

U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
Pension and Welfare Benefit Programs
Washington, D.C. 20216



JAN 16 1979

Mr. Andrew J. Donohue
Attorney at Law
Suite 300
120 Wall Street
New York, New York 10005

OPINION 79-5 A

3(2)

Dear Mr. Donohue:

This is in response to your request for an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether First Investors Corporation (FIC) would have an employee pension benefit plan within the meaning of section 3(2) of ERISA if FIC permits its employees to purchase individual retirement accounts (IRAs) funded with shares of First Investors Fund, Inc., a mutual fund which is underwritten by FIC and its affiliate First Investors Management Company, Inc. (FIMCO), and which receives investment advice from FIMCO.

You advise that FIC and its affiliate FIMCO are broker-dealers and members of the National Association of Securities Dealers, Inc. FIC offers investments in eight different mutual funds. FIC and FIMCO are co-underwriters of six mutual funds of which FIMCO is the investment adviser. FIC and FIMCO receive underwriting fees from these six funds. In addition, FIC is paid sales commissions upon sales of shares it sells as a broker-dealer and FIMCO is paid a management fee as the investment adviser. Two of the six funds offer master retirement programs for eligible individuals and companies to adopt. One offers a master corporate plan while the other offers both a master Keogh plan and an IRA plan. You ask whether, if employees of FIC or any of its affiliated companies adopt the latter plan, an employee pension benefit plan would result within the meaning of section 3(2) of ERISA.

You state that the employers will not recommend the IRAs to their employees and that no charges will be made other than those applicable to unrelated persons. In addition, in telephone conversations with representatives of the Department, you indicated that the employers will make no contribution to the IRAs, either directly or indirectly, and that in this connection no employees who adopt IRAs will receive payments of any kind which they would not have received if they had not adopted IRAs.

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Section 3(2) of ERISA 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 -- (A) provides retirement income to employees, or (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

In regulation 29 CFR 2510.3-2 (issued August 15, 1975, copy enclosed) the Department identified certain programs which would not be considered as employee pension benefit plans within the meaning of section 3(2). Specifically, section 2510.3-2(d) of that regulation states:

(d) Individual Retirement Accounts. (1) For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that --

- (i) no contributions are made by the employer or employee association;
- (ii) participation is completely voluntary for employees or members;
- (iii) the sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
- (iv) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

It is the position of the Department of Labor, that, if an employee of FIC or its affiliated companies adopts an IRA plan under the conditions you describe, an employee pension benefit plan would not result within

the meaning of section 3(1) of ERISA. In this regard, although FIC and its affiliate FIMCO underwrite the underlying mutual fund, provide investment advice to the fund and presumably sell the shares in connection with the IRAs as broker-dealer, they engage in these activities in the normal course of their business, rather than in their capacity as employers of the persons adopting the IRAs. Therefore, such activities do not constitute an "involvement" of the type not permitted under section 2510.3-2(d)(iii). Similarly, though FIC and FIMCO might receive underwriting fees, management fees and sales commissions in connection with the use of the mutual fund shares to fund the IRAs, they would receive this compensation for services rendered in their regular business capacity as underwriters, investment adviser, and broker-dealer, rather than in their capacity as employers. Such compensation, therefore, would not represent consideration of the type not permitted under section 2510.3-2(d)(iv).

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 opinions.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Enclosure