P/OPINION 77-10

3(3)

June 2, 1977

Dear :

This is in response to your letters of January 30, and September 2, 1976, requesting an opinion as to whether (named) Insurance Company's Flexible Series Prototype Self-Employed Individual's Retirement Plan is covered by Title I of the Employee Retirement Income Security Act of 1974 (ERISA). I regret the delay in answering, but the press of issuing necessary regulations and other documents of general applicability has unavoidably delayed our response to many inquiries.

According to the facts stated in your letter, (named) Insurance Company, an insurance company licensed to do business in (State) and nine other western states, sponsors an H.R. 10 prototype, adopted by approximately 400 owner-employees, which provides for contributions on either money-purchase or profit-sharing formulas. These plans may cover both owner-employees and common law employees. At the time an owner-employee sets up the plan, your company issues insurance or annuity contracts to each participant which specifically provide his or her retirement benefit. All benefits, current and future, are fully guaranteed by your company under the terms of the contract issued. Each contract, which contains a nontransferable endorsement, is issued in the name of the employee, and the employee is the owner of the contract.

At the time of issue of each contract, you furnish certain other descriptive material, such as a ledger statement and a (State) disclosure statement to further explain the costs, limitations, and values in the contract. On each policy anniversary, your company furnishes the employee with a current summary of the policy to inform the employee of the amount in his or her account.

On the basis of your interpretation of 29 CFR 2510.3-3(d)(2)(ii), it is your belief that the individuals covered under these prototypes are not "participant(s) covered under an employee pension plan," and, therefore, that these plans are not subject to the reporting and disclosure requirements of Title I of ERISA.

Under Department regulations (29 CFR 2510.3-3(b)), the term "employee benefit plan" does not include, for purposes of Title I, any plan in which no employees are participants covered under the plan, as defined in §2510.3-3(d). Thus, H.R. 10 or Keogh plans in which only partners or only a sole proprietor and his or her spouse are participants covered under the plan are not plans covered under Title I of the Act. (See 29 CFR 2510.3-3(c)). However, a Keogh plan in which one or more common law employees are participants covered under the plan is covered under Title I.

§2510.3-3(d)(2)(ii) states, inter alia, that an individual is not a participant covered under an employee pension plan if the "entire benefit rights" of the individual (1) are fully guaranteed by an insurance company licensed to do business in a state, and are legally enforceable by the sole choice of the individual against the insurance company; and (2) a contract, policy, or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual.

The phrase "entire benefit rights" in §2510.3-3(d)(2)(ii) is not satisfied if the employee is continuing to accrue benefits. This section of the regulation covers situations where employment has been severed, where the employee is fully vested and changes into employment not covered by the plan, or where the employee has earned the maximum benefit he can earn under the plan. In such circumstances, a participant with an insurance contract in hand covering all of his or her benefits and providing a right of action against the insurance company would no longer look to the plan for his or her benefits. To require the plan to furnish these participants with plan documents would not serve the purposes of the Act.

On the other hand, participants who continue to accrue benefits and for whom the employer continues to make contributions obviously have a present interest in the plan which Title I of ERISA was designed to protect. Such is the case in your plans. Although the benefit rights for past years under your plans meet the tests of §2510.3-3(d)(2)(ii), these are not the entire benefit rights. Benefits continue to accrue during subsequent years as the employer makes contributions under section VI of the plans. Moreover, section V provides for the continuing application of policy dividends either to increase benefits or reduce the employer contribution.

Therefore, if an employer adopts your prototype and includes common law employees in its coverage, the plan will be covered under Title I.

Sincerely,

GPO 922-115