

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



MAY 24 1979

OPINION 79-34 A

Mr. R. Hardin Matthews
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110

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Dear Mr. Matthews:

This is in reply to your letters concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Frederick Wainwright Bradlee Pension Fund and the Seth Sprague Pension Fund (collectively referred to as the Fund). Specifically, you request an advisory opinion to the effect that the Fund does not constitute an "employee benefit plan" as defined in section 3(3) of ERISA.

You represent the following:

In 1916, Frederick Wainwright Bradlee, a member of the Somerset Club (the Club), which is a non-profit social club, gave \$1000 to the trustees of the Club for the purpose of establishing a fund "for the benefit of such employees or ex-employees of the Club, past, present or future, as said (Executive) Committee may direct." In a letter from the President and Treasurer of the Club to Club members dated November 24, 1916, the fund which the Club instituted on acceptance of this gift was referred to as a "Pension Fund" for its employees. In the same letter the officers of the Club appealed to Club members for further subscriptions to the "Pension Fund."

In 1927, shortly after the Club was incorporated, Mr. Bradlee's contribution and subscriptions by other members of the Club were transferred from the Club trustees to the newly formed corporation, which now treats the Fund as a restricted fund of the Club rather than as a separate trust. The income of the Fund is treated by the Club as unrelated business income taxable under section 511 of the Internal Revenue Code. Payments made from the Fund are taxable as income to the recipients. The Club's constitution provides that, in the event the Club shall cease to exist, the assets of the Fund shall be considered as part of the general assets of the Club or returned to the donors as the Executive Committee shall at the time determine. The Fund, consisting of Mr. Bradlee's gift, the gifts

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of other members, and the earnings thereon, now total approximately \$210,000, inclusive of amounts in the Seth Sprague Fund (see below). Benefits of about \$10,000 annually are currently being paid to six former employees of the Club. Benefits may be paid to both retired employees and disabled employees. Amounts paid are determined annually by the Club's Executive Committee with reference to the position held by the employee at the Club, the length of service and financial need. The Executive Committee has complete discretion to terminate or vary payment from the Fund.

In accordance with the present constitution of the Club, a special assessment of up to \$10 per annum per member may be made to eliminate any deficits incurred by the Fund in meeting the amounts of awards made by the Club's Executive Committee. No such special assessments have been levied on members in recent years.

Mr. Seth Sprague, also a member of the Club, by will dated February 15, 1939, and admitted to probate in New York County on March 31, 1941, bequeathed \$5000 to the Club to permit them to establish a fund for the benefit of the Club's employees. Mr. Sprague's will allowed the Board of Governors of the Club complete discretion in applying the income of the proposed fund for the benefit of Club employees. The Seth Sprague Pension Fund, which consists primarily of securities, currently amounts to about \$11,000 and is held by the Club separately from the Frederick Wainwright Bradlee Pension Fund.

Plans, funds or programs established or maintained by an employer for the purpose of providing disability benefits to employees are employee welfare benefit plans within the meaning of ERISA section 3(1). Because the Club acted directly as an employer in instituting and organizing the Fund for the benefit of its employees through its Executive Committee, which determines awards to be made therefrom, and because the Fund provides disability benefits to employees, it is an employee welfare benefit plan within the meaning of ERISA section 3(1).

Plans, funds or programs established or maintained by an employer for the purpose of providing retirement income to employees are employee pension benefit plans within the meaning of ERISA section 3(2) 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 under the plan. As you know, the Department, in regulations section 2510.3-2, has identified certain payments, which would not constitute an employee pension benefit plan within the meaning of ERISA section 3(2). The Department has indicated that

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certain payments to retirees which do not fully conform with the regulations may nevertheless not be part of an employee pension benefit plan. Subsequent to the issuance of this regulation, the Department expressed the view, for example, that certain payments to persons who retired prior to the end of 1976 do not constitute an employee pension benefit plan so long as certain criteria are met. See news release USDL 76-707, April 26, 1976. However, on the basis of the information submitted to us, it would appear that the Fund is an employee pension benefit plan within the meaning of title I of ERISA.

Any plan which is an employee welfare benefit plan or an employee pension benefit plan or any plan which is both an employee welfare benefit plan and an employee pension benefit plan is an "employee benefit plan" within the meaning of ERISA section 3(3). Accordingly, the Fund is an employee benefit plan. In this regard you should note that ERISA section 403(a) requires that, with limited exceptions, all assets of an employee benefit plan shall be held in trust.

In your discussion of the issues raised by your request you contend that Congress did not intend ERISA to apply to the Fund because the activities of the Club are predominantly intrastate. Section 4(a)(1) of ERISA states that, with limited exceptions not relevant here, title I of that act shall apply to any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. You have not requested an advisory opinion with respect to section 4(a)(1) of ERISA nor have you given sufficient information upon which to base such an opinion. However, for your general information, section 3(12) of ERISA defines the term "industry or activity affecting commerce" as any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act of 1947, or the Railway Labor Act. Cases have held that an employer is deemed to be engaged in commerce or in an industry affecting commerce if any of its operations include the purchase of equipment, supplies and material from out-of-state sources, the interstate transmission of information and correspondence, the regular and continual use of instrumentalities of interstate communications, such as the mails, telephone and teletypes, as well as interstate travel on official business. It would appear that the Club, one of whose activities includes the management of a fund with assets of approximately \$210,000.00, would be engaged in activities affecting commerce.

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You have also expressed concern about the expenses of meeting the reporting, disclosure and other administrative requirements of ERISA. In this regard we wish to refer you to regulations sections 2520.104-20, 2520.104-41 and 2520.104-46 which provide limited relief from those requirements for certain small plans.

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. We have considered your request for a conference under section 8 of the procedure and have decided that a conference is not necessary in providing these advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs