**U.S. Department of Labor**

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

Reply to the Attention of:
Ivan Strasfeld
(202)523-7901

OPINION #82-30A
Sec. 3(38), 403(a)(2)

JUL 7 1982

James D. Hutchinson, Esquire
Steptoe & Johnson
1250 Connecticut Avenue
Washington, D.C. 20036

Re: Carreau, Smith, Inc.
Identification Number F-2200A

Dear Mr. Hutchinson:

By letter of December 2, 1981, you requested an advisory opinion under the fiduciary responsibility standards of the Employee Retirement Income Security Act of 1974 (ERISA) regarding the participation of employee benefit plans in certain limited partnerships. Your letter includes the following facts and representations:

Carreau, Smith, Inc. (Carreau) is an investment adviser registered under the Investment Advisers Act of 1940. Carreau's primary investment advisory service is the provision of advice to employee benefit plans and endowment funds on the debt-equity asset mix of their portfolios. Carreau sponsors certain limited partnerships, including one, the C & S Optioned Equities Fund for Employee Benefit Plans (the Fund), which is designed specifically for employee plans. The partnerships enable investors to utilize optioned equities investment strategies on a diversified basis.

The Fund consists of two general partners and a number of limited partners. Both of the general partners are principals of Carreau. All of the limited partners are employee plans qualified under section 401 of the Internal Revenue Code. The Fund operates pursuant to a Limited Partnership Agreement (the Partnership Agreement). Under the Partnership Agreement, the general partners are responsible for managing and administering the Fund, with one exception. They select an investment manager who is otherwise independent of Carreau and them to select and manage investments.

The current investment manager is Analytic Investment Management, Inc. (Analytic). Analytic's discretion to select and manage investments is limited only to the extent that it must be exercised in a manner consistent with the general investment objectives of the Fund, as expressed in the Partnership Agreement. The Partnership Agreement requires that Analytic, or any investment manager chosen by the general partners, be registered under the Investment Advisers Act of 1940 and acknowledge that it is a fiduciary of each employee plan participating in the Fund. The Partnership Agreement may not be amended with respect to any material matter without the express written consent of all of the limited partners.

Pursuant to relevant securities laws, employee plans contemplating investment in the Fund are provided an Offering Circular describing the Fund and offering, a copy of the Partnership Agreement, and financial statements of the Fund. Prospective investors are also provided brochures describing Analytic and the services it performs, and are permitted access to any other information which they deem necessary to make an informed evaluation of the proposed participation in the Fund.

Analytic is party to an investment advisory agreement (the Advisory Agreement) with the Fund, under which Analytic acknowledges that it is a registered investment adviser and that it is a fiduciary of the Fund. The Advisory Agreement may not be unilaterally amended, transferred, or assigned by Analytic, and may be terminated by either the Fund or Analytic upon written notice to the other party.

Analytic also has entered into an agreement with each limited partner, under which Analytic acknowledges that it is a registered investment adviser and that it is a fiduciary with respect to that partner.

Under the Partnership Agreement, a limited partner may withdraw part or all of its investment in the Fund at the end of any month, upon seven days written notice to the Fund. Distribution of withdrawn amounts must be made within twenty days following the end of the month in which the limited partner gave notice of its intent to withdraw.

You ask

> (a) whether, under the facts and representations set forth in your letter, Analytic, or any other person selected as investment manager for the Fund, would be considered an "investment manager," as defined in section 3(38) of ERISA, with respect to each employee benefit plan participating in the Fund, and
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> (b) whether, under the facts and representations set forth in your letter, a named fiduciary of a plan participating in the Fund would be considered to have delegated authority to the Fund's investment manager to manage, acquire, or dispose of plan assets in accordance with section 403(a)(2) of ERISA.

With regard to your first question, section 3(38) of ERISA defines the term investment manager as any fiduciary, other than a trustee or named fiduciary, who

> (a) has the power to manage, acquire, or dispose of any asset of a plan;
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> (b) is registered as an investment adviser under the Investment Advisers Act of 1940, is a bank as defined in the Investment Advisers Act of 1940, or is an insurance company qualified under the laws of more than one state to manage, acquire, or dispose of plan assets; and
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> (c) has acknowledged in writing that he is a fiduciary with respect to the plan.

You represent that Analytic is registered as an investment adviser under the Investment Advisers Act of 1940 and that Analytic has acknowledged in writing to each plan participating in the Fund that it is a fiduciary of the plan. You also represent that any person selected as an investment manager for the Fund would be a registered investment adviser and would similarly acknowledge its fiduciary status. You state that, under the Partnership Agreement, Analytic, or any other investment manager, has the authority to manage, acquire, and dispose of assets of the Fund.

In your opinion request you note that the Department has proposed regulations dealing with the definition of "plan assets," and conclude that the assets of the Fund would be considered assets of the plans participating in the Fund. Accordingly, for purposes of this letter, we have assumed that the assets of the Fund include plan assets for purposes of part 4 of title I of ERISA. Therefore, in performing its services for the Fund, Analytic, or any other investment manager, has the power to manage, acquire, and dispose of assets of the plans participating in the Fund. As a result, Analytic, or any other person selected as investment manager for the Fund, could qualify as an "investment manager," as defined in section 3(38) of ERISA, with respect to each plan participating in the Fund, provided the investing plan provides for the appointment of an investment manager and provided the person selected as investment manager otherwise meets the requirements of section 3(38).

With regard to your second question, under section 402(c)(3) of ERISA, a plan may provide a named fiduciary with authority to appoint an investment manager or managers to manage any assets of the plan.

Section 405 of ERISA sets forth, among other things, procedures for allocating and designating fiduciary duties. Under section 405(c)(1), a plan may establish procedures for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan. Section 405(c)(3) defines "trustee responsibility" for purposes of section 405(c) as any responsibility provided in a plan's trust instrument to manage or control the assets of the plan. Specifically excluded from the definition of "trustee responsibility" is a power of a named fiduciary under a trust instrument to appoint an investment

manager. Thus, a named fiduciary's authority to select an investment manager is a responsibility that may be properly delegated to another fiduciary.

You represent that trustees of plans contemplating investment in the Fund are provided, or have access to, information required to decide whether to participate in the Fund, including information about the investment manager and the services it performs, and that trustees of plans participating in the Fund are able to monitor the performance of the investment manager through the plan's access to the Fund's books and through the annual and interim reports issued by the general partners. You represent that trustees may terminate their plans' association with the investment manager by liquidating the plans' interests in the Fund. You state that any investment manager of the Fund is required to acknowledge in writing that it is a fiduciary of each plan participating in the Fund, thereby providing plan participants with a record as to who controls the plan's assets.

Based on the facts and representations you have set forth, it is the opinion of the Department that the named fiduciary of a plan participating in the Fund would have delegated authority to the Fund's investment manager to manage, acquire, or dispose of plan assets in accordance with section 403(a)(2) of ERISA.

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

Sincerely,

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