U.S. Department of Labor

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

Reply to the Attention of:
David Rood
(202) 523-8368

OPINION NO. 81-89A
Sec. 3(2), 3(34), 407(d)(3)

DEC 24 1981

George J. Pantos, Esquire
Vedder, Price, Kaufman, Kammholz & Day
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Identification Number F-2214A

Dear Mr. Pantos:

This is in response to your request of December 11, 1981, on behalf of General Motors Corporation, in which you seek an advisory opinion concerning the GM Personal Retirement Income Plan (the Plan), which General Motors proposes to adopt. Specifically, you ask for an opinion that the Plan would be a "savings plan" and, as such, would be an "eligible individual account plan" under section 407(d)(3) of the Employee Retirement Income Security Act of 1974 (ERISA).

In your request, you represent that eligible employees would be permitted to make voluntary contributions to the Plan of any amount up to $2,000 annually either through payroll deductions or in a lump sum. All contributions to the Plan would be forwarded to and invested by a banking institution acting under a trust agreement. Individual accounts would be maintained for each participant who contributes to the Plan consisting entirely of the participant's voluntary contributions and the income, expenses, gains, and losses which are allocated to each account. A participant's benefit would be based only on the amount in his or her individual account.

You also represent that the purpose of General Motors in establishing the proposed Plan is to afford its salaried employees the opportunity to take advantage of the provisions of the Economic Recovery Tax Act of 1981 which permit individuals to deduct up to $2,000 annually from their income taxes for voluntary retirement contributions which they make to employer plans qualified under § 401(a) of the Internal Revenue Code (the Code). You indicate that General Motors believes the Plan would qualify as a pension plan under Code section 401(a), and intends to seek a determination letter from the Internal Revenue Service to that effect.

You further represent that each participant would have the option of directing that up to 25% of his or her contributions be invested in notes of General Motors Acceptance Corporation (GMAC). The participant could choose the GMAC investment option for any amount between five and twenty-five percent of his or her contributions in five percent increments. For the remainder of his or her contributions, the participant would be required to select one of three other investment options: an equity fund; a money market fund; or a guaranteed income contract, probably issued by an insurance carrier. If the participant does not choose to have any of his or her contributions invested in GMAC notes, he or she could select one of the other three options or an additional option of General Motors stock. However, the participant will be limited to choosing one of the investment options, except that he or she could choose to invest in GMAC notes and one other investment option excluding General Motors stock. The Plan would explicitly provide for the acquisition and holding of up to 100 percent of General Motors stock and up to 25 percent of GMAC notes. It would also explicitly provide for the acquisition and holding of qualifying employer securities.

Section 3(2) of ERISA defines a "pension plan" as any plan, fund, or program established or maintained by an employer which provides retirement income to employees. Because the express purpose of the Plan is to permit participants to accumulate tax-favored retirement savings in accordance with the recent Code changes and because the Plan appears reasonably designed to accomplish this purpose, it is the Department's opinion that the Plan would be a pension plan within the meaning of section 3(2).

Section 3(34) of ERISA defines an "individual account plan" as a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses and any forfeitures of accounts of other participants which may be allocated to the participant's account. Because the Plan would require an individual account to be maintained for each participant who makes contributions, and because each participant's benefit would be based only on the amount contributed to his or her account and any net gains or losses allocated to the account, it is the Department's opinion that the Plan would be an "individual account plan" within the meaning of section 3(34) of ERISA.

Section 407(d)(3)(A) of ERISA defines an "eligible individual account plan" as an individual account plan which is (i) a profit-sharing, stock bonus, thrift or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on the date of enactment of ERISA and which on that date invested primarily in qualifying employer securities. It excludes individual retirement accounts described in section 408(a) of the Code from the definition. Because section 408(a) is under the jurisdiction of the Internal Revenue Service, we are unwilling to give an opinion as to whether the Plan would consist of individual retirement accounts. If the plan does not consist of Code section 408(a) individual retirement accounts, however, but rather is a single plan qualified under section 401(a) of the Code, it is the Department's opinion that it would be a savings plan and an eligible account plan under ERISA section 407(d)(3)(A).

Section 407(d)(3)(B) of ERISA provides, in pertinent part, that, notwithstanding section 407(d)(3)(A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer securities only if the plan explicitly provides for acquisition and holding of qualifying employer securities. Section 407(d)(5) defines the term "qualifying employer security" as an employer security which is stock or a marketable obligation. Section 407(e) defines the term "marketable obligation" to include evidence of indebtedness if, among other things, immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer. We note that you have not asked, nor are we ruling on, the question of whether the fiduciary of the Plan would be causing the Plan to engage in a prohibited transaction if immediately following an acquisition of GMAC notes the value of all GMAC notes held by the Plan exceeds 25 percent of the Plan's assets.

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure describes the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs