U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-23A
SEC. 3(2)(A)

MAY 18 1983

Mr. Thomas J. Moore
Faegre & Benson
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402-1790

Dear Mr. Moore:

This is in reply to your letter of October 29, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the arrangement described in the 403-B7 Group Custodial Account Agreement (the Agreement) enclosed with your request would constitute a program described in Department of Labor regulation 29 C.F.R. §2510.3-2(f) and, therefore, would not be covered by title I of ERISA.

You advise that your client, Group Health Cooperative of Puget Sound (Group Health), is interested in providing its employees with as many tax-sheltered investment options as possible. In considering a tax-sheltered annuity (TSA) program for its employees under section 403(b)(7) of the Internal Revenue Code (the Code), Group Health believes this can best be accomplished by allowing its employees to have virtually unlimited discretion to invest TSA contributions in virtually all open-ended mutual funds that are offered for sale and virtually all close-ended mutual funds traded on national or regional exchanges. To this end, Group Health proposes to enter into the Agreement with a bank as a custodian.

You further state that this gives the employees of Group Health more flexibility than if Group Health made available all Code section 403(b)(7) programs, now in existence, sponsored by open-ended mutual funds. You also state that, to Group Health's knowledge, there are no Code section 403(b)(7) programs offered by close-ended mutual funds. You also state that use of the Agreement will result in a reduced cost for Group Health's employees and that investment decisions will be easier.

Under the Agreement, TSA contributions made by Group Health on behalf of employees with whom it has entered into salary reduction agreements will be made to the custodial account program. If an employee has not given the custodian any investment direction, the custodian will invest the contributions held for that employee in a money market mutual fund it selects. Alternatively, the employee may direct the custodian to invest the contributions in virtually any mutual fund he or she selects. An "independent service provider" will perform all accounting services and the custodian will be limited to holding title to the investments on behalf of each employee.

You note that Group Health will perform the following acts under the Agreement: a) sign the Agreement itself, b) select a custodian and a record-keeper, c) approve brokerage firms

through which mutual fund shares may be purchased, d) establish procedures whereby an employee can give investment directions, e) transmit information on one mutual fund to be selected by the custodian to employees, f) close out accounts at brokerage firms that do not comply with procedural rules of the program, g) receive beneficiary designation forms, h) appoint an independent committee and establish the rules under which that committee determines financial hardship and disability, i) agree to the custodian's compensation, j) provide certain warranties and indemnifications to the custodian, and k) be able to amend the Agreement.

Based on the above, you ask whether Group Health would be considered to have established or maintained an employee pension benefit plan within the meaning of section 3(2)(A) of ERISA.

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.

In regulation section 2510.3-2, the Department of Labor (the Department) stated that it would not consider certain programs to constitute employee pension benefit plans within the meaning of section 3(2) of ERISA. Specifically with regard to TSAs, regulation section 2510.3-2(f) provides:

> (f) Tax Sheltered Annuities. For the purpose of Title I of the Act and this chapter a program for the purchase of an annuity contract described in section 403(b) of the Code pursuant to salary reduction agreements or agreements to forego an increase in salary which meets the requirements of 26 CFR 1.403(b)-(3) shall not be "established or maintained by an employer" as that phrase is used in the definition of the terms "employee pension benefit plan" and "pension plan", if
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> (1) participation is completely voluntary for employees;
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> (2) all rights under the annuity contract or custodial account are enforceable solely by the employee, by a beneficiary of such employee, or by any authorized representative of such employee or beneficiary;
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> (3) the sole involvement of the employer, other than pursuant to paragraph (f)(2) above, is limited to any of the following:
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> (i) permitting annuity contractors (which term shall include any agent or broker who offers annuity contracts or who makes available custodial accounts within the meaning of section 403(b)(7) of the Code) to publicize their products to employees;
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> (ii) requesting information concerning proposed funding media, products or annuity contractors;
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> (iii) summarizing or otherwise compiling the information provided with respect to the proposed funding media or products which are made available,

or the annuity contractors whose services are provided, in order to facilitate review and analysis by the employees;
(iv) collecting annuity or custodial account considerations as required by salary reduction agreements or by agreements to forego salary increases, remitting such considerations to annuity contractors and maintaining records of such considerations;
(v) holding in the employer's name one or more group annuity contracts covering its employees;
(vi) before February 7, 1978, to have limited the funding media or products available to employees, or to annuity contractors who could approach employees, to those which, in the judgment of the employer, afforded employees appropriate investment opportunities; or
(vii) after February 6, 1978, limiting the funding media or products available to employees, or the annuity contractors who may approach employees, to a number and selection which is designed to afford employees a reasonable choice in light of all relevant circumstances. Relevant circumstances may include but would not necessarily be limited to, the following types of factors:
(A) the number of employees affected,
(B) the number of contractors who have indicated interest in approaching employees,
(C) the variety of available products,
(D) the terms of the available arrangements,
(E) the administrative burdens and costs to the employer, and
(F) the possible interference with employee performance resulting from direct solicitation by contractors; and
(4) the employer receives no direct or indirect consideration or compensation in cash or otherwise other than reasonable compensation to cover expenses properly and actually incurred by such employer in the performance of the employer's duties pursuant to the salary reduction agreements or agreements to forego salary increases described in this paragraph (f) above.

Based on your representations it would appear that the TSA arrangement described in the Agreement would not be a TSA program described in regulation section 2510.3-2(f). The Agreement appears to be a program designed by Group Health itself (or its agents) and not a program of any TSA contractor. Consequently, Group Health would have exceeded the limitations on an employer's involvement described in regulation section 2510.3-2(f)(3). Additionally, the Department does not view an employer's ability to close accounts with brokerage firms under the program, or to approve brokerage firms with which the custodian will contract to purchase mutual funds as constituting limited involvement of an employer described in that regulation section.

Therefore, the Department is not able to assure you that the TSA arrangement described in the Agreement would not be an employee pension benefit plan covered by title I of ERISA.

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