

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION NO. 84-12A  
Sec. 3(1), 3(2)

FEB 23 1984

Mr. R. Philip Steinberg  
Drinker Biddle & Reath  
Philadelphia National Bank Building  
Broad and Chestnut Street  
Philadelphia, Pennsylvania 19107

Dear Mr. Steinberg:

This is in reply to your advisory opinion request on behalf of Concept Systems, Inc. (the Employer) concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to Concept Systems, Inc. Growth Share Plan (the Plan). Specifically, your request concerns whether the Department of Labor (the Department) views the Plan as an employee welfare benefit plan within the meaning of section 3(1) or an employee pension benefit plan within the meaning of section 3(2) of ERISA.

The Employer, a wholly-owned subsidiary of Concept Holding Company, designed the Plan to provide annual payments to participating employees during employment. The Plan provides compensation deferral for a maximum of 3 years in the form of phantom stock of Concept Holding Company. All full-time employees are eligible to participate in the Plan after 6 months of continuous service. Each participating employee elects to defer 2, 4, or 6 percent of compensation (Employee Contribution). The Employer defers 50 percent of the amount the employee sets aside (Employer Contribution). A participating employee is always vested in Employee Contributions. Ordinarily, a participating employee becomes vested in an Employer Contribution on December 31 of the second calendar year following the year the contribution was made. Additionally, a participating employee becomes fully vested in any previously non-vested Employer Contribution (1) when death or disability occurs while employed by the Employer or (2) when Concept Holding Company becomes a publicly held company and the participating employee agrees to accept Employer Contributions and Employee Contributions in the form of common stock of Concept Holding Company. Termination of employment for any reason (other than death or disability) before the Employer Contribution becomes vested results in forfeiture of Employer Contributions under the Plan. Under Plan terms, an employee's retirement has the same effect as any other termination of employment.

The Plan provides that participating employees will ordinarily receive distributions from the Plan on April 30 of the third calendar year following the date of Employer and Employee Contributions on which the distribution is based. Participating employees terminating for reasons other than death or disability receive a distribution of deferred income based on Employer Contributions only if Employer Contributions are vested on December 31 preceding termination. Deferred income based on Employee Contributions is also paid out based on the Plan's deferral schedule. Death or disability of a participating

employee results in a distribution on April 30 after the event. On termination of employment for reasons other than death or disability occurring after vesting but prior to distribution of deferred income, a participating employee receives income on April 30 of the year after termination of employment. You state that the maximum period between termination of employment and receipt of deferred income under the Plan is 4 months for employees terminating employment for reasons other than death or disability.

The term "employee benefit plan" is defined in section 3(3) of ERISA as "... an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA as "... 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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Inasmuch as the Plan provides plan participants the opportunity to defer a portion of their annual base salary, and benefits that result from a deferred salary are not among the benefits listed in section 3(1), the Plan is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA as "... 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...."

As discussed in your submission, although the recognition of income to an employee will be deferred because such income will not be transferable to the employee, such deferral would not be a deferral to termination of covered employment or beyond but merely to the year in which the participant and employer deferrals are distributed (i.e., the third year following the year in which such participant and employer deferrals are made).

Accordingly, because the Plan does not condition distribution of the amount deferred upon termination of employment, retirement, or any other circumstances other than the passage of a fixed period of time, the plan is not by its express terms an employee pension benefit plan within the meaning of section 3(2)(A) of ERISA.

Under section 3(2)(A), a plan may be an employee pension benefit plan as a result of surrounding circumstances. If the operation or administration of the Plan resulted in provision of retirement income to employees or resulted in deferral of income for employees extending to termination of covered employment or beyond, the plan could be an employee pension benefit plan as a result of surrounding circumstances. Because a determination of whether a plan is an employee pension benefit plan as a result of

surrounding circumstances is inherently factual in nature, this letter takes no position on that issue. See section 5 of ERISA Procedure 76-1.

This letter constitutes an advisory opinion as defined in 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 an advisory opinion.

Sincerely,

Morton Klevan  
Deputy Administrator  
Pension and Welfare Benefit Programs