



OPINION 80-41A
3(2)

JUL 19, 1980

Mr. Stuart J. Offer
Morrison & Foerster
One Market Plaza
Spear Street Tower
San Francisco, California 94105

Dear Mr. Offer:

This is in response to your letter of May 16, 1979, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether a program of supplemental benefits to former employees by the Crocker National Bank (the Bank) constitutes an employee pension benefit plan within the meaning of ERISA section 3(2).

You advise that the Bank maintains a defined benefit pension plan qualified under section 401(a) of the Internal Revenue Code. In 1970 and 1973 the Bank approved pension supplements to retirees who were advised that the supplements were to be paid from the Bank's general assets subject to annual review by the Board of Directors. On November 28, 1978, the board adopted a resolution authorizing an increase in benefits to be paid to pre-January 1, 1974 retirees or their survivors (Pensioners). The resolution provided that the duration of this latter increase was to "continu[e] until further action by this Committee." The Pensioners were informed of the board's action by its chairman, Thomas R. Wilcox, in a letter dated November 22, 1978. Specifically, the letter informed the Pensioners of the manner of determining, and the amount of, the increase in benefits. The letter also stated that the increase did not affect the increases awarded in 1970 and 1973 or any other increases in benefits which the Pensioners had experienced, and that the supplemental payments were undertaken voluntarily, are not required by law or the terms of the Crocker Pension Plan, and are subject to annual renewal based upon the Bank's earnings. In addition, the letter conveyed to the Pensioners the Bank's expectation "to continue these supplemental payments indefinitely," and the "hope [that] this increase in pension amount, which in many cases exceeds 50% of present payments, will help in the enjoyment of retirement years."

Department of Labor regulation section 2510.3-2 (issued August 15, 1975, copy enclosed) identifies certain payments which will not be considered to be employee pension benefit plans within the meaning of section 3(2) of ERISA. Specifically, regulation section 2510.3-2(e) (the Regulation) provides:

(e) Gratuitous payments to pre-Act retirees.

For purposes of Title I of the Act and this chapter, the term "employee benefit plan" and "pension plan" shall not include voluntary, gratuitous payments by an employer to former employees who separated from the service of the employer if:

- (1) Payments are made out of the general assets of the employer,
- (2) Former employees separated from the service of the employer prior to September 2, 1974,
- (3) Payments made to such employees commenced prior to September 2, 1974, and
- (4) Each former employee receiving such payments is notified annually that the payments are gratuitous and do not constitute a pension plan.

However, since the payments authorized in 1978 did not begin before the date specified in the Regulation, and there is no assurance that the recipients of the payments will receive appropriate disclosure statements annually, these payments do not meet the conditions of the Regulation.

Supplemental payments to retirees which do not fully conform with the Regulation may nevertheless not be part of an employee pension benefit plan. Subsequent to the issuance of the Regulation, the Department expressed the view, for example, that payments outside a pension plan for persons who retire 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 (the Release). However, the payments you describe do not meet the criteria set forth in the Release. Based on the representations made to the Department in connection with your request for an advisory opinion, we are unable to assure you that the payments you describe will not be regarded as a pension plan under title I of ERISA. In addition, information necessary to a determination with respect to the supplements authorized in 1970 and 1973 was not supplied to the Department, and we express no opinion regarding them.

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 this advisory opinion.

Sincerely,

Ian D. Lanoff
Administrator
Pension and Welfare Benefit Programs

Enclosure