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

MAR 28 1990

90-04A
Sec. 3(18), 407(d)(3), 408(e)

Lawrence J. Eisenberg
Laxalt, Washington, Perito and Dubuc
1120 Connecticut Avenue, N.W.
Washington, DC 20036

Re: Greenhorne and O'Mara, Inc.
Identification Number: F-4022A

Dear Mr. Eisenberg:

This is in response to your August 30, 1988 request for an advisory opinion under section 408(e) of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that Greenhorne & O'Mara Inc. (G&O) is the principal sponsor of the Greenhorne & O'Mara, Inc., Profit Sharing Retirement Plan and Trust Agreement (the Plan). G&O intends to amend the Plan to permit up to 50 percent of its assets to be invested in "qualifying employer securities" as defined in section 407(d)(5) of ERISA. Upon amendment, the Plan will be an eligible individual account plan within the meaning of section 407(d)(3) of ERISA. The qualifying employer security that will be acquired by the Plan is the common stock of G & O, the only outstanding stock of G & O.

You further represent that the acquisition of qualifying employer securities by the Plan will be for adequate consideration as defined in section 3(18) of ERISA, and that no commission will be charged with respect thereto. You state that there is no recognized market for G & O common stock. Therefore, adequate consideration will be determined by reference to the fair market value of G & O common stock. Generally, it is intended that fair market value will be determined by an independent appraiser.[1]

You also indicate that G & O is a party to the Greenhorne & O'Mara, Inc. Amended Stockholder's Agreement (the Stockholder's Agreement). The Stockholder's Agreement generally provides for the purchase and sale of G & O common stock by certain managers at a specified formula price (120 percent of valuation date book value) which may or may not represent the fair market value of the G & O common stock at the time of the sale or repurchase. The Stockholder's Agreement does not operate in conjunction with the Plan and will be amended to assure that stock purchases by the Plan will not be subject to the special restrictions contained in the Agreement. The existence of the Stockholder's Agreement will be taken into account in determining the fair market value of G & O common stock for purposes of the Plan.

You have requested an advisory opinion that: (1) the acquisition or sale of G & O common stock by the Plan from or to parties in interest under the circumstances described above will not violate the provisions of sections 406 and 407

[1] You have stated that the valuation of G & O common stock will take into account circumstances prevailing at the time of valuation and will be performed using sound business principles of evaluation. All valuations of G & O common stock will be in writing and will contain the information set forth in proposed regulation 29 CFR 2510.3-18(b). Finally, it is expected that final regulations under 29 CFR 2510.3-18(b) will be complied with in all respects.

of ERISA by reason of section 408(e) of ERISA, and (2) an acquisition or sale of G & O common stock by the Plan that otherwise satisfies the requirements of section 408(e) will not constitute a prohibited transaction by reason of purchases and sales of G & O common stock by persons other than the Plan at the formula price described in the Stockholder's Agreement.

Under Presidential Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Internal Revenue Code (the Code) has been transferred, with certain exceptions not here relevant, to the Secretary of Labor and the Secretary of the Treasury is bound by the interpretations of the Secretary of Labor pursuant to such authority. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

Section 406(a)(1)(A) and (D) of ERISA prohibits a fiduciary with respect to a plan from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing of any property between the 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. Section 3(14)(C) of ERISA defines a party in interest with respect to a plan to include an employer any of whose employees are covered by such plan.

Section 406(a)(1)(E) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect acquisition, on behalf of the plan, of any employer security in violation of section 407(a).[2] Section 407(a) of ERISA provides, in pertinent part, that a plan may not acquire or hold any employer security which is not a qualifying employer security.

Section 406(b)(1) and (2) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account; or acting in his individual or in any other capacity in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

However, section 408(e) of ERISA provides, in part, that sections 406 and 407 shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)) if the following conditions are met:

(1) the acquisition or sale is for adequate consideration,

(2) no commission is charged with respect to the acquisition or sale, and

(3) the plan is an eligible individual account plan (as defined in section 407(d)(3)).

See also, 29 CFR 2550.408e.

Section 407(d)(1) of ERISA defines the term "employer security", in part, to mean a security issued by an employer of employees covered by the plan. Section 407(d)(5) of ERISA defines the term "qualifying employer security", in part, to mean an employer security which is stock or a marketable obligation.

Section 3(34) of ERISA defines an "individual account plan" as a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

[2] For purposes of section 407(a) of ERISA, an acquisition by a plan of qualifying employer securities shall include, among other things, a contribution of such securities to the plan. See 29 CFR 2550.407a-2(b).

Section 407(d)(3) of ERISA defines an "eligible individual account plan" to mean, in part, an individual account plan which is a profit-sharing plan and which explicitly provides for the acquisition and holding of qualifying employer securities.

Based on the facts and representations contained in your letter, it is the opinion of the Department that, following amendment of the Plan to explicitly provide for the acquisition and holding of qualifying employer securities (e.g., G & O common stock), the Plan will be an eligible individual account plan within the meaning of section 407(d)(3) of ERISA.

You have further represented that no commissions are to be paid with respect to acquisitions or sales of G & O common stock by the Plan. Accordingly, the acquisition or sale of G & O common by the Plan would be exempt from the prohibitions of sections 406(a), 406(b)(1), 406(b)(2) and 407 by reason of section 408(e) of ERISA provided that the transactions are for adequate consideration.

Section 3(18)(B) of ERISA defines the term "adequate consideration" to mean, in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary. The Department published proposed regulations under section 3(18)(B) on May 17, 1988 (53 Fed. Reg. 17632).

The Department generally will not opine as to whether a particular transaction is for adequate consideration. See section 5 of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976). Rather, the Department believes that such determinations should be made by appropriate fiduciaries on the basis of all relevant facts and circumstances. Thus, whether the Plan acquires or sells G & O stock for adequate consideration within the meaning of section 3(18) is a determination which must, at the time of each transaction, be made in good faith by the trustees of the Plan.

With regard to your second question, you represent that the Stockholder's Agreement will be taken into account in determining the fair market value of G & O common stock for purposes of transactions with the Plan. Accordingly, it is the view of the Department that purchases and sales of G & O common stock by persons other than the Plan at the formula price described in the Stockholder's Agreement will not affect the availability of section 408(e) for transactions involving the Plan if such transactions are otherwise for adequate consideration.

We wish to point out that ERISA's general standards of fiduciary conduct would also apply to your proposed transactions. Section 404(a)(1) 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 a like character and with like aims. Accordingly, the fiduciaries of the Plan must act "prudently" and "solely in the interest" of the Plan's participants and beneficiaries when deciding whether to acquire or sell G & O common stock. Thus, for example, the Plan fiduciaries must consider the economic affect that the Stockholder's Agreement will have on the Plan's investment in the G & O common stock. If the acquisition of the G & O common stock by the Plan is not "prudent" and "solely in the interest" of the Plan's participants and beneficiaries, the fiduciaries of the Plan would be liable for any loss resulting from such breach of fiduciary responsibility, even though the acquisition or sale of the G & O common stock may be exempt from the prohibited transaction restrictions of ERISA by virtue of section 408(e).

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, Office of Regulations and Interpretations