

U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210



JAN 29 1985

85-04A
Sec. 3(2), 3(1)

Mr. Jerry H. Biederman
Kanter & Eisenberg
Three First National Plaza
Chicago, Illinois 60602

Dear Mr. Biederman:

This is in response to your request for an advisory opinion concerning whether the VMS Employees' Investment Incentive Plan (the Plan) is as "employee benefit plan" within the coverage of title I of the Employee Retirement Income Security Act of 1974 (ERISA).

The Plan, which is not yet adopted, but the documents of which were drafted and submitted with your request, would be an incentive investment plan for employees of the VMS Realty Partners and VMS Realty, Inc. (hereinafter referred to collectively as VMS).

The facts, as you represent them, are as follows:

VMS is a developer and syndicator of commercial, residential, and resort properties throughout the United States. It wishes to adopt the Plan as a means of giving its employees an added incentive to apply their best efforts to its business. In most cases in which it syndicates real property, VMS receives as part of its consideration a "back end position" entitling it to a percentage of cash flow and profit from the property after the other investors have recovered their original investment. In cases where it does not syndicate, it receives a direct participation in the profits and losses of the real estate. Pursuant to the terms of the Plan, VMS intends to organize a limited partnership (hereinafter referred to as Employees' Partnership) each year to invest in the limited partnerships organized by it during that year only. VMS will grant to the Employees' Partnership a percentage, to be determined by VMS, of VMS' interest in each such partnership without cost to the Employees' Partnership. Each employee of the VMS who has completed one year of service on January 1 may elect to participate in the Employees' Partnership without cost to such employee.

VMS will transfer and assign a limited partnership interest in the Employees' Partnership to each eligible employee who wishes to participate in the Plan (Exh. A p.1), in addition to paying his regular compensation. The Plan provides: "The shares of the Employees' Partnership which will be transferred to each employee is based upon the number of years the employee has been

employed by the Company and his salary level" (Exh. A p.6). Each employee who participates in the Employees' Partnership will receive a share of the profits and losses and the distributable cash thereof in the proportion which the number of points he has bears to the aggregate points of all the partners (Exh. B §4.1).

The employees will be required to report the receipt of each year's partnership interest as income for that year by filing an election under section 83(b) of the Internal Revenue Code with the Internal Revenue Service as a condition for participation in the Plan (Exh. A p.6).

Pursuant to the terms of the Partnership Agreement, VMS or an affiliate of VMS will act as the general partner. In the event an employee terminates his employment with VMS prior to completing 5 years of service, the general partner will have the right to repurchase a percentage of his partnership interest in accordance with a schedule provided in the agreement (Exh. B §8.83 p.18).

The term "employee benefit plan" is defined in section 3(3) of ERISA to mean "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

The terms "employee welfare benefit plan" and "employee pension benefit plan" are defined respectively, in section 3(1) and 3(2) of ERISA. Section 3(1) defines an "employee welfare benefit plan" as:

... any plan, fund, or program which was heretofore or is hereafter established or maintained ... for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds or pre-paid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Section 3(2)(A) defines an "employee pension benefit plan" as:

... 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,....

The Plan does not provide benefits which fall within any of the categories of welfare plans set forth in section 3(1) of ERISA and consequently is not a welfare plan under the Act.

You represent that the Plan provides for a current transfer of income and the reporting thereof for tax purposes by the employees making an election under §83(b) of the Code, and therefore does not provide for a deferral of income. You indicate that in the event the employee does not file a §83(b) election due to circumstances beyond the control of VMS, VMS does not believe that any deferral of income is likely to coincide with the termination of employment or retirement.

Based on these representations, the Plan is not by its express terms an employee pension benefit plan within the meaning of §3(2)(A) of ERISA.

Under §3(2)(A) of ERISA, a plan may be an employee pension benefit plan as a result of surrounding circumstances. While we have no reason to believe, based on the representations in your submission, that the Plan would be a pension plan as a result of surrounding circumstances, plan fiduciaries should be aware of the possibility that, if as result of surrounding circumstances payments are deferred until the termination of employment, or so as to provide retirement income, the plan might be deemed to be a pension plan and therefore subject to 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 opinion.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations