U.S. Department of Labor Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

JUN 28 1985

OPINION NO. 85-26A
Sec. 3(5), 3(14)(C)
406(a)(1)(A)

Thomas J. Brzezinski, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street
San Francisco, CA 94104

RE: Profit Sharing Plan for Eligible Employees of Southern Extrusions, Inc., and its Affiliates (the Plan)
Identification Number: F-3059A

Dear Mr. Brzezinski:

This is in response to your various letters concerning the application of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1954 (the Code) to a series of transactions involving the Plan.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

You represent that the Plan was established by Southern Extrusions, Inc. (Southern) and its affiliates on June 1, 1959. On May 21, 1971, Howmet Aluminum Corporation (Howmet) acquired the assets of Southern in a type "C" reorganization under the Code, and Southern was dissolved. Prior to the dissolution, the Plan was "frozen" and the plan instrument was amended to provide that the members of the board of directors of Southern immediately prior to dissolution would continue to exercise all powers over the Plan that they exercised prior to the dissolution. In August, 1983, Howmet was acquired by Alumax, Inc. and its name was changed to Alumax Aluminum Corporation (the Company). Neither Howmet, Alumax, Inc. nor the Company has ever assumed, adopted or maintained the Plan. However, many of the Plan participants are currently employed by the Company. The Plan currently remains frozen.

You further represent that in 1961 the Plan erected a 40,000 square feet building (the Plant) on land contributed to the Plan by Southern. The Plant was erected adjacent to existing buildings of

Southern and is entirely surrounded by land currently owned by the Company. The Plant is used in the semi-fabrication and fabrication of aluminum products.

In 1964, Southern contributed an office building (Office Building) and surrounding property to the Plan. This Office Building is currently used by administrative personnel of the Company.

The Plant was originally leased to Southern in l961 for a period of ten years with an option to renew for an additional ten years. The Office Building was originally leased to Southern in 1964 for a period of twenty years. In l981, Howmet and the Plan entered into a new lease covering both the Plant and the Office Building for a term of three years with two options to renew for additional three-year periods. The Plan and the Company are currently discussing certain modifications to the lease.

Originally, it was your view that the lease transactions were prohibited by ERISA section 406(a)(1)(A) as constituting transactions between an employee benefit plan and a party in interest under ERISA section 3(14)(C) with respect to such plan, i.e., an employer any of whose employees are covered by the plan. You further believed that the leases were exempt under ERISA section 414(c)(2) until June 30, 1984 from the prohibited transaction restrictions of ERISA sections 406 and 407(a). You recently filed an application for an administrative exemption under ERISA section 408(a) with respect to periods subsequent to June 30, 1984.

In your most recent letter, you enclosed a copy of Advisory Opinion 81-78A (AO 81-78A) issued by the Department of Labor (the Department) on October 19, 1981. You request an opinion that AO 81-78A correctly states the Department's current position regarding the type of factual situation you have described, and that, therefore, the Company is not a party in interest with respect to the Plan. In AO 81-78A, the Department took the position that, where the sponsor of a pension plan was dissolved in a type “C” reorganization and where the plan was frozen, the company which acquired the assets of the sponsor was not a party in interest with respect to that plan under ERISA section 3(14)(C), even though some of the acquiring company's employees continued to be covered by the plan. The Department's position in that case was based, in part, upon representations that the acquiring company had not assumed, adopted or maintained the plan.

ERISA section 406(a)(1)(A) and (D) prohibits a plan fiduciary from causing the plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest, or a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. ERISA section 406(b)(1) further prohibits a plan fiduciary from dealing with the assets of the plan in the fiduciary's own interest or for the fiduciary's own account.

The term "party in interest" is defined in ERISA section 3(14)(C) as an employer any of whose employees are covered by the plan. However, the definition of an employer under section 3(14)(C) should be viewed in light of the overall statutory framework of ERISA, including section 3(5) thereof. Section 3(5) provides, in relevant part, that the term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan.

With regard to your request for an advisory opinion, we have based our conclusions as set forth below upon the representations contained in your submission and upon the assumptions that the Company has not since the reorganization and will not in the future assume, adopt or maintain the Plan, and that the Plan has been and will continue to be frozen. On this basis, it is the view of the Department that, so long as the Company is not acting directly as an employer or indirectly in the interest of an employer with respect to the Plan, the Company is not an “employer” within the meaning of section 3(5) of ERISA and therefore is not a party in interest with respect to the Plan within the meaning of ERISA section 3(14)(C). Accordingly, the lease of the Plant and the Office Building from the Plan to the Company would not involve a prohibited transaction under ERISA section 406(a)(1)(A) by reason of the Company’s being a party in interest with respect to the Plan under section 3(14)(C).

However, the Department notes that there could be a violation of ERISA sections 406(a)(1)(D) and 406(b)(1) if, for example, the Plan were to receive less than fair market value for the lease of the Plant and the Office Building to the Company as part of a single arrangement to benefit Plan fiduciaries or other parties in interest.

The question of whether or not the Company is a party in interest with respect to the Plan under any other provision of section 3(14) is inherently factual in nature. Section 5.01 of Advisory Opinion Procedure 76-1 (ERISA Proc. 76-1, 41 FR 36281, August 27, 1976) states that the Department generally will not issue opinions on such questions. The fiduciaries of the Plan must themselves determine whether the Company is a party in interest with respect to the Plan as a result of any other relationship described in ERISA section 3(14).

This letter is an advisory opinion under ERISA Proc. 76-1. Section 10 describes the effect of advisory opinions. This advisory opinion relates to ERISA section 3(5), 3(14) and 406 and not to any other section. For instance, the Department is expressing no opinion with respect to the trustee’s fiduciary responsibility in connection with the sale.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations