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Ms. Jennifer Loyd  
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Tennessee Department of Commerce  
and Insurance  
500 James Robertson Parkway  
Volunteer Plaza Building, 5th Floor  
Nashville, Tennessee 37243

**91-09A**  
ERISA SEC.  
3(40), 514(b)

Dear Ms. Loyd:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the National Employees and Operators Association Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether the Trust is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of that title.

According to the information submitted, the Trust was created pursuant to a trust agreement dated February 16, 1986, between the National Employees and Operators Association (the Association) and two individuals, as the Trustees. The Trust agreement provides that the purpose of the Trust is to provide "medical, surgical, hospital, pharmaceutical, dental, optical and like benefits to eligible employees and their dependents of Participating Employers...." The term "Participating Employers" is defined in Article II, Section 2.3 to include "such persons, firms, organizations, associations or corporations as shall have entered into an Agreement with the [Association] or the Trust pursuant to which eligible employees of said Participating Employers shall be entitled to one (1) or more of the benefits provided by that Participating Employer's plan, as adopted." You also advise that, as of December 11, 1990, approximately 250 employers provide benefits through the Trust,<sup>1</sup> that there is no indication that the Trust is maintained pursuant to a collectively bargained agreement, and that there is no

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<sup>1</sup> Your correspondence characterizes each arrangement between an employer and the Trust as an employee welfare benefit plan within the meaning of section 3(1) of ERISA. Because you have sought an opinion only as to whether the Trust itself is a title I plan, we have not opined on whether each individual employer's arrangement with the Trust is a title I plan. Please note, however, that the Department has taken the position that subscription by an employer to a group insurance arrangement to provide employee benefits constitutes a single employer welfare benefit plan. See, *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982).

indication that the employers participating in the Trust constitute a "control group."

Section 3(40)(A) of title I of ERISA defines the term "MEWA" to include:

... an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained--

- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
- (ii) by a rural electric cooperative.

Section 3(40)(B) provides in pertinent part:

For purposes of this paragraph --

- (i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,
- (ii) the term "control group" means a group of trades or businesses under common control...

Based upon the information you submitted, it is the position of the Department of Labor (the Department) that the Trust is a MEWA within the meaning of section 3(40). The Trust covers the employees of two or more separate, independent employers, is not maintained by a rural electric cooperative, and is not maintained under or pursuant to any collective bargaining agreement.

Although section 514(a) of ERISA provides that any state law or regulation which relates to an employee benefit plan covered by ERISA is preempted, section 514 (b) of title I of ERISA provides:

(6)(A) Notwithstanding any other provision of this section -- (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

- (II) provisions to enforce such standards, and
- (ii) in the case of any other employee welfare benefit

plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has previously stated that it did not see the need to prescribe regulations to exempt MEWAs from state regulation. The Department, at this time, has not changed its position. Accordingly, the Department is not providing MEWAs exemptions from state regulation.

It is, therefore, the Department's position that the preemption provisions of title I of ERISA do not preclude state regulation of the Trust at least to the extent provided in section 514(b)(6)(A), regardless of whether it is an employee benefit plan covered by title I of ERISA, because it is a MEWA within the meaning of section 3(40) of that title.

Enclosed for your information is a copy of opinion 90-18A (issued July 2, 1990) which discusses the scope of the states' authority to regulate pursuant to section 514(b)(6)(A).

Because your request for an advisory opinion was concerned primarily with the issue of whether or not the Trust is subject to the applicable regulatory authority of the state of Tennessee's insurance law or is saved from such authority under the general preemption provision of section 514(a) of title I of ERISA, and because of the opinion above, we have determined it is not necessary at this time to render an opinion as to whether the Trust is an employee welfare benefit plan within the meaning of section 3(1) of that title.

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

Sincerely,

Robert J. Doyle  
Director of Regulations  
and Interpretations

Enclosure