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

February 1, 2011

Edward L. Wender
Venable LLP
750 E. Pratt Street
Suite 900
Baltimore, MD 21202

2011-01A
ERISA SEC.
3(40) & 514(b)(6)

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 ask the Department of Labor (Department) to determine that CREW is a "multiple employer welfare arrangement" (MEWA) within the meaning of ERISA section 3(40)[1] that is "fully insured" within the meaning of ERISA section 514(b)(6).[2] For purposes of that analysis, you ask the Department to assume that CREW is also an "employee welfare benefit plan" within the meaning of ERISA section 3(1). For the reasons set forth below, it remains the Department's view that CREW is a MEWA that is not fully insured for purposes of ERISA.

In Advisory Opinion 2007-06A (August 16, 2007), the Department concluded that CREW was a MEWA within the meaning of ERISA section 3(40), but was not fully insured within the meaning of ERISA section 514(b)(6).[3] Under ERISA section 514(b)(6)(D), a MEWA is considered fully insured, for purposes of ERISA, only if the terms of the arrangement provide for benefits the amount of all of which the Secretary 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.[4] Although CREW had purchased a "Certificate of Insurance" (Certificate) from certain Underwriters at Lloyd's, London (Underwriters) the

[1] 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 ERISA section 3(1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries.

[2] ERISA section 514(b)(6) applies only to MEWAs that are "employee welfare benefit plans" within the meaning of ERISA section 3(1).

[3] In Advisory Opinion 2007-06A, the Department assumed for purposes of its analysis that CREW was an "employee welfare benefit plan" within the meaning of ERISA section 3(1).

[4] ERISA Section 514(b)(6)(D) grants to the Secretary of Labor broad discretion whether to make a determination that any given MEWA is fully insured for the purposes of ERISA. *See Virginia Beach Policemen's Benevolent Ass'n v. Reich*, 881 F. Supp. 1059 (E.D. Va. 1995), *aff'd*, 96 F.3d 1440 (4th Cir. 1996).

Department concluded that the Certificate did not unconditionally guarantee payment of all benefits due to participants under the CREW Welfare Trust. In so concluding, the Department noted that pursuant to the Certificate the Underwriters' liability for paying benefits under the CREW Welfare Trust was conditioned upon, among other things, CREW maintaining a "terminal fund" within the Trust from which to pay benefits; CREW failing to pay a participant's claim for benefits within thirty days of determining that the claim was payable; and CREW assigning to the participant its right to recover from the Underwriters specific "incurred claims" that were not paid within a thirty-day period.[5] Consequently, the Department found that because the Certificate did not unconditionally guarantee payment of all benefits due under the CREW Welfare Trust, as required by ERISA section 514(b)(6)(D), CREW was not fully insured for purposes of ERISA. See Advisory Opinion 2007-06A.

You subsequently submitted to the Department this advisory opinion request together with a revised "Certificate of Insurance" (Revised Certificate). You assert that the Revised Certificate reflects changes that address the concerns the Department raised in Advisory Opinion 2007-06A. Those revisions include, among others, a provision stating that the Underwriters' obligations under the Revised Certificate are not conditioned upon CREW maintaining the "terminal fund," and a provision stating that if a specific claim for benefits is denied or "deemed denied" the participant (or claimant) may "join the Underwriters" in any legal proceeding against CREW "seeking a judicial resolution of such denial" which would be binding on the Underwriters.[6] The Revised Certificate does not, however, alter that aspect of the insurance arrangement whereby CREW retains first-in-line responsibility for paying participants and beneficiaries all "incurred claims" for benefits under the Welfare Trust.[7] See Revised Certificate, Insuring Clauses 2 and 6. Based on the various revisions presented in the Revised Certificate, you ask the Department to find that CREW is now fully insured.

The Department is not persuaded that the insurance arrangement between CREW and the Underwriters, as reflected in the Revised Certificate, is the type of arrangement the Department would consider to be fully insured within the meaning of ERISA section 514(b)(6)(D). Despite the changes described above, the Underwriters would not have a first-in-line obligation under the Revised Certificate to pay the benefits provided under the CREW Welfare Trust. In fact, according to your own representations, the Underwriters cannot assume first-in-line responsibility for paying benefits under the CREW welfare trust because the Underwriters are not "licensed to sell direct group health insurance" to CREW or its participants. For that reason, the Revised Certificate

[5] The Certificate defines "claims incurred," in part, as "properly covered Program costs" for medical treatment, diagnosis or advice provided during the period of insurance.

[6] A claim that is "deemed denied" includes claims that are "deemed denied as a result of the Claims Administrator's failure to Act…." Revised Certificate, Insuring Clause 8.

[7] The Revised Certificate defines "incurred claims" as claims for benefits, including health benefits, which have been "determined to be covered" under the CREW Welfare Trust.

would be issued or "placed" with the Underwriters in the District of Columbia on a "surplus lines basis."[8]

By way of comparison, in Advisory Opinion 93-11A, the Department found a MEWA to be fully insured for ERISA purposes under a contract of insurance pursuant to which the insurer was first in line to pay all benefits due under the plan directly to plan participants and beneficiaries. Like CREW, the MEWA in Advisory Opinion 93-11A was attempting to structure its contractual insurance arrangements to cause the MEWA to be considered "fully insured" within the meaning of section 514(b)(6)(D).[9] The contractual insurance arrangement in Advisory Opinion 93-11A was described as follows:

> The MPI Agreement [group health policy rider] obligates FSL [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. 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 [holding premium payments], 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 [the Plan sponsor] 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.

---

[8] The District of Columbia describes a "surplus lines insurer" as an insurer that "does not hold a certificate of authority to do insurance business in the District of Columbia." *See* http://disb.dc.gov/disr. *See also* D.C. Code § 31-2502.40. Surplus lines insurance is defined, generally, as "'[i]nsurance with an insurer that is not licensed to transact business within the state where the risk is located.'" See *Schmidt v. Certain Underwriters at Lloyd's London*, 2007 WL 2111377, at *4 (D. Nev. July 19, 2007) (quoting BLACK'S LAW DICTIONARY 807 (7th ed. 1999)). In your submission, you represent that surplus lines insurance is "generally not available through the normal insurance market. The insurance may be unavailable because of risk factors (the insured risk has a poor prior loss history), the underwriting for the risk is complex (such as an oil well), the risk exceeds the capacity of normal insurers, or the risk is unique. The rates and policy forms for surplus lines insurance are generally not regulated by state insurance commissioners." See submission, page 5. We assume for purposes of this letter that the Underwriters liable under the Revised Certificate continue to be admitted insurers in the States of Illinois and Kentucky.

[9] The insurance contract at issue in Advisory Opinion 93-11A replaced a preexisting contract, similar to the CREW arrangement, under which the MEWA trust was primarily liable to pay plan benefits, with the insurer's liability arising only if the MEWA trust first failed to pay the benefits.

Thus, the arrangement in Advisory Opinion 93-11A contrasts with the insurance arrangement between CREW and the Underwriters, under which CREW retains first-in-line responsibility for paying benefits to its participants and beneficiaries.

Determining whether the CREW MEWA is fully insured for purposes of ERISA is significant in that such determination will dictate the extent to which a state may apply its insurance laws to regulate CREW. When Congress amended ERISA in 1983 to add sections 3(40) and 514(b)(6), one of the main purposes of those amendments was to protect employee benefit plan participants and beneficiaries by facilitating state regulation of MEWAs. To that end, ERISA section 514(b)(6) modified the scope of ERISA's preemption of state insurance laws as they apply to employee welfare benefit plans that are also MEWAs.[10] Thus, if an employee welfare benefit plan that is also a MEWA is not fully insured, then under section 514(b)(6)(A)(ii) any state law that regulates insurance may apply to the MEWA to the extent that such state law is not inconsistent with ERISA. If, on the other hand, an employee welfare benefit plan which is also a MEWA is fully insured, ERISA section 514(b)(6)(A)(i) provides that only those state laws that regulate the maintenance of specified contribution and reserve levels may apply to the MEWA. ERISA section 514(b)(6)(D) provides, in turn, that a MEWA will be considered fully insured for purposes of section 514(b)(6) only if all of the benefits offered or provided under the MEWA are guaranteed under a contract or policy of insurance issued by an insurance company that is "qualified to conduct business in a State."

As the Department noted in Advisory Opinion 2007-06A, a central purpose of the "qualified to conduct business" requirement is to ensure that the contract or policy of insurance that insures plan benefits is subject to regulation under a state's insurance laws that regulate the type of benefits being insured under the policy. Thus, it is the Department's view that in exchange for limiting state insurance regulation of the fully insured MEWA itself, Congress intended that the insurance company that insures the MEWA must be licensed or admitted by a state to insure the type of benefits that the MEWA offers or provides to participating employers and participants. Accordingly, in order for a MEWA that offers or provides group health benefits to be considered fully insured within the meaning of ERISA section 514(b)(6), the MEWA must obtain insurance from an insurer that is licensed or admitted to conduct business under a state's insurance laws governing group health insurance, and the policy guaranteeing the benefits must be regulated under the group health insurance laws of a state. This view is consistent with the guarantee of benefits protection contemplated by section 514(b)(6)(D). Accordingly, because it appears that Revised Certificate would not be issued as group health insurance nor regulated under the group health insurance laws

[10] This should not be confused with a state's ability to apply its insurance laws directly to the insurer that issues insurance to a MEWA.

of a state, the Department would not view CREW as fully insured under the Revised Certificate.

We also note that ERISA section 501(b) imposes criminal penalties on any person who is convicted of violating the prohibition in ERISA section 519 against making false statements or representations of fact in connection with the marketing or sale of a MEWA. See Patient Protection and Affordable Care Act section 6601(b), Pub. L. No. 111-148, 124 Stat. 119 (2010).

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