U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

MAY 8 1990

90-14A
Sec. 201(2), 301(a)(3), 401(a)(1)

Mr. Arnold J. Zurcher, Jr.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10038

Dear Mr. Zurcher:

This is in response to your request, on behalf of the CSX Corporation (CSX), for an advisory opinion concerning the application of Title I of the Employee Retirement Income Security Act (ERISA) to a nonqualified plan of deferred compensation which CSX proposes to adopt and maintain primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

Your letter contains the following representations relevant to your request. CSX proposes to adopt and maintain a deferred compensation plan (the Plan) for certain of its employees. The Plan would not be qualified under section 401(a) of the Internal Revenue Code (the Code). Employees of CSX eligible to participate in the Plan would be limited to "a select group of management or highly compensated employees", within the meaning of sections 201(2), 301(a)(3), and 401(a)(l) of ERISA. In addition to requiring that CSX agree to pay certain amounts as deferred compensation, computed under the terms of the Plan, at times specified in the Plan, the Plan provisions would afford participants an election to instruct CSX to defer a stated percentage of their compensation and to pay such amounts in the future at the same time as CSX is obligated to pay other amounts deferred under the Plan. Only compensation earned after the Plan's effective date would be deferred.

You indicate that the employee-participants' elections would be required to be made prior to the beginning of the period of service (typically the calendar year) for which the compensation would otherwise be payable and, once made, would be irrevocable. CSX would be contractually liable to pay the amounts of compensation deferred under the terms of the Plan, including the elective deferrals. You represent that CSX's promise to pay such amounts would not be secured, and that employee-participants in the Plan would have no interest in the assets of CSX, other than as unsecured general creditors. All amounts payable pursuant to the terms of the Plan would be payable from the general assets of CSX, which would be subject to claims of CSX's general creditors, as well as the claims of participants.

With respect to the Plan, you have requested that the Department find that: (1) the Plan will not fail to be "unfunded" solely because the Plan permits employee-participants to elect to have payment of a stated percentage of their compensation deferred under the Plan; and (2) 29 CFR 2510.3-102 does not apply to amounts of compensation subject to such deferral elections. We believe the following guidance is responsive to your request.

Sections 201(2), 301(a)(3), and 401(a)(1) provide an exclusion from the requirements of Parts 2, 3 and 4 of Title I (pertaining to participation, vesting, funding and fiduciary responsibilities, respectively) for "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" (commonly referred to as a "top-hat" plan). It is the view of the Department that in providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.[1]

In addition to limiting participation to a "select group of management or highly compensated employees", a "top-hat" plan, within the meaning of sections 201(2), 301(a)(3), and 401(a)(1), must also be "unfunded". The Department has expressed the view that any determination with respect to the "funded" or "unfunded" status of a plan of deferred compensation requires an examination of the surrounding facts and circumstances, including the status of the arrangement under relevant non-ERISA law.[2] In this regard, the Department, in addressing the issue as to whether "top-hat" plans (or excess benefit plans) would fail to be "unfunded" solely because certain "rabbi trusts" are maintained in connection therewith, the Department indicated that, in the absence of pertinent legislative history defining the term "unfunded" for purposes of Title I of ERISA, significant weight should be accorded under Title I to the positions adopted by the Internal Revenue Service (the Service)[3] Similarly, in the absence of an ERISA regulation defining a "top-hat" plan, it is the view of the Department that the positions adopted by the Service with respect to deferred compensation arrangements should be accorded weight in determining whether a "top-hat" plan is "unfunded" for purposes of Title I.

29 CFR 2510.3-102 defines when certain monies which a participant pays to or has withheld by an employer, for contribution to an employee benefit plan constitute "plan assets" for purposes of Title I of ERISA and the related prohibited transaction provisions of the Internal Revenue Code (53 Fed. Reg. 17628, May 17, 1988). The regulation does not define the concept of what constitutes an "unfunded" plan for purposes of Title I of ERISA, which is relevant only with respect to two types of plans, "top-hat" plans (which by definition are "unfunded") and "unfunded" excess benefit plans.[4] Accordingly, it is the view of the Department that 29 CFR 2510.3-102 is not relevant to these types of plans and does not apply to amounts of compensation subject to deferral elections made pursuant to such plans. Similarly, it is the view of the Department that a plan which would otherwise be a bona fide "top-hat" plan or "unfunded" excess benefit plan would not fail to be "unfunded" solely because the plan permits employee-participants to elect to defer a certain percentage of their compensation.

This letter constitutes an advisory opinion under ERISA Procedure 76-1.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

[1] It also is the Department's position that the term "primarily", as used in the phrase "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" in sections 201(2), 301(a)(3) and 401(a)(1), refers to the purpose of the plan (i.e., the benefits provided) and not the participant composition of the plan. Therefore, a plan which extends coverage beyond "a select group of management or highly compensated employees" would not constitute a "top hat" plan for purposes of Parts 2, 3 and 4 of Title I of ERISA.

[2] See: Letter from Elliot I. Daniel, Assistant Administrator for Regulations and Interpretations, Pension and Welfare Benefits Administration, to Richard H. Manfreda, Chief, Individual Income Tax Branch, Internal Revenue Service, dated December 13, 1985.

[3] Id.

[4] ERISA section 3(36) defines an "excess benefit" plan as "a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of the Internal Revenue Code of 1954 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan."