

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-76A  
Sec. 3(1), 3(5)

OCT 14 1981

Mr. R. B. Ashworth  
Deputy Commissioner  
State Board of Insurance  
1110 San Jacinto  
Austin, Texas 78786

Dear Mr. Ashworth:

This is to inform you of the results of a review of the Homebuilders Association Employees Benefit Trust (the Trust), Houston, Texas. As you are aware the Dallas Area Office of the Labor-Management Services Administration of the Department of Labor initiated the review of the Trust to determine whether the Trust was an employee welfare benefit plan covered by title I of the Employee Retirement Income Security Act of 1974 (ERISA). After reviewing the facts involved, we are of the opinion, for the reasons set forth below, that the Trust does not constitute an employee welfare benefit plan within the meaning of section 3(1) of ERISA and is not covered by title I of ERISA.

In order to satisfy the definition of an "employee welfare benefit plan" or "welfare plan" set forth in ERISA section 3(1), benefit programs must, among other things, provide welfare benefits, including the type provided by the Trust, and be "established or maintained by an employer or by an employee organization, or by both." The Trust does not appear to be connected to any employee organization. Therefore, in determining whether the Trust is an "employee welfare benefit plan," we have found it necessary to consider only whether it is established or maintained by an "employer."

Section 3(5) of ERISA provides:

The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

Thus, the definitional provisions of ERISA recognize that a single welfare plan might be established by a group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members in providing benefits to their employees. On the other hand, where several unrelated employers merely execute identically worded "trust agreements" or similar documents offered by an independent third party as a means to fund benefits, in the absence of any indication that such employers have formed a group or association to act in their interest in providing benefits, a single employee benefit plan within the meaning of section 3(3) of ERISA cannot be recognized. Instead, each benefit program provided by an individual employer for his employees, to the extent that it meets the "welfare plan"

definition in section 3(1) of ERISA, will be considered a separate employee benefit plan. Among the key factors in determining whether an organization providing health and welfare benefits to employees of more than one employer is a welfare plan established and maintained by a group or association of employers acting in the interest of its employer members are the process by which the group or association of employers was formed and who actually controls and directs the activities and operations of the organization.

While employers eligible to participate in the Trust are limited to members of the Texas Association of Builders (the Association), our investigation does not indicate that the Association has any significant relationship to the Trust, and the Association is not a party to the agreement dated September 1, 1977, under which the Trust was established and is maintained. In fact, our investigation indicates that the Trust was conceived not by the Association, but by Mr. C. Lee Hampton, the owner of Instex Group Services, Inc. (Instex), which serves as Administrator of the Trust, and that participation in the Trust was marketed by Mr. Hampton or by Instex to individual employer members of the Association.

Under the terms of the documents and instruments governing the Trust, moreover, Instex is specifically appointed as Administrator with "general and complete managerial authority over the affairs of the Trust," including the power to appoint one or more trustees for the Trust, the power to "establish and administer Benefit Plans on behalf of Participating Employers," and the powers to amend and terminate the benefit plans so established. Instex may not be removed from its position as Administrator except on a vote of a majority of the participating employers who choose to vote, but may resign upon 30 days' notice. The Administrator also has the power to terminate the participation of any participating employer in the event such employer fails to make timely contribution payments or required reports, or fails to meet underwriting standards which the Administrator establishes. While the trust agreement authorizes the creation of a "benefit advisory council" to be appointed by local or regional associations affiliated with the Association, and to consist of participating employers or their representatives, it appears that the functions of any such council would be purely advisory in character and that they would not exercise any substantive control over the activities and operations of the Trust.

In light of these circumstances, we do not think that the Trust can be considered to have been formed, or to be controlled, by the Association or by any other group or association of employers acting for its employer members. Instead, it appears that it is Mr. Hampton and Instex who created the Trust and who control and direct its activities and operations. Accordingly, the Trust itself cannot be recognized as an employee welfare benefit plan within the meaning of section 3(1) of ERISA. However, it appears that each benefit program provided by an individual employer participating in the Trust could be an employee welfare benefit program to the extent that such program otherwise meets the "welfare plan" definition in section 3(1). Moreover, persons who act in fiduciary capacities with respect to those plans would be subject to the fiduciary obligations set forth in part 4 of title I of ERISA, 29 U.S.C. §1101 *et seq.*

Sincerely,

Ian D. Lanoff  
Administrator of Pension and Welfare Benefit Programs

cc: Texas Association of Builders