U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-1A
Sec. 3(2)

JAN 13 1983

Mr. W. Eugene Jessup
Waller Lansden Dortch & Davis
2100 One Commerce Place
Nashville, Tennessee 37239

Dear Mr. Jessup:

This is in reply to your letters of May 12, 1982, and July 8, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether under certain circumstances an individual retirement account (IRA) payroll deduction program will constitute an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA.

You advise that you represent J.C. Bradford & Company (Bradford), a Tennessee limited partnership engaged in the securities brokerage business. Bradford has been authorized to act as an active, non-bank trustee or custodian for IRAs and for plans benefiting owner-employees (Keogh Plans) by the Internal Revenue Service. Bradford now wishes to institute an IRA payroll deduction program for its own employees. In a letter dated July 8, 1982, you state that the IRA product to be offered through the payroll deduction program will be one offered by Bradford in the normal course of its business to the general public. However, Bradford wishes to waive the enrollment, management, etc., fees that it normally charges members of the public. You ask whether such a waiver would cause the IRA payroll deduction program to be considered an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA. Further, if such a waiver would cause the IRA payroll deduction program to be considered an employee pension benefit plan thereunder, you ask whether Bradford could waive these fees if the employees funded their IRAs through direct employee/participant contributions (rather than through payroll deduction) and not be considered to have established or maintained an employee pension benefit plan within the meaning of section 3(2) of ERISA.

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 --
>
> (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.

In regulation 29 C.F.R. §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)(A) 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 --

(i) no contributions are made by the employer or employee association;

(ii) participation is completely voluntary for employees or members;

(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

(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.

In Opinion 82-13A (issued February 17, 1982) to which you refer, the Department stated that, if certain specified criteria were met, an employer, which in the normal course of business sponsors IRA programs offered to the public, would not be considered to have "endorsed" the IRA program offered to its own employees or the employees of its affiliates through payroll deductions. One of the criteria specified was that, “/a/ny management fees, sales commissions, and the like charged by the employer or its affiliate as IRA sponsor to employees maintaining an IRA with the employer or an affiliate of the employer through the payroll deduction program are the same as those charged by the employer or its affiliate as IRA sponsor to employees of non-affiliated employers who enter into an IRA payroll deduction program with the IRA sponsor.”

It is the position of the Department that if, for its employees utilizing the proposed IRA payroll deduction program, Bradford waives the enrollment and management fees, etc., normally charged employees of non-affiliated employers, the IRA payroll deduction program proposed by Bradford would not meet the criteria specified in Opinion 82-13A. Further, the proposed IRA payroll deduction program would not be a program described in regulation section 2510.3-2(d). Accordingly, the Department is not able, at this time, to assure you that the IRA payroll deduction program proposed by Bradford would not constitute an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA.

Additionally, you ask whether Bradford would be considered to establish or maintain an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA if Bradford waived the enrollment, management, etc., fees for its own employees who purchase an IRA product offered to the general public by Bradford but Bradford did not implement an IRA payroll deduction program. It is the Department's position that if Bradford does not implement an IRA payroll deduction program for its own employees and waives for its employees who do not contribute to their IRAs through an IRA payroll deduction program, the fees charged in connection with the IRA products, Bradford would be considered not to have met the criteria of regulation section 2510.3-2(d). Accordingly, the Department is unable to assure you that the situation you present would not constitute 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 the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs