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

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2007-06A
ERISA SEC.
3(40) & 514(b)(6)(A)

Dear Mr. Wender:

This is in reply to your request on behalf of the Custom Rail Employer Welfare Trust Fund ("CREW" or "CREW Welfare Trust") 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 CREW is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA, and whether it is a "multiple employer welfare arrangement" (MEWA), within the meaning of section 3(40), that is "fully insured" within the meaning of section 514(b)(6)(A) of ERISA.[1]

The following summary of facts and representations is based on the materials submitted in support of your request and information on CREW's website at www.crew-benefits.com. CREW is marketed to members of the Small Railroad Business Owners Association of America, Inc. (Association) as an employee welfare benefit plan designed to provide medical, surgical, hospital, and disability benefits exclusively to members' employees and dependents. The Association's Articles of Incorporation provide that the Association "shall be operated exclusively as a nonstock not-for-profit organization and specifically for the following purposes: (i) To function as a trade association of short line and small railroads in the United States and Canada; . . . and (iv) To provide for insurance and other employee benefits and welfare plans to employees of members of the Association." [2] The Association's By-Laws provide that "[m]embership will be open

[1] The National Association of Insurance Commissioners (NAIC) submitted a letter urging the Department to conclude that the CREW Welfare Trust is subject to state insurance regulation, including state insurance laws that would require CREW to become licensed in the states where it operates as a MEWA and obtain insurance from a carrier or carriers licensed in each State in which CREW operates. The NAIC described itself as an organization that represents the chief insurance regulators from the 50 states, the District of Columbia, and four U.S. territories. We also received your supplemental submission responding to the NAIC's arguments and legal analyses.

[2] Included in the materials you submitted is a copy of a Certificate of Incorporation issued by the Government of the District of Columbia, Department of Consumer and Regulatory Affairs. The Certificate of Incorporation, dated October 11, 2001, certified that "all applicable provisions of the District of Columbia NonProfit Corporation Act have been complied with and accordingly, this Certificate of Incorporation is hereby issued to: Small Railroad Business Owners Association of America, Inc." The website of the District of Columbia Department of Consumer and Regulatory Affairs

to all railroads and railroad related entities that employ at least one (1) person and that otherwise are engaged in [activities]" including "the operation of interstate freight, and intrastate scenic and tourist railroads and who otherwise pursue the purposes of the Association. . . ." The Association's Articles of Incorporation and By-Laws have been construed "so that only (a) railroad contractors who maintain the railroad track right away [sic] and whose operations may result in them being subject to FELA [Federal Employment Liability Act] liability, and (b) a parent company or affiliate of a small railroad which leases track or employs the administrative personnel who supervise the operation of one or more small or short line railroads are eligible to participate in the New Association [Association] and CREW."[3]

You represent that the Association lobbies State and Federal agencies on matters affecting small and short line railroads, sponsors programs and distributes publications to publicize the importance of small and short line railroads, provides a forum for the exchange of ideas and facilitates the purchase and sale of equipment among members, develops briefing papers for use by members, and provides email alerts to members concerning the industry.

The Association is managed by a Board of Directors. The Board is required to have a minimum of three Directors, with up to a maximum of seven upon amendment of the By-laws to so provide. The materials you provided do not indicate how many Directors currently serve on the Board of Directors, and we did not see any amendment to the By-laws that would increase the number of Directors from three. Each Director may serve on the Board for a term of not more than three years. The By-Laws provide that "Directors shall be elected by a plurality of the votes cast provided that a quorum is present or that the requisite minimum number of votes is cast by written ballot, as the case may be." It is not clear from your submission how Directors are nominated to serve on the Board of Directors or what number constitutes a "requisite minimum number" of votes cast by written ballot. Moreover, it is unclear from the materials you provided whether all Association members are entitled to vote. The Association's Articles of Incorporation provide that the Association shall have only one class of members, and both the Articles of Incorporation and the By-laws provide that "each member" gets one vote with respect to each vacancy on the Board of Directors. However, those two documents define "voting members" differently. The Articles of Incorporation provide that "the voting members of the Association shall be limited to employers (persons or entities who or which employ at least one (1) person for purposes of the provision of welfare and pension benefits)," but the By-Laws provide that "the voting members of the Association shall be limited to employers (persons or entities who or which employ at least five (5) persons for purposes of the provision of welfare and pension benefits)."

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(www.mblr.dc.gov/corp/lookup/status.asp?id=26854), however, indicates that the Association's registration has been revoked.

[3] *See* Affidavit of Ronald J. Wilson, at 3 (August 7, 2006).

The CREW Welfare Trust is organized as a trust under the laws of the District of Columbia and is intended to operate as a "voluntary employees' beneficiary association" (VEBA) within the meaning of section 501(c)(9) of the Internal Revenue Code (Code). You represent that only "employer members" of the Association may participate in the CREW Welfare Trust. The Board of Directors of the Association initially selects the trustees of the CREW Welfare Trust who are responsible for the overall supervision of the CREW Welfare Trust, including approval of insurance policies. Thereafter, the Board presents a slate of trustee nominees to the employer members, and employer members may add additional nominees to the slate. According to CREW's trust agreement, if no employer adds nominees, the slate of trustees is "deemed elected." The trust agreement does not specify the process that ensues if an employer adds a nominee to the slate, and there appear to be discrepancies in the documents we reviewed regarding whether CREW trustees are appointed by the Association's Board of Directors or elected by the Association's members. Specifically, your March 27, 2006 letter to this office provides that "employer members elect the trustees." However, in the Application for Membership in the CREW Welfare Trust, prospective member rail employers must sign that they "understand that the elected Directors [of the Association] appoint the Officers of the Association and appoint the Trustees of the Custom Rail Employer Welfare Trust Fund ('CREW')."

CREW contracts with Medical Benefits Administrators of MD, Inc. (MBA) to undertake CREW's day-to-day administration, including claims processing and adjudication services, access to and management of provider networks, and compliance management. MBA uses an actuarial firm to establish the health insurance rates for employee and dependent coverage options available under the CREW Welfare Trust. Advance Benefit Services, an affiliate of MBA, "assists association member employers in the implementation, design, presentation, and enrollment of employees and dependents under national association benefit programs."[4]

You indicate that CREW has a certificate of insurance coverage (Certificate) with a group of underwriters (Underwriters) at Lloyd's, London. The Certificate was obtained through R. J. Wilson & Associates Ltd., a reinsurance brokerage firm and affiliate of MBA.[5] The Certificate is not covered by any state guaranty association. The Underwriters liable under the Certificate are admitted insurers in the States of Illinois

[4] *See* CREW's website (www.crew-benefits.com/faq/faq_list.asp).

[5] The general organizational structure used in the CREW arrangement appears to be a prototype-like employee benefit structure that is being established and marketed under various designations. See, for example, the websites for The Evangelical Benefit Trust (www.ebt-benefits.com/overview.html) the ATA Archery & Bowhunting Industry Benefit Trust (www.archerybenefits.com), and the IGA Group Employee Benefits Trust (www.iga-benefits.com).

and Kentucky.[6] The Certificate provides CREW with stop-loss coverage for individual claims in excess of $50,000. In addition, in the event of CREW's insolvency, bankruptcy, financial impairment, receivership, voluntary plan of arrangement with creditors or dissolution, or termination or non-renewal of the CREW Welfare Trust, the Underwriters are liable for claims incurred during the period of insurance in excess of a "terminal fund" which CREW must maintain in accordance with the Certificate. The terminal fund consists of current assets on hand to fund the actuarial value of all incurred but unpaid claims (including unreported claims). Individuals covered under the CREW Welfare Trust have the right to seek payment of benefits directly from the Underwriters by making a request through a designated U.S. based representative of the Underwriters after there is a final determination that an individual's claim is payable under the CREW Welfare Trust, and CREW fails to pay within thirty days of the determination. In this eventuality, CREW is required to assign its right of recovery under the Certificate to the claimant or his or her representative.[7]

Your request for an advisory opinion focuses on provisions added to ERISA in 1983 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 MEWAs. Section 3(40)(A) of ERISA defines the term "MEWA," in pertinent part, 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) [ERISA section 3(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, (ii) by a rural electric cooperative, or (iii) by a rural telephone cooperative association.

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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[6] Lloyd's website (www.lloyds.com) states that Lloyd's is an insurance market, not a single insurance company, consisting of a number of separate businesses (syndicates) that underwrite risks. Lloyd's underwriters are licensed in Kentucky, Illinois and the US Virgin Islands, and are eligible surplus lines insurers in all US jurisdictions except Kentucky and the US Virgin Islands. Lloyd's underwriters are also accredited reinsurers in all US states. Insurance policies issued by Lloyd's underwriters are not protected by state insurance guaranty associations or insolvency funds, except in states where licensed.

[7] 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 does not express any view on whether the CREW arrangements satisfy those fiduciary requirements.

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. 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 which regulates insurance" may apply to the extent it is "not inconsistent with" the provisions of ERISA. 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.

It is the view of the Department based on the information we reviewed that CREW is a MEWA within the meaning of section 3(40) of ERISA. CREW is an arrangement that has been established and is maintained for the purpose of offering and providing welfare benefits to employees of two or more separate employers and does not fall within any of the exceptions listed in section 3(40). Thus, unless the CREW Welfare Trust is itself an ERISA-covered employee benefit plan, ERISA would impose no limit on the application of state insurance law to the CREW benefit arrangement and trust.

Although it appears that the CREW Welfare Trust provides benefits described in section 3(1) of ERISA, to be an employee welfare benefit plan, the Trust must also, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization. There is no indication in your submission that the Fund was established or is maintained by an employee organization within the meaning of section 3(4) of ERISA. Therefore, this letter will only address whether the CREW Welfare Trust is established or maintained by an "employer" within the meaning of section 3(5) of ERISA. Section 3(5) of ERISA defines an employer as "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 acting in the interests of its employer members to provide benefits for their employees. A determination whether there 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. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

The Department has expressed the view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5). Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employers (i.e., the group or association members include persons who are not employers) or where control of the group or association is not vested solely in employer members, the group or association is not a bona fide group or association of employers for purposes of ERISA section 3(5). *See, e.g.,* Advisory Opinion 95-01A, and Advisory Opinion 88-07A. In that regard, the Department has previously concluded that sole proprietors without common-law employees are not eligible to be treated as "employers" for purposes of participating in a bona fide group or association of employers within the meaning of ERISA section 3(5). *See* Advisory Opinion 94-07A ("[A]lthough 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.'").

If the Association membership is limited to employers, and if control of the CREW Welfare Trust is vested solely in its employer members that participate in the CREW Welfare Trust, the Department would find that the Association constitutes a bona fide employer group or association acting as an employer in relation to the CREW Welfare Trust within the meaning of ERISA section 3(5).

However, even if the Crew Welfare Trust is an employee welfare benefit plan within the meaning of section 3(1), it would be a plan covering multiple employers, not a single employer plan, and a MEWA subject to state insurance regulation at least to the extent

permitted under section 514(b)(6)(A) of ERISA. Assuming for purposes of this letter that the CREW Welfare Trust is itself an ERISA-covered plan, it is the view of the Department based on the information we reviewed that CREW is not fully insured within the meaning of section 514(b)(6)(D) of ERISA.

Under 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 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."[8] ERISA's requirement that a fully insured MEWA have *benefits* guaranteed under a contract, or policy of insurance does not refer merely to a financial guaranty running to the plan, but rather requires the insurance company or organization that issued the insurance contract to unconditionally guarantee, upon receipt of the required premium or consideration, to pay all benefits due under the plan, and each participant must have a right to those guaranteed benefits which is legally enforceable directly against the insurance company or organization. In the Department's view, the Certificate is not such a contract or policy of insurance. Rather, the financial arrangement between CREW and Lloyd's, London represented by the Certificate's stop-loss coverage, the CREW Welfare Trust's terminal fund, and the Trust's promise to assign rights to payment under the Certificate to participants and beneficiaries, is fundamentally one where, until the occurrence of a triggering event—CREW's failure to pay a claim within thirty days of a final determination that an individual's claim is payable under the CREW Welfare Trust—the insurance risk for the benefits remains primarily with CREW and the employers and employees funding the program and the terminal fund.[9]

We were unable to conclude that the participants would, upon the Underwriters' receipt of the required premium, have rights to guaranteed benefits legally enforceable directly against the Underwriters. For example, it is unclear whether a failure by CREW

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[8] In the Department's view, section 514(b)(6)(D) requires the insurer to be qualified to do business in "a State," not in every State where the plan offers or provides benefits. A central purpose of the "qualified to do business" requirement, however, is to ensure that the policy insuring the plan benefits is subject to insurance regulation by a State that authorized the insurer to sell its residents the type of insurance purchased by the plan. Nonetheless, a consequence of the insurance savings clause in ERISA section 514(b)(2)(A), under which the application of State insurance laws to insurance companies is saved from preemption, is that even in the case of a fully insured MEWA, ERISA would not limit any State in which the MEWA's insurance risk is resident or located or to be performed from enforcing state insurance law requirements directly against the insurance company, insurance service or insurance organization insuring the MEWA.

[9] *See generally John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 US 86 (1993) (in interpreting the definition of "guaranteed benefit policy" in ERISA section 401, the Court concluded that a contract "provides for benefits the amount of which is guaranteed by the insurer" in the context of insured pension benefits "only if it allocates investment risk to the insurer." The Court explained that "[s]uch an allocation is present when the insurer provides a genuine guarantee of an aggregate amount of benefits payable to retirement plan participants and their beneficiaries.").

to meet its commitments regarding the terminal fund would affect the ability of plan participants to make a claim against the Underwriters. Further, since the Underwriters' liability under the Certificate does not arise until after there is a final determination that a participant's claim is payable under the CREW Welfare Trust, it is unclear when a liability would arise, if ever, for the Underwriters if CREW refused to make such a determination. It would appear that a participant in such a case might have to obtain an enforceable court order concluding that a particular claim was payable under the CREW Welfare Trust before being able to make a claim against the Underwriters.

Thus, even if the CREW Welfare Trust is an ERISA-covered plan within the meaning of section 3(1) of ERISA, CREW as a MEWA that is not fully insured would be subject to state insurance regulation subject to the limitation in section 514(b)(6)(A)(ii) of ERISA that the state law is "not inconsistent" with Title I of ERISA.

The relationship between CREW, the participants, and the Underwriters is distinguishable from the arrangement in Advisory Opinion 93-11A, which the Department concluded was a fully insured MEWA. In that advisory opinion, the insurance agreement obligated the insurer 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. The insurer's obligation to pay benefits directly to participants and beneficiaries was backed by the insurer's general assets and was not conditioned on whether the insurer received reimbursements from the plan. Although agreements between the plan and the insurer limited the insurer's actual risk of loss in various ways, such as by providing that the insurer would be reimbursed by the plan on a daily basis for its benefit payments, by requiring the plan to maintain a substantial balance in a trust used to reimburse the insurer for benefit payments, and by permitting the insurer to terminate insurance agreements unilaterally if these conditions were not met, the insurer was unconditionally liable to the participants and beneficiaries for payment of all claims for benefits incurred while the insurance agreement was in effect. Further, the insurer's obligation to pay benefits survived termination of those agreements with respect to all claims for benefits incurred prior to their termination. *See also* Advisory Opinion 2005-20A.

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,

Lisa M. Alexander
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations