U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

MAR 19 1986

86-12A
Sec.

Mr. Richard D. Belford
Donovan, Leisure, Newton & Irvine
30 Rockefeller Plaza
New York, NY 10112

Re: PaineWebber, Inc.
Identification Number F-3055A

Dear Mr. Belford:

This responds to your letter of March 7, 1985, requesting an advisory opinion regarding the application of Part V of Prohibited Transaction Exemption 75-1 (40 FR 50845, October 31, 1975) (PTE 75-1). Your letter concerns extensions of credit in connection with securities transactions involving PaineWebber, Inc. (PaineWebber) and employee benefit plans covered by Title I of ERISA, H.R. 10 plans and individual retirement accounts (IRAs).

You represent that PaineWebber, a subsidiary of Paine Webber Group Inc., is a member of the New York Stock Exchange and other exchanges and is registered as a broker-dealer under the Securities Exchange Act of 1934. PaineWebber provides various services to employee benefit plans, H.R. 10 plans and IRAs, including effecting or executing securities transactions, rendering investment advice for a fee, and acting as a nondiscretionary, nonbank custodian. PaineWebber has received approval from the Internal Revenue Service to serve as a nonbank custodian pursuant to Treasury Regulation section 1.401-12(n).

PaineWebber proposes to extend credit under the following circumstances to those plans with respect to which it is a party in interest under section 3(14) of the Employee Retirement Income Security Act of 1974 (ERISA) or a disqualified person under section 4975(e)(2) of the Internal Revenue Code of 1954 (the Code) but not a fiduciary as defined in ERISA section 3(21) or Code section 4975(e)(3).

(1) PaineWebber will permit an employee benefit plan, H.R. 10 plan or IRA to establish a margin account in connection with the purchase or sale of securities and to maintain the securities purchased in such account.

(2) PaineWebber will allow an employee benefit plan, H.R. 10 plan or IRA which previously bought securities and paid the purchase price in full (whether within or beyond the customary five-day settlement period) to transfer the securities from a cash account to a margin account, thereby permitting the plan to satisfy current margin calls (according to a formula which the plan has agreed to in advance) in regard to other securities previously purchased or sold and held in the margin account.

You explain that a "cash account" is an investment account under which a customer is expected to pay a broker-dealer in full within the customary five-day settlement period for any purchases for the account. A "margin account" is an account where the customer pays a portion of the amount required for a purchase of securities and borrows the balance from the broker-dealer. The amount that is to be paid in cash is the "initial margin requirement" and the relationship that subsequently must be maintained between the equity in the account and the market value of the securities is the "maintenance margin." If the market value of the investments falls to the point where the equity is below the maintenance margin, the customer must provide more cash or transfer unmargined securities into the margin account. Otherwise, a part of the investments will be sold to satisfy the loan by the broker-dealer.

You further represent that all extensions of credit by PaineWebber in these situations will be made in accordance with the applicable rules of the Federal Reserve Board, the Securities and Exchange Commission and any appropriate stock exchange. Moreover, these extensions of credit will be made at the same interest rates and on the same terms as PaineWebber ordinarily requires of its other customers in connection with securities transactions. The credit extensions will satisfy the conditions described in paragraph (b)(2) and (3) and paragraph (c) of Part V of PTE 75-1.

You ask our opinion whether the exemption contained in Part V of PTE 75-1 applies to extensions of credit as described above by PaineWebber to employee benefit plans subject to Title I of ERISA. You ask also if the exemption extends to H.R. 10 plans and IRAs.

Certain H.R. 10 plans and individual retirement accounts are not subject to Title I of ERISA, as discussed in Department of Labor regulations 29 CFR 2510.3-2(d) and 2510.3-3(b).[1] Such

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[1] Under the regulations, the term "employee benefit plan" does not include an IRA provided that: (1) no contributions to the plan are made by the employer or employee association; (2) participation is completely voluntary for employees or members; (3) the sole involvement of the employer or employee organization is to permit the sponsor to publicize the program and to collect contributions on behalf of the sponsor through payroll deductions or dues checkoffs; and (4) 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.

H.R. 10 plans and IRAs are subject to Title II of ERISA, section 4975 of the Code. Presidential Reorganization No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, transferred the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code to the Secretary of Labor. Accordingly, references in this letter to sections 3(14) and 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

Section 406(a)(1)(B) and (D) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he or she knows or should know that the transaction constitutes a direct or indirect lending of money or other extension of credit between a plan and a party in interest or a use of plan assets for the benefit of a party in interest. ERISA section 3(14) defines the term "party in interest" to include a plan fiduciary as well as a person providing services to the plan. Additionally, section 406(b)(1) and (2) provides that a fiduciary, as defined in section 3(21)(A), may not deal with plan assets in his or her own interest or for his or her own account or act in a transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or its participants or beneficiaries.

PTE 75-1 permits various classes of transactions involving employee benefit plans and certain broker-dealers, reporting dealers and banks, provided the relevant conditions specified in the class exemption are met. Part V of PTE 75-1 provides that the restrictions of section 406 of ERISA and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to any extension of credit to an employee benefit plan by a party in interest or disqualified person with respect to the plan, if the following conditions are met:

(a) The party in interest or disqualified person--

(1) Is a broker or dealer registered under the Securities Exchange Act of 1934; and

(2) Is not a fiduciary with respect to any assets of such plan, unless no interest or other consideration is received by such fiduciary or any affiliate thereof in connection with such extension of credit.

(b) Such extension of credit--

(1) Is in connection with the purchase or sale of securities;

(2) Is lawful under the Securities Exchange Act of 1934 and any rules and regulations promulgated thereunder; and

(3) Is not a prohibited transaction within the meaning of section 503(b) of the Code.

Conditions (c) and (d) of Part V impose certain requirements involving the retention of records and availability of records on the part of plans engaging in transactions in reliance on the exemption.

The preamble to Part V of PTE 75-1 states that a normal part of the execution of securities transactions by broker-dealers on behalf of their customers, including employee benefit plans, is the extension of credit to the customers in order to permit settlement within the usual five-day period. The preamble further states that extensions of credit by broker-dealers also are customary in connection with certain kinds of security transactions, such as short sales and the writing of option contracts.

The condition contained in paragraph (b)(1) of Part V of PTE 75-1 specifies that, in order to qualify for the exemption, an extension of credit must be in connection with the purchase or sale of securities. It is the Department's opinion that the extension of credit by a broker-dealer to a plan purchasing securities on margin will satisfy the requirement imposed by paragraph (b)(1) of Part V of PTE 75-1. Accordingly, the exemption provided by Part V of PTE 75-1 encompasses the purchase of securities on margin if all the other conditions of the exemption are met.

With respect to your second issue, it is the Department's view that the exemption is applicable not only to transactions involving employee benefit plans covered under Title I of ERISA, but also to transactions involving individual retirement accounts and H.R. 10 plans which are not covered by Title I of ERISA but which are subject to the provisions of section 4975 of the Code.

We have conferred with representatives of the Internal Revenue Service and they concur in the views set forth in this letter insofar as those views relate to the applicability of Part V of PTE 75-1 to H.R. 10 plans and IRAs.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure describes the effect of advisory opinions.

Sincerely,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations