

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 84-10A
Sec. 103(a)(3)(A)

FEB 22 1984

Lynn A. Arnhold, Esq.
Corporate Counsel
Pension & Group Services, Inc.
The Haymarket
Suite 400
161 East Michigan Avenue
Kalamazoo, Michigan 49007

Dear Ms. Arnhold:

This is in response to your letter, on behalf of Donnelly Mirrors, Inc., in which you have requested an advisory opinion as to whether the Donnelly Mirrors, Inc. Participant Benefit Plan (the Plan) may avail itself of the limited exemption at 29 CFR §2520.104-44 issued by the Department of Labor (the Department) under the Employee Retirement Income Security Act of 1974 (ERISA). We regret that the volume of correspondence concerning ERISA has resulted in a delay in responding to your request.

Your letter contains the following facts and representations. Donnelly Mirrors, Inc. established the Plan, a self-funded health and welfare benefit plan, on March 1, 1981. There are no employee contributions to the Plan. For purposes of administrative convenience, a checking account, separate from the general corporate account, was established to disburse benefit payments to participants and dependents covered under the Plan, to pay insurance premiums to the carrier for excess risk coverages, and to pay administrative fees and other authorized plan expenses.

With respect to the limited exemption under §2520.104-44, you feel it is significant that there is no asset accumulation in the checking account established for Plan purposes. In this regard, you indicate that a procedure has been established whereby as checks issued from the account are presented to the drawee bank, the bank automatically transfers funds from the general corporate account into the Plan's checking account from which the checks are immediately paid. Thus, you suggest, although a separate checking account exists, it never has any assets; it is simply a conduit from the general account to the payee. Accordingly, you believe that the Plan meets the requirements of the limited exemption under §2520.104-44 because the benefits provided by the Plan are paid "solely from the general assets of the employer."

Section 103(a)(3)(A) of ERISA provides, in relevant part, that the administrator of an employee benefit plan shall 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 are presented fairly in conformity with generally accepted accounting principles.

Section 2520.104-44 exempts certain employee benefit plans from specified reporting requirements, set forth in paragraph (c) thereof, including the requirements relating to the examination and opinion of an independent qualified public accountant under ERISA section 103(a)(3)(A). Pursuant to §2520.104-44, the limited exemption applies, in the case of an employee welfare benefit, only to a plan under the terms of which benefits are to be paid - (i) solely from the general assets of the employer or employee organization maintaining the plan; or (ii) 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 from its general assets, provided that any plan assets held by the insurance company or similar organization are held solely in the general account of such company or organization; or (iii) partly in the manner specified in (i) and partly in the manner specified in (ii).

The Department determined in promulgating §2520.104-44 that it would be inappropriate, and serve no useful disclosure purpose, to require plans which have no assets or liabilities, other than insurance contracts or past due insurance premiums in the case of an insured plan, to prepare financial statements and engage an independent qualified public accountant. On the other hand, the Department also determined that where funds pass through an intermediary trust or other entity, for even a limited period of time, there is an opportunity for fund management that should be subject to financial reporting and accounting.

With regard to the Plan, we note that the amended Plan Document, submitted with your letter of August 23, 1983, provides, at page I-1 under the caption "Funding Policy", that "[p]lan funds shall be held in a Plan Account by the Company. Any amount of money contributed by covered participants shall be held by a Trustee appointed by the Company. The Company shall deposit a sum of money which together with the participants' contributions (if any) shall be sufficient to provide for benefit payments and expenses of the Plan." The amended plan document further provides, at page I-1 under the caption "Termination of Plan", that ". . . all previous contributions by the Company shall continue to be used for the purpose of paying benefits under the provisions of this Plan . . . until all contributions are exhausted."

While you represent in your letter that procedures have been established to avoid the accumulation of assets in the Plan Account, it nonetheless appears, based on the information contained in your letter and on the referenced provisions of the Plan Document, that the Plan Account is a separately maintained fund into which plan assets are deposited, albeit for short periods of time, and from which benefits, insurance premiums, administrative fees and other expenses of the Plan are paid. Because the Plan pays benefits from a separately maintained fund, rather than from the general assets of the employer maintaining the Plan, and has assets and liabilities other than insurance contracts and past due insurance premiums, we are unable to conclude that the Plan is an unfunded welfare plan for purposes of the limited exemption under §2520.104-44. Consequently, it is the opinion of the Department that the Donnelly Mirrors, Inc. Participant Benefit Plan may not avail itself of the limited exemption under §2520.104-44.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (copy enclosed). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs

Enclosure