

**U.S. Department of Labor**

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



March 6, 1998

98-02A  
ERISA SEC. 3(2)

Samuel Arthur Butts III  
Manier Herod Hollabaugh & Smith  
First Union Tower  
Suite 2200  
150 Fourth Avenue North  
Nashville, TN 37219-2494

Dear Mr. Butts:

This is in response to your request for an advisory opinion regarding the status of the UT Medical Group, Inc. Key Employee Incentive Plan (Plan). Specifically, you ask whether the Plan should be considered a "bonus plan," rather than a "pension plan" under section 3(2)(A) of the Employee Income Security Act of 1974, as amended (ERISA), and, if the Plan should be considered a pension plan, whether it is a so-called "top hat" plan under ERISA sections 201(2), 301(a)(3), and 401(a)(1).<sup>1</sup>

You represent that the UT Medical Group, Inc. (UTMG) provides medical services primarily through employee-physicians. UTMG would like to establish and maintain the Plan to motivate its physicians to increase revenues and to continue in employment with UTMG. The Plan would not be structured to qualify for any tax benefits under the Internal Revenue Code. The Plan would offer three different types of yearly bonuses. First, each physician would be eligible to receive an individual bonus award amount equal to the percentage of revenue that his or her efforts have gained during a fiscal year in excess of his individual Clinical Revenue Goals (CRGs).<sup>2</sup> Second, a physician can earn a group bonus award if the physician's medical practice department exceeds its applicable departmental performance target. An individual physician's share of such a group bonus award would also be set by negotiation between the physician and his or her department before the beginning of a fiscal year. Third, if a physician's individual and group goals are met, and if all departments of UTMG exceed their targets, a physician will receive a share of a corporate-wide bonus also negotiated in advance.

To receive any fiscal year bonus earned under the Plan, however, a physician must be continuously employed by UTMG for five years after the last day of the fiscal year in which the bonus is earned. If this condition is met, the bonus will be distributed to the physician on the first day of the sixth fiscal year after the year in which the bonus is earned (the distribution date), regardless of whether the physician continues to be employed as of this day or thereafter. Physicians may not extend or delay the distribution date.

Section 3(2)(A) of ERISA provides, in relevant part, that the term "pension plan" includes any plan, fund, or program established or maintained by an employer to the extent that by its express terms or as a result of

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<sup>1</sup> Sections 201(2), 301(a)(3), and 401(a)(1) of ERISA, generally referred to as "top hat plan" provisions, apply to "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."

<sup>2</sup> Each physician would negotiate with UTMG in advance of each fiscal year to establish both his or her applicable bonus percentage and CRG for that fiscal year. Individual physicians' applicable percentages and CRGs would vary, depending on the education, research, and clinical practice goals established by negotiation for each medical practice department.

surrounding circumstances 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. In Department of Labor (Department) regulation at 29 CFR § 2510.3-2(c), the Department described certain programs that do not constitute pension plans within the meaning of section 3(2)(A) because they involve only payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.

The bonus program you described provides that employees who terminate their employment for any reason, including retirement, before the lapse of the five-year period following the last day of the year in which the bonus was earned will forfeit their right to receive such bonus. However, if a physician remains employed continuously during this five-year period, he or she will receive his or her bonus on the first day of the sixth fiscal year, regardless of his or her employment status on such date. You represent that this delay is designed to motivate physicians to continue in employment with UTMG. Because the Plan does not expressly condition distribution of the bonus payments upon termination of employment or retirement, the Plan is not by its express terms a pension plan within the meaning of section 3(2)(A) of ERISA, but rather may function as a bonus program described in regulation section 2510.3-2(c).

You should be aware, however, under section 3(2)(A) of ERISA, a plan, fund, or program which does not by its express terms provide retirement income or result in the deferral of income by employees for periods extending to the termination of covered employment or beyond may be a pension plan if it has these effects as a result of surrounding circumstances. Thus, if payments under a plan are, in operation, systematically deferred until the termination of employment or retirement age, in such case, the plan may be deemed to be a pension plan. For example, the manner in which bonus percentages are negotiated by employees yearly may allocate the economic benefits earned in a year disproportionately to retirees and participants reaching retirement age as defined under the Plan; an inordinate percentage of the bonus recipients may be at one time at or nearly at retirement age; and payments may not be made under the plan often enough or within a reasonable time to avoid their actually serving as retirement income. Furthermore, if the plan is communicated to participants in a manner that causes them to act under the Plan so as to result in their deferring receipt of income until retirement, it may be deemed a pension plan. The question of whether a plan, fund, or program is a pension plan as a result of surrounding circumstances is inherently factual in nature, and generally the Department does not issue advisory opinions on such questions. See section 5.01 of ERISA Procedure 76-1 (41 FR 36281; August 27, 1976), relating to advisory opinions.

The second issue raised by your request is predicated upon a finding that the Plan is a pension plan. Because we do not find, based upon your representations, that the Plan by its express terms is a pension plan, it is unnecessary to address this issue. Moreover, we note that due to the inherently factual nature of such requests, advisory opinions generally will not be issued on the status of a particular plan as a so-called "top-hat" plan within the meaning of sections 201(2), 301(a)(3), and 401(a)(1) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of an advisory opinion.

Sincerely,

John J. Canary  
Chief, Division of Coverage, Reporting & Disclosure  
Office of Regulations and Interpretations