

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



May 18, 1995

95-06A  
ERISA SECTION 3(40)(A), 514(b)(6)

Mr. Tom Portier  
Compliance Examiner  
Louisiana Department of Insurance  
P.O. Box 94214  
Baton Rouge, Louisiana 70804-9214

Dear Mr. Portier:

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 Mid-Continent Medical Benefits Trust (MCMBT), which is administered by Profession Administration Group (PAG), is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40)(A) of Title I of ERISA.

Based on the information you submitted, it appears that MCMBT was created pursuant to a trust agreement effective October 1, 1988, between the Mid-Continent Business and Health Alliance, Inc (MCA); three trustees; and certain unnamed employers. The trust agreement was amended and restated on June 1, 1992. Under the MCMBT, an employer can adopt what is termed a "single-employer," "fully-insured" plan. MCMBT maintains a program of benefits that employers may adopt and permits an employer to select among a number of elections regarding benefits offered. MCMBT maintains a pooled custodial account with reserves for the plans in effect for participating employers.

MCMBT states that it has secured reinsurance covering 100% of the risk assumed for each of the employers' plans through Commercial Indemnity Assurance Company (CIAC), a Dominican Republic corporation. It is unclear from the information submitted whether CIAC has been authorized to conduct insurance business under the laws of any state of the United States.<sup>1</sup> You state that CIAC is not licensed to do business in either Louisiana or Missouri, the state in which MCMBT was organized to operate. The information you submitted also indicates that MCMBT has secured a stop-loss policy from Standard Insurance Company, Portland, Oregon, and a reinsurance contract from LFB Insurance and Reinsurance, International Division of La Fenix Boliviana S.A. De Seguros Y Reaseguros, an insurance company organized in Bolivia (La Fenix Boliviana). La Fenix Boliviana apparently has received a certificate of authority from the Insurance Commissioner of American Samoa. In a letter to you, PAG also stated that, effective November 1, 1994, the stop-loss insurance would be carried by Lexington Insurance Company, Boston, Massachusetts, instead of Standard Insurance Company.

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

---

<sup>1</sup> You submitted a copy of a opinion dated May 10, 1993, from Birrane, Harlan, Brattan & Bendos of Baltimore, Maryland, to the effect that CIAC meets the statutory requirements of one or more state insurance departments, but there is no indication that CAIC has requested or received authority to offer insurance from the insurance department of any entity included in the definition of the term "State" in section 3(10) of ERISA.

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 --

- (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.

Based on the information provided, it is the position of the Department of Labor (the Department) that the arrangement described herein, in which employers' contributions are deposited in a pooled custodial account from which benefit claims are paid, constitutes a MEWA within the meaning of section 3(40)(A). The arrangement has been established and is maintained for the purpose of providing benefits to employees of two or more employers and does not fall within any of the exceptions listed in that section.

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 --

(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--

(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

(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.

(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 may exempt employee benefit plans that are MEWAs from state regulation under section

514(b)(6)(A)(iii), the Department has not issued any such regulations. Accordingly, the Department does not provide such MEWAs exemptions from state regulations.

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 section 3(1) of ERISA. 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).<sup>2</sup> 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 sponsored by the Mid-Continent Business and Health Alliance (the Alliance), a Missouri not-for-profit corporation. The By-laws of the Alliance provide in Article 2, Section 2.1:

Section 2.1 Voting Members. The Articles of Incorporation of this Corporation provide that this Corporation shall have members with voting rights. Any individual, corporation, partnership or association which is an employer or self-employed in the vicinity of Kansas City, Missouri, or in a state adjacent to the State of Missouri, or in a business or industry concerned with the problems and goals of the Alliance, and such other individuals or entities as the Board of Directors shall from time to time determine, shall be eligible for voting membership.

On the basis of the documentation you have provided, we agree with MCMBT's position that it is not an employee benefit plan covered under Title I of ERISA. Instead, it appears that at least some of the employers, within the meaning of section 3(5) of ERISA, that adopt MCMBT to provide group health benefits for their employees have established and maintain separate, single-employer, employee welfare benefit plans within the meaning of section 3(1) of Title I of ERISA.<sup>3</sup> Accordingly, MCMBT is not an employee benefit plan covered under Title I of ERISA and section 514(a) of that title would not preempt state regulation of MCMBT, PAG or the pooled custodial account maintained by such entities.

In rendering this opinion, the Department takes no position on questions involving the interpretation of state insurance laws. In particular, the Department takes no position on whether CIAC is "qualified" to conduct business in a State.

---

<sup>2</sup> MCMBT represented in a letter to you that each employer adopting the program of benefits offered by MCMBT to provide benefits to its employees has established and maintains a separate, single-employer, employee welfare benefit plan.

<sup>3</sup> The information submitted indicates that some of the employers that have adopted the MCMBT program may be governmental entities described in section 3(32) or churches described in section 3(33) and therefore may be excluded from coverage under Title I of ERISA by section 4(b) thereof. Additionally, some of the employers may have adopted a program that covers only the owner and/or the owner's immediate family. Department of Labor regulation § 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 § 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.

Enclosed for your information is a copy of Opinion No. 90-18A (issued July 2, 1990), discussing 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