

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



MAR 19 1979

OPINION 79-20 A

Mr. Anthony A. Lenza
1058 Forest Avenue
Staten Island, New York 10310

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3(2)

Dear Mr. Lenza:

This is in reply to your letter of August 22, 1978, regarding applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the proposed American Society of Travel Agents, Inc. Incentive Compensation Plan (the Plan). Specifically, your inquiry concerns whether the Plan is an employee benefit plan within the meaning of ERISA section 3(3), as further defined by ERISA sections 3(1) and 3(2), and, thus is covered by ERISA title I.

You represent that the proposed Plan provides periodic incentive compensation for managerial and non-managerial employees of the American Society of Travel Agents, Inc. (ASTA), a non-profit organization. The Plan is administered by the Executive Vice President of ASTA under the direction of the Executive Committee. At stated intervals of completed service, participating employees receive accumulated amounts equal to a percentage of annual total salary compensation credited for years of employment with ASTA, plus the earnings thereon. Managerial employees are credited with 5 percent of total annual salary compensation for the first 5 consecutive years of employment, 7 percent for the next 5 consecutive years of employment, and 8 percent for the third consecutive 5-year period of employment and for each 5 consecutive years of employment thereafter. Managerial employees are eligible for distribution of amounts thus credited when the first 5 years of employment after January 1, 1978, are completed and on completion of each succeeding 5-year period of continuing service thereafter. Non-managerial employees are credited with 4 percent of total annual salary compensation after 3 consecutive years of employment, 5 percent after the next 3 consecutive years of employment, and 6 percent after the third consecutive 3-year period of employment and for each 3 consecutive years of employment thereafter. Non-managerial employees are eligible for distribution of amounts thus credited when the first 3 years of continuous service after January 1, 1978, are completed and on completion of each succeeding 3-year period of continuous service thereafter.

Participating employees who terminate employment due to involuntary termination, resignation, death or disability prior to completing an interval of service required for entitlement to a distribution under the Plan ordinarily forfeit all sums credited to them. However,

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the Executive Committee may waive up to 2 years of required service for managerial employees and up to 1 year of required service for non-managerial employees who terminate employment due to death, disability, or other reason. The Plan's waiver of service provision thus allows the Executive Committee to permit, at their discretion, the payment of incentive compensation to deserving employees who die or become disabled or who terminate service with ASTA for other reasons, even though such employees have not completed the entire interval of service required for distribution under the Plan.

ERISA section 3(3) defines the term "employee benefit plan" as " . . . an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

ERISA section 3(1) defines the term "employee welfare 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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Based on the representations set forth in your request for an advisory opinion, it does not appear that the purpose of the Plan is to provide any of the benefits enumerated in section 3(1) of ERISA. Therefore, the Plan is not an employee welfare benefit plan within the meaning of that section.

ERISA section 3(2) defines the term "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." Based on the representations set forth in your request for

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an advisory opinion, it does not appear that the Plan by its express terms provides retirement income or results in a deferral of income for periods extending to the termination of covered employment or beyond. Therefore, it would appear that, by its express terms, the Plan is not an employee pension benefit plan within the meaning of section 3(2) of ERISA. You should note, however, that under section 3(2), a plan may be an employee pension benefit plan as a result of surrounding circumstances. While we have no reason to believe, based on the representations in your submission, that the Plan would be a pension plan as a result of surrounding circumstances, plan fiduciaries should be aware of the possibility that if a pattern should be adopted of delaying payouts until retirement age, this would cause the Plan to be deemed a pension plan.

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