

U.S. Department of Labor

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



Reply to the Attention of:

OPINION LETTER 82-27A

Sec. 3(2)

JUN 16 1982

Mr. Garry P. Jerome
Pepper, Hamilton & Scheetz
123 South Broad Street
Philadelphia, Pennsylvania 19109

Dear Mr. Jerome:

This is in reply to your letter of February 3, 1982, and subsequent submissions requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the individual retirement account (IRA) payroll deduction program of the Consolidated Rail Corporation (Conrail) would constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA.

In your letter, you state that Conrail believes many of its employees would like to maintain IRAs through payroll deductions. You and the IRA sponsors whom you have selected have made detailed representations, which may be briefly summarized as follows. Conrail is willing to offer an IRA payroll deduction program but feels it is administratively burdensome to involve many IRA sponsors. Conrail has been contacted by a number of IRA sponsors interested in soliciting Conrail employees. After eliminating some sponsors through a set of factors it established, Conrail has decided to contract with two different mutual fund "families" and a bank. These three IRA sponsors are expected to offer the Conrail employees a total of 10 IRA funding media. After announcing that the IRA payroll deduction program is available, Conrail will permit the IRA sponsors to make presentations at its staff locations. Employees will execute the necessary forms with the IRA sponsors and present Conrail with a payroll deduction authorization form. All further contacts will be between the employees and the IRA sponsors with one exception. Conrail will review the performance of the IRA sponsors on an ongoing basis to determine whether the initial selection factors warrant continued retention of that IRA sponsor. If the factors are not satisfied, Conrail may replace the IRA sponsor on notice as specified in the contracts. The terms on which the IRA sponsors have agreed to make available their IRA products to employees under the Conrail payroll deduction program are the same terms as would be generally made available under payroll deduction programs to employees of similarly sized or similarly situated employers. You have further made agreements of indemnification from the IRA sponsors in the event of a lawsuit.

You question whether the initial selection of the IRA sponsors to be involved in the IRA payroll deduction program and the subsequent review of their performance will cause the IRA payroll deduction program to be considered an employee pension benefit plan within the meaning of section 3(2). Conrail believes these activities are necessary to prevent the program from becoming counterproductive and discouraging employees from contributing to IRAs.

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 –
- (i) provides retirement income to employees, or
 - (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 29 C.F.R. §2510.3-2 the Department of Labor (the Department) described certain programs which would not be considered to constitute "employee pension benefit plans" within the meaning of section 3(2) of ERISA. With regard to IRAs, the relevant provisions of regulation section 2510.3-2(d) provide:

(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 -

* * *

(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.

In Opinion 81-80A (issued December 18, 1981) the Department stated that, even if an IRA payroll deduction program were limited to one funding medium provided by one IRA sponsor, an employer which collects payroll deductions from its employees for an IRA program would

not be considered to have endorsed the IRA program within the meaning of regulation section 2510.3-2(d)(iii) provided certain specified criteria were met. Accordingly, Conrail would not be involved in an IRA program beyond the limits of regulation section 2510.3-2(d)(iii) merely because it initially selects an IRA sponsor or sponsors to be involved in its IRA payroll deduction program or limits the number of products to be offered by the IRA sponsors selected or merely because it engages in an ongoing review of IRA sponsors to determine whether or not to continue allowing payroll deductions to those sponsors or products, provided that the criteria of regulation section 2510.3-2(d) are met.

Nothing herein should be interpreted as stating the Department's views as to whether or not any expressions or activities of Conrail regarding an IRA program constitute endorsement of that program or involvement beyond that permitted in regulation section 2510.3-2(d)(iii). However, the mere selection by an employer of an IRA product generally offered by that IRA sponsor to other similarly sized or otherwise similarly situated employers would not result in endorsement or involvement beyond that permitted under regulation section 2510.3-2(d)(iii). Negotiating terms and conditions of an IRA product that would not be otherwise available from an IRA sponsor to employees of similarly sized or situated employers might indicate that an employer has done more than select an IRA product and/or IRA sponsor whom it will permit to publicize an IRA program to employees, resulting in involvement in the program by the employer sufficient to bring the arrangement outside the scope of regulation section 2510.3-2(d). We are expressing no opinion whether the activities of Conrail evidenced in your submissions would constitute endorsement or employer involvement because a determination on this issue is inherently factual and the Department will not ordinarily issue an advisory opinion on matters which are inherently factual. See section 5.01 of ERISA Procedure 76-1.

However, with respect to the provisions relating to indemnification of Conrail by the IRA sponsor, it is the Department's view that such indemnification does not constitute impermissible "involvement" for purposes of regulation section 2510.3-2(d)(iii) nor "consideration" for purposes of regulation section 2510.3-2(d)(iv). These provisions do not appear to affect the terms and conditions of the IRA program as they relate to Conrail employees who might choose to participate in the program.

If, therefore, the IRA payroll deduction program of Conrail otherwise meets the criteria set forth in regulation section 2510.3-2(d) and in Opinion 81-80A, it would not constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA. However, nothing herein should be interpreted as stating the Department's view as to whether or not the Conrail IRA payroll deduction program meets the criteria set forth in Opinion 81-80A and regulation section 2510.3-2(d).

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