U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

October 19, 2015

Nancy S. Gerrie
McDermott Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096

2015-02A
ERISA Sec.
401(b)

Dear Ms. Gerrie:

This is in response to your request for guidance on behalf of Schneider Electric Holdings, Inc., and its subsidiary, Schneider Electric USA, Inc., regarding Title I of the Employee Retirement Income Security Act of 1974 (ERISA). In particular, you ask whether stop-loss insurance policies purchased by a plan sponsor to manage risk associated with a self-insured contributory welfare plan would constitute "plan assets."

You represent the following. Schneider Electric Holdings, Inc. (SEHI), and its subsidiary, Schneider Electric USA, Inc. (SEUSA) (Plan Sponsors) sponsor the Schneider Electric Benefit Program for US Employees (Plan I) and the Schneider Electric USA, Inc. and Subsidiaries Employee Welfare Benefit Plan for Coordinated Bargaining Employees (Plan II). Plan I covers non-collectively bargained employees. Employees who are covered by collective bargaining agreements with one of three unions participate in Plan II. Both Plans provide medical, dental, vision, health care flexible spending accounts, and dependent care flexible spending accounts under Internal Revenue Code section 125. Although the medical portions of the Plans are largely funded from the general assets of the Plan Sponsors, employees also make contributions to both Plans at specified rates.

The Plan Sponsors wish to purchase one or more stop-loss insurance policies (Policies) for the purpose of managing the risk associated with their liabilities under the medical benefit portions of the Plans. Pursuant to the Policies, the insurer will reimburse the Plan Sponsors only if, during the policy year, they pay benefit claims required under the Plans in excess of a pre-determined amount, or attachment point, consistent with applicable state insurance law.[1] The purchase of such insurance will not relieve the Plans of their obligations to pay benefits to Plan participants, and the stop-loss insurer has no obligation to pay claims of Plan participants. The Plan Sponsors would be the named insured under the Policies. Reimbursements to the Plan Sponsors will be made at the end of the calendar year after the Plan Sponsors have paid for plan benefits and presented appropriate stop-loss claims to the insurer for reimbursement. Any reimbursement would be made to the Plan Sponsors within 120 days following the end of the calendar year. The Policy will reimburse the Plan Sponsors only if the Plan Sponsors pay claims under the Plan from their own assets, so that the Plan Sponsors will never receive any reimbursement for claim amounts paid with participant contributions.

[1] States may regulate insurance policies issued to plans or plan sponsors, including stop-loss insurance policies, if the law regulates the insurance company and the business of insurance. *See Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003). The Department has addressed state regulation of stop-loss policies in the context of group health plans, and concluded that ERISA would not preempt a state insurance law that prohibits insurers from issuing stop-loss contracts with attachment points below specified levels either for a single enrollee or for aggregate claims. *See* Technical Release 2014-01 (available at www.dol.gov/ebsa/newsroom/tr14-01.html).

You describe certain accounting procedures that were put in place by the Plan Sponsors to ensure that no monies attributable to employee contributions are used for paying premiums on the Policies. Specifically, participant contributions are paid into the general account of SEUSA and recorded in a balance sheet. All health claims and other Plan expenses are paid from this SEUSA general account. The Plan Sponsors will pay premiums for the Policies, or any other stop-loss insurance, exclusively from a general account of SEHI.

Except for the use of participant contributions to partly fund the medical benefit portions of the Plans, you represent that the facts surrounding the purchase of the Policies will be identical in all material respects to the facts surrounding the purchase of the stop-loss insurance policy described in Advisory Opinion 92-02A (Jan. 17, 1992), where the Department found that a stop-loss insurance policy purchased by an employer sponsoring a self-insured welfare benefit plan to which employees did not contribute, and that provided benefits exclusively out of the employer's general assets, would not be an asset of the plan. As in the advisory opinion: (1) the insurance proceeds from the Policies would be payable only to the Plan Sponsors, who would be the named insured under the Policies; (2) the Plan Sponsors would have all rights of ownership under the Policies, and the Policies would be subject to the claims of the creditors of the Plan Sponsors; (3) neither the Plans nor any participant or beneficiary of the Plans would have any preferential claim against the Policies or any beneficial interest in the Policies; (4) no representations would be made to any participant or beneficiary of the Plans that the Policies would be used to pay benefits under the Plans or that the Policies in any way represent security for the payment of benefits; and (5) the benefits associated with the Plans would not be limited or governed in any way by the amount of stop-loss insurance proceeds received by the Plan Sponsors.

You request clarification as to whether, under the above described arrangement, the Policies would constitute plan assets under ERISA.

Title I of ERISA does not impose funding requirements with respect to welfare plans. Rather, an employer can sponsor and maintain a welfare benefit plan without identifiable plan assets by paying plan benefits exclusively from the employer's general assets. The sponsor's general assets do not become plan assets solely as a result of the employer's promise to pay benefits.

The Department's regulations describe the point at which employee contributions paid to, or withheld by, an employer constitute assets of a welfare benefit plan. 29 C.F.R. 2510.3-102. In situations outside the scope of the plan assets regulations, the Department has indicated that it will apply ordinary notions of property rights under non-ERISA law to identify plan assets. *See* Advisory Opinion 92-24A. The process includes consideration of any contracts, plan documents or other legal instruments involving the plan.

It is the view of the Department, based on the facts and representations contained in your submission, that the Policies would not constitute assets of the Plans. This conclusion is premised on the following facts. First, except for the use of participant contributions to partly fund the medical benefit portions of the Plans, the facts surrounding the purchase of the Policies will be identical in all material respects to the facts surrounding the purchase of the stop-loss insurance policy described in Advisory Opinion 92-02A. Second, with respect to the use of participant contributions to fund in part the benefits under the Plans, you have put in place an accounting system that ensures that the payment of premiums for the Policies includes no employee contributions. Third, the purchase of such insurance will not relieve the Plans of their obligation to pay benefits to Plan participants, and the stop-loss insurer has no obligation to pay claims of Plan participants. Fourth, the Policies will reimburse the Plan Sponsors only if the Plan

Sponsors pay claims under the Plans from their own assets so that the Plan Sponsors will never receive any reimbursement from the insurer for claim amounts paid with participant contributions.

You indicated that the Plan Sponsors and the Plans are relying on the Department's enforcement policy adopted in Technical Release 92-01, 57 Fed. Reg. 23272 (1992) and 58 Fed. Reg. 45359 (1993), with respect to holding participant contributions in trust and certain related annual reporting requirements under ERISA. The Department cautioned in Technical Release 92-01 that the enforcement policy in no way relieves plan sponsors and fiduciaries of their obligation to ensure that participant contributions are applied only to the payment of benefits and reasonable administrative expenses of the plan. Utilization of participant contributions for any other purpose may result not only in civil sanctions under Title I of ERISA but also criminal sanctions under 18 U.S.C. 664. *See U.S. v. Grizzle*, 933 F.2d 943 (11th Cir. 1991).

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter 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 the provisions of Title I of ERISA and does not address issues under the Internal Revenue Code.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations