

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:

OPINION 80-25A  
406, 408(b)(2)

APR 23 1980

Mr. David L. Raish  
Ropes & Gray  
225 Franklin Street  
Boston, Massachusetts 02110

Re: President and Fellows of Harvard College  
Identification Number: C-3374A

Dear Mr. Raish:

This is in response to your request for an advisory opinion on behalf of President and Fellows of Harvard College (Harvard) regarding the appointment of Harvard as trustee of certain trusts established in connection with four defined benefit pension plans and the performance by Harvard of the functions of trustee with respect to those plans.

Your request was submitted jointly to the Department of Labor (the Department) and to the Internal Revenue Service (the Service). Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Internal Revenue Code of 1954 (the Code), with certain exceptions not here relevant, has been transferred to the Secretary of Labor, and the Secretary of the Treasury is bound by the rulings issued by the Secretary of Labor pursuant to such authority. Therefore, this response is issued solely by the Department and references to specific sections of the Employee Retirement Income Security Act of 1974 (ERISA) shall also refer to corresponding sections of the Code.

The facts are represented to be as follows. Harvard is a nonprofit educational corporation which has been determined to be exempt from Federal income tax under section 501(a) of the Code as an organization described in section 501(c)(3) of the Code. It maintains three defined benefit pension plans - Harvard University Retirement Plan for Officers of Instruction and Administration (Plan A), Harvard University Staff Retirement Income Plan (Plan B) and Retirement Income Plan for Hourly Employees of Harvard University (Plan C). Plan A has been amended to become a qualified plan under section 401(a) of the Code and to comply with the applicable requirements of ERISA. Plans B and C are presently unfunded, although amendment will be made soon to these plans in order that they may be qualified under Code section 401(a).

Trustees for Harvard University is a charitable corporation (THU) whose governing board consists of the members of the principal governing board of Harvard. (The relationship between Harvard and THU is not a parent-subsidary one, since THU is not a stock corporation.) THU maintains for its employees a defined benefit pension plan, Trustees for Harvard University Staff Retirement Income Plan (Plan D). Like Plans B and C, Plan D is presently unfunded, although amendments thereto will be made soon in order that it may be qualified under section 401(a).

When qualifying amendments are made to Plans B, C and D and their corresponding trusts established (viz, Trust B for Plan B, etc.), it is contemplated that an additional "group trust" will be established in which the assets of the four individual trusts will be commingled for investment purposes. The assets of the four individual trusts are expected to consist in part or in whole of unit interests in the group trust. Harvard will apply to the Service for a determination letter on the qualified status of the group trust under section 401(a) of the Code.

Harvard is presently the trustee of Trust A and proposes, in addition, to act as trustee of the three other individual trusts and of the group trust. (Hereafter, the four individual trusts and the group trust will be collectively referred to as the "Trusts.") As trustee of the Trusts, Harvard, acting through its Treasurer and Deputy Treasurer, will manage and invest the Trusts' assets. It will charge no fees to the Trusts for its services as trustee; however, it may in the future charge to the Trusts some or all of the expenses it incurs in performing its duties.

Your letter also indicates that Harvard will be provided with investment research and advice by Harvard Management Company, Inc. (HMC), a nonprofit corporation organized in 1974 to promote the educational purposes of Harvard by providing it with investment research, advice and management with respect to Harvard's own endowment and also with respect to funds held in charitable remainder trusts and pooled income trusts of which Harvard is designated as trustee. HMC has been determined to be exempt from Federal income tax under section 501(a) of the Code as an organization described in section 501(c)(3) of the Code.

Your authorized representative has requested opinions to the effect that:

1. the appointment of Harvard as trustee of the Trusts,
2. the performance by Harvard of the functions of trustee of the Trusts, and
3. contributions by Harvard and THU under the terms of each plan to Harvard, as trustee of the Trusts,

do not constitute prohibited transactions within the meaning of section 406(a) or (b) of ERISA.

Issue 1:

A party in interest, as defined in section 3(14) of ERISA, including a fiduciary, is prohibited, under section 406 of ERISA, from engaging in certain transactions with a plan. The statutory list of prohibited transactions includes the sale or exchange, or leasing, of property between a plan and a party in interest, the lending of money or other extension of credit between a plan and a party in interest, the furnishing of goods, services or facilities between a plan and a party in interest, the transfer to, or use by or for the benefit of, a party in interest of the income or assets of a plan, and an act by a party in interest who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account. The appointment of Harvard as trustee of the Trusts in itself does not constitute a prohibited transaction under section 406 of ERISA.

Issue 2:

Section 406(a)(1)(C) 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 furnishing of goods, services or facilities between the plan and a party in interest. A party in interest is defined in section 3(14) of ERISA to include (A) a fiduciary, (B) a person providing services to the plan and (C) an employer any of whose employees are covered by the plan. Harvard is a party in interest with respect to Plan A, Plan B, and Plan C and the group trust because it is an employer of employees covered by the plans. It may also be a fiduciary with respect to the Trusts. Thus, when Harvard commences providing trustee services to the Trusts, this provision of services would, unless exempted, constitute a prohibited transaction under section 406(a)(1)(C) of ERISA.

Section 408(b)(2) and the regulations promulgated thereunder provide an exemption from section 406(a) for the payment of compensation by a plan to a party in interest, including a fiduciary, for office space or any service (or a combination of services), if (A) such office space or service is necessary for the establishment or operation of the plan, (B) such office space or service is furnished under a contract or arrangement which is reasonable, and (C) no more than reasonable compensation is paid for such office space or service. In this regard, 29 CFR section 2550.408b-2(a) of the regulations states further that section 408(b)(2) of ERISA does not contain an exemption from acts described in section 406(b)(1) or (b)(2) of ERISA. However, in accordance with section 2550.408b-2(e)(3), the provision of services by a fiduciary without the receipt of compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services) does not, in and of itself, constitute an act described in section 406(b) of ERISA. Therefore, the mere provision of trustee services to the Trusts by Harvard without the receipt of compensation or other consideration (other than reimbursement of direct expenses properly and actual incurred in the performance of such services), will not, in and of itself, fall within the prohibitions of sections 406(b) of ERISA. Furthermore, the gratuitous provision of services by Harvard to the Trusts, in and of itself, is exempt from the prohibitions imposed by sections 406(a)(1)(A) through (D) of ERISA if the above-described conditions of section 2550.408b-2(a) of the regulations are met. Note that whether the services provided are necessary and the contract and compensation reasonable are

questions of fact. Under section 5.01 of ERISA Proc. 76-1 (41 FR 36281, August 27, 1976), the Department will not ordinarily issue rulings on these questions due to their factual nature.

It is not clear from your letter whether HMC is an entity in which Harvard has an interest which may affect the exercise of Harvard's best judgment as a fiduciary. If HMC is such an entity, it might constitute a prohibited transaction under section 406(b)(1) of ERISA for Harvard to use the authority, control or responsibility which makes it a fiduciary to cause the Trust to pay a fee to HMC for the provision of services. Of course, in accordance with section 2550.408b-2(e)(3), the provision of services by HMC without the receipt of compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred) would not, in and of itself, constitute an act described in section 406(b) of ERISA.

Issue 3:

Section 406(a)(1)(D) 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 transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Contributions under the terms of a plan to the trustee of a plan acting in his capacity as trustee do not constitute a violation of section 406(a)(1)(D) of ERISA even if the trustee of the plan is also the contributor to the plan because the trustee has not caused a transfer to or use by or for the benefit of the contributor of the income or assets of the plan. Hence, Trust contributions by Harvard and THU to Harvard, as trustee of the Trust, do not violate section 406(a)(1)(D) of ERISA. Further, such contributions do not violate any other subsection of section 406 of ERISA.

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

Sincerely,

Alan D. Lebowitz  
Assistant Administrator for Fiduciary Standards  
Pension and Welfare Benefit Programs