



OFFICE OF  
INSURANCE COMMISSIONER

September 25, 2012

Sam Anderson, Executive Officer  
Employee Benefit Group Insurance Trustees  
Master Builders Association of King & Snohomish Counties  
335 - 116th Avenue SE  
Bellevue, WA 98004

Dear Mr. Anderson and Trustees:

As you know, under the federal Affordable Care Act, small group employers' health plans for their employees obtained through associations will be community rated beginning in 2014, unless the association constitutes an "employer" under ERISA Sec. 3 (5), which includes:

*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.*

While the U.S. Department of Labor (DOL) is the agency charged with administering ERISA, and its determination of this question will be given deference by a court, the Office of the Insurance Commissioner (OIC) has attempted, through careful analysis of the statutes and existent DOL Advisory Opinions regarding this issue and through consultation with individuals at DOL, to examine the facts of your organization and test them against the DOL/ERISA criteria. This letter will review the work that the OIC, in cooperation with your association and health trust, has done to analyze whether the Master Builders Association of King and Snohomish Counties, (MBAKS)'s health insurance trust arrangements and history satisfy the definition of "employer" in ERISA.<sup>1</sup>

The Master Builders Association of King and Snohomish Counties was originally formed in 1909 to promote the viability of the housing industry and to secure cooperative action in advancing the common purpose and objectives of the building and construction industry. Our analysis of the association's history prior to the 1995 inception of the Insurance Trust indicates that the employer members who are eligible for participation in the Insurance Trust have a commonality of interest and genuine organizational relationship beyond participation in the trust. Further, the Insurance Trust Agreement's limitation of the categories of MBAKS members allowed to

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<sup>1</sup> This letter will not address any fiscal issues involving Trust management, such as those contained in Articles VII and VIII of the Insurance Trust Agreement.

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participate in the Trust to 284 business categories<sup>2</sup> clearly engaged in the building and construction industry is also indicative of the commonality of interest and genuine organizational relationship of the employer members beyond participation in the insurance trust.

The Trust Agreement makes clear that only those employers whose principal business purpose is engaging in the building and construction industry are eligible for participation in the Insurance Trust.<sup>3</sup> While MBAKS is the sponsor of the Trust, it is the Trustees who control the operations of the Trust and it is the Participating Employers who elect the Trustees from among their number. The Participating Employers delegate to those duly elected Trustees certain responsibilities and authority as set forth in Article 5.01 of the Trust Agreement. The Trust Agreement allows the Trustees to delegate to MBAKS specific responsibilities and implementation authority, but requires Trustee approval of MBAKS' executing any documents on behalf of the Trust.

The Trust Agreement provides for seven voting Trustees and the Executive Officer of MBAKS as a non-voting Trustee. Each voting Trustee must be a principal in a Participating Employer and are elected by a majority of the Participating Employers. Candidates may be nominated by MBAKS, by a majority of incumbent Trustees, or by written petition signed by the lesser of 10% of the Participating Employers or 10 Participating Employers.

A Trustee may be removed by Participating Employers whose contributions during the preceding 12 months totaled more than 50 percent of all contributions. Article 6.13 of the Trust Agreement sets forth the powers and duties of the Trustees, providing them and, through them, the Participating Employers, with complete control of the critical functions of the Insurance Trust. Article 7.01 provides that all duties not allocated by the Agreement to the Trustees are to be exercised by the Participating Employer. Finally, in Article 8.01, the Trust may be amended only by a majority of Trustees approving or by Participating Employers whose contributions during the preceding 12 months totaled more than 50 percent of total contributions. It appears that the Participating Employers control and direct the activities and operation of the MBAKS' Insurance Trust.

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 MBAKS unrelated to the provision of welfare benefits. Furthermore, because of their authority to elect and remove the Trustees and to amend or terminate the Trust, they appear to control and direct the activities and operations of the Trust.

Based on the information submitted to this office, it is the view of the OIC that the Participating Employer members of the Insurance Trust would, at least in form, constitute a bona fide group

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<sup>2</sup> (MBAKS has 470 total business categories of membership in the Association).

<sup>3</sup> The only other eligible participants are the MBAKS' employees.



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or association of employers, and the welfare benefits provided to Participating Employers through the Insurance Trust would, at least in form, constitute an employee welfare benefit plan for purposes of Title I of ERISA.

I want to thank the association staff and Trustees for your cooperation and openness to this process; it allowed me to conclude that the Participating Employers are entitled to act as an "employer" within the meaning of ERISA Sec. (3) (2) in the offering of employee welfare benefits through the MBAKS' Health Insurance Trust. This process enabled me to fulfill my responsibilities to insurance consumers in Washington state, while supporting MBAKS' position that the Health Insurance Trust does, in my opinion, constitute, at least in form, a bona fide association of employers that satisfies the ERISA definition of "employer."

Sincerely,



Mike Kreidler  
Insurance Commissioner

Enclosure

cc: Joe Canary, Director, Office of Regulations and Interpretations  
Susan Elizabeth Rees, Chief, Division of Coverage, Reporting and Disclosure  
U.S. Department of Labor