

U.S. Department of Labor

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



March 22, 2001

2001-04A
ERISA SEC 3(1) & 3(5)

John E. Mossberg, Esq.
Reinhart, Boerner, Van Deuren
Norris & Rieselbach, S.C.
1000 North Water Street
P.O. Box 514000
Milwaukee, Wisconsin 53203-3400

Dear Mr. Mossberg:

This is in response to your request on behalf of the Wisconsin Automobile and Truck Dealers Association, Inc. Insurance Trust for an advisory opinion. Specifically, you ask for an advisory opinion which would confirm that the Wisconsin Automobile and Truck Dealers Association, Inc. Insurance Trust (Trust) is a single employee welfare benefit plan maintained by a "group or association of employers" within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA).

The facts and representations before the department in this matter, as furnished with your request and with the August 19, 1999 request on behalf of the Trust, include the following. You represent that it appears that the Wisconsin Automobile and Truck Dealers Association, Inc. ("Association") was formed in 1928 for the purpose of lobbying against a Wisconsin property tax law that applied to automobiles. The Association was incorporated in Wisconsin in 1935 for the purpose of promoting automotive trade in the State of Wisconsin and is a trade association recognized as exempt from tax under section 501(c)(6) of the Internal Revenue Code. The By-Laws of the Association provide for two classes of members, regular members and associate members. The regular members consist of entities whose primary business is the operation of a motor vehicle dealership established for the purpose of buying and holding automobiles and trucks in inventory for resale and licensed for such activity by the State of Wisconsin. Associate members are entities that do not qualify as regular members, but who are actively engaged in the automotive industry or allied industries in the State of Wisconsin or elsewhere. The By-Laws provide that only regular members are entitled to vote.

The Association is managed by the Board of Directors of the Association (Board of Directors). Regular members are permitted to elect the Association's 30 to 36 new vehicle directors by plurality vote. The By-Laws also provide for one new truck director and three used vehicle directors who are elected by the regular members of the Association who are members of the new truck council of the Association and the used vehicle council of the Association. The regular members of the Association, by majority vote, can remove any director for cause. The regular members may also, by two-thirds vote, amend the By-Laws. The By-Laws provide that the elected officers of the Association are elected by the Board of Directors from their own number and may be removed for cause by the directors. The Board of Directors employs a salaried staff head whose terms and conditions of employment are specified by the Board of Directors. The salaried staff head serves as a non-elected officer holding the position of President of the Association.

The Trust was established in 1948 by the Association for the purpose of providing group life, accident and health insurance benefits to employees of eligible members of the Association who elect to participate in the Trust. The Trust's benefit program is available to regular members of the Association who are eligible to, and who apply to,

participate in the Trust. Such eligible regular members of the Association who participate in the Trust are called "Subscribers." The Trust qualifies as a voluntary employees beneficiary association (VEBA) within the meaning of Section 501(c)(9) of the Internal Revenue Code. The Trust is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of ERISA. The Association serves as the plan administrator of the Trust's benefit programs and, among other powers, duties and responsibilities enumerated in the Trust Agreement under which the Trust currently operates, has the power to procure insurance policies on behalf of the Trust. The Trustees have the powers, duties and responsibilities enumerated in the Trust Agreement, including the powers to procure insurance policies on behalf of the Trust, to construe the Trust provisions and to promulgate rules and regulations for the administration of the Trust. A majority of the Subscribers may terminate the Trust. The Trust may be amended by an instrument in writing signed by all of the Trustees or by an instrument in writing, delivered to the Trustees, signed by Subscribers whose contributions during the preceding twelve months totaled more than 50% of all contributions. Any Trustee may be removed from office by a majority vote of the Association's Board of Directors or by a majority of the Subscribers. Subscribers whose contributions during the preceding twelve months totaled more than 50% of all contributions may direct the Trustees' method and manner of conducting any particular action by delivering the instruction in writing to the Trustees.

There are seven trustees of the Trust ("Trustees"), consisting of the current President of the Association and six elected Trustees. Each of the six elected Trustees must be a principal in a dealership that is a Subscriber to the Trust. The six elected Trustees are elected by the incumbent Trustees. You have submitted a proposed amendment to the Trust Agreement that you represent will be adopted by the Trustees. Under the proposed amendment, the six elected Trustees will be elected by a majority of the Subscribers and an eligible individual may be nominated as a Trustee candidate by: (1) the Board of Directors; (2) a majority of the Trustees (excluding elected Trustees who are in the final year of their term); (3) written petition submitted to the Board of Directors signed by the lesser of ten Subscribers or 10% of the total Subscribers. In the event that an elected Trustee leaves in mid-term, the remaining Trustees and the Board of Directors may nominate a replacement Trustee who is then elected by the Board of Directors.

Only regular members of the Association, with at least two full-time employees who are eligible for personal coverage under the benefit program may participate in the Trust as Subscribers, provided that the employer agrees to maintain coverage on at least 75% of its eligible employees at all times and that a minimum of two employees must be covered at all times. Currently, approximately 3,200 employees (working for approximately 225 automobile and truck dealerships in Wisconsin) and 4,800 dependents are covered.

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA to include any plan, fund, or program established or maintained by an employer, an employee organization, or both an employer and an employee organization that provides benefits in the event of sickness, accident, disability, death, or unemployment. Although the Trust is established for the purpose of providing benefits among those described in section 3(1) of ERISA, in order to be an employee welfare benefit plan, the Trust must, among other criteria, be established or maintained by an employer, an employee organization, or both. Since there is no indication that an employee organization within the meaning of section 3(4) of ERISA is in any way involved in the Trust, this letter will address only the issue of whether the Trust is established or maintained by an employer.

The term "employer" is defined in section 3(5) 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 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 establishes a benefit program for the employees of member employers and exercises control of the amendment process, plan termination,

and other similar functions on behalf of these members with respect to a trust established under the program. On the other hand, where several unrelated employers merely execute participation agreements or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between the employers, no employer association 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, the employers that participate in a benefit program must, either directly or indirectly, exercise control over the 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 your representations, the regular members of the Association are all entities involved in the motor vehicle dealer industry in Wisconsin and the voting membership of the Association consists of the regular members of the Association. Participation in the Trust is limited to employers who are regular members of the Association with at least two full-time employees who are eligible for personal coverage under the benefit program, provided that the employer agrees to maintain coverage on at least 75% of its eligible employees at all times and that a minimum of two employees must be covered at all times. Moreover, under the Association By-Laws and Trust Agreement, including the above-described amendment to the Trust Agreement relating to the election and nomination of Trustees, the Subscribers will have the authority to exercise control and direct the activities and operations of the benefit program.

Based on the information submitted, and assuming adoption of the aforementioned amendment to the Trust Agreement, it is the view of the Department that the Association would, at least in form, constitute a bona fide employer group or association and the Trust, therefore, would, at least in form, constitute a single employee welfare benefit plan for purposes of Title I of ERISA. Whether the Subscribers exercise control in substance over the benefit program is an inherently factual issue on which the Department generally will not rule in an advisory opinion.

You have also raised a number of issues in a separate submission concerning the application of the fiduciary responsibility provisions of Part 4 of Title I of ERISA. For your information, prohibited transaction issues similar to those you raise are addressed in, and we would refer you to, Advisory Opinion 97-23A (September 26, 1997), a copy of which is enclosed. We note that the general standards of fiduciary conduct contained in ERISA sections 403 and 404 would apply to those fiduciary issues with respect to prudence, acting solely in the interests of participants and beneficiaries, and diversification. Accordingly, the respective fiduciaries of the plan must act prudently and solely in the interests of the participants and beneficiaries of the plan and must carry out their ongoing fiduciary responsibilities under ERISA to monitor plan investments. Whether the actions of the plan fiduciaries satisfy these requirements is an inherently factual question, and the Department generally will not issue advisory opinions on such questions. The appropriate plan fiduciaries must make such determinations based on all the facts and circumstances of the individual situation.

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

Sincerely,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

Enclosure