U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

OPINION 81-26A
3(2)

MAR 3 1981

Mr. Mark A. Vogel
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153

Dear Mr. Vogel:

This is in reply to your letters of November 14, 1980, September 22, 1980, and earlier submissions from your office on behalf of Oppenheimer Holdings, Inc., and its affiliates (collectively, the "Company") requesting an advisory opinion concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA). In this regard, you describe certain proposed transactions in which individual retirement accounts (IRAs) maintained with broker-dealer affiliates of Oppenheimer Holdings, Inc. ("Broker-Dealer affiliates") may receive contributions as a result of rollovers from Company employees' IRAs (SEP-IRAs) under a simplified employee pension plan (SEP) which the Company may establish.

You advise that the SEP which the Company proposes to establish for its employees may be one of two types. One type would provide for IRA accounts for participating employees with a bank or trust company unrelated to the Company. The other type would provide for IRA accounts for participating employees funded with shares of a mutual fund underwritten and managed by a Broker-Dealer affiliate. You have stated no other terms of the SEP, except that rollover contributions from SEP-IRAs to other IRAs are completely within the discretion of the individual employee. It is contemplated that, due to the latter provision, some "rollover" funds may be deposited in IRA accounts maintained with Broker-Dealer affiliates (or, in the case of a SEP funded by shares of a mutual fund, rollovers would be into an IRA maintained by a different Broker-Dealer affiliate). Such IRAs allow the individual employee maintaining it to direct the purchase and sale of securities through a Broker-Dealer affiliate. In at least some cases, those IRAs are funded by shares of mutual funds underwritten and managed by Broker-Dealer affiliates. You state that you are not requesting an opinion that the SEP proposed by the Company is not an employee pension benefit plan. Your sole request is for an opinion that in the event a participant in the SEP chooses to rollover funds from the IRA established under the SEP to another IRA maintained by a Broker-Dealer affiliate, that second IRA is not an "employee pension benefit plan" within the meaning of section 3(2) of ERISA.

You state that the Company does not endorse or recommend any separate IRA, maintained by a Broker-Dealer affiliate, to its employees participating in the SEP. With regard to fees and commissions received by Broker-Dealer affiliates in connection with those IRAs, you state that any such fees and commissions will result only from the use of brokerage services performed in the normal course of business as an underwriter, investment adviser, and broker-dealer. You state further that, in the event a participant either of the proposed types of SEPs were to roll over funds from his/her SEP-IRA account into a separate mutual fund IRA underwritten and managed by a Broker-Dealer affiliate, the Company would continue to make contributions on the participant's behalf into the participant's SEP-IRA account under the SEP established by the Company, and under no circumstances would Company contributions be made directly to the separate rollover IRA established by the participant.

ERISA section 3(2)(A) defines the term "employee pension benefit plan" as "… any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program - (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan."

The Department, in a regulation contained in 29 C.F.R. §2510.3-2(d), identified certain individual retirement accounts which would not be considered employee pension benefit plans within the meaning of section 3(2)(A). That regulation states:

> For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code provided that -
> (i) no contributions are made by the employer or employee association;
> (ii) participation is completely voluntary for employees or members;
> (iii) the sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
> (iv) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

You have not asked for, and the Department is not rendering, an opinion as to whether the SEP proposed by the Company is an employee pension benefit plan. It is the view of the Department that, in general, when employees roll over funds from SEP-IRAs connected with an employer's SEP to deposit them in separate IRAs, which otherwise are not employee pension benefit plans

within the meaning of ERISA section 3(2)(A) as clarified by regulation section 2510.3-2(d), the IRAs receiving such funds do not thereby become IRAs meeting the definition of an "employee pension benefit plan" within the meaning of ERISA title I.

It is the opinion of the Department that an IRA maintained with a Broker-Dealer affiliate, under the conditions described in your submissions, would not be deemed an employee pension benefit plan within the meaning of section 3(2) of ERISA.

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

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs