U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

December 19, 2008

2008-08A
ERISA SEC.
104

Bruce J. McNeil, Esq.
Leonard, Street and Deinard
150 South Fifth Street
Suite 2300
Minneapolis, Minnesota 55402

Dear Mr. McNeil:

This responds to your request on behalf of Empresas Fonalledas, Inc. (Empresas) for an advisory opinion concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, your inquiry relates to whether, in the case of a plan covering a "controlled group of corporations" or a "group of trades or businesses under common control" within the meaning of section 414(b) and (c) of the Internal Revenue Code (Code), filing a single registration statement for the plan will satisfy the alternative method of compliance in 29 C.F.R. § 2520.104-23 for the participating employers.

The Department has by regulation at 29 C.F.R. § 2520.104-23 provided administrators of certain pension plans maintained for a select group of management or highly compensated employees (so-called "top hat" plans) with an alternative method of compliance with the reporting and disclosure provisions of Part 1 of Title I of ERISA. A plan administrator of such a plan may comply with the reporting and disclosure requirements under Part 1 by filing a registration statement with the Secretary of Labor in accordance with the provisions of the regulation and providing any plan documents requested by the Secretary. The regulation describes the filing requirement as follows:

> Filing a statement with the Secretary of Labor that includes the name and address of the employer, the employer identification number (EIN) assigned by the Internal Revenue Service, a declaration that the employer maintains a plan or plans primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees, and a statement of the number of such plans and the number of employees in each.

29 C.F.R. § 2520.104-23(b). This statement must be filed within 120 days after the plan becomes subject to Part 1 of Title I of ERISA.

This alternative method of compliance is available only to employee pension benefit plans that are: (1) maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; and (2) for which benefits (i) are paid as needed solely from the general

assets of the employer, (ii) are provided exclusively through insurance contracts or policies, the premiums for which are paid directly by the employer from its general assets, issued by an insurance company or similar organization which is qualified to do business in any State, or (iii) both. 29 C.F.R. § 2520.104-23(d).

The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program — (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan, or the methods of distributing benefits from the plan."

The term "employer" is defined in section 3(5) of ERISA to include "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." This definition encompasses persons acting directly as employers, and also certain persons, groups and associations that, while acting indirectly in the interest of or for an employer in relation to an employee benefit plan, have no direct employer-employee relationship with individuals covered under the plan.

In the Department's view, there are circumstances under which companies in a controlled group will be treated as maintaining "separate plans" and circumstances under which a "single plan" will be found to exist with respect to the controlled group as a whole. *See* Advisory Opinion 84-35A (the Department would consider, among others, the following factors in determining whether there is a single plan or several plans in existence: (1) who established and maintains the plans, (2) the process and purposes of plan formation, the rights and privileges of plan participants, and (3) the presence of any risk pooling). *See also* Advisory Opinion 82-17A; Advisory Opinion 83-21A. If a "single plan" is found to exist, it is the Department's view that 29 C.F.R. § 2520.104-23 requires the filing of only a single registration statement for the plan rather than separate statements filed for each participating employer.

The Department did not, in 29 C.F.R. § 2520.104-23, specifically address, however, how the "employer" is to be identified in the registration statement filed for a single plan of a controlled group of corporations or a group of trades or businesses under common control within the meaning of section 414(b) and (c) of the Code. Although they are not necessarily the exclusive means by which the requirements of 29 C.F.R. § 2520.104-23 may be satisfied in the case of such plans, the Department would accept the following as methods of compliance. The plan administrator could identify each employer

maintaining the plan on the statement required to be filed under 29 C.F.R. § 2520.104-23(b). Where one of the participating employers is the plan administrator, the plan administrator could identify the employer that serves as the plan administrator by name, EIN, and address. If a participating employer is an authorized person from whom the Department may request plan documents under 29 C.F.R. § 2520.104-23(b)(2), including documents regarding the other participating employers, the statement could identify that authorized employer as the "employer." In cases where only one participating employer is identified as the "employer," the registration statement should include some general identifying information regarding the group of participating employers that maintain the plan. The addition or removal of individual participating employers from the group would not necessitate the filing of an updated registration statement as long as the employer identified in the original registration statement continues to be an employer of employees covered by the plan and continues to be an authorized person from whom the Department could request documents regarding the plan.

You have not asked, and we express no opinion as to whether the proposed arrangement would in fact qualify as a plan maintained for a select group of management or highly compensated employees within the meaning of 29 C.F.R. § 2520.104-23. Such inquiries are inherently factual in nature and generally will not be ruled upon by way of advisory opinion. *See* Advisory Opinion 90-14A. Further, we express no opinion as to whether the participating employers in the plan you described would be deemed to be members of a controlled group of corporations or of a group of trades or businesses under common control within the meaning of section 414(b) or 414(c) of the Code. Interpreting these provisions of the Internal Revenue Code is solely within the jurisdiction of the U.S. Department of the Treasury/Internal Revenue Service.

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

Sincerely,

Lisa M. Alexander
Chief, Division of Coverage, Reporting & Disclosure
Office of Regulations and Interpretations