U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-25A
Sec. 3(2)

MAY 24 1983

Mr. Martin L. Fleming
Treasurer
Holladay-Tyler Printing Corporation
P.O. Box 1769
Rockville, Maryland 20852

Dear Mr. Fleming:

This is in reply to your letters of January 20, 1982, and January 28, 1982, and subsequent telephone conversations with a member of the staff of this Office 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 would constitute an employee pension benefit plan.

You advise that Holladay-Tyler Printing Corporation (the Company) wishes to provide its employees with the opportunity to establish IRAs through payroll withholding. The Company is considering letting employees contribute to IRAs with a bank which handles a major portion of the Company's banking. Further, this bank is a principal lender to the Company and will soon lend additional funds through the purchase of Industrial Revenue Bonds (IRBs) from Montgomery County. You state that this transaction will constitute a significant dollar amount.

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 29 C.F.R. §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 ERISA. Specifically, regulation section 2510.3-2(d) states:

> (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.

Additionally, in Opinion 81-80A (issued December 18, 1981, copy enclosed), the Department stated that IRA payroll deduction programs would not be considered to exceed regulation section 2510.3-2(d)(iii) if certain criteria were met even though the employer limited the payroll deduction program to one funding medium of one IRA sponsor. One of the criteria stated in Opinion 81-80A was that the funding medium is not identified to employees as having as one of its purposes investments in securities of the employer or its affiliates and does not in fact have any significant investments in such securities.

Although the information you have submitted indicates that the proposed IRA sponsor is the employer's principal lender, it does not appear that the bank, by virtue of purchasing IRBs from Montgomery County, would be investing in employer securities as defined in section 407(d)(1) of ERISA, since the bonds appear to be issued by Montgomery County, not by the employer. As a result, the proposed IRA program would not fail to meet regulation section 2510.3-2(d)(iii) solely due to the purchase of these bonds.

However, it is the Department's position than an employer which collects payroll deductions from its employees for an IRA program would be considered to have received consideration within the meaning of regulation section 2510.3-2(d)(iv), or to be involved with the program beyond the criteria set forth in regulation section 2510.3-2(d)(iii) if the employer does not promptly transfer the withheld funds to the IRA sponsor, or if the employer exercises any influence over investments of the IRA sponsor. For example, an arrangement between the Company and the bank whereby the Company agrees to permit IRA payroll deductions and the bank agrees to make a particular investment or program of investments would cause the IRA program to fail to meet the conditions of regulation section 2510.3-2(d). Such an investment by the bank would include, among other things, an extension of credit to the Company or the purchase of a bond the proceeds of which accrue to the benefit of the Company. Such an IRA payroll deduction program would be an employee pension benefit plan within the meaning of section 3(2) of ERISA and would be covered by title I of ERISA unless otherwise excluded.

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

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

Enclosure