U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 82-13A
Section 3(2)

FEB 17 1982

Nina G. Gross, Esq.
Government Relations Counsel
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Ms. Gross:

This is in reply to your letter of January 4, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether a payroll deduction program for an Individual Retirement Account (IRA) will constitute an employee pension benefit plan for the purposes of title I of ERISA under certain circumstances.

You advise that various member banks of the American Bankers Association are planning to offer their employees payroll deduction programs for investment in IRAs for which the member bank will be custodian of the IRA. Apparently, the funding medium for the IRA would be deposits in the member bank. You note that the Department of Labor (the Department), in Opinion 81-80A, stated that certain payroll deduction IRA programs would meet the requirements of regulation 29 C.F.R. §2510.3-2(d), and therefore would not be considered pension plans. However, you also note that the Department did not express an opinion as to whether such a program, where the IRA sponsor is an employer or an affiliate of the employer, is a pension plan by virtue of the sponsor or the funding medium being "endorsed" by the employer within the meaning of regulation section 2510.3-2(d)(iii). Because many banks and other financial institutions are considering payroll deduction programs for their employees in the immediate future, you request that the Department issue an opinion as to this matter.

You represent that the member banks will be affording the IRAs to their employees in the ordinary course of their business of making IRAs available to the general public. Although you do not explicitly state this, we assume that the IRAs which are afforded to the member banks' employees have the same terms and conditions as the IRAs afforded to the general public. You state that, in such a situation, Opinion 79-5A should apply to determine whether there is any "involvement" of the type not permitted under regulation section 2510.3-2(d)(iii). In that

opinion, the Department stated that, in a situation in which the employer and its affiliates underwrote the underlying mutual fund, provided investment advice to the fund, and as broker/dealer sold shares of the fund in connection with the IRAs to employees who desired to purchase such shares for their IRAs, such employers would "engage in these activities in the normal course of their business, rather than in their capacity as employers of the persons adopting the IRAs," and held that the activities of the employer and the affiliates in the ordinary course of their business would not constitute involvement of the type not permitted under the regulation.

You note that Opinion 79-5A does not involve a situation in which the employer affords IRA payroll deduction privileges to its employees. You state that the same principle should apply to a financial institution such as a bank which in the normal course of its business administers IRAs in its capacity as custodian (or trustee), and which in its capacity as an employer provides its employees with a payroll deduction service. You argue that the term "employee pension benefit plan" should not include an IRA payroll deduction program where the employer in the normal course of its business sponsors the IRAs purchased by the employees provided the other conditions stated in Opinion 81-80A are met.

Section 3(2)(A) of title I of ERISA defines the term "employee pension benefit plan" as:

> (2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --
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> (i) provides retirement income to employees, or
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> (ii) 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.

In regulation section 2510.3-2 the Department described certain programs which would not be considered to constitute "employee pension benefit plans" within the meaning of section 3(2)(A) of ERISA. With regard to IRAs, regulation section 2510.3-2(d) provided:

> (d) Individual Retirement Accounts. (1) For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that --
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> (i) no contributions are made by the employer or employee association;
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> (ii) participation is completely voluntary for employees or members;

(iii) the sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and

(iv) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

The Department has reviewed Opinions 81-80A and 79-5A with respect to their applicability to the situation of an employer which collects payroll deductions from its employees for an IRA program where the sponsor of the IRA program is the employer or an affiliate of the employer. It is the view of the Department that in such situations, an employer, which in the normal course of business sponsors IRA programs offered to the public, would not be considered to have "endorsed" the IRA program within the meaning of regulation section 2510.3-2(d)(iii) provided that all of the following conditions are met:

1. The materials distributed to the employees clearly and prominently state in language reasonably calculated to be understood by the average employee that the program is completely voluntary, that the employer is not endorsing either the sponsor or the funding media, that there are other IRA funding media available to employees outside the payroll deduction program, that an IRA may not be appropriate for all individuals, and that the tax consequences to the employee contributing to an IRA would be the same regardless of whether payroll deductions are used to make the contribution.

2. If the program is a result of an agreement between the employer and an employee organization, the funding medium is not identified to employees as having as one of its purposes investing in an investment vehicle which is designed to benefit an employee organization by providing more jobs for its members, loans to its members, or similar direct benefits and does not in fact have any significant investments in any such investment vehicle.

3. The IRA program offered to the employees through the payroll deduction program is identical to an IRA program the IRA sponsor offers the general public in the normal course of its business.

4. Any management fees, sales commissions, and the like charged by the employer or its affiliate as IRA sponsor to employees maintaining an IRA with the employer or an affiliate of the employer through the payroll deduction program are the same as those charged by the employer or its affiliate as IRA sponsor to employees of non-affiliated employers who enter into an IRA payroll deduction program with the IRA sponsor.

You will note that the condition contained in Opinion 81-80A prohibiting the identification of the funding medium as having as one of its purposes investing in securities of the employer or its affiliates and prohibiting significant investments in such securities has been deleted. This is

because the nature of the funding medium offered by IRA sponsors to the general public may often be considered "employer securities" under ERISA when offered to its own employees or to employees of an affiliate.

It is the Department's view that, if the above conditions are satisfied, an employer which sponsors IRA programs offered to the general public will not be considered to have endorsed the IRA program offered to its own employees or the employees of its affiliates through payroll deductions solely because such program is limited to one funding medium provided by that IRA sponsor which is also the employer of the employees or an affiliate of the employer.

Moreover, the Department notes that management fees, sales commissions, and the like regularly received from customers and received by the IRA sponsors from employees in connection with the IRA program would not represent consideration of the type not permitted under regulation section 2510.3-2(d)(iv) because this compensation is received for services rendered in their regular business capacity as IRA sponsors rather than in their capacity as employers.

The Department further notes that, in its view, an employer which collects payroll deductions from its employees for an IRA program would be considered to have received consideration within the meaning of regulation section 2510.3-2(d)(iv) or to be involved with the program beyond the criteria set forth in regulation section 2510.3-2(d)(iii) if the employer does not promptly transfer the withheld funds from its general assets to the IRA program.

We note that, notwithstanding whether an IRA is a plan within the meaning of title I of ERISA, the prohibited transaction provisions of section 4975 of the Internal Revenue Code of 1954 are applicable to transactions by the IRA.

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.

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs