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85-34A

Mr. Richard J. Razook  
Thomson, Zeder, Bohrer, Werth, Adorno & Razook  
4900 Southeast Financial Center  
200 South Biscayne Boulevard  
Miami, Florida 33131-2363

Dear Mr. Razook:

This is in reply to your letter of August 7, 1985, requesting an advisory opinion concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Burger King Crew Education Assistance Program (the Plan). Specifically, you have requested an advisory opinion stating that the Plan established by the Burger King Corporation (the Company) is an unfunded scholarship program within the meaning of 29 C.F.R. §2510.3-1(k) and, therefore, not an "employee welfare benefit plan" subject to the provisions of title I of ERISA.

Your correspondence and the accompanying Plan document contain the following facts and representations. The Plan was established by the Company to furnish certain educational assistance to the Company's crew employees to further their post-high school education (Article I of Plan document). Crew employees are food handlers, usually high school students working on a part-time basis, in the Company's restaurants throughout the United States. Participation in the Plan is limited to employees of the Company, which does not include the Company's parent corporation or other affiliates or any franchisee of the Company (Article II of the plan document). Article I of the Plan document provides that the Company intends that the Plan will qualify as an educational assistance program under section 127 of the Internal Revenue Code. Articles III and IV of the Plan generally provide that an employee who qualifies as a participant under the Plan may accumulate credits or benefits for funds to be made available to reimburse the participant for educational expenses in the form of "Covered Costs" for "Courses of Instruction." The terms "Covered Costs" and "Courses of Instruction" are defined in sections 2.07 and 2.08 of the Plan document, respectively, and are intended to assure that the participant will receive reimbursement only for educational expenses actually incurred and, not, for example, for tools or supplies retained by the participant after completion of a course of instruction, or for meals, lodging, or transportation.<sup>1</sup>

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<sup>1</sup> Section 2.07 defines the term "Covered Costs" to mean "the cost of tuition, fees, and similar payments, books, supplies and equipment paid by the Company for education of a Participant

The only type of benefit offered by the Plan is educational expense payment or reimbursement. The Plan offers no other type of benefit, directly or indirectly. The Company has not provided, nor does it intend to provide, any form of security to assure payment of educational expenses under the Plan. Article VII of the Plan document expressly provides:

So long as this Plan remains in force, the Company shall pay Benefits out of the general assets of the Company at the time such Benefits are due to be paid. The Company has not established, nor is it obligated to establish, a special fund, trust or other arrangement from which Benefits shall be paid.

Section 3(1) of title I of ERISA defines the term "employee welfare benefit plan", in pertinent part, as "... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer ... 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, ... scholarship funds...." Regulation section 2510.3-1(k) provides as follows in clarifying the extent to which scholarship programs are excluded from coverage by title I of ERISA:

For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a scholarship program, including a tuition and education expense refund program, under which payments are made solely from the general assets of an employer or employee organization.

On the basis of the information provided, it appears that the Plan was established and is maintained by the Company for the exclusive purpose of providing direct payments or refunds for tuition and educational expenses of certain of its employees, and such payments and refunds are made solely from the general assets of the Company. Accordingly, it is the opinion of the Department that the Plan is a "scholarship program" within the meaning of §2510.3-1(k) and,

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through a Course of Instruction. Such term shall not include payment for, or the provision of, any tools or supplies which may be retained by the Participant after completion of a Course of Instruction, or the costs of meals, lodging or transportation incurred by a Participant incidental to taking a Course of Instruction."

Section 2.08 defines the term "Course of Instruction" to mean "any course of educational instruction taken by a Participant at an Educational Institution as part of a degree program or in connection with obtaining a vocational, trade, or technical license. Course of Instruction does not include education involving any sports, games, or hobbies unless such education is required as part of a degree program."

therefore, not an "employee welfare benefit plan" within the meaning of ERISA section 3(1) subject to the provisions of 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,

Elliot I. Daniel  
Assistant Administrator for Regulations and Interpretations