

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 83-010A

FEB 9 1983

Mr. Richard A. Hopp
Jones, Grey & Bayley, P.S.
36th Floor
One Union Square
600 University
Seattle, Washington 98101

Dear Mr. Hopp:

This is in reply to your letters of December 22, 1981, February 2, 1982, February 25, 1982, and March 16, 1982, requesting advisory opinions regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Individual Retirement Account (IRA) payroll deduction program adopted by Cascade Natural Gas Corporation (Cascade) is an employee benefit plan within the meaning of section 3(3) of ERISA and, if so, the effect of being covered under title I of ERISA.

You advise that Cascade has adopted a payroll deduction program whereby its employees may elect to have IRA contributions deducted from their paychecks and the IRA contributions invested as they direct in one or more mutual funds distributed by American Funds Distributors, Inc. The custodian for the IRAs to which payments by payroll deductions are made is Capital Guardian Trust Company (Capital). Employees who elect to participate must make a minimum contribution of \$50 in any one month although contributions need not be made every month. Employees may also utilize the IRA payroll deduction program to make spousal IRA contributions. Capital will charge an initial and an annual fee to IRA participants, both of which will be paid out of the participant's IRA contributions. Cascade, however, is considering paying those fees on behalf of participants.

Under the agreement between Cascade and Capital, on each semi-monthly payday Cascade will deposit in an escrow account the total amount withheld pursuant to its employees' instructions. The escrow account is a non-interest bearing checking account with a Seattle bank. The escrow agent is an officer of Cascade. Upon instructions from Capital the escrow agent will once a month draw on the account and Capital will invest the contributions in shares of mutual funds as directed by Cascade's participating employees. In the event an employee terminates service with Cascade after one contribution less than the \$50 minimum and before a second contribution can be made, Capital will pay the contribution directly to the employee upon notification by Cascade. The escrow agent has agreed he will not exercise any control over the escrow account except to the extent necessary to comply with withdrawal requests by Capital and will not transfer his authority to withdraw funds to any person other than Capital. Cascade has agreed to indemnify Capital in the event that the bank in which the escrow account has been established fails to honor a draft upon the escrow account. Cascade will also relieve the escrow agent of the burden of any expenses or liabilities incurred in his capacity as escrow agent, including any monthly bank fees.

You ask the following questions regarding the IRA payroll deduction program:

a) Will the escrow bank account described above constitute an employee benefit plan within the

meaning of section 3(3) of ERISA?

- b) Will deposit by Cascade of amounts withheld from employees' paychecks to the escrow bank account constitute prompt transfer of withheld amounts (See Opinion 81-80A, issued December 18, 1981)?
- c) Will payment by Cascade of any banking or other fees of the escrow agent or indemnification of Capital as described above constitute an employer contribution within the meaning of Department of Labor regulation 29 C.F.R. §2510.3-2(d)(i)?
- d) In the event Cascade elects to do so, will the payment by Cascade of either the initial or annual fees charged to IRA participants by Capital constitute employer contributions within the meaning of regulation section 2510.3-2(d)(i)?
- e) If the IRA payroll deduction program constitutes an employee pension benefit plan, will Cascade, the escrow agent or any of Cascade's employees be fiduciaries within the meaning of section 3(21) of ERISA with regard to that program?
- f) If Cascade or any of its employees is a fiduciary with regard to the IRA payroll deduction program,
 - 1) does that program constitute a pension plan that permits participants to exercise control of assets in their accounts within the meaning of section 404(c) of ERISA, and
 - 2) will either Cascade or any of its employees be liable for losses or breaches resulting from the participant's exercise of control over his or her account?
- g) If the IRA payroll deduction program constitutes an employee pension benefit plan, may Cascade utilize the alternate method of compliance authorized for certain simplified employee pensions in Department of Labor regulation 29 C.F.R. §2510.104-49? Alternatively, Cascade asks
 - 1) how to complete the annual report required under section 103 of ERISA, and
 - 2) how to complete the summary annual report required under section 104(a)(2) of ERISA.

Section 3(3) of ERISA defines the term "employee benefit plan" to include both employee welfare benefit plans and employee pension benefit plans. However, for the purposes of this letter, we have only considered whether or not the IRA payroll deduction program adopted by Cascade is an employee pension benefit plan. Section 3(2)(A) of ERISA defines the term "employee pension benefit plan" to include:

- (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 section 2510.3-2, the Department of Labor (the Department) described certain programs which would not be considered to constitute employee pension benefit plans. With regard to IRAs, regulation section 2510.3-2(d) provides:

- (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 81-80A, to which you refer, the Department stated that if an IRA payroll deduction program met certain specified requirements the employer would not be considered to have endorsed the IRA program offered through payroll deduction even though the payroll deduction program is limited to one funding medium provided by one IRA sponsor. In that opinion, the Department also noted that if the employer did not promptly transfer the withheld funds to the IRA sponsor, the criteria set forth in regulation section 2510.3-2(d)(iii) would not be satisfied.

In regard to question (a) that you pose, it is the view of the Department that the escrow bank account that you describe is a part of the IRA payroll deduction program adopted by Cascade. Accordingly, if the IRA payroll deduction program adopted by Cascade meets the criteria set forth in regulation section 2510.3-2(d), it (including the escrow bank account) would not be an employee pension benefit plan within the meaning of section 3(2) of ERISA. With the exception of the issues you raise in questions (b), (c), and (d) which are addressed below, it is assumed for the purposes of this letter that the IRA payroll deduction program otherwise meets the criteria set forth in the regulation.

With regard to your question (b), it should be noted that the issue of whether or not there is prompt transfer of withheld amounts is inherently factual in nature. In section 5.01 of ERISA Procedure 76-1 (issued August 27, 1976, copy enclosed), the Department stated it will not ordinarily issue advisory opinions where the issue is inherently factual in nature. Based on your representations, however, the Department does not view the deposit of withheld funds in an escrow account controlled by an officer of Cascade to be a transfer to the IRA sponsor. Such transfer would not occur until the escrow account disburses money at the request of Capital, the IRA custodian. We note that, whether or not there is a prompt transfer, if Cascade receives any benefit or consideration for maintaining an interest-free checking account with the Seattle bank, the conditions in regulation section 2510.3-2(d) may not be satisfied. We are assuming that Cascade receives no such consideration or benefit.

With regard to your questions (c) and (d), in Opinion 82-18A (issued March 22, 1982, copy enclosed), the Department distinguished between those fees and charges in connection with an IRA payroll deduction program that an employer may pay and meet the criteria of regulation section 2510.3-2(d) and those that an employer may not pay in order to meet the criteria of that regulation. Payment by Cascade of fees or charges ordinarily imposed by Capital on individuals purchasing IRAs would not meet the criteria of regulation section 2510.3-2(d). Therefore, to the extent the banking and other fees of the escrow agent represent fees or other charges ordinarily imposed by Capital on individuals purchasing IRAs, the payment of such by Cascade would not meet the criteria of regulation section 2510.3-2(d). The issue of whether indemnification of Capital in the event the bank holding the escrow account failed to honor a draft upon that account constitutes an employer contribution within the meaning of regulation section 2510.3-2(d)(1)(i) is inherently factual in nature dependent upon the reason the bank failed to

honor the draft and the circumstances surrounding the indemnification. Accordingly, we are unable to render an opinion on that issue at this time.

Since there is nothing in your representations which would indicate that the IRA payroll deduction program adopted by Cascade is an employee pension benefit plan, we feel it is not necessary to respond to your questions (e), (f), and (g) which are predicated upon the conclusion that the IRA payroll deduction program is an employee benefit plan 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 such procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

Enclosures