

**U.S. Department of Labor**

Employee Benefits Security Administration  
Washington, D.C. 20210



September 30, 2003

2003-13A  
ERISA SEC. 3(5) & 3(40)

Robert L. Sacks, Esq.  
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Dear Mr. Sacks:

This is in response to your request for an advisory opinion under the Employee Retirement Income Security Act of 1974 (ERISA), on behalf of the Association of Independent Commercial Producers (AICP). Specifically, you ask whether the AICP Health Benefits Fund (Fund) is an employee welfare benefit plan established and maintained by an employer group or association within the meaning of section 3(5) of ERISA. You also ask whether the Fund is a "fully insured" multiple employer welfare arrangement (MEWA) within the meaning of ERISA section 3(40) and section 514(b)(6)(A).

You supplied the following facts and representations in connection with your request. The AICP is a nonprofit corporation and a tax-exempt business league under section 501(c)(6) of the Internal Revenue Code (Code). The AICP is an advocate and forum for the television commercial production industry on such issues as sales taxes, technological advances in production, business ethics and relations with advertising agencies, legal developments, insurance matters, intellectual property and creative rights issues. In addition, for over thirty years the AICP has negotiated and executed labor agreements with labor organizations on behalf of its producer members who are employers participating in collective bargaining. The AICP also represents its producer employer members in processing contract grievances and conducting grievance arbitrations.

The AICP is composed of eight local chapters. A fourteen-member board of directors controls the affairs of the AICP. The board of directors is comprised of local chapter officers and national officers elected by the AICP membership. The AICP membership consists of over 250 independent television commercial "producers" and approximately 260 associate members. Under the AICP Bylaws, a "producer" is described as "...any proprietorship, partnership, firm, or corporation engaged in the physical production of television commercials as an independent film or tape producer: (1) which as part of such production employs, engages or contracts with television commercial directors (who may also be principals in the entity) for their directorial and other services, and employs employees for their commercial production services; (2) who is neither wholly or partly owned or operated by an advertising agency or an advertiser, nor has on its staff an employee of an advertising agency or advertiser." Any individuals and entities related to the television commercial production industry can be associate members. Associate members vote on AICP matters, but are not eligible to participate in the AICP Health Benefits Fund, either individually or on behalf of their employees.

The Trust document for the Fund states that eight original signatory trustees, all employers who were producer members of the AICP, established the Fund as a voluntary employees beneficiary association under section 501(c)(9) of the Code. The Fund's stated purpose is to provide health and welfare benefits for employees who are not covered by a collectively bargained group health plan. The Trust document limits participation in the Fund to "participating employers." The term "employer" is defined in the Trust document as an independent commercial producer member in good standing of the AICP who is an employer as defined in ERISA § 3(5) and who employs employees as defined under the Trust document. The term "participating employer" means an employer who is or

becomes a signatory to the Trust, and who agrees to become a sponsor and party to the Plan and executes a participation agreement to contribute to the Fund. The Trust defines "employee" as a common law employee employed by a participating employer in a staff or freelance job category. To be eligible to participate in the Fund, an employee must not be covered by a collectively bargained employee benefit plan to which his or her employer is a contributing party either directly or through membership in the AICP.

The affairs of the Fund are managed and controlled by a board of trustees. The Trust document provides that the board of trustees is the named fiduciary and the administrator of the Fund. The trustees have the authority to determine the plan of benefits, including medical, surgical, hospital, dental, life insurance, accidental death or dismemberment, disability accident and sickness benefits, and other similar benefits, and to amend the rules and procedures of the Fund. The trust agreement may be amended or terminated by vote of a majority not less than two-thirds of all trustees.

The Trust document provides that the number of trustees is not to exceed nine elected by the participating employers, and not more than three elected by a majority vote of the employees of participating employers. The trustees meet not less than quarterly, and a quorum for the transaction of business at any meeting is seven trustees of whom not less than five shall be employer trustees. Each trustee is to serve until his or her removal, resignation, death, incapacity, or, for employer trustees, until the trustee's employer ceases to be an AICP producer member and a participating employer in the Fund. Under the terms of the Trust, an officer, manager, or director of a participating employer may be nominated as an employer trustee by the Fund's trustees, or by petition of 10% of the participating employers. Any employer trustee can be removed by a majority vote of the participating employers, and any employee trustee may be removed by a majority vote of the covered employees.<sup>1</sup> The trustees elect one of the employer trustees to serve as chairperson for five years or until a successor is chosen.

Under the terms of the Trust, the Fund's plan of benefits is to be evidenced by policies of insurance and the Fund is prohibited from providing benefits on a self-insured basis. The amount of required employer and employee contributions is to be determined by the Fund's trustees based on premiums charged by the health insurance carriers and on the administrative costs of the Fund. Cost variations due to individual employer claims experience and failures of employers to make required contributions will be shared among all contributing employers or offset by Fund reserves.

The term "employee welfare benefit plan" is defined in section 3(1) of Title I 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 it appears that the Fund intends to provide benefits described in section 3(1), to be an employee welfare benefit plan, the Fund must also, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization. Although the Trust provides for three employee

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<sup>1</sup> You indicated that employees who participate in the Fund will receive regular electronic communications from the Fund concerning eligibility, enrollment, benefits, and claims, and that the Fund will maintain a website. You contemplate that nominations, elections and removals of employee trustees will be conducted through the website. We express no opinion as to whether any of these procedures will satisfy the requirements of Title I of ERISA.

representatives on the Fund's board of trustees, there is no indication in your submission that the Fund was established or is maintained by an employee organization within the meaning of section 3(4) of ERISA.<sup>2</sup> Therefore, this letter will only address whether the Fund is established or maintained by an "employer" within the meaning of section 3(5) of ERISA.

Section 3(5) of ERISA defines 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 definitional provisions of ERISA thus recognize that a single employee welfare benefit plan might be established or maintained by a cognizable, bona fide group or association of employers, acting in the interests of its employer members to provide benefits for their employees.

A determination 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 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 § 3(5). Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employers (i.e., the group or association members include persons who are not employers) or 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 § 3(5). See, e.g., Advisory Opinion 95-01 (dated February 13, 1995) and Advisory Opinion 88-07A (dated March 28, 1988).

In this case, we note that AICP's membership is not limited to employers in that the associate membership class includes persons who are not necessarily employers of common-law employees.<sup>3</sup> Also, control of the AICP is not vested solely in its employer members who participate in the Fund. The Department, therefore, is unable to find that the AICP itself constitutes a bona fide employer association acting as an employer in relation to the Fund within in the meaning of ERISA section 3(5).

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<sup>2</sup> Section 3(4) of Title I 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."

<sup>3</sup> The mere presence of non-employer members will not, in and of itself, vitiate the status of a group or association as an "employer" within the meaning of ERISA section 3(5) if such other members have no voting rights in the association and no control over it. See Advisory Opinion 80-15A (dated March 14, 1980). In this case, however, non-employer members have voting rights in the AICP.

It is the view of the Department, however, that the AICP producer members who are participating employers in the Fund are, at least in form, a bona fide group or association of employers that can act as an “employer” within the meaning of section 3(5) of ERISA for the purpose of establishing and maintaining the Fund as a single employee welfare benefit plan. The participating employers are engaged in the same industry. They also have a history of organized cooperation on employment-related matters and a genuine organizational relationship through their membership in the AICP unrelated to the provision of welfare benefits. Further, because of their authority to elect and remove the majority of the Fund’s trustees and to amend or terminate the Fund, they appear to control and direct the activities and operations of the Fund. The question of whether the Fund is subject, not only in form, but also in substance, to the control of the AICP producer members who are participating employers is an inherently factual issue on which the Department generally will not rule in an advisory opinion.

We note that, without regard to whether the Fund constitutes a single employee welfare benefit plan, the Fund would be a MEWA within the meaning of ERISA section 3(40). You asked whether the Fund is a “fully insured” MEWA within the meaning of ERISA 514(b)(6)(A).<sup>4</sup> Section 514(b)(6)(D) provides that, for purposes of Section 514(b)(6)(A), “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 conduct business in a State.” The contract between the insurance company and the insured must be examined to consider whether a particular MEWA is “fully insured” within the meaning of ERISA section 514(b)(6)(D). See Advisory Opinion 94-07A (dated March 14, 1994). We, therefore, are unable to determine whether the Fund would be “fully insured” because the Fund has not yet obtained any insurance coverage.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, including section 10 thereof, relating to the effect of advisory opinions. This opinion relates only to Title I of ERISA, and does not address any issues arising under any other federal or state law.

Sincerely,

John J. Canary  
Chief, Division of Coverage, Reporting and Disclosure  
Office of Regulations and Interpretations

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<sup>4</sup> Section 514(b)(6)(A) of ERISA permits the application of state insurance law, otherwise preempted under section 514(a) of ERISA, to an employee welfare benefit plan that is a MEWA, as follows: If the MEWA is “fully insured” within the meaning of section 514(b)(6)(D) of ERISA, state insurance law may apply to the extent it provides standards requiring the maintenance of specified levels of reserves and contributions, and provisions to enforce such standards. See section 514(b)(6)(A)(i). If the MEWA is not fully insured, any law of any state that regulates insurance may apply to the extent not inconsistent with Title I of ERISA. See section 514(b)(6)(A)(ii).