U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

FEB 27 1996

Mr. Lewis A. Siegel
Siegel Benefit Consultants, Inc.
71 Union Avenue
Rutherford, New Jersey 07070

Dear Mr. Siegel:

This is in reply to your request for information regarding the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to Internal Revenue Service Procedure No. 95-24, which establishes the Tax Sheltered Annuity Voluntary Correction Program (the TVC Program). Specifically, you ask whether an employer that takes advantage of the process provided by TVC Program to correct defects in the tax-qualified status of a tax sheltered annuity program will be considered to have "established" and to "maintain" an employee benefit plan that is covered under Title I of ERISA, based solely on its activities in connection with the TVC Program. We hope that the following information will be helpful.

As set forth in Revenue Procedure No. 95-24, the TVC Program is intended to provide a method through which employers may voluntarily elect to identify and correct "defects" in the operation of tax sheltered annuity programs for their employees that prevent the programs from being tax-qualified under section 403(b) of the Internal Revenue Code (the Code). The TVC Program contemplates a process of negotiation and compromise between an employer and the Internal Revenue Service (IRS) that will result, ultimately, in "full correction" of the identified defects and the IRS's issuance of a "correction statement" that represents the IRS's commitment not to pursue revocation of the income tax treatment accorded the tax sheltered annuity program, provided that the conditions set forth in the correction statement are satisfied in operation.

Participation in the TVC Program is conditioned on an employer's, inter alia, identifying the defects to be corrected; proposing to the IRS corrections for the defects, including "any needed improvements to the plan's administration;" obtaining the cooperation of any other independent entities involved in the program needed to correct the defects; and paying to the IRS a "correction fee" and a "negotiated sanction" imposed under the TVC Program. An employer may also be required to initiate changes in its administrative processes that will obviate the recurrence of the defects, to pay all employment taxes due with respect to the actual ("defective") operation of the program, and to make contributions under the program to rectify past errors in operations.

We note that the tax advantages provided under section 403(b) of the Code are available with respect to arrangements that constitute employee benefit pension plans under section 3(1) of Title I of ERISA, as well as other arrangements that are not included within that definition. The Department of Labor's (the Department's) regulation at 29 C.F.R. section 2510.3-2(f) sets forth criteria by which to determine whether a tax sheltered annuity program is subject to Title I of ERISA.

It is the view of the Department that the activities required of an employer under the TVC Program, in large part, fall within the limits contemplated by the regulation. We note that regulation section 2510.3-2(f) is intended to apply to tax sheltered annuity programs that are qualified under section 403(b) of the Code and that the tax-qualification requirements of section 403(b) of the Code impose administrative and record-keeping obligations on the employer. It is our view, therefore, that to the extent that the TVC Program requires an employer to conduct administrative reviews and to fashion remedies to correct past defective administration of its responsibilities, those activities are subsumed in regulation section 2510.3-2(f), which permits employers, inter alia, to hold group annuity contracts in their names, to act as a representative of their employees in enforcing rights under the group annuity contract, to administer the terms of salary reduction agreements, and to keep records of their activities in so doing.[1] To interpret regulation section 2510.3-2(f) otherwise would deprive it of any effect. It is further our view that the regulation permits employers to negotiate with the IRS, through the TVC Program, and to take the collateral steps necessary to obtain a correction statement, including developing and initiating reforms in administrative procedures governing the tax sheltered annuity program, contacting third parties and obtaining their cooperation in correcting defects, and paying any imposed correction fee and negotiated sanction out of the employer's assets, without exceeding the limits on employer activities contemplated by the regulation. In our view, an employer's payment of a one-time, make-up contribution to a tax sheltered annuity program on behalf of participants who were harmed by past defects in its administration of the program, if the contribution is required as

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[1] We note that in adopting section 2510.3-2(f), the Department indicated that an employer may, under paragraph (f)(2) thereof, exercise rights as representative of its employees under a group annuity contract, at least with respect to amendment of the contract, and that the recordkeeping exception in subparagraph (f)(3)(iv) thereof includes the "employer's maintenance of records relative to the employees' exclusion allowance under section 403(b) of the Code." See 44 Fed. Reg. 23525 (April 20, 1979).

a part of the TVC process, is also included in the administrative processes contemplated by the regulation.

We note, however, that the TVC Program offers an employer considerable flexibility in shaping remedies for tax-qualification defects, including the possibility that an employer may assume direct responsibilities, under the auspices of the TVC Program, either to correct actions of third parties that are not the employer's responsibility under a tax sheltered annuity program, or to undertake on-going duties with regard to a tax sheltered annuity program. It is our view that such responsibilities may not be assumed free of any consideration of whether the employer is thereby establishing and maintaining an ERISA-covered plan. Whether the undertaking of any such responsibilities by an employer will cause the employer to be considered to have established or to maintain a plan that is covered under Title I of ERISA must be analyzed on a case-by-case basis, applying the criteria set forth in 29 C.F.R 2510.3-2(f).[2]

Sincerely

Susan G. Lahne
Chief, Division of Coverage
Office of Regulations and
Interpretations

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[2] See Advisory Opinion No. 94-30A (August 19, 1994), finding, inter alia, that an employer's retention of discretion to determine who is eligible for in-service withdrawals for disability and hardship constituted involvement in a 403(b) annuity program in excess of that contemplated by section 2510.3-2(f).