U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

FEB 9 1990 ERISA OPINION 90-01A
Sec. 3(1), 3(40), 514

Mr. Ralph J. Gillis
Gillis and Campbell
160 Old Derby Street
Suite 227
Hingham, Massachusetts 02043

Dear Mr. Gillis:

This is in reply to your letter requesting an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the F/V Inshore Group Health Plan (the Plan) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and therefore must comply with that title.

You advise that the purpose of the Plan is to provide medical benefits to the members of the Massachusetts Inshore Draggermen's Association (MIDA) and their employees. The Plan is funded through a trust created under a Declaration of Trust dated February 1, 1989, made by five individuals as Trustees. The Declaration of Trust implements a Pre-Declaration of Trust of the same date under which the MIDA appointed the five Trustees and authorized them to sign the Declaration of Trust. The Pre-Declaration of Trust provides for the Trust to issue 1,000 shares of stock to MIDA as the sole shareholder and limits the issuance of stock to those shares. The Declaration of Trust also limits stock issued to 1,000 shares. Article VII of the Declaration of Trust provides that Trustees have annual terms and are appointed by the Shareholders (MIDA) at the Shareholders Annual Meeting. If a vacancy in the Trustees occurs during a term, a new Trustee may be appointed by the Shareholders. Trustees may be removed from office with or without cause by a majority vote of either the other Trustees or the Shareholders.

Under the Bylaws of MIDA, there is only one class of members and only members may vote. As amended February 1, 1989, an applicant for membership "must be actively involved in commercial fish harvesting as (a) a fishing vessel owner, (b) a self-employed captain or (c) a self-employed crew member." However, the Bylaws permit the MIDA Board of Directors to have non-voting Associates qualifying on such criteria as the Board of Directors would determine; provided the Associates are representative of any of four groups: Fin-Fishery Industry Groups, Fin-Fishery Processing Firms, Fin-Fishery Harvesters, or Fin-Fishery Marketers or dealers. The amendments of February 1, 1989, provide that anyone displaced as a Member as a result of those amendments is reclassified as an Associate. Prior to amendment, the Bylaws provided that an applicant for membership "must be actively employed as a Massachusetts commercial fish harvester." Although there is no information whether the MIDA Board of Directors established criteria for Associate membership, the notice for the February 1, 1989, meeting at which the Bylaws were amended states that Associate Members are not eligible to vote. The notice also contains a membership application indicating dues for "Business Assoc.," "Fishing Assoc." and "Indiv. Assoc."

The term "employee welfare benefit plan" is defined in section 3(1) of title I of ERISA to include:

> ...any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Although the Plan provides health benefits which are among those benefits identified in section 3(1), in order to be an employee welfare benefit plan, the Plan must also, among other criteria, be established or maintained by an employer, an employee organization, or both.

The terms "employee organization" and "employer" are defined respectively by ERISA section 3(4) and 3(5) as:

> (4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.
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> (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.

There is no indication in your submission that MIDA, which established and maintains the Plan, is an employee organization within the meaning of section 3(4) of ERISA. The MIDA does not exist "…for the purpose, in whole or in part, of dealing with employers…" Furthermore, in several opinion letters the Department of Labor (the Department) has identified criteria for purposes of determining what constitutes an "employees' beneficiary association" as that term is used in section 3(4). One of those criteria is that membership in such an association must be conditioned on employment status -- for example, where membership is limited to employees of a certain employer or members of one union. However, membership in MIDA is not conditioned upon one's status as an employee.

With regard to the issue of whether MIDA is an "employer" within the meaning of section 3(5) of ERISA, the definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits to their employees.

The Department has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that, in the absence of the involvement of an employee organization, a "multiple employer" plan, i.e., a plan to which more than one employer contributes, may, nevertheless, exist where a cognizable bona fide group or association of employers established a benefit program for the employees of member employers. On the other hand, where several unrelated employers merely execute identically worded “trust agreements” or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between these employers, no employer association, and consequently no employee welfare benefit plan, can be recognized. Also, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such an association is not vested solely in employer members, such an association is not a bona fide association of employers within the meaning of section 3(5) of ERISA.

A determination whether a purported group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: 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 preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. In addition, in the Department's view, the employers that participate in a 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 program.

Although the employer members of MIDA appear to have control over the Trust in form, the issue of whether such employer members exercise control in substance as well is inherently factual in nature. Section 5.01 of ERISA Procedure 76-1 (issued August 27, 1976, copy enclosed) provides that the Department will ordinarily not issue an advisory opinion in certain areas due to the inherently factual nature of the problem involved. Accordingly, we are unable to advise you at this time whether MIDA is a bona fide employer group or association within the meaning of section 3(5) of ERISA with respect to the Trust.

We also note that the Department's regulation section 29 CFR 2510.3-3(b) provides that the term "employee benefit plan" does not include any plan, fund or program (other than an apprenticeship or other training program) under which no employees are participants covered under the plan. Regulation section 2510.3-3(c)(1) provides that:

> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse….

Thus, if only self-employed members of MIDA participate in the Trust, it would not constitute an employee benefit plan covered by title I of ERISA. Your inquiry does not indicate that any employee of a self-employed member of MIDA is covered by the Trust. For the reasons state above, the Department is unable to assure you, at this time, that the Trust is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

Finally, we note that section 3(40)(A) of title I of ERISA defines the term "multiple employer welfare arrangement" (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—
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> (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
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> (ii) by a rural electric cooperative.

From the information submitted, there is no indication that the Trust was established or is maintained pursuant to any agreement between an employer and an employee organization. Nor is there any indication that the participating employers in the Trust constitute either a rural electric cooperative or a control group. Thus, it is the position of the Department that, if the Trust covers employees of two or more separate and independent self-employed members of the MIDA, the Trust, regardless of whether it is an employee welfare benefit plan covered by title I of ERISA, would be a MEWA within the meaning of section 3(40).

Section 514(a) of title I of ERISA generally preempts any state law which relates to an employee benefit plan covered by that title. However, section 514(b)(6) provides, with regard to MEWAs:

> (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--
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> (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
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> (II) provisions to enforce such standards, and
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> (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.
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> (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.
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> (C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.
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> (D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

The Department has previously stated it is not providing MEWAs exemptions from state regulation under section 514(b)(6)(B). The Department's position has not changed at this time. Therefore, if, as previously stated, the Plan is a MEWA as defined in section 3(40) of ERISA, it is the Department's position that the Plan is subject to state regulation at least to the extent provided in section 514(b)(6)(A) regardless of whether the Plan is an employee benefit plan covered by title I of ERISA.

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

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

Enclosure