FLSA-751

June 17, 1982

Thank you for your letter of June 2, 1962, regarding Section 7(e)(3) of the Fair Labor Standards Act (FLSA). You are reviewing a savings and bonus plan of one of your clients and, after reviewing the regulations and provisions of section 7(e)(3), have a variety of questions you wish to have answered.

We will respond to your questions in the order presented.

Question I: If the employer sponsors a savings plan, open to all employees, must the employer, in order to exclude employer contributions to a savings plan from employee base earnings for overtime pay calculation purposes, receive formal approval on the plan from the Administrator?

Answer: It is not required that a bona fide 7(e)(3) savings plan receive formal approval from the Administrator, provided the statutory and regulatory criteria are met, for employer contributions to be excluded from the regular rate of pay computation.

Question II: If such a plan provided for vesting of the employer's contribution, what is the minimum vesting period?

Answer: The FLSA does not establish any vesting criteria. As my staff member, Mr. ***, advised you on June 14, 1982, it is primarily the case with which an employee may withdraw savings contribution (both his/hers and the employer's) which may affect a determination regarding the bona fides of such a plan. However, we have been advised that the Employee Retirement Income Security Act does have vesting requirements. Therefore, we suggest that you contact the Department's Labor Management Services Administration Area Office located at the James A. Byrne Courthouse, 601 Market Street, Room 7401, Philadelphia, Pennsylvania 19106, telephone: (215) 597-4961, about this matter.

Question III: If such a plan provided for matching contributions with a stipulated vesting provision, what is the maximum matching rule?

Answer: There is no maximum matching rule. However, as explained in Section 547.1(e) of 29 CFR 547, a plan permitting a greater employer contribution may be approved by the Administrator, if four conditions are met. Otherwise, such a plan would not be in compliance with the regulatory requirements.

Question IV: Would an employer matching contribution greater than the employee's contribution change the necessity of pre-qualification by the Administrator?

Answer: Yes, see our response to your third question.

Question V: Would a salary reduction feature (Section 401(k) of the Internal Revenue Code) change any of the above, if such reductions were included or excluded for purposes of calculating overtime pay?

Answer: As my staff member advised you, the employee's wages, for purposes of computing the regular rate of pay, would not be changed by the inclusion of a 401(k) salary reduction feature in the plan.

Question: VI: What information must be furnished with an application for qualification of a plan under section 7(e)(3)? What is the normal review procedure, and how long does it normally take?

Answer: There should be sufficient information submitted to permit us to determine whether all the standards set forth in paragraphs (b) through (f) of section 547.1 have or will be met and, that none of the disqualifying provisions set forth in section 547.2 are contained in the plan. Our normal procedure is to review a plan and determine if the plan meets the standards stated above, and render an opinion on the plan. Inasmuch as the ability to render an opinion depends on a variety of factors such as the plan's complexity, staff resources and workload, we are unable to say how long it would normally take to issue an opinion regarding any particular plan.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator