

U.S. Department of Labor

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



OCT 1 1985

85-33A

Mr. Sidney Kelly, Assistant Secretary
Ford Aerospace & Communications Corporation
300 Renaissance Center, P.O. Box 43342
Detroit, Michigan 48243

Identification Number: F-2710A

Dear Mr. Kelly:

This is in response to your request for an advisory opinion regarding the application of sections 406(a), 406(b) and 414(c) of the Employee Retirement Income Security Act of 1974 (ERISA) to a transaction involving the receipt of payment by the Ford Aerospace & Communications Corporation (FACC) from an unrelated buyer (the Buyer) for the sale by FACC of its leasehold interest, including renewal rights, in certain real property (the Property). Specifically, you ask whether ERISA sections 406(a), 406(b) and 414(c) prohibit FACC from receiving full payment from the Buyer for the assignment of its entire leasehold interest in the Property.

Your letters contain the following facts and representations.

The fee in the Property is owned by Morgan Guaranty Trust Company of New York (Morgan) as trustee and subtrustee for various employee benefit plans. As explained further below, FACC is a party in interest as defined in ERISA section 3(14) with respect to certain of these plans. The Buyer is acquiring for its own use (1) all fee and leasehold interests in the Property (i.e., the fee held by Morgan as trustee and subtrustee and the entire leasehold interest held by FACC) and (2) certain real estate owned solely by FACC which is located adjacent to the Property.

During 1959, Morgan, as trustee for eleven pension plans, including the Ford Motor Company General Retirement Plan (GRP), purchased the Property located in Willow Grove, Pennsylvania and leased it to Philco Corporation (Philco). At the time of the lease agreement, Philco was not affiliated with Ford Motor Company (Ford) or the aforementioned pension plans. The term of the lease agreement between Morgan and Philco (the Lease) was for a period of 25 years (expiring December 31, 1984) with the right of renewal by Philco for three 5-year periods commencing December 31, 1984, at an annual rental of \$106,000 and two additional 5-year periods at an annual rental of \$88,750. Among other things, the Lease permitted the tenant to assign, mortgage and sublease the Property while remaining liable for full payment of rent as well as performance

of the tenant's obligations under the Lease. You represent that the Lease, when made, was an arm's length transaction between unrelated parties.

In 1961, Philco sold its assets to Ford, including its leasehold interest in the Property. The leasehold interest in the Property was then transferred by Ford to its newly-formed, wholly-owned subsidiary, now named FACC.

Subsequently, in order to increase the diversification of assets and foster administrative efficiencies, the assets of GRP and other Ford sponsored plans, including four plans sponsored by FACC, were assumed by the Ford Motor Company Master Trust Fund (the Master Trust Fund), for which Manufacturers National Bank of Detroit is master trustee and Morgan is a sub-trustee.

You further represent that Morgan holds title to the entire Property in three capacities: (1) a 4.7 percent undivided interest in the Property directly as trustee for the benefit of pension plans unrelated to Ford; (2) a 60.4 percent undivided interest in the Property as trustee of a Commingled Pension Trust Fund (the Commingled Fund) consisting of the beneficial interests of a number of pension plans unrelated to Ford or its subsidiaries; and (3) a 34.9 percent undivided interest in the Property as trustee and subtrustee for Ford-related Plans (30.2 percent of the Property is owned directly by GRP and held by Morgan as subtrustee of the Master Trust Fund and 4.7 percent of the Property is owned indirectly by pension plans of Ford and FACC through the Master Trust Fund's participation in the Commingled Fund).

In addition, you state that FACC is a party in interest as defined in ERISA section 3(14)(G) with respect to GRP because FACC is a subsidiary of Ford, which sponsors GRP and has employees receiving benefits from GRP. Also, you state that FACC is a party in interest as defined in ERISA section 3(14)(C) with respect to the Master Trust Fund because FACC is an employer of employees that are covered by plans that participate in the Master Trust Fund. FACC is also represented to be a named fiduciary with respect to such plans. Ford is a named fiduciary of GRP.

The Buyer wished to acquire the entire interest in the Property and certain adjacent property for its own use. Since the parties wished to complete the conveyance and assignment to the Buyer of their various interests in the Property without waiting for the issuance of the requested advisory opinion, the following transactions were effected during July 1983 by Morgan and FACC respectively with the Buyer:

- (1) Morgan conveyed the fee interest in the Property (including all of the interests of GRP, the Commingled Fund, and the unrelated pension plans) to the Buyer, subject to FACC's rights under the Lease, for the sum of \$2,810,000;

(2) FACC assigned to the Buyer all its right, title and interests in the Property under the Lease for the sum of \$1,740,000;¹

(3) At the request of the Buyer, FACC conveyed to the Buyer certain real estate located adjacent to the Property and owned solely by FACC for the sum of \$100,000; and

(4) FACC leased from the Buyer approximately 25 percent of the Property until FACC could occupy (sometime between November 1 and December 31, 1983) a new building to be leased from another unrelated party.

Pursuant to an agreement between FACC and Morgan, as trustee of the Ford-related plans, \$607,857.69 (which amount is based on the 34.9 percent ownership interests in the Property of the Ford-related plans) of the total consideration of \$1,740,000 for the sale of FACC's entire leasehold interest (including renewal rights) was placed in an escrow account with the Chase Manhattan Bank, N.A. until an advisory opinion is issued by the Department of Labor. Depending upon the holding of the advisory opinion, the escrow account of \$607,857.69 will be subsequently distributed either (1) to FACC as payment for its entire leasehold interest, including renewal rights, or (2) if such a distribution to FACC is determined by the Department of Labor to involve a violation of the prohibited transaction provisions of ERISA, to Morgan as trustee of the Ford-related plans in amounts which are proportionate to each plan's interest in the Property at the date of conveyance of the Property to the Buyer.

ERISA section 406(a)(1)(A) and (D), respectively, prohibit a plan fiduciary from causing a plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between a plan and a party in interest, or a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. ERISA section 406(b) further prohibits a fiduciary from (1) dealing with the assets of the plan in his or her own interest or for his or her own account, (2) representing a party whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries, or (3) receiving any consideration for his or her own account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

ERISA section 3(14) defines the term "party in interest" to include, among others, a fiduciary of an employee benefit plan, an employer any of whose employees are covered by a plan and a corporation of which 50 percent or more of its stock is owned by a sponsoring employer. Accordingly, since both Ford and FACC are represented by you to be parties in interest in more

¹ FACC and Morgan agreed that the fair market value of FACC's rights under the Lease, including the renewal rights beyond 1984, was \$1,740,000.

than one capacity with respect to the Ford-related plans, the leasing of the Property by Morgan as trustee on behalf of the Ford-related plans to FACC would be a prohibited transaction under ERISA section 406(a)(1)(A) in the absence of an administrative or statutory exemption.

In this connection, section 414(c)(2) provides that ERISA sections 406 and 407(a) do not apply until June 30, 1984 to a lease involving a plan and a party in interest pursuant to a binding contract in effect on July 1, 1974 (or pursuant to renewal of such a contract), if the lease remain at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if the execution of the lease was not, at the time of execution, a prohibited transaction within the meaning of section 503(b) of the Internal Revenue Code or the corresponding provisions of prior law. Whether the conditions of section 414(c)(2) have been met in each case involves questions which are inherently factual in nature. See regulation 29 CFR 2550.414c-2 and section 5.01 of ERISA Procedure 76-1 (41 FR 36281, August 28, 1976).

You state that the Buyer of the Property is an unrelated party with respect to the Ford-related plans. We assume for purposes of this letter that the Buyer is not a party in interest with respect to any of the plans having an ownership interest in the Property. As a result, the sale of the Property to the Buyer is not prohibited by section 406(a)(1)(A) of ERISA.

We note that your request deals with ownership rights and interests in real property as well as the efficacy of conveyances of such rights and interests. As a general matter, such questions must be resolved in the first instance by state law. Thus, we are assuming, for purposes of this letter, that the sale of FACC's leasehold interest to the Buyer was in accordance with applicable state law and the express terms and conditions of the Lease.

Based solely on the facts and representations contained in your submission, it does not appear to the Department that the assignment in 1983 of FACC's leasehold interest in the Property (including the renewal rights under the Lease) to the Buyer constituted a direct or indirect transfer of any assets of the Ford-related plans in violation of section 406(a)(1)(D) of ERISA, notwithstanding the contemporaneous acquisition by the Buyer of the fee interest in the Property. This conclusion, however, does not preclude an examination of the facts and circumstances surrounding the transaction to determine whether it was part of an agreement, arrangement or understanding in which the fiduciary caused plan assets to be used in a manner designed to benefit a party in interest in violation of section 406(a)(1)(D) of ERISA as interpreted by 29 CFR §2509.75-2.

The Department further notes that, if the assignment by FACC to the Buyer of its leasehold interest in the Property and the sale of the fee interest to the Buyer were part of an arrangement, agreement, or understanding designed by a plan fiduciary to benefit any of the fiduciaries of the Ford-related plans (or any persons in which such fiduciaries had interests which affected the

exercise of their best judgement as fiduciaries), such arrangement, agreement or understanding would contravene section 406(b)(1) of ERISA. Under those circumstances, the fiduciaries could also be viewed as acting on behalf of persons whose interests are adverse to those of the plans, a transaction prohibited under section 406(b)(2) of ERISA. Because of the inherently factual nature of this question, the Department is not in a position to issue an opinion with regard to it. However, the Department notes generally that, under the circumstances you describe and absent such an arrangement, agreement or understanding, the receipt by FACC from the Buyer of the fair market value of its leasehold interest in the Property would not, in itself, constitute a violation of section 406(b)(1) or 406(b)(2) of ERISA.

With respect to section 406(b)(3) of ERISA, it appears that under the circumstances you describe, FACC disposed of its leasehold interest in the Property in a separate transaction from Morgan's sale of its interest in the Property as trustee for the plans. As such, FACC's disposal of its leasehold interest was not a transaction involving plan assets. Accordingly, it is the Department's view that FACC's receipt of payment from the Buyer for the assignment of its entire interest in the Property did not involve a violation of section 406(b)(3) of ERISA.

We wish to point out that ERISA's general standards of fiduciary conduct would also apply to the subject transaction. Section 404(a)(1)(B) of ERISA requires that a fiduciary discharge his duties with respect to a plan solely in interest 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. Accordingly, the fiduciaries of the plans must act "prudently" and "solely in the interest" of the plans' participants and beneficiaries when causing the plans to enter into a particular transaction. If the sale by the plans of the Property was not "prudent" and "solely in the interest" of the plans' participants and beneficiaries, the fiduciaries would be liable for any loss resulting from such breach of fiduciary responsibility, even though the sale of the Property to the Buyer may not have constituted a prohibited transaction.

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

Sincerely,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations