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

March 14, 1994

Mr. Robert R. Googins
Commissioner of Insurance
P.O. Box 816
Hartford, CT 06142-0816

94-07A
ERISA SECTION
3(l),3(5),
514(b)(6)(D)

Dear Commissioner Googins:

This responds to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to an employee benefit arrangement sponsored by the United Service Association for Health Care (USA). Specifically, you asked whether seven trusts established under the arrangement constitute "employee welfare benefit plans" within the meaning of section 3(1) of ERISA and whether they are "fully insured" within the meaning of section 514(b)(6)(D) of ERISA. Subsequent to your request, USA advised the Department of Labor (Department) that it has determined to restructure the arrangement by consolidating the seven trusts into a single trust, described below.' Because your request for an opinion was concerned primarily with the status that the USA benefit arrangement will have under Connecticut's insurance laws on an ongoing basis, this letter will address the arrangement only as to its restructured form.

The facts and representations before the Department in this matter, as furnished with your request or separately by USA, include the following. USA represents that it is a non-profit trade association of small employers that was founded in 1983 under the name "American Tax Reform Committee." The association's original purpose was to promote equitable tax policy for its members. By 1988, the focus of the association shifted to other concerns of small employers that included health care concerns in particular, and the association adopted its present name at that time to reflect the interests of its membership. USA further represents that it has a current membership of approximately 130,000 small employers located throughout the United States. In addition to offering the health benefit arrangement at issue here, USA provides certain services to its members that include access to legal counsel at reduced fees through a network of 3,500 law firms, a magazine and other publications providing information and advice on employment matters, a telephone 800 number service to answer questions from members, and a computer system that allows members to communicate with each other on matters of common concern.

The Articles of Incorporation (Articles) under which USA is organized, as amended in October 1992, state that USA "shall have, as its members, small business employers (including persons who are self-employed), who are interested in and supportive of the purposes for which [USA] was organized. ..." The Articles state further that "[t]he business of [USA] shall be carried on through its Board of Directors; the manner of their election and/or appointment shall be as provided in the Bylaws of [USA]." Bylaws of USA adopted in October 1992 (the Bylaws) similarly provide that USA "shall have one (1) class of members, consisting of small business employers and persons who are self-employed. .." and that "[t]he business and affairs of [USA] and all corporate powers shall be managed by the Board of Directors . . . . " (Art. 2.1 and 4.1).

The Bylaws require the holding of annual meetings of USA members at which the members elect the Board of Directors (Art. 3.1). Each member is entitled to one vote and voting may be in person or by proxy (Art. 3.6). A quorum of members consists of the lesser of 100 members or members holding 5 percent of the votes that may be cast (Art. 3.5). The Board is to be composed of three to nine directors, as determined by the Board, and each director serves until his or her successor is elected and qualified (Art. 4.2). Candidates for the Board are to be nominated by existing directors (Art. 4.3). Directors may be elected to succeed themselves (Art. 4.4). The Bylaws further provide that officers of USA are to be elected by the Board of Directors and may be removed by the Board at any time with or without cause (Art. 6.1 and 6.2). The Bylaws may be amended by the Board of Directors, subject to repeal or change by action of the members (Art. 8.4).

USA established an arrangement in 1992 to provide health care benefits for its employer members, their employees, and eligible dependents. The arrangement was structured under seven benefit trusts, each of which provides for participation by employers engaged in a particular industry group. The seven trusts are now being consolidated into a single trust (the "Trust") pursuant to a restated trust instrument entitled "Restatement of Agreement and Declaration of Trust/USA for Health Care Benefit Trust" (the "Trust Agreement"). The Trust is treated hereafter in this letter as though it has been fully effectuated.

Under the Trust Agreement, participation in the Trust is limited to employers that are members of USA, agree to be bound by the terms and conditions of the Trust, and meet the underwriting standards of the Trust (Trust Agreement §§ 1.02, 1.03 and 26.01). A bank serves as custodial trustee and control over the management and administration of the Trust is placed in a Benefits Review Committee (BRC) composed of the Board of Directors of USA. The BRC or the trustee may propose amendments to the Trust Agreement for adoption by a majority vote of the BRC or of the participating employers (Trust Agreement § 29.02). The Trust may be terminated by the BRC (Trust Agreement § 29.04).[?]

For the reasons discussed below, the Department is unable to find on the basis of the information presented that USA is a bona fide group or association of employers within the meaning of section 3(5) of ERISA and, accordingly, is unable to conclude that the USA for Health Care Benefit Trust (referred to herein as the "Trust") is an employee welfare benefit plan for purposes of Title I of ERISA. Moreover, as also discussed below, even if the Trust were found to be an ERISA-covered employee welfare benefit plan, the Department is unable to find that the Trust would, under the contractual agreements presented, be "fully insured" within the meaning of ERISA section 514(b)(6)(D).

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 it s 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 sicknessaccident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholar-ship 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 Trust is established for the purpose of providing benefits among those identified in section 3(1) of ERISA, in order to be an employee welfare benefit plan, the Trust must, among other criteria, be established or maintained by an employer, an employee organization, or both. Since there is no indication that an employee organization within the meaning of section 3(4) of ERISA is in any way involved in the Trust, this letter will address only the issue of whether the Trust is established or maintained by an employer.

The term "employer" is defined in section 3(5) of ERISA to include "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." The definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a cognizable, bona fide 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. On the other hand, where several unrelated employers merely execute participation agreements or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between the employers, no employer association can be recognized.

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 the view of the Department, 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.

Based on the documents and representations presented, the Department cannot conclude that USA is a bona fide group or association of employers within the meaning of section 3(5) of ERISA. In particular, we note the following. First, although USA represents that its membership is composed of employers, the Articles and Bylaws indicate that USA's membership class includes self-employed persons. Because self-employed persons are not necessarily employers of common-law employees, it appears that membership eligibility in USA is not limited to "employers." Second, the Articles and Bylaws do not appear to place control over USA in its membership. Although the Bylaws provide that USA's members elect directors who serve on the Board of Directors, which has the power to conduct the business and affairs of USA, the Bylaws provide that only directors may nominate persons to be directors. In addition, directors may be reelected indefinitely. It thus appears that the Board may be a self-perpetuating body that is insulated from any control by the members of USA. Moreover, the Bylaws place the power to amend the Bylaws primarily in the Board of Directors and the Trust Agreement provides that only the BRC or the trustee may propose amendments to that document. Thus, the role of USA's members appears to be limited to rejecting or modifying amendments adopted by the Board, the BRC or the trustee. Members, therefore, appear to have no meaningful method under the Bylaws or the Trust Agreement to propose amendments. It thus appears that USA's governing documents provide no effective way for members to affect the Board or operations of USA, including the Trust. [3]

The information provided further indicates that USA may lack the commonality of interest that forms the basis for sponsorship of an employee welfare benefit plan. "The definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, unrelated to the provision of benefits." Wisconsin Education Association Insurance Trust v. Iowa State Board of Public Instruction, 804 F.2d 1059, 1063 (8th Cir. 1986). [4] USA has numerous members spread across the country who are engaged in operating small businesses. The activities of USA appear to consist primarily of offering its members services or programs of a consumer nature, among which the opportunity to purchase health care benefits may be the most significant.

None of the information furnished points to a common economic or representation interest linking employees of USA's members to USA that is unrelated to their obtaining benefits.

Because we cannot conclude that USA is a bona fide group or association of employers within the meaning of ERISA section 3(5), we are unable to find that the Trust constitutes an ERISA-covered "employee welfare benefit plan." With regard to your inquiry concerning whether the Trust would constitute a "multiple employer welfare arrangement" (MEWA) that is "fully insured" within the meaning of ERISA section 514(b)(6)(D), we note the following.

The question whether a MEWA is fully insured arises only if the arrangement constitutes an "employee welfare benefit plan" covered by ERISA.[5] Although, as indicated above, we cannot find that the Trust is an employee welfare benefit plan, we note that the Trust is a MEWA within the meaning of section 3(40) of ERISA. Pursuant to section 514(b)(6)(D) of ERISA, a MEWA "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."

According to the facts and representations provided, the Trust receives contributions from the participating employers and benefit claims are paid from the Trust. The Trust, acting through its BRC, has entered into a contract, called a "quota share reinsurance agreement" (the Agreement),[6] with National Health Insurance Company (NHIC). NHIC is an insurance company licensed in the District of Columbia and in all states except New York.

Under the Agreement, as described by USA, NHIC is obligated to pay to the Trust 90 percent of the amount of liabilities that the Trust incurs under its benefit plan, up to a per-claim limit of $10 million (Art. 6.01)[7] The Trust retains responsibility for the remaining 10 percent of the liabilities (Art. 6.02), except under certain conditions described below. The Trust is obligated to pay to NHIC 90 percent of the amount of contributions received from participating employers (Art. 7.01), and NHIC is obligated to pay to the Trust a "commission" specified in the Agreement to cover acquisition costs and issuing fees, taxes, and other costs (Art. 7.03). The Trust retains 10 percent of the contributions for payment of its share of the liabilities and maintaining a reserve thereon, and for its administrative expenses.

The Agreement provides further that NHIC guarantees payment to the Trust of the Trust's retained portion of the liabilities in the event the Trust is unable to fund that portion (Art. 6.03). NHIC's obligation for both the 90 percent portion and the 10 percent portion of the liabilities is payable to the Trust notwithstanding insolvency of the Trust or failure of the Trust's liquidator, receiver, or statutory successor to pay the claims (Art. 12.01).[8] In addition, under a proposed amendment to the Agreement (proposed new Art. 6.05), NHIC will undertake a further obligation in the event the Trust is unable to fund its

retained portion of the liabilities.[9] Specifically, NHIC agrees, notwithstanding any other provision of the Agreement, that if the Trust remains unable to fund the full amount of benefits after NHIC has made the full 100 percent payment to the Trust, NHIC will pay the remaining claims directly to the plan participants. USA represents, and the proposed amendment provides, that payments under this provision would be made for the benefit of the Trust pursuant to the reinsurance relationship between NHIC and the Trust, and that this obligation would not create a direct contractual relationship between NHIC and the plan participants.

The Agreement provides that it may be cancelled by either party by giving 90 days' advance notice in writing (Art. 5.01). The Agreement also provides that the Trust's insolvency, defined by the Agreement as inability of the Trust to fund its retained portion of the losses, will be deemed termination of the Agreement to be effective the first day of the following month (Art. 5.03).

Based on the representations concerning the nature of the Agreement that have been submitted, it is the opinion of the Department that the Agreement, including the proposed amendment, would not cause the Trust to be "fully insured" within the meaning of section 514(b)(6)(D) of ERISA. At all times that the Agreement would be in effect, plan participants would be required to present benefit claims to the Trust, and benefit payments would be made solely by or on behalf of the Trust. Although NHIC would promise under the proposed amendment to the Agreement to pay remaining unpaid claims directly to plan participants, NHIC and the Trust intend that the obligation to make those payments would not create any direct contractual relationship between NHIC and plan participants. Because participants do not appear to have contractual rights against the insurance company, there is, in the view of the Department, a serious question as to whether plan participants could in any manner enforce the provisions of the amendment against NHIC. In addition, because the obligation of NHIC with respect to the 10 percent portion of the liabilities is conditioned on the Trust's inability to fund that portion, and is not triggered by the mere failure of the Trust to pay the full amount of benefits due, NHIC's obligation does not, in the view of the Department, constitute a guarantee of the full amount of the benefits for purposes of section 514(b)(6)(D) of ERISA. Whether the failure of the Trust to pay a valid claim for benefits is due to an inability to pay could become a matter of dispute and require a determination of facts not readily ascertained by the affected participant. Further, due to provisions in the Agreement limiting NHIC's liability in certain circumstances (notes 7 and 8 supra), it is questionable whether NHIC's liability would extend to all benefit claims that could be valid under the Trust. For these reasons, the contractual arrangement between the Trust and NHIC does not, in the view of the Department, appear to provide the certainty of benefit protection contemplated by section 514(b)(6)(D).

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] A copy of USA's correspondence in this regard is enclosed.

[2] The Trust Agreement, at section 1.08, establishes seven sub-trusts, which USA represents are only for the purpose of underwriting and rating participants according to industry groups.

[3] Because the Board, in its capacity as the BRC, controls the Trust, members of USA also have no effective way to exercise control over the benefit program.

[4] See also Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (en banc); Matthew 25 Ministries, Inc. v. Corcoran, 771 F.2d 21 (2d Cir. 1985); Wayne Chemical, Inc. v. Columbus Agency Service, 567 F.2d 692 (7th Cir. 1977); Bell v. Employee Security Benefit Association, 437 F. Supp. 382 (D. Kan. 1977); Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617 (9th Cir. 1987); MD Physicians & Associates Inc. v. Texas Board of Insurance, 957 F.2d 178 (5th Cir. 1992).

[5] Section 3(40)(A) of ERISA provides that, subject to certain exceptions not relevant here, a MEWA is an employee welfare benefit plan or other arrangement that provides any benefit described in section 3(1) of ERISA to the employees of two or more employers. Section 514(b)(6)(A) of ERISA permits the application of state insurance law, otherwise preempted under section 514(a) of ERISA, to an employee welfare benefit plan that is a MEWA, as follows: If the MEWA is "fully insured" within the meaning of section 514(b)(6)(D) of ERISA, state insurance law may apply to the extent it provides standards requiring the maintenance of specified levels of reserves and contributions, and provisions to enforce such standards (See section 514 (b)(6)(A)(i)). If the MEWA is not fully insured, any law of any state that regulates insurance may apply to the extent not inconsistent with Title I of ERISA (See 514(b)(6)(A)(ii)).

[6] The Department expresses no view in this letter concerning how the Agreement would be characterized under the insurance law of Connecticut or any other state.

[7] In addition to the per-claim limit, the Agreement limits or circumscribes NHIC's liability in several ways. For example, Article III contains exclusions relating to, inter alia, claims arising from the Trust's participation in any insolvency fund and losses attributable to inability of the Trust to collect from any other reinsurer; Article IV provides a territorial limitation; and Article X specifies the extent to which the Agreement includes "excess limits judgments."

[8] The Agreement also provides that, as a condition precedent to NIHIC's obligation upon the trust's insolvency, the liquidator, receiver, or statutory successor will give written notice of any claim against the trust filed in the insolvency proceeding (Art. 12.02).

[9] USA represents that NHIC has agreed to this additional obligation. A copy of the amendment that the Trust and NHIC propose to execute has been submitted by USA to the Department of Labor and to the Connecticut Insurance Department.