U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

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92-24A
ERISA SEC. 104, 3(21)

Mr. Norman K. Pellerino
Pellerino Consulting Services, Inc.
115 Union Street
Marine City, Michigan 48039

Dear Mr. Pellerino:

This is in response to your letter requesting an advisory opinion from the Department of Labor (the Department) concerning the Department's regulatory exemption from the annual reporting requirements for certain small employee welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that Pellerino Consulting Services, Inc. provides consulting services to third party administrator firms (TPAs), which in turn adjudicate claims and disburse benefits under employer sponsored welfare plans. You state that a significant number of your TPA clients maintain, in the name of the TPA, a single bank account (combined claims account) from which benefits under the various employers' plans are disbursed. The combined claims account, you state, contains funds from various employers operating self-funded and partially self-funded welfare benefit plans covered by ERISA. The TPA adjudicates all plan benefit claims, prepares benefit checks drawn on the combined claims account, and periodically advises each employer of the total amount of the checks prepared for its plan and requests the transfer of funds in this amount to the TPA. Upon deposit of such funds into the combined claims account, the prepared benefit checks are released, and are mailed on that date to the claimants or service providers.

You request clarification as to whether, under the above-described arrangement, plan benefits drawn on a TPA's combined claims account may be considered to be paid "solely" from the general assets of the employer[1]; within the meaning of the limited reporting exemption in 29 C.F.R. 2520.104-20(b)(2)(i) and the corresponding instructions to the Annual Return/Report Form 5500 Series.

Section 104 of Title I of ERISA generally requires that the administrator file an annual report with the Department for every employee welfare benefit plan to which the reporting and disclosure provisions of Title I of ERISA apply. Regulation section 2520.104-20 provides conditional exemptive relief from the annual reporting requirement to three classes of small employee welfare benefit plans. As described in paragraph 2520.104-20(b)(2) of the regulation, these three classes include welfare plans with fewer than 100 participants and with respect to which:

> (i) benefits are paid as needed solely from the general assets of the employer maintaining the plan; or
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> (ii) benefits are provided exclusively through insurance contracts issued by a qualified insurance company or similar organization or through a qualified health maintenance organization (HMO), the premiums for which are paid directly by the employer from its general assets or partly from its general assets and partly

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[1] Your request refers only to employers that sponsor plans. We note, however, that as used in this letter, references to "employers" and their "employees" should, as appropriate, be read to include "employee organizations" and their "members."

from contributions from its employees, provided that contributions by participants are forwarded to the insurance carrier or HMO by the employer within three months of receipt; or

(iii) benefits are provided partly from the general assets of the employer and partly through insurance contracts or through a qualified HMO, as described in (ii), above.

A plan in one of these three classes that meets the other conditions of the limited exemption[2]; is generally relieved from requirements to file information with the Department, including the annual report.

Your request focuses on the first prong of the exemption, in subparagraph 2520.104-20(b)(2)(i) of the regulation, for plans whose benefits are paid as needed solely from the general assets of the employer maintaining the plan. As explained in the instructions to the Form 5500 Series, a plan seeking to rely on this first prong of the exemption cannot pay benefits from participant contributions held by the employer, or from a trust or separately maintained fund that holds plan assets or acts as a conduit for the transfer of plan assets. In other words, the application of this prong of the exemption to a given plan turns, as a threshold matter, on whether any of the amounts used to pay benefits constitute plan assets.[3]

Title I of ERISA does not impose funding requirements or standards with respect to welfare plans. Nor do the provisions of Title I expressly define what property will be regarded as "assets" of an employee benefit plan. The Department has promulgated regulations identifying plan assets when a participant pays or has amounts withheld by an employer for contribution to a plan (29 C.F.R. 2510.3-102) or when a plan makes investments in another entity (29 C.F.R. 2510.3-101).[4] In other situations, the Department has indicated that the assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights.

Under the participant contribution regulation, amounts that a participant pays to or has withheld by an employer for contribution to a plan become plan assets as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, not to exceed 90 days from the date such amounts are received by the employer or the date on which such amounts would otherwise have been payable to the participant in cash. The regulation contemplates that all amounts that a participant pays to or has withheld by an employer for purposes of obtaining benefits under a plan will constitute plan assets without regard to when related plan expenses or benefits

[2] In the case of an insured plan, paragraph 2520.104-20(b)(3) of the regulation further requires that (i) refunds, to which contributing participants are entitled, are returned to them within three months of receipt by the employer or employee organization, and (ii) contributing participants are informed upon entry into the plan of the provisions of the plan concerning the allocation of refunds.

[3] Your inquiry does not involve the class of plans whose benefits are provided exclusively through insurance contracts or a qualified HMO, as described in the second prong of the exemption (subparagraph 2520.104-20(b)(2)(ii)). Accordingly, we have not addressed the application of these provisions. Nor have you inquired about the application of the third prong of the exemption (subparagraph 2520.104-20(b)(2)(iii)), concerning the class of plans whose benefits are provided partly from employer general assets and partly through insurance contracts or a qualified HMO. We note, however, that the general principles discussed below would apply under the third prong of the regulation to the extent that such a plan purports to provide benefits from the general assets of the employer.

[4] On June 2, 1992, the Department announced an interim enforcement policy providing temporary relief from the trust requirement for certain types of welfare plans that involve participant contributions. See Technical Release 92-1, 57 Fed. Reg. 23272 (copy enclosed).

are paid by the employer. Accordingly, a plan involving participant contributions would not qualify for relief under the first prong of the exemption in subparagraph 2520.104-20(b)(2)(i) of the regulation.[5]

Apart from participant contributions, applying ordinary notions of property rights, the assets of a welfare plan generally include any property, tangible or intangible, in which the plan has a beneficial ownership interest. The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved. For example, a welfare plan generally will have a beneficial interest in particular assets if the employer establishes a trust on behalf of the plan, sets up a separate account with a bank or other third party in the name of the plan, or specifically indicates in the plan documents or instruments that separately maintained funds belong to the plan. See, e.g., Advisory Opinion 84-10 (Feb. 24, 1984) (plan document obligated employer to deposit in a plan account monies which, when combined with participant contributions, would be sufficient to pay benefits and expenses of the plan).

On the other hand, the mere segregation of employer funds to facilitate administration of the plan would not in itself demonstrate an intent to create a beneficial interest in those assets on behalf of the plan. In the absence of any other actions or representations which would manifest an intent to contribute assets to a welfare plan, the mere establishment of an account in the name of the employer to be used exclusively in administering the plan would not create a beneficial interest in the plan. Cf. Advisory Opinion 92-02 (Jan. 17, 1992) (employer retained all rights of ownership, and plan had no interest, in stop-loss insurance policy purchased by a single employer plan sponsor to meet the employer's liabilities under a medical benefit plan where, among other things, the employer was named as the beneficiary of the policy and the insurance proceeds were payable only to the employer; the insurance policy was subject to the claims of the employer's creditors; neither the plan nor any participant or beneficiary of the plan had any preferred claim against the policy; there was no representation to any participant or beneficiary of the plan that the policy would be used to provide plan benefits or that it in any way represented security for the payment of benefits; the plan benefits were not limited or governed in any way by the amount of the insurance proceeds; and the plan did not require or allow participant contributions).

In determining, for purposes of reporting, whether a given plan serviced by one of your TPA clients has a beneficial interest in the assets of the combined claims account, the plan administrator must, as discussed above, consider all of the relevant facts and circumstances. Without specifically ruling on the issue, in the absence of additional facts, we note that drawing benefit checks on a TPA account, as opposed to an employer account, may suggest to participants that there is an independent source of funds securing payment of their benefits under the plan.

Consideration should also be given to the application of ERISA's trust requirement. In this regard, section 403(a) of Title I of ERISA generally requires that "all assets of an employee benefit plan shall be held in trust by one or more trustees" who, upon acceptance of being named or appointed, have exclusive authority and discretion to manage and control the assets of the plan. The fact that a TPA may be engaged to administer the plan does not negate this requirement. For purposes of administration, a TPA may be given access to an account, e.g., to prepare and sign

[5] It should also be noted that, although the second and third prongs of the exemption contemplate the possible use of participant contributions to pay insurance or HMO premiums, these provisions by their terms apply only to those plans that, in whole or in part, "pay benefits . . . through insurance contracts or policies." Thus, for example, stop-loss policies, which typically insure liabilities for benefits, but do not pay benefits, generally would not meet this condition for relief.

checks for the payment of insurance premiums or benefit claims. However, when the funds involved are plan assets, they must, absent an exception, be held in trust in order to satisfy the requirements of section 403(a).[6]

Due to the inherently factual nature of the inquiry, we are unable to determine whether the individual employee welfare benefit plans that disburse benefits through the combined claims accounts of your client TPA firms are exempt from filing the annual report required by ERISA. However, we believe the principles articulated above, when applied to the circumstances of each of the plans involved, should be helpful to you in determining whether individual plans operate in a manner consistent with the requirements for the limited exemption set forth in 29 C.F.R. section 2520.104-20(b)(2)(i).

This letter constitutes an advisory opinion under ERISA Procedure 76-1.

Sincerely,

Robert J. Doyle
Director, Office of Regulations and Interpretations

Enclosure

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[6] See note 4, supra. Further, it should be noted that, regardless of whether plan assets are involved, a third party administrator who exercises discretion in the adjudication of claims for benefits under a plan would be acting as a fiduciary with respect to the plan within the meaning of ERISA section 3(21)(A)(i) and (iii) by virtue of exercising discretionary authority respecting the management and administration of the plan.