U.S. Department of Labor

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

Reply to the Attention of:
Dan O'Neil (202) 523-8368

Opinion 83-6A
Sec. 407(d)(6)

JAN 24 1983

Leon E. Irish, Esq.
Caplin & Drysdale
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

Re: Identification Number: F-2402A

Dear Mr. Irish:

This is in response to your letter of May 20, 1982, requesting an advisory opinion under the Employee Retirement Income Security Act of 1974 (ERISA) to the effect that an employee benefit plan that is required under the plan documents to have more than 50 percent of its assets invested in qualifying employer securities will satisfy the requirement that an employee stock ownership plan (ESOP) be "designed to invest primarily in qualifying employer securities" for purposes of section 407(d)(6) of ERISA.

You represent that circumstances could arise under which it would not be prudent or otherwise beneficial to plan participants for an ESOP to invest a very large percentage of its assets in qualifying employer securities. This might be the case even though plan documents require the investment of all or a minimum percentage of plan assets in such securities. In that situation, the potential liability for breach of duty makes a fiduciary's decision to disregard a plan provision a difficult one. Accordingly, it is your belief that a plan provision that requires a plan to invest more than 50 percent of its assets in qualifying employer securities should satisfy the "primarily" requirement of section 407(d)(6) of ERISA while, at the same time, permitting plan fiduciaries as much flexibility as possible.

Section 407(d)(6) of ERISA defines an ESOP to be an individual account plan which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase both of which are qualified, under section 401 of the Internal Revenue Code of 1954 (the Code), which is designed to invest primarily in qualifying employer securities and which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

29 CFR §2550.407d-6(a)(2) of the Department's regulations provides that to be an ESOP, a plan must be formally designated as such in the plan document. 29 CFR §2550.407d-6(b) further provides that a plan constitutes an ESOP only if the plan specifically states that it is designed to invest primarily in qualifying employer securities. Moreover, the Department has recognized in these regulations that a stock bonus plan or a money purchase pension plan constituting an ESOP may invest part of its assets in other than qualifying employer securities. Such plan will be treated the same as other stock bonus plans or money purchase pension plans qualified under section 401(a) of the Code with respect to those other investments.

Section 404(a)(1) of ERISA requires that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA. Section 404(a)(2) of ERISA provides, in pertinent part, that, in the case of an eligible individual account plan, the diversification requirement and the prudence requirement (only to the extent that it requires diversification) of section 404(a)(1) are not violated by the acquisition or holding of qualifying employer securities.

Neither ERISA nor the applicable regulations promulgated thereunder contain maximum or minimum percentages of plan assets which must be invested in employer securities over the life of an ESOP in order to satisfy the "primarily" requirement of section 407(d)(6) of ERISA. The regulations, however, do specifically permit a portion of plan assets to be invested in other than qualifying employer securities. It is the view of the Department that the plan provision you have described would not, in itself, contravene the requirement of ERISA section 407(d)(6) that the ESOP be designed to invest primarily in qualifying employer securities.

Of course, the inclusion of such a provision in a plan document would not insulate plan fiduciaries from liability under section 404 of ERISA should prudence or exclusive benefit requirements dictate an alternative investment course of section. Instances may arise where an investment of more than 50 percent of plan assets in qualifying employer securities would not satisfy the fiduciary responsibility requirements imposed by section 404 of ERISA. In this regard, however, we must emphasize that the Department believes that in order to satisfy the ESOP requirements imposed by ERISA and applicable regulations, a plan must satisfy the "primarily" requirement of section 407(d)(6) of ERISA over the life of the plan.

This letter is an advisory opinion under ERISA Procedure 76-1. 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