U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-3A
103

DEC 22 1980

Mr. Homer L. Elliott
Drinker Biddle & Reath
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, PA 19107

Re: Phoenix Steel Corporation Supplemental Unemployment Benefit Plans
(Control No. P-1567A)

Dear Mr. Elliott:

This is in response to your letters of September 25, 1979 and October 18, 1979, in which you request an advisory opinion regarding (1) the requirement contained in section 103(a)(3)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) that a plan engage an independent qualified public accountant, and (2) the requirement of section 103(b) of ERISA that a plan include in its annual report a report from such qualified public accountant regarding the financial status of the plan. Your request concerns the following plans:

(1) Supplemental Unemployment Benefit Plan for the Phoenix Steel Corporation - Claymont Plant Production and Maintenance Employees (United Steelworkers of America Local 3182) (hereinafter referred to as the CP&M SUB)

(2) Supplemental Unemployment Benefit Plan for the Phoenix Steel Corporation - Clayton Plant Clerical and Technical Employees (United Steelworkers of America Local 6627) (hereinafter referred to as the C&T SUB)

(3) Supplemental Unemployment Benefit Plan for the Phoenix Steel Corporation - Phoenixville Plant Production and Maintenance Employees (United Steelworkers of America Local 2322) (hereinafter referred to as the PP&M SUB)

(4) Supplemental Unemployment Benefit Plan for the Phoenix Steel Corporation - Phoenixville Plant Office and Technical Employees (United Steelworkers of America Local 6637) (hereinafter referred to as the O&T SUB)

(5) Phoenix Steel Corporation NCBU Supplemental Layoff Benefit Plan (hereinafter referred to as the NCBU SUB)

Specifically, you request from the Department of Labor (the Department) the following opinions, that:

(1) Pursuant to 29 CFR §2520.104-44, the above-referenced plans are not required to:

(a) engage an independent qualified public accountant to conduct an examination of the financial statements and schedules of each plan, or

(b) include in the annual report a report of an independent qualified public accountant concerning the financial statements and schedules required to be a part of the annual report; and

(2) Pursuant to 29 CFR §2520.104-46, the O&T SUB is not required to engage an independent qualified public accountant since it is an employee welfare benefit plan which has never had 100 or more participants.

The following is a summary of the relevant facts and representations contained in your above-referenced letters and the materials submitted with them:

Pursuant to collective bargaining agreements entered into by Phoenix Steel Corporation (the Employer) and the collective bargaining representatives of certain employees employed at the Claymont Plant and the Phoenixville Plant of the Employer, the Employer maintains for its employees covered by such collective bargaining agreements the first four plans named above. All of these collectively bargaining plans were established prior to 1974, to provide "supplemental unemployment compensation" to covered employees who are involuntarily separated from service with the Employer due to lack of work. In addition, the NCBU SUB was established in 1975 to provide supplemental layoff benefits to certain employees not represented by a collective bargaining unit.

Benefits under all five plans are paid through a single Trust, consisting of five separate trust funds maintained with First Pennsylvania Bank N.A., which acts as Trustee for the Trust. The Trust Agreement provides that, subject to the approval of the Internal Revenue Service, the five trust funds created by the Trust Agreement constitute a single Trust, which, in turn, the Employer desires to qualify as exempt under Section 501(c)(17) of the Internal Revenue Code of 1954, as amended, (the Code). All of these plans other than the O&T SUB have had or now have more than 100 participants. The O&T SUB has never had 100 or more participants.

It is the Employer's practice to pay to the Trustee from its general assets exactly those amounts which are currently owed to participants in each of these plans. The Trustee "simultaneously" makes the required payments to participants. Because of this practice by the Employer, the trust

fund for each separate plan retains no assets beyond the period of time required for payments made by check to participants to clear through the Trustee's commercial banking processes. You further represent that the Trust has had no income in previous years, and that the Employer pays all Trust and administrative expenses relating to the plans from its general assets.[1]

The copy of the Trust Agreement submitted states that the Trust was established by the Employer to satisfy its obligations under the collective bargaining agreements concerning the funding of benefits under the plans. Each of the five separate trust funds contains only the assets of the particular plan to which it relates (section 1.1 of the Trust Agreement), and accumulates all amounts contributed to that particular plan.

All five plan documents contain a formula to determine the amount of cash to be paid by the Employer to each plan every month. In addition, all five plans also provide formulas to determine the amount of unpaid accrued liability for Employer contributions each month. Each plan also obligates the Employer to pay additional cash contributions if needed to pay benefits within specified limits. (See sections 6.5 of the CP&M and PP&M SUBs, section 5.5 of the C&T and O&T SUBs, and section 6.4 of the NCBU SUB).

In connection with the required funding of all five plans, set forth in the plan documents, The Trust Agreement further indicates that the Trust is to be funded. The Trust Agreement provides for the Trustee to invest, reinvest, and hold the assets of the Trust in accordance with the Trust Agreement and plan provisions (section 1.4) in a prudent manner and with diversified investments, unless it is clearly imprudent to diversify (section 3.1). Section 3.2 of the Trust Agreement grants the Trustee specific powers including, among others, those relating to holding or investing trust assets in checking accounts, savings accounts, certificates of deposit, common or collective trusts of the Trustee, shares of stock, leases, real estate and improvements thereon, mortgages, partnerships, and joint ventures.

Further, the plan documents for all five plans provide that plan assets shall be held, invested, and applied by the Trustee in accordance with the provisions of the plan. All four collectively bargained plans permit the assets of the trust funds to be held in cash or invested by the Trustee in obligations of the U.S. Government or other appropriate securities approved by the Employer (section 6.1 of the PP&M and CP&M SUBs and section 5.1 of the C&T SUB and the O&T SUB). Section 6.0 of the NCBU SUB, among other things, permits fund assets to be held in cash or invested by the Trustee in accordance with the terms of the Trust Agreement.

Regarding the above facts and representations, it is your position (a) that each plan is an unfunded employee welfare benefit plan in which benefits are provided solely from the general assets of the Employer; (b) that the presence of a "completely flow-through trust," in which

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[1] The Trust Agreement, however, provides that all compensation, administrative expenses, charges, assessments and taxes will be paid from the Trust unless otherwise directed by the Employer.

Employer contributions are made to the Trust only in such amounts and at such times as benefits are paid to participants, should not limit the applicability of the limited exemption set forth in 29 CFR §2520.104-44 to the plans; (c) that since the O&T SUB has never had 100 participants, separate financial statements prepared by an independent qualified public accountant are not required for the O&T SUB pursuant to 29 CFR §2520.104-46; and (d) that the O&T SUB is exempt pursuant to §2520,104-46 despite the fact that benefits under the O&T SUB are paid from the same trust as are benefits of the other plans, which in fact have more than 100 participants each.

Section 103(a)(3)(A) of ERISA provides, in relevant part, that the administrator of an employee benefit plan shall engage an independent qualified public accountant, who shall conduct an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statement and schedules required to be included in the annual report by subsection (b) of that section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

29 CFR §2520.104-44 exempts certain employee benefit plans from the specified reporting requirements set forth in paragraph (c) thereof, including those required by section 103(a)(3)(A), regarding an independent public accountant's examination and opinion. According to §2520.104-44, a welfare plan is entitled to this limited exemption if it provides for benefits to be paid (i) solely from the general assets of the employer or employee organization maintaining the plan, (ii) exclusively through insurance contracts or policies if certain specified conditions are met, or (iii) partly through each these methods.

Regardless of how benefits are funded, however, a welfare or pension plan covering fewer than 100 participants at the beginning of the plan year is exempted for that year by 29 CFR §2520.104-46 from the requirements of section 103(a)(3)(A), regarding an accountant's examination and opinion, and also from the requirement to include within the annual report the financial statements and schedules prescribed in section 103(b) of ERISA and 29 CFR §2520.103-1, §2520.103-2, and §2520.103-10. Since the Trust Agreement provides, in relevant part, that the assets of each particular plan are to be held and accumulated in a separate trust fund, and indicates also that there can be no pooling of the assets among the various plans, the financial information required under section 103(a)(3)(A) of ERISA, for one of the above-referenced plans, should, therefore, not be relevant to participants in the other four plans. Moreover, given the provisions of the Trust Agreement which contemplate that the Employer would establish separate trust funds in satisfaction of its funding obligation for each plan (under the collective bargaining agreements), and in view of the fact that the Employer treats these separate trust funds as a single Trust solely for purposes of qualification under section 501(c)(17) of the Code, it is the Department's opinion that the participants of each of these plans should not be aggregated for purposes of §2520.104-46. Accordingly, it is the Department's opinion that neither the financial statements and schedules required by section 103(b) of ERISA, nor an accountant's examination and opinion, would be required for the O&T SUB for any year in

which it covered less than 100 participants at the beginning of such year, even though the O&T SUB is one of the plans covered by the single Trust.

With respect to all of the plans, it is the Department's opinion that §2520.104-44 would not be applicable to these plans. The plan documents for the plans, the Trust Agreement and collective bargaining agreements all explicitly require the Employer to fund each plan. Moreover, all the plan documents submitted set forth in detail the exact formula to be used by the Employer in determining the precise amount of cash to be contributed to each plan every month. In conjunction with this required funding, the plan documents and Trust Agreement also specifically permit the Trustee to hold the plan assets in trust, and to invest and reinvest these assets. Thus, as evidenced by the plan documents, these plans are not unfunded plans of the type described in §2520.104-44.

Yet despite the requirement for Employer funding as expressed in the plan documents, you represent that the current method of funding by the Employer results in payments to the plan only in response to benefits which are presently owed to plan participants. Even if that current funding method were consistent with the plan documents, the exemption contained in §2520.104-44 would not be available. The presence of a trust into which Employer contributions are deposited, for even a limited period of time, to pay benefits for plan participants indicates that these benefits are not provided solely from the general assets of the Employer. As stated by the Department in the preamble to §2520.104-44 (43 FR 10138, March 10, 1978) the "passage of … funds through an intermediary trust or other entity present[s] an opportunity for fund management that should be subject to financial reporting." Consequently, plans that operate in the manner you describe are not unfunded welfare plans, and are not entitled to the exemption from financial reporting contained in §2520.104-44.

In view of the foregoing, it is the Department's opinion that an accountant's examination and opinion will be required, pursuant to section 103(a)(3)(A) of ERISA, for each of the plans, except that such examination and opinion will not be required, pursuant to §2520.104-46 for any plan in any year in which the plan covers less than 100 participants at the beginning of such year.

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 thereof relating to the effect of advisory opinions. We have considered your request for a conference under section 8 of the procedure and have decided that a conference is not necessary in providing this advisory opinion.

Sincerely,

Ian D. Lanoff
Administrator
Pension and Welfare Benefit Programs