U.S. Department of Labor

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

Reply to the Attention of:

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

JAN 13 1983

Larry M. Howe, J.D., CLU
Assistant Vice President
Advanced Underwriting
Farmers & Traders Life Insurance Company
960 James Street
Syracuse, New York 13201

Dear Mr. Howe:

This is in reply to your letter of May 11, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Individual Retirement Annuity (IRA) payroll deduction program of Farmers and Traders Life Insurance Company (the Company) constitutes an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA.

You advise that the Company decided after passage of the Economic Recovery Tax Act of 1981 to allow its home office employees to contribute to a Flexible Premium Retirement Annuity issued by the Company which qualifies as an IRA under section 408(b) of the Internal Revenue Code. Employee contributions are to be made by payroll deductions. The IRA program offered through the IRA payroll deduction program is identical to IRA programs offered to the general public by the Company. However, the Company will also contribute 4 percent of the premium paid for the annuity as a reimbursement to the employee. The Company normally pays a 4 percent sales commission on sales of an annuity by its agents, but no sales commission is paid when an employee purchases an annuity. The Company, therefore, elected to pass this savings in sales commissions to its employees, thereby avoiding receiving a windfall profit. As a result the Company's profitability on IRA annuity contracts will be equal for contracts written for its employees and for the general public.

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 –
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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.

In Opinion 82-13A (issued February 17, 1982, copy enclosed), the Department stated that, with respect to an employer which collects payroll deductions from its employees for an IRA program and where the sponsor of the IRA program is the employer or an affiliate of the employer, an employer, which in the normal course of its business sponsors IRA programs offered to the general public, would not be considered to have "endorsed" the IRA program within the meaning of regulation section 2510.3-2(d)(iii) provided four criteria were met. The third criteria was that the IRA program offered to the employees through the payroll deduction program is identical to an IRA program the IRA sponsor offers the general public in the normal course of its business. The fourth criteria was that any 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.

In Opinion 79-5A (issued January 16, 1979, copy enclosed), the Department stated that underwriting fees, management fees, and sales commissions in connection with the sale of mutual fund shares to fund an IRA received by an employer or its affiliate for services rendered in their normal business as underwriters, investment advisors, and broker-dealers rather than as employers would not represent consideration of the type not permitted under regulation section 2510.3-2(d)(iv).

It is the position of the Department that the reimbursement by the Company to employees of sales commissions paid by its employees in connection with IRAs to which they contribute under the IRA payroll deduction program do not constitute contributions by an employer within the meaning of regulation section 2510.3-2(d)(i). However, such reimbursement would mean that the employees were charged different amounts by the Company from those it charges as IRA sponsor to employees of non-affiliated employers who enter into an IRA payroll deduction program with it.

Accordingly, if the Farmers and Traders Life Insurance Company reimburses its employees contributing to an IRA program under the IRA payroll deduction program the 4 percent of their contributions normally charged as sales commissions, the Farmers and Traders Life Insurance Company's IRA payroll deduction program would not meet the criteria of regulation section 2510.3-2(d). Consequently the IRA payroll deduction program would constitute an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA and would be covered by title I of ERISA.

However, if the Farmers and Traders Life Insurance Company charges its employees contributing to an IRA program under the IRA payroll deduction program the same sales commission it charges as an IRA sponsor to employees of non-affiliated employers who enter into an IRA payroll deduction program with it and otherwise meets the criteria of regulation section 2510.3-2(d), the IRA payroll deduction program would not constitute an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA and would not be covered by 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

Enclosures