



December 20, 2024

W. James Hamilton  
Bose McKinney & Evans LLP  
111 Monument Circle, Suite 2700  
Indianapolis, Indiana 46204

2024-02A  
ERISA SEC.  
3(5)

Dear Mr. Hamilton:

This is in response to your request on behalf of the Trustees of the Independent Colleges of Indiana Benefits Consortium (Consortium) for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the ICI Benefits Consortium Health Benefit Plan (Plan). Specifically, you ask whether the Plan is an “employee welfare benefit plan” within the meaning of section 3(1) of ERISA that is maintained by a “group or association of employers” within the meaning of section 3(5) of ERISA. You also ask, in effect, whether the Plan constitutes a “multiple employer welfare arrangement” (MEWA) within the meaning of section 3(40) of ERISA.

You provided the following facts and representations in support of your request. The Independent Colleges of Indiana, Inc. (ICI) was formed in 1948 as the Associated Colleges of Indiana, originally to serve as a fund-raising organization. ICI is a non-profit association that represents 29 non-profit, regionally accredited colleges and universities in Indiana. ICI, among other things, engages in public policy advocacy, preparation and dissemination of research regarding the performance and contributions of the independent college sector in Indiana, fundraising and disbursement to member colleges, funding and administration of scholarship programs and grants, and development of collaborative services, such as group purchasing and shared services among the campuses. ICI, itself, is an employer with 14 employees.

The Consortium currently consists of a sub-group of six ICI members and ICI, itself, as an employer. The original Consortium members entered into the ICI Benefits Consortium Agreement (Consortium Agreement) on October 2, 2019. This agreement provides for the organizational structure and operations of the Consortium. It also is an instrument pursuant to which the Plan is established and operated. The Consortium Agreement limits membership in the Consortium to ICI and institutions of higher learning that are members of ICI who choose to enter into the Consortium Agreement. ICI members may be admitted into the Consortium upon a majority vote of the trustees of the Consortium.

The Consortium Agreement provides that each of the Consortium’s participating employers nominates and elects one of its employees to serve as a trustee of the Consortium and states the number of trustees shall equal the number of participating employers in the Consortium – currently there are seven trustees of the Consortium. All trustees must be participants in the Plan and must live in Indiana. Trustees who do not meet this requirement are required to resign. Each trustee is elected for a three-year term and may be elected for an unlimited number of successive terms. All trustees are afforded one vote. A trustee may resign at any time or be removed by vote of the participating employers. Additionally, a successor trustee shall be elected by the participating employer of the resigning or removed trustee. Any action of the trustees occurs pursuant to the decision of a majority of the trustees in attendance at a Consortium meeting.

The Plan provides group health benefits to approximately 716 participants and beneficiaries. The medical component of the Plan is partially self-funded. The dental, life and disability components of the Plan are fully insured. The Plan is funded through the ICI Benefits Consortium Trust (Trust), which was established to qualify as a voluntary employees' beneficiary association in accordance with section 501(c)(9) of the Internal Revenue Code. The Internal Revenue Service granted the Trust tax-exempt status effective October 24, 2019. The Trust is funded by contributions from participating employers and employees and is designed to provide benefits only to participants and covered dependents in the Plan. You also represent that participation in the Plan is limited to common law employees of employers participating in the Consortium.

Under the Trust document, all trustees of the Consortium serve ex-officio as trustees of the Trust, and their election, resignation and removal as trustees of the Trust is governed by the Consortium Agreement. Pursuant to the Trust and Consortium Agreement, the trustees have exclusive authority to control and manage the property, business and affairs of the Trust and Plan, including as a fiduciary and administrator of the Plan, as those terms are defined under ERISA sections 3(21) and 3(16)(A).

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA to include, among other things, "any plan, fund, or program . . . 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 . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . ." Although the Plan provides benefits among those described in section 3(1) of ERISA, to be an employee welfare benefit plan, the Plan must also, among other criteria, be established or maintained by an employer, an employee organization, or both. There is no indication that an employee organization within the meaning of section 3(4) of ERISA is in any way involved in the Plan.<sup>1</sup> Therefore, this letter will focus on whether the Consortium may act as a bona fide employer group or association for the purpose of establishing the Plan within the meaning of section 3(1) of ERISA.

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 single "employee welfare benefit plan" may nevertheless exist where a cognizable, bona fide group or association of employers acts in the interests of its employer members to establish a benefit program for the employees of member employers. *See, e.g.,* Advisory Opinion 2017-02AC (sub-group of employer members of trade association can be a bona fide group or association of employers acting as an "employer" within the meaning of section 3(5) of ERISA).

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<sup>1</sup> Section 3(4) of ERISA defines the term "employee organization" as "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." The Department has previously stated that whether an entity has or has not been recognized as a voluntary employees' beneficiary association for purposes of Code section 501(c)(9) of the Internal Revenue Code is not indicative of whether the entity is an employee organization for the purposes of section 3(4) of ERISA. *See, e.g.,* Advisory Opinion 96-25A.

A determination of whether there 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. The employers that participate in a benefit program must be united by a commonality of interest and 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.

The Department has expressed the view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5). *See, e.g.*, Advisory Opinion 96-25A. Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employer, and where control of the group or association is not vested solely in employer members, the group or association is not a bona fide group or association of employers for purposes of ERISA section 3(5). *See, e.g.*, Advisory Opinion 94-07A.

The Department has also concluded that a sub-group of employers who are members of a trade or industry association can constitute a bona fide group of employers within the meaning of ERISA section 3(5) capable of sponsoring a multiple employer plan. *See, e.g.*, Advisory Opinion 2005-25A. In cases where the employers who participate in the plan do not have the ability to control the association (*e.g.*, where the employers participating in the plan do not have the voting control over the governing body of the association), the association itself cannot serve as the “employer” sponsoring the plan because the participating employers would not be able to control the plan through control of the association. However, the membership in the trade or industry association can satisfy the requirement that the sub-group of employers have a genuine organizational relationship unrelated to the provision of benefits, and the documents governing the plan can be structured so that the sub-group of employers participating in the plan control the program, both in form and in substance.

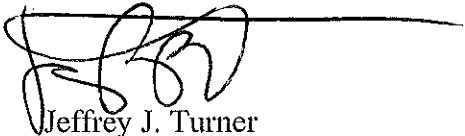
In this case you have represented that the employers participating in the Consortium are all employers that are regionally-accredited Indiana colleges and universities that are members of the ICI and ICI, itself. The Department views these employers as having a commonality of interest and genuine organizational relationship beyond participating in the Consortium as a means to provide welfare benefits to their employees. Furthermore, under the Consortium Agreement, the participating employers have the power to control and direct the activities and operation of the Consortium and the Plan by reason of their authority to nominate, elect and remove the Consortium’s trustees. Based upon the information provided and consistent with Advisory Opinions 2017-02AC and 2005-25A, it is the Department’s view that the participating employers, at least in form, constitute a bona fide group or association of employers for purposes of ERISA section 3(5), and the Plan, at least in form, constitutes an employee welfare benefit plan that is a multiple employer plan for purposes of Title I of ERISA. Whether the participating employers exercise control in substance over the Consortium, the Plan, and the Trust is an inherently factual issue on which the Department will not rule in an advisory opinion.

We note that, without regard to whether the Plan constitutes an employee welfare benefit plan, the Plan is a MEWA within the meaning of section 3(40) of ERISA. Section 3(40) defines the term MEWA, subject to

certain exceptions not relevant here, to mean an employee welfare benefit plan, or any other arrangement, which is established or maintained for the purpose of offering or providing any benefits described in section 3(1) of ERISA to the employees of two or more employers.

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. This opinion relates solely to the application of the provisions of Title I of ERISA addressed in the letter. It is not determinative of any particular tax treatment under the Internal Revenue Code and does not address any other federal or state laws.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey J. Turner", is written over a horizontal line.

Jeffrey J. Turner  
Acting Director  
Office of Regulations and Interpretations