

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



OCT 25 1990

ERISA SEC. 90-36A  
3(40), 514(b)

Mr. Clifford J. Hudson  
Texas State Board of Insurance  
1110 San Jacinto  
Austin, Texas 78701-1998

Dear Mr. Hudson:

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 Texas Panhandle Medical Group, Inc. (TPMG) is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of title I of ERISA. You also ask whether any action by the State of Texas to enforce its requirement that TPMG obtain a certificate of authority to transact insurance business would be deemed inconsistent with ERISA section 514(b)(6)(A)(ii).

You advise that TPMG has enrolled at least eighty-nine small employers, mostly in the Panhandle region of Texas, in its "SelectCare" program. In return for premiums, TPMG provides what you describe as group medical insurance to the employees and dependents of participating employers. As a condition to participation in the TPMG arrangement, employers are required to purchase a 25-share certificate of membership in TPMG. You advise further that the membership does not appear to confer upon any participating employers any voting rights or other participation in the operation of the plan. A list of enrolled employers that you submitted indicates that the employers are involved in diverse trades.

You stated in a telephone conversation with a representative of this office that there is no indication that TPMG is maintained pursuant to a collectively bargained agreement and that there is no indication that the participating employers in TPMG constitute a "control group" within the meaning of section 3(40)(B).

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 TPMG is a MEWA within the meaning of section 3(40). TPMG 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, 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 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 such regulations. The Department, at this time, has not changed its position. Accordingly, the Department is not providing MEWAs exemptions from state regulation under section 514(b)(6)(B).

It is, therefore, the Department's position that the preemption provisions of ERISA do not preclude state regulation of TPMG, 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.

In response to your second question, we note that the Department of Labor recently issued an advisory opinion to Mr. J. Scott Kyle of your office (AO 90-18A, enclosed), which states, among other things, that a state law regulating insurance which requires the obtaining of a certificate of authority as a condition to transacting insurance business would not, for purposes of section 514(b)(6)(A)(ii), be inconsistent with the provisions of title I of ERISA.

Because your request for an opinion was concerned primarily with the issue of whether or not TPMG is subject to the applicable regulatory authority of the State of Texas' 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 to render an opinion as to whether TPMG 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