



May 16, 2017

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2017-02AC  
ERISA SEC.  
3(40)  
3(5)

Dear Ms. Hitesman:

This is in response to your request on behalf of the First District Association for an advisory opinion regarding applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Dairy Consortium Health Plan (Plan). Specifically, you ask whether the Plan would constitute 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 whether the Plan would constitute a “multiple employer welfare arrangement” within the meaning of section 3(40) of ERISA.

You provided the following facts and representations in support of your request. The First District Association (FDA) has been operating as an independent dairy cooperative organized under Minnesota Chapter 308A since 1921. FDA provides two classes of memberships, FDA Association Member Creameries and FDA Direct Members. The memberships for FDA Association Member Creameries are issued to dairy cooperative associations, which you describe as business entities owned and controlled by multiple individual dairy farms that produce milk for the cooperative associations. Each FDA Association Member Creamery is entitled to a number of votes in the affairs of FDA equal to the number of the cooperative’s dairy farm members actively producing milk for the FDA Association Member Creamery. The memberships for FDA Direct Members are issued to active dairy farms directly producing milk. Each FDA Direct Member is entitled to one vote. Membership in FDA is by invitation. FDA’s articles of incorporation provide that, among other related purposes, FDA’s purposes and activities include the purchase, sale, manufacture, promotion and marketing of its members’ dairy and agricultural products and engaging in other activities in connection with manufacture, sale or supply of machineries, equipment or supplies to its members.

You represent that a group of dairy farm employers in Minnesota and Wisconsin who are FDA Direct Members or are members of FDA Association Member Creameries propose to establish the Dairy Consortium (Consortium) for the purpose of establishing the Plan to provide group health benefits to their employees. You indicate that the Consortium intends to establish a trust as described in section 501(c)(9) of the Code as a funding vehicle for the Plan. You represent that the terms described below from the by-laws for the Consortium, and the trust and plan documents for the Plan, will govern membership and control of the Consortium and the Plan and its trust. Participation in the Consortium will be limited to dairy farm employers with at least one common law employee. The participating employer members of the Consortium must be either a FDA Direct Member or an active member of an FDA Association Member Creamery. The employer members of the Consortium will elect a Board of Trustees to control and manage the property, business and affairs of the Consortium, and the Plan and its trust, including acting as fiduciary and administrator of the Plan, as those terms are defined under ERISA sections 3(21) and 3(16)(A), respectively. The Board of Trustees will be comprised of five

trustees. In order to be a trustee, the individual must be an owner or common law employee of an employer member participating in the Consortium and must be enrolled in and covered under the Plan. Any employer member of the Consortium participating in the Plan may nominate a trustee. The trustees are selected by a majority vote of the participating employer members of the Consortium. Any trustee may be removed by a majority vote of the participating employer members of the Consortium, with or without cause. Eligible dairy farm employers must execute a plan participation agreement to become a member of the Consortium. Employees of participating employer members of the Consortium who meet the Plan's eligibility requirements may be enrolled in and covered under the Plan.

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA to include, among others, "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 is to provide 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(5) 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 2003-13A (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); Advisory Opinion 2005-20A (multi-state franchisee group can serve as a bona fide group or association of employers under ERISA section 3(5)).

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

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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 (VEBA) for the purposes of Code section 501(c)(9) 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.

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 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 plan can be structured so that the sub-group of employers participating in the plan control the program, both in form and in substance.<sup>2</sup>

In this case, you have represented that the membership of the Consortium is comprised of employers that are active dairy farms in Minnesota and Wisconsin directly producing milk that are either FDA Direct Members or are members of a cooperative that is an FDA Association Member Creamery. The Department would view these employer members of the Consortium as engaged in the same industry of manufacturing, marketing and selling dairy products and having a genuine organizational relationship unrelated to the Plan through the FDA, either as FDA Direct Members or as members of a cooperative that is an FDA Association Member Creamery. Furthermore, under the Consortium by-laws, the employer members of the Consortium that participate in the Plan will 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 Board of Trustees. Assuming that the Consortium’s by-laws and the instruments governing the Plan and trust are adopted as described in this letter, it is the view of the Department that the participating employer members of the Consortium would, at least in form, constitute a bona fide group or association of employers for purposes of ERISA section 3(5), and the Plan would, at least in form, constitute an employee welfare benefit plan that is a multiple employer plan for purposes of Title I of ERISA. Whether the participating employer members of the Consortium exercise control in substance over the Consortium and the Plan and its 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 would be a multiple employer welfare arrangement (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

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<sup>2</sup> In such a case, the association could still be responsible for day-to-day operations of the plan by being identified as a named fiduciary pursuant to ERISA section 402(a)(1) or designated as the plan administrator pursuant to ERISA section 3(16)(A)(i), but the sub-group of employers would be the “employer” under ERISA section 3(5) establishing and maintaining the plan.

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 issues arising under ERISA or any other federal or state laws.

Sincerely,

Susan Elizabeth Rees  
Chief, Division of Coverage, Reporting and Disclosure  
Office of Regulations and Interpretations