

U.S. Department of Labor

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



APR 28 1986

86-17A
Sec.

Mr. Paul S. Berger
Ms. Marian S. Block
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Berger and Ms. Block:

This is in response to your request concerning the annual reporting requirements of sections 103 and 104 of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you have requested an advisory opinion from the Department of Labor (the Department) as to whether certain fees paid to insurance brokers by insurance companies calculated on the aggregate value of certain classes of insurance policies placed or retained in one year must be reported on Schedule A of the Annual Return/Report Form 5500.

You state that a number of insurance brokers have requested to receive, in addition to the normal commission paid which is based upon a set percentage of the premium received on a particular contract, compensation based on the aggregate volume of new business placed for a particular class of policies (e.g., group accident and health) in one year and/or the aggregate volume of such policies retained by the broker that year. This compensation or fee, referred to as "excess commission", might be calculated on a percentage of new business and/or renewal business obtained by a particular broker in one year, or on the increase in premiums earned by a broker in one year over a prior year, or on the total business managed by a broker. You indicate that this fee will not relate to the placement of any particular contract and will not be attributed to any particular employee benefit plan or to any other particular arrangement for insurance. You further indicate that, no matter how the fee is calculated, the "excess commission" will not in any event compensate the broker for the placement of a particular contract with an employee benefit plan.

Based on your analysis of the instructions to Schedule A, and the disclosure requirements of Prohibited Transaction Class Exemption 77-9 relating to the disclosure of insurance information in a different context, you conclude that, because "excess commissions" do not relate to any

particular contract with an employee benefit plan, information concerning such commissions should not be required to be reported on the Schedule A.¹

Section 103(e) of ERISA, the statutory basis for the information required to be reported on the Schedule A, provides, in pertinent part, that:

If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating --

* * *

(2) ...commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization ... and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose

Commission and fee information is required to be reported on item 3 of the Schedule A. In promulgating instructions to the Schedule A, the Department considered the extent to which insurance fees and commissions should be required to be reported. In this regard, the Department adopted the following instruction:

3. All sales commissions are to be reported in column (c) regardless of the identity of the recipient. Override commissions, salaries, bonuses, etc. paid to a general agent or manager for managing an agency, or for performing other administrative functions, are not to be reported. Fees to be reported in column (d) represent payments by insurance carriers to agents and brokers for items other than commissions [e.g., service fees, consulting fees, and finders fees].... (Emphasis added.)

It is the view of the Department that all fees and commissions directly or indirectly attributable to a contract between a plan and insurance company, insurance service, or similar organization must be reported on the Schedule A. The only exception, as indicated in the above instruction, is for these amounts paid, in the form of an override commission, salary, bonus, etc., to a general agent or manager for managing an agency or for performing other administrative functions.

¹ We note that, while PTE 77-9 does require the disclosure of certain information concerning insurance commissions, the Department continues to believe that the disclosure provisions of PTE 77-9 are not relevant for purposes of determining the information which should be reported on the Schedule A. See: 44 Fed. Reg. 36518 (1979).

Because the "excess commissions" described in your letter would be calculated taking into account contracts with employee benefit plans and such commissions are not paid for managing an agency or for performing other administrative functions, it is the view of the Department that such "excess commissions" are required to be reported, on a proportionate basis, on the Schedule A as part of a plan's Annual Return/Report.

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

Sincerely,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations

Enclosure