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

May 25, 2012

Robert J. Toth, Jr.
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2012-04A
ERISA SEC.
3(2)

Dear Mr. Toth:

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 savings program operated by 401(k) Advantage LLC (Advantage). Specifically, you ask whether the Department of Labor (Department) would view the Program as a single "employee pension benefit plan" within the meaning of ERISA section 3(2) where multiple unrelated employers adopt the Plan to provide retirement benefits to their employees.

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 TAG Resources LLC (TAG), is a registered investment advisory firm based in Knoxville, Tennessee. Advantage is a limited purpose corporation formed to operate the 401(k) Advantage LLC 401(k) Plan. (Advantage Plan or Plan). The Plan is intended to be a single "multiple employer" 401(k) profit-sharing plan covering employees of Advantage as well as employees of other unrelated employers that adopt the Plan. The current participation agreement form describes each participating employer as acting "directly as an employer" and as a "co-sponsor" of the Advantage Plan. You indicate that there are currently over 500 unrelated employers participating in the Plan.

TAG is designated as the administrator, within the meaning of ERISA section 3(16), of the Plan. Advantage signs the Forms 5500 filed for the Plan as the "plan sponsor." You represent that Advantage is also the "named fiduciary" for the Advantage Plan, and "assumes the risk and liability associated with the trustee role and removes every adopting employer from the liability associated with that role." According to the Plan's 2010 Form 5500, the Plan had over 9,800 participants in the 2010 plan year and $63,000,000 in net assets.

You have provided us with copies of several similar participation agreements, what appears to be an Advantage Plan document covering current participating employers, and an updated Plan document drafted to permit inclusion into the Plan of various Bermudian employers. The terms for prospective participating Bermudian employers are similar to those for currently participating employers, but the investment alternatives and service provider arrangements differ. There are no variations in the operative

documents for these two groups of employers that would affect our analysis. Some of the materials you provided indicate that professional employer organizations (PEOs)[1] may become participating "employers" of the Advantage Plan, and unions may become plan "sponsors." In the latter case the Plan will cover employees of any employer who is a party to the union's collective bargaining agreement which provides for participation in the Plan by employees of the employer.

Under the participation agreement, participating employers delegate to TAG the "full responsibility of Plan Administrator" which includes resolving beneficiary disputes, interpreting plan terms, completing audited financial statements, and appointing investment advisors and investment managers. Each participating employer represents that it has "independently exercised its fiduciary judgment in selecting this plan and, initially, the attendant offering of investment contracts and funds." The participating employer also acknowledges that it has ongoing fiduciary responsibility to periodically review the performance of TAG and is responsible for periodically determining whether to continue the arrangement. The participation agreement further provides that a participating employer's obligation to review its delegation of authority extends "only to the portion of the plan which covers its own employees." Participating employers acknowledge that, as the Plan Sponsor, Advantage retains complete authority with regard to the Plan document, including the right to amend or restate the Plan document from time to time. Advantage and TAG each retain the authority to terminate any employer's participation in the Advantage Plan, and participating employers are permitted to discontinue or revoke participation in the Plan at any time upon 60 days written notice. In the event an employer's participation in the Plan is discontinued, the assets, liabilities, contracts and other plan assets allocable to the participating employer's participation in the Plan will be "spun off pursuant to Code Section 414(l) and such spun off assets shall constitute a retirement plan of the Participating Employer with such Participating Employer becoming the sponsor and the individual who has signed [the participation agreement] on behalf of the Participating Employer becoming Trustee for this purpose."

The documents we reviewed indicate that information concerning plan fees payable to TAG, and other service providers for administrative and recordkeeping services is disclosed in an appendix to the participation agreement. The participation agreement provides that by signing the participation agreement, the participating employer "hereby approves such compensation." These fees are paid on a monthly basis and are deducted

[1] In general, for purposes of this letter we understand a PEO to be a firm that provides a service under which an employer can outsource HR and administrative tasks such as payroll, workers' compensation, and recruiting. The PEO relationship to the employers and employees is often described as co-employment or joint employment for purposes such as tax withholding and filing related paperwork as the "employer" under the PEO's own employer identification number. The client company continues to be the direct employer under common law principles.

directly from the assets of the Plan. We understand that this fee disclosure is not intended to be a complete disclosure for all expenses of the Plan and that TAG will "provide information related to fees and expenses to the Participating Employer and to Plan Participants in a manner as otherwise required by law of Plan Administrators." There is no information in your material on compensation payable from the Plan to Advantage LLC as Plan trustee and named fiduciary.

Relevant Law, Analysis, and Conclusion

The term "employee pension benefit plan" is defined in section 3(2) of Title I of ERISA to include: "[A]ny plan, fund, or program . . . established or maintained by an employer or 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 . . . 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 . . ."

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."

Section 3(5) of ERISA provides that the term "employer" means "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."

The term "plan sponsor" is defined in section 3(16) of ERISA as (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

Although the Advantage Plan appears to provide benefits described in ERISA section 3(2), to be an employee pension benefit plan, it must also be established or maintained by an employer, an employee organization, or both. The materials we reviewed give no indication that the Plan was established or is maintained by an employee organization within the meaning of section 3(4) of ERISA. Nothing in the documents we reviewed indicates that employees participate in Advantage (the named plan sponsor) or TAG (the plan administrator), nor do either of these entities constitute an "employees' beneficiary

association" as that term is used in the second part of section 3(4). There is no evidence that membership or ownership of Advantage or TAG is conditioned on one's status as an employee. Accordingly, the Advantage Plan does not appear to be established by an employee organization within the meaning of section 3(4) of Title I of ERISA.

The documents describe Advantage as the sponsor of the Plan; however, it does not appear that Advantage is acting as an "employer" within the meaning of ERISA section 3(5). Although employees of Advantage will participate in the Plan, Advantage would not have a direct employment relationship with the vast majority of the participants covered by the Plan. As a result, Advantage would not be acting directly as the employer within the meaning of ERISA section 3(5) in establishing and maintaining the Plan.

Additionally, according to the materials we reviewed, it does not appear that Advantage or any other entity involved in the administration or operation of the Plan would be a bona fide employer association acting in the interest of the direct employers whose employees are covered by the Plan. In this regard, in the absence of regulations under ERISA section 3(5), 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 single "multiple employer" plan (*i.e.*, a plan to which more than one employer contributes) may, nevertheless, exist where a cognizable 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. *See also* Advisory Opinion 96-25A (if an employer adopts for its employees a program of benefits sponsored by a group or association that does not itself constitute an "employer" or an "employee organization," such an adopting employer or employee organization may have established a separate, single-employer benefit plan covered by Title I of ERISA). As explained in these and other advisory opinions, relevant factors in determining whether a purported plan sponsor is a bona fide group or association of employers include 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. There is nothing in your submission to support a conclusion that a bona fide association or group of employers is sponsoring the Advantage Plan.

It has been the Department's consistent view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5). Based on our review of the information provided, there is no employment based common nexus or other genuine organizational relationship that is unrelated to the provision of benefits between Advantage or TAG and the employers of employees that benefit from the Plan, or among the different groups of employees that participate in the Plan.[2] Rather than acting in the interest of an employer with respect to the Plan, Advantage and TAG appear to be acting more as service providers to the plan, much like a third party administrator or investment advisor. As a result, in the Department's view, neither Advantage nor TAG would constitute an employer for purposes of section 3(5) of ERISA that is capable of sponsoring the plan as a single "multiple employer" plan.

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 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."). In your submission, you assert that there is no need for a bona fide employer group or association or for any person to be acting indirectly in the interest of the direct employers because each employer who enters into a participation agreement with TAG to provide benefits to its employees through the Advantage Plan will be acting as a Plan "co-sponsor," and "acting directly on its own behalf" in separately adopting a "multiple employer" defined contribution plan for its own employees. As described above, the mere execution of identically worded trust agreements or similar documents by unrelated employers as a means to fund or provide benefits for their employees, is not a sufficient basis for concluding that the employers

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[2] We note that any relationship between Advantage LLC as "sponsor" of the Advantage Plan, and the employees of participating employers is even more attenuated to the extent that the Advantage Plan permits participation as "employers" by entities themselves not acting directly as employers of the covered employees, such as unions acting on behalf of employers with whom they have collective bargaining agreements or PEOs acting on behalf of their client employers.

have established or maintain a single plan for purposes of ERISA. *See, e.g.,* Advisory Opinion 2008-07A. Participation agreements that label the signatory employers as co-sponsors of a plan do not change this conclusion. Accordingly, it is the view of the Department that the Plan does not constitute a single "multiple employer" plan for purposes of ERISA, but rather is an arrangement under which each participating employer establishes and maintains a separate employee benefit plan for the benefit of its own employees.

In your submission, you urge that the Department's historical interpretation of "employer" under section 3(5) of ERISA regarding multiple employer welfare arrangements (MEWAs) should be restricted to welfare plans and that a less restrictive interpretation be applied to retirement plans. The Department is of the view, however, that the term "employer" should have the same meaning in this context whether applied to the term welfare plan or pension plan. *See Sullivan v. Stroop,* 496 U.S. 478, 484 (1990).

Importantly, we note that persons who operate the arrangement would be subject to the fiduciary provisions of Title I to the extent they have control over plan assets or have discretionary control over the administration or management of the participating employers' separate plans. They would also be subject to the prohibited transaction provisions in ERISA section 406 to the extent they are "parties in interest" within the meaning of ERISA section 3(14) either as service providers to the separate employer plans or otherwise. Similarly, each employer sponsor of a plan that participates in the arrangement will be subject to ERISA's fiduciary provisions. *See* FAB 2002-03 (in selecting a service provider, plan fiduciaries must, consistent with the requirements of section 404(a), act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan).

The Department is not expressing any opinion in this letter on the application of section 413(c) of the Internal Revenue Code (Code) to the Advantage Plan. Code section 413(c) addresses the tax qualified status of certain pension "plans" that cover the employees of multiple employers. Section 413 of the Code, however, does not control whether an arrangement is an "employee benefit plan" under ERISA. *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). Contrary to your suggestion, section 210 of ERISA and the regulations implementing the minimum coverage and participation rules of Part 2 of ERISA do not dictate a different conclusion. While those regulations refer to section 413 of the Code at various points (*see, e.g.,* 29 CFR 2530.210(c)), they do not purport to make questions of ERISA coverage turn on section 413 of the Internal Revenue Code. To the contrary, as the Department's regulations make clear (*see* 29 CFR 2530.201-1), the determination of ERISA coverage is a multiple step process, and, in order for Part 2 of ERISA 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)." This letter concerns only whether the Advantage Plan is an "employee benefit plan" under sections 3(2) and 3(3) of ERISA. For the reasons set forth above, in the Department's view, it is not.

Nothing in your submission suggested that TAG, Advantage and the employers participating in the 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 directly or indirectly in the interest of an employer in establishing and maintaining employee benefit plan). This letter also does not address the circumstance where an employee pension plan is maintained by more than one employer as a result of a corporate merger, acquisition or divestiture transaction or other circumstance that involves a substantial economic, business, or representational purpose unrelated to provision of benefits to the employees of separate employers.[3]

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

[3] A "substantial business purpose" test applies in the context of ERISA section 3(37) to address arrangements formed solely to obtain the benefits of being regulated as a multiemployer plan under ERISA. *See* 29 C.F.R. § 2510.3-37. The Department has also applied a "substantial business purpose" in evaluating whether a health benefit program should be treated as a single employer plan or as multiple employer welfare arrangement (MEWA) for purposes of section 3(40) of ERISA. *See* ERISA Information Letter, dated March 1, 2006, to Mike Kreidler, Washington State Insurance Commissioner (at www.dol.gov/ebsa/regs/ILs/il030106.html).