

PWBA Office of Regulations and Interpretations

Advisory Opinion

August 9, 1995

Mr. Robert Heimbichner
Pillsbury Madison & Sutro
P.O. Box 7880
San Francisco, Ca 94120

95-19A
ERISA SECTION
408(b)(1)

Dear Mr. Heimbichner:

This is in response to your letter requesting guidance from the Department of Labor (the Department) concerning the application of the regulations governing plan loans under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). Your request concerns the application of the requirement at section 408(b)(1)(A) that the loans be available to all participants and beneficiaries who are parties in interest on a reasonably equivalent basis. Specifically, you ask whether a plan, whose participants are members of more than one collective bargaining unit, would fail to satisfy this requirement if loans are available only to participants (and their beneficiaries) whose collective bargaining units have agreed to the loan feature.

You represent that the Potlatch Corporation (Potlatch) sponsors four profit-sharing plans (the Plans). Each Plan covers participants of more than one collective bargaining unit. One of the Plans also covers employees who do not belong to the bargaining unit. You further represent that, under applicable labor law, Potlatch would be unable to allow plan loans to any participants covered by a collective bargaining agreement until the representatives of those participants agreed to the loan feature.¹ Since the contracts for the various bargaining units expire at different times, you represent that Potlatch and the union representatives will, in the collective bargaining forum, negotiate the plan loan feature as each contract comes up for renegotiation. We will assume, because you have not indicated to the contrary, that outstanding loans to participants and beneficiaries will not be affected by the expiration of a governing collective bargaining agreement, and that all non-represented employees will be eligible for loans without regard to the collective bargaining process.

Section 406(a)(1)(B) of ERISA prohibits plan fiduciaries from making loans from plans to parties in interest, including employees of the plan sponsor, absent an exemption. Section 408(b)(1) of ERISA provides a conditional exemption from the prohibitions of section 406 for "[a]ny loans made by a plan to parties in interest who are participants or beneficiaries of the plan." Section 408(b)(1)(A) of ERISA requires that these loans be

made "available to all such participants and beneficiaries on a reasonably equivalent basis."

The Department has issued regulations at 29 C.F.R. 2550.408b-1 interpreting the participant loan exemption. This regulation, at paragraph (b)(1), states that:

Loans will not be considered to have been made available to participants and beneficiaries on a reasonably equivalent basis unless:

- (i) Such loans are available to all plan participants and beneficiaries without regard to any individual's race, color, religion, sex, age or national origin;
- (ii) In making such loans, consideration has been given only to those factors which would be considered in a normal commercial setting by an entity in the business of making similar types of loans. Such factors may include the applicant's creditworthiness and financial need; and
- (iii) An evaluation of all relevant facts and circumstances indicates that, in actual practice, loans are not unreasonably withheld from any applicant.

It is the view of the Department that making the loan program available to participants only as their collective bargaining agreements are renegotiated would not necessarily cause the loans to fail to be provided on a reasonably equivalent basis, if, within a reasonable period of time, all bargaining units approve the loan feature.

You should be aware that ERISA requires plan loans to be made in accordance with specific plan provisions. In this regard, the plan documents must accurately reflect the proposed loan program, including the condition that each collective bargaining unit approve the loan program in the normal collective bargaining process before its members can take advantage of the loan program.

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

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

¹Each plan provides that Potlatch, as plan sponsor, will bargain in good faith with representatives of eligible employees before adopting substantive amendments to the plan affecting the benefits of eligible employees. See, e.g., section 15(a) of the Potlatch

Corporation Savings Plan for Hourly Employees of the Pulp and Paperboard and
Consumer Products Divisions.