U.S. Department of Labor

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

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

OPINION NO. 82-31A
Sec. 406(a)(1), 406(b), 408(b)(2), 408(c)(2),
401(b), 3(14)(A), (G), & (H), 3(21)(A)

JUL 14 1982

Mr. Brent R. Armstrong, Esquire
Suitter, Axland & Armstrong
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175 South West Temple
Salt Lake City, Utah 84101

Re: Identification Number: F-1925A

Dear Mr. Armstrong:

This is in response to your request for an advisory opinion from the Department of Labor concerning the application of the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to several aspects of the formation and operation of Pension Equity Growth Trust (PEGT).

Your letter contains the following facts and representations. Michael S. Purles (Purles) and Richard D. Nicholls (Nicholls) own all the outstanding shares in R-P Holding Company (R-P), a Utah Corporation, which, in turn, owns all the outstanding share in Pension Equity Advisers, Incorporated (Advisers) and in Research-Planning, Incorporated (Research), both Utah Corporations. Research is registered as an investment adviser under the Investment Advisers Act of 1940, and Advisers is a newly formed corporation that intends to become registered under the 1940 Act. Purles and Nicholls are officers and directors of R-P, Research and Advisers and will be employees of Research and Advisers.

Research currently serves as investment adviser to individuals, firms, corporations and more than sixty employee benefit plans. Research provides its investment advisory services for a fee computed as a percentage of the value of assets managed. The percentage rate varies according to the amount of assets managed. Generally the annual rate for employee benefit plan clients is 1 1/2% to 2 1/4% of assets managed.

Advisers wishes to form PEGT as a pooled trust of the type described in Revenue Ruling 81-100, 1981-13 I.R.B. 32, to provide qualified employee benefit plans with a vehicle for pooling a portion of their assets for investments in real estate, real estate loans and, to some extent, in government securities. Purles and Nicholls would serve as the initial trustees, and Advisers would be the investment manager of PEGT. Advisers is required under the proposed trust agreement with PEGT to furnish office space and office facilities to the trustees without charge therefor.

Units of beneficial interest in PEGT will be denominated initially in amounts of $1000. Thereafter, units will be revalued quarterly at their proportionate share of the net asset value of PEGT. All offerings of units will be registered with the Securities and Exchange Commission and the appropriate state securities commissions. It is probable that Research will inform its qualified employee benefit plan clients of the availability of units in PEGT. It is probable that participating employee benefit plans will act on the advice of Research or Advisers

with respect to redemption of its units in PEGT in order to meet other investment or liquidity needs of the individual employee benefit plan. A fiduciary of each individual employee benefit plan who is independent of Advisers, Research, R-P, Purles and Nicholls will make the decision to invest in PEGT. Advisers, Research, R-P, Purles or Nicholls will never make this decision. In purchasing units and signing the "Adoptive Agreement" with PEGT and Purles and Nicholls as trustees, the individual employee benefit plan becomes part of PEGT, appoints Purles and Nicholls as trustees of PEGT and appoints Advisers as the investment manager.

The units of participation in PEGT will be non-voting except with respect to removal and replacement of trustees. After the initial appointment of the trustees by signing the Adoptive Agreement, the individual employee benefit trusts vote on removal and/or appointment of trustees. The initial appointment of the investment manager is for a period of three years. During that period, the trustees may not remove the investment manager except for breach of fiduciary duty.

No commissions or fees will be paid to anyone with respect to sale or redemption of units in PEGT. At the time of the initial contribution by an employee benefit plan that does not have an existing relationship with Purles, Nicholls, R-P, Research or Advisers, however, a fee equal to one-half of one percent of the value of the contribution will be paid by the plan to Advisers for initial administrative costs. The trustees, Purles and Nicholls, will serve without compensation, but, as full-time employees of Advisers or Research, they will continue to receive compensation from those entities commensurate with their services. Advisers will furnish office space and facilities to the trustees without charge. Advisers, as investment manager, will be paid a fee of one-half of one percent of the net asset value of PEGT as of each valuation date. No separate investment advisory fees will be paid to Research or Advisers with respect to any portion of plan assets invested in PEGT by employee benefit plans to which Research or Advisers provide individual investment management services. The only investment advisory fees payable, therefore, would be the plan's pro rata share of PEGT's investment advisory fee to Advisers.

You have asked for opinions (or, in the alternative, a prohibited transaction exemption) to the effect that:

(a) The establishment and operation of PEGT, with Advisers as investment manager and Purles and Nicholls as trustees, does not constitute dealing by a fiduciary with the assets of a plan in his or her own interest in violation of ERISA section 406(b)(1) and does not constitute a transaction in which a fiduciary acts on behalf of a party whose interests are adverse to the interests of a plan in violation of ERISA section 406(b)(2);

(b) The purchase (with money or by a contribution of property) or sale (redemption) by an employee benefit plan of units in PEGT during any time that Advisers is the investment manager or Purles or Nicholls are trustees, or any of them is otherwise a fiduciary with respect to PEGT and it, Research, R-P, Purles, Nicholls, or an affiliate of any of them, is also a fiduciary with respect to such plan, does not violate ERISA sections 406(a)(1)(A), 406(a)(1)(D), or 406(b) or section 4975(c)(1)(A) or 4975(c)(1)(D) of the Internal Revenue Code of 1954 (the Code);

(c) The payment by a beneficiary trust or its sponsoring employer (directly or by redemption of units), and the receipt by Advisers of investment management fees with respect to PEGT and the trust's units therein, is not a transfer of plan assets to, or use of plan assets by or for the benefit of, a party in interest or disqualified person in violation of ERISA section 406(a)(1)(D) or Code section 4975(c)(1)(D) nor the receipt by a fiduciary of consideration in connection with a transaction involving the assets of the plan in violation of section 406(b)(3);

(d) The payment by an employee benefit plan, and the receipt by Research or Advisers or an affiliate thereof, of investment advisory fees or compensation with respect to the portion of the plan's assets which are not invested in units of PEGT, do not violate Code section 4975(c)(1)(F) or the conflict of interest provisions of ERISA section 406(b);

(e) The furnishing by Advisers of office space and office facilities to the trustees without separate charge therefor does not constitute the furnishing of goods, services or facilities within the meaning of ERISA section 406(a)(1)(C) or Code section 4975(c)(1)(C);

(f) The advancement by Purles or Nicholls as trustees of PEGT or by Advisers as investment manager for PEGT of expenses incurred in the performance of their duties for and on behalf of PEGT does not constitute the lending of money or extension of credit between a plan and a party in interest or disqualified person as prohibited by ERISA section 406(a)(1)(B) or Code section 4975(c)(1)(B): and

(g) The reimbursement to Purles and Nicholls as trustees of PEGT or to Advisers as investment manager for PEGT for expenses incurred in the performance of their duties for or on behalf of PEGT is not a transfer of plan assets to or for the use of a party in interest or disqualified person as prohibited by ERISA section 406(a)(1)(D) or Code section 4975(c)(1)(D) nor the receipt of consideration by a fiduciary in violation of ERISA section 406(b)(3) or Code section 4975(c)(1)(F).

In your letter, you indicate that Advisers desires to form PEGT as a group trust under the principles of Rev. Rul. 56-267, 1956-1 C.B. 206. That Revenue Ruling has been superseded by Rev. Rul. 81-100, 1981-13 I.R.B. 32. Rev. Rul. 81-100 holds, among other things, that a group trust is exempt under section 501(a) of the Code with respect to its funds which equitably belong to participating trusts if the following requirements are satisfied:

(1) The group trust is itself adopted as a part of each individual retirement account or employer's pension or profit-sharing plan.

(2) The group trust instrument expressly limits participation to individual retirement accounts which are exempt under section 408(e) of the Code and employer's pension and profit-sharing trusts which are exempt under section 501(a) of the Code by qualifying under section 401(a).

(3) The group trust instrument prohibits that part of its corpus or income which equitably belongs to any individual retirement account or employer's trust from being used for or diverted to any purposes other than for the exclusive benefit of the individual or the employees, respectively, or their beneficiaries who are entitled to benefits under such participating individual retirement account or employer's trust.

(4) The group trust instrument prohibits assignment by a participating individual retirement account or employer's trust of any part of its equity or interest in the group trust.

(5) The group trust is created or organized in the United States and is maintained at all times as a domestic trust in the United States.

In the Department’s view, where an employee pension benefit plan participates in PEGT, a group trust of the kind described in Rev. Rul. 81-100, the assets of the plan include an undivided interest in each of the underlying assets of PEGT.

Because of their relationship to PEGT, Nicholls, Purles, R-P, Advisers and Research are parties in interest with

respect to plans that invest in PEGT. Advisers, as investment manager of PEGT, is a fiduciary with respect to the plans that invest in that entity under section 3(21) of ERISA, and is therefore a party in interest with respect to those plans under section 3(14)(A). Nicholls and Purles, as trustees of PEGT, are also fiduciaries of, and parties in interest with respect to, the investing plans. Nicholls and Purles are also parties in interest under section 3(14)(H) of ERISA by reason of their other relationships with Advisers. R-P is a party in interest under section 3(14)(H) of ERISA by reason of its ownership of Advisers' stock. Research is indirectly owned by Purles and Nicholls and is therefore a party in interest under section 3(14)(G) of ERISA. In addition, Nicholls, Purles, and Research are fiduciaries of, and parties in interest with respect to, individual plans to which they give investment advice. See sections 3(14)(A) and 3(21) of ERISA.

Section 406(a)(1)(D) of ERISA and section 4975(c)(1)(D)[1] of the Code prohibit transactions involving the transfer to, or use by or for the benefit of, a party in interest, of any plan assets. Section 406(b)(1) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his or her own interest or for his or her own account. Section 406(b)(2) of ERISA provides that a fiduciary with respect to a plan shall not in his or her individual capacity or any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Section 406(b)(3) of ERISA provides that a plan fiduciary shall not receive any consideration for his or her own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan. Section 408(b)(2) of ERISA provides an exemption for reasonable arrangements with a party in interest for services necessary for the operation of a plan if no more than reasonable compensation is paid therefor. Department regulations section 2550.408b-2, however, provides that section 408(b)(2) of ERISA does not provide an exemption from acts described in section 406(b)(1), 406(b)(2) and 406(b)(3) of ERISA. Thus, a fiduciary may not use the authority control, or responsibility which makes the person a fiduciary to cause a plan to pay an additional fee to that fiduciary (or to a person in which that fiduciary has an interest which may affect the exercise of the fiduciary's best judgement as a fiduciary) to provide a service.

Accordingly, in response to your requests in paragraphs (a), (c) and (d), section 408(b)(2) of ERISA exempts the provision of services to employee benefit plans by Research or Advisers, the provision of investment management services to PEGT by Advisers and the provision of trustee services to PEGT by Purles and Nicholls from the prohibitions of sections 406(a)(1)(C) and (D) of ERISA if the conditions of the exemption are met. Furthermore, the initial appointment of Purles and Nicholls as trustees of PEGT and the initial appointment of Advisers as investment manager of PEGT by independent plan fiduciaries purchasing units in PEGT does not violate sections 406(b)(1) or 406(b)(2) of ERISA as long as Purles, Nicholls, Research, Advisers and any of their affiliates, if they are fiduciaries of plans purchasing units in PEGT, exercise none of the authority control or responsibility that makes them fiduciaries to cause the plans to purchase units in PEGT. Furthermore, under the facts presented in your opinion request, the mere receipt by Advisers of investment management fees with respect to PEGT would not violate section 406(b)(3) of ERISA. However, Nicholls and Purles, as trustees, should consider whether decisions regarding the continuance of the investment management relationship between Advisers and PEGT after the expiration of the initial agreement would involve prohibited transactions under sections 406(b)(1) and 406(b)(2).

With respect to your request in paragraph (b), the Department is not prepared to issue an opinion that the purchase or sale of an interest in PEGT by a plan with respect to which Advisers, Purles, or Nicholls is a party in interest would not violate these provisions. Accordingly, we have included this issue in an administrative exemption which was proposed on April 6, 1982 (Application No. D-2525, 47 FR 14811) and which was granted on July 9, 1982 (PTE 82-115, 47 FR 29911). With respect to violations of section 406(b) of ERISA, while the purchase of units in PEGT necessarily involves an indirect contracting for the provision of services by Purles, Nicholls, and Advisers, if Purles, Nicholls and Advisers use none of their authority control or

[1] References to Code sections that parallel provisions of Title I of ERISA will hereafter be dropped but may be assumed to be incorporated by reference when the parallel section in Title I of ERISA is cited.

responsibility as fiduciaries to cause a plan to purchase or sell interests in PEGT, there is generally no violation of sections 406(b)(1) or 406(b)(2) of ERISA. You represent that it is possible or probable that a plan may act on the advice of Research or Advisers with respect to redemptions of its units in PEGT. The redemption of units in reliance on such advice may involve violations of sections 406(b)(1) and 406(b)(2) of ERISA.

With respect to your request in paragraph (e), Advisers' furnishing office space and facilities to the trustees does not involve a transaction between a plan and a party in interest.

With respect to your requests in paragraphs (f) and (g), section 408(c)(2) of ERISA provides a statutory exemption for the receipt by a fiduciary of reimbursement of expenses properly and actually incurred in the performance of his or her duties with the plan. Section 2550.408c-2(b)(4) of the Department's regulations provide that under sections 408(b)(2) and 408(c)(2) of ERISA, the term "reasonable compensation", as applied to a fiduciary or employee of a plan, includes an advance to such a fiduciary or employee by the plan to cover direct expenses to be properly and actually incurred by such person in the performance of such person's duties with the plan if the amount of the advance is reasonable and the fiduciary or employee accounts to the plan.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976). Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

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