

**U.S. Department of Labor**

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



OCT 31 1990

ERISA SEC. 90-39A  
3(40), 514(b)

Mr. Michael J. Angelini  
New Jersey Department of Insurance  
20 W. State Street  
Trenton, New Jersey 08625

Dear Mr. Angelini:

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 Independent Distributors of America, Inc. Health Benefits Plan (the Plan) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether the Plan is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of that title.

You advise that the Plan was created pursuant to a 1987 trust agreement between the Independent Distributors of America, Inc. and Mr. John Winter as Trustee. The trust agreement states that the purpose of the Plan is to provide various sickness, accident and other benefits for the signatory and other employers. Article I, Section 2.9 of the trust agreement defines the term "Employer" as "any person, firm or corporation making payments into (the Trust) for his or its employees pursuant to this Agreement... For purposes of this Agreement only, Employer shall also include employee welfare benefit plans established by Employers or employee organizations, or by both, which choose to participate in the Trust."

In a telephone conversation with a representative of this Office, you stated that the employers utilizing the Plan to provide benefits to their employees do not constitute a "control group" within the meaning of section 3(40)(B) and that the Plan is not maintained pursuant to any collectively bargained agreement.

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 Plan is a MEWA within the meaning of section 3(40). The Plan 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 section 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 ERISA do not preclude state regulation of the Plan 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 Plan is subject to the applicable regulatory authority of the State of New Jersey'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 Plan 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 opinion.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations

Enclosure