

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



August 30, 1995

95-23A
ERISA SECT. 3(3), 3(33)

Ms. A. Colleen Hutchinson
Mayor, Day, Caldwell & Keeton, L.L.P.
700 Louisiana, Suite 1900
Houston, Texas 77002-2778

Dear Ms. Hutchinson:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the M.G.S.I., Inc. Contingent Equity Ownership Program (the Program) constitutes an employee benefit plan within the meaning of section 3(3) of Title I of ERISA.

You advise that M.G.S.I., Inc. (the Employer), a company engaged primarily in the securities business, maintains a pension plan qualified under the Internal Revenue Code and several welfare benefit programs. In addition, the Employer has adopted the Program to enhance its ability to attract and retain employees and to provide an incentive for employees to increase the book value of the Employer by a predetermined amount over the duration of the Program. The Program was designed to become effective July 1, 1993, and to terminate as of June 30, 2003.

Under the Program, participation is extended to employees other than shareholders who are nominated by the Employer's Board of Directors and who execute certain required enrollment forms. It is anticipated that participants will include individuals who are not likely to be considered management or highly compensated employees. Once an individual is nominated and completes the required forms, he or she will remain a participant in the Program every full year he or she remains in the employ of the Employer unless the Employer's Board of Directors determines that such an individual will no longer be a participant and so notifies the individual. Participants are designated as "Contingent Equity Owners" under the Program.

Under the Program, at the end of a fiscal year ending on June 30th, any increase during the year that exceeds a reasonable rate of return for the Employer's shareholders, as calculated under the terms of the Program, will be used to determine the number of new Units to be allocated to participants in the Program for that year. A participant is credited with an allocation of Units in the ratio that his or her compensation paid during the year bears to the compensation of all participants. Units are valued under a formula set forth in the Program.

If during the term of the Program, a substantial portion of the assets or shares of common stock of the Employer are disposed of in a transaction resulting in a change of control, participants may be entitled to a share of the market price paid under a formula set forth in the Program. If paid, this amount is in lieu of any other amount payable under the Program.

Generally, a participant's payment under the Program will not become distributable until the earliest of the end of the Program, a change of control of the Employer, the participant's death, or the participant's becoming totally and permanently disabled. A termination of employment (including retirement) for any reason other than the participant's death or disability will cause the participant to forfeit any payment based on Units allocated to his or her account. Forfeited Units are not reallocated to remaining participants but revert to the Employer. Upon the termination of the Program or a participant's death or disability, amounts payable under the Program will be paid as soon as practical based on a formula set forth in the Program. If an amount is payable because of a change of control in the Employer, it will be paid under a separate formula no later than the date of the closing of the transaction. All payments are reduced for federal, state and local taxes required to be withheld by the Employer.

The Program is funded solely from the general assets of the Employer, a participant's interest under the Program is non-transferable, and the Employer reserves the right to amend or terminate the Program at any time. However, no such amendment or termination may adversely affect a participant's right to Units allocated to his or her account.

The term "employee benefit plan" is defined in section 3(3) of Title I of ERISA to include both employee welfare benefit plans and employee pension benefit plans. The term "employee welfare benefit plan" is defined in sections 3(1) of Title I of ERISA to include programs established or maintained by an employer for the purpose of providing certain benefits described therein.

From the information you submitted, there is no indication that the Program is an employee welfare benefit plan within the meaning of section 3(1). The Program was not established and is not maintained for the purpose of providing any of the benefits described in that section. Although the Program provides for the participant's Units to become payable upon a participant's death or disability, this is not the purpose for which the Program is maintained.

The term "employee pension benefit plan" is defined in section 3(2) of ERISA to include any program established by an employer which, by its express terms or as a result of surrounding circumstances, provides retirement income to employees or results in the deferral of income to the termination of covered employment or beyond. In regulation 29 C.F.R. § 2510.3-2, the Department of Labor (the Department) identified certain programs that it determined would not constitute employee pension benefit plans within the meaning of section 3(2). Specifically, regulation §2510.3-2(c) provides:

(c) For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.

Based on the information you submitted, it is the position of the Department that the Program is not an employee pension benefit plan within the meaning of section 3(2) of ERISA under the express terms of the Program. The Program does not expressly provide for a deferral of income to the termination of covered employment or beyond and, in fact, provides for a forfeiture of the Units allocated to a participant if the participant terminates employment during the ten year term of the Program for any reason other than death or disability. Nor does the Program expressly provide retirement income for participants.

Under section 3(2) of ERISA, however, a plan may be an employee pension plan as a result of surrounding circumstances. Although the Program is not, by its express terms, an employee pension benefit plan, it is possible that the Program in operation might be a vehicle for the provision of retirement income through such circumstances as the selection of employees to participate in the Program or the timing of the payments of the Units allocated to participants. See, e.g., Advisory Opinion 83-46A (Sept. 8, 1983). A significant operational factor would be that an inordinate percentage of the Program's participants were at or nearly at retirement age when the Program terminates.

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

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations