U.S. Department of Labor

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

SEP 27 1989

ERISA OPINION 89-25A
Sec. 408(b)(2)

Charles Stewart, Esq.
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Metropolitan Square
Washington, DC 20005-2088

Re: The United Company Profit-Sharing and Retirement Plan
Identification Number F-3769A

Dear Mr. Stewart:

This is in response to your request for an advisory opinion on behalf of the United Company (the Company) under sections 404 and 406 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1986 (the Code).

You represent that the United Company Profit-Sharing and Retirement Plan (the Plan) is a defined contribution plan qualified under section 401(a) of the Code, which is maintained by the Company for the benefit of its employees and employees of certain of its subsidiaries. Investment policy under the Plan is determined by an Investment Committee (the Committee), which also has the authority as named fiduciary under the Plan to appoint an investment manager. The Plan's Trustee is Flat Top National Bank.

United Financial Services Inc., (UFS), a wholly-owned subsidiary of the Company, manages the Company's investment portfolio. United Investment Corporation (UIC), a wholly-owned subsidiary of UFS, is a registered investment adviser under the Investment Advisers Act of 1940 which provides investment advisory services to numerous clients.

You indicate that the Committee proposes to retain UIC as investment manager of the Plan. No UIC employees participate in the Plan and UIC will receive no compensation from the Plan for

investment management services.[1] Any fees will be paid directly by the Company to UIC. These fees will be calculated at the same rate charged by UIC to unrelated employee benefit plans. You further indicate that there will be no recourse against the Plan for any fees not paid by the Company. You represent that section 11.3 of the Plan[2] will be amended to provide that it will never be applied to the fees paid to UIC for investment management services.

You request an advisory opinion that the Committee may retain UIC as investment manager for the Plan, and that the Company may pay UIC for such services, without violating sections 404 and 406 of ERISA or section 4975 of the Code.

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) and (D) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services or facilities between the plan and a party in interest, or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Sections 406(b)(1) and (2) of ERISA provide that a fiduciary with respect to a plan shall not deal with the assets of the plan in his or her own interest or for his or her own account, or in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Section 406(b)(3) of ERISA provides that a fiduciary with respect to a plan shall not receive any consideration for his or her own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Each member of the Investment Committee is a fiduciary of the Plan under section 3(21) of ERISA by reason of his or her discretionary authority in the administration of the Plan and is, therefore, a party in interest with respect to the Plan under section 3(14)(A). In addition, UIC is a party in interest with respect to the Plan under section 3(14) of ERISA because more than fifty percent (50%) of the equity interest in UIC is indirectly owned by the Company. Furthermore,

---

[1] The materials you have submitted indicate that brokerage transactions will be controlled by UIC though effected by the Trustee through unrelated brokers and that brokerage expenses will be paid by the Plan.

[2] Section 11.3 of the Plan states, in relevant part: “Should the Company for any reason fail to pay such expenses, the same shall be paid by the Trustee out of the Trust Fund.”

upon its appointment as investment manager, UIC would be a fiduciary under section 3(21) of ERISA. Accordingly, the prohibited transaction provisions of section 406 of ERISA would apply to transactions between the Plan and UIC in the absence of a statutory or administrative exemption.

Section 408(b)(2) of ERISA exempts from the prohibitions of section 406(a) any contract or reasonable arrangement with a party in interest, including a fiduciary, for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor. Section 408(c)(2) of ERISA provides, in relevant part, that nothing in section 406 shall be construed to prohibit any fiduciary from receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred in the performance of his or her duties with the plan. Regulations issued by the Department of Labor (the Department) clarify the terms "reasonable contract or arrangement" (29 CFR 2550.408b-2(c)), "necessary service" (29 CFR 2550.408b-2(b)) and "reasonable compensation" (29 CFR 2550.408b-2(d) and 2550.408c-2)) as used in sections 408(b)(2) and 408(c)(2) of ERISA.

The provision of investment management services by UIC to the Plan would be exempt from the prohibitions of section 406(a) of ERISA if the conditions of section 408(b)(2) are met. Whether the conditions are met in each case involves questions which are inherently factual in nature. Sections 5.01 of ERISA Advisory Opinion Procedure 76-1 (ERISA Pro. 76-1, 41 FR 36281, August 27, 1976) states that the Department generally will not issue opinions on such questions. Therefore, the Investment Committee, or other appropriate plan fiduciaries, must determine, based on all the relevant facts and circumstances, whether the conditions of section 408(b)(2) are satisfied.

With respect to the prohibitions in sections 406(b), regulation 29 CFR 2550.408b-2(a) states that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) of ERISA, even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2). As explained in regulation 29 CFR 2550.408b-2(e)(1), if a fiduciary uses the authority, control or responsibility which makes him or her a fiduciary to cause the plan to enter into a transaction involving the provision of services when such fiduciary has an interest in the transaction which may affect the exercise of his or her best judgment as a fiduciary, a transaction described in section 406(b) of ERISA would occur, and that transaction would be deemed to be a separate transaction from the transaction involving the provision of services and would not be exempted by section 408(b)(2) of ERISA.

If the Company agrees to pay UIC's fees for the provision of investment management services rendered to the Plan, and if the Plan is not in any circumstances either directly or indirectly obligated to pay such fees, then the mere initial selection by the Committee of UIC would not, in

itself, constitute a violation of section 406(b)(1) because no member of the Committee would be using any of the authority, responsibility, or control that makes him or her a fiduciary to cause a plan to pay an additional fee to UIC for the provision of services. However, because a violation of section 406(b)(1) could occur in the course of the Committee's deliberations regarding the retention of UIC, the Department is unable to rule that the decision would, in no case, violate that section. In addition, it is also the Department's view that, generally, a fiduciary's decision to retain an affiliate service provider whose fees will be paid by the plan sponsor will not involve an adversity of interests as contemplated by section 406(b)(2) of ERISA. We also note, however, that if the Plan pays (directly or indirectly), or obligates itself to pay, any of the fees of UIC, then the Committee's retention of UIC to perform investment management services for the Plan would involve violations of section 406(b)(1). In addition, if a fiduciary of the Plan (or a person subject to the control or direction of a fiduciary), in negotiating the arrangement between the Plan and UIC, causes UIC to benefit from the arrangement at an expense of any kind to the Plan, then that fiduciary would have engaged in a transaction described in section 406(b)(2) of ERISA.

Based on the representations made in your letter, it is our opinion that the mere initial retention by the Committee of UIC as investment manager would not involve a violation of section 406(b)(3) of ERISA because no fiduciary would be receiving a fee or other consideration for his or her own personal account from UIC, the party dealing with the Plan in connection with a transaction involving the assets of the Plan.

With respect to the application of section 404 of ERISA to your proposed transactions, please note that section 5.02 of ERISA Proc. 76-1 provides that the Department generally does not issue advisory opinions on the application of section 404(a) of ERISA to particular fiduciary conduct. In this regard, we further note that section 404(a)(1)(B) of ERISA requires that a fiduciary discharge his duties with respect to a plan solely in the 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 like character and with like aims. Accordingly, the Committee must act "prudently" and "solely in the interest" of the Plan's participants and beneficiaries when causing the Plan to enter into the proposed arrangement. If the decision by the Committee to retain UIC to provide investment management services is not "prudent" and "solely in the interest" of the Plan's participants and beneficiaries, the Committee would be liable for any loss resulting from such breach of fiduciary responsibility, even though the retention of UIC may not constitute a prohibited transaction.

Finally, we note that the principles discussed in this letter relate only to arrangements involving the provision of services to a plan and different principles may apply in cases involving other types of arrangements between a plan and a fiduciary of the plan (or a person in whom such a fiduciary has an interest that may affect his best judgment as a fiduciary).

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure explains the effect of an advisory opinion.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations