

U.S. Department of Labor

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



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION NO. 83-14A
Sec. 3(1), 514, 3(5)

MAR 14 1983

Mr. George R. Kamperschroer
Boardman, Suhr, Curry & Field
First Wisconsin Plaza, Suite 410
One South Pinckney Street
Madison, Wisconsin 53701

Dear Mr. Kamperschroer:

This is in reply to your letters of February 15, and May 28, 1980, requesting an advisory opinion concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Wisconsin Bankers Association (the Association) Insurance Trust Fund (the Trust). In your correspondence, you requested consideration by the Department of Labor (the Department) of three issues: (1) whether each individual bank providing benefits to its employees through its participation in the Trust in the manner described below would be deemed to have established its own separate employee welfare benefit plan within the meaning of section 3(1) of ERISA, (2) whether the Trust constitutes an employee welfare benefit plan within the meaning of that same section, and (3) whether the Trust is a trust established under an employee benefit plan within the meaning of ERISA section 514(b)(2)(B) such that the Trust may not be deemed to be an insurance company or other insurer or deemed to be engaged in the business of insurance for the purposes of the laws of any state.

In the correspondence and related materials submitted to the Department in connection with your request, you represent that the situation is as follows. The Association's By-laws provide in Article II that its purpose is, in relevant part, "... to serve the needs and interests of Wisconsin banks and bankers by providing leadership and service ... and aiding its member banks in serving, the people and economy of the state and nation." Membership in the Association, under Article V of the Restated Articles of Incorporation and Article IV of the By-laws, is of three kinds: Active, Associate, and Honorary. Active members may be any national or state bank, savings bank, or trust company within the State of Wisconsin and doing business therein, which shall pay such annual dues as may be provided for by the By-laws of the Association. Only Active members are entitled to vote in any election held by the Association. Associate members may be any national or state bank, savings bank, or trust company incorporated and doing business outside of the State of Wisconsin, or any insurance company, bond dealer, commercial paper broker, public accountant, or other individual or entity, within or without the State of Wisconsin, or any loan or investment company or association within the State of Wisconsin that shall be invited to become such by the officers of the Association with the approval of its

Executive Council and shall pay such annual dues as may be provided for in the By-laws of the Association. Honorary members may be any chapter of the American Institute of Banking in the State of Wisconsin and such individuals as may be elected by a two-thirds (2/3) vote of all Active members present and voting at any annual meeting. Such membership is without dues. Article V of the By-laws provides for an annual meeting of the membership of the Association.

Under a trust document established December 28, 1956, and restated effective January 1, 1976, fully insured group health policies were designated as the means to be used by the Trust to provide benefits for employees of any of its members. In accordance with these documents and for the benefit of members of the Association currently participating in the Trust "as employers," the Trust now purchases group health insurance from the Travelers Insurance Company (the Company). By amendment of the trust document dated February 7, 1980, the Trust is permitted to participate in a "minimum premium arrangement" which you describe and for which you have prepared and submitted sample documents to be used. Under such documents, Association members' payments to the Trust will be deposited in a bank account with Hartford National Bank and Trust Company. Up to an amount agreed upon between the Association and the Company, claims filed with the Company by employees of the Association's members participating in the Trust will be paid by drafts issued by the Company against the Trust's bank account. The amount of claims to be paid by the Trust directly is expressed in terms of a percentage of premiums charged by the Company under the group policies presently in use plus, in some months, an added amount based on the difference between benefits paid and monies available for such payments for prior months. The Trust will also forward premiums to the Company as payment for the Company's agreement to be responsible for claims exceeding the agreed upon amount. Under the proposed arrangement, the Company continues to review all employees' claims for purposes of ascertaining their validity, whether or not such claims must be paid by the Company under the terms of their agreement with the Association.

Section 4.02 of the Trust's Article 4 allows the trustee of the Trust, after notice, to terminate any employer's participation in the Trust if such employer's contribution is not made within 10 days after it is due. Section 9.01 of Article 9 of the Trust provides that the documents under which the Trust operates may be amended and that the Trust may be terminated at any time by the trustees of the Trust with the approval of the Association's Pension and Insurance Committee. Article 6 of the Trust authorizes this committee to select the Trust's insurance carrier as well as the benefits to be provided to Trust participants. This committee also may remove and/or replace the trustees in accordance with Article 8 of the Trust. (Article XI of the Association's By-laws provides that such committees are composed of nine Active members appointed by the Association's president with the approval of its Executive Council. The president and other elective officers of the Association must be active officers of Active members and are elected by the Active members in accordance with Article VI of the Association's By-laws.)

The first question posed in your letter is whether each individual bank participating in the Trust is deemed to have established its own employee welfare benefit plan within the meaning of section 3(1) of ERISA.

Under section 3(1) of ERISA, the term "employee welfare benefit plan" is generally defined to mean, in relevant part, "... any plan, fund, or program ... established or maintained by an

employer” for the purpose of providing certain specified types of benefits for its participants or their beneficiaries. The term “employer” is defined in section 3(5) of ERISA to include a group or association of employers acting for an employer in relation to an employee benefit plan. Thus, the definitional provisions of ERISA recognize that a single employee welfare benefit 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 to provide 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 genuine organizational relationship among these employers, no employer association, and, consequently, no employee benefit plan within the meaning of section 3(3) of ERISA, can be recognized.

A determination whether a purported group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the pre-existing relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the association and the benefit program.

In examining your letters and the documents submitted with them, we have identified some circumstances that tend to support a conclusion that the Trust was established and is maintained by a bona fide employer group or association to the extent it provides benefits to employees of Active members of the Association. Your submissions, however, do not indicate whether the Active member employers exercise control in substance, as well as in form, over the Trust. In the Department’s view a bona fide group or association of employers must be subject to the control of its employer members both in form and in substance. The question of whether a group or association is subject, not only in form, but also in substance, to the control of its employer members is a factual question. Section 5.01 of ERISA Procedure 76-1 provides that the Department ordinarily will not issue an advisory opinion when the nature of the question is inherently factual. Accordingly, the Department is unable to issue an advisory opinion with regard to whether the Association is or is not a group or association of employers within the meaning of section 3(5) of ERISA with regard to its Active members.

In this regard, it appears that some of the non-Active members of the Association, who apparently have no voice in the Association’s activities and operations, may participate in the Trust. In light of the relevant factors mentioned above, it is the Department’s position that, as a result of participation in the Trust by employers who have no voice in the Association’s activities and operations, at least with respect to those employers, the Association is not a bona fide employer association acting for them in relation to the Trust, particularly if such employers have no genuine basis for membership in the Association in view of the purposes for which it was formed.

Under these circumstances, since the Association is not a group or association of employers with

the capacity to act for its non-Active employer members in relation to the Trust, the benefit programs of such employers electing to participate in the Trust could not be considered to amount to a single employee benefit plan. Instead, each such participating employer would be considered to have established a separate welfare plan for its employees.

The second question posed in your letter is whether the Trust is an “employee welfare benefit plan” under section 3(1) of ERISA. The answer to this question would, of course, depend on the extent to which each participating employer would be considered to have established a separate welfare plan for its employees, or whether the Association, acting for its employer members, has established a single welfare plan of which the Trust forms a part.

The third question posed in your letter is whether the Trust is a trust established under one or more employee benefit plans within the meaning of section 514(b)(2)(B) of ERISA, such that the Trust may not be deemed to be an insurance company or other insurer or to be engaged in the business of insurance for the purposes of the laws of any state purporting to regulate insurance companies. As you may be aware, sections 3 and 514 of ERISA have recently been amended.¹ As a result of those amendments, new section 3(40) of ERISA defines the term “multiple employer welfare arrangement” (MEWA) to mean, as here relevant, an employee welfare plan, or any other arrangement which is established or maintained for the purpose of offering or providing any benefit described in section 3(1) of ERISA to the employees of two or more employers. Section 514(b)(6) of ERISA (as amended), provides, in part, that in the case of an employee welfare benefit plan which is a MEWA and is fully insured, and notwithstanding any other provision of section 514, state law which regulates insurance may apply to the extent that such law provides standards, requiring the maintenance of specified levels of reserves and levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to pay benefits when due. Section 514(b)(6) further provides that in the case of any other employee welfare benefit plan which is a MEWA, state insurance law may apply to the extent not inconsistent with the provisions of title I of ERISA. Accordingly, since the Trust appears to us to be part of a MEWA, state insurance law would apply to it in the manner summarized above, even if the trust is an employee welfare benefit plan or a trust established under such a plan within the meaning of section 514(b)(2)(B) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it 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

¹ See title III of Act of January 14, 1983, Pub. L. 97-473.