

**U.S. Department of Labor**

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



April 10, 1997

97-11A  
ERISA SECS. 104(b)(2), 104(b)(4)

Mr. Ken Paff  
Teamsters for a Democratic Union  
P.O. Box 10128  
Detroit, MI 48210

Dear Mr. Paff:

This is in response to a letter that was originally requested by the National Office of the Teamsters for a Democratic Union (TDU). We were asked to forward our response to you. TDU inquired whether a plan administrator is required under section 104(b)(4) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to furnish a participant with a copy of the contract between an employee benefit plan and a third party administrator (TPA).

Section 104(b)(4) of ERISA provides that "[t]he administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." Although section 104(b)(4) includes the term "contract" in its specific delineation of documents required to be furnished, it is the Department of Labor's view that this term does not necessarily encompass all contracts between a plan and third parties who render services to the plan. The terms "bargaining agreement," "trust agreement," "contract," and "instruments" in section 104(b)(4) are all modified by the phrase "under which the plan is established or operated." Accordingly, only TPA contracts, or provisions thereof, that establish, amend or constitute part of an employee benefit plan or that otherwise are instruments under which the plan is established or operated are subject to mandatory disclosure under section 104(b)(4).<sup>1</sup> For example, if a TPA contract, or any part of the contract, establishes or amends the plan in question, establishes a claims procedure, specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement, or does any of the other things described in sections 402(b) and 402(c) of ERISA, it would have to be furnished in accordance with the terms of section 104(b)(4).<sup>2</sup>

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<sup>1</sup> The same conclusion would apply under ERISA section 104(b)(2) which provides that a plan participant has a right to examine copies of the plan description, the latest annual report and the "bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated . . . ."

<sup>2</sup> The Department concluded in Advisory Opinions 82-21A, 82-33A, and 87-10A that minutes of trustees' meetings that establish a claims procedure or do any of the things described in section 402(b) and 402(c) of ERISA would have to be furnished in accordance with section 104(b)(4) as "other instruments under which the plan is established or operated." We also stated in Advisory Opinion 96-14A that any document or instrument that specifies procedures, formulas, methodologies, or schedules to be applied in determining or calculating a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute "instruments under which the plan is established or operated."

The plan "administrator," as defined in ERISA section 3(16)(A), is responsible for making the determination as to whether a document is a "contract" or "instrument" under section 104(b)(4) in response to a written request by a participant or beneficiary.<sup>3</sup> The administrator's determination is reviewable by a U.S. District Court pursuant to section 502 of ERISA.

We also note that section 404(a)(1)(D) of ERISA requires a fiduciary to discharge his duties in accordance with the documents and instruments governing the plan insofar as they are consistent with the provisions of Title I of ERISA. Therefore, in addition to the above section 104(b)(4) obligations, if such a plan document or instrument, consistent with the other provisions of Title I, requires the furnishing or disclosure of information to a participant or beneficiary on request, the administrator would be required to grant such a request.

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

Sincerely,

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

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<sup>3</sup> Persons who hold the position of "administrator" as defined in section 3(16)(A) are, by the very nature of their position, considered fiduciaries. See 29 CFR 2509.75-8 (Question and Answer D-3).