U.S. Department of Labor

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

Reply to the Attention of:

JAN 4 1984

OPINION NO. 84-03A
Sec. 406(b)(1), 3(21)(A)(ii)

Lawrence J. Hass
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1775 Pennsylvania Avenue, N.W.
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Re: Identification Number: F-2283A

Dear Mr. Hass:

This is in response to your request for an advisory opinion from the Department of Labor concerning the application of section 406(b)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975(c)(1)(E) of the Internal Revenue Code of 1954 (the Code) to the provision of certain pension investment consulting services by The Equitable Life Assurance Society of the United States (Equitable).

Your letter contains the following facts and representations.

Equitable is a mutual life insurance company organized under the laws of the State of New York. Among the insurance products and services it offers, Equitable provides funding vehicles, asset management, and other investment services for employee benefit plans subject to the provisions of ERISA.

The Consulting Division of Equitable's Investment Advisory Department has recently established a new pension consulting program called Equitable Pension Investment Consulting (EPIC). EPIC is a three-phase investment consulting service designed to assist plan fiduciaries in:

a) formulating an investment strategy.
b) implementing the plan's investment strategy to maximize the plan's investment performance.
c) analyzing the performance of the plan's investment managers.

Under the first phase of EPIC, the "Planning" phase, Equitable will determine a plan's financial condition and, together with an analysis of the financial needs of the sponsor, will recommend an optimal mix of assets to be achieved over a five year period. This part of the service will not involve specific recommendations with respect to a particular investment manager or investment account. The written report prepared by Equitable could serve, if adopted by the plan, as the written description of the fundamental investment strategy to be used by the plan.

Under the second phase of EPIC, the "Implementing" phase, Equitable will make general recommendations for the allocation of plan contributions over a six month to one year period among various types of investments. As in the planning phase, the recommendations will not refer to specific investment vehicles or investment managers. The advice will be rendered with respect to general types of investments and general types of investment managers.

Under the third phase of EPIC, the "Monitoring" phase, Equitable will provide integrated performance measurement and quantitative analysis of a plan's investments. You represent that this service will be provided on a strictly quantitative, objective and impartial basis. Included in this service will be a measurement of the past performance of the plan's investment managers, including Equitable. Most of the performance measurement and quantitative analysis, as well as other parts of the consulting services, will be provided by Equitable with the assistance of independent consulting firms. Except for assisting plan customers in determining relevant market portfolios or in developing appropriate "risk tolerance", Equitable does not have any control or input with respect to the computations, measurements or rankings used by the independent consulting firms.

A plan customer may subscribe to individual services within a phase, individual phases of the program or any combination thereof. A separate flat rate fee will be charged for each phase of the EPIC program provided a plan customer. The fee charged for each service within a phase will depend on the size of the plan, among other factors, and fees for a single service are expected to range from approximately $2,000 to $25,000 annually. The maximum fee for a plan for the entire EPIC program will range from $50,000 to $75,000. The product of each phase of the EPIC program will be reports and recommendations to plan fiduciaries, who are independent of Equitable. You have represented that the EPIC program does not involve the provision of any discretionary investment services by Equitable or advice or recommendations that a plan establish an investment relationship with Equitable or increase or decrease the amount of plan assets allocated to Equitable under an existing relationship. All decisions regarding the investment management of plan assets will continue to be made by a plan fiduciary independent of Equitable.

You have asked for an advisory opinion to the effect that the provision of the investment consulting services under the EPIC program will not constitute a violation of section 406(b)(1) of ERISA or section 4975(c)(1)(E) of the Code.

Under Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code, with certain exceptions not here relevant, has been transferred to the Secretary of Labor. Accordingly, all references to specific sections of ERISA shall also refer to the corresponding sections of the Code.

Section 406(b)(1) of ERISA provides that a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account.

Section 3(21)(A) of ERISA defines the term fiduciary as a person with respect to a plan who (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan. Regulation 29 CFR §2510.3-21(c)(1) states that, as a general matter, a person will be deemed to be rendering investment advice within the meaning of section 3(21)(A)(ii) if two criteria are met. First, pursuant to regulation section 2510.3-21(c)(1)(i), the person must render advice to the plan with regard to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property. Second, pursuant to regulation section 2510.3-21(c)(1)(ii), a person performing this type of service must either (A) have discretionary authority or control with respect to purchasing or selling securities or other property for the plan, or (B) render such advice on an individualized basis pursuant to a mutual agreement, arrangement or understanding, written or otherwise, with the plan that the plan or a fiduciary with respect to that plan will rely on such advice as a primary basis for investment decisions with respect to plan assets. Although the question of whether an entity is a fiduciary by reason of providing consulting (or any other) services generally depends on the particular facts and circumstances of each case, we are assuming, for purposes of the discussion that follows in this advisory opinion, that the totality of services provided by Equitable causes it to be a fiduciary with respect to plans subscribing to the EPIC program. Thus, we will assume that Equitable renders investment advice as defined in section 3(21)(A)(ii) of ERISA and regulation 29 CFR 2510.3-21(c) because the services it provides to a plan on a regular basis, although not including specific recommendations with regard to the acquisition or retention of specific investment vehicles or managers, will in fact be relied upon as a primary basis for either the longer range strategic decisions or the more immediate allocation decisions that are made by the plan, or by the plan's fiduciary.

Section 408(b)(2) of ERISA provides a statutory exemption from the prohibitions of section 406(a) of ERISA for contracting or making reasonable arrangements with a party in interest, including a fiduciary, for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

With respect to the prohibitions in section 406(b), regulation 29 CFR §2550.408b-2(a) indicates that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) of ERISA (relating to conflicts of interests on the part of fiduciaries) even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2). As explained in regulation 29 CFR §2550.408b-2(e)(1), if a fiduciary uses the authority, control or responsibility which makes it a fiduciary to cause the plan to enter into a transaction involving the provision of services when such fiduciary has an interest in the transaction which may affect the exercise of its best judgment as a fiduciary, a transaction described in section 406(b)(1) would occur, and that transaction would be deemed to be a separate transaction from the transaction involving the provision of services and would not be exempted by section 408(b)(2). Conversely, the regulation explains that a fiduciary does not engage in an act described in section 406(b)(1) if the fiduciary does not use any of the authority, control or responsibility which makes such person a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary. This may occur, for example, when one fiduciary is retained on behalf of a plan by a second fiduciary to provide a service for an additional fee. However, because the authority, control or responsibility which makes a person a fiduciary may be exercised "in effect" as well as in form, mere approval of the transaction by a second fiduciary does not mean that the first fiduciary has not used any of the authority, control or responsibility which makes such person a fiduciary to cause the plan to pay the first fiduciary an additional fee for a service.

Reading regulations 29 CFR §2510.3-21(c) and §2550.408b-2 together, the Department believes as a general matter that, when a person is deemed to be a fiduciary by virtue of rendering investment advice as described in regulation section 2510.3-21(c)(1)(ii)(B), the presence of an unrelated second fiduciary acting on the investment adviser's recommendations on behalf of the plan is not sufficient to insulate the investment adviser from fiduciary liability under section 406(b) of ERISA. Regulation section 2510.3-21(c)(1)(ii)(B) presupposes the existence of a second fiduciary who by agreement or conduct manifests a mutual understanding to rely on the investment adviser's recommendations as a primary basis for the investment of plan assets. In the presence of such an agreement or understanding, the rendering of investment advice involving self-dealing will subject the investment adviser to liability under section 406(b) of ERISA. If, however, the unrelated second fiduciary has not agreed to rely on the investment adviser's

recommendations, the investment adviser will not be deemed to be a fiduciary under section 3(21)(A)(ii) because the requirements of regulation section 2510.3-21(c)(1)(ii)(B) will not be met.

It is the Department's view that, based on your representations, Equitable's provision of the generalized investment consulting services contained in the "Planning" and "Implementing" phases of the EPIC program will not result in transactions prohibited under section 406(b) of ERISA merely because Equitable also maintains various investment programs. Because of the general nature of the advice given under EPIC phases I and II, which you represent contain no specific investment recommendations, the Department cannot say that rendering such advice would by definition involve prohibited transactions described in section 406(b) of ERISA. Such advice may, for example, relate to areas beyond the scope of Equitable's other business dealings. Similarly, however, the Department is not prepared to state that advice given in the course of the EPIC program would in no case violate section 406(b). Thus, for example, a violation of section 406(b)(1) may occur where the availability of an Equitable-sponsored investment opportunity causes Equitable, in the exercise of its fiduciary function, to render advice (and/or recommendations) calculated to cause a plan to invest in that Equitable vehicle. Similarly, a violation of section 406(b)(1) may be manifest where the existence of an investment by a plan in an Equitable program causes Equitable to modify its advice and/or recommendations.

By letter dated May 5, 1982, you amended your advisory opinion request by withdrawing that part of the request concerning the application of section 406(b)(1) of ERISA to the performance measurement (Monitoring) phase of the EPIC program. You then requested that the Department grant an administrative exemption for Equitable's performance of this service. Upon further consideration of the issues presented in connection with the Monitoring phase of the EPIC program, it is the view of the Department that to the extent that such services provide no more than quantitative measurements and rankings of a plan's investment portfolio and/or management performance, based on objective, reasonable and relevant criteria that are uniformly applied, such services would not constitute the rendering of the type of advice contemplated by regulation 29 CFR §2510.3-21(c)(1)(i). Under such circumstances, Equitable would not, therefore, be a fiduciary under section 3(21)(A)(ii) with respect to plans enrolled in phase III of the EPIC program. However, where, for example, Equitable adopts, applies or modifies performance or portfolio indices in such a way that a plan is furnished with a format for decision-making which is designed to influence the plan's continued participation in an Equitable program or investment in an Equitable program, the Department would view such services as falling within the type of advice described in regulation section 2510.3-21(c)(1)(i), and, as a result, the rendering of such

advice would subject Equitable to liability under section 406(b)(1) of ERISA if the other conditions of the regulation are met.[1]

Accordingly, implementation of the "Monitoring" phase would not clearly need an administrative exemption under all circumstances. On the basis of your representations with respect to the Monitoring phase, we perceive no reason to proceed under the exemption procedure at this time.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions. This letter relates only to those issues that you specifically raised in your request. Specifically, no opinion has been requested nor is any expressed regarding the propriety or reasonableness of compensation arrangements in connection with the performance of services under the EPIC program.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs

[1] No inference should be drawn from the above discussion as to whether EPIC would be considered a fiduciary under section 3(21)(A)(i) or (iii) in its dealings with plans under the particular facts and circumstances, or as to whether section 406(b) would be violated in such circumstances.