

U.S. Department of Labor

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



DEC 11 1990

90-48A
ERISA SEC.
3(40), 514(b)

Mr. Neil K. Rector
Deputy Director
Ohio Department of Insurance
2100 Stella Court
Columbus, Ohio 43266-0566

Dear Mr. Rector:

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 Select Business Development Trust (the Trust) is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of title I of ERISA and, if so, whether the Trust is fully insured within the meaning of section 514(b)(6)(A) of that title.

The information you submitted indicated that the Trust was created pursuant to a trust agreement dated November 8, 1989, between the Trust (through its Trustees) and Benemax of America, Inc. as the Administrator of the Trust. The trust agreement states that the purpose of the Trust is to provide fringe benefits to employees of small employers. Article II, Section 2.1 of the trust agreement defines the term "Participant" to include an employer within the meaning of section 401(c)(4) of the Internal Revenue Code which satisfies the requirements for participation established by the Trustees and which adopts the Trust. Further, in a letter dated to July 9, 1990, addressed to Ms. Jacqueline Windley and Mr. Charles Perin of your office, Mr. John W. E. Bowen, representing the Trust, stated:

The Agreement and Declaration of Trust ("Trust Agreement"), to which each participating employer subscribes through a participation application, obligates such employers to provide sufficient funds through their contributions (sometimes referred to in documents as "deposits" or "premiums") to pay directly or otherwise provide all health care expense benefits and death benefits of the Plan adopted by the Trust and all other expenses of operation. While the Trust very recently purchased medical stop-loss insurance for its own benefit, the health care expense benefits are paid directly by the Trust and, as a consequence, under the Trust Agreement, must be self-funded by the participating employers, whereas the death benefits are provided to the employees and their family members through group life insurance purchased by the Trust for which premiums are paid from the contributions of the participating employers.

Regarding the latter benefit, the group life insurance policy is issued by John Aden Life Insurance Company to and in the name of the Trust.

Thus, on the basis of the requirements of its organizational and operational documents, I construe SBDT to be a "not fully insured" MEWA under and within the contemplation of ERISA.

Finally, in a telephone conversation with a representative of this Office, Mr. Perin stated that the employers utilizing the Trust to provide benefits to their employees do not constitute a "control group" within the meaning of section 3(40)(B) and that the Trust is not maintained pursuant to any collectively bargained agreement.

Section 3(40)(A) of title I of ERISA defines the term "MEWA" to include:

...an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained--

- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
- (ii) by a rural electric cooperative.

Section 3(40)(B) provides in pertinent part:

For purposes of this paragraph --

- (i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,
- (ii) the term "control group" means a group of trades or businesses under common control,...

Based upon the information you submitted, it is the position of the Department of Labor (the Department) that the Trust is a MEWA within the meaning of section 3(40). The Trust covers the employees of two or more separate, independent employers, is not maintained by a rural electric cooperative, and is not maintained under or pursuant to any collective bargaining agreement.

Although section 514(a) of ERISA provides that any state law or regulation which relates to an employee benefit plan covered by ERISA is preempted, section 514(b) of title I of ERISA provides:

(6)(A) Notwithstanding any other provision of this section-- (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding section of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has previously stated that it did not see the need to prescribe regulations under section 514(b)(6)(B) to exempt MEWAs

from state regulation. The Department, at this time, has not changed its position. Accordingly, the Department is not providing MEWAs exemptions from state regulation.

It is, therefore, the Department's position that the preemption provisions of ERISA do not preclude state regulation of the Trust at least to the extent provided in section 514(b)(6)(A), regardless of whether it is an employee benefit plan covered by title I of ERISA, because it is a MEWA within the meaning of section 3(40) of that title.

Enclosed for your information is a copy of Opinion 90-18A (issued July 2, 1990) which discusses the scope of the states' authority to regulate pursuant to section 514(b)(6)(A).

With regard to the second issue you raise, section 514(b)(6)(D) provides:

For the purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization qualified to do business in a State.

In his letter of July 9, 1990, Mr. Bowen states the Trust is not fully insured and we found no indications in the information you submitted that the Trust may be fully insured. The fact that the Trust may have obtained stop-loss insurance does not in itself indicate the Trust is fully insured within the meaning of section 514(b)(6)(D). Although the information you submitted did not include a copy of the stop-loss insurance contract, it is the Department's position that such a policy shall be considered to fully insure an arrangement only if the terms of the arrangement provide that the amount of all benefits are guaranteed under the insurance contract of policy. Many stop-loss policies only guarantee benefits above a threshold amount paid through another funding vehicle. Accordingly, based on the information provided, we are unable to conclude that the Trust is fully insured within the meaning of section 514(b)(6)(D) of title I of ERISA.

Because your request for an advisory opinion was concerned primarily with the issue of whether or not the Trust is subject to the applicable regulatory authority of the State of Ohio's insurance laws or is saved from such authority under the general preemption provision of section 514(a) of title I of ERISA, and because of the opinion above, we have determined it is not necessary at this time to render an opinion as to whether the Trust is an employee welfare benefit plan within the meaning of section 3(1) of that title.

The preceding 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 of Regulations and Interpretations

Enclosure