U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

MAY 19, 1992

92-13A
Sec. 4(b)(5), 201(2), 301(a)
401(a)(1)

Mr. William J. Kilberg
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5306

Dear Mr. Kilberg:

This is in response to your request for an advisory opinion concerning whether a "rabbi trust," as described in your request, which is designed to invest primarily in employer stock, would be considered to be "unfunded" for the purposes of the so-called "excess benefit" and "top hat" plan exemptions under sections 4(b)(5), 201(2), 301(a)(3) and 401(a)(1) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent the parent corporation (the Corporation) of an affiliated group of corporations (collectively, the Participating Affiliates) whose employees are covered by qualified retirement and savings plans. According to your representations, a wholly-owned subsidiary of the Corporation (the Subsidiary) has also established and, together with the other Participating Affiliates, maintains a supplemental pension annuity plan (the Plan). The Plan provides supplemental benefits based on amounts that would have been payable under the qualified benefit plans but for the limits imposed by section 415 of the Internal Revenue Code of 1986 (the Code), as well as certain other benefits. The Plan is intended to constitute an unfunded "excess benefit plan," as defined in section 3(36) of ERISA. To the extent that the Plan provides benefits that are not "excess benefits," you represent that the Plan constitutes an unfunded "top hat" plan maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees, within the meaning of sections 201(2), 301(a)(3) and 401(a)(1) of ERISA.

The Plan neither requires nor permits elective salary deferrals by the participants. Benefits under the Plan are currently paid exclusively from the general assets of the Participating Affiliates. The Plan also provides that "no special or separate fund shall be established nor other segregation of assets made to create plan assets or to cause the Plan to be a funded plan." The Plan provides that the Subsidiary, at its sole discretion, may place assets in a trust that may be used to meet all or a portion of the Participating Affiliates' obligations under the Plan. The Plan further provides, however, that the assets of any such trust must be available to general creditors of the Participating Affiliates, in the event of their insolvency or bankruptcy.

In order to provide Plan participants and beneficiaries greater assurance of payment of their Plan benefits, the Corporation proposes to establish a "rabbi trust" (the Trust). The Corporation would make cash contributions to the Trust at its sole discretion which would be invested primarily in the Corporation's common stock, purchased by the Trustee on the open market. Dividends on such stock would be reinvested in the Corporation's common stock. The Trustee would have full voting rights with respect to such stock.

The Trust would be used to pay Plan benefits that a Participating Affiliate does not pay directly. Each Participating Affiliate would retain the option of discharging its liabilities under the Plan by paying participants and beneficiaries directly out of its general assets and would remain obligated for any Plan benefits not discharged by the Trust. The Trust provides that the rights of any participant under the Plan and Trust are the rights of a general, unsecured creditor of the Participating Affiliates, as applicable, and that no right or interest of any participant or beneficiary under the Plan or Trust is transferable, assignable, or subject to alienation, anticipation, encumbrance, garnishment, attachment or execution.

The Trust would be irrevocable, unless Plan benefit obligations were fully satisfied or the purposes of the Trust could not be carried out by reason of a change in law. In the event of the Corporation's or Subsidiary's insolvency, (a) the assets of the Trust would be subject to the claims of general creditors of the Corporation or Subsidiary (including Plan participants and beneficiaries), and (b) the Trustee would be required, upon receipt of notice thereof, to suspend payments from the Trust until receipt of a court order directing disposition of the assets. In the event of the insolvency of any other Participating Affiliate, (a) the assets of the Trust attributable to employees of the Participating Affiliate would be subject to the claims of general creditors of such Participating Affiliate, and (b) upon receipt of written notice thereof, the Trustee would be required to suspend payments from the affected funds and hold such assets in suspense until it received a court order directing their disposition.

The Trust provides that upon a change in control, participants and beneficiaries would have a right to submit claims for benefits directly to the Trustee, through a third-party recordkeeper. However, the assets of the Trust would continue to be subject to the claims of general creditors of the Corporation, the Subsidiary, or the other Participating Affiliates.

You have submitted a copy of a private letter ruling that the Corporation received from the Internal Revenue Service (the Service) in this matter. The conclusions reached by the Service on the tax issues indicate that the Corporation's contributions to the Trust will not result in current taxation to Plan participants.

You have requested an advisory opinion that the Plan will not fail to be "unfunded," within the meaning of sections 4(b)(5), 201(2), 301(a)(3) and 401(a)(1) of ERISA, solely because of the Corporation's establishment of and contributions to the Trust.

Section 4(b)(5) of ERISA exempts from the coverage of all of Title I of ERISA a plan which is both "unfunded" and an "excess benefit plan" as defined in section 3(36) of ERISA. Section 3(36) defines an excess benefit plan as "a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of the Code on plans to which that section applies, without regard to whether the plan is funded." Sections 201(2), 301(a)(3) and 401(a)(1) of ERISA exempt from the application of Parts 2, 3 and 4 of Title I, respectively, "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."

Your representations indicate that the Plan is intended to be an unfunded “excess benefit” plan, as defined in section 3(36) of ERISA, and to the extent that any benefit for any participant does not qualify for such status, the Plan is intended to constitute a “top hat” plan, as described in sections 201(2), 301(a)(3), and 401(a) of ERISA. Since you have requested only that we address the status of the Plan as an “unfunded” plan we do not opine on the extent to which it otherwise meets or does not meet the criteria for an exempt excess benefit or “top hat” plan.[1]

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[1] We note that employers must design and maintain "top hat" plans only for a select group of management or highly compensated employees. The Department has expressed the view that, in providing relief for "top hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I. See A.O. 90-14A (May 8, 1990).

The Department has expressed the view that any determination of the "unfunded" status of an "excess benefit" or "top hat" plan of deferred compensation requires an examination of the surrounding facts and circumstances, including the status of the plan under non-ERISA law. Addressing the issue as to whether such plans would fail to be "unfunded" solely because certain "rabbi trusts" are maintained in connection therewith, the Department has indicated that, in the absence of pertinent legislative history defining "unfunded" for purposes of Title I of ERISA, the positions adopted by the Service regarding the tax consequences to trust beneficiaries should be accorded significant weight under Title I. In a December 13, 1985, letter to the Service, the Department addressed this issue in the context of "rabbi trust" arrangements that did not contain mandatory contribution provisions. In that letter, the Department indicated that, in consonance with positions expressed by the Service in numerous private letter rulings, it was the working premise of the Department that a "top hat" plan (or "excess benefit" plan) would not fail to be "unfunded" for purposes of sections 4(b)(5), 201(2), 301(a)(3) and 401(a)(1) of Title I of ERISA solely because there is maintained in connection with such a plan a "rabbi trust" of the kind described in those rulings.[2]

Therefore, based on the facts and circumstances submitted as part of your request, and consistent with the Department's general views above, it is the opinion of the Department that the Plan will not fail to be "unfunded" for purposes of sections 4(b)(5), 201(2), 301(a)(3) and 401(a)(1) solely because of the establishment and operation of the Trust described herein.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, Aug. 27, 1976). Accordingly, it is issued subject to the provisions of section 10 of the procedure, regarding the effect of an advisory opinion.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations

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[2] See Letter of December 13, 1985 from Elliot I. Daniel, Assistant Administrator for Regulations and Interpretations, Pension and Welfare Benefits Administration, to Richard H. Manfreda, Chief, Individual Income Branch, Internal Revenue Service. See also, A.O. 91-16A (April 5, 1991), A.O. 90-14A (May 8, 1990).