July 10, 2008

2008-06A
ERISA SEC
403 and 404

Joanne K. Moak
Wine and Spirits Wholesalers of America, Inc.
805 15th Street, NW, Suite 430
Washington, DC 20005

Dear Ms. Moak:

This is in response to your request for an advisory opinion under Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request guidance as to the permissibility of (1) amending the Trust for WSWA Sponsored Welfare Plans (Trust or Plan) to permit its remaining assets to be transferred to an organization exempt from tax under section 501(c)(3) of the Internal Revenue Code of 1986 (Code), as amended, and (2) subsequent to the termination of the Plan, transferring such assets to such an organization that is not a party in interest under section 3(14) of ERISA.

You represent that the Wine and Spirits Wholesalers of America, Inc. (WSWA) originally established the Trust on May 19, 1975. WSWA is the sponsor of the Trust, a multiple employer welfare arrangement that provides health, hospital, disability, and death benefits to employees of various employers in the wine and spirits wholesale industry. The Insurance Committee is the named fiduciary of the Trust.

The Plan combined two existing plans, one that provided life, medical, and hospital income (Health Plan),[1] and a second that provided accidental death and dismemberment insurance (AD&D Plan),[2] into one document. The two plans remained distinct, however, and their assets were held in separate accounts. Over the years, the insurance offered through the Plan also included dental, vision, and long-term disability insurance.

You represent that participants were categorized into classes, each of which was permitted to choose from insurance offered under the Plan. Each participant paid a

[1] The WSWA Insurance Fund was established on June 2, 1958, to provide group life insurance for certain employees of WSWA, WSWA's members, and related state trade associations. Medical insurance and hospital income were added in approximately 1972. For the purposes of this letter, we rely on your representation that the WSWA is a cognizable, bona fide group or association of employers within the meaning of section 3(5) of ERISA. We note, however, that if the WSWA in fact consists of unrelated employers that have executed participation agreements or similar documents merely as a means to fund benefits, in the absence of any genuine organizational relationship between the employers, no employer association would be recognized, and the Plan would not be a plan within the meaning of section 3(1) of ERISA. See Advisory Opinion 2001-04A (Mar. 22, 2001).

[2] WSWA enrolled in the accidental death and dismemberment insurance plan on July 1, 1965.

premium based on his or her class, the types of insurance policies enrolled in, the amount of insurance coverage, and the number of people insured. Administrative fees were also charged and generally were based on the types of insurance policies enrolled in, the amount of insurance coverage sought, and the number of participants in a particular plan. Premiums and administrative fees were primarily paid for by the participating employers. Levels of employee contributions were determined by each employer.

You also represent that since the time the Health Plan was established, participants have included thousands of employees from as many as hundreds of different WSWA-member and affiliated companies. By 2004, however, there were approximately 38 participating employers and 1,064 participants. You represent that, effective May 1, 2004, the insurance provider for the Health Plan cancelled the insurance policy because it was not economical to continue the coverage and that the AD&D Plan was terminated because the expense of maintaining the Plan would have been disproportional to the premiums and coverage provided. Thus, you represent that all insurance contracts under the Plan were terminated and that all liabilities of the Plan have been satisfied. You further represent that additional insurance contracts have not been entered into and that no former participants or beneficiaries in the Plan have a claim or right to a future benefit from either of the plans.

As of September 1, 2006, approximately $380,000 remained in the Trust, subject to ongoing interest earnings, ordinary expenses, and the expense of requesting this advisory opinion and a companion letter ruling from the Internal Revenue Service (IRS). You represent that, of this amount, approximately $280,000 was in an account of the Health Plan and was derived from an accumulation of administrative fees and compound interest earned on those fees, as well as dividends from experience-rated policies. In some years, policy ratings resulted in a partial refund of premiums, which was placed in reserves to offset losses incurred in other years. In late 2005, the insurance provider for the Health Plan completed its final accounting and sent the Trust a check in the amount of $25,044, the total amount remaining in the reserves after payment of all outstanding claims. The approximately $100,000 in the account of the AD&D Plan was derived from an accumulation of administrative fees and the compound interest earned on those fees.

You represent that, due to the cost of maintaining the Trust, the Insurance Committee has been considering how to liquidate it. The Trust document provides that assets must be used for the exclusive benefit of the participants (including their dependents and beneficiaries). In addition, it provides that no asset of the Trust will inure to the benefit of any employer and that assets of each account will be held exclusively for the purpose of providing benefits to participants and for defraying the reasonable expenses of administering the Trust. It also provides that, in the event that a plan for which an account is maintained under the Trust terminates, assets will be paid out by the trustee

in accordance with Trust provisions and, upon disbursement of all of the assets, the Trust will terminate.

You explain that participants do not have an expectation of any right to the corpus or income of the Trust because the Trust precludes any person, including any participant, from having any legal or equitable right in the corpus or income of the Trust unless specifically provided for in a plan. You also assert that, even if the Insurance Committee desired to provide participants with a portion of the remaining assets, there is no equitable means by which to determine the portion of assets that derived from the contributions of those participants. You explain that calculating an equitable disbursement among participants would require information that is not available because the administrator's records extend back no more than seven years and there is no other source of the information, including the policies in which each participant was enrolled, the employee class to which he or she belonged, the amount of insurance the participant sought, the length of their participation in each plan, and the administrative fees paid over the years for the different classes and levels of insurance. Further, you assert that, because the amount of reserves is small given the period of time during which the Trust existed, the number of participating employers and employees was large over time, the expense of allocating and distributing the remaining assets would be prohibitive.

WSWA and the Insurance Committee propose to amend the Trust to permit the trustee to transfer the assets remaining in the Plan to an organization exempt from tax under Code section 501(c)(3), specifically, an organization established by WSWA, after all the liabilities of the Plan have been satisfied. You note that the Plan document permits its amendment.

You represent that WSWA established the WSWA Educational Foundation, Inc. (Foundation) in March 2006 to pursue educational and charitable activities on behalf of the United States wine and spirits distribution industry. The Foundation is a tax exempt organization within the meaning of section 501(c)(3) of the Internal Revenue Code. The activities of the Foundation include increasing public knowledge of the role of the wine and spirits distributor on a local and national level, educating the public about the responsible consumption and distribution of alcohol, sponsoring studies and promoting public awareness regarding the deregulation of alcohol, and supporting communities to stop underage alcohol consumption, none of which, according to your representations, constitute employee welfare benefit plans. You represent that the Foundation is not a party in interest under section 3(14) of ERISA. You also indicate that the IRS determined that the Foundation is exempt from tax under Code section 501(c)(3).

You have requested an advisory opinion with regard to the following questions:

1. Whether it is permissible under section 403(d)(2) of ERISA, to amend the Trust and for the trustee to transfer the remaining assets (less certain administrative fees) to the Foundation.
2. Whether transferring the Plan remaining assets subsequent to the termination of the Plan to the Foundation is a prohibited transaction involving either a party in interest or a fiduciary within the meaning of sections 406(a)(1)(D), 406(b)(1) or (2) of ERISA.

The Department ordinarily will not issue advisory opinions regarding sections 403(c)(1) and 404(a)(1) of ERISA. See ERISA Advisory Opinion Procedure 76-1, sec. 5.02(n) and (o). We note, however, that section 403(c)(1) of ERISA provides that except as provided in section 403(d), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. In addition, section 404(a)(1) of ERISA provides, in part, that subject to sections 403(c) and (d), a fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries.

Section 403(d)(2) provides that the assets of an employee welfare benefit plan that terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary of Labor. Although no regulations have been issued under section 403(d)(2), Conference Report No. 93-1280, 93rd Congress, 2d Session, at page 303, states in part that it is intended that the terms of the welfare plan will govern distribution or transfer of assets upon termination of the plan, except to the extent that implementation of the terms of the plan or agreement would unduly impair the accrued benefits of the plan participants. See Advisory Opinions 2003-08A (June 26, 2003) and 93-14A (May 5, 1993).

Section 403(d)(2) of ERISA does not preclude the amendment of the Trust as described to permit the transfer of surplus assets to an unrelated tax-exempt foundation after termination of the Plan and satisfaction of all liabilities.

With regard to your second question, section 406(a) prohibits various types of transactions between a plan and persons who are parties in interest with respect to the plan. In particular, section 406(a)(1)(D) prohibits a fiduciary from engaging in a transaction if the fiduciary knows or should know that the transaction is a direct or indirect transfer to, or use by or for the benefit of any party in interest, of the assets of the plan. Further, section 406(b)(1) of ERISA prohibits a fiduciary from dealing with plan assets in his or her own interest or for his or her own account and section 406(b)(2) provides that a fiduciary with respect to a plan shall not in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests

of its participants or beneficiaries. If the Trust has properly been terminated and all claims have been either paid or properly forfeited, the proposed subsequent transfer of surplus funds by the trustees of that Trust would not violate ERISA sections 406(a)(1)(D), 406(b)(1) or (2).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations