

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



JUN 2 1987

87-04A
Sec. 406(b)(3)

Ms. Katherine L. Thompson
Director of Communication Service
Facciani & Company
Rock Run Center
Suite 242
5700 Lombardo Centre
Cleveland, OH 44131

Re: Identification Number F-3596A

Dear Ms. Thompson:

This responds to your letter of January 27, 1987, in which you ask whether the purchase of preferred stock of a corporation by a defined benefit pension plan sponsored by that corporation would contravene the prohibited transaction provisions of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) if such stock is acquired from the estate of the father of a plan fiduciary. You suggest that the stock constitutes a "qualifying employer security" as defined by section 407(d)(5) of ERISA and that the plan's purchase would comply with the limitations imposed on such investments by section 407(a) of ERISA.¹

Subject to the limitations of section 408(d) of ERISA (relating to transactions involving owner-employees and certain other persons), section 408(e) of ERISA and regulation section 29 CFR 2550.408e provide, in pertinent part, that sections 406(a) and 406(b)(1) and (2) of ERISA do not apply to the acquisition of qualifying employer securities by a defined benefit pension plan if certain conditions are met. The conditions are that (1) the acquisition is for adequate consideration, (2) no commission is charged to the plan with respect to the transaction, and (3) the acquisition complies with the requirements of section 407(a) of ERISA. The regulation under section 408(e) of ERISA does not provide relief for an act described in section 406(b)(3) which

¹ You have not asked us to address any issues under section 407 of ERISA and, accordingly, we have not considered those issues for purposes of this response. However, you may wish to note that the Department has declined to issue an opinion regarding whether an issue of stock constitutes a qualifying employer security in a case involving preferred stock that had characteristics similar to a debt obligation. See Advisory Opinion 81-33, March 23, 1981 (copy enclosed).

prohibits a plan fiduciary from receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the plan's assets.

Generally, a violation of section 406(b)(3) of ERISA would not be apparent from the mere receipt of a distribution from an estate by a plan fiduciary as beneficiary of the estate in a transaction separate and apart from the plan's acquisition of qualifying employer securities from that estate. Under such circumstances, the distribution would not appear to be in connection with a transaction involving plan assets.

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 relating to the effect of advisory opinions.

Sincerely,

Elliot I. Daniel
Associate Director for Regulations and Interpretations