U.S. Department of Labor

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

JUL 17 1991

Mr. Kevin E. Davis
The Chapman Company, Investment Bankers
Mercantile Safe Deposit & Trust Building
Suite 1010, Two Hopkins Plaza
Baltimore, MD 21201

Re: Identification Number: F-4748G

Dear Mr. Davis:

This is in response to your letter of February 27, 1991, in which you request information regarding the application of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to the proposed transmittal of a letter to money managers of pension plans encouraging them to consider using the Chapman Company to execute trades.

You represent that the Chapman Company is a minority-controlled securities firm which provides execution services for ERISA and non-ERISA pension plans. You propose to ask that a letter be sent on individual company letterhead to money managers of plans introducing the Chapman Company, and requesting that they consider using the Chapman Company to provide execution services. You indicate that the form letter would expressly state that it should not be construed as a direction to the fund managers to execute trades through the firm, or in any way as relieving them of any fiduciary responsibilities under Title I of ERISA when deciding how to execute trades on behalf of the plans.

Section 5.01 of ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976) provides that the Department of Labor (the Department) ordinarily will not issue advisory opinions on questions of an inherently factual nature. For this reason, and because the Department has expressed general views which are relevant to the type of transaction involved in this case, we are responding to your request in the form of an information letter, which is described by section 3.01 of ERISA Procedure 76-1.

When deciding whether to cause a plan to utilize specified services of a particular service provider, and when establishing the terms and conditions of a service provider arrangement, plan fiduciaries are subject to ERISA's general fiduciary responsibility standards, as well as its prohibited transaction restrictions. Section 403(c)(1) 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 and defraying reasonable expenses of administering the plan. Regarding your request, these requirements would apply both to any fiduciaries deciding whether and what information to transmit regarding retention of service providers and to fiduciaries receiving the information.

The Department has construed the requirements that fiduciaries act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting fiduciaries from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. Therefore, in deciding whether and to what extent to engage a service provider, fiduciaries must ordinarily consider only factors relating to the interests of plan participants and beneficiaries in their retirement income. Such decision may not be influenced by non-economic factors unless the services provided, when judged solely on the basis of economic value to the plan, would be equal or superior to services otherwise available to the plan. Moreover, under ERISA's prudence requirement, fiduciaries must give appropriate consideration to those facts and circumstances that they know or should know are relevant to a particular decision, and act accordingly.

With respect to the prohibited transaction implications of the proposed letter, section 406(a)(1)(C) and (D) of ERISA prohibit fiduciaries with respect to a plan from causing the plan to engage in a transaction if they know or should know that the transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest, or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 406(b)(1) of ERISA prohibits fiduciaries with respect to a plan from dealing with the assets of the plan in their own interest or for their own account. Section 3(14) of ERISA defines the term "party in interest" to include a fiduciary and a person providing services to such plan.

Subject to the limitations of section 408(d), section 408(b)(2) of ERISA exempts from the prohibitions of section 406(a) contracting (or making reasonable arrangements) for services with a party in interest, if: (1) the service is necessary for the establishment or operation of the plan; (2) the service is furnished under a contract or arrangement which is reasonable; and (3) no more than reasonable compensation is paid for the service. Regulations issued by the Department clarify the terms "necessary service" (29 C.F.R. 2550.408b-2(b)), "reasonable contract or arrangement" (29 C.F.R. 2550.408b-2(c)) and "reasonable compensation" (29 C.F.R. 2550.408c-2) as used in section 408(b)(2) of ERISA.

Accordingly, the provision of brokerage services to a plan would be exempt from the prohibitions of section 406(a) of ERISA if the conditions of section 408(b)(2) are met. Whether the conditions are met in each case involves questions which are inherently factual in nature. The appropriate plan fiduciaries must determine, based on all the relevant facts and circumstances, whether the conditions of section 408(b)(2) are satisfied.

With respect to the prohibitions of section 406(b), the Department's regulation at 29 C.F.R. 2550.408b-2(a) states that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2). As explained in 29 C.F.R. 2550.408b-2(e)(1), if fiduciaries use the authority, control or responsibility which make them fiduciaries to cause the plan to enter into a transaction involving the provision of services when they have an interest in the transaction which may affect the exercise of their best judgment as fiduciaries, a transaction described in section 406(b) of ERISA would occur, and the transaction would be deemed to be a separate transaction from the one involving the provision of services and would not be exempted by section 408(b)(2).

We hope that this information has been of assistance to you.

Sincerely,

Bette J. Briggs
Chief, Division of Fiduciary
Interpretations
Office of Regulations and
Interpretations