

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



June 19, 1998

98-05A
ERISA SEC. 3(33)

Ms. Sandi J. Porter
Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Dear Ms. Porter:

This responds to your correspondence on behalf of Foulkeways at Gwynedd ("Foulkeways"), a non-profit, continuing care retirement community operated in Gwynedd, Pennsylvania, by the Religious Society of Friends. You request an advisory opinion concerning whether certain employee benefit plans maintained by Foulkeways are church plans within the meaning of section 3(33) of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). Specifically, the plans covered by this letter are the following pension and welfare benefit plans sponsored by Foulkeways: (1) Foulkeways at Gwynedd Retirement Plan ("Retirement Plan"); (2) Life and Health Insurance Plan; (3) Dental Insurance Plan; and (4) Educational Assistance Plan (collectively "Plans").

You submitted to the Department of Labor ("Department") documentation about the Plans, including a private letter ruling recently issued by the Internal Revenue Service ("IRS") to Foulkeways concerning the status of the Plans under section 414(e) of the Internal Revenue Code ("Code"). In that private letter ruling the IRS concluded, based on representations provided by Foulkeways, that the Plans constituted church plans within the meaning of section 414(e).¹ As you know, section 414(e) of the Code defines the term "church plan" using language that is virtually identical to ERISA section 3(33).

Subject to the following two paragraphs, we conclude that, to the extent that Foulkeways and each of the Plans are currently operated in substantially the same manner as was described to the IRS for purposes of obtaining a private letter ruling, those plans meet the church plan definition in section 3(33) of Title I of ERISA. Provided that, as you represent, none of the plans, if entitled to do so, has made an election pursuant to Code section 410(d), ERISA section 4(b)(2) therefore excludes the Plans from coverage under Title I of ERISA.

As stated in your submission and the IRS private letter ruling described above, the participants of the Retirement Plan are the employees of Foulkeways and Friends Life Care at Home, Inc. The Retirement Plan document specifies, however, that plan coverage may be extended to employees of other employers, "whether an affiliate or subsidiary or not," and to certain "leased employees" (Exh. K, §§ 1.17-19 and 11.1). Due to the open-ended nature of those provisions, you may not rely on our conclusion that the Retirement Plan is a church plan if the plan extends coverage to individuals who are not "employees," as that term is defined in section 3(6) of ERISA, of Foulkeways or

¹ You advised that when Foulkeways obtained its IRS ruling on the Plans, Foulkeways' Tax Shelter Annuity Plan was omitted from its ruling request, and, accordingly, the IRS has not been asked whether that plan constitutes a "church plan" within the meaning of section 414(e) of the Code. Nothing in this letter should be construed as expressing the Department's opinion on whether the Tax Shelter Annuity Plan is or is not a church plan within the meaning of section 3(33) of ERISA.

Friends Life Care at Home, Inc. A discussion of section 3(6) may be found in ERISA Opinion 95-22A (copy enclosed).

You represent that benefit payments under the Educational Assistance Plan are made from a segregated account within the general reserves of Foulkeways, but not from a funded trust or other funded arrangement. We note in this regard that regulation section 29 CFR 2510.3-1(k) excludes from the terms "employee welfare benefit plan" and "welfare plan," and therefore from ERISA Title I coverage, unfunded scholarship programs, including tuition expense and refund programs, "under which payments are made solely from the general assets of an employer" Whether a plan meets this regulation when payments are made from an employer's segregated account is an inherently factual question on which the Department ordinarily will not opine. ERISA Procedure 76-1, § 5.01. Accordingly, our conclusion that the Educational Assistance Plan is a church plan should not be taken as an opinion on the status of that plan under regulation section 2510.3-1(k).

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,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

Enclosure