**U.S. Department of Labor**

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

SEP 9 1994

94-31A

Mr. Thomas Veal
Deloitte & Touche
Suite 350N
1001 Pennsylvania Ave., NW
Washington, D.C. 20004-2594

Dear Mr. Veal:

This is in response to your request for an advisory opinion concerning the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to a purported grantor trust (the Trust) designed to offset liability for post-retirement benefits in accordance with Financial Accounting Standards Board Statement 106 (FAS 106). Specifically, you inquire whether assets contributed to the Trust would constitute plan assets under Title I of ERISA.

According to your representations, your client, an employer, proposes to establish the Trust to accumulate funds to help satisfy its obligation to provide post-retirement medical benefits to its employees.[1] The Trust will be irrevocable, and, to the extent permitted under local law, its assets will be exempt from the claims of the employer's creditors. The Trust will reimburse the employer for amounts paid from the employer's general assets. No other use of Trust assets will be permitted, and they will not be available to pay other corporate expenses.

You state that employer contributions to the Trust will be discretionary as to both time and amount. No employee contributions will be required or permitted. Contributions will be invested primarily in employer stock and warrants to purchase employer stock. You further state that no reference to the Trust will appear in the summary plan description, and the employer will not represent to the employees that the Trust assets provide additional security for medical benefits.

You further represent that the employer intends to create the Trust as an asset that may be used to offset the employer's liability for post-retirement medical benefits under FAS 106. FAS 106 requires that employers recognize all liabilities for post-retirement medical benefits on its financial statements. FAS 106 provides, however, that certain "plan assets," including stocks, bonds and other investments, that have been segregated and restricted (usually in a trust) for the payment of post-retirement benefits, may be used to offset the accumulated post-retirement benefit obligations of an employer. In this regard, FAS 106 requires the employer to make certain disclosures, including the nature of the plan, the employee groups covered, types of benefits provided and the funding policy. Additionally, FAS 106 requires that the employer separately disclose, among other things, the fair value of plan assets; the accumulated post-retirement benefit obligation; and the amount of the net post-retirement benefit asset or liability recognized in the employer's statement of financial position.

You request an advisory opinion as to whether, under the circumstances outlined above, the assets of the Trust would constitute assets of an employee welfare benefit plan for purposes of Title I of ERISA.

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[1] Although you have not provided specific information regarding the employer or the nature of its commitment to provide benefits, we assume for purposes of this opinion that the employer's obligation to provide post-retirement medical benefits to its employees arises pursuant to an employee welfare benefit plan that is covered by Title I of ERISA.

Title I of ERISA does not expressly define the types of property that will be regarded as "assets" of an employee benefit plan. The Department of Labor (the Department) has promulgated regulations identifying plan assets when a plan invests in other entities (29 C.F.R. 2510.3-101) or when a participant pays or has amounts withheld by an employer for contribution to a plan (29 C.F.R. 2510.3-102). In other situations, the Department has indicated that the assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights.

The provisions of Title I of ERISA do not impose funding standards on employee welfare benefit plans. Accordingly, the Department has acknowledged that an employer sponsor of a welfare plan may maintain such a plan without identifiable plan assets by paying plan benefits exclusively from the general assets of the employer. This would be true even if the employer set aside some of its general assets in a segregated employer account for the purposes of providing benefits under the plan. However, if an employer takes steps that cause the plan to gain a beneficial interest in particular assets, under ordinary notions of property rights, such assets would become plan assets.

In the Department's view, a plan obtains a beneficial interest in particular property if, under common law principles, the property is held in trust for the benefit of the plan or its participants and beneficiaries or the plan otherwise has an interest in such property on the basis of ordinary notions of property rights.[2] The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved. As the Department explained in Advisory Opinion 92-24A (Nov. 6, 1992), a welfare plan generally will have a beneficial interest in particular assets if the employer establishes a trust on behalf of a plan, sets up a separate account with a bank or with a third party in the name of the plan, or specifically indicates in the plan documents or instruments that separately maintained funds belong to the plan. See also, Advisory Opinion 84-10 (Feb. 22, 1984) (finding plan assets where a plan document obligated the employer to deposit in a plan account monies which, when combined with participant contributions, would be sufficient to pay benefits and expenses of the plan).

On the other hand, the mere segregation of employer funds to facilitate administration of the plan would not in itself demonstrate an intent to create a beneficial interest in those assets on behalf of the plan. As explained in Advisory Opinion 92-24A, in the absence of any other actions or representations which would manifest an intent to contribute assets to a welfare plan, the mere establishment of an account in the name of the employer to be used exclusively in administering the plan would not create a beneficial interest in the plan. Similarly, in Advisory Opinion 92-02A (Jan. 17, 1992), the Department determined that, under the particular circumstances involved in that case, a stop-loss insurance policy purchased by a single employer plan sponsor to meet the employer's liabilities under a medical benefit plan did not constitute plan assets. That determination was based, among other things, on the fact that there was no representation to any participant or beneficiary that the policy would be used to provide benefits or that it in any way represented security for the payment of benefits. The employer, and not the plan, retained all rights of ownership under the policy. The employer was named as the beneficiary of the policy; neither the plan nor any participant or beneficiary had any preferred claim against the policy or any beneficial ownership interest in the policy; the plan benefits were not limited or governed in any way by the amount of the insurance proceeds; and employee contributions were not expended toward the purchase of the policy.

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[2] This is consistent with Congressional intent under ERISA to foster the development of a body of federal common law that encompasses traditional trust law principles, applied in light of the special nature and purpose of employee benefit plans. See 120 Cong. Rec. 29,942 (1974), reprinted in Leg. Hist. Vol. III, p.4771 (remarks of Senator Javits); H.R. Rep. 93-533, pp. 11-13 (1973), Leg. Hist., Vol. II pp. 2358-2360.

In the Department's view, whether a plan acquires a beneficial interest in definable assets depends, largely, on whether the plan sponsor expresses an intent to grant such a beneficial interest or has acted or made representations sufficient to lead participants and beneficiaries of the plan to reasonably believe that such funds separately secure the promised benefits or are otherwise plan assets.

In this case, you state that for purposes of financial reporting under FAS 106, the employer intends to offset its benefit obligations by the amount of assets in the Trust. This treatment or use of the Trust's assets for employer financial reporting purposes would be tantamount to a representation that such assets separately secure the benefits promised under the plan. Under these circumstances, it is the view of the Department that the plan would have a beneficial interest in the assets of the Trust and, accordingly, such assets would constitute plan assets for purposes of Title I of ERISA.

We wish to point out that, in the Department's view, the Employer's establishment and funding of the Trust for the express purpose of offsetting its benefit obligations under an employee welfare plan for purposes of FAS 106 would also constitute funding of the plan for purposes of Title I of ERISA. In this regard, the Department has taken the position that an employee welfare benefit plan which is funded must provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan, as required by section 402(b)(1) of ERISA. See Advisory Opinion 78-10A (Mar. 31, 1978). Section 102(b) of ERISA and the implementing regulations (29 C.F.R. 2520.102-3(p),(q)) also require that the Summary Plan Description describe sources of contributions to the plan and identify any funding medium for the accumulation of assets through which benefits are provided.[3]

To the extent that there are assets of a plan subject to Title I of ERISA, those assets must be held in accordance with the fiduciary responsibility and prohibited transaction provisions of Part 4 of Title I. In this regard, section 403 of ERISA generally requires that all assets of an employee benefit plan be held in trust for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. Further, section 406 of ERISA prohibits fiduciary self-dealing as well as transactions between a plan and certain parties in interest to the plan.[4]

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

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[3] These provisions regarding a plan's funding policy or medium apply to those welfare plans, as discussed above, for which separate assets have been identified. The analysis discussed above, however, would not apply to so-called "top hat" and "excess benefit" plans, as defined in sections 4(b)(5), 201(2), 301(a)(3) and 401(a)(1) of ERISA. Given the special nature of "top hat" and "excess benefit" plans and the ability of employees who participate in such plans to affect or substantially influence the design and operation of their deferred compensation plans, and in light of current rulings of the Internal Revenue Service regarding the tax consequences of so-called "rabbi trusts" established in connection with these types of deferred compensation plans, the Department has determined that the analysis outlined above for identifying plan assets is not relevant to such plans.

[4] In particular we note that section 406 of ERISA imposes prohibitions on a plan's acquisition or holding of any employer security in violation of section 407(a) of ERISA. Section 407(a) of ERISA specifically precludes a plan from acquiring or holding any employer security which is not a "qualifying employer security" as defined in section 407(d)(5). In the Department's view, warrants to purchase employer securities generally would not constitute "qualifying employer securities" under section 407(d)(5) of ERISA since they are neither stock nor marketable obligations.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations