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

April 5, 1993

93-11A
ERISA SECTION
514(b)

Ms. Lois A. Sherwood
Multiple Employer Welfare
Arrangement Section
Michigan Insurance Bureau
P.O. Box 30220
Lansing, Michigan 48909

Dear Ms. Sherwood:

This responds to your request for an advisory opinion regarding application of section 514(b)(6)(D) of the Employee Retirement Income Security Act of 1974 ("ERISA") to the Associated Builders and Contractors, Inc. of Michigan Employee Benefit Plan (the "Plan"). Specifically, you ask whether the Plan would be "fully insured" within the meaning of section 514(b)(6)(D) of ERISA if the Associated Builders and Contractors, Inc. of Michigan ("ABC") enters into a proposed contractual arrangement (described below) with First Security Health and Life Assurance Company ("FSL") with respect to payment of benefits under the Plan.

The following facts and representations have been furnished by the Michigan Insurance Bureau and by ABC. ABC is the Michigan chapter of a national trade association whose members are "merit shop" contractors and suppliers. ABC has for a long time made a group health insurance program available to its members. Benefits under this program originally were provided through insurance, but in 1981, ABC established the Plan on a "self-insured" basis. From that time forward, ABC members who participate in the Plan have paid premiums to a trust (the "Trust") established under a trust agreement between ABC and Old Kent Bank and Trust Company. Benefit claims are processed by a third-party administrator, and benefits have always been paid directly from the Trust. The Trust has purchased "stop-loss" insurance to protect the Trust against losses due to large claims.

Following enactment in 1983 of certain amendments to ERISA that modified the scope of ERISA's preemption of state law to permit application of certain state insurance laws to employee welfare benefit plans that are "multiple employer welfare arrangements" ("MEWAs"), ABC entered into a contractual arrangement with FSL (then called National Retirement Insurance Company) that ABC intended would cause the Plan to be considered "fully insured" within the meaning of section 514(b)(6)(D), while retaining as many elements of self-insurance as possible.

This contractual arrangement, as originally entered into, was composed of two parts: a "group health insurance policy" (the "Policy")[1] and a "Security and Reimbursement Agreement" (the "SR Agreement")[2] that, by its terms, was made part of the Policy.

Following discussions with the Michigan Insurance Bureau over the SR Agreement, ABC negotiated a proposed "minimum premium insurance agreement" (the "MPI Agreement") with FSL. The MPI Agreement is intended to replace the SR Agreement and to result in the Plan's being considered "fully insured" within the meaning of section 514(b)(6)(D).

If executed, the MPI Agreement would become a rider to the Policy, and all other agreements between ABC and FSL, including the SR Agreement and an existing excess-loss insurance policy, would terminate as of the MPI Agreement's effective date. The MPI Agreement would provide that all benefits under the Policy will be paid by FSL. It would further require ABC to designate the Trust as the "claims fund" for the purpose of funding benefit payments under the Policy. The MPI Agreement would require the Trust to reimburse FSL, each business day, by wire transfer of funds, for all benefit claims paid by FSL under the Policy. It would further require ABC to fund the Trust sufficiently to permit these reimbursements and to provide FSL, upon request, with confirmation of the balance in the Trust. FSL would be permitted to audit the records of the Trust upon reasonable notice to ABC. The MPI Agreement would further provide that the Trust is the sole entity responsible for making payments to FSL. Neither ABC, nor its individual employer members, their employees, or their dependents are to have any liability of any type to FSL.

The MPI Agreement would set a maximum amount for which the Trust will be liable to FSL for reimbursement of claims actually paid in a contract year. The MPI Agreement also would set a maximum amount, called the "Maximum Liability Upon Termination," for which the Trust will be liable to FSL upon termination of the MPI Agreement for claims incurred but not paid during the period in which the MPI Agreement is in effect. ABC would be required to maintain, during a specific portion of each month, a balance in the Trust at least equal to the Maximum Liability Upon Termination.[3]

The MPI Agreement would further require ABC to pay FSL a monthly premium. This monthly premium would be experience-rated, which means that each contract year's monthly premium would be set by taking into account the Plan's actual claims experience during the previous contract year and that ABC could receive an experience-rated premium refund at the end of each contract year, if actual claims during the year are lower than expected.[4] ABC would be permitted to choose whether to receive the premium refund in cash or in the form of a credit applied toward future monthly premium payments. Before the beginning of each month during a contract year, FSL and ABC would determine the list of eligible participants for that month and, therefore, the number of participants for which the monthly premium would be due.

The MPI Agreement further calls for ABC and FSL to set a per-participant "medical pooling point" for each contract year. If any participant's claims during the year exceed the medical pooling point, the excess would not be treated as part of the year's experience in setting the next year's premiums and would increase ABC's experience-rated premium refund for that year. ABC represents that although the Trust will be obligated to reimburse FSL for its payments in excess of the medical pooling point, ABC will in turn be reimbursed by FSL for such "excess" payments through the experience-rated refund at the end of the contract year.

The MPI Agreement would provide that it will terminate either on the date the Policy terminates or upon the written agreement of the parties. Alternatively, either party would be permitted to terminate the MPI Agreement immediately if the other party ceased doing business or became insolvent. FSL would further be permitted to terminate the MPI Agreement immediately if ABC fails to pay any monthly premium within 30 days after it is due, if FSL is not timely reimbursed for claims paid by it, if the Trust is not adequately funded to permit such reimbursement, or the Trust is not adequately funded to maintain the Maximum Liability Upon Termination balance within ten days after the specified period in each month.

With respect to payment of incurred claims if the MPI Agreement terminates, Section XIII of the MPI Agreement would provide: If this Agreement is terminated, FSL shall continue to pay claims incurred (whether or not reported) before the termination and shall be reimbursed from the Trust for claims actually paid and for administra- tive expenses, up to the Maximum Liability Upon Termination .... However, if the Trust fails to contain sufficient assets to reimburse FSL, FSL shall be solely liable for the payment of any excess amounts

The only issue on which the Department's views are sought in this case is whether the Plan would be "fully insured" within the meaning of section 514(b)(6)(D) of ERISA, if the parties enter into the MPI Agreement described above. Section 514(b)(6)(D) provides that, for purposes of section 514(b)(6)(A) of ERISA, "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 [of Labor] 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."

For purposes of this letter, it is assumed that the benefits to be provided by the Plan consist solely of the benefits provided under the Policy. It is further assumed that FSL is and will continue to be an insurance company, insurance service, or insurance organization qualified to conduct business in a state.[6] Subject to these assumptions and based on the representations concerning the nature of the proposed MPI Agreement that have been submitted, it is the view of the Department that, if the MPI Agreement is executed and in force, the Plan will be "fully insured" within the meaning of ERISA section 514(b)(6)(D).[7]

The MPI Agreement obligates FSL to pay participants and beneficiaries of the Plan, directly or through its agent, and in a timely manner, all of the benefits under the Plan. FSL's obligation to pay benefits directly to participants and beneficiaries, which is backed by FSL's general assets, is not conditioned on whether FSL receives reimbursements from the Trust, and FSL's obligation to pay benefits will survive termination of the MPI Agreement with respect to all claims for benefits incurred prior to termination, whether such claims have been reported or not. Although the MPI Agreement limits FSL's actual risk of loss in various ways, such as by providing that FSL will be reimbursed by the Trust on a daily basis for its benefit payments, by requiring ABC to maintain a substantial balance in the Trust, and further by permitting FSL to terminate the MPI Agreement unilaterally if these conditions are not met, FSL nonetheless will be unconditionally liable to the participants and beneficiaries for payment of all claims for benefits incurred while the MPI Agreement is in effect.

Inasmuch as its views on the matter were not sought by the parties, the Department does not opine in this letter on whether the Plan is an "employee welfare benefit plan" as that term is defined by section 3(1) of ERISA.

Finally, we wish to note that decisions regarding the method through which benefits are to be paid under an employee welfare benefit plan, including the selection of an insurer and the negotiation of the terms of any contractual arrangement obligating the plan, are matters that generally are subject to the fiduciary responsibility provisions of Title I of ERISA.

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

[1] The use of the term "group health insurance policy" in describing the Policy is based on the representations made by ABC and does not reflect any view of the State of Michigan or the Department of Labor concerning how the existing or proposed contractual arrangement between ABC and FSL would be characterized under Michigan insurance law.

[2] The SR Agreement, which is currently in effect, provides that Plan benefits (which are those benefits provided under the Policy) are to be paid from the Trust. It obligates FSL to pay such benefits only if the Trust first fails to pay them. The SR Agreement specifically provides that payment by FSL of any such benefit will not alter the Trust's primary obligation to pay the benefit. ABC is obligated to obtain a stop-loss policy providing specific and aggregate limits acceptable to the FSL and to designate a certain

sum from the assets of the Trust from which FSL has the right to draw to reimburse itself for any benefits it pays that are not reimbursed by the Trust or the stop-loss insurer. The SR Agreement further provides that the Trust will pay FSL a premium for the Policy in the amount of two percent of paid claims.

The SR Agreement provides that either party may terminate the agreement upon written notice to the other party or upon certain events. Termination of the SR Agreement and the Policy for any reason, however, will not terminate the application of their provisions with respect to benefits that have "become due" prior to the date of termination. It is further provided that, for purposes of the SR Agreement, "benefits become due upon receipt by the third-party administrator or [FSL] of sufficient proof in substantiation of a valid claim for such benefits".

[3]ABC represents that the "Maximum Liability Upon Termination" is not defined in the MPI Agreement, but that the parties contemplate that it will be equal to the estimated claims for the next three months.

[4] ABC represents that FSL currently has no experience-rated arrangements, but that the parties to the MPI Agreement intend to negotiate rules and guidelines to govern the experience-rated premium refund in advance and anticipate that such rules and guidelines will be incorporated into the MPI Agreement by reference.

[5] ABC represents that, although it is not specifically stated in the MPI Agreement, it is the intent of the parties that FSL's liability be backed by its general assets.

[6] Whether any specific insurance company, insurance service, or insurance organization is in fact qualified to conduct business in a particular state is a determination that must be made under the applicable laws of that state.

[7] The Department offers no view in this letter concerning whether the Plan as currently in effect under the Policy and the SR Agreement would be considered "fully insured" within the meaning of section 514(b)(6)(D) of ERISA.