U.S. Department of Labor

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

JAN 17 1992

92-02A
ERISA SEC. 103(a), (e)
401(b)

Mr. James A. Kinder
Executive Vice President
Self-Insurance Institute of America, Inc.
1700 East Dyer Road, Suite 165
P.O. Box 15466
Santa Ana, California 92705

Dear Mr. Kinder:

This is in response to your letter of March 13, 1991, in which you requested an advisory opinion, on behalf of the members of the Self-Insurance Institute of America, Inc., regarding the definition of plan assets under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you inquire whether, under the circumstances presented, a stop-loss insurance policy purchased by the employer sponsoring a welfare benefit plan that provides benefits exclusively out of the employer's general assets would be an asset of the plan.

In your request you describe a specific situation which you represent is typical of a great number of plans sponsored by employers in your membership. In the case you describe, the employer has established a medical benefit plan (the Plan) whose benefits are paid exclusively out of the employer's general assets. To facilitate the employer in managing its risk associated with its liabilities under the Plan, the employer is considering the purchase of a stop-loss policy (the Policy). Pursuant to the Policy, an insurer agrees to reimburse the employer if, during the Policy year, the employer is required under the Plan to pay claims in excess of a predetermined amount.

You further represent, with regard to the Policy, that: (i) the insurance proceeds will be payable only to the employer, who would be the named insured under the Policy; (ii) the employer would have all rights of ownership under the Policy, and the Policy would be subject to the claims of the employer's creditors; (iii) neither the Plan nor any participant or beneficiary of the Plan would have any preferential claim against the Policy or any beneficial interest in the Policy; (iv) no representations would be made to any participant or beneficiary of the Plan that the Policy will be used to provide benefits under the Plan or that the Policy in any way represents security for the payment of benefits; (v) the benefits associated with the Plan would not be limited or governed in any way by the amount of insurance proceeds received by the employer; and (vi) the Plan does not, and will not, require or allow employee contributions.

You request an advisory opinion as to whether the Policy in this case would be an asset of the Plan; and you further request clarification of certain reporting and disclosure requirements under section 103(a)(2)(A) and 103(e) of ERISA as they apply to the Policy.

Title I of ERISA does not impose funding requirements or standards on employee welfare benefit plans. Accordingly, sponsors of welfare plans can, without violating ERISA, maintain such plans without identifiable plan assets or separate trust property. The benefits under such plans are secured by the general assets of the employer. However, the sponsor's general assets do not become plan assets solely as a result of the employer's promise to pay benefits.

It is the position of the Department that, in situations outside the scope of the plan assets - plan investments regulation (29 C.F.R. 2510.3-101), the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. This identification process includes consideration of any contract or other legal instrument involving the plan, including the plan documents.[1] It also requires the consideration of the actions and representations of the parties involved.

Based on the facts and circumstances submitted in your request, it is the Department's opinion that if the employer purchases and uses the Policy as you have represented, the Policy would not be considered an asset of the Plan. Because the Policy would not be an asset of the Plan and would not provide benefits under the Plan, it would not be required to be reported (on Schedule A) or submitted with the annual report of the Plan in accordance with sections 103(a)(2)(A) and 103(e) of ERISA.

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the Procedure explains the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

[1] Specifically, such consideration must, among other things, take into account whether the plan or other relevant documents, such as a collective bargaining agreement, require the employer to purchase an insurance policy or policies, or whether such documents identify an insurance policy or policies which would be used to satisfy the liabilities of the plan. With respect to this consideration, we note that section 402(b)(1) of ERISA requires that the plan document specify the procedure for establishing and carrying out a funding policy and method. In addition, section 102(b) of ERISA and the regulations thereunder require that the Summary Plan Description describe sources of contributions to the plan and identify any funding medium for the accumulation of assets.