U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

OCT 23 1985

85-36A

Ralph P. Katz
Delson & Gordon
230 Park Avenue
New York, NY 10169

Re: Annuity Fund of the Electrical Industry of Long Island
Identification Number: F-2521

Dear Mr. Katz:

This is in response to your letter of September 23, 1982, in which you requested clarification regarding the application of the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to a proposed investment by the Annuity Fund of the Electrical Industry of Long Island (the Fund). Specifically, you inquired whether a prohibited transaction would occur if the trustees of the Fund made an investment which was part of an overall agreement obligating an insurance company to invest a specified amount of insurance company assets in construction mortgages within the geographic jurisdiction of the union whose members are participants in the Fund. The agreement would further require the insurance company to make such investments in construction projects employing only labor represented by unions affiliated with the AFL-CIO. You state that the trustees will make the investment after determining that the investment rate of return is equal to or greater than similar investments bearing similar risks.

Section 406(a)(1)(D) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction which the fiduciary knows or should know constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 406(b)(1) and (2) of ERISA further prohibit a fiduciary with respect to a plan from dealing with the assets of a plan in his or her own interest or for his or her own account, or acting in any transaction on behalf of a party or representing a party whose interests are adverse to the interest of the plan or its participants.

Section 3(14) of ERISA defines the term party in interest to include a fiduciary, an employer any of whose employees are covered by the plan and any employees of such employer.

We wish to point out, as we have done in prior correspondence regarding this matter, that ERISA's general standards of fiduciary conduct apply to your proposed investment course of action. Sections 403(c) and 404(a)(1) of ERISA require, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries. As you know the Department, on a number of occasions, has expressed its views as to the meaning of these requirements in the context of investment decision-making.

We have stated that, to act prudently, a plan fiduciary must consider, among other factors, the availability, riskiness, and potential return of alternative investments for his plan. Because the investment you propose causes the plan to forego other alternative investment opportunities, such an investment would not be prudent if it provided a plan with less return, in comparison to risk, than comparable investments available to the plan, or if it involved a greater risk to the security of plan assets than other investments offering a similar return.

We have construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. Thus, in deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider only factors relating to the interests of plan participants and beneficiaries in their retirement income. A decision to make an investment may not be influenced by a desire to stimulate the construction industry and generate employment, unless the investment, when judged solely on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan.

Thus, it would not be inconsistent with the requirements of sections 403(c) or 404 of ERISA for plan fiduciaries to select an investment course of action that reflects non-economic factors, so long as application of such factors follows primary consideration of a broad range of investment opportunities that are, economically, equally advantageous.

Based on the representations made in your letter, it does not appear that the arrangement you describe would involve a prohibited transaction of the kind described in sections 406(a)(1)(A), (B) or (C) of ERISA (relating to sales, leases or other exchanges of property, loans or other extensions of credit and the furnishing of goods, services or facilities). In addition, it does not appear that the arrangement involves a direct transfer of plan assets to, or use of plan assets by or for the benefit of, a party in interest of the kind described in section 406(a)(1)(D) of the Act. Nonetheless, it is reasonable to infer that the arrangement will result in some benefit to parties in interest with respect to the plan, i.e. contributing employers and their employees. Thus, it is necessary to determine whether the arrangement would involve an indirect use of plan assets for the benefit of a party in interest. In the circumstances you describe, where the arrangement would be prohibited, if at all, solely as an indirect use of plan assets for the benefit of a party in interest,[1] the Department believes that it is appropriate to examine the facts and circumstances surrounding the plan's investment to determine whether it is made for the purposes of providing such a prohibited benefit. Since this is an inherently factual determination, the Department is not prepared to issue an advisory opinion regarding the specific arrangement described in your letter. In our view, however, a plan investment which is made subject to a condition which can reasonably be expected to result in a benefit to one or more parties in interest would violate section 406(a)(1)(D) (as well as sections 403 and 404 of the Act) if it involves greater risk or a lesser return to the plan than a comparable transaction that is not subject to such a condition.

This letter constitutes an advisory opinion under ERISA Proc. 76-1. Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations

[1] This kind of arrangement should be distinguished from a plan Investment made subject to a condition which in effect makes the transaction an indirect sale or loan.