U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-43A
Sec. 3(1), 3(4), 3(5), 3(16)

AUG 23 1983

Mr. Robert J. Tanguay
Group Benefits Consultant
The Wyatt Company
Suite 210
10689 North Kendall Drive
Miami, Florida 33176

Dear Mr. Tanguay:

This is in reply to your letter of March 2, 1982, and subsequent letters concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an advisory opinion concerning a Collective Bargaining Agreement Clinic Plan (the Clinic Plan) and the Collective Bargaining Agreement Blue Cross Plan (the Blue Cross Plan). The covered employees work under a collective bargaining agreement between the Bacardi Corporation, San Juan, Puerto Rico (the Company), and the Congress of Industrial Unions of Puerto Rico (the Union). You question whether the Clinic Plan and the Blue Cross Plan (hereinafter referred to collectively as the Plans) are employee welfare benefit plans within the meaning of section 3(1) of title I of ERISA, and you seek clarification of the term "administrator" within the meaning of ERISA section 3(16) as applied thereto.

Your correspondence and the documents you submitted contain the following facts and representations. Article XIV of the collective bargaining agreement requires the Company to contribute toward a plan for hospitalization and medical-surgical services to cover all regular employees covered by the agreement. Pursuant to Clause 75 of Article XIV of the agreement between the Company and the Union, the Union selects the plan for hospitalization and medical-surgical services to which contributions are to be made by the Company. Clause 79 of Article XIV, provides that:

> It is understood and agreed that the only participation and obligation of the Company in relation to this plan shall consist of the contribution as stipulated in Clause 75 and said contribution shall be forwarded by the Company directly to the organization managing the plan selected by the Union. The Organization or plan must be properly licensed and fulfill all legal requirements. The Company reserves the right to stop the payments to the organization if its license is suspended or revoked, or if it ceases to fulfill all legal requirements. The Union, through written notice signed by its legal representatives, shall keep the Company up to date on the organization to which payments must be made and any notice of change should be made within thirty (30) days prior notice. For the Company's information, the Union shall be responsible that the organization managing the plan keeps the Company informed of all the benefits furnished under the plan.

The organization selected by the Union, with respect to the Clinic Plan, according to the

documents submitted, is Servicios Grupales, Inc. The name "Losan, Inc., Consultorios Medicos" is listed on certain documents submitted and "the Collective Bargaining Agreement Clinic Plan" is listed on others.

Your first question concerns the coverage provisions of title I of ERISA. Pursuant to section 4(a) of title I of ERISA, title I applies to any employee benefit plan established or maintained by (1) any employer engaged in commerce[1] or in any industry or activity affecting commerce, (2) any employee organization(s) representing employees so engaged, or (3) both, unless excluded under section 4(b) of title I of ERISA. Nothing in your correspondence indicates any exclusion in section 4(b) of title I of ERISA applies to the Plans.

ERISA section 3(5) defines the term "employer" as "… 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." Based on your representations, the Company is an employer within the meaning of ERISA section 3(5) with respect to the Plans.

ERISA section 3(4) defines the term "employee organization", in pertinent part, as "… 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.…" Based on your representations, there is no reason to believe the Union is not an employee organization within the meaning of ERISA section 3(4) with respect to the Plans.

Section 3(3) defines the term "employee benefit plan" to include an "employee welfare benefit plan."

ERISA section 3(1) defines the term "employee welfare benefit plan" as "… any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or 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)." Hospitalization and medical-surgical benefits are among the benefits included in ERISA section 3(1).

Assuming that the Plans are the medical plans referred to in Article XIV of the collective bargaining agreement between the Company and the Union, the Company and Union acting jointly have established and are maintaining one or more plans described in the collective bargaining agreement for the purpose of providing medical or health benefits. The Department of Labor (the Department) views the Plans as one or more employee welfare benefit plans within the meaning of ERISA title I, section 3(1). Accordingly, the Plans are covered by title I of ERISA. However, the

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[1] The Department of Labor previously took the position in ERISA Opinions 75-20A and 78-6A (copies enclosed), that an employee benefit plan is not excluded from coverage under title I of ERISA merely due to location in Puerto Rico.

entrepreneurs or vendors of medical or health services selected by the Union to provide hospitalization, and medical-surgical and health benefits in return for Company contributions are not themselves employee welfare benefit plans. Instead, they are service providers with respect to the Plans you describe.

Unless excluded by regulation or otherwise, an employee welfare benefit plan covered by title I of ERISA must comply with all applicable requirements of title I of ERISA. The requirements of title I of ERISA for employee welfare benefit plans generally include the following: (part 1) reporting and disclosure, (part 4) fiduciary requirements, and (part 5) claims procedure and other requirements.

Your second question pertains to the definition of "administrator" under section 3(16) of ERISA. In this regard, you have inquired whether the Company or the Union is the "administrator" of the Plans.

In cases where an administrator is not designated by the terms of the instruments under which a plan is operated, ERISA section 3(16)(A)(ii) provides that the administrator is the "plan sponsor." Section 3(16)(B)(iii) defines the term "plan sponsor," in the case of a plan established or maintained by one or more employers and one or more employee organizations, as appears to be the case at hand, to be "the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan."

Based on the information contained in your letter and the submissions relative thereto, it appears that, while the Plans are established and maintained jointly by an employer, the Company, and an employee organization, the Union, pursuant to a collective bargaining agreement, there is no identifiable association, committee, joint board of trustees or other similar group of representatives of the parties who established or maintained the plans, as those terms are used in ERISA section 3(16)(B)(iii) for purposes of defining "plan sponsor." In those cases where a plan administrator may not be determined by the direct application of ERISA section 3(16), it is the view of the Department that, in the absence of regulations, the "administrator" is the person or persons actually responsible, whether or not under the terms of the plan, for the control, disposition, or management of the cash or property received by or contributed to the plan, irrespective of whether such control, disposition or management is exercised directly by such person or persons or indirectly through an agent or trustee designated by such person or persons.

Based on the information provided, it appears that, because the Union is responsible for the selection of the plan and the selection of the organization managing the plan to which contributions are forwarded by the Company, the Union (i.e., indirectly through the organization designated by the Union to manage the plan) is the person actually responsible for the control, disposition, and management of cash or property received by or contributed to the plan. Therefore, assuming that the Plans are the medical plans referred to in Article XIV of the collective bargaining agreement between the Company and the Union, it is the opinion of the Department that the Union is the "administrator" within the meaning of ERISA section 3(16), of the Plans and, thereby responsible for the obligations attendant thereto under title I of ERISA.

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