

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 81-44A
514, 3(2)(A), 4(a)

MAY 4 1981

Mr. Frederick C. Kneip
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York 10005

Dear Mr. Kneip:

This is in response to your request of October 10, 1980 for an advisory opinion regarding the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you question 1) whether the Savings and Security Plan for Non-Secretarial Employees of the Young Women's Christian Association (the Savings Plan) is an employee benefit plan within the meaning of ERISA section 3(2) and 3(3) which is covered under section 4(a); and 2) if the Savings Plan is an employee benefit plan, whether ERISA section 514 preempts the provisions of section 200 of the New York Insurance Law (NYIL section 200) as the latter affects the Savings Plan.

You represent that the Savings Plan was incorporated in 1940 under NYIL section 200 and is a qualified plan under section 401(a) of the Internal Revenue Code of 1954. The Savings Plan provides retirement benefits to the non-professional employees of Young Women's Christian Associations (YWCA) in the United States. Each local YWCA, as a condition of affiliation with the national association, is required to become a Participating Association in the Savings Plan. The term "Association" is defined in the By-Laws of the Savings Plan as any YWCA organization which conforms in spirit, purpose, and objectives to the generally accepted standard of the national YWCA and similar organizations allowed to participate by resolution. An Association becomes a "Participating Association" by executing a written participation agreement.

According to the Savings Plan Constitution, a board of trustees is responsible for handling and investing all funds, making and amending By-Laws, and electing officers. Participating associations contribute on behalf of each employee participating in the Savings Plan a percentage of that employee's compensation. Participating employees also contribute a percentage of their compensation through a system of wage deductions. The Savings Plan pays participants who retire at normal retirement age an annuity based on the contributions of their employer and an annuity based on their own contributions. Participants retiring after January 1, 1971 also receive

a supplemental annuity. You state in your submission that the Savings Plan does not guarantee benefits. It appears, however, that the Savings Plan does, nevertheless, assume mortality and investment risks with respect to the payment of annuities payable to participants after their retirement, since such annuities are apparently paid regardless of whether assets of the Savings Plan attributable to contributions made by or on behalf of a particular participant are sufficient to cover all annuity payments made to that participant.

Section 3(3) of ERISA defines the term "employee benefit plan" to include any employee welfare benefit plan or any employee pension benefit plan or any plan which is both. The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA as "... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -- (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond" The Department has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that a plan may be sponsored by more than a single employer if the sponsoring employers form a cognizable, bona fide group or association of employers. Whether a bona fide employer association exists is generally a factual question. Among the factors to be considered are: 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 pre-existing relationships of its members; and who actually controls the operation of the association and the benefit program.

On the basis of the information provided in your letter and the accompanying submissions, we have concluded that the Savings Plan is an employee pension benefit plan within the meaning of section 3(2) of ERISA. Among the factors that we believe support our conclusion in this regard are the following. By its express terms, the Savings Plan is designed to provide retirement income to employees. The Constitution and by-laws of the Savings Plan restrict the class of employers to whose employees the Plan provides retirement income to YWCA's and, as permitted by resolution, similar organizations. Participation in the Savings Plan is a condition of affiliation with the national association of YWCA's.

The Constitution of the Savings Plan provides for election by participating employers of the board of trustees that, among other duties, manages the Savings Plan corporation and handles the funds of the Plan, makes and amends by-laws, and elects officers. It appears, moreover, that the Savings Plan does not issue annuity contracts or policies to its member employers, but rather provides benefits to their employees on the basis specified in its by-laws. In addition, the Savings Plan is a qualified plan under section 401(a) of the Internal Revenue Code.

Section 514 of ERISA provides in pertinent part:

- (a) Except as provided in subsection

(b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan [subject to ERISA].

* * *

(b)(2)(A) Except as provided in subparagraph (B) nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan ... nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer ... or to be engaged in the business of insurance ... for purposes of any law of any State purporting to regulate insurance companies...."

Under section 514(b)(2)(B) of ERISA, to the extent that an organization is an employee benefit plan described in section 4(a) of ERISA and not exempt under section 4(b) (i.e., an employee benefit plan subject to title I of ERISA), it may not be deemed to be an insurance company or other insurer. As applied to such an organization, therefore, state insurance law is not preserved under section 514(b)(2)(A) from the preemptive effect of section 514(a).

In advisory opinions dealing with section 200 of the New York Insurance Law, the Department has indicated that that law relates to employee benefit plans for purposes of section 514(a) of ERISA and that some organizations originally established under section 200 are employee benefit plans,¹ while other such organizations are insurance companies or other insurers for purposes of section 514.²

In view of our conclusion that the Savings Plan is an employee pension benefit plan within the meaning of section 3(2) of ERISA, therefore, section 200 of the NYIL will be preempted as applied to the Savings Plan if it is an employee benefit plan described in section 4(a) of ERISA and not exempt under section 4(b).

Section 4(a) provides, in relevant part, that, with certain exceptions, title I of ERISA applies to any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. From the information you have

¹ See ERISA Opinion 80-54A, cited in your letter.

² See ERISA Opinion 80-56A. Although that opinion did not explicitly address a preemption issue, the Department recognized the continuing validity of regulation under section 200 of the organization in question in determining that the organization was an insurance carrier regulated and supervised and subject to periodic examination by a State agency for purposes of 29 C.F.R. §2520.103-4(b).

provided, it appears that the Savings Plan is maintained by employers engaged in commerce or in an activity affecting commerce. Further, it does not appear that the Savings Plan is a member of any of the classes of plans exempted under section 4(b) from title I coverage.³ Accordingly, we have concluded that section 200 of the New York Insurance Law as applied to the Savings Plan is preempted under section 514(a) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

³ In this connection, we are assuming that the Savings Plan is not a church plan as that term is defined in section 3(33) of ERISA, as amended by section 407(a) of the Multiemployer Pension Plan Amendments Act of 1980.