U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

August 19, 1994

94-30A
ERISA SECTION 3(2)

Mr. Mark H. Sokolsky
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803

Dear Mr. Sokolsky:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to a tax-sheltered annuity program established pursuant to section 403(b) of the Internal Revenue Code (the Code). Specifically, you ask whether Universities Research Association, Inc. (also known and hereinafter referred to as Fermilab) has established or maintains an employee pension benefit plan within the meaning of section 3(2) of Title I of ERISA with regard to either the "retirement annuity contracts" or the "supplemental retirement annuity contracts" made available to employees of Fermilab under the annuity program.

You represent that Fermilab makes available to its employees, on a voluntary basis, annuity contracts issued by the Teachers Insurance & Annuity Association-College Retirement Equity Fund (TIAA-CREF). You further represent that the annuity contracts qualify as tax-sheltered annuities under section 403(b) of the Code. Employees of Fermilab are permitted under the annuity program to make voluntary contributions to the annuity contracts. In addition, prior to March 1, 1989, Fermilab made contributions to the annuity contracts on behalf of its employees out of its own assets. However, after February 28, 1989, Fermilab ceased making contributions of its own funds. You state that Fermilab does not recommend the annuity contracts to its employees, does not hold the contracts in its name, and does not receive any compensation from TIAA-CREF; that all rights under the annuity contracts are enforceable solely by the employees who own the contracts; and that, except as described below, Fermilab merely remits employee contributions to TIAA-CREF.

You further represent that employees may choose to purchase either retirement annuity contracts or supplemental retirement annuity contracts from TIAA-CREF. Only the supplemental retirement annuity contracts permit in-service withdrawals, and such withdrawals are permitted only on account of disability or financial hardship. To make an in-service withdrawal, an employee must file a request, using a TIAA-CREF form entitled "Request for a Supplemental Retirement Annuities Payment" (the Payment Form).

The instructions for the Payment Form provide that "[i]f your withdrawal is because of disability or hardship, the Plan Representative of your employer must complete and sign Section A or B, whichever is applicable." Under Section A, the form requires the plan representative to certify that the participant "is eligible for a distribution of 403(b) elective deferral accumulation (including post-1988 contributions and earnings) because he/she is disabled as defined by the Internal Revenue Code." Under Section B, the form requires the plan representative to certify that the participant "is eligible for a distribution of post-1988 403(b) elective deferral contributions because he/she has met the definition of financial hardship (as set out in the Internal Revenue Code and regulations)." You represent that Fermilab verifies financial hardship "based on factors it deem[s] appropriate given the employee's circumstances," but requiring only minimum documentation, such as a copy of the requestor's mortgage loan application in the case of a purchase of a residence, to show that the employee is using the distribution in an appropriate manner. You

further state that, since January 1, 1989, only 10 employees of the 549 who own supplemental retirement annuity contracts have requested hardship distributions.[1]

The term "employee pension benefit plan" is defined in section 3(2) of Title I of ERISA to include:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or 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--
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> (i) provides retirement income to employees, or
>
> (ii) 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 under the plan.

In 29 C.F.R. § 2510.3-2, the Department of Labor (the Department) clarified the definition of "employee pension benefit plan" by identifying certain tax-sheltered annuity arrangements that would not constitute employee pension benefit plans, particularly those arrangements with respect to which the employer's involvement is so limited that it does not, in the Department's view, constitute the establishment or maintenance of the program by the employer. In pertinent part, regulation section 2510.3-2(f) provides that a program shall not be "established or maintained by an employer" if:

> (3) the sole involvement of the employer, other than pursuant to paragraph (f)(2) above, is limited to any of the following:
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> (i) permitting annuity contracts (which term shall include any agent or broker who offers annuity contracts or who makes available custodial accounts within the meaning of section 403(b)(7) of the Code) to publicize their products to employees;
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> (ii) requesting information concerning proposed funding media, products or annuity contractors;
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> (iii) summarizing or otherwise compiling the information provided with respect to the proposed funding media or products which are made available, or the annuity contractors whose services are provided, in order to facilitate review and analysis by the employees;
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> (iv) collecting annuity or custodial account considerations as required by salary reduction agreements or by agreements to forgo salary increases, remitting such considerations to annuity contractors and maintaining records of such consideration; [and]
>
> (v) holding in the employer's name one or more group annuity contracts covering its employees . . . .

In connection with our review of your request, we have identified certain areas in which the annuity program does not meet the criteria set forth in regulation section 2510.3-2(f).[2]

First, you have represented that Fermilab formerly made contributions from its own assets to the annuity contracts on behalf of employees. By making such contributions, Fermilab exceeded, at that time, the limited involvement permitted to an employer under subparagraph 2510.3-2(f)(3).

In addition, Fermilab's involvement in the process of determining eligibility for in-service distributions on account of disability or financial hardships under the supplemental retirement annuity contracts requires employer involvement in excess of that contemplated by regulation section 2510.3-2(f)(3). In order for Fermilab to certify an individual's disability or an individual's financial hardship, within the meaning of the Code, Fermilab must evaluate circumstances and exercise its judgment. Its determinations, in effect, control the grant or denial of an important benefit under the program, the right to in-service withdrawals. It is our view that Fermilab, in exercising this control, exceeds the limited involvement contemplated by the regulation. We would view differently an annuity program that was structured to require an employer merely either to certify to the annuity issuer a state of facts within the employer's knowledge as employer, such as an employee's attendance record or compensation level, or to transmit to the annuity issuer another party's certification as to other facts, such as a doctor's certification of the employee's physical condition. An employer's agreement to perform such ministerial duties under an annuity program would not, in our view, constitute involvement in excess of that contemplated by section 2510.3-2(f).

Accordingly, in the case at hand, we are unable to conclude that the supplemental retirement annuity contracts offered to employees of Fermilab are not "established or maintained" by Fermilab within the meaning of section 3(2) of Title I of ERISA.

You request that, in the event the Department declines to opine that the annuity contracts are not established or maintained by Fermilab within the meaning of section 2510.3-2(f), the Department toll the grace period for non-filers, which was originally to expire September 30, 1992, and was further extended to December 31, 1992, for Fermilab during the period this opinion was under consideration. The Department has determined generally not to further extend the grace period and declines to extend the grace period for Fermilab.

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.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations

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[1] You have made no representations regarding the frequency of requests for disability withdrawals or the nature of the process employed in evaluating such requests.

[2] In accordance with the Department's prior practice, we will not opine on whether the particular funding media or products offered to employees under the annuity program constitute a "reasonable choice" within the meaning of regulation subparagraph 2510.3-2(f)(3)(vii).