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403(b)

February 2, 1975

Dear

The Assistant Secretary has asked me to reply to your letter of October 30, 1974, requesting an opinion that the (named) Association, Inc., although not technically an insurance company, may be deemed to be an insurance company for the purposes of section 403(b) of the Employee Retirement Income Security Act of 1974 (ERISA).

The requirements of section 403 of the ERISA that all assets of an employee benefit plan be held in trust by one or more trustees does not apply to assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a state, or to assets of such an insurance company or any assets of a plan which are held by such an insurance company (there are certain other exceptions not relevant to the question at issue). There is evidence in the statute and the legislative history that the term "insurance company" may include insurance service and insurance organizations which are not technically insurance companies. [See section 401(b)(2) of the Act and page 297 of the Joint Explanatory Statement of the Conference Committee.]

The Association is a nonprofit association incorporated and licensed as a retirement system under section 200 of the (State) Insurance Law. Under its Constitution and bylaws, membership in the Association is limited to nonprofit organizations in the United States and Canada devoted to charitable health or welfare work. The purpose, as set forth in its Constitution, is to provide pension benefits to employees of its members and to itself.

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As a retirement system incorporated and licensed under section 200 of the (State) Insurance Law, the Association is subject to regulation which in most respects closely resembles the regulation of domestic life insurance companies. In particular, subsection 8 of section 200 of the (State) Insurance Law imposes limitations on investments by a retirement system such as the Association. These limitations are in most respects identical to those to which domestic life insurance companies are subject under the (State) Insurance Law. For example, section 79 requires a domestic life insurance company, and, by virtue of subsection 8 of section 200, a retirement system to invest a specified amount of its assets only in government and municipal bonds and in obligations secured by real property. Section 81 requires domestic life insurance companies and retirement systems to invest assets in excess of the amount specified in section 79 primarily in fixed income, rather than equity, securities.

In addition, the Association is closely supervised by the (State) Insurance Department: for example, contracts issued by the Association must be approved by the Insurance Department; the Association must file an annual statement with the Insurance Department which the Department audits; and the Association must submit to a thorough examination by the Insurance Department at least once every five years.

Under the various types of annuity contracts which the Association writes to provide pension benefits for employees of its members, the Association bears the risks of group experience. Under subsection 6 of section 200 of the (State) Insurance Law, a retirement system such as the Association, except to the extent of reinsurance, must maintain reserves which are "calculated to be adequate to cover the liabilities on account of benefits payable under its contracts…" on the basis of experience tables approved by the (State) Superintendent of Insurance and of statutory interest assumptions.

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It is represented that there are approximately 3,600 charitable organizations which are members the Association and that the reserves for the pension benefits provided through the Association are supported by approximately $150,000,000 in assets held by the Association, and by an additional $300,000,000 held by the (named) Insurance Company under a reinsurance agreement.

For these reasons and on the basis of the representations made in our letter of October 30, 1974, and its enclosures, we have been advised by the Solicitor of Labor that the Association may be deemed to be an insurance company for the purposes of section 403(b) of the ERISA and this letter.

No opinion is expressed whether the Association constitutes an insurance company for the purposes of any other section of the ERISA.

Sincerely,