U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-15A
Sec. 3(2), 3(4), 3(5)

MAR 22 1983

Mr. Louis T. Mazawey
Groom & Nordberg, Chtd.
Suite 450
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Mazawey:

This is in reply to your letter of April 5,1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask for an opinion that the Individual Retirement Accounts (IRA's) offered by The Equitable Life Assurance Society of the United States (Equitable) to members of certain professional associations do not constitute employee pension benefit plans within the meaning of section 3(2) of ERISA because these professional associations are neither employers within the meaning of section 3(5) of ERISA or employee organizations within the meaning of section 3(4) of ERISA.

In ERISA Procedure 76-1 (issued August 27, 1976) the Department of Labor (the Department) issued general procedures for issuing information letters and advisory opinions. In your request for an advisory opinion you refer to several professional associations including the American Dental Association (the ADA). However, the information submitted with regard to the professional associations other than the ADA did not meet the requirements of section 6.02 of ERISA Procedure 76-1. Therefore, we have limited our consideration of your request to the representations you made regarding the ADA. Accordingly, no opinion expressed below should be interpreted as applying to any association other than the ADA.

You state that the ADA offers a wide variety of services and programs to its members. After the enactment of the Economic Recovery Tax Act of 1981, the ADA decided it would make an IRA product available to its members and the ADA Council on Insurance selected an IRA product offered by Equitable (the Equitable IRA) to be offered to the membership. Equitable has issued a group individual retirement annuity contract to United States Trust Company of New York, whose sole responsibility is to act as contractholder and custodian. Members of the ADA who elect to adopt the Equitable IRA will be issued individual certificates containing the provisions of this contract. The certificate will constitute the individual's IRA. The ADA is not a party to the group contract.

Members of the ADA, employees of "ADA-affiliated practices," and their spouses may adopt the Equitable IRA offered by the ADA. An "ADA-affiliated practice" is a sole proprietorship, partnership, professional corporation, or association in which the sole proprietor or at least one partner, shareholder or member is a member of the ADA. You

state the ADA will endorse the Equitable IRA and encourage its members to adopt it. Each member will receive a letter from Equitable describing the Equitable IRA and encouraging them to adopt it. Further each individual covered by an ADA-sponsored retirement program will also be mailed similar letters. The ADA will not be compensated or receive any fees from Equitable for offering or endorsing the Equitable IRA. Equitable will deal directly with individuals who wish to adopt the Equitable IRA.

Equitable and the ADA expect to enter into an agreement under which Equitable would agree to:

1. Report to the ADA semi-annually on administrative activity, participation statistics, asset growth, investment performance, and cash flow;

2. Market the Equitable IRA through direct mailings to the ADA membership;

3. Provide procedures for communications to participants of information concerning the Equitable IRA;

4. Service the Equitable IRAs; and

5. Invest the funds under the group individual retirement annuity contract.

In return the ADA will agree to endorse the Equitable IRA exclusively and cooperate with Equitable by facilitating advertisements in its newspapers and including materials regarding the Equitable IRA in its mailings to its members. Additionally, after some mutually agreed stated period (such as 5 years), the ADA may discontinue its endorsement upon giving Equitable 90-days notice.

You state that the ADA is a national organization which charters constituent societies of dentists in the District of Columbia, Puerto Rico, or any state or dependency of the United States. Section 10 of the ADA Bylaws provides for seven classifications of membership.

1. Active Member - open to any licensed dentist.

2. Life Member - open to members with 35 years of consecutive active membership or 40 years of active membership and having attained age 65.

3. Student Member - open to pre-doctoral students of a dental school and dentists engaged in certain training, residency or advanced education programs.

4. Honorary Member - open to individuals who have made outstanding contributions to the advancement of dentistry and have been elected to this classification.

5. Affiliate Member - open to certain dentists practicing outside the United States.

6. Associate Member - open to persons approved by the Board of Trustees who contribute to the objectives of the ADA but do not otherwise qualify for membership.

7. Retired Member - open to individuals who have been active members for 25 years but no longer earn income from practicing dentistry.

It is your position that because the ADA is neither an employee organization within the meaning of section 3(4) of ERISA nor an employer within the meaning of section 3(5) of ERISA the Equitable IRA offered by the ADA to its members would not constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA. You specifically state that you are not requesting an opinion whether an ADA-affiliated employer would be considered to have established or maintained an employee pension benefit plan within the meaning of section 3(2) of ERISA by virtue of its involvement, if any, with offering the Equitable IRA to its employees or whether the ADA would be considered to have established an employee pension benefit plan by virtue of offering the Equitable IRA to its employees.

Section 3(2)(A) 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
>
> (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.

Although the purpose of an IRA is to provide benefits described in section 3(2)(A), in order to be an employee pension benefit plan, the Equitable IRA offered to its members by the ADA must, among other criteria,[1] be established or maintained by an employer, an employee organization, or both, for the purpose of providing these benefits to participants.

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[1] In regulation 29 C.F.R. §2510.3-2 the Department identified certain programs or practices which would not be considered to constitute an employee pension benefit plan. With specific regard to IRAs, regulation section 2510.3-2(d) provides:

(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(a) 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.

For the purposes of this letter, it is assumed that the ADA's endorsement of the Equitable IRA would not meet the criteria of regulation section 2510.3-2(d) if the ADA is an employer or an employee organization for the purposes of title I of ERISA in relation to the Equitable IRA offered to the members of the ADA.

Sections 3(4) and 3(5) of ERISA define the terms "employee organization" and "employer" respectively.

Section 3(4) of ERISA defines the term " employee organization" to mean any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

Section 3(5) of ERISA defines the term "employer" to mean any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

The ADA would not constitute an employee organization within the first part of the definition (before the semi-colon) contained in section 3(4) since, according to your representation, it does not exist for the purpose of dealing with employers on behalf of employees concerning either an employee benefit plan or other matters incidental to employment relationships. Additionally, the ADA is not an employees' beneficiary association as that term has been interpreted by the Department under the second part of the definition. One of the criteria used by the Department in determining whether an organization is an employees' beneficiary association is that there must be a commonality of interest among members with respect to their employment relationship. For example, membership may be limited to employees of a certain employer or employers, or to members of one particular union. We do not express an opinion as to whether membership in the same profession or business, in this case, satisfies the commonality of interest criterion. In either event, the ADA is not an employees' beneficiary association for the reason that employees, in their capacity as employees, do not control the ADA's affairs. Rather, Active and Life Members of the ADA have equal rights and equal voting power without regard to their status as employees or employers. Thus, neither employees nor employers, as such, control the ADA.

It is also the Department's position that the ADA is not an "employer" within the meaning of ERISA section 3(5) in relation to the Equitable IRA offered to members of the ADA. A group or association such as the ADA described in your application must be a bona fide group or association of employers in order to meet the definition in section 3(5) of ERISA. A determination of the existence of a bona fide employer group or association must be made on the basis of all relevant facts and circumstances. The following are among the factors which should be considered in making such a decision: the manner in which association members are solicited; identification of persons eligible to participate (and who actually participate) in the association; the presence of a pre-existing relationship among the members; the process by which and the purpose for which the organization was formed; the powers, rights, and privileges of employer members that exist by reason of their employer status; and the identification of the parties who actually control and direct the

activities and operations of the association and its benefit program.

From the information submitted with your inquiry, it appears that members of the ADA who are also employers enjoy no special powers, rights or privileges because of their employer status. It is the Department's position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of the Act. See Opinions 80-68A (dated December 1, 1980, copy enclosed), and 81-51A (dated June 9, 1981, copy enclosed).[2]

Accordingly it is the Department's position that the Equitable IRA offered to members of the ADA is not an employee pension benefit plan because the ADA is neither an employer nor an employee organization establishing or maintaining the Equitable IRA within the meaning of section 3(2) of ERISA with regard to its members.

However, if the Equitable IRA offered to members of the ADA is adopted by an employer within the meaning of section 3(5) for the purpose of providing retirement benefits to its employees, that employer may be considered to have established an employee pension benefit plan with regard to such employees.

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

Enclosures

[2] It should be noted that the mere presence of non-employer members will not, in and of itself, vitiate the status of a group or association as an "employer" if such other members have no voting rights in the association and no control over it. See Opinion 80-15A (dated March 14, 1980, copy enclosed).