U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216

Reply to the Attention of:

OPINION 81-27A
3(2)

MAR 9 1981

Mr. Gary B. Lawson
Katten, Muchin, Gitles, Zavis, Pearl & Galler
4100 Mid-Continental Plaza
55 East Monroe Street
Chicago, Illinois 60603

Dear Mr. Lawson:

This is in reply to your letters requesting an advisory opinion concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to a proposed bonus arrangement (the Plan) of Bennett & Kahnweiler Associates (the Company). Specifically, your inquiry concerns whether the Plan is an employee pension benefit plan within the meaning of ERISA section 3(2). In the event the Department determines the Plan to be a pension plan, you also inquire whether it is an unfunded plan maintained primarily for the purpose of providing deferred compensation to a select group of management or highly compensated employees, and, therefore, exempt from parts 2, 3, and 4 of title I of ERISA under sections 201(2), 301(a)(3), and 401(a)(1), respectively. We regret the delay in responding to your inquiry.

You have submitted an instrument under which the Plan will be established and maintained and made the following representations in connection with your request for an advisory opinion. The Plan will involve an account, termed a "Brokerage Profits Pool" (the pool account), within the general assets of the Company, to be credited each year with a percentage of Company profits, as the term "profits" is defined in the Plan, which are in excess of a dollar amount or base figure. The Company will set this percentage yearly, at its discretion, and may also raise the base figure annually on the basis of a cost of living factor.

Employees will be selected for participation in the Plan, at the Company's discretion, from among the group of employees specified in the Plan. An employee will be offered an individual deferred compensation contract at the time of his/her selection. An individual account within the pool account will be set up for each participant.

Amounts credited by the Company to the pool account will be allocated among participants' accounts partly in accordance with formulas specified in the Plan based on commission payment

earned by participants and partly at the Company's discretion. Interest will be credited to participants' accounts at a rate specified in the Plan.

The Plan provides for "vesting" of amounts credited to participants' accounts. As explained below, however, it appears that "vesting," as the term is used in the Plan, refers not to the non-forfeitability of amounts credited to the accounts, but rather to their distributability.

Ordinarily, vesting of amounts credited to individual accounts will occur on a class year basis. Accordingly, each year's allocation to an individual account will vest independently of account credits attributable to any other year, and the vested percentage of a year's allocation will begin at 10 percent vesting in a particular year's allocation 2 years after it is credited to a participant's account, and increase 10 percent each year between the 2nd and the 11th years after the year in which credited.

On a participant's 60th birthday, credited amounts will vest according to a separate schedule if it will result in additional vesting. At that time, participants with 2 to 3 years of service will become 50 percent vested in all non-vested account credits, and participants with more than 3 years of service will become 100 percent vested. Also, at age 63, a participant will become 100 percent vested in all account credits. If the Company elects not to credit any amount to the pool account during the first 45 days of 2 successive calendar years, the individual accounts of participants will become 100 percent vested; however, such vesting will not occur when Company profits are merely not sufficient to result in a credit to the pool account. In addition, death or permanent and total disability of a participant will result in 100 percent vesting of the individual's account.

Notwithstanding these "vesting" provisions, however, termination of employment for any reason other than death or disability, or attainment of age 63 with undistributed amounts in the participant's account, will cause forfeiture of the entire balance of a participant's individual account. Forfeitures will be credited to other individual accounts in the pool account in the same manner as current credits.

Any vested portion of a participant's account will ordinarily be distributed on December 31 of the calendar year in which it vested. Participants' individual contracts for deferral of income may provide for distribution of vested account credits to be delayed, but not past the participant's 63rd birthday. When vesting is due to the disability of a participant, the Company may, in its discretion, allow an early distribution of vested account credits, but distribution normally occurs when such account credit would have vested were it not for the disability.

Thus, it appears that under some circumstances, "vested" amounts may be forfeited, e.g., when a participant terminates employment with vested but undistributed amounts remaining in his account. From your letters and accompanying plan document, we are unable to determine whether amounts which are "vested" but which a participant has elected to defer receiving

pursuant to an individual deferred compensation agreement would also be forfeited if the participant terminates employment before they are distributed to him/her.

The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA 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."

Regulations issued by the Department of Labor clarify the definition of employee pension benefit plan. As you note in your submissions, 29 C.F.R. §2510.3-2(c) of the regulations provides as follows:

> For the purposes of Title I of the Act and (29 C.F.R. c. XXV], the terms "employee pension benefit plan" and "pension plan" shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.

The terms of the Plan provide for the Company to allocate amounts within its general assets to employees as bonuses for work performed, the payment of which will be deferred for specified periods of time. Thus, the Plan provides for a deferral of income by employees. From the plan instrument furnished with your letter, however, it appears that (1) all payments will ordinarily be completed by age 63 and (2) termination of employment, other than for certain specified reasons, will cause forfeiture of all further payments under the Plan. Thus, it does not appear that the plan instrument, by its express terms, provides for a systematic deferral of bonus payments either to the termination of covered employment or beyond, or so as to provide retirement income. By its express terms, therefore, the Plan appears to contemplate a bonus program described in section 2510.3-2(c), that is, one which is not a pension plan subject to title I of ERISA.

In your submissions, however, you have not provided any information regarding the terms of the individual deferred compensation contracts entered into by employees when they become participants in the Plan, other than the fact that no distribution of amounts credited to a participant's account may be postponed later than the participant's 63rd birthday. In particular, as we have noted above, it is not clear whether amounts that are "vested" but, pursuant to a deferred compensation contract, have not been distributed to him/her would be forfeited if the participant retires before age 63 or otherwise terminates employment. Thus, we are unable to determine whether, when the plan instrument furnished with your letter is considered in conjunction with the deferred compensation contracts (which an employee must accept in order to participate in the Plan), the Plan, by its terms, would provide retirement income for employees or result in a

deferral of income by employees for periods extending to the termination of covered employment or beyond.

You should be aware, moreover, under the definition of "pension plan" in section 3(2)(A) of ERISA, a plan, fund, or program which does not by its express terms provide retirement income to employees for periods extending to the termination of covered employment or beyond may be a pension plan if it has these effects as a result of surrounding circumstances. Thus, assuming that when the deferred compensation contracts are considered in conjunction with the plan instrument, the Plan is not a pension plan by its express terms, it might be a pension plan if it is communicated to participants or administered in a manner that has the effect of providing retirement income to employees or resulting in a deferral of income by employees for periods extending to the termination of covered employment or beyond. For example, if distributions under the Plan are skewed towards the last years of participants' careers, the Plan might be a pension plan. The question whether a plan, fund, or program is a pension plan as a result of surrounding circumstances is inherently factual in nature, and ordinarily the Department does not issue advisory opinions on such questions. See section 5.01 of ERISA Procedure 76-1 (41 FR 36281; August 27, 1976), relating to advisory opinions.

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

With regard to the exceptions contained in sections 201(2), 301(a)(3), and 401(a)(1) for plans maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees, the Department has not issued regulations under those provisions. As noted in section 5.03(c) of ERISA Procedure 76-1, if an inquiry presents an issue that cannot be reasonably resolved prior to the issuance of a regulation, an advisory opinion will not be issued. We will, therefore, not issue an advisory opinion on the question whether the Plan, if it is a pension plan subject to title I, meets the terms of those provisions.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs