1978 WL 12510 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

***1 Martin**
R
.
Hochman
; William M. Shelton

Publicly Available April 3, 1978

LETTER TO SEC

February 14, 1978

Securities and Exchange Commission
Division of Corporation Finance
500 North Capitol Street, Northwest
Washington, D.C. 20549Re: **Martin R**. **Hochman**; William M. Shelton

Gentlemen:

Our clients, Mr. **Martin R**. **Hochman** and Mr. William M. Shelton, or a business entity to be formed and owned by them (collectively, the 'Company'), contemplate entering into a transaction whereby a so-called 'multiple employer trust' ('MET') will be formed.

The Company, as Settlor, is entering into a Trust Agreement (the 'Trust Agreement') with Rhode Island Hospital Trust National Bank, a national bank association organized under the laws of the United States of America (the 'Trustee'). A copy of the Trust Agreement is attached. Under the Trust Agreement, the Settlor is acting as agent for employers who desire to establish separate plans of insurance for their employees. The employers and employees may be located in more than one state. Under the plans of insurance, life, medical, and disability benefits will be provided to eligible employees of each employer by insurance companies which are qualified to transact an insurance business in the state where an insured employee is located. Attached hereto is a specimen copy of the Plan of Group Insurance, and Adoption and Participation Agreement to be entered into by each employer.

The employer will agree to pay to the Trustee the amount of the premiums, as calculated by the insurance companies, to pay for the policies issued by such insurers necessary to fund the benefits set forth in the plans. The policies are to be issued at standard rates, and the employer premiums are not increased as a result of the use of the MET. The principal obligation of the Trustee under the Trust Agreement is to hold the contributions by the employers in trust and to pay the premiums on the policies of insurance. The compensation of the Trustee for such services is paid by the Settlor.

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The policies are issued directly by the insurers to the Trustee as policyholder. The employers will normally be the named insureds under the policies of insurance and the individual employees will receive certificates of insurance evidencing their coverage. In some instances, the individual employees will be the named insureds under the policies.

The Trustee is empowered under the Trust Agreement to appoint an Administrator whose responsibilities will include, among others, (a) making application for the policies, (b) calculation of premiums, (c) maintenance of records, and (d) locating several employers to constitute a single group, thereby making available to all employers lower group insurance rates. The fees of the Administrator will be paid in one of three ways (at the option of the individual employer): (a) by the Trustee from monies deposited in the fund, (b) by the employers, or (c) by the insurers. It is contemplated that the Company, or another business entity formed and owned by Messrs. Hochman and Shelton, will be appointed the Administrator.

***2** The purpose for establishing the MET is to obtain favorable insurance rates for employers who might not otherwise qualify for such rates because they fail to have a sufficient number of employees. This is accomplished by having several small employers in effect aggregate their employees together for purposes of insurance coverage.

Legal Questions Presented

(a) Employers' Beneficial Interests in MET
In our opinion, the beneficial interest in the MET of an employer is not a ‘security’ so as to require registration under Section 5 of the Securities Act of 1933 (the ‘Act’).

Section 2(1) of the Act defines the term ‘security’ to include any ‘participation in any profit-sharing arrangement’ or ‘investment contract.’ The leading United States Supreme Court case of Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946) concluded that an ‘investment contract’ means a transaction whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. It is clear from the above description of the MET that the MET is not intended as a profit-sharing arrangement or investment contract with respect to the participating employers inasmuch as such employers do not invest money in the MET with the expectation of receiving profits based on the activities of the Trustee. The Trustee is, in reality, merely a conduit for the transmission of insurance premiums and the holding of insurance policies. Under these circumstances, no security is being sold to the participating employers.

Moreover, the employers do not pay any consideration or value for the receipt of their beneficial interests in the trust. The full amount of the employer's contribution is paid over the insurers issuing policies to the Trustee; the Trustee's fees are paid by the Settlor of the trust. The fees paid to the Administrator are solely for the performance of ministerial duties (such as keeping employee records and calculating premium amounts), and the Administrator undertakes no discretionary investment activities. Therefore, in our opinion there is no sale (as defined in Section 2(3) of the Act) of any security to the employers so as to require registration under section 5 of the Act.

(b) Employees' Interests

Employees of the participating employers have no interest in the MET. Their only interest would be as a holder of a certificate of insurance or as a named beneficiary under a policy of insurance held by the Trustee. The issu-

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ance of the subject insurance policies is exempt under Section 3(a)(8) of the Act. Therefore, we are of the opinion that the only securities (as defined in the Act) being issued to the employees under the MET are insurance policies or certificates which are exempt under Section 3(a)(8) of the Act.

Although, as stated above, we are of the opinion that the formation and operation of MET's by our client will not require any registration under the Act, we have been unable to locate any authority which discusses this specific question. Accordingly we are requesting your advice as to whether the staff would recommend that the Commission take any action if the MET were established and operated in the manner set forth above.

***3** To date, our clients have not entered into any agreements with respect to the proposed transactions. Our clients have advised us that disclosure of the proposed transaction at this time would be premature and could be detrimental if disclosed to potential competitors. Accordingly, it is respectfully requested that this letter and the information contained therein be treated in a manner consistent with its confidential nature. In accordance with Commission Reg. § 100.81(b), request is hereby made for such confidential treatment for a period of 90 days following 30 days after the staff's response is made.

Very truly yours,

Loyd P. Derby

SEC LETTER

1933 Act / s 2(1); 3(a)(8)

March 3, 1978
Publicly Available April 3, 1978

Loyd P. Derby, Esquire
Adams, Duque & Hazeltine
523 West Sixth Street
Los Angeles, CA 90014Re: Mr. **Martin R. Hochman**

Mr. William M. Shelton

Dear Mr. Derby:

This is in response to your letter of February 14, 1978, in which you ask our views concerning the establishment and operation of a multiple employer trust (‘MET’) without compliance with the registration requirements of the Securities Act of 1933 (the ‘Act’).

We understand the facts to be as follows. Your clients, Mr. Martin R. Hochmen and Mr. William M. Shelton, or a business entity to be formed by them (the ‘Company’), contemplate entering into a transaction whereby an MET will be formed. The Company, as Settlor, is entering into a Trust Agreement (the ‘Trust Agreement’) with Rhode Island Hospital Trust National Bank (the ‘Trustee’). Under the Trust Agreement, the Settlor is acting as agent for employers who desire to establish separate plans of insurance for their employees. Under the plans of insurance, life, medical, and disability benefits will be provided to eligible employees of each employer by in-

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surance companies which are qualified to transact an insurance business in the state where an insured employee is located.

The employer will agree to pay to the Trustee the amount of premiums, as calculated by the insurance companies, to pay for the policies issued by such insurers necessary to fund the benefits set forth in the plans. The policies are issued directly by the insurers to the Trustee as policyholder. The employers will normally be the named insureds under the policies of insurance and the individual employees will receive certificates of insurance evidencing their coverage. In some instances, the individual employees will be the named insureds under the policies.

The principal obligation of the Trustee under the Trust Agreement in to hold the contributions by the employers in trust and to pay the premiums on the insurance policies. The compensation of the Trustee for such services is paid by the Settlor. The Trustee also is empowered under the Trust Agreement to appoint an Administrator who performs certain specified ministerial duties. The fees of the Administrator will be paid either by the Trustee from monies deposited in the fund, by the employers, or by the insurers. It is contemplated that the Company, or another business entity formed and owned by your clients, will be appointed the Administrator.

***4** Based upon the facts presented, this Division will not recommend any enforcement action to the Commission if the MET is established and operated in the manner described in your letter, without compliance with the registration requirements of the Act, in reliance upon your opinion as counsel that registration is not required.

Because this position is based upon the representations made to the Division in your letter, it should be noted that any different facts or conditions might require a different conclusion. Further, this letter only expresses the Division's position on enforcement action and does not purport to express any legal conclusion on the questions presented.

Finally, your request for confidential treatment of this letter and any information contained therein for an additional 90 days is granted.

Sincerely,

William E. Toomey
Assistant Chief Counsel

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END OF DOCUMENT

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