

**BERGAN, PAULSEN  
& COMPANY, P.C.**

CERTIFIED PUBLIC ACCOUNTANTS  
AND CONSULTANTS

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February 26, 2003

Top Hat Plan Exemption  
Pension and Welfare Benefits Administration  
Room N-5644  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

**Re: Waterloo Warehousing and Service Company, Inc.**


Under Reg. 2520.104-23, the taxpayer provides the following information to comply with the alternate method of compliance with the reporting and disclosure requirements of Part 1 of Title I of ERISA for unfunded pension plans maintained by an employer for a select group of management pursuant to the authority of the Secretary of Labor under Section 110 of the Act.

Name of Employer: Waterloo Warehousing and Service Company, Inc.  
Address of Employer: 324 Duryea Street, Waterloo, Iowa 50701  
Federal ID Number: 42-1195655

Effective February 13, 2003, the employer has established two plans primarily for the purpose of providing deferred compensation for a select group of management. Each plan covers one employee for a total of two employees. The benefits will be provided solely from the general assets of the employer.

Sincerely,

**BERGAN, PAULSEN & COMPANY, P.C.**



Chad E. Abbas  
Certified Public Accountant

c: Kevin Hemmen  
Kate Petersen  
David Tyler

250 Waterloo Building  
P.O. Box 2100  
Waterloo, Iowa 50704-2100  
(319) 234-6885  
Fax (319) 234-6287

120 West Fourth Street  
P.O. Box 489  
Cedar Falls, Iowa 50613-0489  
(319) 268-1715  
Fax (319) 268-1720

● **Financing vehicles**

An employer may still assure that funds are available when due by utilizing financing vehicles such as a Rabbi Trust (see ¶ 315), Corporate Owned Life Insurance (COLI) (see ¶ 9291), or a Secular Trust (see ¶ 320). An employer may also adopt a contingency plan, which is maintained separately from other nonqualified plans, but, under which payments may be made to in the event of an employee's insolvency or other conditions (.12).

● **ERISA's reporting and disclosure rules apply**

A top-hat plan, even if unfunded, is subject to ERISA's reporting and disclosure rules.

Top-hat plans satisfy the reporting and disclosure requirements of ERISA by (.14):

1. filing a statement with the Secretary of Labor, within 120 days after the plan has been adopted, that includes the name and address of the employer, the employer identification number (EIN) assigned by the IRS; a declaration that the employer maintains the plan or plans primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; and a statement of the number of such plans and the number of employees in each, and
2. providing plan documents, if any, to the Secretary of Labor upon request.

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Failure to satisfy the conditions of the alternative mechanism for compliance will subject the top-hat plan to all of ERISA's reporting and disclosure rules.

● **Enforcement and administration rules apply**

A top hat plan, funded or unfunded, must comply with ERISA's enforcement and administration requirements (.145).

Top-hat plans are also covered by ERISA's preemption rules. See ¶ 5905.

● **Determining vesting**

For the purpose of determining whether an employee's rights in a top-hat plan have vested, the rules of common law contract interpretation, rather than ERISA, apply (.15). The common law interpretation was applied because the court determined that ERISA did not contain a clear indication of how the term "vested" should be defined.

● **Top-hat loans**

Participants may voluntarily extend loans to the employer after receiving distributions from top-hat plans without violating ERISA, as long as the employer does not exert pressure on the participants to make the loans (.20). The loans may consist of the amount of lump-sum distributions received by the participants, less the amount of any income tax paid, and may be evidenced by a note and secured by insurance policies with interest payments at a fair market rate.

● **Employer deduction**

An employer may generally not deduct contributions to an unfunded top-hat plan until the benefits are actually distributed or made available to the employee (.25). The employer may deduct contributions to a funded top-hat plan in the year that the contributions are made. However, contributions subject to a substantial risk of forfei-

ture may not be deducted until the benefits vest and are not subject to a substantial risk of forfeiture.

● **Benefits are taxable to employees**

An employee is subject to tax on employer contributions to an unfunded top-hat plan when the amounts are paid or made available to the employee (.30). Employer contributions to a funded top-hat plan are includable in an employee's income in the year in which the contributions are made.

- .05 ERISA Reg. § 2520.104-23(a)-(c).
- .06 IRS Letter Ruling 9030035, 4-30-90.
- .07 *Dependahl v. Falstaff Brewing Corp.*, CA-8 (1981), 653 F 2d 1208, cert. denied, 454 US 968.
- .10 ERISA Opinion Letter 90-14A, 5-8-90.
- .11 *Duggan v. Hobbs*, CA-9 (1996), No. 95-15863.
- .12 "Risk and Insurance," December 1994.
- .14 ERISA Reg. § 2520.104-23(b).
- .15 *Barrowclough v. Kidder, Peabody, and Co.*, CA-3 (1985), 752 F2d 23; *Levinson v. Carnival Corp.*, Fla Dist Ct (1998), No.97-3416, at ¶23,9490. See also, *Emmenegger, et al. v. Bull Moose Tube Co., et al*, DC Mo (1998), No. 4:06CV1095, at ¶23,947J (employees were entitled to bring suit under ERISA for benefits under a phantom stock plan where the plan limited participation to senior managers, allowed employees to defer compensation, and was unfunded and, thus, was a top-heavy plan subject to ERISA's enforcement provisions).
- .15 *Healy v. Rich Products Corp.*, CA-2 (1992), No. 92-7398.
- .20 ERISA Opinion Letter 89-24A, 9-25-89.
- .25 Code Sec. 83(h).
- .30 Code Sec. 402(b).

¶ 310 **Deferred Bonuses**

The simplest form of deferred compensation is where one year's bonus is paid in several annual installments. These are ordinary bonuses for extraordinary efforts in a single year—the development of a new patent, suggestion of a cost-saving system, and so on—which will not be repeated each year. From the tax standpoint, spreading of the payment could be more advantageous to the recipient than receiving the entire amount in a single sum.

In addition to spreading the employee's tax load, the deferment of award payments could have a stabilizing influence on turnover where continued employment is required in order to obtain the balance of the money.

¶ 315 **Rabbi Trusts**

A "rabbi trust" is a nonqualified deferred compensation arrangement in which amounts are transferred to an irrevocable trust to be held for the benefit of executive employees. Because the trust provides that it is subject to the claims of general creditors of the employer, the employer is considered the owner of the trust and the executive beneficiary is *not* subject to tax on the deferred amounts until he actually receives the compensation (.05). This type of arrangement is named for a rabbi who received an early favorable ruling from the IRS establishing the validity of this trust as a method of deferring income. The IRS has provided model language for rabbi trust arrangements (.10).

The IRS will issue *favorable rulings* for rabbi trusts if *three conditions* are met:

1. the trust's assets must be available to all the general creditors of the employer if the employer files for bankruptcy;
2. insolvency triggers that hasten payments to creditors when the employer's net worth falls below a certain point will be disallowed; and
3. a procedure to provide notice to the trustee of the bankruptcy of the employer or financial hardship of the employer will be required (.15).

payment of premiums to the insurance company. [Amended April 19, 2000 by 65 FR 21084.]

(c) Limitations. This exemption does not exempt the administrator of an employee benefit plan from any other requirements of title I of the Act, including the provisions which require that plan administrators furnish copies of the summary plan description to participants and beneficiaries (section 104(b)(1)), file an annual report with the Secretary of Labor (section 104(a)(1)(A)) and furnish certain documents to the Secretary of Labor upon request (section 104(a)(6)), and authorize the Secretary of Labor to collect information and data from employee benefit plans for research and analysis (section 513). [Revised by 67 FR 771, effective March 8, 2002.]

(d) Examples. (1) A welfare plan has 25 participants at the beginning of the plan year. It is part of a group insurance arrangement of a trade association which provides benefits to employees of two or more unaffiliated employers, but not in connection with a multiemployer plan as defined in the Act. Plan benefits are fully insured pursuant to insurance contracts purchased with premium payments derived half from employee contributions (which the employer forwards within three months of receipt) and half from the general assets of each participating employer. Reimbursements to the plan are paid to participating employees within three months of receipt as provided in the plan and as described to each participant upon entering the plan. The trade association holds the insurance contracts. A trust acts as a conduit for payments, receiving premium payments from participating employers and paying the insurance company. The plan appoints the trade association as its plan administrator. The association, as plan administrator, provides summary plan descriptions to participants and beneficiaries, enlisting the help of participating employers in carrying out this distribution. The plan administrator also makes copies of certain plan documents available to the plan's principal office and such other places as necessary to give participants reasonable access to them. The plan administrator files with the Secretary an annual report covering activities of the plan, as required by the Act and such regulations as the Secretary may issue. The exemption provided by this section applies because the conditions of paragraph (b) have been satisfied. [Amended April 19, 2000 by 65 FR 21084.]

(2) Assume the same facts as paragraph (d)(1) of this section except that the premium payments for the insurance company are paid from the trust to an independent insurance brokerage firm acting as the agent of the insurance company. The trade association is the holder of the insurance contract. The plan appoints an of-

ficer of the participating employer as the plan administrator. The officer, as plan administrator, performs the same reporting and disclosure functions as the administrator in paragraph (d)(1) of this section, enlisting the help of the association in providing summary plan descriptions and necessary information. The exemption provided by this section applies. [Amended April 19, 2000 by 65 FR 21084.]

(3) The facts are the same as paragraph (d)(1) of this section except the welfare plan has 125 participants at the beginning of the plan year. The exemption provided by this section does not apply because the plan had 100 or more participants at the beginning of the plan year. See, however, § 2520.104-43. [Amended April 19, 2000 by 65 FR 21084.]

(4) The facts are the same as paragraph (d)(2) of this section except the welfare plan has 125 participants. The exemption provided by this section does not apply because the plan had 100 or more participants at the beginning of the plan year. See, however, § 2520.104-43. [Amended March 9, 1978, by 41 F.R. 10130; amended April 19, 2000 by 65 FR 21084.]

(e) Applicability date. For purposes of paragraph (b)(3) of this section, the arrangement may continue to use an entity (such as a trade association) as the conduit for the payment of insurance premiums to the insurance company for reporting years of the arrangement beginning before January 1, 2001. [Added April 19, 2000 by 65 FR 21084.]

§ 14,247B

§ 2520.104-22 Exemption from reporting and disclosure requirements for apprenticeship and training plans.—(a) An employer that has a benefit plan that provides exclusively apprenticeship training benefits or other training benefits or that provides exclusively apprenticeship and training benefits shall not be required to meet any requirement of Part 1 of the Act, including the requirements of section 110 of the Act, if the plan is filled with the Secretary the notice described in paragraph (b) of this section; (2) takes steps reasonably designed to ensure that the information required to be contained in such notice is disseminated to employees of employers contributing to the plan who may be eligible to enroll in any other study sponsored or established by the plan; (3) makes such notice available to such employees upon request.

(b) The notice referred to in paragraph (a) of this section shall contain accurate information concerning: (1) the name of the plan; (2) the Employer Identification Number (EIN) of the plan sponsor; (3) the name of the plan administrator.

tor. (4) the name and location of an office or person from whom an interested individual can obtain: (i) a description of any existing or anticipated future course of study sponsored or established by the plan, including any prerequisites for enrolling in such course; and (ii) a description of the procedure by which to enroll in such course. [Amended March 10, 1980, by 45 FR 15527.]

(c) Filing Address. The notice referred to in paragraph (a) of this section shall be filed with the Secretary of Labor by mailing it to: Apprenticeship and Training Plan Exemption, Pension and Welfare Benefits Administration, Room N-5644, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, or by delivering it during normal working hours to the Division of Reports, Office of Program Services, Pension and Welfare Benefits Administration, Room N-5644, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC. [Amended on March 1, 1989 by 54 FR 8624.]

§ 14,247C

§ 2520.104-23 Alternative method of compliance for certain selected employees.—(a) Purpose and scope. (1) This section contains an alternative method of compliance with the reporting and disclosure requirements of Part 1 of Title I of the Employee Retirement Income Security Act of 1974 for unfunded or insured pension plans maintained by an employer for a select group of management or highly compensated employees, pursuant to the authority of the Secretary of Labor under section 110 of the Act (88 Stat. 851).

(2) Under section 110 of the Act, the Secretary is authorized to prescribe an alternative method for satisfying any requirement of Part 1 of Title I of the Act with respect to any pension plans, or class of pension plans, subject to such requirement.

(b) Filing obligation. Under the authority of section 110 of the Act, an alternative form of compliance with the reporting and disclosure requirements of Part 1 of the Act is provided for certain pension plans for a select group of management or highly compensated employees. The administrator of a pension plan described in paragraph (d) shall be deemed to satisfy the reporting and disclosure provisions of Part 1 of Title I of the Act by—

- (1) Filing a statement with the Secretary of Labor that includes the name and address of the employer, the employer identification number (EIN) assigned by the Internal Revenue Service, a declaration that the employer maintains a plan or plans primarily for the purpose of providing deferred compensation for a select group of man-

agement or highly compensated employees, and a statement of the number of such plans and the number of employees in each, and

(2) Providing plan documents, if any, to the Secretary upon request as required by section 104(a)(6) of the Act. Only one statement need be filed for each employer maintaining one or more of the plans described in paragraph (d) of this section. For plans in existence on May 4, 1975, the statement shall be filed on or before August 31, 1975. For a plan to which Part 1 of Title I of the Act becomes applicable after May 4, 1975, the statement shall be filed within 120 days after the plan becomes subject to Part 1. [Revised by 67 FR 771, effective March 8, 2002.]

(c) Filing Address. Statements may be filed with the Secretary of Labor by mailing them addressed to: Top Hat Plan Exemption, Pension and Welfare Benefits Administration, Room N-5644, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, or by delivering it during normal working hours to the Division of Reports, Office of Program Services, Pension and Welfare Benefits Administration, Room N-5644, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, D.C. [Amended on March 1, 1989 by 54 FR 8624.]

(d) Application. The alternative form of compliance described in paragraph (b) of this section is available only to employee pension benefit plans—

- (1) Which are maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees, and

(2) For which benefits (i) are paid as needed solely from the general assets of the employer, (ii) are provided exclusively through insurance contracts or policies, the premiums for which are paid directly by the employer from its general assets, issued by an insurance company or similar organization which is qualified to do business in any State, or (iii) both.

§ 14,247D

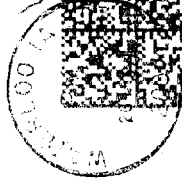
§ 2520.104-24 Exemption for welfare plans for certain selected employees.—(a) Purpose and scope. (1) This section, under the authority of section 104(a)(3) of the Employee Retirement Income Security Act of 1974, exempts unfunded or insured welfare plans maintained by an employer for the purpose of providing benefits for a select group of management or highly compensated employees from the reporting and disclosure provisions of Part 1 of Title I of the Act, except for the requirement to provide plan documents to the Secretary of Labor upon request under section 104(a)(1) of the Act.

**BERGAN, PAULSEN  
& COMPANY, P.C.**

CERTIFIED PUBLIC ACCOUNTANTS  
AND CONSULTANTS

P.O. Box 2100

Waterloo, IA 50704-2100



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