

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-32A

103

MAR 23 1981

Mr. John M. Connors, President
Pension and Group Services, Inc.
308 Michigan Building
Kalamazoo, Michigan 49006

Dear Mr. Connors:

This is in response to your letter concerning a reporting requirement under the Employee Retirement Income Security Act of 1974 (ERISA) as it applies to three employee welfare benefit plans for which Pension & Group Services, Inc., provides administrative services: the Industrial State Bank and Trust Company Participant Benefit Plan (Bank Plan); L. Perrigo Company Participant Benefit Trust Plan (Perrigo Plan); and Archway Cookies, Inc. Participant Benefit Trust (Archway Plan). We regret that the volume of correspondence concerning ERISA has resulted in a delay in responding to your request.

With regard to all three plans, you inquire as to whether or not a report by an independent qualified public accountant is mandatory.

ERISA section 103(a)(3)(A) states:

... the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report ... are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year

Section 2520.104-46 of Annual Reporting Regulations issued on March 10, 1978 (copy enclosed), provides a waiver of the examination and report of an independent qualified public accountant for welfare and pension plans with fewer than 100 participants. As you state that all three accounts have more than 100 participants, this waiver would not apply.

Section 2520.104-44 of these regulations exempts unfunded and certain insured welfare benefit plans from the requirement to engage an independent qualified public accountant. In order to meet the requirements of this exemption, the benefits provided by such a plan must either (i) be paid solely from the general assets of the employer or employee organization maintaining the plan, or (ii) be provided exclusively through insurance contracts or policies issued by an insurance company or similar organization which is qualified to do business in any State, the premiums for which are paid directly by the employer or employee organization from its general assets or partly from its general assets and partly from contributions by its employees or members.

On the basis of the information you have provided, we are unable to conclude that the Bank Plan may avail itself of the exemption provided by Section 2520.104-44. In your letter of January 10, 1979, you represent that "[t]he Bank maintains a separate checking account to pay claims and expenses." However, according to the Administrative Services Agreement between Pension & Group Services, Inc. and the Bank Plan, a "Plan Account" was established and is maintained by Pension & Group Services, Inc. as a depository for funds of the Bank Plan. The Plan Account is to be used to pay benefits to participants, to pay insurance premiums and to pay a monthly service fee. According to the Agreement, Pension & Group Services, Inc. "shall disburse Plan benefits by checks drawn on the Plan Account ..." and will submit to the plan a monthly accounting of payments made "for the audit and control of Plan funds." In addition, in the event that the Plan Account is diminished as a result of such expenditures, the Bank Plan is required, on a monthly basis, to restore the Plan Account to "the amount specified" in the Agreement, which appears to be \$1,500.00.

Based upon the language of the Administrative Services Agreement, the Bank Plan does not meet the requirements of Section 2520.104-44, since the Plan Account constitutes a separately maintained fund which accumulates reportable plan assets, disburses plan benefits and has liabilities other than insurance contracts or past due insurance premiums.

We feel that an accountant's examination of the books and records of the Bank Plan is appropriate to safeguarding the interests of plan participants. Absent a certified audit, there would be no assurance that the claims and other expenses paid from the Plan Account were within the confines of the plan documents.

According to copies of the plan documents which have been submitted to the Department, both the Perrigo Plan and the Archway Plan utilize trusts for providing benefits to the participants. Both trust agreements state that assets are held for the exclusive purpose of providing plan benefits and shall not inure or revert to the benefit of the Company. According to your submissions, both plans are partially self-insured. The Perrigo Plan is funded in part with employer contributions and in part with employee contributions. On a monthly basis, employee contributions, which you indicate constitute ten percent of the total expenses of the plan, are deducted from employees' paychecks, immediately forwarded to the trust, and immediately used to pay claims. The employer makes monthly payments to cover the balance of the Perrigo Plan's

expenses for that month. In contrast, the trust for the Archway Plan, which is also a contributory plan, maintains a reserve for payment of claims and expenses.

Based on this information, neither Plan would be considered unfunded in the sense that benefits are paid directly from general corporate assets as needed. The Department has taken the position that the presence of a trust into which contributions are deposited, for even a limited period of time, to pay benefits for plan participants indicates that these benefits are not provided solely from the general assets of the employer.¹

Therefore, we are unable to conclude that either of these two plans may avail themselves of the limited exemption provided in section 2520.104-44.

You also inquired about reserve requirements under I.R.S. rules. We are expressing no opinion whether, or to what extent, reserve requirements may apply to these plans. Part 3 of Subtitle B, Title I of ERISA (relating to funding standards) does not apply to employee welfare benefit plans. Any request for advice concerning I.R.S. rulings on the subject of reserve requirements should be directed to the Internal Revenue Service.

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.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

¹ See Advisory Opinion #81-3A, Phoenix Steel Corporation (December 22, 1980).