U.S. Department of Labor

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

Reply to the Attention of:

OPINION #82-29A
Sec. 3(1), 3(2)

JUL 2 1982

Mr. Ralph O. Winger
Cahill Gordon & Reindel
Eighty Pine Street
New York, New York 10005

Dear Mr. Winger:

This is in reply to your letter of December 14, 1981, regarding the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Forest Oil Corporation and Forest Oil of Canada, Ltd. Division Overriding Royalty Bonus Plan (the Plan). Specifically, your inquiry concerns whether the Plan is an employee benefit plan within the meaning of ERISA section 3(3) and thus is covered by ERISA title I.

You state that the Plan has been established by Forest Oil Corporation and its wholly-owned subsidiary, Forest Oil of Canada, Ltd. (each of which corporations is referred to below as a "Company"), as a long term performance incentive cash bonus program in order to attract and retain certain employees of each Company.

On the basis of your submission it appears that the Plan operates as follows. The Plan is administered by a committee appointed by the Board of Directors of Forest Oil Corporation and provides for a cash bonus to be paid to each participant. The amount of the bonus is measured by the net revenue interest of a Company (defined in the Plan as "Forest's Net Revenue Interest") in the potentially productive acreage determined by a Company to be associated with an exploratory well (a Prospect). A participant's "Benefit" consists of a cash payment equal to four one hundredths of one percent (.04%) of Forest's Net Revenue Interest in each successful Prospect in the division of the Company in which the participant is employed. To be eligible for the "Benefit" the participant must be employed in that division on the date the first successful well was "spudded" on that Prospect. Each participant is always 100 percent vested in his or her "Benefit".

"Benefits" commence to accrue as of the first production from a Prospect and continue until the date of termination of the participant's employment with the Company, except that if the participant's termination of employment is due to death, disability, or retirement, payment of benefits will continue until the later of the death of the participant or his or her surviving spouse.

In any event a payment terminates when the Prospect from which it is payable reaches its economic limit. As soon as practical, but no less than quarterly, following receipt of the "Benefit" amount by the Company, the Company is to pay an amount equal thereto to the participant (or his or her surviving spouse). In your letter of April 8, 1982, you indicate that the first such payment is generally received about l year after the date the first well on the Prospect is spudded and that subsequent payments are usually received on a monthly or quarterly basis. The participant is not entitled to any proprietary interest in the Prospect and is a general unsecured creditor of the Company regarding his or her payment.

The term "employee benefit plan" is defined in section 3(3) of ERISA as, "… an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." The term "employee welfare benefit plan" is defined in section 3(1) 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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Based on the representations set forth in your request for an advisory opinion, it does not appear that the purpose of the Plan is to provide any of the benefits enumerated in section 3(1) of ERISA. Accordingly, it is our view that the Plan is not a welfare plan within the meaning of section 3(1) of ERISA.

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…."

Regulations issued by the Department of Labor clarify the definition of employee pension benefit plan. As you note in your submission, 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.

Because the Plan does not condition distribution of the bonus payments upon termination of employment or retirement, the Plan is not by its express terms an employee pension benefit plan within the meaning of section 3(2)(A) of ERISA, but, rather, appears to be a bonus program described in regulation section 2510.3-2(c).

Under section 3(2)(A) of ERISA, a plan may be an employee pension benefit plan as a result of surrounding circumstances. While we have no reason to believe, based on the representations in your submission, that the Plan would be a pension plan as a result of surrounding circumstances, plan fiduciaries should be aware of the possibility that, if as a result of surrounding circumstances, payments are systematically deferred until the termination of employment or until retirement age, the Plan might be deemed to be a pension plan.

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

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs