

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 82-61A

Sec. 110, 103, 104

NOV 17 1982

Mr. Alan M. Ahart
Ross & DeMonte
12301 Wilshire Boulevard
Suite 600
Los Angeles, California 90025

Dear Mr. Ahart:

This is in response to your request, on behalf of Foothill Thrift and Loan ("Foothill Thrift"), for an advisory opinion concerning the application of the reporting and disclosure requirements of Part 1 of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to certain simplified employee pensions (SEPs) to be made available by Foothill Thrift. Specifically, you request an opinion that employers adopting SEP arrangements with Foothill Thrift would not be precluded from using the alternative method of compliance prescribed in 29 CFR §2520.104-49 by reason of certain limitations on the withdrawal of funds by participants exercisable by Foothill Thrift.

Your letter contains the following facts and representations. Foothill Thrift is an industrial loan company organized under the laws of the State of California. As a licensed industrial loan company, Foothill Thrift can make loans and take "deposits" subject to the restrictions set forth in the California Financial Code and regulations issued thereunder by the California Commissioner of Corporations. In accordance with §1152 of Title 10 of the California Administrative Code,¹ Foothill Thrift is required to place a six month deferral provision on its individual retirement account (IRA) thrift certificates. In this regard, you reference paragraph 5 of the "individual retirement account fully paid investment certificate" issued by Foothill Thrift, which provides as follows:

¹ §1152 of Title 10 of the California Administrative Code (reference §18315, California Financial Code) provides, in relevant part, that: "(a) A full-paid certificate or installment certificate of an industrial loan company shall contain a provision that said full-paid certificate or installment certificate may be repurchased within 30 days after, and shall be repurchased within 6 months, of the first of the month following the date upon which the owner or the owner's agent submits to the industrial loan company a written demand for repurchase".

Foothill Thrift will redeem this Certificate at any time upon request of the registered owner hereof subject to the right of Foothill Thrift (a) to defer payment for a period of 30 days after the first of the month following the date upon which a written request for redemption is received from the registered owner, and/or (b) to limit the aggregate amount of withdrawal to payment of its full paid and passbook thrift Certificates of all classes in any one calendar month to an amount not exceeding its net receipts of the previous calendar month (and in this connection, Certificates will be redeemed in the order in which they are presented for payment; provided, however, that in the event the amount payable hereunder is not paid within six months after the first of the month following receipt of such request the entire amount due hereunder together with all accruals from the date of demand shall become immediately due.

You indicate that the six month deferral provision not only applies to IRA certificates, but to any investment certificate issued by an industrial loan company licensed to do business in the State of California. In addition to the six month deferral provision, Foothill Thrift's investment certificates also prescribe in paragraph 5, set forth above, the order in which certificates would be redeemed. Both of these provisions, according to your letter, are intended to provide an industrial loan company with time in which to liquidate its investments in the event of a "run" by depositors.

Foothill Thrift is currently planning on making a prototype SEP arrangement available to employers. Foothill Thrift intends to furnish an employer with a set of documents designed to permit the employer to establish a SEP for its employees with a minimum of expense. You state that an essential element of the "package" is to be able to represent to the employer that the employer will not have to comply with all the ERISA reporting and disclosure requirements applicable to regular pension plans.

However, as you note in your letter, the alternative method of compliance with the reporting and disclosure requirements of Part 1 of title I of ERISA for certain simplified employee pensions, under section 2520.104-29, does not apply to a SEP in connection with which the employer who establishes or maintains the SEP selects, recommends or otherwise influences its employees to choose IRAs into which employer contributions will be made and such IRAs are subject to provisions which prohibit the withdrawal of funds by participants for any period of time. Accordingly, you have requested an opinion as to whether the limitations on withdrawal provisions of paragraph 5 of Foothill Thrift's IRA investment certificates, which could possibly affect withdrawals of contributions under a SEP arrangement, are deemed to be "provisions that prohibit the withdrawal of funds by participants" within the meaning of such phrase as it is used in §2520.104-49.

It is the view of the Department that the limitations on withdrawals contained in paragraph 5 of Foothill Thrift's IRA investment certificates are not provisions that per se prohibit the withdrawal of funds by participants, but rather limitations on the payment of funds exercisable at the

discretion of Foothill Thrift. Accordingly, it is the opinion of the Department that an employer who selects, recommends or otherwise influences its employees to choose IRAs offered by Foothill Thrift, in connection with a SEP established or maintained by the employer, would not be precluded from using the alternative method of compliance under §2520.104-49, provided that all other conditions of the regulation are satisfied by the employer, and provided that, to the extent Foothill Thrift exercises its discretion to limit the withdrawal of funds under paragraph 5 of its investment certificates, the limitations on the withdrawal of funds imposed by Foothill Thrift are applied with respect to all owners of Foothill Thrift investment certificates and not merely those owner-participants covered by simplified employee pension arrangements.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs