

## FLSA-497

December 21, 1971

This is in reply to your letter of September 9, 1971, in which you ask if a proposed benefit and profit sharing plan would qualify for approval under section 7(e)(4) of the Fair Labor Standards Act or qualify as a single program as a profit sharing plan under section 7(e)(3)(b) and a benefit plan under section 7(e)(4).

The proposed plan would not meet the requirement, in section 778.215(a)(5) of IB 778, that the plan must not give the employee the option to receive part of the employer's contribution in cash. Because the employees have the option of receiving half of the employer's contribution in cash, the plan must be viewed as a hybrid plan to be tested under both section 7(e)(3)(b) and section 7(e)(4).

Section 778.215(a)(5) permits payment to an employee in cash of the amount standing to his credit under circumstances specified in the plan not inconsistent with the purpose of the plan to provide old age, retirement, life, accident or health insurance or similar benefits for employees. Section 7 of the proposed plan permits employee withdrawals for expenses for the medical care or education of the employee's family, the purchase of a home, financial aid to members of the employee's family in case of emergency or pressing need, or "other substantial financial requirements deemed worthy by the committee".

With regard to section 7(e)(3)(b), section 549.1(d)(1) requires that all employees subject to the minimum wage and overtime provision of the Act be eligible to share in the profits. The proposed plan excludes all commission employees. However, participation in a profit-sharing plan may be limited to a particular classification of employees if specific approval is obtained from the Administrator. This approval may be given if, after interested persons have had an opportunity to present their views either orally or in writing, the Administrator finds that the plan is in accordance with the meaning and intent of the provisions of section 7(e)(3)(b) of the IB and Regulations, Part 549. When the plan is modified as suggested above, we will send you notices which are required by the regulations to be posted.

Sincerely,

Horace E. Menasco  
Administrator