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VIA E-MAIL AND U.S. MAIL

Mr. Norman Russell
Chair, AGC Health Benefit Trust
Associated General Contractors
9450 SW Commerce Circle, #200
Wilsonville, OR 97070

Re: AGC Health Benefit Trust

Dear Norman:

This letter is in response to a request for an analysis of the position of the AGC Health Benefit Trust (the "Trust") that its welfare benefit plan (the "Plan") is maintained by a group or association of employers within the meaning of Section 3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). We understand this letter will be shared with Regence Blue Cross Blue Shield of Oregon ("Regence"), the Plan's insurer, and the Oregon Insurance Division.

I. Background

The Oregon-Columbia Chapter of the Associated General Contractors of America ("Oregon-Columbia AGC") was established nearly a century ago as an affiliate of the Associated General Contractors of America ("AGCA"), a national association serving the construction industry. Oregon-Columbia AGC is an Oregon nonprofit corporation.

Oregon-Columbia AGC is maintained by its members, which are commercial contractors working in the construction industry in Oregon and Southwest Washington. If a member needs assistance on issues arising outside of that region, Oregon-Columbia AGC does so through its affiliation with AGCA.

The members of Oregon-Columbia AGC receive a wide range of services, including training and education on safety and employment law, advocacy for interests of the industry, and participation in sponsored employee benefit programs. The Plan is one of those programs.

The Trust was established in 1971 by Oregon-Columbia AGC for its employer members. Under the Trust document, the trustees of the Trust are appointed by Oregon-Columbia AGC and can



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be removed by it. Each of the trustees is employed by an employer that is a member of Oregon-Columbia AGC.

The trustees have authority to make all the operational and administrative decisions for the Trust and the Plan. They often act by delegation of that authority to the staff of Oregon-Columbia AGC or outside service providers.

II. ERISA Section 3(5)

Title I of ERISA sets out the federal law protections for employee benefit plans maintained by an employer. Section 3(5) defines the term “employer” for purposes of Title I:

(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. (emphasis supplied)

Title I of ERISA is administered by the U.S. Department of Labor (the “DOL”). In that capacity the DOL has interpreted the phrase, “association of employers.” It has determined that some multiple employer welfare arrangements (“MEWAs”) are presented as an ERISA welfare benefit plan maintained by an association of employers in order to limit state insurance regulation. The DOL’s interpretation requires that an association be bona fide and not merely a vehicle for the marketing of insurance. The DOL’s position is summarized in its booklet, MEWAs - Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA) - A Guide to Federal and State Regulation. The relevant passage from the booklet reads as follows:

In order for a group or association to constitute an “employer” within the meaning of Section 3(5), there must be a bona fide group or association of employers acting in the interest of its employer-members to provide benefits for their employees. In this regard, 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 Section 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



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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 Section 3(5).

The following factors are considered in determining whether a bona fide group or association of employers exists for purposes of ERISA: 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 pre-existing relationships of its members; the powers, rights and privileges of employer-members; and who actually controls and directs the activities and operations of the benefit program. In addition, employer-members of the group or association that participate in the benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the benefit program. It should be noted that whether employer-members of a particular group or association exercise control in substance over a benefit program is an inherently factual issue on which the Department generally will not rule.

III. Oregon-Columbia AGC as a Bona Fide Association

The DOL's interpretation of what constitutes a bona fide association is squarely applicable to Oregon-Columbia AGC. The members of Oregon-Columbia AGC are solicited by offering them the package of services it makes available to its member companies, which services go far beyond the mere marketing of insurance available through the Trust. Oregon-Columbia AGC was formed nearly a century ago for the purpose of delivering services to commercial construction contractors within a limited geographic area. All members of the board of directors of Oregon-Columbia AGC are representatives of its member companies.

The Trust is controlled by its board of trustees, who make all the decisions with respect to the Plan. Those trustees are all drawn from Oregon-Columbia AGC's member companies. Oregon-Columbia AGC and the Trust are entirely the creatures of the commercial contractors that have joined the association. There is no element present of the abuses that led the DOL to articulate its position on MEWAs formed as a device for the promotion of insurance. None of the indicators of non-bona fide status described by the DOL is present here. The employers contributing to the Trust did not execute identically worded trust agreements in the absence of any genuine organizational relationship. Participation in the Trust is not made available to those in a trade or profession who are not employers. Control of the Trust and its Plan is not vested in someone other than representatives of Oregon-Columbia AGC and its members.



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IV. Conclusion

The DOL cautions in the booklet passage quoted in II above that whether an employee benefit plan is maintained by a bona fide association is an inherently factual inquiry on which they generally will not rule. Therefore, there can be no certainty of the outcome on any inquiry. Nevertheless, we believe the Trust and its related Plan have a very strong and well-founded position that they are maintained by a bona fide association of employers within the meaning of Section 3(5) of ERISA. Furthermore, because this inquiry is inherently factual, the strength of the position could be affected by any change in the underlying facts.

If you, the staff and advisers to the Trust, Regence, or the Oregon Insurance Division have questions regarding this analysis, please let me know. We would be happy to talk with them at their convenience.

Very truly yours,

Gregory H. Macpherson

cc (via electronic delivery):

Ms. Colette Evers
Ms. Susan Taylor
Ms. Bethany Bacci