

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



FEB 12 1979

Lawrence J. Hass, Esq.
Groom and Nordberg
Suite 450
1775 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

OPINION 79-10 A

3(14)
3(21)
412(a)

Dear Mr. Hass:

This is in response to your requests directed jointly to the Department of Labor (Department) and the Internal Revenue Service (Service) for advisory opinions and rulings under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1954 (Code). By letter dated August 14, 1978, you requested such opinions and rulings on behalf of American Savings & Loan Association (American). By letter dated November 27, 1978, you requested similar opinions and rulings on behalf of Home Savings Association (Home), which is under common ownership with American.

Your first letter contains the following representations. American and Professional Services Incorporated (PSI) intend to offer a program entitled "Utah Pacer" that has been developed by PSI for corporate employee pension benefit plans in the State of Utah. American will offer passbook savings accounts and certificate investment accounts for the investment of assets of plan participants in such program. These accounts will be of the same type as are offered to all customers of American. Participating plans will not be required to be in the form of a prototype plan sponsored by a financial institution. PSI will have sole responsibility for participating plan administration and will be the named fiduciary for plan administration within the meaning of section 402(a) of ERISA and the plan administrator within the meaning of sections 101(a) and 3(16)(A) of ERISA. A participating plan will pay PSI an annual retainer, which is also a minimum annual fee. Any fees or expenses incurred by PSI in excess of the minimum annual fee will be paid by the participating plan in accordance with a published schedule of rates.

Any individual or entity permitted to serve as trustee under the provisions of ERISA may serve as trustee of a participating plan. American will not be an asset custodian or trustee under any participating plan. However, such

-2-

plans must maintain a passbook savings account at American with a minimum balance of \$5.00. A participating plan may deposit additional sums in this or other American accounts, if such action is deemed prudent by the plan trustee. Assets not deposited in American accounts will be invested and reinvested by the trustee in other investment vehicles in any manner permitted by law. Neither American nor PSI will take part in investment decisions. Various types of American accounts will be made available to participating plans, depending on the amount invested. Evidence of ownership of American accounts attributable to a participating plan will be issued in the name of the plan trustee. Individual participant bookkeeping accounts will be maintained by PSI. In accordance with its normal practices, American will provide information reports relating to American accounts to the plan trustee with respect to deposits, withdrawals and interest paid.

If a participating plan maintains a passbook savings account at American with a minimum balance of \$1,000.00, American will reimburse the trustee of the participating plan for all or part of the fee paid by the plan to PSI. The amount of the reimbursement will be based upon the amount that a participating plan has on deposit in American passbook accounts. The amount of the reimbursement will be at a minimum rate of \$10 per \$1,000 in a passbook account. The actual rate will be specified in a written agreement between the trustee of a participating plan and American providing for reimbursement to the trustee of the participating plan of the fee paid by the plan to PSI. Although the reimbursement rate will be no less than the above-referenced rate, at its discretion, American may reimburse the trustee of a participating plan at a greater rate than that specified above. American accounts are subject to regulation by the Utah Savings and Loan Commissioner.

You further state that American is not otherwise affiliated with PSI or any of its affiliates. American and PSI are free to participate in similar programs with other persons and entities. Neither American nor PSI will be authorized legally to commit the other in any connection. None of the shareholders, officers, directors, employees, or their "relatives" (as this term is defined in section 3(15) of ERISA) of PSI or any of its affiliates are shareholders, officers, directors, employees, or their "relatives" of

-3-

American or any of its affiliates. Similarly, none of the shareholders, officers, directors, employees, or their "relatives" of American or any of its affiliates are shareholders, officers, directors, employees, or their "relatives" of PSI or any of its affiliates. Furthermore, no partnership or joint venture exists between PSI or any of its affiliates and American or any of its affiliates.

You request the following opinions and rulings:

1. American is not a "fiduciary" within the meaning of section 3(21) of ERISA with respect to plans participating in the Utah Pacer program.
2. American is not a "party in interest" within the meaning of section 3(14) of ERISA with respect to plans participating in the Utah Pacer program.
3. American is not a "plan official" of participating plans within the meaning of section 412(a) of ERISA and is not, therefore, subject to the bonding requirements of that section with respect to plans participating in the Utah Pacer program.

Regarding the question of whether or not American is a "fiduciary" as defined in section 3(21) of ERISA, you represent that American will exercise no discretionary authority or discretionary control with respect to the management of a participating plan and will not exercise any authority or control with respect to the management or disposition of the assets of a participating plan. American's relationship with respect to a participating plan is that of a debtor/creditor by virtue of the fact that American will be obligated to repay to a participating plan the amounts deposited in the American accounts, plus interest. In addition, American will be obligated to reimburse the trustee of a participating plan for any fees paid to PSI that qualify for reimbursement. American will have no discretionary authority or control with respect to the decision to deposit assets in American accounts, the type of American account in which a participating plan will make deposits, or the investment of plan assets in other investment vehicles. These decisions will be outside of the

-4-

authority or control of American and will be in the control of the trustee or the plan sponsor of a participating plan.

You further represent that American will not be rendering investment advice for a fee or other compensation with respect to any assets of the participating plans and will have no authority or responsibility to render any investment advice. American merely will provide the information to plan participants and plan sponsors concerning American accounts that is ordinarily provided to customers with respect to such accounts. Department of Labor regulation section 2510.3-21(c) clarifies the definition of "fiduciary" with respect to the rendering of investment advice. This regulation provides, in relevant part, that a person shall not be deemed to be rendering "investment advice" to an employee benefit plan unless there is a mutual agreement, arrangement or understanding under which such person will render advice to a plan on a regular basis with such advice serving a primary basis for investment decisions with respect to plan assets. There will be no such mutual agreement, arrangement or understanding between American and a participating plan.

In addition, you state that American will have no discretionary authority or responsibility in connection with the administration of a participating plan. Such authority will be given to PSI. There is no arrangement between PSI or any of its affiliates and American or any of its affiliates under which American or any of its affiliates will have any discretionary authority or responsibility with respect to the administration of any of the participating plans.

Regarding the question of whether or not American is a party in interest as defined in section 3(14) of ERISA, you submit that American is not a party in interest under section 3(14)(A) of ERISA because it will not be a "fiduciary" with respect to a participating plan. American will not be a party in interest under section 3(14)(B) of ERISA as American will not be rendering services to a participating plan. American's activities with respect to a participating plan will be to offer American accounts to such plan, and to reimburse to the trustee of a participating plan fees paid to PSI which qualify for reimbursement. It will not be

-5-

rendering any services to a participating plan that opens and maintains American accounts.

You further submit that American will not be a party in interest within the meaning of section 3(14)(C) or (D) of ERISA because American is not an employer or employee organization, any of whose employees or members will be covered by a participating plan. Additionally, American is not a party in interest under section 3(14)(F) of ERISA because American is not a "relative" (as this term is defined in section 3(15) of ERISA) of any of the individuals described in section 3(14)(A), (B), (C) or (E) of ERISA. Also, American will not be a party in interest under section 3(14)(H) of ERISA because American is not an officer, director or an individual having powers or responsibilities similar to those of officers or directors, a ten percent or more shareholder, or a highly compensated employee of a person described in section 3(14)(B), (C), (D), (E) or (G) of ERISA.

You state that American will not be a party in interest with respect to a participating plan under section 3(14)(E), (G) or (I) of ERISA. The relationships required under these sections of ERISA do not exist in this situation. In addition, the arrangement between PSI and American is not a partnership or joint venture. You point out that it is a well recognized legal requirement that a sharing of profits and losses must exist in order for a partnership or joint venture to exist between two parties (Treas. Reg. section 301.7701-3). PSI's and American's income from Utah Pacer will not be pooled and expenses will not be shared. American's reimbursement arrangement is to reimburse participating plan assets, not to reimburse PSI or any other party in interest. In addition, the arrangements are nonexclusive and none of the parties has the authority or power to commit another in any connection.

With respect to the question of whether or not American would be subject to the bonding requirements, you submit that American will not be "handling" participating plan assets. The relationship between American and a participating plan will be that of debtor and creditor because a participating plan's deposit in an American account is, in essence, a loan from the plan to American. American's only obligation to a participating plan will be

-6-

to repay principal amounts deposited in American accounts, pay a stated amount of interest on such principal and to reimburse any reimbursable administrative fees paid by a participating plan to PSI. The plan asset involved in this situation is the American account itself, not the amounts deposited therein.

In your second letter you represent that the facts, representations and legal discussions and analysis set forth in your August 14, 1978, submission are equally applicable to Home and the "Texas Pacer" program except that Home passbook accounts and certificate investment accounts are subject to regulation by the Texas Savings and Loan Commissioner rather than the Utah Commissioner.

Based upon the facts and representations contained in your letters, it is the view of the Department that American and Home, by participating in the Utah and Texas "Pacer" programs in the manner described in your letters, would not be fiduciaries under section 3(21) (A) of ERISA and would not be subject to the bonding requirements of section 412 of ERISA, with respect to any of the plans or transactions described in your letters.

With regard to the fiduciary status of American and Home, neither the fact that plan monies will be held in American or Home accounts nor the fact that American and Home may have assisted in the development of the Utah or Texas "Pacer" programs makes American and Home fiduciaries under section 3(21) (A) of ERISA.

With regard to the bonding requirements,, the monies deposited in American and Home accounts do not constitute plan "funds or other property" as that term is defined in 29 CFR section 464.5, issued under section 13 of the Welfare and Pension Plans Disclosure Act and applicable to ERISA under the temporary bonding regulations. This opinion applies only to American and Home and not to any other person who may be "handling" plan funds or other property.

With respect to the party in interest status of American and Home, the mere holding of plan monies in American or Home accounts does not make American or Home a service provider under section 3(14) (B) of ERISA.

-7-

The Department notes your representations that American and Home are not parties in interest by virtue of sections 3(14)(E), (G), (H) or (I) but provides no opinion with respect to whether American or Home is or would become a party in interest by virtue of the operation of such sections. We assume that you have examined the factual situation carefully and have determined to your satisfaction that neither American nor Home has, or is expected to have, any relationship described in such sections.

This ruling relates only to sections 3(14), 3(21) and 412 of ERISA as they apply to American and Home and not to any other provisions of ERISA. For example, we are expressing no opinion herein with respect to the prudence under section 404(a)(1)(B) of ERISA of any of the transactions described in your letter, nor do we express an opinion as to whether any of the transactions or arrangements described in your letter constitute prohibited transactions under section 406 of ERISA.1/

Section 3(14) and 3(21) of ERISA have parallel provisions in sections 4975(e)(2) and (3) of the Code. Under Reorganization Plan No. 4 of 1978 (Executive Order 12108, 44 FR 1065) effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor, and the Secretary of the Treasury shall be bound by the rulings issued by the Secretary of Labor pursuant to such authority. Accordingly, we conclude that the views set forth above apply also under the Code to the extent that such views relate to Code sections 4975(e)(2) and (3).

Sincerely,

Alan D. Lebowitz
Acting Assistant Administrator
Office of Fiduciary Standards

1/ Further, we wish to note that ERISA section 404(c)(2) exempts the directed trustee of an individual account plan from liability for losses arising out of participant and beneficiary direction. No similar protection is available with respect to investments directed by others.