

**U.S. Department of Labor**

Office of Pension and Welfare Benefit Programs  
Washington, D.C. 20210



DEC 16 1985

85-42A

Mr. Don D. Carlson  
Dorsey & Whitney  
2200 First Bank Place East  
Minneapolis, Minnesota 55402

Dear Mr. Carlson:

This is in response to your correspondence on behalf of the Insurance Plan and Trust of the North Dakota Auto and Implement Dealers (Intrust) requesting an exemption from the prohibited transaction provisions of title I of the Employee Retirement Income Security Act of 1974 (ERISA) and posing certain fiduciary questions.

As you were apprised, review of your exemption application raised a question whether, and to what extent, Intrust constitutes a single "employee welfare benefit plan" within the meaning of section 3(1) of title I of ERISA. The additional fiduciary questions involved will be answered in a separate response.

You advise that Intrust was created in 1949 by the Automobile Dealers Association of North Dakota (ADAND) and the North Dakota Implement Dealers Association (NDIDA) for the purpose of providing health and welfare benefits. Four trustees appointed by the ADAND board of directors, four trustees appointed by the NDIDA board of directors, and one additional trustee elected by the above-mentioned eight trustees are responsible for administration of Intrust. The membership of NDIDA and ADAND, respectively, elects its own board of directors, with each member in good standing having one vote.

ADAND is an incorporated body whose membership, according to Article III, section 1, of the ADAND bylaws is as follows:

Any person, firm or corporation regularly engaged in the retailing of new motor vehicles, having an established place of business, carrying an assorted stock of new motor vehicles, when available, parts and accessories, reasonably commensurate with the demands of his community, shall be considered a regular automobile dealer and be eligible to membership in this Association.

NDIDA is an incorporated body whose membership, according to Article III, section 1, of the NDIDA bylaws is as follows:

Any person, firm or corporation regularly engaged in the retailing of farm and earth-moving equipment in the state of North Dakota, having an established place of business, carrying an assorted stock of merchandise, when available, parts and accessories, reasonably commensurate with the demands of his community, shall be considered a regular implement dealer and be eligible to membership in this Association.<sup>1</sup>

The current Intrust agreement dated May 25, 1983, indicates that an entity becoming an "employer" within the meaning of Intrust enters into a subscription agreement with Intrust furnished by the trustees. Section 1.08 of the Intrust trust agreement defines "employer" as:

a corporation, partnership, proprietorship or other business entity which is engaged primarily in retailing of new automobiles, trucks, tractors or farm machinery, carrying, in connection therewith at a regular established place of business an assorted stock of parts, implements and materials reasonably commensurate with the demands of its community, and its principle place of business is located in the State of NORTH DAKOTA and who by executing a Subscription Agreement furnished by the Trustees adopts this Agreement in accordance with the rules of the Trustees and satisfies such other requirements as the Trustees may establish. The term "Employer" shall also refer to any corporation, partnership, proprietorship or other business entity which is engaged in the business of manufacturing or wholesaling new automobiles, trucks, tractors, farm machinery, implements and parts or materials therefore, which regularly furnishes such to dealers who are members of either or both Associations, which has its principal place of business in NORTH DAKOTA, and which is an associate member of either or both Associations, to the extent that it enters into a Subscription Agreement with the Trustees and satisfies such other conditions as the Trustees may establish. The term "Employer" shall also refer to the Automobile Association and the Implement Association if and to the extent that they enter into a Subscription Agreement with the Trustees and satisfy such conditions as the Trustees may establish.

It appears that §1.08 of the Intrust agreement allows any corporation, partnership, proprietorship or other business entity to participate in Intrust so long as the criteria for participation stated therein are met regardless of whether the entity is actually a regular or associate member of ADAND or NDIDA. We note that neither the bylaws of ADAND or NDIDA make reference to associate members. However, other materials accompanying your submission indicate that

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<sup>1</sup> Both sets of bylaws allow for membership to be divided into classes but the classes of membership are not specified in the bylaws, and associate members are not specified as a type of "members" in either organization.

associate members of ADAND include a broad range of unrelated businesses, e.g., banks, insurance companies, finance companies, manufacturers and suppliers. A listing of associate members of NDIDA was not provided.

Section 3(1) of title I of ERISA defines the term "employee welfare benefit plan" to include:

... 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 Intrust provides benefits among those identified in section 3(1) of ERISA, to be an employee welfare benefit plan, Intrust must, among other criteria, also be established or maintained by an employer, an employee organization, or both. It is clear that ADAND and NDIDA have established and are maintaining Intrust. Because there is no indication in the materials you submitted that any employee organization is involved in any manner with Intrust, the only issue with regard to the status of Intrust is whether Intrust has been established or maintained by an employer.

Section 3(5) of ERISA defines an "employer" as:

... 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.

The Department of Labor (the Department) has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that, in the absence of the involvement of an employee organization, a "multiple employer" plan, i.e., a plan to which more than one employer contributes, may, nevertheless, exist where a cognizable bona fide group or association of employers established a benefit program for the employees of member employers. On the other hand, where several unrelated employers execute similar documents or otherwise participate in an arrangement as a means to fund benefits, in the absence of a defined and identifiable organizational relationship between the employers, no employer association, and consequently no employee welfare benefit plan, can be recognized.

A determination whether a 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 preexisting 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 benefit program. In addition, in the Department's view, the employers that participate in a benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

According to the terms of the ADAND and NDIDA bylaws, membership is open to "any person, firm or corporation" regularly engaged in the business of automobile and farm and earthmoving equipment retailing, respectively, in the State of North Dakota, without regard to whether such persons or entities are employers within the meaning of title I of ERISA. Because there is no indication that membership in ADAND or NDIDA is conditioned on employer status, the Department is unable to find that ADAND or NDIDA constitute bona fide employer organizations for purposes of title I of ERISA. In addition, because there is no indication that the employers who participate in ADAND or NDIDA as associate members and who are eligible to participate in Intrust either directly or indirectly exercise any control over the operation or management of ADAND or NDIDA which, in turn, established and maintains Intrust, the Department is unable to find that ADAND or NDIDA act as bona fide employer associations with respect to Intrust.

Therefore, it is the view of the Department that the program of benefits offered by Intrust is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA because it is not established or maintained by an employee organization or an employer, as those terms are defined in sections 3(4) and 3(5) of ERISA, respectively. However, each employer member of ADAND and NDIDA which has elected to provide benefits for its employees through a subscription agreement with the trustees of Intrust would be maintaining its own separate employee welfare benefit plan for purposes of title I of ERISA. Because each employer entering into a subscription agreement with the trustees of Intrust would have established a separate employee welfare benefit plan for its own employees, each of the separate plans involved, as well as the transactions involving each covered plan are governed by the provisions of part 4 of 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,

Elliot I. Daniel  
Assistant Administrator for Regulations and Interpretations