

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 80-29A
3(2)

MAY 12 1980

Mr. Richard C. Schiller
Tax Attorney
MCA, Inc.
100 Universal City Plaza
Universal City, California 91608

Dear Mr. Schiller:

This is in response to your letter of August 13, 1975, addressed to Mr. Peter A. Chiregotis of this Office. In your letter you inquired whether the 1973 Incentive Stock Plan (the Plan) maintained by MCA, Inc. (the Employer) constitutes an employee pension benefit plan within the meaning of section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA). We regret that we have not replied to your letter earlier.

According to the Plan document, which was enclosed as an exhibit to your letter, employees of the Employer who are selected by a committee of the Employer's board of directors participate in the Plan. Each year the Employer distributes shares of its stock to employees participating in the Plan. The aggregate number of shares to be distributed to all participating employees is determined by the Employer's board of directors, while the number of shares to be distributed to each participating employee is determined by the committee on a discretionary basis.

Shares of stock distributed to employees under the Plan are subject to certain restrictions. The shares may not be sold, transferred, or otherwise disposed of voluntarily or involuntarily (except pursuant to an exchange or conversion by reason of a merger or other corporate action), and may not be pledged or otherwise hypothecated. Generally, under the provisions of the Plan encaptioned "Vesting of Shares", one-fifth of the shares distributed to a participant vest each year, beginning with the earlier of the fifth anniversary of the distribution of the shares or the participant's date of retirement. When shares vest, the restrictions are removed. If a participant dies or is totally disabled, the restrictions are removed from one-half of the total number of shares distributed to the participant. Upon a participant's separation from employment (except separation at retirement), death or total disability, any shares from which the restrictions have not been removed must be transferred back to the Employer.

On the basis of the foregoing facts, it appears that the Plan may be an employee pension benefit plan within the meaning of section 3(2) of ERISA. Under section 3(2) of ERISA, the term "employee pension benefit plan" is defined, in relevant part, as:

. . . any plan, fund, or program . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Although shares of the Employer's stock are distributed under the Plan to participants during their employment with the Employer, such shares are subject to restrictions. These restrictions, in effect, deprive the participants of a significant portion of the benefits of ownership, specifically, the right to dispose of the shares and thus realize their value in cash. As a result, we think that the income which the award of shares represents is deferred until the restrictions are removed. Under the provisions of the Plan relating to vesting, moreover, the restrictions on substantial numbers of shares might not be removed until after a participant retires. For example, restrictions would remain at retirement on at least 20 percent of shares awarded within 9 years of retirement. Further, the Plan provides that shares awarded to a participant which are not vested at the date of the participant's retirement continue to vest after the participant's retirement. It appears, therefore, that the Plan may provide retirement income for employees of the Employer or result in a deferral of income to the termination of covered employment. Under such circumstances, the Plan would be an employee pension benefit plan within the meaning of section 3(2) 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,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs