 28, 1984 in which you request an advisory opinion regarding the application of the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1954 (the Code) to certain transactions involving the IRA.

You represent that, prior to his retirement, Mr. Preston D. Huston was an officer, director and shareholder of Associated Advertising Agency, Inc. (Associated) and a participant in the employee stock ownership plan (the ESOP) sponsored by Associated. On October 31, 1975, Mr. Huston retired and sold all of his stock in Associated to the ESOP. On January 16, 1976, Mr. Huston independently established the IRA. Associated does not sponsor, contribute or render services to the IRA. In June, 1976, Mr. Huston received an in kind distribution of his vested benefits in the ESOP consisting of title to a commercial building. The building was subject to a mortgage with a third party lender and an existing lease by the ESOP to Associated. The lease was entered into on July 8, 1969 with a profit sharing plan which was the predecessor of the ESOP. The lease was renewed on August 27, 1975 when the profit sharing plan was amended and became the ESOP. Upon distribution, Mr. Huston made a "roll over" contribution to the IRA of the building subject to the lease with Associated and the mortgage. In March of 1977, Mr. Huston was rehired by Associated as chairman of the board of directors.

You are specifically requesting an advisory opinion as to whether Associated is a party in interest under section 3(14) of ERISA or a disqualified person under section 4975(e)(2) of the Code with respect to the IRA and, as a result, whether the lease between the IRA and Associated constitutes a prohibited transaction under section 406 of ERISA or 4975 of the Code. Your analysis of the issues focuses primarily on whether Associated is an employer under section 3(14)(C) of ERISA or 4975(e)(2)(C) of the Code.

The first issue raised by your request is whether the IRA constitutes an employee benefit plan as defined in ERISA section 3(2). 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 an employee organization, or both, which provides retirement income to employees. An employee pension benefit plan is, with certain exceptions, subject to the provisions of Title I of ERISA.

Regulation 29 C.F.R. section 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, ... provided that --

- (i) no contributions are made by the employer or employee association;
- (ii) participation is completely voluntary for employees or members;
- (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
- (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 purposes of this discussion that the IRA you have described is an individual retirement account within the meaning of Code section 408(a), the Department has determined that the IRA is not a pension plan covered by Title I of ERISA. Accordingly, the prohibited transaction provisions of ERISA section 406 are inapplicable to the IRA.

The second issue raised by your request is whether Associated comes within the definition of disqualified person in Code section 4975(e)(2) with respect to the IRA. 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 here not relevant, to the Secretary of Labor.

Section 4975(e)(1) of the Code states, in pertinent part, that, for purposes of section 4975, the term "plan" means an individual retirement account described in section 408(a) of the Code. Section 4975(c)(1)(A) and (D) prohibits the direct or indirect sale, exchange or leasing of

property between a plan and a disqualified person or the direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Section 4975(c)(1)(E) prohibits an act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account. Section 4975(c)(1)(F) of the Code prohibits any direct or indirect receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving income or assets of the plan. Section 4975(e)(2)(A) and (B) of the Code defines a disqualified person to mean a fiduciary or a person providing services to a plan. Section 4975(e)(2)(C) defines a disqualified person to mean an employer any of whose employees are covered by the plan.

There is no further definition of the term "employer" under Code section 4975. ERISA section 3(5), however, which defines the term "employer" for plans within the jurisdiction of Title I, is helpful in interpreting this provision. That section provides, in part, that an employer is any person acting as an employer in relation to an employee benefit plan. In the Department's view, an employer is acting in relation to an individual retirement account only when it is maintaining, sponsoring, or contributing directly to that individual retirement account. You have represented that Associated has no involvement whatsoever with the establishment or maintenance of the IRA. The Department is of the opinion, therefore, that Associated is not a disqualified person with respect to the IRA under Code section 4975(e)(2)(C).

This conclusion concerning Code section 4975(e)(2)(C) does not preclude the existence of other prohibited transactions under Code section 4975 having occurred or presently occurring as a result of the sequence of events you have described. The Department will generally not issue advisory opinions with respect to either past transactions or inherently factual matters.¹ We wish to alert you, however, to the fact that Mr. Huston may be a fiduciary and a disqualified person with respect to his IRA (see Code sections 4975(e)(2)(A) and 4975(e)(3)). We note that the roll over of the building to the IRA had the effect of relieving the ESOP of its obligations under the lease and the mortgage through the substitution of the IRA as the new lessor and mortgagor. We further note that currently Mr. Huston is the chairman of the board of Associated. Accordingly, you may wish to consider whether any of the transactions relating to the rollover of the building or the lease of the building by the IRA to Associated involve violations of section 4975(c)(1)(D), (E), (F) of the Code.²

¹ See ERISA Proc. 76-1, section 5.01.

² See Treas. Reg. section 54.4975-6(a)(5)(i) and 29 CFR 2550.408b-2(e)(1) (describing the scope of sections 406(b)(1) of ERISA and 4975(c)(1)(E) of the Code) and 29 CFR 2509.75-2 (discussing certain indirect prohibited transactions).

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,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations