

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION 81-1A  
3(2)

DEC 17 1980

Mr. Stuart J. Offer  
Morrison & Foerster  
One Market Plaza  
Spear Street Tower  
San Francisco, California 94105

Dear Mr. Offer:

This is in response to your letter of September 24, 1980, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether a revised program of supplemental benefit payments (the Revised Program) to be made to former employees by the Crocker National Bank (the Bank) constitutes an employee pension benefit plan within the meaning of section 3(2) of ERISA.

You state that the Revised Program is a revised version of a supplemental payments' program, implemented by the Bank in 1978, which was the subject of an advisory opinion dated July 10, 1980. The resolution by which the Board of Directors of the Bank proposes to adopt the Revised Program provides for monthly supplements to regular pension benefits during calendar year 1981 for former employees who retired before January 1, 1974, or beneficiaries of persons entitled to receive pension benefits before that date, and supersedes the resolution that authorized the supplemental payments' program adopted by the Bank in November, 1978. The resolution also states that payments pursuant to the Revised Program are not part of the Crocker National Bank Pension Plan. As we understand the Revised Program, supplemental payments are only authorized for the duration of 1981; if the Bank decides to provide additional payments after 1981, the Board of Directors will have to adopt an additional authorization. In addition, for payments made in 1981, the Bank proposes to send to all payment recipients a letter with respect to the Revised Program. This letter will state that the payments have been granted for 1981, that the payments are completely voluntary by the Bank, and that the payments are not part of the Crocker Pension Plan.

Department of Labor regulation 29 C.F.R. §2510.3-2(e) (the Regulation) identified certain "gratuitous payments to pre-Act retirees" which will not be considered to be employee pension benefit plans within the meaning of section 3(2) of ERISA. However, since the payments under

the Revised Program did not begin before the date specified in the Regulation, the Revised Program does not meet the conditions of the Regulation.

Supplemental payments to retirees which do not fully conform to the Regulation may nevertheless not be part of an employee pension benefit plan. For example, subsequent to the issuance of the Regulation, the Department expressed the view that payments outside a pension plan for persons including those retired after the date specified in the Regulation but before the end of 1976 would not constitute an employee pension benefit plan if certain criteria were met. See News Release USDL 76-707, April 26, 1976.

Based on the information submitted with your request, it is the Department's position that the Revised Program to be authorized for calendar year 1981 would not be an employee pension benefit plan within the meaning of ERISA section 3(2). Supplemental payments in any subsequent year would also not constitute a pension plan provided that such payments are authorized, made, and disclosed in a manner consistent, in all material respects, with the Revised Program to be implemented in 1981.

However, this position relates only to those payments proposed for calendar year 1981 or after. We do not express any opinion herein regarding any payments authorized for years before 1981.

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