

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



AUG 7 1989

ERISA OPINION 89-17A  
Sec. 3(40)

Mr. Homer Elliot  
Drinker, Biddle & Reath  
Philadelphia National Bank Building  
Broad and Chestnut Streets  
Philadelphia, Pennsylvania 19107

Dear Mr. Elliot:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the WBMA, Inc. Voluntary Employee Benefit Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether the Trust is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of title I of ERISA.

You advise that the Trust was created pursuant to a trust agreement effective April 1, 1987 (the Trust Agreement) between WBMA, Inc. as settlor and Northern Central Bank as Trustee. The Trustee is subject to removal and replacement by a majority vote of Participating Companies. A Participating Company is defined in Article I, Section 1.12 of the Trust Agreement as any organization which adopts the Trust under Article XVII. Under Article XVII, Section 17.1, any company may adopt the Trust with the approval of WBMA, Inc. and the Trustee. A majority of Participating Companies may also amend or terminate the Trust.

WBMA, Inc. is wholly owned by the West Branch Manufacturers Association (the Association). Mr. Michael J. Sharbough, Executive Director of the Association, has stated in a letter that it is the policy of the Association that only members of the Association may participate in the Trust. Under Article II, Section 2 of the By-Laws of the Association, membership is restricted to employers whose primary business is manufacturing and/or processing and who are located in central and north central Pennsylvania. Directors of the Association must be executives of member manufacturing firms and are ratified by the members at an annual meeting.

The Trust Agreement states that the Trust was created to provide medical benefits to employees of Participating Companies. The Participating Companies appoint a Welfare Benefits Committee (the Committee) to administer the Trust. The Committee is comprised of five persons who serve without compensation.

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 (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).

Thus, in order to be an employee welfare benefit plan, an entity must, among other criteria, not only provide benefits described in section 3(1), but also be established or maintained by an employer, by an employee organization, or by both. Because there is no indication in the materials you submitted that an employer organization is in any way involved in the Trust, this letter will consider only whether the Trust was established or is maintained by an employer.

The term "employer" is defined in section 3(5) of title I of ERISA 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 definitional provisions of ERISA thus recognize that a single employee welfare benefit plan might be established or maintained by a cognizable, bona fide group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits for their employees. On the other hand, where several unrelated employers merely execute similar documents or otherwise participate in an arrangement and a means to fund benefits, in the absence of any genuine organizational relationship between the employers, no employer association, and consequently no employee welfare benefit plan, can be recognized.

A determination of 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, it is the Department of Labor's (the Department)

view that 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.

Although the Association, in form, appears to be a bona fide employer association, the issue of whether the Association, in substance, is a bona fide employer association is inherently factual in nature. Additionally, although Mr. Sharbough states it is the policy of the Association to limit participation in the Trust to members of the Association, the Trust Agreement does not limit Trust participation to employers who are members of the Association. Accordingly, the Department is unable to assure you, at this time, that the Trust is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

In response to the second part of your inquiry, even if the Trust were an employee benefit plan within the meaning of title I of ERISA, it appears to be a multiple employer welfare arrangement within the meaning of section 3(40) of the Act, and thus would be subject to state insurance law.

Section 3(40) of title I of ERISA defines the term "MEWA", in pertinent part, as follows:

... an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained--

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or

(ii) by a rural electric cooperative.

(B) For purposes of this paragraph--

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group.

From the information you submitted there is no indication that the Trust was established or is maintained pursuant to any agreement between an employer and an employee organization. Nor is there any indication that the participating employers in the Trust constitute either a rural electric cooperative or a control group. Accordingly, the Trust appears to be a MEWA within the meaning of section 3(40).

We note that section 514 provides, in pertinent part:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

\* \* \*

(b)(6)(A) Notwithstanding any other provision of this section--

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan. to which this title applies.

\* \* \*

If the Trust is not an employee welfare benefit plan within the meaning of section 3(1), section 514(a) would not be applicable and a state would not be preempted from regulating it. On the other hand, if the Trust is an employee welfare benefit plan within the meaning of section 3(1) and a MEWA within the meaning of section 3(40), the general preemption provision of section 514(a) would apply. However, under section 514(b)(6), the Trust would be subject to applicable state regulation to the extent permitted under subsection 514(b)(6)(A).

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has previously stated that it did not see the need to prescribe regulations under section 514(b)(6)(B) to exempt MEWAs from state regulation. The Department, at this time, has not changed its position. Accordingly, the Department is not providing MEWAs exemptions under section 514(b)(6)(B) from state regulation. An advisory opinion under ERISA Procedure 76-1 holding that an entity is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA would not constitute an exemption under section 514(b)(6)(B) from state regulation.

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

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations