



October 19, 2015

2015-01A  
ERISA SEC.  
3(1) & 3(4)

Christopher Chediak  
Weintraub Tobin  
400 Capitol Mall, 11th Floor  
Sacramento, California 95814

Dear Mr. Chediak:

This is in response to your request for guidance regarding Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the long-term disability (LTD) program sponsored by the California Law Enforcement Association (CLEA) is an "employee welfare benefit plan" within the meaning of section 3(1) of Title I of ERISA.<sup>1</sup>

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. CLEA is a non-profit mutual benefit corporation that provides self-funded long-term disability benefits to participating law enforcement personnel throughout the State of California. CLEA established the LTD program in 1985 under California Insurance Code sections 11400-11407. Those sections allow firemen's, policemen's, or peace officers' benefit and relief associations to be formed for the purpose of aiding their members or dependents of their members in case of sickness, accident, distress, or death. The associations are required to have a governing body elected by the membership, use assets only to pay benefits, and are prohibited from using assets to solicit or procure new members. Associations established under these sections of the California Insurance Code receive a certificate of authority and are exempted from other provisions of the California Insurance Code and other state laws relating to insurance.

CLEA's by-laws indicate that the directors of CLEA may "seek low-cost insurance protection for all plan participants, both by self-funding welfare benefits or by contracting through insurance companies for such benefits." CLEA is also allowed to adopt and maintain other benefit plans, including a long-term care plan and an accidental death and dismemberment plan. This letter addresses only the LTD program.

Section 3.02 of the by-laws describes CLEA's members as "participants in Plans . . . established by [CLEA] or by Trusts . . . established or sponsored by [CLEA] . . ." Section 4.03 defines those "eligible for plan membership" as "peace or law enforcement officers who are regular and salaried officers or employees of the state or of a county or any other political subdivision or public or municipal corporation, or any employee of a police department of a municipal or public

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<sup>1</sup> In Advisory Opinion 93-32A the Department opined that CLEA's LTD program was not a single ERISA-covered plan sponsored by an employee organization because participation in CLEA was open to employers as well as employee organizations. You represented, and we assume for purposes of this letter, that no law enforcement agencies are currently participating as employers in CLEA, although it appears such participation is still nominally allowed in CLEA documentation.

corporation or district ..."if he or she is (i) a participant in a participating association, or (ii) an "eligible individual ... subject to such additional requirements as may be established by the directors."

Participating associations include "charter associations," "regular associations" and 'independent associations.' A charter or regular association is defined as "any law enforcement agency, association, union or club" in which more than 100 of the members (and more than 60% of the membership) are participants in the CLEA LTD program. An independent association is any law enforcement agency, association, union or club electing to associate with CLEA which has less than 100 participants in the LTD program and is not a charter association.

An "eligible individual" is defined in section 4.07 as "any member residing within the State of California and not belonging to a participating association and complying with such plan participation criteria as the directors may adopt from time to time in accordance with the restrictions upon plan participation set forth in the plan document." A current listing of approximately 150 participating associations you provided included associations such as the Beverly Hills Police Officer Association, the San Diego County Probation Officer's Association, and the California Association of Motor Vehicle Investigators. The listing also included associations of insurance :fraud investigators, district attorney investigators, social service investigators, and fish and game wardens.

Under its by-laws, a board of directors manages the affairs of CLEA. Directors generally serve for a term of one year or until a successor has been appointed and qualified. Responsibilities of the board include establishing CLEA's executive board; appointing and removing officers, agents and employees of the corporation unless otherwise provided by contract; prescribing powers and duties for them that are consistent with law, the articles of incorporation and the by-laws; and determining benefit provisions, eligibility, and claims. Section 9.01 provides that the board has the power to adopt plans such as the LTD program, and may adopt and maintain trusts for which the trustees shall be CLEA directors.

Under section 6.04, the directors of CLEA's board are selected as follows. Each charter association and regular association is entitled to elect one director. There are approximately 65 directors named by charter or regular participating associations for the CLEA board. CLEA's by-laws are silent as to the actual voting procedures of the participating associations except to state that the results of the voting by each participating association should be communicated to CLEA annually. You state that CLEA generally has no knowledge, and does not confirm whether any individual offered by a participating association to be a CLEA director was elected by the membership of that particular association. Participating eligible individuals are not represented on the board and one non-voting representative of the independent associations is permitted to attend some of CLEA' s meetings. There are currently 3,957 individuals, out of a total of over 20,000 participants, who participate in the CLEA LTD program who are eligible individuals or members of independent associations.

The CLEA LTD program is self-funded and its assets are held in a CLEA trust established by "various unions and other profit and non-profit mutual benefit associations." Prior to May 19, 2013, CLEA filed one Form 5500 for a plan named the California Law Enforcement Association

Long Term Disability Plan. Although the CLEA LTD program is still administered by CLEA as a single benefit arrangement, on May 19, 2013, CLEA transferred all of the trust assets to a successor plan, the California Law Enforcement Long Term Disability Plan – Safety Personnel, and on the same date created a smaller separate LTD plan for non-safety personnel, the benefits of which are "guaranteed" by the larger plan for five years.<sup>2</sup>

Section 3(1) of ERISA defines the term "employee welfare benefit plan" in relevant part as:

[A]ny plan, fund, or program ... established or maintained by an employer or by an employee organization, or by both, to the extent 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 ... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment ...

Although it appears that the LTD program provides benefits described in section 3(1) of ERISA, to be an employee welfare benefit plan, the plan, fund or program must also, among other criteria, be established or maintained by an "employer, an employee organization, or by both" as those terms are defined under ERISA. Because you have represented that the LTD program was not established or is maintained, wholly or partially, by the State of California<sup>3</sup> or any other employer, this letter addresses only whether the program is established or maintained by an "employee organization" within the meaning of section 3(4) of ERISA.

Section 3(4) of ERISA defines the term "employee organization" to mean:

[A]ny labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, 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.

It does not appear that CLEA "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" such as labor disputes, wages, hours of employment, or conditions of work. Therefore, CLEA would not be an employee organization within the meaning of the first part of the definition contained in section 3(4), *i.e.*, that portion appearing before the semi-colon. Nor, as explained below, does it appear that CLEA is an "employees' beneficiary association" within the meaning of the second part of section 3(4), after the semi-colon.

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<sup>2</sup> You have not asked and this letter does not address any potential fiduciary or other issues under Title I of ERISA that may arise in connection with the transfer of assets from the CLEA LTD Plan to the CLEA LTD Plan for Safety Personnel and the CLEA LTD Plan for Non-Safety Personnel.

<sup>3</sup> The fact that all the participants in a plan are government employees would not in and of itself result in the plan being treated as a governmental plan under ERISA section 3(32). See Advisory Opinion 80-22A.

ERISA does not define the term "employees' beneficiary association." The Department, however, applies criteria developed for the same term under the Welfare and Pension Plans Disclosure Act (WPPDA).<sup>4</sup> Accordingly, an association or organization qualifies as an "employees' beneficiary association" within the meaning of section 3(4) of ERISA, only if employees participate in it and it meets the following criteria: (1) membership is conditioned on employment status -- for example, membership is limited to employees of a certain employer or members of one union; (2) the association has a formal organization, with officers, by-laws or other indications of formality; (3) the association generally does not deal with employers (as distinguished from organizations described in the first part of the definition of "employee organization"); and, (4) the association is organized for the purpose, in whole or in part, of establishing a welfare or pension plan. *See, e.g.*, Advisory Opinion 92-19A.

Based on your submissions, CLEA appears to have some of the characteristics of an employees' beneficiary association in that it has a formal organization, it generally does not deal with employers, and it was organized in part to provide welfare benefits. However, in the Department's view, CLEA membership is not conditioned on employment status nor do employees "participate" in CLEA as the Department has interpreted those requirements under section 3(4) of ERISA.

With regard to the employment status condition, the Department has consistently stated that members in an employees' beneficiary association must be related to each other through a common economic or representation interest, unrelated to the provision of benefits. *See* Advisory Opinion 77-59A (the concept of commonality means in general that membership in an employees' beneficiary association is conditioned on employment in a common working unit, *e.g.*, employees of a single employer or members of one union). *See also* Advisory Opinion 92-19A (association with active membership open only to police officers employed by the City of Richmond has required commonality) and Advisory Opinion 93-09A (employees of same employer working at same location have requisite commonality). The Department has also recognized commonality for purposes of ERISA section 3(4) where the members are employed by more than one employer if the employers share common ownership. *See* Advisory Opinion 85-27A (citing to Advisory Opinion 81-61A). *See also* Advisory Opinion 81-61A (plan offered to members of a credit union where membership is limited to employees of one employer and its subsidiaries; Advisory Opinion 79-19A (plan is limited to employees of Goodyear and its subsidiaries and is coordinated with the welfare benefits offered by Goodyear).

Members of CLEA (*i.e.*, individuals who participate in the CLEA LTD program) are not employees of a single employer or group of affiliated employers or members of a single employee organization. Rather, membership in CLEA is open to members of participating associations, which includes employees of any number of unrelated employers, as well as to individuals who are not members of any participating association. For example, CLEA members include employees of the State of California and multiple counties, cities and municipalities in the State of California.

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<sup>4</sup> The criteria were developed while the WPPDA, 29 U.S.C. § 302 (1970), was in effect. The WPPDA, which was repealed in 1975 when ERISA was enacted as its successor law, also used the term "employees' beneficiary association."

You assert that CLEA meets the commonality of interest test because CLEA program participants are all employees of a "closely related group of employers" (the State of California and its political subdivisions), are all in the same profession, and most are members of similar participating associations. In the Department's view, having the same occupation or being employed by similar employers does not provide the type of employment-based commonality that characterizes an employees' beneficiary association. *See Advisory Opinion 90-1 IA* (employees of a variety of employers in the railroad industry not sufficient commonality).

You cite as support for your position the fact that the Department has found commonality for ERISA 3(4) purposes with respect to broad classes of individuals who are employed by a larger umbrella employer, such as federal employees. *See Advisory Opinion 89-20A* (federal employees in local area with a local association have an employees' beneficiary association). But you have not shown that the individuals who participate in the CLEA LTD program are all employees of one such employer, *i.e.*, the State of California. Instead, you suggest that the CLEA LTD program participants have a similar commonality to that shared by federal employees because they are covered by a state-mandated benefit package and participate in the CLEA program as a supplement to that state-mandated benefit package. However, even if state law entitles a diverse group of employees to specified benefits, that fact alone would be insufficient to satisfy the commonality requirement. *See Advisory Opinion 80-74A* (commonality requires close ties between employee members such as employment with the same employer). We are aware of no authority to the contrary. In fact, a U.S. District Court has recently held that CLEA is not an employees' beneficiary association within the meaning of ERISA section 3(4). *Mandala v. California Law Enforcement Ass'n*, 561 F.Supp.2d 1130, 1135 (C.D. Cal. 2008).

The second basis for commonality for an employees' beneficiary association -- that the members are all members of the same union or employee organization -- is also not satisfied by the CLEA arrangement. We do not view this commonality requirement as satisfied where the association's membership extends to individuals belonging to a variety of associations, unions or clubs. *See Advisory Opinion 85-02A* (benefit program of employee organization not a single plan because plan participants are represented by different unions or no union at all although all are employees of public school districts).

The Department is also unable to conclude that the employee members participate in CLEA within the meaning of section 3(4) of ERISA. The Department has interpreted this requirement to mean that the members must participate in the association in such a way that its functions and activities are controlled by the members, in form as well as in fact, either directly or through the regular election of directors, officers, or other similar representatives. *See Advisory Opinion 80-63A* (benefit arrangement covering federal employees nationwide is not an employees' beneficiary association where there is no evidence of employee control over association); *Advisory Opinion 80-74A* (members of association did not have meaningful involvement in or control of association that ceded all voting rights to plan trustee and administrator).

As noted above, participants in CLEA's LTD program are not members of CLEA *per se*. Rather, most are eligible for CLEA's benefit program by reason of membership in a participating association. You suggest these associations control CLEA through CLEA's by-law provision

that each charter association and regular association is entitled to elect one CLEA director. However, you advised us that CLEA does not have the means to, and does not verify, whether the named directors are elected by the members of their participating associations. Further, you acknowledged that participants who are "eligible individuals" or members of independent associations do not have any direct or indirect control over CLEA or the CLEA LTD program. Thus, the Department is unable to conclude that CLEA is an organization in which employee members participate by controlling, directly or indirectly, its functions and activities.

Rather than being an employees' beneficiary association, CLEA reflects characteristics more consistent with the sale of a commercial insurance product than an employee benefit plan, and it appears to operate as a self-funded insurance provider servicing employees of independent and geographically widespread employers.<sup>5</sup> For example, CLEA's by-laws are structured to protect its operations from competitors, and it engages operators to perform marketing functions. In 2011, CLEA and CLEA's third party administrator, California Administration Insurance Services, Inc. (CAISI – a firm owned by CLEA's assistant secretary) together sued and reached a favorable settlement with the Peace Officers Research Association of California (PORAC) and PORAC's LTD program regarding PORAC's competition with CLEA's LTD program. According to its press release on the settlement, CLEA's president said: "The primary goal of CLEA's lawsuit was to stop its competitor from attempting to gain an unfair advantage by using inappropriate tactics and making unfounded claims that cast doubt upon CLEA's financial strength or its ability to serve plan participants . . ." See [www.clea.org](http://www.clea.org).

Federal courts have also reached the conclusion that ERISA's statutory provisions and legislative history do not support the inclusion of what amounts to commercial products or entrepreneurial ventures within the definition of an ERISA benefit plan. *See Wisconsin Educ. Ass'n Ins. Trust*, 804 F.2d 1059, 1063 (8th Cir.1986) (*citing* H.R.Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977)). *See also Bell v. Employee Security Benefit Association*, 437 F. Supp. 382, 390-92 (D.C. Kan. 1977)(program fell within the definition of "insurance" subject to regulation by state, rather than within ERISA's definition of "employee benefit plan," where operation of a program was not noncommercial but rather provided profit-making opportunities for a marketing agency and an administrative services provider, both of which had substantial ties to organizers of the program).

Accordingly, it is the view of the Department that the CLEA LTD program does not constitute an employee welfare benefit plan within the meaning of ERISA section 3(1) because the requirement that such plans be "established or maintained by an employer or by an employee organization or by both" is not satisfied. However, the associations whose members participate in the CLEA LTD program may themselves constitute employee organizations under ERISA 3(4), in which case they may be sponsoring employee welfare benefit plans for their employee

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<sup>5</sup> CLEA files a Form 990 as a tax exempt "voluntary employees' beneficiary association" (VEBA) under Internal Revenue Code section 501(c)(9). The Department has previously stated that whether an entity is recognized as a VEBA for the purposes of Code section 501(c)(9) is not determinative of whether the entity is an employee organization for the purposes of section 3(4) of ERISA. *See, e.g.*, Advisory Opinion 2005-25A. We also note that sections 11400 through 11407 of the California Insurance Code appear to treat certain employee organizations as single entities for state insurance law purposes. The status of the CLEA program under state insurance law is not determinative of whether the arrangement constitutes a single employee welfare benefit plan under Title I of ERISA. *See generally* DOL Information Letter to Nevada Attorney General George J. Chano (May 8, 2006).

members through the CLEA LTD program. In such cases, CLEA would be acting as a fiduciary for those plans and would be subject to all of ERISA's fiduciary responsibility provisions, including the prohibited transaction provisions.

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