

**U.S. Department of Labor**

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



APR 6 1990

90-07A  
ERISA Sec. 3(1), 3(5)

Mr. William T. Belcher  
Steptoe & Johnson  
P.O. Box 2190  
Clarksburg, West Virginia 26302

Dear Mr. Belcher:

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 asked whether (a) the proposed Flat Top Coal Benefits Trust (the Trust), if established, will be an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA, (b) the Trust will be a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of title I of ERISA, (c) any ERISA obligations will be applicable to the Trust; and (d) any ERISA obligations will apply to either the Flat Top Insurance Agency (the Agency) or the Flat Top National Bank of Bluefield (the Bank).

You advise that the Flat Top Coal Benefits Program (the Benefits Program) was established pursuant to a Trust Agreement dated February 1, 1985 (the 1985 Trust Agreement), between three named employers and other unnamed employers collectively known as the Employer and the Agency as Trustee. You further advise that the Benefits Program now proposes to become the Trust under a proposed Trust Agreement (the Proposed Trust Agreement) between various Applicant Members/employers and the Bank as Trustee. The Benefits Program provides benefits through a group policy or group policies from The Connecticut General Life Insurance Company (CGLIC) and the Trust would provide benefits in the same way. The Proposed Trust Agreement also states that the group policy or group policies would be acquired from CGLIC through the Agency. The 1985 Trust Agreement states that its purpose is to provide life, health and disability insurance coverage for employees (both non-union and members of the United Mine Workers of America and other unions) employed by the Employer. The Proposed Trust Agreement states its purpose is to provide health, disability and life insurance to employees of Applicant Members. You further advise that purpose of both Agreements is to enable employers too small to qualify for insurance on their own or unable to afford insurance premiums for such insurance to fulfill their obligations under the United Mine Workers of America Welfare Benefits Plan.

The 1985 Trust Agreement provides no method for replacing the Trustee. The Proposed Trust Agreement empowers the Trustee to designate its successor. In the event a Trustee failed to designate its successor, such successor would be named by any person delegated by Trustee with the responsibility of administering the Trust. Members are specifically denied the right to name a successor.

Under the 1985 Trust Agreement, the term "Employer" is defined to include:

... every person, partnership, firm or corporation who are or shall hereafter become engaged in business in the Coal Industry and are accepted as participants in this Trust by Trustee in accordance with the terms of this Agreement.

Section 15 of the Proposed Trust Agreement defines the membership requirements by providing, in pertinent part, that:

... any person in law, whether natural, corporate or whatever, which is engaged in a business which includes one or more of the functions inherent in the aforementioned business or profession and which employs a person or persons in connection therewith may become a Member of the Trust by agreeing in

writing with the Trustee to be bound by the provisions hereof, by having its eligible employees approved for coverage under the Policy and by making payment to the Trustee of an initial contribution in an amount equal to the current monthly premium allocated by the Trustee for each coverage on its employees and their dependents, plus the amount of any initial assessment the Trustee may specify. A natural person who becomes a Member shall be considered an employee for purposes of the provisions of this Trust relating to coverage under the policy.

The second paragraph of the Proposed Trust Agreement fails to specify the business or profession referred to in Section 15 of that Agreement.

You state the employers are unrelated and do not form a bona fide group or association of employers for the purposes of title I of ERISA. You state that the Trust is an arrangement whereby several unrelated employers merely execute identically worded trust agreements as a means to fund benefits and that it is maintained by the Bank as Trustee with the Agency acting as an entrepreneur for the purpose of marketing products and services to others.

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 the proposed Trust provides benefits among those identified in section 3(1) of title I of ERISA, in order to be an employee welfare benefit plan within the meaning of that section, the Trust must also, among other criteria, be established or maintained by an employer, an employee organization, or both.

The terms "employee organization" and "employer" are defined in sections 3(4) and 3(5) respectively of title I of ERISA as follows:

(4) The term "employee organization" means any labor union or any 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.

(5) The term "employer" means 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.

Because there is no indication in the information you submitted that an employee organization within the meaning of section 3(4) is in any way involved in the proposed Trust and you make no assertion that such is the case, this letter will be limited to a discussion of whether the proposed Trust will be established or maintained by an employer within the meaning of section 3(5).

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 a "multiple employer" plan, i.e., a plan to which more than one employer contributes, may be considered a single employee welfare benefit plan under title I of ERISA where a cognizable bona fide group or association of employers establish a benefit program for the employees of member employers. On the other hand, where several unrelated employers merely execute identically worded "trust agreements" or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between these employers, no employer association, and consequently no employee welfare benefit plan, 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 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 employer; 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.

Based on the information you submitted, it appears that the proposed Trust will not be established or maintained by an employer within the meaning of section 3(1) of ERISA because the employers who may be involved are not a bona fide employer group or association within the meaning of section 3(5) of ERISA. Although the participating employers may have commonality of interest based on being engaged in the same industry, there does not appear to be any genuine organizational relationship between them. Rather, the proposed Trust will be formed initially by the Trustee and membership appears to be open to any employer in the industry who wishes to receive insurance coverage through the program. Further, there is no indication that the proposed Trust will be under the control, in form or substance, of the participating employers. Instead, the Trust is proposed to be under the sole control of the Trustee. Accordingly, it is the position of the Department that the proposed Trust is not an employee welfare plan covered by title I of ERISA.

However, it is the Department's position that each employer within the meaning of section 3(5) of ERISA which utilizes the proposed Trust to provide welfare benefits to its employees and their dependents will establish a separate, single-employer welfare benefit plan within the meaning of section 3(1) of ERISA. Thus, to the extent the proposed Trust will handle plan assets, it will be nevertheless subject to the fiduciary provisions of part 4 of title I of ERISA. The Department takes a similar position with regard to both the Agency and the Bank.

Finally, because the proposed Trust is not an employee welfare benefit plan within the meaning of section 3(1) it is not necessary to address the issue of whether the Trust is a MEWA within the meaning of section 3(40). Regardless of whether the proposed Trust would be a MEWA, ERISA section 514(b)(6) will not operate to limit the application of state law to the proposed Trust because the proposed Trust will not be an employee benefit plan for purposes of title I.

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,

Robert J. Doyle  
Director of Regulations and Interpretations