

**U.S. Department of Labor**

Office of Pension and Welfare Benefit Programs  
Washington, D.C. 20210



JAN 9 1985

85-01A  
Sec. 3(33), 4(b)(2)

Mr. Stephen D. Lowry  
Frost & Jacobs  
2500 Central Trust Center  
201 East Fifth Street  
Cincinnati, Ohio 45202

Dear Mr. Lowry:

This is in reply to your letter of September 29, 1983, and your previous correspondence directed to the Department of Labor (the Department) requesting an advisory opinion on behalf of the Sisters of Mercy of the Union in the United States of America, Province of Cincinnati, Incorporated (the Sisters) concerning the definition of the term "church plan" in section 3(33) of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you describe in your request certain entities and state your reasons for asserting that these entities are church plans within the meaning of ERISA section 3(33). We conclude below that the entities are one or more church plans within the meaning of that section.

You have requested an opinion with respect to the following plans: St. Bernard Convent and Academy Employees Retirement Plan; Owensboro Our Lady of Mercy Hospital Retirement Plan; Toledo Mercy Hospital Retirement Plan; St. Charles Hospital Retirement Plan; St. Rita's Medical Center, Lima, Ohio, Retirement Plan; The Sisters of Mercy of Fremont, Ohio, Retirement Plan; Assumption High School Retirement Plan; St. Mary's Medical Center, Inc., Retirement Plan; Mariemont Our Lady of Mercy Hospital Retirement Plan; Mercy Medical Center Retirement Plan; St. Catherine Convent and Academy Retirement Plan; Sisters of Mercy, Siena Nursing Home Employees' Retirement Plan; Mercy Hospital (of Tiffin, Ohio) Retirement Plan; Mercy Memorial Hospital (Urbana, Ohio) Retirement Plan; Sisters of Mercy Provincialate Employees' Retirement Plan; The Sisters of Mercy of Hamilton, Ohio Retirement Plan; and Clermont County Hospital Retirement Plan. Each entity named above received a letter from IRS dated August 22, 1983, stating it is a church plan within the meaning of section 414(e) of the Internal Revenue Code (the Code).

You represent that each of the above plans has been adopted or maintained by a corporation that is exempt from taxation under Code section 501(c)(3) based upon a group exemption letter applicable to organizations operated, supervised or controlled by or in connection with the

Roman Catholic Church, which are listed in the Official Catholic Directory. You also represent that each of these corporations is listed in the Official Catholic Directory and that each is subject to the control of the Provincial Council of the Religious Order of the Sisters of Mercy. That organization, you state, is composed of nine members, five of whom are selected by the sisters of each respective area, and four of whom are appointed by the National Organization of the Religious Order of the Sisters of Mercy. You also state that none of the plans has made any election under section 410(d) of the Code to have its plan be considered subject to certain provisions of the Code.

In addition, you indicate in your letter that 37 of the 954 participants in the St. Charles Hospital Retirement Plan are employees of a hospital laundry whose earnings are considered unrelated business taxable income under the Internal Revenue Code.

Section 4(b)(2) of title I of ERISA provides that title I of ERISA does not apply to a church plan described in section 3(33) of title I of ERISA if the plan has made no election under Code section 410(d). Section 3(33), in relevant part, defines the term "church plan" as follows:

... a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954.

(B) The term "church plan" does not include a plan –

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of the Internal Revenue Code of 1954), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph –

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes –

- (I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
- (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1954 and which is controlled by or associated with a church or a convention or association of churches; and
- (III) an individual described in clause (v).
  - (iii) A church or a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954 shall be deemed the employer of any individual included as an employee under clause (ii).
  - (iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches...

The Department has not issued regulations further clarifying section 3(33). Nevertheless, section 5.03(a) of ERISA Procedure 76-1 (issued August 27, 1976; copy enclosed), provides that the Department may issue advisory opinions where, in a given situation, interpretation of the statute is reasonably clear in the absence of regulations.

Accordingly, based on the information included in your request, the Department concludes that the entities which are named above as recipients of “church plan” letters from IRS constitute one or more church plans within the meaning of section 3(33) of title I of ERISA. Thus, section 4(b)(2) of title I of ERISA excludes the plan or plans from coverage by title I of ERISA. With respect to the St. Charles Hospital Retirement Plan, we have taken into consideration the fact that 37 of the 954 participants of the plan are employed by an unrelated trade or business within the meaning of section 513 of the Code and have concluded that the plan is not maintained primarily for the employees who are employed in connection with one or more unrelated trades or businesses so as to be excluded from the definition of the term “church plan” by reason of section 3(33)(B)(i) of ERISA.<sup>1</sup>

If the factual situation you describe changes, you may wish to submit a request for reconsideration or a request for an additional opinion.

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

---

<sup>1</sup> This position is consistent with regulations under section 414(e) of the Code dealing with the definition of “church plan.” See Treas. Reg. 1.414(e) 1(b)(2).

Sincerely,

Elliot I. Daniel

Acting Assistant Administrator for Regulations and Interpretations

Enclosure