U.S. Department of Labor

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

Reply to the Attention of:
Ivan Strasfeld
(202) 523-8971

Opinion No. 82-26A
Sec. 408(b)(2)

JUN 9 1982

Mr. Larry R. Linhart
Murphey, Young & Smith
250 East Broad Street
Columbus, Ohio 43215

Re: The Ohio Company
Identification Number F-1091A

Dear Mr. Linhart:

By letter dated May 3, 1979, you requested an advisory opinion on behalf of The Ohio Company under the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that The Ohio Company proposes to enter into contractual arrangements with sponsors of employee benefit plans for the provision of trust services, including investment management, and brokerage services to such plans. All costs for the services will be paid directly by the plan sponsors. The Ohio Company is currently serving as trustee of various employee benefit plans. You request an advisory opinion regarding the status of the proposed arrangement under the prohibited transaction rules of ERISA.

Among the details of the proposed services described in your submissions are the following: Pursuant to the contractual agreement entered into with plan sponsors, The Ohio Company proposes to provide trust services (including investment management) and brokerage services to employee benefit plans. The plan sponsors will pay all costs associated with the provision of such services under a single fee arrangement which will be calculated at a percentage of the market value of the fund under management. There will be no separate charges for the provision of brokerage services. Under the contract, the plan sponsor has the option to elect to have The Ohio Company provide additional services at an additional cost as set forth in the agreement. The Ohio Company will not have the authority as trustee to provide any services for a fee other than the services to be provided for the fees set forth in the agreement.

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 he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services or facilities between a 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. Section 406(b)(1) 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.

Section 3(14) of ERISA defines the term party in interest to include a fiduciary and a person providing services to a plan.

Subject to the conditions set forth in section 408(d) of ERISA, 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.

The provision of trust and brokerage services to a plan by The Ohio Company would be exempt from the prohibitions of section 406(a)(1) of ERISA if the conditions contained in section 408(b)(2) of ERISA are met. We note, however, that the questions of what constitutes a necessary service, a reasonable contract or arrangement and reasonable compensation are inherently factual in nature. Section 5.01 of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976) states that the Department generally will not issue opinions on such questions. The plan sponsor or other appropriate plan fiduciary must determine, based on all relevant facts and circumstances, whether the conditions of section 408(b)(2) are satisfied.

It should be noted that although this exemption generally permits the performance of multiple services for the same plan, it does not exempt an act of self-dealing by a fiduciary from the prohibitions of section 406(b)(1) of ERISA. In this connection, 29 CFR 2550.408b-2(e) of the Department's regulations provides, in pertinent part, that a fiduciary engages in an act described in section 406(b)(1) of ERISA if the fiduciary uses any of the authority, control or responsibility which makes such person a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary.

Under the facts described, The Ohio Company acting in its capacity as a fiduciary of a plan, would not be using its authority, control or responsibility which makes it a fiduciary to cause the plan to select The Ohio Company or to pay any fee for the provision of services by The Ohio Company. Accordingly, it is the Department's opinion that selection of The Ohio Company to provide multiple services to employee benefit plans would not involve The Ohio Company in acts described in section 406(b)(1) of ERISA.

Regardless of whether a plan or its plan sponsor pays the costs associated with the provision of multiple services by The Ohio Company, the actual provision of the specified services to a plan is regulated by the statutory exemption from multiple services described in ERISA section

408(b)(2) and the regulations thereunder. Thus, because a violation of the self-dealing proscription contained in section 406(b)(1) could occur in the course of The Ohio Company's performance of such duties, the Department is not prepared to rule that the described arrangement, in operation, would, in no case, violate that section.[1]

Finally, we wish to note that the mere fact that a fiduciary of a plan does not violate the prohibited transactions restrictions of section 406(a) and (b) of ERISA does not relieve such fiduciary from the general fiduciary responsibility provisions of section 404 of ERISA as they pertain to the management and disposition of the assets of a plan. Thus, for example, when plan fiduciaries consider whether they may properly cause a plan to enter into a series of brokerage transactions, they must determine, among other things, whether such transactions will be entered into on behalf of the plan solely in the interest of participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man would use in the conduct of an enterprise of a like character and with like aims.

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 has been, with certain exceptions not here relevant, 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 letter is issued solely by the Department.

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,

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

[1] For example, a fiduciary who causes a plan to make a loan to himself or to a close associate has engaged in conduct in violation of section 406(b)(1) of ERISA. See Freund v Marshall and Ilsley Bank, 485 F. Supp. 629 (W D. Wis. 1979)