U.S. Department of Labor

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

OCT 27 1992

92-22A
Section 401(b)

Mr. Joseph R. Simone
Schulte Roth & Zabel
900 Third Avenue
New York, NY 10022

Dear Mr. Simone:

This is in response to your request for an advisory opinion on behalf of Marsh & McLennan, Inc. (the Broker), an insurance broker. Specifically, you have asked the Department of Labor (the Department) to issue an advisory opinion that, under the arrangement proposed by the Broker, the cash value element of a split-dollar life insurance policy will not be a plan asset for purposes of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).

You indicate that the term "split dollar" life insurance generally refers to a variety of arrangements between an employer and an employee whereby interests in and proceeds payable under a whole life insurance policy are split, and premiums may be split. The particular arrangements concerning the respective rights and obligations of employer and employee may vary. In your opinion request, you describe a proposed arrangement whereby General American Life Insurance Company (the Carrier) will issue a split dollar life insurance policy (the Policy) to a prospective employer (the Employer) that sponsors an employee death benefit plan (the Plan). Under the current Plan, employees pay for coverage under a group term life insurance policy. You indicate that the Employer proposes to use the new "split dollar" Policy to provide a source of funding under the existing Plan, or under a new plan. In either case, employee participation in the arrangement will be entirely voluntary.

You represent that each employee electing to participate in the proposed arrangement will have the right to elect a specific amount of life insurance coverage (the Death Benefit) and to designate the beneficiary of the Death Benefit. The employee will be responsible for paying a premium equal to the mortality charges and required administrative expenses for the Death Benefit level selected. Employees will pay the required premium through payroll deduction while in service and, thereafter, through direct payment to the Carrier. Death Benefit premiums will be placed in the Carrier's general assets account. The Policy will expressly guarantee the Death Benefit as the face amount of the Policy, and will incorporate a split dollar endorsement under which each participating employee will become a party to the Policy and will have the right to enforce it against the Employer and the Carrier.

You further represent that an independent fiduciary will be retained by the Employer to make the initial selection of the Policy on behalf of the Plan. The decision to provide coverage under the Policy will be based on a comparison of the rates and terms available under the death benefit element of the Policy with the rates and terms available with respect to other commercially available insurance products. The independent fiduciary will be retained to negotiate the terms of the coverage and the participants' premium rates, including the allocation of administrative expenses between the Employer and the Plan. In addition, the independent fiduciary will have the authority, independent of the Employer, and at reasonable intervals, to terminate the Plan's participation in the Policy if it determines that the rates are no longer favorable to the Plan.

You represent that the Employer, at its discretion, can make additional premium payments and thereby increase the proceeds payable under the Policy by an amount in addition to the Death Benefit (the Cash Value Element). There is

no requirement under the Policy that the employer invest any particular amount in the Cash Value Element, nor participate in the Cash Value Element for any particular period of time. The Employer will be the beneficiary of the Cash Value Element and, to the extent permitted under the terms of the Policy, will be able to borrow against or withdraw all or a portion of the Cash Value Element. The Cash Value Element will, in accordance with state law, be subject to the claims of the Employer's creditors. Participating employees will have no rights with respect to the Cash Value Element, the Cash Value Element will not be pledged to provide any Death Benefit, and no contribution by any employee will be used to fund the Cash Value Element.

You further represent that the Death Benefit portion and the Cash Value Element of the Policy will be fully and independently supported by their respective premium structures. The Cash Value Element of the Policy will be provided through investment in a separate investment account created by the Carrier, and thus can vary based on the investment experience of the separate account. The insured employee's Death Benefit, however, will be supported by the Carrier's general asset account and will remain a fixed obligation of the Carrier. The Death Benefit and Cash Value Element of the Policy will each be maintained by separate records indicating the amount of employee premiums and Employer contributions respectively, and a written statement reflecting these contributions will be provided to the Employer on a regular basis.

You state that any action by the Employer with respect to the Policy -- including borrowing against or withdrawing all or a portion of the Cash Value Element, discontinuing participation in the Policy or surrendering the Policy -- will not affect the employee's right to continue to pay for and receive the selected Death Benefit. An individual's coverage under the Policy will be subject to termination only upon the employee's express written waiver or, in the case of individuals who are no longer active employees, upon failure to pay required premiums to the Carrier.

You further state that the benefit that will be available to the Employer under the Policy will be no greater than that available under traditional corporate owned life insurance. In this regard, the Carrier issuing the Policy will not provide the Employer any reduction in the administrative expenses, or any other expense attributable to the management of the Cash Value Element of the Policy, that is related to the purchase of the Death Benefit.

You represent that the proposed arrangement offers a number of advantages to employees. Unlike standard individual life insurance policies which require proof of insurability, the Death Benefit under the proposed arrangement will be available on a "guaranteed issue" basis, so that employees will not have to take a physical examination and will be eligible to participate regardless of their health. You also represent that the premiums that participating employees will be required to pay under the arrangement will be substantially less than the premiums required for the same coverage under the Plan's current group term life insurance policy. In addition, the Death Benefit will be portable. If an employee terminated employment or retired, or if the Policy is not continued by the Employer, the employee will be entitled to maintain the Death Benefit and will be billed directly by the Carrier for the applicable premiums. The rates utilized to establish employee premiums will be the same for all participating individuals, regardless of whether they are active employees or have terminated employment.

You further represent that the Plan will make full disclosure to eligible employees regarding their rights and responsibilities under the Policy to assist them in their decision whether to participate in the arrangement. In this regard, the plan description provided to employees will include a table showing the premium rates and loads, as well as the income tax consequences, that employees will incur if they participate in the Plan, and compare them with the cost and tax treatment of the life insurance coverage currently available to participants. As will be stated in the plan description, rates quoted to employees will be based upon the Carrier's unisex rates for individuals and subject to change by the Carrier due to adverse mortality experience. The Broker indicates that employee premiums for each year will be guaranteed at the rates negotiated. Employees will be notified of the applicable premium rates a reasonable time in advance of any election period to permit them to make an informed decision regarding participation in the Plan.

You state that the plan description will also delineate the rights of the Employer under the Policy. Employees thus will be expressly informed that the Cash Value Element will be payable only to the Employer, who will own the Cash Value Element; that neither the Plan nor any participant or beneficiary of the Plan will have any preferential claim against, or beneficial interest in the Cash Value Element of the Policy; and that the Cash Value Element will not be used to provide or secure the payment of benefits under the Plan.

You request an advisory opinion that, under the facts outlined above, the Cash Value Element of the split dollar life insurance policy will not be considered a "plan asset" for purposes of Title I of ERISA.

The provisions of ERISA do not expressly define the types of property that will be regarded as "assets" of an employee benefit plan. However, section 401(b) of ERISA describes certain types of property which will not be regarded as plan assets, even though a plan might be viewed as having an interest in such property. In light of these provisions, the Department promulgated the plan assets-plan investment regulation (29 C.F.R. 2510.3-101), which addresses when the assets of employee benefit plans include an interest in the underlying assets of corporations, partnerships or other entities in which they invest.[1]

In situations outside the scope of the plan assets-plan investments regulation, the assets of a plan generally are to be identified on the basis of ordinary notions of property rights. In general, the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest. The identification of plan assets would therefore include consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved.

In Advisory Opinion 92-02A (January 17, 1992), the Department took the position that, under the particular circumstances involved in that case, a stop loss insurance policy purchased by a single employer plan sponsor to meet the employer's liabilities under a medical benefit plan did not constitute plan assets. Among other things, that determination was based on the fact that the employer, and not the plan, retained all rights of ownership under the policy. The employer was named as the beneficiary of the policy; neither the plan nor any participant or beneficiary had any preferred claim against the policy or any beneficial ownership interest in the policy; there was no representation to any participant or beneficiary that the policy would be used to provide plan benefits or that it in any way represented security for the payment of benefits; the plan benefits were not limited or governed in any way by the amount of the insurance proceeds; and employee contributions were not expended toward the purchase of the policy.

You have made similar representations regarding each of these factors with respect to the Cash Value Element of the Policy in this case. Therefore, based solely on the representations contained in your opinion letter request, it appears

[1] The Department also promulgated a plan assets-participant contribution regulation (29 C.F.R. 2510.3-102), which provides that amounts that a participant pays to or has withheld by an employer for contribution to a plan become plan assets as of the earliest date they can reasonably be segregated from the employer's general assets, but in no event later than 90 days. You have not specifically inquired about the fiduciary responsibilities with respect to the participant contributions in this case. The Department notes, however, that the regulation contemplates that all amounts that a participant pays to or has withheld by an employer for purposes of obtaining benefits under a plan will constitute plan assets without regard to when related plan expenses or benefits are paid by the employer. Accordingly, at such time as the participant contributions can reasonably be segregated from the employer's general assets and, therefore, constitute plan assets, plan fiduciaries are obligated under ERISA to treat those assets as any other assets of the plan.

that the Cash Value Element of the Policy, standing alone, will not be a "plan asset" for purposes of Title I of ERISA.

The Department wishes to point out that ERISA's general standards of fiduciary conduct would apply to the selection and retention of the Policy. Section 404(a)(1)(A) of ERISA provides, in part, that a fiduciary of a plan shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. Section 404(a)(1)(B) requires a fiduciary to discharge his or her duties with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Section 406(a)(1)(D) provides that a plan fiduciary shall not cause the plan to engage in a transaction if he or she knows or should know that the transaction constitutes a direct or indirect use by or for the benefit of a party in interest of any assets of the plan. Section 406(b)(1) further prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his or her own interest or for his or her own account. Section 406(b)(2) prohibits a fiduciary with respect to a plan from acting in any capacity in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan. Section 406(b)(3) prohibits a fiduciary with respect to a plan from receiving consideration from a party dealing with the plan in connection with a transaction involving the assets of the plan.

You represent, however, that the premiums for the Death Benefit portion and the Cash Value Element of the Policy are completely independent, the Employer does not receive any greater benefit than that available under traditional corporate owned life insurance and does not receive any diminution in fees and expenses in connection with the Cash Value Element on account of the purchase and retention of the Death Benefit. Further, an independent fiduciary has the authority to select the split dollar policy as a funding mechanism for the Plan, the authority to periodically negotiate the premium rates for the Plan participants, and the authority, to be exercised at reasonable intervals, to terminate the Plan's involvement with the Policy.

Based on these representations, it is the Department's view that the use of the split dollar policy, as described above, does not in itself appear to violate section 406(a)(1)(D), or sections 406(b)(1), (2), or (3) of ERISA. The use of the Policy to fund the Death Benefit does not appear to provide any direct or indirect benefit to the Employer, nor does it appear that the Employer can use its authority as plan fiduciary to effect transactions in its own interest, nor can it be said the arrangement permits the Employer to be involved in a transaction with the Plan in which the employer is acting on its own behalf. Further, it does not appear that the Employer will receive any consideration from the insurance broker or carrier in connection with any transactions involving the Policy.

Furthermore, a plan fiduciary may, under appropriate facts and circumstances, provide benefits under a death benefit plan through a life insurance policy whose cash value element belongs exclusively to the sponsoring employer, without violating the requirements that the selection (and retention) of the policy be prudent and be made solely in the interest, and for the exclusive purpose, of providing benefits for plan participants and beneficiaries. However, if a split dollar life insurance policy were selected to fund a death benefit plan without due regard to both the cost to the plan of the pure insurance and the financial soundness and claims paying ability of the insurer; or if such a policy were acquired for the benefit of the employer, this would not meet the standards of section 404 of Title I of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, Aug. 27, 1976). Section 10 of the Procedure explains the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director, Office of Regulations and Interpretations