**U.S. Department of Labor**

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

Reply to the Attention of:

OPINION NO. 83-62A
Sec. 401(b), 403(a), 3(21)(A)

DEC 13 1983

Mr. Robert C. Pozen
Caplin & Drysdale
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

Re: Identification Number F-2797A

Dear Mr. Pozen:

This is in reply to your request on behalf of the New York Stock Exchange for a number of advisory opinions under the Employee Retirement Income Security Act of 1974 (ERISA) relating to trading on a "when-issued" basis in the securities of the "new" American Telephone and Telegraph and the seven regional holding companies (ATST securities).

Your opinion request and exhibits contain the following facts and representations.

Under the AT&T divestiture plan, approximately 938 million shares of common stock will be converted into approximately 1.595 billion shares of common stock of seven regional holding companies and the "new" AT&T. Stockholders of the "old" AT&T will retain their shares of AT&T common stock and will receive one share of common stock in each of the seven regional holding companies for each 10 shares of AT&T common stock they hold. The record date for the AT&T divestiture is planned to be December 30, 1983, and the certificates will probably be distributed to AT&T shareholders during February, 1984.

On November 21, 1983, the common stock of each of the seven regional holding companies and the "new" AT&T began trading on a when-issued basis pursuant to a listing on the New York Stock Exchange (the Exchange). When-issued trading is simply trading in unissued securities in contemplation of their issuance at a future date. A contract is entered into for delivery of a specific number of shares against payment of a specific price shortly after the date of issuance. During February, 1984, when-issued trading in the AT&T securities is expected to be replaced by regular way trading in such securities, which will remain listed on the Exchange.

In view of the magnitude of the AT&T divestiture and the extended when-issued trading period, numerous credit and capital concerns necessitated the Exchange's adoption of special procedures designed to insure the continued financial viability of its member organizations and the protection of investors and the public interest. Pursuant to Rule 431, on November 18, 1983, the Exchange required that in order to trade in AT&T securities on a when-issued basis, plans are required to make an initial deposit equal to 10 percent of the contract price of such securities.[1] This

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[1] These deposit requirements were approved by the Securities and Exchange Commission (SEC) on November 18, 1983.

requirement is imposed on all when-issued transactions in AT&T securities for "exempt accounts".[2] In addition, each net when-issued position will be marked to the market on a daily basis. Whenever such marks reduce the equity position in the account below 7 percent of the current market value of the net position, the plan must deposit additional funds to restore the equity position in the account to the 7 percent level (maintenance deposit). You represent that the nature of the deposit requirements is different from the nature of margin as that term is used to describe the typical customer margin transaction in which the purchase of securities by the customer is financed in part by the broker. Rather, the deposit requirements are in the nature of a performance bond or earnest money to assure that the plan completes its transaction in when-issued AT&T securities.

The Exchange member will itself be subject to analogous mark to the market obligations pursuant to its contractual undertakings with the National Securities Clearing Corporation (NSCC). Although those obligations arise independently of the customer's deposit requirements, the Exchange member's marking obligations do have a derivative relationship to the plan's transactions. This is because the Exchange member's marking obligations will be calculated in respect of the Exchange member's net position at NSCC representing all customer accounts trading in when-issued AT&T securities. NSCC marks each member's net position in each AT&T security to the market on a daily basis and requires more cash from an Exchange member in the event of an adverse price movement. Conversely, if there is a favorable price movement, NSCC will credit the Exchange member's account.

To comply with the deposit requirements, Exchange members may accept cash or readily marketable securities (e.g. Treasury bills) as deposits by plans. The deposit requirements applicable to plans may be held in one of two locations -- the Plan's account at the broker-dealer or a custodial account at a bank. If an account at a broker-dealer is utilized, the securities and cash will be subject to the protections contained in Rule 15c3-3 under the Securities Exchange Act of 1934.[3] If a custodial account at a bank is utilized, the arrangements to satisfy the deposit requirements will be determined among the bank, the broker-dealer and the plan. In addition, you note that the Securities Investor Protection Corporation protects securities and cash in customer accounts with a broker-dealer up to $500,000 per customer, with claims for cash limited to $100,000.

You have requested the Department's opinion with regard to the following issues:

(1) That neither the initial deposit nor the maintenance deposit for when-issued trading in AT&T securities constitutes a plan asset for purposes of Part 4 of Subtitle B of Title I of ERISA:

(2) That neither the initial deposit nor the maintenance deposit must be held in trust in accordance with section 403(a) of ERISA: and

(3) That a broker-dealer would not become a fiduciary solely by reason of holding the

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[2] You represent that, for purposes of trading in when-issued AT&T securities, an "exempt account" is defined by the Exchange as the accounts of a member organization. non-member broker or dealer, bank, trust company, investment trust, insurance company, charitable or non-profit educational institution, ERISA plan, government pension plan, foreign bank and foreign broker-dealer.

[3] 17 C.F.R. §240.15c3-3 (1982).

initial deposit or maintenance deposit of a plan trading in when-issued AT&T securities.

1. Deposit Requirements and Plan Assets.

You have represented that both the initial deposit and the maintenance deposit are in the nature of a performance bond or earnest money and are designed to assure a customer's completion of its transaction in when-issued AT&T securities. You state that, because of this, initial and maintenance deposits should not be classified as plan assets.

You also represent that the plan investor's rights and obligations with respect to trading in when-issued securities are determined in accordance with the confirmation slip issued pursuant to Rule 10b-10 of the Securities Exchange Act that evidences the plan's rights to a specific number of AT&T securities at a specific price, the AT&T prospectus which describes the rights of purchasers of AT&T securities and the rules of the Exchange and the SEC which are binding upon all such transactions in such securities on the Exchange.

In this regard, initial and maintenance deposits are designed to protect all investors, all broker-dealers, and the Exchange itself from market disruptions that could be caused if customers failed to meet their obligations to complete transactions in when-issued AT&T securities. SEC Rule 15c3-3 provides various protections for the securities and cash held by broker-dealers for their customers. Any deposits required of plans for when-issued trading in AT&T securities would be covered by this rule. Pursuant to Rule 15c3-3, a broker-dealer must promptly segregate and maintain possession or control of fully paid securities of its customers (including securities used by plans to satisfy deposit requirements). A broker-dealer must also maintain a special reserve account with a bank for the exclusive benefit of its customers for which it holds cash. The broker-dealer must deposit in this reserve account an amount (computed in accordance with a formula set forth in Rule 15c3-3) which is designed to achieve an effective prohibition against a broker-dealer's use of customer funds to finance activities for its own account. Thus, you represent that all customers' assets received as initial and maintenance deposits by the broker-dealer may be held in one or more single commingled accounts segregated from the funds of the broker-dealer.

So long as a plan-investor has not closed out its position in such securities, the plan has no right to withdraw the cash or securities deposited to satisfy the deposit requirements, except for amounts which become available for withdrawal by reason of price movements favorable to the plan.

On the basis of these facts and representations, it is the opinion of the Department that the assets held by a broker-dealer to fund the deposit requirements (consisting of initial and maintenance deposits in connection with when-issued trading in AT&T securities) are not plan assets for the purposes of Part 4 of Subtitle B of Title I of ERISA. When a plan engages in a transaction in when-issued AT&T securities, its assets are the rights evidenced by the written confirmation slip and the prospectus for AT&T securities, those embodied in any agreement with the broker-dealer, and those conferred by the general rules of the Exchange and the SEC governing the relationship between broker-dealers and their customers with particular reference to Exchange Rule 431.

2. Trust Requirement.

Section 403(a) of ERISA provides, in relevant part, that all plan assets must be held in trust. As noted above, it is the Department's opinion that the relevant plan assets are the rights evidenced by the confirmation slip and the rules and regulations surrounding when-issued trading in AT&T securities rather than the assets used to fund the deposit requirements. Therefore, the trust requirements contained in section 403(a) generally would be satisfied, with respect to the holding

of initial and maintenance deposits in connection with trading on a when-issued basis in AT&T securities, if the broker-dealer maintains the account, including any agreements, confirmations etc., relating to the account, in the name of the plan's trustees, as trustees of the plan. See 29 CFR §2550.403a-1 (47 FR 21241, 21247, May 18, 1982).

3. Holding Initial and Maintenance Deposits.

You have asked whether a broker-dealer will be deemed to be a fiduciary merely because the broker-dealer holds initial and maintenance deposits. A person's status as a plan fiduciary is determined pursuant to section 3(21)(A) of ERISA. Section 3(21)(A) provides, in pertinent part, that a person is a fiduciary to the extent he exercises any discretionary authority or control with respect to management of the plan, or management or disposition of plan assets. Since the assets held by the broker-dealer to fund the initial and maintenance deposits are not plan assets, as noted above, a broker-dealer would not be a plan fiduciary under section 3(21)(A) of ERISA solely by reason of holding the initial or maintenance deposit.

The Department notes that it is offering no opinion with regard to the status of other aspects of when-issued trading in AT&T securities under the prohibited transaction provisions of section 406 of ERISA.

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

Sincerely,

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