



OPINION NO. 84-47A  
Sec. 3(1), 3(5)

DEC 5 1984

Mr. William J. Reidenbach  
The Columbus Mutual Life Insurance Company  
303 East Broad Street  
Columbus, Ohio 43215

Dear Mr. Reidenbach:

This is in reply to your letter of March 13, 1984, requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the (eb) Group Insurance Trust Funds (the Funds) constitute multiple employer welfare arrangements (MEWAs) within the meaning of section 3(40) of title I of ERISA and, if so, whether such MEWAs are fully insured within the meaning of section 514(b)(6)(A)(i) of title I of ERISA and therefore state insurance laws would not apply except to the extent permitted under section 514(b)(6)(A)(i) of ERISA.

You advise that BancOhio Corporation of Columbus (now BancOhio National Bank, hereafter referred to jointly as BancOhio) has entered as Trustee into trust agreements with two or more employers in each of 13 different industry classifications to establish the Funds. Upon the establishment of each Fund trust, BancOhio purchased a group insurance policy issued by the Columbus Mutual Life Insurance Company (Columbus Mutual) providing the available benefits. In addition, BancOhio agreed on February 6, 1977, to delegate certain administration duties to Columbus Mutual.

The sample group insurance policy you submitted provides for life, accidental death and dismemberment, and disability insurance and major medical expense coverage for covered employees and their dependents. Employees covered by the Funds are given an (eb) Group Trust Insurance Certificate which describes the various coverages provided to them. Applications to participate in the Funds by employers are solicited solely by licensed insurance agents of Columbus Mutual. An employer which desires to become a participating employer executes an Application for Membership in the appropriate Fund and selects the benefits to be provided its employees from those available under that Fund's group insurance policy.

The sample trust agreement provides that the Trustee may not cancel, reduce, replace or supplement the policy issued by Columbus Mutual without the written signed consent of Columbus Mutual or of all the participating employers. However, the Trustee may amend the Trust agreement in any manner it may in its sole discretion deem appropriate to accomplish the purpose of the trust. Further the trust agreement does not provide for replacement of the Trustee except upon the Trustee's resignation. In such an event, the Trustee appoints its successor. If the Trustee fails to do so, the new Trustee may be appointed by Columbus Mutual.

The requirements of ERISA apply to a welfare fund only if that fund is an "employee welfare benefit plan" as defined in section 3(1) of ERISA. If a fund qualifies as a welfare plan under section 3(1), section 514 of ERISA provides that, with certain exceptions, state laws relating to that plan are preempted by ERISA. One exception to this general preemption provision is contained in section 514(b)(6)(A), which provides that an employee welfare benefit plan will still be subject to certain state insurance laws if that plan is a multiple employer welfare arrangement (MEWA) as defined in section 3(40) of ERISA, and if certain other conditions are met. Section 514(b)(6)(A) is, therefore, a limitation on general ERISA preemption applicable to ERISA-covered welfare plans which are also MEWAs. Section 514(b)(6)(A) does not operate to limit the application of state law to MEWAs which are not also ERISA-covered plans.

As a result, if the Department of Labor (the Department) determines that an entity is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA, it is not necessary to ascertain whether it is a multiple employer welfare arrangement (MEWA).

The term "employee welfare benefit plan" is defined in section 3(1) of title I of ERISA 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 Funds provide benefits among those identified in section 3(1), to be an employee welfare benefit plan, the Funds must, among other criteria, also be established or maintained by an employer, an employee organization, or both. As there is no indication in the materials you submitted that any employee organization is involved in any manner with the Funds, this letter will only concern itself with an analysis of whether the Funds have been established or maintained 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 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 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.

From the information you submitted, it does not appear that the Funds are under the control of the participating employers, directly or indirectly. Rather the Funds appear to be solely under the control of BancOhio and Columbus Mutual. Nor does it appear that the participating employers constitute a cognizable, bona fide group or association of employers within the meaning of section 3(5) of ERISA. Accordingly, it is the position of the Department of Labor that the Funds are not employee welfare benefit plans within the meaning of section 3(1) of ERISA as they have not been established or maintained by an employer, an employee organization, or both.

However, if an employer within the meaning of section 3(5) of ERISA adopts one of the Funds to provide benefits identified in section 3(1) of ERISA to its employees, such an employer would establish and maintain a separate, single-employer employee welfare benefit plan covered by title I of ERISA.

Further, as noted above, because the Funds are not employee welfare benefit plans within the meaning of section 3(1) of ERISA, it is not necessary for the Department to reach the issue of whether the Funds are MEWAs as defined in section 3(40) of ERISA. Regardless of whether the Funds are MEWAs, ERISA will not operate to limit the application of state law to the Funds since the Funds are not plans covered by ERISA.

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,

Elliot I. Daniel  
Acting Assistant Administrator for Regulations and Interpretations