U.S. Department of Labor Pension and Welfare Benefits Administration
Washington DC 20210

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Mr. Terrance A. Keating
Department Counsel-MEWA Unit
Pennsylvania Insurance Department
Strawberry Square
Harrisburg, Pennsylvania 17120

92-21A
ERISA SECTION
3(40),
514(b)(6)

Dear Mr. Keating:

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 a program described below administered by Advanced Administrative Companies (AAC) is a multiple employer welfare arrangement (MEWA) within the meaning of ERISA section 3(40).

You advise that in June, 1991, AAC made an offer to certain employers which had previously had group health coverage with two MEWAs suspended from doing business in Pennsylvania. Under the AAC offer, each employer could adopt what AAC claimed was a single-employer, self-funded accident and health benefit program. The list provided to AAC of 107 employers participating in the suspended MEWAs was accompanied by $56,635.00 in premiums that the employers had paid to the last of the two MEWAs although there was no identification of what premiums were paid by any particular employer.

Under the program offered by AAC, AAC was to act as third party administrator for the employers' plans and Winston-Hill Assurance Company (Winston-Hill) would provide up to "100% reinsurance" to the plans. Each employer accepting the program signed an administrative agreement with AAC and a reinsurance contract with Winston-Hill. All employer contributions under the program are sent to AAC and pooled (minus an amount for administrative expenses) in one "reinsurance account" from which benefit claims are paid. AAC is the sole signatory to the account and has the authority to approve or deny claims. In addition to Winston-Hill, Colonial Insurance Company (Colonial) was an available reinsurer. You further advise that neither Winston-Hill nor Colonial is licensed to transact insurance in Pennsylvania.

The term "multiple employer welfare arrangement" is defined in section 3(40)(A) of Title I of ERISA 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,
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> (ii) by a rural electric cooperative, or
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> (iii) by a rural telephone cooperative association.

Based on the information provided, it is the position of the Department that the arrangement described herein in which employers sign "reinsurance agreements" for up to 100% of their contribution liabilities to employee welfare benefit plans, and payments under such agreements are deposited in a pooled account for which benefit claims are paid, is a MEWA within the meaning of ERISA section 3(40). The arrangement is established and maintained for the purpose of providing benefits to employees of two or more employers and it does not fall within any of the exceptions listed in section 3(40).

As indicated below, a determination that an employee benefit arrangement is a MEWA has implications for regulation of the arrangement under ERISA as well as under applicable state law.

We note that section 514(b)(6) provides, in pertinent part:

> (6)(A) Notwithstanding any other provision of this section --
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> (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

> (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.

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department of Labor (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.

The limitations on state regulation of MEWAs in section 514(b)(6) apply only to MEWAs that are also employee welfare benefit plans within the meaning of ERISA section 3(1). These limitations, as well as the general preemption provision of ERISA section 514(a), do not prevent state regulation of MEWAs or other entities that are not employee welfare benefit plans.

Based on the information provided, the MEWA described herein does not appear to be an employee welfare benefit plan under ERISA section 3(1). This section provides that an employee welfare benefit plan covered by Title I of ERISA must be established or maintained by an employer or employee organization or both. The instant arrangement appears to be established or maintained by AAC and the reinsurance companies rather than by an employer or by an employee organization as those terms are defined at ERISA section 3(4) and section 3(5). For the same reasons, it is the position of the Department that neither AAC, Winston-Hill nor Colonial is an employee benefit plan covered under Title I of ERISA. Accordingly, section 514(a) of Title I of ERISA would not preempt state regulation of the arrangement or of AAC, Winston-Hill, and Colonial.

From the information provided, it appears that at least some of the employers that accepted the AAC program may have established separate, single-employer, employee welfare benefit plans under ERISA section

In rendering this opinion, the Department takes no position on questions involving the interpretation of state insurance laws.

Enclosed for your information is a copy of Opinion No. 90-18A (issued July 2, 1990) which discusses the scope of the states' authority to regulate MEWAs pursuant to ERISA section 514(b)(6)(A).

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

[1] You indicated that some of the employers which received offers from AAC adopted a health and accident program that covered only the owner and/or the owner's immediate family. Department of Labor regulation section 29 C.F.R. 2510.3-3(b) excludes "plans without employees" from the definition of employee benefit plans covered by Title I of ERISA. Regulation section 29 C.F.R. 2510.3-3(c) provides that, for the purposes of regulation section 2510.3-3, an individual and his or her spouse will not be deemed to be employees with respect to a trade or business wholly owned by the individual or by the individual and his or her spouse.