

U.S. Department of Labor

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



July 17, 1996

96-12A
ERISA SEC. 3(1)

Mr. Durward J. Gehring
Bell, Boyd & Lloyd
Three First National Plaza
70 West Madison Street, Suite 3200
Chicago, Illinois 60602-4207

Dear Mr. Gehring:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Topco Associates, Inc. Pre-Tax Premium Plan (the Pre-Tax Plan) is an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA.

You advise that Topco Associates, Inc. (Topco) maintains a health benefit program, called the Topco Associates, Inc. Group Health Plan (the Group Health Plan), under which its employees may choose to receive health benefits from any one of three providers: an insurer acting under a group indemnity insurance contract with Topco, or two health maintenance organizations (HMOs). You represent that the Group Health Plan is an employee welfare benefit plan under ERISA section 3(1) and is maintained pursuant to a plan document separate from the instruments of the Pre-Tax Plan.¹ An employee is required to make contributions under the Group Health Plan to Topco to pay a portion of the premiums or membership dues charged by the selected provider under the Group Health Plan.

Effective January 1, 1991, Topco adopted the Pre-Tax Plan. Under the Pre-Tax Plan, a Topco employee may pay the employee contributions that are required under the Group Health Plan on a pre-tax basis by electing to reduce his or her compensation by an amount equal to the required contribution. Topco, in turn, pays the premiums or membership dues on behalf of its employees to the providers. The plan document you have submitted for the Pre-Tax Plan currently provides only for the payment of contributions under the Group Health Plan. By adopting the Pre-Tax Plan, Topco intends to take advantage of the favorable tax treatment provided to a "cafeteria plan" under section 125 of the Internal Revenue Code (the Code). If a plan qualifies under section 125 of the Code, employees may exclude from their gross income the amount by which their salaries are reduced under the plan.²

The term "employee welfare benefit plan" is defined in section 3(1) of Title I to include, in pertinent part:

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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . , or (B) any benefit described in section 302(c) of

¹ The Department takes no position herein as to whether the Group Health Plan constitutes one or several employee welfare benefit plans within the meaning of section 3(1) of ERISA.

² The Department takes no position herein as to whether Topco's arrangements satisfy section 125 of the Code.

the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Based on the information you have submitted, the function of the Pre-Tax Plan is to provide a method by which employees may receive tax-favored treatment of contributions that are in any case required under the Group Health Plan. The provision of this tax-favored treatment, however, is not the equivalent of the provision of a benefit enumerated under section 3(1), and it does not appear that the Pre-Tax Plan itself provides any enumerated benefit. It is therefore the position of the Department that the Pre-Tax Plan, as currently structured,³ does not constitute, in itself, a separate employee welfare benefit plan within the meaning of section 3(1). It is, rather, part of the Group Health Plan inasmuch as it constitutes a mechanism by which the Group Health Plan, an ERISA welfare benefit plan (or plans), is funded with employee contributions. In this regard, we note that such contributions constitute "plan assets" of the Group Health Plan "as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets."

See 29 C.F.R. § 2510.3-102.⁴ Accordingly, those who exercise discretion or control over such assets are subject to the fiduciary standards of ERISA.

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,

Susan G. Lahne
Chief, Division of Coverage

³ You suggest that the Pre-Tax Plan could be easily amended to provide that employees may direct that amounts credited to a "flexible spending account" under the Pre-Tax Plan be used to provide other benefits. We express no view as to the effect any such amendments might have on the status of the Pre-Tax Plan under Title I of ERISA.

⁴ The Department has adopted a non-enforcement policy with respect to a failure to hold such contributions in trust. See ERISA Technical Release No. 92-01, as modified by the notice published at 58 Fed. Reg. 45359 (August 27, 1993).