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## **DOL Opinion Letter 2017-01A**

January 13, 2017

Vanessa A. Scott, Esq.  
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700 Sixth Street NW, Suite 700  
Washington, DC 20001-3980

2017-01A  
ERISA 3(1); 3(40)

Dear Ms. Scott:

You asked for an advisory opinion on behalf of the Health Transformation Alliance (HTA) regarding the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you asked whether a program of administrative services created by HTA is an "employee welfare benefit plan" within the meaning of ERISA section 3(1) or a "multiple employer welfare arrangement" (MEWA) within the meaning of section 3(40).

You provided the following representations in support of this request. Membership in HTA currently is limited to large employers who are members of the HR Policy Association, a non-profit business league formed under section 501(c)(6) of the Internal Revenue Code. The HR Policy Association consists of over 360 large corporations from a broad range of industry sectors of the U.S. economy. Association members employ more than twenty million employees worldwide, employ over 9% of the U.S. private sector workforce, with self-funded employee benefit plans that provide employer-sponsored healthcare to approximately four million individuals. You represent that HTA members operate their separate employee benefit plans under administrative services only (ASO) contracts with various insurance companies.

HTA is affiliated with several other entities of the HR Policy Association. The American Health Policy Institute is non-profit educational organization under section 501(c)(3) of the Code. One of the missions of the American Health Policy Institute is to explore new options for large employers to provide quality and affordable health coverage to their employees. The Institute developed the concept that has grown into the Health Transformation Alliance. HTA itself is a member-operated cooperative formed under the laws of the District of Columbia. Members pay a capital contribution out of their general corporate assets and eventually will be required to pay monthly participation fees based on the number of persons the member employs and the HTA services the member chooses. The capital contribution and monthly fees give the member access to HTA's various services.<sup>1</sup> Companies that join HTA must, among other things, commit to at least two years of membership in the cooperative and make all required financial contributions during the term of their membership. HTA intends to use another affiliated entity, HTA Coop Services, to provide certain provider network negotiation services to HTA members.

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<sup>1</sup> You indicated that in many cases HTA's member-employers will pay for HTA's services out of the employer's general assets, but that there may be circumstances where a member-employer wants its employee benefit plan to pay for certain HTA services. The Department has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management, of plans, so-called "settlor" functions, which include decisions relating to the establishment, design and termination of plans. Expenses incurred in connection with the performance of settlor functions would not be reasonable plan expenses as they would be incurred for the benefit of the employer and would involve services for which an employer could reasonably be expected to bear the cost in the normal course of its business or operations. You have not asked, and this letter expresses no opinion on, whether, and if so, under what circumstances, assets of an employee benefit plan could be used consistent with title I of ERISA, including the general fiduciary responsibility provisions of sections 403 and 404 of ERISA, to pay for HTA's services as a reasonable

HTA intends to engage in a number of initiatives designed to improve the way in which its employer-members and their employee benefit plans purchase healthcare coverage for their covered employees. It will develop and give its members access to cost, quality and access standards for medical networks based on improved analysis of its members' individual and collective healthcare spending and utilization. This will include analysis of employee health care spending and outcomes to identify providers delivering the best care at the lowest cost. HTA's pharmacy initiative will similarly use its employer members' data to support the development of evidence-based formularies and utilization controls to better manage employee benefit plan costs. HTA will also act as a negotiating agent on behalf of its members in order to leverage their combined purchasing power to get favorable terms and conditions from health care and pharmacy benefit providers on packages of benefits and services. For example, HTA intends to negotiate with insurance companies currently providing ASO contracts to HTA members to secure access for its members' plans to the insurers' provider networks at favorable rates. HTA will also provide its members with a consumer engagement initiative service. The initiative service involves gathering and distributing information to HTA members and health care providers that will help the members and providers improve their own employee communications and engagement practices.

Although an HTA affiliated entity, HTA Coop Services, Inc., is licensed as an insurance broker and issuer, you have represented that neither HTA nor any HTA affiliate provides insurance brokerage services to HTA members and further, is not operating as an insurance issuer and will not provide insurance, risk pool, be responsible for providing medical or pharmaceutical benefits, or otherwise underwrite benefits.<sup>2</sup> HTA also will not determine benefit levels, administer plans, administer benefits or claims, or enter into contracts with providers or third parties on behalf of its members. HTA also will not receive funds to pay HTA members' ASO fees to insurance companies, will not be involved in filing or processing claims, and will not have any legal responsibility for any insurance company's performance under an ASO contract with an HTA member or its employee benefit plan. None of the HTA activities will involve any direct interaction by HTA with any participants or beneficiaries in any of the members' separate employee benefit plans.

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<sup>2</sup> You represent that HTA or HTA Coop Services Inc., may consider using the issuer licenses in the future in the event HTA decides to build its own proprietary networks. You further indicate that HTA and its affiliates do not now, or contemplate at this time, providing insurance brokerage services to HTA members. This letter should not be interpreted to address HTA's status as a MEWA if HTA began operating as an insurance issuer, or to address any issues arising in the event that HTA or an HTA affiliate in the future engages in insurance brokerage arrangements with HTA members.

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Section 3(1) of ERISA defines the term "employee welfare benefit plan" as "including any plan, fund, or program ... 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 its participants or their beneficiaries, through the purchase of insurance or otherwise, ... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment." By definition, a welfare plan requires (1) a plan, fund, or program, (2) established or maintained, (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing benefits listed in section 3(1), (5) to participants or their beneficiaries.

Section 3(40) of ERISA defines a "multiple employer welfare arrangement" (MEWA), in relevant part, as "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, 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."

The Department has previously concluded that the term "employee welfare benefit plan" does not include a program maintained by an employer or group or association of employers which has no employee participants and does not provide covered benefits to employees or their dependents. See 29 C.F.R. §2510.3-1(i)(an industry advancement program maintained by an employer or group or association of employers is not an employee welfare benefit plan if it has no employee participants and does not provide ERISA covered benefits to employees or their dependents). See also 29 C.F.R. §2510.3-3("The term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no

employees are participants covered under the plan . Based on the information you provided, neither HTA nor its programs for employer-members have employee participants and the services it provides to its employer members do not involve the provision of benefits to employees or their dependents. Rather than being established or maintained for the purpose of providing welfare benefits to participants and beneficiaries, the HTA program of services facilitate the efficient establishment and operation of employee benefit plans by employer-members. Thus, based on the information provided, it is the view of the Department that the HTA program of services is not an "employee welfare benefit plan" within the meaning of section 3(l) of ERISA.

Further, the HTA program is not a MEWA within the meaning of ERISA section 3(40) because no component of the HTA program "offers or provides" any welfare benefit described in section 3(1) of ERISA to the employees of its member-employers. In addition, the HTA program does not operate as a MEWA under ERISA section 3(40) because no component of the program (1) underwrites or guarantees welfare benefits, (2) provides welfare benefits through group insurance contracts covering more than one employer, (3) pools welfare benefit risk among participating employers, or (4) provides similar insurance or risk spreading functions. Thus, although section 3(40), unlike section 3(1), does not condition MEWA status on the arrangement being established or maintained by any particular party, in the Department's view, offering employer-members the bundle of administrative services you describe does not result in the HTA program constituting a MEWA within the meaning of ERISA section 3(40).<sup>3</sup>

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<sup>3</sup> This letter does not address the ERISA status of any of the employee benefit plan(s) of HTA member-employers to which HTA provides services nor does it address compliance by those plans with Title I of ERISA (including its Health Insurance Portability and Accountability Act, COBRA continuation health coverage, and Affordable Care Act provisions) or any other provision of federal or state law. This letter also does not address any issues under the fiduciary provisions in Part 4 of Title I of ERISA that may arise in connection with services provided under the HTA program to member-employers or their separate employee benefit plans.

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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 relating to the effect of advisory opinions.

Sincerely,

Susan Elizabeth Rees  
Chief, Division of Coverage, Reporting and Disclosure  
Office of Regulations and Interpretations

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