U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-41A
Sec. 3(1), 3(4), 3(5), 412, 3(16)

AUG 17 1983

Ms. Jane S. Kimball
Stryker, Tams & Dill
33 Washington Street
Newark, New Jersey 07102

Dear Ms. Kimball:

This is in reply to your letter of May 10, 1982, requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you are concerned about the applicability of title I of ERISA to the NJSCPA Insurance Trust.

You advise that the NJSCPA Insurance Trust was created on February 1, 1982, by the New Jersey Society of Certified Public Accountants (NJSCPA) for the purpose of providing its members and their employees life insurance benefits, medical insurance benefits, and other benefits. You state that only "accounting organization Subscribers" or individual members of the NJSCPA may subscribe to the NJSCPA Insurance Trust. The term "accounting organization Subscriber" is used to refer to proprietorships, partnerships, or professional corporations where the proprietor or at least one partner or shareholder-employee is a member of the NJSCPA. Certain dependents, employees of "accounting organization Subscribers," retired members, and dependents of deceased members may also be covered by the program of benefits. The Board of Trustees of the NJSCPA Insurance Trust is appointed by the Board of Trustees of the NJSCPA from the membership of the NJSCPA.

Article III of the NJSCPA Constitution provides:

ARTICLE III MEMBERSHIP

> Class -- There shall be three classes of members: Fellows, Associates, and Honorary Members.
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> Fellows shall be holders of a certificate from the State of New Jersey authorizing them to practice as Certified Public Accountants, or residents of New Jersey who hold a commission or certificate from any other State, territory or territorial possession of the United States or the District of Columbia authorizing them to practice as Certified Public Accountants.
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> Associates shall be:
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> (a) Non-residents of the State of New Jersey, who are holders of certificates issued by any other State, territory or territorial possession of the United States or the District of Columbia to practice as Certified Public Accountants;

(b) Chartered or authorized accountants of other countries;

(c) Fellows or associates, who are no longer in active practice through retirement or who have entered industry, commerce, government or the educational field and consequently allow their license to practice [to] lapse, shall continue as members in their respective classes.

Honorary Members shall be those persons who, upon unanimous nomination by the Board of Trustees and by majority vote of the members present at any annual or special meeting, shall be elected to such class of membership.

Based on the above representations, you ask (1) whether the NJSCPA Insurance Trust constitutes an "employee welfare benefit plan" subject to title I of ERISA, and (2) if not,

a. whether an "accounting organization Subscriber" which constitutes an employer within the meaning of section 3(5) of ERISA and whose employees are covered by the NJSCPA Insurance Trust will be considered to be maintaining an employee welfare benefit plan by participating in the NJSCPA Insurance Trust, and

b. whether the Trustees of the NJSCPA are subject to the bonding requirements of section 412 of ERISA or the reporting and disclosure requirements of part 1 of ERISA in the event such an "accounting organization Subscriber" participates in the NJSCPA Insurance Trust.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

> … any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

The NJSCPA Insurance Trust provides benefits among those identified in section 3(1) of ERISA to its participants. However, to be an employee welfare benefit plan within the meaning of section 3(1), the NJSCPA Insurance Trust, among other criteria, must be established or maintained by an employer, an employee organization, or both.

The terms “employee organization” and “employer” are defined in ERISA sections 3(4) and 3(5) respectively as:

> (4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

> (5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

The Department of Labor (the Department) concurs in your position that the NJSCPA is not an employee organization within the meaning of section 3(4) of ERISA. There is no indication that the NJSCPA exists for the purpose of dealing with employers concerning an employee benefit plan or other matters incidental to employment relationships. Therefore, the NJSCPA does not fall within the first part -- i.e., before the semi-colon -- of the definition contained in section 3(4) of title I of ERISA. Nor is the NJSCPA an employees' beneficiary association within the second part -- i.e., after the semi-colon -- of the definition contained in section 3(4). The Department has previously stated that, among other criteria, membership in an employees' beneficiary association must be conditioned upon the commonality of the members' employment status. However, membership in the NJSCPA is not conditioned upon the members being employees.

Therefore, in order that the NJSCPA Insurance Trust be an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA, NJSCPA must be an employer within the meaning of section 3(5) of title I of ERISA, with respect to the NJSCPA Insurance Trust. However, the Department does not find this is the case.

A group or association such as the one described in your application must be a bona fide group or association of employers in order to meet the definition in section 3(5). A determination of the existence of a bona fide employer group or association must be made on the basis of all relevant facts and circumstances. The following are among the factors which should be considered in making such a decision: the manner in which association members are solicited; identification of persons eligible to participate (and who actually participate) in the association; the presence of a pre-existing relationship among the members; the process by which and the purpose for which the organization was formed; the powers, rights, and privileges of employer members that exist by reason of their employer status; and the identification of the parties who actually control and direct the activities and operations of the association and its benefit program.

The NJSCPA is composed of members who have in common their authorization to practice as certified public accountants and that only such members as are residents of New Jersey are entitled to voting membership in the NJSCPA. It appears that members who are also employers enjoy no special powers, rights, or privileges because of their employer status. It is the Department's position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such a group or association is not a bona fide group or association of employers within the meaning of section 3(5) of ERISA. See Opinions 80-68A (dated December 1, 1980, copy enclosed), and 81-51A (dated June 9, 1981, copy enclosed).[1] Accordingly, it is the Department's position that the NJSCPA would not be an "employer" within the meaning of section 3(5) of ERISA in relation to a program of benefits among those identified in section 3(1) of ERISA and which is offered to the members of the NJSCPA. Further, the NJSCPA Insurance Trust, therefore, would not constitute an employee welfare benefit plan within

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[1] It should be noted that the mere presence of non-employer members will not, in and of itself, vitiate the status of a group or association as an "employer" if such other members have no voting rights in the association and no control over it. See Opinion 80-15A (dated March 14, 1980, copy enclosed).

the meaning of section 3(1) of ERISA.

However, if an employer within the meaning of section 3(5) of ERISA adopts the NJSCPA Insurance Trust for the purpose of providing life and medical insurance benefits for its employees, that employer would have established an employee welfare benefit plan with regard to such employees.

Where an employer is deemed to have established an employee benefit plan within the meaning of section 3(3) of ERISA, the bonding requirements in section 412 of title I of ERISA would be applicable to the plan unless the plan is one under which the only assets from which benefits are paid are the general assets of a union or an employer.

However, the affirmative requirement in section 412(a) of title I of ERISA that plan officials of covered employee benefit plans be bonded is applicable only if the plan officials are "handling" funds or other property of the employee benefit plan concerned. The term "handling", as used in ERISA, encompasses any duty or activity of a plan official with respect to funds or other property of a plan that gives rise to a risk that such funds or other property could be lost in the event of fraud or dishonesty on the part of the plan official, acting alone or in collusion with others.

You represent that the Agreement and Declaration of Trust for the NJSCPA Insurance Trust authorizes the Trustees thereof to receive premium payments from subscribers and disburse those payments to the insurer. The Agreement also authorizes the Trustees to instruct subscribers to forward payments directly to the independent agency servicing the policy which will transmit the payments to the insurer. This latter procedure presently is being followed. A review of the Agreement discloses that the Trustees are authorized to establish reserves for the administration of the NJSCPA Insurance Trust equivalent to 2 month's contributions, and to agree with the insurer to the appointment of one or more persons to sign drafts upon the insurer's bank for the amount of claims payable in accordance with the terms of the insurance policy. The Trustees are also authorized to receive from the insurer all dividends and rate adjustment refunds, to pay the costs of administering the NJSCPA Insurance Trust and to invest assets of the NJSCPA Insurance Trust in such securities as may be legal investments for trustees under the laws of the State of New Jersey.

The Department has issued a temporary regulation (29 C.F.R. §2550.412-1) which, pending issuance of a permanent bonding regulation implementing section 412 of ERISA, incorporates by reference most of the bonding regulations issued under the predecessor statute, the Welfare and Pension Plans Disclosure Act (the WPPDA) and makes them applicable to plan officials under ERISA.

Section 464.6 of the WPPDA bonding regulations discusses the determination of when "funds or other property" belong to a plan. Where the employer establishing the plan is itself the plan administrator, section 464.6(b)(2) provides that contributions made to a plan by such employer and contributions made by withholdings from employees' salaries would normally become "funds or other property" of the plan if and when they are taken out of the general assets of the employer and placed in a special bank account, or investment account, or identified on a separate set of books and records, or paid over to a trustee or used to purchase benefits from an insurance carrier, or otherwise segregated, paid out or used for plan purposes.

Section 464.7 of the WPPDA bonding regulations deals with the subject of "handling" and section 464.7(b)(7) provides that where plan contributions from whatever source are not segregated from the general assets of an employer until payment for the purchase of benefits from an insurer, no bonding would be required except to the extent that monies are returned to the plan by the insurer by way of benefit payments, cash surrender, dividends, credits, or otherwise. Therefore, where funds to purchase benefits are paid directly from the general assets of an employer to the insurer or its agent, there is no return of monies to the NJSCPA Insurance Trust and the NJSCPA Insurance Trust does not maintain any sort of fund for whatever purpose, no "handling" occurs in the operation of the NJSCPA Insurance Trust and no bonding would be required. Moreover, in the Department's view, when an insurer provides a plan with blank drafts drawn on the insurer's bank for use in paying sickness, accident, and surgical benefits, such preparation of drafts would not constitute "handling" of funds of the plan.

On the other hand, if the NJSCPA Insurance Trust does maintain an account for the payment of premiums, administrative expenses or whatever purpose, which account involves "funds or other property" of covered employee benefit plans, the Trustees of the NJSCPA Insurance Trust would be "handling" "funds or other property" of the NJSCPA Insurance Trust by reason of their authority over disbursements and investments (see sections 464.7(b)(4) and 464.7(b)(6)(i)(b) of the WPPDA regulations) and would be required to be bonded in proper amount.

As noted in your letter, part 1 of title I generally imposes reporting and disclosure obligations only upon the "administrator", as defined in title I of ERISA section 3(16), of an employee benefit plan. Because each employer within the meaning of section 3(5) of title I of ERISA adopting the NJSCPA Insurance Trust to provide life and medical insurance benefits for its employees would be viewed as a "plan sponsor", as defined in ERISA section 3(16)(B)(i), with respect to its employee welfare benefit plan, each adopting employer would, in the absence of a designation otherwise, be the "administrator" of its plan and thereby responsible for compliance with the applicable reporting and disclosure requirements of title I of ERISA. Accordingly, unless designated as the "administrator" pursuant to the terms of the instrument under which a plan is operated (see title I of ERISA section 3(16)(A)(i)), the NJSCPA and/or Trustees of the NJSCPA Insurance Trust would not be responsible for compliance with the reporting and disclosure requirements of title I of ERISA with respect to employee welfare benefit plans adopted by subscribing employers.

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,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

Enclosures