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

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2012-03A
ERISA SEC.
3(2)

Dear Mr. Sletto:

This is in response to your request for guidance regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to a retirement benefit arrangement to be established by National Retirement Plan, Inc. (NRP). Specifically, you ask the Department of Labor (Department) whether this arrangement would constitute an employee pension benefit plan within the meaning of ERISA section 3(2).

The following summary is based on the materials and representations you provided in support of your request and should not be treated as factual findings by the Department. You represent that NRP is a Minnesota corporation with the sole business purpose of taking over employee retirement plans that, for a variety of reasons, have been abandoned by their employer plan sponsors. As part of this proposal, NRP will establish the NRP Plan and will serve as both the plan sponsor and plan administrator. You represent that NRP intends to merge unrelated, abandoned, individual account plans into the NRP Plan and thereafter manage and administer the NRP Plan as an ongoing individual account retirement plan. You acknowledge that many abandoned plans' records will not be complete and practical procedures will need to be developed to complete the mergers while protecting participant benefits. For example, NRP will obtain the abandoned plans' participant accounting and compliance testing records, asset statements, Form 5500 filings, participant loan documents, plan and trust documents and participant contact information from various sources. Furthermore, participant contact information may be limited and require searches to locate lost participants. Although employees of NRP will participate in the NRP Plan, there is no indication in the materials that NRP intends that the NRP Plan be primarily for the benefit of employees of NRP.

You represent that once an abandoned plan has been merged into the NRP Plan and "stabilized," participants will be able to elect to directly roll over the amounts in their accounts into individual retirement accounts (IRAs), take a distribution of those amounts (partial or total), or have their assets retained in the NRP Plan for investment and subsequent distribution. Participants that have account balances of $1,000 or less will receive an automatic distribution as a lump sum or as a direct rollover into an IRA. You represent that participants who elect to remain in the NRP Plan will be able to

direct the investment of their accounts among "a diverse portfolio of investment[s], with Internet access and quarterly paper statements."

You anticipate that a significant percentage of the abandoned plan participants will elect to retain their assets in the NRP Plan as a result of the "access they will have and the institutional level investments made available to them." You expect that "over time the number of participants and plan assets should grow sufficiently to allow NRP to negotiate favorable pricing with outside investment or recordkeeping vendors, thus allowing NRP to take sufficient asset and participant based fees to fund its operation while maintaining reasonable administrative cost at the participant level."

The term "employee pension benefit plan" is defined in section 3(2)(A) of Title I of ERISA to include:

> . . . any plan, fund, or program . . . 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 . . .

Although the NRP Plan will provide retirement benefits described in ERISA section 3(2), to be an employee pension benefit plan under ERISA, the plan must also, among other criteria, be established or maintained by an employer, an employee organization, or both. You have requested guidance on whether NRP would constitute an employee organization or an employer for purposes of sponsoring a plan covered by ERISA.

The term "employee organization," defined in section 3(4) of ERISA, in pertinent part, includes "any labor union or any organization of any kind . . . 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; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan."

NRP does not appear to be an employee organization within the meaning of section 3(4) of ERISA. Nothing in the documents we reviewed indicates that NRP exists ". . . for the purpose, in whole or in part, of dealing with employers . . ." Therefore, NRP would not be an employee organization within the meaning of the first part of the definition contained in section 3(4), *i.e.*, before the semi-colon. Nor does it appear that NRP is an "employees' beneficiary association" as that term is used in the second part of section 3(4), *i.e.*, after the semi-colon. The Department has identified necessary criteria for what constitutes such an "employees' beneficiary association." One is that membership in an employees' beneficiary association must be based upon one's status as an employee --

for example, where membership in the association is limited to employees of a certain employer or members of one union. *See e.g.*, Advisory Opinions 90-01A and 95-01A. There is no indication that employees would participate in NRP in any manner other than to be eligible to receive benefits. In addition, NRP is not an association and there is no evidence that membership or ownership of NRP is conditioned on one's status as an employee. As a result, NRP would not be an employee organization within the meaning of section 3(4) of Title I of ERISA.

Nor, in the Department's view, would NRP be acting as an "employer" within the meaning of ERISA section 3(5), with respect to most of the individuals covered under the NRP Plan. The term employer is defined in section 3(5) of ERISA 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."

Although NRP employees will participate in the plan, NRP would not have a direct employment relationship with the vast majority of the participants who will be covered by the NRP Plan. NRP, thus, would not be acting directly as the employer within the meaning of ERISA section 3(5) in establishing and maintaining the NRP Plan. According to the materials we reviewed, it also does not appear that NRP would be a bona fide employer association acting in the interest of direct employers whose employees are covered by the NRP Plan, or sponsoring the plan as an employer acting indirectly in the interest of the direct employers.[1]

The Department has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that, in the absence of the involvement of an employee organization, a multiple employer plan (*i.e.*, a plan to which more than one employer contributes) may, nevertheless, exist where a cognizable, bona fide group or association of employers, acting in the interest of its employer members, establishes a benefit program for the employees of member employers and exercises control of the amendment process, plan termination, and other similar functions on behalf of these members with respect to a trust established under the program. *See e.g.*, Advisory Opinions 2003-17A and 2001-04A.

A determination whether there is a bona fide employer group or association within the meaning of section 3(5) of ERISA must be made on the basis of all the facts and

[1] Nothing in your submission suggested that NRP and the employers whose plans participate in the NRP Plan would be a controlled group or corporations, a group of trades or businesses under common control, or otherwise have any substantial common ownership, control or organizational connections. *See* Advisory Opinion 89-06A (Department would consider a member of a controlled group which establishes a benefit plan for its employees and/or the employees of other members of the controlled group to be an employer within the meaning of section 3(5) of ERISA); Advisory Opinion 95-29A (employee leasing company may act either directly or indirectly in the interest of an employer in establishing and maintaining employee benefit plan).

circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program. *See* Advisory Opinion 2003-13A (employers were engaged in the same industry, had a history of organized cooperation on employment-related matters; had a genuine organizational relationship through their membership in the association unrelated to the provision of benefits; and appeared to have control over the management of the plan).

There is nothing in your submission that, applying those factors, would support a conclusion that a formal association or group of employers is involved in this arrangement. The issue, therefore, is whether there is any other basis to find that NRP is acting as an employer "indirectly in the interest" of each participating employer, for purposes of section 3(5) of ERISA, in relation to the NRP Plan. There is no employment-based common nexus that is unrelated to the provision of benefits between NRP and the employers of employees that benefit from the abandoned plans or among the different groups of employees that participate in these plans. Rather than acting in the interest of an employer with respect to the plan, NRP appears to be acting more as a service provider to the plan, much like a third party administrator or investment advisor. As a result, in the Department's view, NRP would not constitute an employer for purposes of section 3(5) of ERISA. Accordingly, it is the view of the Department that the NRP Plan does not constitute a single employee benefit plan for purposes of Title I of ERISA. Rather, the Department would view the NRP Plan as a collection of separate, albeit apparently abandoned, employee benefit plans.[2]

This conclusion reflects the established judicial view that the person or group maintaining an "employee benefit plan" under ERISA must be tied to the employees or the contributing employers by genuine economic or representational interests unrelated to the provision of benefits. *See MDPhysicians & Associates, Inc. v. State Bd. Ins.*, 957 F.2d 178, 185 (5th Cir.), *cert. denied*, 506 U.S. 861 (1992) (". . . the entity that maintains the plan and the individuals that benefit from the plan [must be] tied by a common economic or representation interest, unrelated to the provision of benefits." (quoting *Wisconsin Educ. Assoc. Ins. Trust v. Iowa State Bd.,* 804 F.2d 1059, 1063 (8th Cir. 1986)). These common employment-based interests distinguish an employee benefit plan from other entities

[2] Thus, the persons who operate or manage NRP would still be subject to ERISA's fiduciary responsibility provisions if such persons are responsible for, or exercise control over, the assets of ERISA-covered plans. Other provisions of ERISA may also apply to NRP.

that underwrite benefits or provide administrative services. The Department has long adhered to this interpretation of ERISA. *See, e.g.,* Advisory Opinion 94-07A (it is the "commonality of interest" among the individuals that benefit from the plan and the party that sponsors the plan that "forms the basis for sponsorship of an employee welfare benefit plan"); Advisory Opinion 80-42A ("plans established and maintained by insurance entrepreneurs for the purpose of marketing insurance products to employers and employees at large are not ERISA plans.").[3] Similarly, it is the Department's view, that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, there is not a sufficient basis for concluding that there is a single "multiple employer" plan for purposes of Title I of ERISA. *See* Advisory Opinion 2008-07A.

The Department is not expressing any opinion in this letter on section 413(c) of the Internal Revenue Code ("Code"). Code section 413(c) addresses the tax qualified status of certain pension "plans" that cover the employees of multiple employers. There is no ERISA equivalent to Code section 413(c); and Code section 413 terminology regarding arrangements that constitute "plans" for tax purposes does not control whether any particular arrangement is an ERISA-covered "employee benefit plan." *Cf. In re Sewell*, 180 F.3d 707, 711 (5th Cir. 1999) (there is no requirement under ERISA that to be a plan governed by ERISA, a plan must be tax-qualified). The regulations implementing the minimum coverage and participation rules of Part 2 of ERISA do not dictate a contrary conclusion. Although the regulation at 29 CFR 2530.210(c) defines the term "multiple employer plan" as including "a multiple employer plan within the meaning of sections 413(b) and (c) of the Code and the regulations issued thereunder," the regulation at 29 CFR 2530.201-1 regarding general coverage of Part 2 makes it clear that the application of the provisions of Part 2 is determined under a multiple step process, and, in order for the Part 2 regulations to apply, "[f]irst, the plan must be an employee benefit plan as defined under section 3(3) of the Act and § 2510.3-3. (See also the definitions of employee welfare benefit plan, section 3(1) of the Act and § 2510.3-1 and employee pension benefit plan, section 3(2) of the Act and § 2510.3-2)." The analysis in this letter regarding the status of the NRP structure concerns only that preliminary question of "employee benefit plan" status under sections 3(2) and 3(3) of ERISA.

Finally, we note that the Department's Abandoned Plan Program provides a mechanism that facilitates the winding up and terminating of plans that have been abandoned by their sponsors. *See* 71 Fed. Reg. 20837(Apr. 21, 2006), 71 Fed. Reg. 29073 (May 19, 2006). The Program provides standards for determining when a plan is abandoned, simplified procedures for winding up the plan and distributing benefits to

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[3] Although many of the Department's advisory opinions and the federal court decisions interpreting section 3(5) of ERISA as it relates to the definition of employee benefit plan have been in the context of group health and other welfare plans, nothing in the definitional provisions of ERISA indicates that the same terms would have different meanings when applied in the defined contribution pension plan or defined benefit pension plan context. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

participants and beneficiaries, and provide guidance on who may initiate and carry out the winding-up process.[4]

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. This letter relates solely to the application of Title I of ERISA to the arrangement that is the subject of your request and is not determinative of any particular treatment under the Code or any other federal or state law.

Sincerely,

Susan Elizabeth Rees
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

[4] In this regard, 29 CFR § 2550.404a-3, provides plan fiduciaries of terminated plans and qualified termination administrators (QTAs) of abandoned plans with a fiduciary safe harbor for making distributions on behalf of participants or beneficiaries who fail to make an election regarding a form of benefit distribution, commonly referred to as missing participants or beneficiaries. A second regulation, codified at 29 CFR 2578.1, establishes a procedure for financial institutions holding the assets of an abandoned individual account plan to terminate the plan and distribute benefits to the plan's participants or beneficiaries, with limited liability. Information about the program is available under the Abandoned Plan Program section of EBSA's Website at www.dol.gov/ebsa.