



October 12, 1993

Mr. Thomas M. Pollan
Bickerstaff, Heath & Smiley, L.L.P.
San Jacinto Center, Suite 1800
98 San Jacinto Boulevard
Austin, Texas 78701-4039

93-28A
ERISA SECTION
4(b)(1), 3(32)

Dear Mr. Pollan:

This is in reply to your correspondence on behalf of the Capital Metropolitan Transportation Authority (Capital Metro) concerning applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you question whether the Capital Metro Retirement and Savings Plan (formerly known as the Capital Metro 401(k) Plan) (hereinafter, the Plan) is a governmental plan within the meaning of section 3(32) of Title I of ERISA and, thus, excluded from ERISA Title I coverage by section 4(b)(1) of Title I of ERISA.

According to your representations, Capital Metro was established pursuant to a state statute governing creation of metropolitan rapid transit authorities in Texas. Tex. Rev. Civ. Stat. 11 18x. Capital Metro was created for public takeover of the city bus system operated by the City of Austin, Texas (Austin).

Texas statutes provide that a transit authority is a "public body corporate and politic, exercising public and essential governmental functions." Tex. Rev. Civ. Stat. 1118x, section 6(a). Accorded by state statute the right to levy and collect a local sales and use tax, the right of eminent domain, and the power to issue municipal bonds and notes, Texas transit authorities such as Capital Metro, along with other "governmental units" in the state also enjoy limited tort liability. It also appears that Capital Metro is subject to review by the Texas Sunset Advisory Commission and that, for purposes of state workers' compensation statutes, Capital Metro employees are treated as employees of a political subdivision of Texas.

Capital Metro's organization is also prescribed by state statute. It has a board of directors consisting of seven members: five directors are appointed by the city council of Austin, Texas; one, by the Travis County Commissioners Court; and one, by a committee composed of the county judge of Williamson County and the mayors of all municipalities within the Capital Metro area, except Austin.

In 1984, Capital Metro adopted the Plan, at that time, a section 401(k) plan for its employees. On April 7, 1987, Capital Metro received notification of a favorable determination by the Internal Revenue Service (IRS), pending amendment of the plan to conform to specified provisions of the Internal Revenue Code. You represent the Plan later submitted a 1987 amendment to IRS intended to meet IRS requirements concerning Plan amendment.

The Plan is administered by a committee consisting of the Capital Metro assistant general manager, the Capital Metro manager of human resources, one member of the Capital Metro board of directors, and an employee representative from Capital Metro. First City Bank-Austin, N.A. serves as plan trustee.

At its inception, Capital Metro was assigned the contract Austin had with American Transit Corporation (ATC), a private company that hired and provided union drivers and maintenance personnel for the bus system. In 1989, Labor Management Services, Inc. (LMS) replaced ATC as the private company that contracted with Capital Metro. LMS continues to employ both union and non-union personnel. A retirement plan for ATC employees was taken over by LMS for its employees; however, no Capital Metro employees participate in that retirement plan. You also represent that no LMS employees, union or non-union, participate in the Plan which is the subject of this advisory opinion.

Your request for an advisory opinion regarding "governmental plan" status of the Plan involves application of the provisions of sections 4(b)(1) and 3(32) of Title I of ERISA to the facts presented. Section 4(b)(1) of ERISA excludes from coverage under Title I of ERISA any plan which is a "governmental plan" as defined in section 3(32) of ERISA. The term "governmental plan" is defined in section 3(32) of ERISA, in pertinent part, as:

a plan established or maintained for its employees by ... the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Based on the representations in your request for an advisory opinion, it is the position of the Department of Labor (the Department) that Capital Metro is a political subdivision, agency, or instrumentality of state or local government. In addition, it is the Department's opinion that the Plan, as established by Capital Metro for its employees, is a governmental plan within the meaning of section 3(32) of Title I of ERISA. Accordingly, the Plan is excluded by section 4(b)(1) from the requirements of Title I of ERISA.

Although only the Plan is the subject of your request for an advisory opinion, you also state that Capital Metro intends to add a retirement plan. We cannot assure you that any Capital Metro retirement plan which covers employees of LMS, whether union or non-union, would be considered a governmental plan within the meaning of section 3(32).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter relates solely to applicable provisions of Title I of ERISA and therefore, is not determinative of any particular tax treatment under the Internal Revenue Code.

Sincerely,

ROBERT J. DOYLE
Director of Regulations
and Interpretations