U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

JUN 15 1990

ERISA OPINION 90-20A
Sec. 2510.3-2(d), 4975(c)(1)(A), 4975(e)(2)(C)

Mr. Scott Morris
Foley & Lardner
First Wisconsin Center
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5367

Re: Robert W. Baird & Co. Incorporated
Identification Number: F-4280A

Dear Mr. Morris:

This is in response to your letters of February 28, April 28, and November 2, 1989, requesting an advisory opinion regarding the application of the prohibited transaction provisions of section 4975 of the Internal Revenue Code of 1986 (the Code). In particular, your letter concerns purchases of stock of the Regis Group Incorporated (Regis) by various self-directed individual retirement accounts for which Robert W. Baird & Co. Incorporated (Baird), a wholly owned subsidiary of Regis, is the prototype sponsor.

You represent that the Internal Revenue Service (the IRS) has authorized Baird to act as a nonbank passive trustee or custodian of the Robert W. Baird & Co. Incorporated Self-Directed IRA (the IRA), a prototype IRA meeting the requirements of section 408(a) of the Code. The IRA documents provide that each IRA participant shall direct Baird as trustee with respect to the investment of all contributions to the IRAs and earnings thereon. Subject to the investment limitations of section 408 of the Code, Baird will not make any investments or dispose of any investments for the IRAs except upon written direction of the participants. Neither Baird nor Regis will provide any investment advice or make any investment recommendations.

You further represent that Baird makes the IRAs available to its employees and the employees of Regis (collectively "Baird employees") in the ordinary course of its business of making the IRAs available to the general public. Baird employees are entitled to no special treatment with respect to their IRAs. The Baird IRAs have a significant level of participation by individuals independent of Regis or Baird. You further state that a number of Baird employees have established IRAs. Other than acting as trustee and offering the IRA to Baird employees on the same terms as to the general public, Baird does not sponsor, maintain or contribute to their IRAs. Several Baird employees propose to direct Baird, as trustee, to purchase Regis securities on behalf of their IRAs. The Regis securities would be purchased directly from Regis or Baird. As trustee for the IRAs, Baird would pay no more than adequate consideration for the Regis securities.

You request an advisory opinion that the proposed purchases of Regis stock from Regis or Baird, by Baird as trustee of the IRAs on behalf of, and at the sole direction of, participants who are employees of Regis or Baird, will not constitute a prohibited transaction under section 4975 of the Code.

The first issue raised by your request is whether the IRA constitutes an "employee pension benefit plan" as defined in section 3(2) of Employee Retirement Income Security Act of 1974 (ERISA). Section 3(2)(A) of ERISA defines the term "employee pension benefit plan" to include:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan or program-
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

In regulation 29 C.F.R. section 2510.3-2, the Department of Labor (the Department) describes certain programs it will not consider to be "employee pension benefit plans" within the meaning of section 3(2) of ERISA. Specifically, with regard to individual retirement accounts, regulation section 2510.3-2(d) provides:

> For the purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, … provided that--
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> (i) no contributions are made by the employer or employee association;
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> (ii) participation is completely voluntary for employees or members;
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> (iii) the sole involvement of the employer or employee association is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
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> (iv) the employer or employee association receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

Additionally, in Advisory Opinion 82-13A, dated February 17, 1982, the Department stated that, if certain specified conditions are satisfied, an employer which sponsors IRA programs offered to the general public will not be considered to have "endorsed" the IRA program if an identical program is offered to its own employees. The Department has reviewed Advisory Opinion 82-13A with respect to its application to the situation presented by your request, and determined the following conditions must be satisfied if Baird is not to be considered as "endorsing" the IRA program.

1. The materials distributed to the employees clearly and prominently state in language reasonably calculated to be understood by the average employee that: the program is completely voluntary; that the employer is not endorsing any specific method of funding; that the employer is not acting as an employer in relation to persons participating in the IRA program; that there are other IRAs available to employees outside of this program; that the IRAs may not be appropriate for all individuals; and that the tax consequences to the employee contributing to an IRA would be the same regardless of whether this program or an outside IRA was established.

2. If the program is a result of an agreement between the employer and an employee organization, the funding medium is not identified to the employees as having as one of its purposes investing in an investment vehicle which is designed to benefit an employee organization by providing more jobs for its members, loans to its members, or similar direct benefits and does not in fact have any significant investments in any such investment vehicle.

3. Any management fees, sales commissions, and the like charged by the employer as IRA sponsor to its employees or the employees of its affiliates maintaining an IRA with the sponsor are the same as those charged by the sponsor to IRA participants independent of the sponsor.

Based upon your representations and, if the above conditions are satisfied, the Department is of the opinion that the IRAs described in your request are not employee pension benefit plans within the meaning of section 3(2) of Title I of ERISA.

The second issue raised by your request is whether Regis or Baird are "disqualified persons" with respect to the IRAs as defined by section 4975(e)(2) of the Code.

Pursuant to section 2510.3-2(d) of the Department's regulations, the Department does not have jurisdiction under Title I of ERISA over those individual retirement accounts described in section 408(a) of the Code which comply with the provisions of that section of the regulation. Such IRAs are within the purview of Title II of ERISA, section 4975 of the Code. Under Presidential Reorganization No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor and the Secretary of the Treasury is bound by the interpretations of the Secretary of Labor pursuant to such authority. To the extent there is Title I jurisdiction regarding any IRA for which the Baird serves as trustee or custodian, references to specific sections of the Code in this letter shall also refer to the corresponding sections of ERISA.

Section 4975(c)(1) of the Code prohibits, in part, the sale or exchange of property between a plan and a disqualified person (4975(c)(1)(A)), the furnishing of goods or services between a plan and a disqualified person (4975(c)(1)(C)), the use by or for the benefit of a disqualified person of the income or assets of a plan (4975(c)(1)(D)), and an act by a disqualified person who is a fiduciary whereby he or she deals with the income or assets of a plan in his or her own interest or for his or her own account (4975(c)(1)(E)).

Section 4975(e)(1) defines the term "plan" to include an individual retirement account described in section 408(a) of the Code. Section 4975(e)(2) of the Code defines the term "disqualified person" to include a fiduciary (4975(e)(2)(A)), a person providing services to a plan (4975(e)(2)(B)), an employer any of whose employees are covered by the plan (4975(e)(2)(C)), and an owner, direct or indirect, of 50 percent or more of the combined voting power of all classes of stock entitled to vote or the total value of all shares of all classes of stock of a corporation which is an employer described above (4975(e)(2)(E)).

There is no further definition of the term "employer" under section 4975 of the Code. ERISA section 3(5), however, which defines the term "employer" for plans within the jurisdiction of Title I, is helpful in interpreting this provision. Section 3(5) of ERISA provides, in part, that an employer is any person acting as an employer in relation to an employee benefit plan. In the Department's view, an employer is acting in relation to an individual retirement account only when it maintains, sponsors, or contributes directly to that individual retirement account.[1]

You have represented that, other than offering the IRA to Baird employees on the same terms as to the general public, Baird does not sponsor, maintain, or contribute to the IRAs established by Baird employees. Based upon the representations contained in your request, the Department is of the opinion, therefore, that Baird is not an employer with regard to the IRAs under section 4975(e)(2)(C) of the Code.

Although Baird is not an employer for purposes of section 4975 of the Code, the definition of "disqualified person" also includes a fiduciary and a person providing services to the plan. Thus, Baird is a "disqualified person" with respect to the IRAs. Regis, however, is not a disqualified person with respect to the IRAs solely by reason of its

[1] In this regard, section 3(16)(B) of ERISA defines the term “plan sponsor” to mean the employer in the case of an employee benefit plan established or maintained by a single employer.

ownership of Baird.[2] The question of whether Regis is a disqualified person with respect to the IRAs under any other provision of section 4975(e)(2) of the Code is inherently factual in nature. Section 5.01 of Advisory Opinion Procedure 76-1 states that the Department generally will not issue opinions on such questions. Additionally, because each person who establishes an IRA under Baird's program has the authority to direct the investment of his IRA, such person is a fiduciary and, thus, a disqualified person with respect to his IRA.

Therefore, the purchase of Regis stock from Baird by Baird as trustee or custodian on behalf of and at the direction of the IRA participants would involve a transaction described in section 4975(c)(1)(A) of the Code. However, to the extent that Regis is not a disqualified person with respect to the IRAs, the purchase of Regis stock from Regis by Baird as trustee or custodian on behalf of and at the direction of the IRA participants would not involve a transaction described in section 4975(c)(1)(A) of the Code.

While Regis may not be a disqualified person with respect to the Baird prototype IRAs established by Baird employees, the purchase and holding of Regis stock by the self-directed IRAs of officers and directors of Regis or Baird raises questions under section 4975(c)(1)(D) and (E) of the Code, depending on the degree (if any) of the participant's interest in the transaction. The IRA participants, as officers and directors of Regis or Baird, may have interests in the proposed transactions which may affect their best judgment as fiduciaries of their IRAs. In such circumstances, the transactions may violate section 4975(c)(1)(D) and (E) of the Code.

In addition, although Baird may have no discretion in selecting the investments to be made by the IRAs, it appears that Baird may have discretion in determining the seller from which the IRAs will purchase Regis stock. To the extent that it does have such discretion, Baird would be a plan fiduciary with respect to its exercise of such discretion. Thus, if the IRA participants do not instruct Baird with respect to such matters, but, rather, rely on it as a fiduciary to select appropriate sellers for the transactions, a selection by Baird of Regis as seller would raise questions under section 4975(c)(1)(D) and (E) of the Code. This is because Baird, as a wholly-owned subsidiary of Regis, has an interest in the fortunes of Regis. Therefore, Baird may be in a position to indirectly use the assets of a plan for its own benefit or to deal with the assets of a plan in its own interest.[3]

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

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

[2] However, the Department notes that Regis may be a party in interest with respect to any IRAs which are within the jurisdiction of Title I of ERISA. In this regard, contrast section 3(14)(H) of ERISA with section 4975(e)(2)(H) of the Code.

[3] We assume, for purposes of this ruling, that Baird does not have any authority or responsibility to vote or otherwise deal with Regis stock held by its self-directed IRAs.