

Comments Regarding ERISA Procedure 76-1: Procedure for ERISA Advisory Opinions

October 27, 2000

Mr. Robert Doyle
Director of Regulations and Interpretations
Room N-5669
Pension and Welfare Benefits Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C.

Re: Comments Regarding ERISA Procedure 76-1: Procedure for ERISA Advisory Opinions

Dear Mr. Doyle:

The American Society of Pension Actuaries ("ASPPA") requests the Pension and Welfare Benefits Administration ("PWBA") to publicize the availability of ERISA Procedure 76-1 for issues which affect tax-sheltered annuity arrangements ("TSAs") described in Section 403(b) of the Internal Revenue Code (the "Code"), and submits the following comments in support of this request.

ASPPA is a national organization of approximately 3,700 members who provide actuarial, consulting, administrative, legal and other professional services to benefit plans in the United States. ASPPA's mission is to educate benefit plan actuaries, consultants, administrators, and others in the employee benefit community and to preserve and enhance the private retirement system as part of the development of a cohesive and coherent national retirement income policy.

Recommendations

ASPPA proposes that an information bulletin or press release be issued, or other outreach medium be used, to announce to TSA sponsors the availability of the information letter and advisory opinion process to organizations whose employees participate in TSAs. The purpose would be to notify such organizations that the advisory opinion process is available to enable employers to ascertain whether their plans are subject to ERISA Title I requirements. This information bulletin (or press release or other outreach medium) could also serve to remind employers who are uncertain as to whether they are governmental employers of the availability of this procedure to assist in determining, on an individual basis, whether their plans are subject to ERISA Title I requirements.

Background

When ERISA was enacted, a major change to Code Section 403(b) was the expansion of permissible investment vehicles to include mutual funds. With the ever-growing number of investment products available, many employers are faced with an overwhelming number of investment options for their employees' TSA elective deferrals. At the time ERISA Procedure 76-1 was issued, this increase in the number of vendors and their products was not foreseen. The expense of maintaining a TSA which does not place restrictions on the funding media and products available under the TSA can become costly and time-consuming for the organization and could both increase compliance responsibilities for the organization and limit retirement savings opportunities for the employees should the organization determine that continuing the TSA is no longer feasible.

Education

A valuable service provided by the PWBA is the issuance of information letters and advisory opinions pursuant to ERISA Procedure 76-1. The procedure was issued shortly after ERISA was enacted a quarter century ago, but has not been subsequently revised or expanded. An important use of the advisory opinion process is enabling an employer to determine whether a plan which covers its employees is subject to Title I of ERISA.

Organizations whose employees participate in TSAs need to be (and often are) aware that there may be more employer responsibility with respect to TSAs than merely providing vendors access to employees to sell individual annuity contracts. Such organizations have an interest and obligation to ensure that the TSAs which cover their employees are being operated in compliance with all applicable requirements so as to minimize liability for non-compliance and ensure tax-favored retirement benefits for their employees. Although DOL Regulations Sec. 2510.3-2(f) describes the characteristics of TSAs which are not subject to ERISA, the correct application of that regulation is unclear in many situations. Publishing the availability of information letters and advisory opinions to address issues not directly covered by that regulation could improve compliance.

Compliance

ASPPA requests the PWBA to publicize the availability of ERISA Procedure 76-1 in order to encourage employees to comply with ERISA Title I requirements for TSA plans. Specifically, ASPPA requests that the PWBA make employers (plan sponsors) aware that the PWBA will issue information letters or advisory opinions that include the following:

- Whether or not a TSA is considered a pension plan as defined in DOL Regulations Section 2510.3-2(f).
- Whether a particular funding media or product offered to employees constitutes a reasonable choice under DOL Regulations Section 2510.3-2(f)(3)(vii).
- Whether an organization's actions in limiting the number of vendors for the TSA program exceed the "limited involvement" exception to Title I coverage.
- If only one vendor requests the right to sell annuity contracts to an organization's employees, whether the organization has any obligation to solicit other vendors to provide a reasonable choice of investment alternatives.
- Whether adoption of a plan document for a TSA, in recognition of the complexities of TSAs since the Tax Reform Act of 1986 and subsequent legislation, causes a TSA sponsor to exceed the "limited involvement" exception to Title I coverage.
- Whether or not a TSA is subject to the fiduciary and reporting responsibilities under ERISA Title I if the employer ceases contributing to an employer funded plan, or if the TSA is terminated.

ASPPA appreciates the opportunity to provide these comments. Please contact any of the undersigned to discuss these issues.

Very truly yours,

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