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

May 11, 2005

2005-08A
ERISA SEC.
29 CFR 2510.101

Joel A. Mintzer, Esq.
Robins, Kaplan, Miller & Ciresi, LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015

Jon W. Breyfogle, Esq.
Groom Law Group, Chartered
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006-5811

Dear Messrs. Mintzer and Breyfogle:

This is in response to your request for an advisory opinion on behalf of BCBSM, Inc., d/b/a Blue Cross and Blue Shield of Minnesota (Blue Cross). Specifically, you ask whether litigation proceeds that are received by Blue Cross and subsequently paid out to certain group insurance policyholders, who maintain welfare benefit plans, would be subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Blue Cross is a non-profit health service corporation organized under Minnesota law and as such is prohibited from retaining surplus assets above a certain level specified by Minnesota law. You represent that Blue Cross received a litigation settlement amount of $469 million that was paid over five years beginning in May 1998. These settlement proceeds caused Blue Cross to have surplus assets in excess of the amount permitted by Minnesota statute (Excess Surplus). You indicate that the settlement proceeds are in satisfaction of all of Blue Cross's claims for damages against the tobacco industry. In response to administrative proceedings initiated by the Minnesota Commissioner of Commerce (the Commissioner), Blue Cross submitted a plan to correct the Excess Surplus condition prohibited by Minnesota law. Blue Cross's initial plan to remove its Excess Surplus, which did not include payments to Blue Cross's fully insured groups, was not approved by the Commissioner.

In November 2001, Blue Cross submitted an amended plan to the Commissioner to remove its Excess Surplus in order to comply with Minnesota law. The amended plan included a proposed distribution of $30 million of the Excess Surplus to certain group insurance policyholders of Blue Cross. In June 2002, the Commissioner tentatively approved Blue Cross's amended plan provided that the distribution does not violate ERISA. In July 2002, certain insured individuals and groups seeking a portion of the tobacco settlement amount received by Blue Cross filed a class action lawsuit against Blue Cross (Class Action Lawsuit). In December 2003, Blue Cross reached a tentative settlement agreement in the Class Action Lawsuit, subject to court approval, that included Blue Cross's payment (Payment) to certain group insurance policyholders (Policyholders) totaling $41 million based on specific criteria determined by Blue Cross. The Payment remains a part of Blue Cross's amended plan to remove its Excess Surplus, which has been tentatively approved by the Commissioner.

You represent that not all current Blue Cross policyholders will receive a portion of the Payment and that there are approximately 38,000 Policyholders that may receive a portion of the Payment amount. You represent that Blue Cross's distribution of the Payment is not based on the amount of premiums paid by Policyholders, nor is it based on the actual health care experience of any Policyholder. Rather, you represent that the distribution of the Payment is based entirely on the following criteria: (1) whether the Policyholder had a fully-insured contract with Blue Cross at any time from January 1, 1978 through June 15, 2001 (Relevant Period); (2) the greatest number of covered employees in the last month in which the Policyholder was fully insured during the Relevant Period; and (3) the length of time that a Policyholder contracted with Blue Cross during the Relevant Period.

You represent that the Blue Cross distribution formula will distinguish Policyholders in narrowly drawn groupings in terms of group size. You further represent that the Blue Cross distribution formula ignores any actuarial differences in premiums paid for similarly-sized insured groups. As a result, Policyholders that have the same number of insured individuals for the same amount of time will receive the same distribution amount despite the fact that one Policyholder may have paid a significantly larger amount in premiums than the other during the Relevant Period.

You represent that the Policyholders, as employers, provided health insurance benefits through their Blue Cross group insurance policies to their employees pursuant to welfare benefit plans that are governed by ERISA. Under typical contracts, Blue Cross requires that the employer contribute at least 50 percent of the premiums and, in fact, Blue Cross believes that most employers contributed in excess of 50 percent over the years. You also represent that some Policyholders may have terminated the welfare plan associated with Blue Cross's group insurance policy for which a portion of the Payment is to be made. You further represent that no Policyholder will receive a portion of the Payment in excess of its total premiums paid to Blue Cross and that because $41 million is such a small portion of overall premiums paid over the years by employers, employers will recover only a relatively small portion of their premium payments. You ask whether any amounts paid to Policyholders constitute plan assets.[1]

Distributions from insurance companies to their policyholders take a variety of forms, including refunds, dividends, demutualization payments and excess surplus distributions, such as the Payment. To the extent that a distribution, such as the Payment, is considered to be plan assets, it becomes subject to the requirements of Title I of ERISA. Anyone with authority or control over plan assets is a fiduciary and subject to, among other things, the fiduciary responsibility provisions of ERISA section 404, the prohibited transaction provisions of ERISA section 406 and the bonding requirements of section 412. Also, under ERISA section 403 plan assets must generally be held in trust and may not inure to the benefit of the employer. Section 403(a) of ERISA provides that all assets of an employee benefit plan shall be held in trust by one or more trustees. ERISA does not expressly define what property will be regarded as "assets of an employee benefit plan." The Department of Labor (the Department) has issued regulations describing what constitutes plan assets with respect to a plan's investment in other entities and

[1] We note that, because Blue Cross sued on its own behalf for damages suffered by it, and not on behalf of any of its policyholders, it is the view of the Department that none of the settlement amount constitutes plan assets while it remains in the possession and control of Blue Cross.

with respect to participant contributions. *See* 29 C.F.R. 2510.3-101 and 29 C.F.R. 2510.3-102, respectively. The Department has indicated that the assets of an employee benefit plan generally are to be identified in other situations on the basis of ordinary notions of property rights.[2]

Generally, a distribution such as the Payment, will be a plan asset if a plan has a beneficial interest in the distribution under ordinary notions of property rights.[3] Under this approach the primary factors in determining beneficial interest would be the types of benefits, the terms of the governing instruments and the source of funds for the insurance contract. In the case where any type of plan or trust is the policyholder, or where the premium is paid entirely out of trust assets, it is the view of the Department that the entire distribution amount received by such policyholder constitutes plan assets.[4] However, if instead the employer is the policyholder or the owner of the policy, this fact would not, by itself, indicate that the employer may retain the entire distribution amount. If an employer is the named policyholder, additional evidence of the parties' intent would be needed to determine whether amounts received by the employer should be allocated to the plan because plan participants and beneficiaries are considered beneficiaries of the policy that underwrites plan benefits.

If the insurance policy or contract, together with other instruments governing the plan, is fairly read to provide for ownership of distributions, such as the Payment, then that language governs subject to the provisions of section 403 of ERISA. In the absence of more direct evidence of ownership, the Department believes that the allocation of a Policyholder's portion of the Payment between a plan and its sponsoring employer may be based on the sources of the insurance policies premium payments and other plan expenses. Under this approach the portion of a distribution that is attributable to participant contributions would be considered plan assets. In this regard, it is the Department's opinion that, if a contract is ambiguous, and an employer paid the entire cost of the insurance coverage, then no part of the distribution with respect to this particular policy would be attributable to participant contributions. Likewise, if instead participants paid the entire cost of the insurance coverage then the entire amount of the distribution to such policyholder would be attributable to participant contributions and considered to be plan assets. If the participants and the employer each paid a fixed percentage of the cost, a percentage of the distribution equal to the percentage of the cost paid by participants would be attributable to participant contributions. If employers were required to pay a fixed amount and participants were responsible for paying any additional costs, then the portion of the distribution under such a policy that does not exceed the participants' total amount of prior contributions would be attributable to participant contributions. Finally, if participants paid a fixed amount and the employer were responsible for paying any additional costs then the portion of the distribution under such a policy that did not exceed the employer's total amount of prior contributions would not be attributable to participant contributions.[5]

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[2] *See e.g.*, Advisory Opinion 94-31 (September 9, 1994) and Advisory Opinion 2001-02A (February 15, 2001).

[3] *See,* Advisory Opinion 92-02A (January 17, 1992) (assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law).

[4] If an employer takes steps that cause the plan to gain a beneficial interest in particular assets, under ordinary notions of property rights (*e.g.,* causing the plan to be the named policyholder or using trust assets to pay the entire premium) such assets would become plan assets. *See,* Advisory Opinion 99-08A (May 20, 1999), Advisory Opinion 94-31A (September 9, 1994), and Advisory Opinion 2001-02A (February 15, 2001).

[5] The Department believes, however, that in the case of a policyholder's receipt of demutualization proceeds, members of a mutual insurance company are required to legally exchange, and thereby extinguish, their equity

In any case, employers that sponsor employee benefit plans that use insurance policies to provide benefits under such plans would be prohibited by ERISA section 403(c)(1) from receiving a distribution amount greater than the total amount of premiums and other plan expenses previously paid by the employer out of its general assets. To the extent that a policyholder's portion of the distribution exceeds the amount of such policyholder's total amount of premiums and other plan expenses previously paid, that excess amount must be held in trust for the exclusive benefit of participants. In addition, if the welfare plan of a policyholder was properly terminated and all obligations and claims under such plan were satisfied prior to the termination, there is no obligation under Title I of ERISA to treat any portion of the distribution received by such policyholder as plan assets. Therefore, no violation of Title I of ERISA would occur if such policyholder retains its portion of the Payment. It should also be noted that the other fiduciary obligations under Title I of ERISA, including those in sections 404 and 406 of ERISA, apply to dealing with any portions of the Payment amount that constitute plan assets.[6]

Consistent with the provisions of ERISA section 403, Policyholders receiving a portion of the Payment constituting plan assets could place those assets in trust until appropriately expended in accordance with the terms of the plan. Alternatively, the Department believes that, prior to or simultaneous with the distribution of the Payment constituting plan assets, such assets could be applied to enhancing plan benefits under existing, supplemental or new insurance policies or contracts; or applied toward future participant premium payments without violating the requirements of section 403.

You represent that many of the Policyholders do not currently maintain trusts to hold plan assets because their plans are funded solely by insurance contracts, and therefore, are exempt from the trust requirement. This is generally true for welfare plan Policyholders and smaller employers holding group annuity contracts to fund retirement benefits. In recognition of the unique circumstances giving rise to the distribution of the Payment (where a portion of the Payment is considered to be plan assets by a Policyholder), the Department has determined that, pending the issuance of further guidance, it will not assert a violation in any enforcement proceeding solely because of a failure to hold plan assets in trust, provided that: such assets consist solely of proceeds received by the Policyholder in connection with the Payment; such assets, and any earnings thereon, are placed in the name of the plan in an interest-bearing account as soon as reasonably possible following receipt and such proceeds are applied for the payment of participant premiums or applied to plan benefit enhancements or distributed to plan participants as soon as reasonably possible but no later than twelve (12) months following receipt; such assets are subject to the control of a designated plan fiduciary; the plan is not otherwise required to maintain a trust under section 403 of ERISA; and the designated fiduciary maintains such

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interests for such proceeds. In this context, and unless it is clear from the contract and other plan documents how the proceeds should be allocated, the policyholder's ownership/equity interest in the insurance company relates directly to the amount of premiums paid. As a result, when participants contribute towards insurance premiums that produce an inchoate equity/ownership interest, it is the view of the Department that a pro-rata portion of the resulting demutualization proceeds is properly attributable to participant contributions. *See* Advisory Opinion 2001-02A and Information Letter to Theodore Groom (February 15, 2001).

[6] The Department expresses no view concerning the tax consequences of any action taken by a Policyholder with regard to the receipt, holding, or distribution of the Payment. Such issues are exclusively within jurisdiction of the Internal Revenue Service.

documents and records as are necessary under ERISA with respect to the foregoing. Nor, with respect to plans satisfying the foregoing, will the Department assert a violation in any enforcement proceeding or assess a civil penalty with respect to such plans because of a failure to meet the reporting requirements by reason of not coming within the limited exemptions set forth in 29 CFR §§ 2520.104-20 and 2520.104-44 solely as a result of receiving a portion of the Payment constituting, in whole or in part, plan assets.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976). Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

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