U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

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ERISA SEC.
514 & 3(40)

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State of Washington
P.O. Box 40255
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Dear Mr. Brown:

This is in reply to your request on behalf of the Washington State Insurance Commissioner for an advisory opinion regarding Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you asked for the view of the Department of Labor (Department) on whether section 514(a) of ERISA would preempt certain recently enacted amendments to the Washington State Insurance Code that provide for a premium tax and high-risk pool assessment to be paid by self-funded multiple employer welfare arrangements (MEWAs).

Your correspondence and other materials submitted in support of your request contain the following facts and representations. The State of Washington recently enacted the "Self-Funded Multiple Employer Welfare Arrangement Regulation Act" (Act), which amended and added sections to the Washington State Insurance Code. The purposes of the Act are to provide for the authorization and registration of self-funded MEWAs in Washington, to ensure the financial integrity of the arrangements, to provide reporting requirements, and to provide sanctions on self-funded MEWAs organized, operated, providing benefits, or maintained in Washington that do not comply with the Act.

Under section 24(2) of the Act, self-funded MEWAs are subject to an annual premium tax equal to two percent of the total premiums and prepayments for health care services received by the MEWA during the preceding calendar year. The premium tax rate for self-insured MEWAs under the Act is the same premium tax rate that is imposed on all authorized insurers in the State of Washington. Rev. Code Wash. § 48.14.020 ("each authorized insurer . . . shall on or before the first day of March of each year pay to the state treasurer . . . a tax on premiums . . . in the amount of two percent of all premiums"). Section 26 of the Act provides that the Board of Directors of the Washington State Health Insurance Pool (WSHIP) may assess self-funded MEWAs for contributions to the State Insurance Pool (high-risk pool assessment). The high-risk pool assessment for a MEWA is determined by the same formula that the Board of Directors uses to determine an insurer's high-risk pool assessment. Rev. Code Wash. § 48.41.090 (the assessment is determined by multiplying the total cost of pool operation by a fraction that represents the percentage of all insured state residents that are covered by the MEWA/insurer).

The Act states that the premium taxes collected from self-funded MEWAs pursuant to the Act are deposited into the state's "health services account." Funds collected from the high-risk pool assessment are exclusively dedicated to the high-risk pool and are used to defray health care expenses of individuals covered by that pool. Section 3(7) of the Act defines a "self-funded MEWA" as a "multiple employer welfare arrangement that does not provide for payments of benefits under the arrangement solely through a policy or policies of insurance issued by one or more insurance companies licensed under this title." Section 3(5) of the Act further provides that a "multiple employer welfare arrangement" under the Act means a MEWA "as defined by [ERISA]."[1]

A provision in the Act states that the premium tax and high-risk pool assessment provisions will apply to self-funded MEWAs "only in the event that they are not preempted by [ERISA]." The Act directs that "the arrangements and the commissioner shall initially request an advisory opinion from the United States Department of Labor or obtain a declaratory ruling from a federal court on the legality of imposing [state premium taxes and high-risk pool assessments] on these arrangements." In that regard, we received letters and other materials submitted on behalf of the Washington State Auto Dealers Insurance Trust, Pacific Benefits Trust, Washington Employers Association and Trust, and Timber Products Manufacturers Association and Trust (Associations). The Associations represented that they sponsor self-funded MEWAs operating in Washington State that would be subject to the premium tax and high-risk pool assessment. The Associations asked that the Department consider their submission a "joint request" with the State of Washington for the Department's view on whether the Act's premium tax and high-risk pool assessment are preempted by ERISA.[2]

Under the general preemption clause of ERISA section 514(a), state laws are preempted to the extent that they "relate to" employee benefit plans subject to Title I of ERISA. There are, however, a number of exceptions to this broad preemption provision. Section 514(b)(2)(A), referred to as the "savings clause," provides in pertinent part that "nothing in this title (Title I of ERISA) shall be construed to exempt or relieve any

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[1] A MEWA is defined in section 3(40) of ERISA, in relevant part, to mean: "[A]n 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 [section 3(1) of ERISA] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries . . . ."

[2] The Act also requires the payment of two other fees by self-funded MEWAs operating in Washington. Section 6(1)(b)(i)(A) requires that $200,000 be deposited with the insurance commissioner to be used for "payment of claims in the event the arrangement becomes insolvent." Section 22(2) provides that the commissioner may assess a pro rata fee on an organization for that organization's portion of the cost of operating the insurance commissioner's office. Washington State has not asked for our view regarding these fees and the Associations' submission is likewise limited to the premium tax and high-risk pool assessment. In addition, the Associations asserted that, excepting the premium tax and high-risk pool assessment, the Associations would be able to comply with the requirements of the Act.

person from any law of any State which regulates insurance . . . ." While section 514(b)(2)(A) saves from ERISA preemption state laws regulating insurance, section 514(b)(2)(B) of ERISA, referred to as the "deemer clause," provides that a state law "purporting to regulate insurance" generally cannot deem an employee benefit plan to be an insurance company (or in the business of insurance) for the purpose of regulating such a plan as an insurance company. An additional piece of analysis, however, is needed if the ERISA welfare plan is a MEWA as defined in section 3(40) of ERISA. Section 514(b)(6)(A) creates a partial exception to the deemer clause for employee welfare benefit plans that are also MEWAs. Specifically, if the employee benefit plan MEWA is "fully insured," then, under section 516(b)(6)(A)(i), any state law that regulates insurance may apply to the MEWA to the extent the law provides standards, or provisions to enforce those standards, requiring the maintenance of specified levels of reserves and contributions in order to be considered able to pay benefits. If the employee benefit plan MEWA is not fully insured, then, under section 514(b)(6)(A)(ii), any law of any state that "regulates insurance" may apply to the extent it is "not inconsistent with" the provisions ERISA.[3]

The first question, thus, is whether the high-risk pool assessment and the premium tax are laws that "regulate insurance" within the meaning of section 514(b)(6)(A). Although addressing the general savings clause for insurance regulation in section 514(b)(2)(A) of ERISA, the Supreme Court in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), articulated a two part test for determining what state laws "regulate insurance."[4] In that case, the Supreme Court held that for a state law to regulate insurance it must (1) be specifically directed toward entities engaged in insurance and (2) substantially affect the risk pooling arrangement between the insurer and the insured. With respect to the first requirement, it is the Department's view that the premium tax and high-risk pool assessment provisions clearly are directed at entities engaged in insurance, i.e., self funded MEWAs. In this regard, the Supreme Court noted in *Miller* that "self-insured plans engage in the same sort of risk pooling arrangements as separate entities that provide insurance to an employee benefit plan." *Miller* at 336. Regarding the second requirement, the Supreme Court specifically stated that its test requires "only that the state law substantially affect the risk pooling arrangement between the insurer and insured; it does not require that the state law

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[3] The limitations set forth in section 514(b)(6)(A) of ERISA on state insurance regulation of MEWAs only apply to MEWAs that are also employee welfare benefit plans as defined in section 3(1) of ERISA. If a MEWA is not an ERISA-covered plan, ERISA's preemption provisions do not limit the ability of states to regulate the arrangement in accordance with applicable state insurance law. Accordingly, ERISA would impose no limit on the application of state insurance law to those MEWAs sponsored by the Associations that are not ERISA-covered plans.

[4] There is nothing in the text of ERISA nor have we discovered any legislative history to support a conclusion that premium taxes and insurance pool assessments would not be included within the scope of "regulation" as that term is used in section 514 of ERISA merely because they generate state revenues.

actually spread risk." *Miller* at 339 n.3. The Washington State Insurance Commissioner explained in a submission how the premium tax provisions satisfy this requirement:

> Since 1996, pursuant to RCW 48.14.0201, these taxes have gone into the state's health services account which funds Washington's Basic Health Plan. Pursuant to RCW 43.72.900, this account is dedicated to maintaining and expanding health services access for low income residents, maintaining and expanding the public health system, maintaining and improving the capacity of the health care system, containing health care costs, and the regulation, planning, and administration of the health care system. In short, Washington's health carrier premium tax and the uses to which it is dedicated directly involve risk shifting and risk pooling and are at the core of health insurance regulation.

Similarly, as to the high-risk pool assessment, the Washington Insurance Commissioner states:

> WSHIP members include carriers, like MEWAs, that operate only in the group market, carriers that operate only in the individual market, and carriers that operate in both. The pool may extend coverage to individuals who once had group coverage, including coverage through a self-insured MEWA, but who do not qualify for guaranteed issue. In short, WSHIP helps stabilize the entire health care market and provides a safety net for all Washington residents including those who currently obtain health coverage through MEWAs. Like the state's health services account, WSHIP directly involves risk pooling that cuts across all health coverage markets and the statutory duties that accompany WSHIP membership fall squarely within the *Kentucky Ass'n of Health Plans, Inc.*, test of insurance regulation.

The Department agrees that the premium tax and high-risk pool assessment regulate insurance within the meaning of ERISA section 514(b)(6)(A).[5]

As described above, if a MEWA is an ERISA-covered plan, the permissible scope of state insurance regulation would, for purposes of section 514(b)(6)(A), be determined on the basis of whether the MEWA is "fully insured" within the meaning of section 514(b)(6)(D). Inasmuch as the Act at issue in your request is limited to self-funded MEWAs, we need focus only on whether application of the Act's premium tax and

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[5] In light of the fact that the ERISA savings clause was designed to save state insurance laws from federal preemption, this conclusion also supports the congressional objective reflected in section 2(b) of the McCarran Ferguson Act generally to preserve the states' ability to impose fees and taxes upon those engaged in the business of insurance. Specifically, section 2(b) of the McCarren Ferguson Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."

high-risk pool assessment provisions are "inconsistent with" ERISA within the meaning of section 514(b)(6)(A)(ii). In Advisory Opinion 90-18A (July 2, 1990), the Department expressed the view that a state law regulating insurance would be inconsistent with ERISA to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under Title I of ERISA or conflict with any provision of Title I of ERISA.[6] The Department further explained in that opinion that a state insurance law will not be deemed "inconsistent with" the provisions of Title I if it requires ERISA-covered plans constituting MEWAs to meet more stringent standards of conduct, to provide more or greater protection to plan participants and beneficiaries than required by ERISA, to meet standards requiring the maintenance of specified levels of reserves and specified levels of contributions, to obtain a license or certificate of authority as a condition precedent or otherwise to transacting insurance business, or which subjects persons who failed to comply with such requirements to taxation, fines or other civil penalties, including injunctive relief.

The Associations contend that application of the premium tax provisions in the Act would be inconsistent with ERISA's exclusive purpose and prudence requirements, as set forth in sections 403(c)(1) and 404 of ERISA, respectively. The payment by a self-funded MEWA of premium taxes or high-risk pool assessments in accordance with the above referenced provisions of the Washington Insurance Code would not, in the Department's view, violate ERISA section 403(c)(1) nor would it be an improper expenditure of plan assets under ERISA section 404(a)(1). This view is consistent with the principles articulated in Advisory Opinion 82-32A (July 20,1982). At least one federal court has also concluded that assessing administrative charges on MEWAs under state insurance law is not inconsistent with Title I within the meaning of ERISA section 514(b)(6)(A)(ii). *See Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 6 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994)(because regulatory fees are legitimate administrative expenses, Connecticut's imposition of regulatory fees on MEWAs is not inconsistent with either ERISA's trust requirement or ERISA's requirement that plan assets be used only to provide benefits and defray plan expenses).[7]

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[6] For example, a state insurance law which would adversely affect a participant's or beneficiary's right to request or receive plan documents to which they have a right under Title I of ERISA, or to pursue claims procedures in accordance with section 503 of ERISA, or to obtain and maintain continuation health coverage in accordance with Part 6 of ERISA, or that would require an ERISA-covered plan to make imprudent investments would be deemed to be "inconsistent" with the provisions of Title I of ERISA.

[7] The Department expressly envisioned MEWAs being subject to premium taxes and assessments under state insurance law in the preamble to the final regulation under section 3(40) of ERISA relating to the exclusion from the MEWA definition for certain employee welfare benefit plans maintained pursuant to collective bargaining agreements: "These MEWAs will likely incur costs to comply with newly applicable state requirements. Such requirements vary from state to state, making it difficult to estimate the cost of compliance, but it is likely that costs might include those attributable to audits, funding and reserves, reporting, premium taxes and assessments, provision of state-mandated benefits, underwriting and rating rules, market conduct standards, and managed care patient protection rules, among other costs.

The Associations also contend that the Act as a whole is inconsistent with ERISA because they claim it effectively prohibits MEWAs that have been in existence for less than 10 years from obtaining a certificate of authority to operate on a self-funded basis in Washington State. As noted above, the Department stated in Advisory Opinion 90-18A that a state law which regulates insurance would be inconsistent with the provisions of ERISA for purposes of ERISA section 514(b)(6)(A)(ii) to the extent that compliance with such law would conflict with any provision of Title I of ERISA. The Department explained that such a conflict would occur when a state insurance law makes compliance with a provision of Title I an impossibility. In the Department's view, the requirement that a MEWA be in existence for ten years before it can operate in Washington on a self-funded basis does not make compliance with any provision of Title I impossible. In addition, this requirement of the Act only impacts a MEWA's ability to operate on a self-funded basis. It does not make it impossible for MEWAs to operate on a fully insured basis in Washington. Furthermore, the Associations did not point to anything in the Act that precludes a MEWA from operating in Washington by obtaining a license to operate as a licensed insurance company. Finally, even if a court determined that the ten-year requirement was inconsistent with ERISA, the Washington Act contains a severability clause under which that provision would be severed and the remaining provisions in the legislation would be enforced.[8]

We note that the Associations' initial submission requested, in the event the Department determines that the premium tax and high-risk pool assessment are not preempted by ERISA, that the Department consider the submission as a request for an exemption under section 514(b)(6)(B) of ERISA. Section 514(b)(6)(B) of ERISA provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs that are employee welfare benefit plans and that are not fully insured from state regulation that otherwise would be permissible under section 514(b)(6)(A)(ii) of ERISA. The Department has neither prescribed regulations nor granted exemptions in this area, having concluded in response to prior requests that there is no need for regulations under section 514(b)(6)(B) to exempt MEWAs from state insurance regulation. *See e.g.*, Advisory Opinion 93-17A (July 7, 1993); Advisory Opinion 92-21A (Oct. 19, 1992); DOL Information Letter to Ms. Renee Granger, April 5, 1993. Nothing in the Associations' submissions persuaded the Department to change its view.

In summary, based on the foregoing, it is the view of the Department that the application of the premium tax and high-risk pool assessment provisions to a self-

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These costs may be higher for those MEWAs that conduct business in more than one state." 68 Fed. Reg. 17477 (Apr. 9, 2003) (emphasis added).

[8] The Department notes that the Washington State Insurance Commissioner's Office has interpretive and regulatory authority over the Act. It would be premature for the Department to address various hypothetical situations raised by the Associations in support of their arguments against the premium tax and assessment until the Washington State Insurance Commissioner has addressed those issues.

funded MEWA in accordance with the above referenced provisions of the Washington Insurance Code would not be preempted by ERISA. This letter constitutes an advisory opinion under ERISA Procedure 76-1, and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. We have considered the Associations' request for a conference under section 8 of the procedure and, in light of the multiple submissions made by the Washington State Insurance Commissioner's Office and the Associations, have decided that a conference is not necessary in providing this advisory opinion.

Sincerely,

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Office of Regulations and Interpretations