

U.S. Department of Labor

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



Reply to the Attention of:
OPINION NO. 82-50A
Sec. 3(1), 3(4), 3(5)

SEP 22 1982

Mr. Thomas F. Dean
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Dear Mr. Dean:

This is in reply to your letter of March 6, 1981, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Realtors Group Insurance Trust (REGIT) is an "employee welfare benefit plan" which is "maintained by an employer" within the meaning of sections 3(1) and 3(5) of ERISA.

You represent that REGIT was established by a trust agreement entered into in 1960 and amended in 1977 by certain individuals and the National Association of Realtors (NAR) for the purpose of providing life and health insurance on a group basis for "employers," eligible "employees," and their eligible dependents. Article 1, section 1(c) of the trust declaration defines the term "employer" to include NAR¹, its Societies, Institutes and Councils, Institute Affiliates, member real estate boards, member State Associations of Real Estate Boards, and any corporation, partnership, sole proprietorship, trust, Realtor Associate (the "Realtor" is a trademark of NAR, and designates a person engaged in the real estate business who is a Board Member or Individual Member of NAR), or real estate licensee principally engaged in the real estate business (including brokerage, management, appraising, real estate counselling, syndicating, mortgage financing, land development, building, and insurance and other specialties relating or incident to the real estate business). Article 1, section 1(b) of the trust declaration defines the term "employee" to mean any person employed by an employer (as defined in Article 1, section 1(c)) on a full-time basis; and any sales person, individual proprietor, or partner who devotes a substantial amount of his time to the business of an employer. Article IV, section 1 of

¹ Article III, section 1 of the constitution and by-laws of NAR indicates that membership in NAR consists of four classes: (1) Member Boards, (2) Board Members, (3) Individual Members, and (4) Institute Affiliate Members. Section 1(c) indicates that Board Members consist of Realtor and Realtor Associates. Realtor Associates consist of both independent contractors and salesmen who are employed by a Realtor.

the trust declaration provides that any employer (as defined in Article 1, section 1 (c)) who subscribes in writing to the trust agreement and who satisfies the requirements of the insurance companies, whom the trustees have purchased insurance policies from, for participation in the group insurance contracts held by REGIT will become a participant in the trust as an employer.²

Under the terms of the trust agreement, the trust is administered by 11 named trustees, who can serve for a maximum of two 5-year terms. The president of NAR, subject to the approval of the Board of Directors of NAR, appoints successor trustees, each of whom must continue to be an active member of NAR in order to remain eligible to serve as trustee. The trustees have the power to amend the trust agreement, although any such amendment that affects the relationship of NAR and REGIT must be approved by NAR.

You state that of the 44,000 persons covered by the REGIT programs, almost 22,000 are "independent contractors" who have no common-law employees.³

NAR itself is governed by a Board of Directors, which is comprised of a number of ex officio Directors plus Directors at Large. Directors at Large are elected on the basis of one from each state, commonwealth, insular possession, and the District of Columbia for the first 200 Realtor members (or fraction thereof), plus one for each additional 500 Realtor members (or major fraction thereof). Additional Directors at Large (who may be Realtor-Associates) are elected on the basis of one for the first 1,000 (or any fraction thereof) Realtor-Associates from each such territory plus one for each additional 5,000 Realtor-Associates (or major fraction thereof). Directors at Large are elected, for terms of 3 years, at NAR's annual National Convention. According to Sections 5 and 10 of Article IX of the NAR constitution, Directors at Large are elected by presidents of Member Boards (or their alternates), together with any Individual Members of NAR from areas not within the jurisdiction of any Member Board or of any state association having a membership agreement with NAR. Section 2 of that Article provides (although it is not entirely clear that the proviso extends to the election of Directors at Large) that the president of a Member Board, in casting votes for his Board, shall be entitled to as many

² For purposes of coverage under the REGIT programs, a Realtor Associate is deemed to be an "employer" and not an "employee."

³ You also assert that participation in REGIT is not limited to members of NAR, but, rather, is available to any person or entity that meets the definition of "employer" described above. We note, however, that the group insurance contracts submitted with your request limit participation by "employers" to those persons who are members of NAR. As is indicated above in the main text, the trust agreement limits participation in REGIT to those persons who satisfy the requirements of the insurance companies selected by the trustees. Although the extent to which nonmembers of NAR may participate in the REGIT programs as "employers" is not entirely clear to us, the opinion contained in this letter does not depend on the resolution of that question. Nor does it depend upon a determination of the extent to which the "independent contractors" would be considered employees for purposes of title I of ERISA.

votes as his Board has Realtor Members, and an additional vote for each three Realtor-Associate members of his Board.

Section 3(1) of ERISA defines an employee welfare benefit plan as:

... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that 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, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Although REGIT does provide benefits among those enumerated in section 3(1), in order to be an employee welfare benefit plan, REGIT must, among other criteria, be established or maintained by an employer, or employee organization, or both, for the purpose of providing these benefits to participants or their beneficiaries.

Sections 3(4) and 3(5) of ERISA define the terms "employee organization" and "employer" respectively. The term "participant" is defined in section 3(7) of ERISA to mean, generally, an employee or former employee of an employer, or a member or former member of an employee organization.

Section 3(4) of ERISA defines the term "employee organization" to mean a labor union or 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.

Section 3(5) of ERISA defines the term "employer" to mean 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.

There is no indication in your submission that NAR 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. Assuming, for purposes of this letter and without making an independent determination with respect to the matter, that NAR does not exist for such purposes, NAR would not be a labor organization described in section 3(4). In addition, in view of the provisions of the NAR constitution governing representation and voting, recited above in part, it appears that NAR is not controlled by employees. In that case, NAR would not be an

"employees' beneficiary association" for purposes of section 3(4). Thus, if the assumption made above regarding the purposes for which NAR exists is true, and if NAR is not subject to the control of its employee members, NAR would not be an "employee organization" as defined in section 3(4) of ERISA.

With regard to the status of NAR under section 3(5) of ERISA, it is the Department of Labor's (the Department) position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of ERISA. See Opinions 80-68A (dated December 1, 1980, copy enclosed), and 81-51A (dated June 9, 1981, copy enclosed). Since it appears, on the basis of your submission, that NAR meets those two criteria, the Department concludes that, in relation to REGIT, NAR has not established, and is not maintaining, REGIT in NAR's capacity as an "employer." Thus, subject to the truth of the assumptions made above regarding section 3(4) of ERISA, REGIT itself would not be an employee welfare benefit plan as defined in section 3(1) of ERISA. However, any employer (including NAR) that establishes or maintains a welfare benefit program for its employees through the REGIT programs will have established an employee welfare benefit plan covered by title I of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

Enclosures