

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 84-06A
Sec. 514

JAN 17 1984

Ms. Gracemary B. Greenleaf
Legal Administration Officer
United Bank of Denver
United Bank Center
1740 Broadway
Denver, Colorado 80217

Dear Ms. Greenleaf:

This is in reply to your letter of January 14, 1982, concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to certain loans to pension plan participants. Because the trust department of the United Bank of Denver (the Bank) serves as trustee for one or more unnamed pension trusts and is authorized under the terms of the trusts to make loans to plan participants from trust assets, you specifically question whether section 514 of ERISA preempts licensing requirements and interest limitations which apply to such loans pursuant to the Colorado Consumer Credit Code (the Consumer Credit Code).

Your correspondence contains the following representations. Loans to plan participants from trust assets meet the definition of "consumer loans" in the Consumer Credit Code. According to the Consumer Credit Code, consumer loans are those made for other than a business purpose in an amount of \$25,000 or less which are not secured by real property. For consumer loans, the Bank's trust department has been identified as an "unsupervised lender" in a letter dated March 18, 1981, issued by the administrator of the Consumer Credit Code. According to section 5-3-201 of the Consumer Credit Code, unsupervised lenders must limit interest charged on consumer loans to 12 percent. Unsupervised lenders need not be licensed.

The Consumer Credit Code sets a higher maximum interest rate for supervised loans: 21 percent or 10 percent over the discount rate, whichever is greater. Only supervised financial organizations or licensed supervised lenders make supervised loans. According to section 5-5-301 of the Consumer Credit Code fines and/or misdemeanor penalties specifically apply to certain classes of lenders willfully making loans at usurious rates, including supervised lenders and lenders making supervised loans without a license.

It is your position that interest rate ceilings for unsupervised lenders and licensing requirements for supervised lenders are preempted by title I of ERISA insofar as they relate to employee benefit plans and that, for that reason, the Bank's trust department need only comply with the provisions of title I of ERISA in making loans to plan participants from pension trusts covered by title I of ERISA. In support of your position, you point out that ERISA Opinion 81-70A, issued September 9, 1981, adopted the position that an Illinois usury law was preempted by title I of ERISA to the extent it applied to employee benefit plans.

Section 514 of title I of ERISA provides, in part, as follows:

- (a) Except as provided in subsection (b) of this section, the provisions of ... (titles I and IV of ERISA) shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)...
- (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.

Section 514 does not preempt only those state laws which conflict with ERISA but all state laws relating to employee benefit plans. The reasons for broad preemption of state laws were succinctly stated by Senator Javits during final congressional consideration of ERISA:

Both the House and Senate bills provided for preemption of State law, but – with one major exception appearing in the House Bill – defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation – at either the State or Federal level – undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required – but for certain exceptions – the displacement of State action in the field of private employee benefit programs. 120 Cong. Rec. 29942 (August 22, 1974).

Section 514(b) of ERISA provides an exception from the preemption provision of section 514(a) for those state laws regulating banking, insurance, and securities and for any “generally applicable criminal law of a State.”

The Consumer Credit Code contains criminal penalties for violations of its interest rate restrictions; thus, it appears that the provision of the Consumer Credit Code in question is not

preempted pursuant to section 514(b)(4) of ERISA because it is a “generally applicable criminal law of a State.” Since the proscriptions of the Consumer Credit Code at issue are not intended to apply specifically to an activity related to employee benefit plans, we believe that the section 514(b) exception to preemption should apply.

The Department does not view this position as inconsistent with the position taken in ERISA Opinion 81-70A. In that letter, the Department concluded that the Illinois usury law was preempted insofar as it applied to employee benefit plans. The Illinois usury law in question, however, did not contain criminal penalties for violations thereof.

This letter is not intended to take any position on whether any specific plan(s) or trust(s) are covered by title I of ERISA. This letter is also not intended to interpret any fiduciary provision of title I of ERISA with regard to loans to plan participants from trust assets of any employee benefit plan covered by title I of ERISA or to take any position on what may constitute a reasonable rate of interest with regard to any proposed transaction.

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,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs