

U.S. Department of Labor

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



SEPT 8 1989

ERISA OPINION 89-21A
Sections 3(1), 3(4), 3(5)

Mr. H. James Gorman, Jr.
Coopers and Lybrand
One Post Office Square
Boston, Massachusetts 02109

Dear Mr. Gorman:

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 ask whether the Home Builders Association of New Hampshire Benefits Trust (the Benefit Program) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that the Benefit Program was created pursuant to a Trust Agreement effective April 1, 1989, between the Home Builders Association of New Hampshire (the Association) as Grantor and three individuals as Trustees. The Trust Agreement states that the Association's purpose in signing the Trust Agreement was to create a system to provide life, medical, accident and other benefits to Governing Members of the Association and the employees of the Governing Members and their dependents. The Trustees administer the Benefit Program with an Advisory Board authorized to act on behalf of the Grantor in regard to the Benefit Program. The Trustees are subject to appointment and removal by the Association or the Advisory Board. The Advisory Board is also subject to appointment and removal by the Association and its members must be voting members of the Association.

The By-Laws of the Association provide in Article III, Section 2 for two types of membership:

Sec. 2 QUALIFICATIONS: Qualifications for membership shall be as follows:

- (A) BUILDER MEMBER. Any person that is or has been in the business of building, or rebuilding homes, apartments, schools, commercial, industrial, or other structures normally related and appurtenant to a community and who subscribes to the Code of Ethics of this Association and is of good character and business reputation.
- (B) ASSOCIATE MEMBER. Any person engaged in a trade, industry, or profession related to home building and not inconsistent with the objectives of this Association or any of its Affiliated Local Associations; who subscribes to

the Code of Ethics of this Association and is of good character and business reputation.

Article IV of the By-Laws provides that only Builder Members may vote or hold office in the Association although the Board of Directors of the Association may otherwise extend to members such benefits or privileges as it determines is in the best interest of the Association and its members.

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 Benefit Program provides health benefits which are among those benefits identified in section 3(1), in order to be an employee welfare benefit plan, the Benefit Program 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 respectively by ERISA section 3(4) and 3(5) as:

(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.

There is no indication in your submission that the Association, which established and maintains the Benefit Program, is an employee organization within the meaning of section 3(4) of ERISA. The Association does not exist, "... for the purpose, in whole or in part, of dealing with employers...." Furthermore, in several opinion letters the Department of Labor (the Department) has identified criteria for purposes of determining what constitutes an "employees' beneficiary association" as that term is used in section 3(4). One of those criteria is that membership in such an association must be conditioned on employment status -- for example, where membership is limited to employees of a certain employer or members of one union. However, membership in the Association is not conditioned upon one's employment status but rather is open to both employers and employees.

With regard to the issue of whether the Association is an "employer" within the meaning of section 3(5) of ERISA, the definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits to their employees.

The Department has taken the position that where membership in a group or association is open to anyone engaged in a particular trade or profession, regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of ERISA. Membership in the Association is open to anyone engaged in a particular industry and is not conditioned on one's status as an employer, and control of the Association is not vested solely in the employer members. Thus, it would appear that the Association is not a bona fide association of employers.

The program of benefits offered by the Benefit Program, therefore, is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA because it is not established or maintained by an employee organization or an employer, as those terms are defined in sections 3(4) and 3(5) of ERISA, respectively. Any employer that establishes and maintains a welfare benefit program for its employees through the Benefit Program, however, may have established a separate, single-employer, welfare benefit plan covered by title I of ERISA. This letter does not, however, address any of the issues surrounding the ERISA duties or obligations of the Benefit Program or any of its agents with respect to such an ERISA plan.

Further, because the Benefit Program is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA, state regulation thereof is not preempted by section 514(a) of title I of ERISA. The general preemption provision of section 514(a) of ERISA applies only to state laws relating to employee benefit plans covered by title I of ERISA. Accordingly, it is not necessary to determine whether the Benefit Program is a multiple employer welfare arrangement (MEWA)

within the meaning of section 3(40) of ERISA. Application of state law to the trust is not preempted by title I of ERISA regardless of whether the Benefit Program is a MEWA and regardless of whether the exception provided by section 514(b)(6) permitting state regulation of MEWAs would apply.

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.

Sincerely,

Robert J. Doyle
Director for Regulations and Interpretations