U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-80A
Sec. 3 (2)

DEC 18 1981

Mr. William M. Tartikoff
Assistant Counsel
Investment Company Institute
1775 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Tartikoff:

This is in reply to your letter of November 25, 1981, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether a payroll deduction program for an Individual Retirement Account (IRA) will constitute an employee pension benefit plan for the purposes of title I of ERISA under certain circumstances.

You advise that members of the mutual fund industry and others (the "sponsors") are actively sponsoring the establishment of IRAs because the Economic Recovery Tax Act of 1981 makes IRAs available, effective January 1, 1982, to all individuals with earned income and raises the maximum annual contribution to the lesser of $2,000 or 100 percent of earned income. You also state that employers have expressed an interest in facilitating their employees' ability to take advantage of the opportunity to have IRAs, by affording payroll deduction programs (so called "payroll deduction IRAs"), but that many employers are unwilling to afford their employees unlimited choice of funding media and that many employers desire to limit the choice of funding media to one medium, offered by one entity. You indicate that some uncertainty exists among both sponsors of IRAs and employers as to whether employers who offer payroll deduction IRAs and who limit the choice of funding media or IRA sponsors might be considered to have established a "pension plan" within the meaning of section 3(2)(A) of title I of ERISA and 29 C.F.R. §2510.3-2(d) by virtue of having "endorsed" the sponsor's IRA program.

You argue that an employer who is merely making available to its employees an IRA payroll deduction program by a limited number of sponsors (or only one sponsor) is not, ipso facto, "endorsing" the sponsor or sponsors within the meaning of the regulation, provided that the employer clearly disclaims endorsement or recommendation of the sponsor and its products in the IRA payroll deduction program; explains to its employees that other IRA products exist outside the payroll deduction program; and makes clear to its employees that the tax

consequences of contributing to an IRA through the payroll deduction program are identical to the consequences of contributing to an IRA outside the program.

Section 3(2)(A) of title I of ERISA defines the term "employee pension benefit plan" as:

> (2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean 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 --
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> (i) provides retirement income to employees, or
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> (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.

In regulation section 2510.3-2 the Department of Labor (the Department) described certain programs which would not be considered to constitute "employee pension benefit plans" within the meaning of section 3(2) of ERISA. With regard to IRAs, regulation section 2510.3-2(d) provided:

> (d) Individual Retirement Accounts. (1) 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 –
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> (i) no contributions are made by the employer or employee association;
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> (ii) participation is completely voluntary for employees or members;
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> (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
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> (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.

It is the view of the Department that an employer which collects payroll deductions from its employees for an IRA program would not be considered to have endorsed the IRA program within the meaning of regulation section 2510.3-2(d)(iii) provided that all of the following conditions are met:

1. The materials distributed to the employees clearly and prominently state in language reasonably calculated to be understood by the average employee that the program is completely voluntary, that the employer is not endorsing either the sponsor or the funding media, that there are other IRA funding media available to employees outside the payroll deduction program, that an IRA may not be appropriate for all individuals, and that the tax consequences to the employee contributing to an IRA would be the same regardless of whether payroll deductions are used to make the contribution;

2. The employer is not the IRA sponsor or an affiliate of the sponsor;

3. The funding medium is not identified to employees as having as one of its purposes investing in securities of the employer or its affiliates and does not in fact have any significant investments in such securities; and

4. If the program is a result of an agreement between the employer and an employee organization, the funding medium is not identified to employees as having as one of its purposes investing in an investment vehicle which is designed to benefit an employee organization by providing more jobs for its members, loans to its members, or similar direct benefits and does not in fact have any significant investments in any such investment vehicle.

In the Department's view, if the above conditions are satisfied, an employer will not be considered to have endorsed the IRA program offered through payroll deduction even if such program is limited to one funding medium provided by one IRA sponsor.

The Department is not, at present, expressing an opinion as to whether a payroll deduction IRA program where the IRA sponsor is an employer or an affiliate of the employer is a pension plan by virtue of the sponsor or the funding media being "endorsed" by the employer within the meaning of regulation section 2510.3-2(d)(iii).

The Department further notes that, in its view, an employer which collects payroll deductions from its employees for an IRA program would be considered to have received consideration within the meaning of regulation section 2510.3-2(d)(iv) or to be involved with the program beyond the criteria set forth in regulation section 2510.3-2(d)(iii) if the employer does not promptly transfer the withheld funds to the IRA sponsor, or if the employer exercises any influence over investments of the IRA sponsor. For example, an arrangement between the employer and the IRA sponsor whereby the employer agrees to permit IRA payroll deductions and the IRA sponsor agrees to make a particular investment or program of investments would cause the IRA program to fail to meet the conditions of section 2510.3-2(d).

The views expressed above with respect to payroll deduction programs of employers are also generally applicable to dues checkoff programs of employee organizations.

We note that, notwithstanding whether an IRA is a plan within the meaning of title I of ERISA, the prohibited transaction provisions of section 4975 of the Internal Revenue Code of 1954 are applicable to transactions by the IRA.

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,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs