

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION 81-59A  
SECTION 3(4), 103

JUL 15 1981

Mr. William Kinnunen, Jr.  
Chairman  
Employees' Benefit Fund  
Munising Mill of Kimberly-Clark Corporation  
Munising, Michigan 49862

Dear Mr. Kinnunen:

This is in reply to your letter requesting an advisory opinion concerning the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Employees' Benefit Fund, Munising Mill of Kimberly-Clark Corporation (the Fund). Specifically, you request an opinion regarding whether the Fund is subject to the ERISA and whether an accountant's opinion is necessary as part of the annual report filed by the Fund. Finally, if the Fund's annual report is required to include an accountant's opinion you request that the Department of Labor (the Department) grant an exemption from that requirement.

We have reviewed your correspondence and the documents pertaining to the Fund which you have forwarded to us.<sup>1</sup> From those documents, it appears that the Fund is sponsored by an association of the employees of the Munising Mill, Kimberly-Clark Corporation (the Mill). The object to the Fund is to provide members with interest free loans to secure medical care. The Fund also provides for sick and death benefit payments, and partial refunds of contributions upon retirement minus sick benefit payments collected during employment. The Fund's income consists of a seventy-five cents per month employee contribution from its approximately four hundred members plus receipts from investments. The Fund is managed by a committee of eight employees who serve as the elected representatives of their departments at the Mill. You indicate that the contributions to the plan average \$3,600 per year, while the estimated cost of an initial audit would be \$1,000 to \$1,500, with a minimum cost of \$500 in subsequent years.

With respect to your request concerning whether the Fund is subject to Title I of ERISA, section 4(a) provides, in pertinent part, that "[Title I] shall apply to any employee benefit plan." An

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<sup>1</sup> These include the Fund regulations and the Statement of Finances for December 31, 1975 through 1976.

"employee benefit plan" is defined in section 3(3) of ERISA as "... an employee welfare benefit plan or employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." An "employee welfare benefit plan" is defined in section 3(1) of ERISA to include a plan, fund, or program established or maintained by an employee organization, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, or death (among other benefits). The term "employee organization" is defined in section 3(4) of ERISA to include an employees' beneficiary association organized for the purpose, in whole or in part, of establishing an employee benefit plan. Since the fund was established and is maintained by a formally organized group of Kimberly-Clark employees, and since it provides benefits (including loans) in the event of sickness and death, the Fund is an employee welfare benefit plan, and is subject to the requirements of ERISA Title I applicable to employee welfare benefit plans, including the requirements of Part 1 of Title I (relating to reporting and disclosure), unless exempted.<sup>2</sup>

With respect to your question of whether an accountant's opinion is required, section 103(a)(3)(A) of ERISA provides, in relevant part, that the administrator of an employee benefit plan must engage an independent qualified public accountant to conduct an examination of any financial statements, books and records of the plan 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 published under that section are presented fairly and in conformity with generally accepted accounting principles, and must include the opinion rendered by the accountant in the annual report for the plan (the audit requirement). Since the Fund is an employee benefit plan subject to the provisions of Title I, we believe that the Fund must comply with the audit requirement pursuant to section 103(a)(3)(A) and 29 CFR §2520.103-1, unless an exemption is provided.<sup>3</sup>

You have also requested an exemption from the audit requirement. Section 104(a)(3) provides that the Department may exempt an employee welfare benefit plan from a reporting and

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<sup>2</sup> The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA to include, generally, a plan, fund, or program established or maintained by an employee organization to the extent that such plan, fund, or program provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. While refunds of contributions of up to \$6.00 per year are distributed to employees on retirement under certain circumstances, it does not appear that such refunds would make the fund a pension plan within the meaning of section 3(2), in view of the amount of the refunds and since they apparently do not include earnings from investments and are reduced by any sick benefits drawn.

<sup>3</sup> Although the Department has provided regulations which grant an exemption from the audit requirement for certain classes of plans, the Fund is not a member of any of the exempted classes.

disclosure requirement of Title I, if it determines that the requirement is inappropriate as applied to the plan. If the representations in your letter and accompanying submissions are accurate, compliance with the audit requirement of section 103(a)(3)(A) may be inappropriate in the case of the Fund.

Accordingly, the Department is considering proposing to exempt the Fund from the audit requirement, provided that the Employee Benefit Fund committee agrees to furnish to each participant in the Fund a copy of the notice of proposal of such an exemption that would be published in the Federal Register. The notice would, among other things, indicate that any interested person, including a participant in the Fund, may present his view on the proposed exemption by commenting in writing to the Department. If the Employee Benefit Fund committee agrees to furnish a copy of the notice to each participant, you should so notify the Department in writing at the following address: Office of Reporting and Plan Standards, Pension and Welfare Benefit Programs, Room N-4508, U.S. Department of Labor, Washington, D.C. 20216. If you have any questions which you may wish to discuss with representatives of the Department by telephone, you should call: John Malagrini of the Office of Reporting and Plan Standards on 202-523-8684.

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  
Pension and Welfare Benefit Programs