

U.S. Department of Labor

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



Reply to the Attention of:
OPINION NO. 82-54A
Sec. 103(a)(3)(A), 3(4)

OCT 13 1982

Mr. Duane Newland
Sisters of Mercy Health Corporation
28550 Eleven Mile Road
Farmington Hills, Michigan 48018

Re: The Sisters of Mercy Short Term Disability Plan
The Sisters of Mercy Dental Plan
The Sisters of Mercy Health Care Plan
Control No. P-3874A

Dear Mr. Newland:

This is in response to your letter of January 29, 1982 regarding the reporting and disclosure requirements under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an advisory opinion that the above referenced employee welfare benefit plans qualify for the limited exemption from certain annual reporting requirements of ERISA provided by 29 CFR §2520.104-44. You also inquire whether the above referenced plans qualify for the exemption in section 2520.104-44 because of the applicability of proposed regulation section 2550.403b-1(e). Finally, in the event of an unfavorable advisory opinion, you request that the Secretary grant the referenced plans a special limited exemption from the audit requirements of section 103(a)(3)(A) under the authority of section 104(a)(3) of ERISA.

Your request contains the following facts and representations:

The Sisters of Mercy Health Corporation (SMHC) is a not-for-profit multi-unit hospital system sponsored by the Sisters of Mercy Province of Detroit incorporated in the State of Michigan on July 1, 1976. SMHC sponsors the Sisters of Mercy Short Term Disability Plan (the STD Plan), the Sisters of Mercy Dental Plan (the Dental Plan), and the Sisters of Mercy Health Care Plan (the Health Care Plan). As of December 1, 1981 there were 14,800 participants in the Dental Plan, and 9,939 participants in the STD Plan. As of December 31, 1981, there were 14,461 participants in the Health Care Plan. The subject three welfare plans sponsored by SMHC hereafter are referred to collectively as the Plans. The purpose of the Plans is to provide life, sickness, accident or other similar benefits to participating employees of SMHC.

The Plans are funded through the Sisters of Mercy Health Corporation Employee Benefit Trust (the Trust). The Trust is a "voluntary employees' beneficiary association" within the meaning of section 501(c)(9) of the Internal Revenue Code (the Code). The Trust receives monies in the form of both employer and employee contributions on behalf of the Plans.

Claims under the Dental Plan and the STD Plan are administered under an administrative services only agreement with John Hancock Mutual Life Insurance Company (Hancock). Funds sufficient to cover one month's claims under each plan are initially deposited into the Trust Account. A separate checking account also has been established from which Hancock, as a disbursing agent, draws amounts necessary to pay benefit claims as they are processed. No other entity or person is authorized to draw against the account. Hancock notifies the Trustee daily of the amount of benefit checks written against the account. In turn, the Trustee transfers funds from the Trust Account to the checking account in amounts sufficient to cover the checks written by Hancock. The various divisions are invoiced each month by SMHC for the claim payments made on their behalf and remittances are deposited into the Trust Account to cover future claims payments.

Health Care Plan claims are administered pursuant to an administrative services agreement with Blue Cross/Blue Shield and employees' health care claims are administered by the Blue Cross/Blue Shield of that state in which his or her divisional employer is located. Claims are set up under a type of advance deposit arrangement similar to the one for the Dental Plan and the STD Plan. An initial payment equal to claims projected for fifty days is made to an advance deposit fund maintained by Blue Cross/Blue Shield and Blue Cross/Blue Shield sends a monthly invoice to each division of SMHC listing the charges for claims attributable to each division employees. Each division then pays its attributable share of claims to SMHC which in turn remits the aggregate amount to the Trustee. The Trustee then pays the total amount of claims charges due into the advance deposit fund.

No reserves are created under the Plans for incurred-but-not-reported or not-yet-incurred claims. Rather, funds are channeled through the Trust into advance deposit accounts in order to pay reported claims. You state that because the Trust holds contributions for only a short time, the Trust earns very little income.

Section 103(a)(3)(A) of ERISA and 29 CFR §2520.103-1(b) provide, 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 and in conformity with generally accepted accounting principles. Also, unless otherwise exempted, section 103(b) of ERISA and section 2520.103-1(b) require that the annual report shall include a report of an independent qualified public accountant concerning the financial statements and schedules required to be part of the annual report.

29 CFR §2520.104-44, in relevant part, provides a limited exemption from the requirement to engage an independent qualified public accountant for welfare benefit plans 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, (ii) the benefits of which are provided exclusively through insurance contracts or policies issued by an insurance company or similar organization which is qualified to do business in any state, . . . , or (iii) partly in the manner specified in (i) and partly in the manner specified in (ii). The regulation further provides that the plans meeting the conditions for the exemption are not required to complete items 13, 14 and 22 of Form 5500, relating to financial information and transactions entered into by the Plan.

Regarding the question of whether the Plans may avail themselves of the limited exemption set forth in section 2520.104-44, you suggest that because a favorable determination letter from the Internal Revenue Service (IRS) has been issued designating the Trust as a "voluntary employees' beneficiary association" under section 501(c)(9) of the Internal Revenue Code (the Code), the Trust should be deemed to be an "employee organization" within the meaning of section 3(4) of ERISA and §2520.104-44. In this regard you indicate that the Trust was organized as an association for the purpose, in whole or in part, of establishing an employee benefit plan and that the Plans are administered on a "pay-as-you-go" basis from the general assets of the Trust.

The term "employee organization" is defined in section 3(4) of ERISA to mean:

... 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 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.

First, it is the view of the Department that a trust which qualifies as a "voluntary employees' beneficiary association" under section 501(c)(9) of the Code and regulations issued thereunder does not, by virtue of that fact alone, constitute an "employees' beneficiary association" as that phrase is used in section 3(4) of ERISA and, therefore is not necessarily an "employee organization" for purposes of section 3(4) and the limited exemption under §2520.104-44.

Second, an examination of the Sisters of Mercy Employee Benefit Trust agreement reveals the following characteristics of the Trust which are relevant to a determination as to whether the Trust is an "employee organization" within the meaning of section 3(4) of ERISA.

The Trust was established by SMHC on behalf of itself and its affiliated employers as a funding medium for the Plans (emphasis supplied, see page 1 of Trust agreement). The exclusive purpose of the Trust is the providing of benefits to employees of the employers who participate in the Plans (Art. I, §1.02). The plan administrator of each Plan and its delegate have full responsibility for and control of the administration of that Plan (Art. I, §1.05). "Plan Administrator" is defined

to mean the person or persons specified in each Plan or otherwise designated pursuant to section 3(16)(A) of ERISA (Art. I, §1.05).¹ The Trust agreement provides with regard to the investment of Trust fund assets that the Trustee shall comply with any direction given in accordance with Article XI by the plan administrator or SMHC and shall be entitled to presume any directions so given are authorized (Art. III, §3.04(a)). Payments from the Trust by the Trustee are to be made at the direction of the plan administrator of each plan for purposes specified in the Trust agreement (Art. IV, §4.01). SMHC has the right at any time, and from time to time, to modify, alter, amend or revoke the Trust agreement "to any extent and in any respect deemed advisable by SMHC, ..." (Art. XI). Finally, the Trust agreement is executed by the SMHC on behalf of the affiliated employers and by the Trustee, but not by employee representatives.

Because it appears that SMHC (and its affiliates) established, maintains and controls the Trust in those respects relevant to our consideration of this matter and that employees are neither parties to the Trust agreement nor participants in the affairs of the Trust, the Trust is not an employees' beneficiary association, as that phrase is used in section 3(4) of ERISA.² For these reasons and because the Trust does not exist for the purpose of enabling employees to "deal with employers" concerning an "employee benefit plan" we must conclude that the Trust is not an "employee organization" within the meaning of section 3(4) of ERISA. Consequently, we conclude that the Plans may not avail themselves of the limited exemption under section 2520.104-44.

Furthermore, even if the Trust were considered to be an "employee organization," we believe that it is SMHC, and not the Trust, which is the entity "maintaining" the Plans for purposes of section 2520.104-44.

Regarding your request as to whether the Plans are entitled to the limited exemption set forth in section 2520.104-44 regardless of whether the Trust is deemed to be an "employee organization" for purposes of section 3(4) of ERISA, you contend that proposed regulation 2550.403b-1(e) (45 FR 50367, August 28, 1979), relating to the conditional exemption of employee contributions to a welfare plan from the trust requirements under ERISA, is directly relevant in the determination that the Plans do not need to be audited and should qualify for the exemption under section 2520.104-44. Furthermore, you represent that because of the application of proposed regulation §2550.403b-1(e) to the Plans in your request, the Trust is a more protective funding vehicle than required under ERISA, and voluntary implementation of such a trust should not be discouraged

¹ Section 3(16)(A) defines the term "administrator" to mean: (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe. (emphasis supplied).

² It should be noted that this conclusion is solely for the purposes of Title I of ERISA and is not intended to affect the status of the Trust under section 501(c)(9) of the Code.

by the Department's determination that the Plans do not qualify for the limited reporting and disclosure exemption.

In view of our determination above that the Plans are not plans described in section 2520.104-44, we cannot agree with these arguments. We have considered them, however, in connection with your alternative request for an exemption from the audit requirements discussed below.

This part of the letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this part of the letter is issued subject to the provisions thereof relating to the effect of advisory opinions.

Regarding your request for an exemption for the Plans from the audit requirements of section 103(a)(3)(A) and the completion of certain financial information contained on the Form 5500, you contend that a limited exemption corresponding to that contained in §2520.104-44 would provide adequate reporting and disclosure under ERISA for the Plans. Additionally, you contend that the application of the audit requirements under ERISA will increase plan costs and adversely affect the interests of plan participants in the aggregate.

Under section 104(a)(3) of ERISA, the Department may grant an exemption from the reporting and disclosure requirements if it is determined that the requirement is inappropriate. In the preamble to regulation section 2520.104-44, published in the Federal Register on March 10, 1978. (43 FR 10138), the Department expressed its view that the presence of a trust fund through which funds are passed to pay insurance premiums provides an opportunity for investment management, even though for a limited period of time, which should be subject to financial reporting in accordance with the annual reporting requirements under 29 CFR §2520.103-1, et. seq.

We are unable to conclude that the additional cost which may be incurred by the Plans in complying with the audit requirements under section 103(a)(3)(A) would be inappropriate. To the contrary, absent a certified audit, participants would not be assured that the amounts reported by the Trustee as being received and disbursed at the direction of the administrator of the Plans or other authorized party have been properly determined in accordance with the terms of the Plans and that the information included in the financial statements and schedules have been presented in compliance with the Department of Labor requirements for reporting and disclosure under ERISA. Since such assurances are fundamental to the security of plan participants, we are of the opinion they should be certified to by an accountant's examination consistent with generally accepted auditing standards, as required under section 103(a)(3)(A). We are not aware of any distinguishing features of the Plans which would justify granting an exemption from the reporting and audit requirements of ERISA. We, therefore, do not find the requirement to engage an independent qualified public accountant to be inappropriate as it applies to the SMHC Health Care Plan, Dental Plan, and the STD Plan.

As was indicated above, we have considered your argument that the policy reasons underlying proposed regulation section 2550.403b-1(e) should serve as justification for granting the exemption you seek. The regulation section to which you refer, if adopted as proposed, would provide, among other things, that employee contributions to a welfare plan can be held by the employer, under certain specified conditions, without being placed into a trust, before those contributions ultimately are forwarded to the funding medium under the welfare plan.³ However, because the provisions to which you refer (1) do not relate to the reporting and disclosure requirements of ERISA, and (2) are merely proposed regulations that remain under consideration by the Department and, therefore, are subject to change, we cannot agree that the proposed regulations are relevant to a determination that the Plans do not need to be audited.

For the reasons stated above, we are denying your request for an exemption from the audit requirements of section 103(a)(3)(A) of ERISA and for other relief in the nature of that provided under section 2520.104-44.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

³ If adopted as proposed, section 2550.403b-1(e) in relevant part would exempt employee contributions to a welfare plan from the trust requirement under the conditions that (1) such contributions, and any income or profits derived from them, are not held more than three months by the employer or employee organization, (2) all such contributions, any income or profits derived from them, are maintained in a segregated account and identified as plan assets, and (3) the employer or employee organization acknowledges in writing to the plan that it is holding such assets in its capacity as a fiduciary of such plan.