

U.S. Department of Labor

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



APR 6 1990

90-06A
ERISA Sec. 3(40), 514

Ms. Sandra Milburn
Investigator
Texas State Board of Insurance
1110 San Jacinto
Austin, Texas 78701-1998

Dear Ms. Milburn:

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 Affiliated Food Stores, Inc. Group Benefit Trust (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 Declaration of Trust dated November 1, 1967, between Affiliated Food Stores, Inc. (Affiliated) on behalf of itself and its members as Trustor and three individuals as Trustees. The Declaration of Trust states that Affiliated is sponsoring the Trust to provide benefits for employees of participating members of Affiliated.

Affiliated is a co-operative made up of independent grocery stores who are member/stockholders of Affiliated. The Trust also permits "Associate Members" to participate. "Associate Members" are suppliers of Affiliated according to a letter dated November 3, 1988, to you from Affiliated General Agency, Inc. (AGA), which is the administrator of the Trust. The letter from AGA also states participation in the Trust was never offered to the suppliers. You stated in a telephone conversation with a representative of this Office that there is no indication that the Trust is maintained pursuant to a collectively bargained agreement and that there is no indication that the participating employers/members of Affiliated constitute a controlled group.

Section 3(40)(A) of title I of ERISA defines the term "MEWA" to include:

. . . 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.

Based upon the information you submitted, it is the position of the Department of Labor (the Department) that the Trust is a MEWA within the meaning of section 3(40). The Trust covers the employees of more than two separate, independent employers; is not maintained by a rural electric cooperative; and is not maintained under or pursuant to any collective bargaining agreement.

Although section 514(a) of ERISA provides that any state law or regulation which relates to an employee benefit plan covered by ERISA is preempted, P.L. 97-473 amended section 514(b) of title I of ERISA to provide:

(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.

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.

It is, therefore, the Department's position that the Trust is subject to state regulation at least to the extent provided in section 514(b)(6)(A), regardless of whether it is an employee benefit plan covered by title I of ERISA, because it is a MEWA within the meaning of section 3(40) of that title.

The preceding 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.

Because your request for an opinion was concerned primarily with the issue of whether or not the Trust is subject to the applicable regulatory authority of the State of Texas's insurance laws or is saved from such authority under the general preemption provision of section 514(a) of title I of ERISA, and because of the opinion above, we have determined it is not necessary at this time to render an opinion as to whether the Trust is an employee welfare benefit plan within the meaning of section 3(1) of that title.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations