U.S. Department of Labor

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

Reply to the Attention of:
OPINION NO. 82-053A
Sec. 3(2)

OCT 4 1982

Louis T. Mazawey, Esq.
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Dear Mr. Mazawey:

This is in reply to your letters of March 16, September 27, and September 30, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether an employer will be considered to have established or maintained an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA under certain circumstances.

You represent The Equitable Life Assurance Society of the United States (Equitable), a mutual life insurance company organized under the laws of the State of New York and subject to the supervision and examination of the Superintendent of Insurance of the State of New York. Among the insurance products and services Equitable offers is Equitable's Group Individual Retirement Annuity Contract (Equitable's Group IRA). Equitable has issued Group Individual Retirement Annuity Contract, AC 5361 (the Contract) to United States Trust Company of New York whose sole responsibility is to act as contractholder and custodian of the Contract. Each individual participating in the Equitable Group IRA will receive an individual certificate containing all the provisions of the Contract and additional pertinent information. This certificate itself will constitute the individual's IRA as described in section 408(b) of the Internal Revenue Code.

Under the Contract, Equitable will maintain an account for each individual participating. Each of these accounts will contain up to four sub-accounts reflecting the individual's interest in each of four pooled separate accounts managed by Equitable. Participants may allocate contributions as well as the balance of their accounts among these four pooled separate accounts. Participants may contribute to Equitable's Group IRA by direct lump-sum payments to Equitable or through payroll deduction.

As part of Equitable's Group IRA, Equitable intends to enter into an "Administrative Agreement" with individual employers which, among other things, will provide for (i) procedures for facilitating the enrollment of employees as individual participants under the Contract, (ii) procedures pursuant to which contributions may be made under the Contract by or on behalf of participants (including payroll deduction, direct contributions by the participants, or a combination thereof or in any other form), (iii) procedures for facilitating the communication to participants of information prepared by Equitable concerning the Contract and enrollment and contributions thereunder, and (iv) the extent to which the employer will perform any services in connection with the Contract which would otherwise be performed by Equitable. For the purposes of your request, you state that no opinion is requested with respect to an employer who provides any such "services."

Although the "Administrative Agreement" will vary from employer to employer, it generally will permit Equitable to distribute material Equitable has prepared explaining Individual Retirement Accounts (IRAs) in general and Equitable's Group IRA in particular. Interested employees may then request additional information and enrollment forms from Equitable. The enrollment form would be returned directly to Equitable.

The "Administrative Agreement" will also outline the conditions under which payroll deductions will be remitted by the employer to Equitable and may, at the employer's request, designate a minimum contribution which may be made through payroll deduction. The "Administrative Agreement" will also contain provisions under which it may be altered or cancelled.

The Contract provides for a quarterly service charge to be assessed against each participant's account. However, the Contract provides that an employer may elect to pay service charges assessed against the accounts of its employees. In addition, under the "Administrative Agreement," the employer must pay the amount required to bring the aggregate service charges assessed against its employees to a minimum annual level of $5,000. For the purposes of your request, you state that no opinion is requested with respect to an employer who pays either of these service charges. Nevertheless, we enclose Opinion 82-18A (issued March 22, 1982) on this subject.

You ask for the following advisory opinions: (a) that an employer would not be considered to establish or maintain an "employee pension benefit plan" within the meaning of section 3(2) of title I of ERISA by virtue of having "endorsed" Equitable's Group IRA where the employer collects payroll deductions from its employees solely to facilitate their participation in Equitable's Group IRA and all the criteria contained in regulation 29 C.F.R. §2510.3-2(d) and Opinion 81-80A are met; (b) that an employer would not be considered to establish or maintain an "employee pension benefit plan" within the meaning of section 3(2) of title I of ERISA in the situation described above but the employer additionally limits the number of investment accounts available to its employees under Equitable's Group IRA; (c) that an employer would not be considered to establish or maintain an "employee pension benefit plan" within the meaning of section 3(2) of title I of ERISA in the situation described in request (a) but the employer

additionally incurs expenses for implementation and maintenance of its payroll deduction system with respect to Equitable' s Group IRA; and (d) that an employer would not be considered to establish or maintain an "employee pension benefit plan" within the meaning of section 3(2) of title I of ERISA in the situation described in request (a) but additionally the employer's name and/or logo appears in employee communication materials prepared by Equitable in a manner which precludes the implication that the employer is endorsing or adopting Equitable's Group IRA or that such IRA is designed especially for the employees of the employer. Each of these requested opinions will be addressed in order.

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

> … 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 constitute "employee pension benefit plans" within the meaning of section 3(2) of title I of ERISA. With regard to IRAs, regulation section 2510.3-2(d) stated:

> (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.

Additionally, in Opinion 81-80A (issued December 18, 1981), to which you refer, the Department stated that if certain specified criteria were met an employer which offered its employees an IRA payroll deduction program would not be considered to have endorsed the IRA

program offered even though the IRA payroll deduction program was limited to one funding medium provided by one IRA sponsor. The criteria specified in Opinion 81-80A were:

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

With regard to your question (a), the criteria specified in Opinion 81-80A are generally applicable to any IRA payroll deduction program offered by an employer. If an IRA payroll deduction program meets the requirements of regulation section 2510.3-2(d) and the criteria of Opinion 81-80A, such a program would not be considered to be an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA.

With regard to your question (b), Opinion 81-80A states, as you note, that, if the criteria stated in that opinion are met, an IRA payroll deduction program will not be considered to have been endorsed by the employer even if the program is limited to one funding medium provided by one IRA sponsor. Accordingly, if an IRA payroll deduction program meets the requirements of regulation section 2510.3-2(d) and the criteria of Opinion 81-80A, such a program would not be considered to be an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA even though the program limits the number of investment accounts available to the employees by the IRA sponsor.

With regard to your question (c), it should be noted that regulation section 2510.3-2(d)(iii) states, in pertinent part, that "the sole involvement of the employer … is without endorsement to permit the sponsor to publicize the program …, to collect contributions through payroll deductions …, and to remit them to the sponsor." Expenses an employer might incur for its

payroll personnel to attend instructional meetings provided for them solely to learn how to implement and maintain the payroll deduction system would not exceed the limitation this regulation places on an employer's involvement. See Opinion 82-18A.

With regard to your question (d), if an IRA payroll deduction program otherwise meets the criteria of regulation section 2510.3-2(d) and Opinion 81-80A, such a program would not be considered an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA merely because the employer's name or logo appears on communication materials provided by the IRA sponsor in the manner described in your request. However, if the use of the employer's name or logo in context would imply that the employer has, for example, endorsed Equitable's IRA program as offered through the payroll deduction program, the employer might be considered to have established or maintained an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA.

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

Enclosure