U.S. Department of Labor

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

February 12, 1997

97-06A
ERISA SEC. 407(d)(3)(C), 407(d)(9)

Mr. Richard J. Razook
Thomson, Muraro, Razook & Hart, P.A.
One Southeast Third Avenue
17 Floor
Miami, Florida 33131

Re: Identification Number: A00411

Dear Mr. Razook:

This is in response to your letter requesting an advisory opinion from the Department of Labor (the Department) concerning the application of section 9345(a)(3) of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) (the grandfather provision) to the proposed amendment of two defined benefit plans to provide that all eligible employees will receive certain minimum benefits. The defined benefit plans and an employee stock ownership plan (ESOP) together make up a floor-offset arrangement (the Arrangement) that was established prior to December 17, 1987.

You represent that the Arrangement was established effective January 1, 1987 by United States Sugar Corporation (U.S. Sugar or the Company) and one of its subsidiaries, South Bay Growers, Inc. The Arrangement consists of the U.S. Sugar Retirement Income Plan, the South Bay Retirement Income Plan (together, the Retirement Income Plans), and the U.S. Sugar ESOP. The ESOP covers all participants in the Retirement Income Plans. The Retirement Income Plans are defined benefit plans as defined in section 3(35) of the Employee Retirement Income Security Act (ERISA). The benefits accrued under the defined benefit plans are offset by the annuity equivalent of 75 percent of a participant's account balance under the ESOP. The Company wishes to amend the defined benefit plans to provide that all eligible participants will receive certain minimum benefits. You represent that no changes will be made to the basic offset relationship, and that all participants will continue to receive a total benefit at least equal to the benefit available before the amendment.

You have requested an advisory opinion that the proposed amendment to the defined benefit plans will not render the grandfather provision of section 9345(a)(3) of OBRA '87 inapplicable to the Arrangement.

Section 406(a)(1)(E) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he or she knows or should know that such transaction constitutes a direct or indirect acquisition on behalf of the plan of any employer security or employer real property in violation of section 407(a). Section 406(a)(2) of ERISA provides that no fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he or she knows or should know that the holding of such security or real property violates section 407(a).

Section 407(a) provides, in part, that (1) a plan may not acquire or hold any employer security which is not a qualifying employer security, and (2) a plan may not acquire any qualifying employer security if immediately after such acquisition the aggregate fair market value of employer securities held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

Section 407(b)(1) of ERISA, however, provides, in part, that the 10 percent limitation of section 407(a) shall not apply to the acquisition or holding of qualifying employer securities by an eligible individual account plan.

Section 407(d)(3)(A) of ERISA defines "eligible individual account plan" to include an individual account plan which is (i) a profit-sharing, stock bonus, thrift or savings plan, (ii) an employee stock ownership plan, or (iii) a money purchase plan which was in existence on the date of enactment of ERISA and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of the Code. Section 407(d)(3)(B) provides that, notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property. Section 407(d)(3)(C) of ERISA, as added by section 9345(a)(1) of OBRA '87, provides that the term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the benefits payable to a participant under any defined benefit plan.

Section 407(d)(9) of ERISA, as added by section 9345(a)(2) of OBRA '87, provides that, for purposes of section 407, an arrangement which consists of a defined benefit plan and an individual account plan shall be treated as one plan if the benefits of such arrangement are taken into account in determining the benefits payable under such defined benefit plan.

Section 9345(a)(3) of OBRA '87 provides that sections 407(d)(3)(C) and 407(d)(9) shall apply with respect to arrangements established after December 17, 1987. Thus, sections 407(d)(3)(C) and 407(d)(9) of ERISA do not apply to floor-offset arrangements established on or before December 17, 1987.

The Department has previously addressed a question similar to the one you have raised in Advisory Opinion No. 89-11A (July 13, 1989). The floor-offset arrangement in that letter involved six defined benefit plans and a single stock bonus plan covering all participants in the defined benefit plans. The six defined benefit plans served as floor plans, providing a minimum level of retirement benefits for participants. The applicant proposed to amend the defined benefit plans to bring each plan up to the highest level of benefits offered by any of the defined benefit plans, and then to merge the defined benefit plans. The applicant represented that the changes would not alter the substantive nature of the arrangement. The Department concluded that, under these circumstances, the application of the OBRA '87 grandfather provision would not be affected by the proposed changes to the defined benefit plans.

You have represented that the company's proposed amendment to ensure that all eligible employees in the Retirement Income Plans will receive certain minimum benefits will not alter the substantive nature of the U.S. Sugar floor-offset Arrangement. On the basis of the facts and representations contained in your submission, it is the opinion of the Department that the amendment of the Retirement Income Plans to provide that all eligible participants will receive certain minimum benefits, with all participants continuing to receive a total benefit at least equal to the benefit available before the amendment, would not render the grandfather provision contained in section 9345(a)(3) of OBRA '87 inapplicable to the Arrangement.

This letter deals only with the issues arising under sections 407(d)(3)(C) and 407(d)(9) of ERISA. The Department has not considered the effect of any other provision of ERISA or the Internal Revenue Code as they may relate to your request.

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the Procedure explains the effect of an advisory opinion.

Sincerely,

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