

U.S. Department of Labor

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



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 81-79A
Section 3(32)

4 NOV 1981

Mr. Roger R. Kemppe
Kemppe, Huffman & Ginder
255 E. Fireweed Lane, Suite 200
Anchorage, Alaska 99503

Dear Mr. Kemppe:

This is in reply to your request dated February 17, 1981, for an advisory opinion concerning the coverage of the Matanuska Electric Association, Inc. Deferred Compensation Plan (the Plan) under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Plan is exempt from the provisions of ERISA by virtue of its being a "governmental plan" within the meaning of ERISA section 3(32). Since the Department of Labor (the Department) is responsible for the administration of title I of ERISA, this letter addresses only that title.

Your letter contains the following representations. Matanuska Electric Association, Inc. (Matanuska), is a rural electric cooperative incorporated under the laws of Alaska. Matanuska is exempt from Federal income taxation under Internal Revenue Code (Code) section 501(a) as an exempt organization described in Code section 501(c)(12).

Code section 457 provides a category of deferred compensation plans for State and local government agencies and rural electric cooperatives. The Plan is intended to meet the requirements of section 457 of the Code which was added to the Code by the Revenue Act of 1978.

While governmental plans (as defined in section 3(32) of ERISA) are expressly excluded from the application of title I of ERISA by reason of the exclusion in ERISA section 4(b)(1), plans of rural electric cooperatives are not so excluded from the application of ERISA if they are not "governmental plans." Code section 457 provides that plan participants of deferred compensation plans which are established and maintained by a State as defined in Code section 457(d)(1) or by a rural electrical cooperative as defined in Code section 457(d)(9)(B) and which comply with the requirements of Code section 457 may defer taxation on the amounts contributed until the income is paid or otherwise made available to the participant or beneficiary.

Because Code section 457 of the Code requires, *inter alia*, that any deferred compensation to be eligible for the treatment accorded under section 457 must generally provide that, absent an unforeseeable emergency, the plan not make payments available to participants and beneficiaries prior to the participants separation from service from the employer, you correctly infer that the plan would be a pension plan subject to title I of ERISA if it is not considered a "governmental plan" under ERISA section 3(32). (Section 4(b)(1) of ERISA provides that title I of ERISA shall not apply to governmental plans, which are defined in section 3(32).) In pertinent part, section 3(32) of ERISA defines a governmental plan as "a plan established or maintained by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." You have not provided any factual material to support a ruling that the Plan is "a plan established or maintained for its employees ... by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing," which is the standard for determining whether a plan is a governmental plan under ERISA. However, you argue that plans of rural electrical cooperatives must be considered governmental plans because they otherwise would have to be funded, which would contravene the requirement of Code section 457 that plan assets must be subject to the claims of the general creditors of the employer. You argue, therefore, that all plans of rural electrical cooperatives must be considered "governmental plans" or else Code section 457(d)(9) would have no meaning. The Department does not interpret section 457 of the Code. We wish to note, however, that we do not believe that section 457(d)(9) of the Code is necessarily rendered meaningless if plans of rural electric cooperatives are not governmental plans within the meaning of title I. It appears that unfunded deferred compensation plans may be maintained by rural electric cooperatives under Code section 457 if such a plan is an excess benefit plan as defined in section 3(36), or is a plan maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees as that term is used in ERISA sections 201(2), 301(3) and 401(1) but not for all the employees of such rural electrical cooperatives.

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
Pension and Welfare Benefit Programs