

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION #83-48A
Sec. 3(1), 3(5)

SEP 14 1983

Mr. R. Dean Conlin
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Conlin:

This is in response to your letters of May 18, 1981, June 3, 1981, and March 21, 1983, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an opinion that the Banks of Illinois Insurance Trust (the Trust) is an "employee welfare benefit plan" as defined by section 3(1) of ERISA.

You advise that the participation in the Trust enables employers to provide to their employees life, health, dental, and long-term disability benefits. You further advise that employers eligible to participate in the Trust are limited to National and State chartered banks and their service corporations which are located in the State of Illinois and which are members of one or more of the following three Illinois bank trade associations: Illinois Bankers Association (IBA), Association for Modern Banking in Illinois (AMBI), and the Independent Community Banks in Illinois (ICBI). Employers also eligible to participate include IBA, AMBI, ICBI, and the following: Association of Reserve City Bankers, the Bank Administration Institute, the American Institute of Banking, and Financial Insurance Service, Inc. (FIS).

Regarding membership in AMBI, Article II, Section 1 of its Bylaws as adopted on September 27, 1973, provides, "Any banking corporation shall be eligible for membership in [AMBI]." There is no mention of different classifications of members. However, the membership directory which you submitted with your request indicates there are three classifications of members - Members, which appear to be banking corporations; Associate Members, which also appear to be banking corporations; and Affiliate Members, which appear to include non-banking corporations.

Article 4 of the Constitution of ICBI provides for three classes of members. Active members, who are eligible to vote, consist of any national or state bank or trust company which is independently owned and controlled and conducts its business as an independent bank. Associate members consist of any person, firm or corporation in sympathy with the purposes of ICBI. Honorary members consist of persons elected to such membership by the ICBI Board of Directors.

Article III of the Constitution of IBA also provides for three classes of members. Active members, who are eligible to vote, consist of any state or national commercial bank located and doing business in Illinois. Associate members consist of any other financial institution

or related organization or person located within or without Illinois. Honorary members consist of persons elected to such membership by the IBA Council of Administration.

In 1964, IBA initiated a group insurance program for its members. With the formation of AMBI in 1973 and the cessation of IBA membership by most AMBI members, the IBA group insurance program was reorganized in that year as the Trust. When ICBI was organized in 1974, ICBI members retained their IBA membership. Effective December 31, 1982, IBA and AMBI were terminated and merged into a new organization also called the Illinois Bankers Association. The Trust is controlled and managed by a nine-member Board of Managers (the Board). Six managers are elected by the employers who participate in the Trust, each employer being entitled to one vote for the election of each of the six managers. Prior to December 31, 1982, the other three managers were on the Board by virtue of their positions as the executive vice-president of IBA, the president of AMBI, and the executive director of ICBI. You have not indicated whether the composition of the Board will be affected by the merger of AMBI and IBA, but we assume that the employers that participate in the Trust will continue to elect at least a majority of the Board. The Board is required to establish and maintain a plan of benefits and to purchase insurance and reinsurance as required by the plan. The Board is required to determine the funding level required to support anticipated disbursements from the Trust. Further, the Board is obligated to determine the contribution required from each participating employer.

You indicate that the Board has determined that in order to reduce the expected increase in the cost of health coverage, it intends to provide benefits through Prudential Insurance Company of America (Prudential) by means of the Prudential Minimum Premium Plan. Under the Prudential Minimum Premium Plan, the Board will pay a certain amount of the claims directly from the assets of the Trust and any excess will be paid by Prudential. The Trust will continue to provide life, dependent life, dental, and long-term disability coverage through conventional group insurance contracts issued by Prudential and Continental Casualty Company, a subsidiary of CNA Financial Corporation (CNA). The Illinois Department of Insurance has advised that the Trust will be permitted to utilize the Prudential Minimum Premium Plan, provided the Department of Labor (the Department) confirms that the Trust is an employee welfare benefit plan subject to title I of ERISA.

The Administrator of the Trust performs a number of duties enumerated in the Trust Agreement that include advising the Board on the amount of contributions required from each participating employer and maintaining all necessary records. Also section 2(c) of the Administration Agreement between the Administrator and the Board requires the Administrator to solicit eligible members for participation in the Trust. The Administrator is also the "plan administrator" of the Trust as defined by section 3(16)(A) of ERISA. The Board, pursuant to the Administration Agreement, compensates the Administrator based upon the number of contributions processed. Further, the Board can discharge the Administrator upon 60-days' notice. The Administrator is Financial Insurance Consultants, Inc., a wholly-owned subsidiary of FIS.

The Trustee of the Trust, the City National Bank & Trust Co., of Rockford, Illinois, receives contributions from each participating employer and, upon the Board's instruction, remits the requisite premium to Prudential and CNA. Although appointed pursuant to the Trust Agreement, the Trustee can be removed at any time by a majority vote of the elected managers, i.e., the managers elected by the participating employers. The Trustee has received consideration in return for services rendered to the Trust.

Section 3(1) of ERISA defines an "employee welfare benefit plan" as:

... 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 [or] death

Although the program of benefits offered by the Trust are among those listed in ERISA section 3(1), to be an employee welfare benefit plan, a program must, among other things, be established or maintained by an employer or an employee organization, or both. There is no claim or any indication that the Trust is connected in any way with an employee organization. Therefore, we have limited our analysis to whether the Trust is established by an employer.

Section 3(5) of ERISA defines an "employer" 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 a 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 established 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 was formed, the purposes for which it was formed, and what, if any, were the pre-existing 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, 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.

In examining your letters and the documents submitted with them, we have identified some circumstances that tend to support a conclusion that the Trust was established and is maintained by a bona fide employer group or association. Among these circumstances is the fact that each participating employer is either affiliated with (although not necessarily as a voting member) a statewide banking association or is a specifically identified entity that is otherwise involved in the banking industry in Illinois. In addition, the participating employers, by virtue of their authority to elect a majority of the Board of Managers of the

Trust, appear to exercise control and direct the activities and operations of the benefit program. However, the question of whether the Trust is subject, not only in form, but also in substance, to the control of its employer members, as well as the ultimate determination whether the participating employers are acting as a bona fide group or association of employers in maintaining a benefit program are factual. Section 5.01 of ERISA Procedure 76-1 provides that the Department ordinarily will not issue an advisory opinion when the nature of the question is inherently factual. Accordingly, the Department is unable to issue an advisory opinion with regard to whether the employers that participate in the Trust are acting as a group or association of employers within the meaning of section 3(5) of ERISA with regard to its members.

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

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs