

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 83-9A
Sec. 3(2)

FEB 9 1983

Mr. Walter J. Rockler
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Rockler:

This is in reply to your letter of February 5, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA) and your subsequent conversations with Helene A. Benson of my staff. Specifically, you ask whether a payroll deduction program for an Individual Retirement Account (IRA) will constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA under certain circumstances.

You advise that 100 percent of the issued and outstanding shares of common stock of the Madison National Bank (the Bank), a national banking association, engaged in general banking activities in the District of Columbia, is owned by James Madison Limited (the Holding Company), a Delaware Corporation. The same 19 individuals comprise the boards of directors of the Bank and the Holding Company. Several of these directors are also directors and/or officers of otherwise unrelated companies (the "Companies"). None of the Companies has more than one person on the boards of directors of the Bank and the Holding Company. None of the directors or the Companies with which they are associated owns more than 5 percent of the issued and outstanding shares of the Holding Company. Some of the Companies wish to initiate IRA payroll deduction programs using a funding medium sponsored by the Bank. You state that each Company will do nothing more than allow the Bank to publicize its IRA program and, at an employee's direction, deduct contributions from payroll for remission to the Bank.

You note the conditions set forth in Opinion 81-80A (issued December 18, 1981) in order for certain IRA payroll deduction programs not to be considered employee benefit plans covered by title I of ERISA. One criterion was that the employer is not the IRA sponsor or an affiliate of the IRA sponsor. However, the Department of Labor (the Department) also stated in Opinion 81-80A that it was not, at that time, expressing an opinion as to whether an IRA payroll deduction program where the IRA sponsor is the employer or an affiliate of the employer is a pension plan by virtue of the IRA sponsor or the funding media being "endorsed" by the employer. You argue that the Companies are not affiliates of the Bank. Accordingly, you ask for an advisory opinion that the IRA payroll deduction programs of the Companies will not be considered to be employee pension benefit plans within the meaning of section 3(2) of ERISA.

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 29 C.F.R. §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) 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 --

- (i) no contributions are made by the employer or employee association;
- (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.

As you noted, in Opinion 81-80A, the Department stated that if certain conditions were met an employer would not be considered to have endorsed an IRA program offered through payroll deduction even if the program were limited to one funding medium provided by one IRA sponsor. In Opinion 82-13A (issued February 17, 1982) the Department stated that, if specified conditions were met, an employer which sponsors IRA programs offered to the general public will not be considered to have endorsed an IRA program offered to its own employees or the employees of its affiliates through payroll deductions solely because the 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.

Since Opinion 82-13A was issued after your request of February 5, 1982, and in accordance with your conversations with Mrs. Benson, we have limited this letter to a consideration of what constitutes an affiliate of an employer and to clarify when an employer will not be considered to have endorsed an IRA program for purposes of regulation section 2510.3-2(d).

On the question of what constitutes an affiliate for purposes of Opinions 81-80A and 82-13A, section 407(d)(7) of ERISA provides that, for the purposes of section 407:

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of the Internal Revenue Code of 1954, except that “applicable percentage” shall be substituted for “80 percent” wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term “applicable percentage” means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

It is the position of the Department that, for the purposes of Opinions 81-80A and 82-13A, the criteria developed under section 407(d)(7) of ERISA in determining what constitutes an “affiliate” is applicable.

In order to further clarify the Department’s position, as stated in Opinion 82-13A, of when an employer will not be considered to have endorsed an IRA program or product, it is the Department’s position that, if the conditions specified in Opinion 82-13A are met, an employer will not be considered to have endorsed the IRA program or product offered to its employees through payroll deductions solely because such program or product is provided by an IRA sponsor which is an affiliate of the employer and which sponsors IRA programs offered to the general public.

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