



September 30, 1992

Mr. Alfred W. Gross, FLMI, CIE  
Deputy Commissioner  
Financial Regulation Division  
Virginia Bureau of Insurance  
Box 1157  
Richmond, Virginia 23209

**92-20A**  
**ERISA SECTION**  
3(40),  
514(b)(6)

Dear Mr. Gross:

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 FCE Health and Welfare Service Industry Trust (the Trust) is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of Title I of ERISA.

You advise that the Trust was established pursuant to a trust agreement dated March 3, 1991, between Federal Contract Employees Health & Welfare Fund, Inc. (FCE, Inc.) as Plan Administrator, Goodwill Industries, Inc. as a participating Employer, and The TM Company of California as Trustee. The "Recitals" section of the trust agreement states that FCE, Inc. established the Trust "for the purposes of (1) receiving health and welfare contributions from the participating Employers, (2) purchasing health and welfare insurance contracts for the benefit of the participating Employers, and (3) servicing claims under such health and insurance contracts..." Article I, Section 1.1 of the trust agreement defines the term "Employer" to include "each sole proprietorship, partnership, or corporation which may from time-to-time becomes [sic] an Employer participating in this Trust. The term "Employer" shall mean the aggregate of all Employers who are participating in this Trust on a given reference date."

In a telephone conversation with a representative of this Office, Mr. Bradley Gales, an insurance analyst with the Bureau of Insurance of the State Corporation Commission stated that, to his knowledge, the Trust was not established or maintained pursuant to any collective bargaining agreement or by any rural electric cooperative or rural telephone cooperative association, and has provided benefits to the employees of two or more employers.

Mr. Gales subsequently submitted documentation indicating that three employers who participated in the Trust had later executed separate trust agreements creating single employer trusts. However, your inquiry does not request the Department of Labor (the Department) to issue any opinion regarding these other trust agreements and the opinions expressed below are based on the situation prior to the signing of these other trust agreements.

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,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

Inasmuch as there is no indication that the Trust is established or maintained under or pursuant to one or more collective bargaining agreements, by a rural electric cooperative, or a rural telephone cooperative association, it is the position of the Department that the Trust is a MEWA within the meaning of section 3(40)(A).

Although section 514(a) of Title I 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 contribution, 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 employee benefit plans which are 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 under section 514(b)(6)(B) to exempt such MEWAs from state regulation. The Department at this time has not changed its position. Accordingly, the Department is not providing such MEWAs exemptions from state regulation.

It is, therefore, the Department's position that the preemption provisions 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, under current law, 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 Virginia's insurance laws 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.

This letter 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