

U.S. Department of Labor

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



OPINION 80-56A
3(38)
103(b)(3)(G)

Sept. 3, 1980

Mr. Daniel J. Robins
Vice President and Secretary
National Health and Welfare Retirement Association, Inc.
360 Park Avenue South
New York, New York 10010

Dear Mr. Robins:

This is in response to your letters inquiring whether the National Health and Welfare Retirement Association (NHWRA) is an "insurance company" within the meaning of the definition of the term "investment manager" in section 3(38) of the Employee Retirement Income Security Act of 1974 (ERISA), and an insurance carrier regulated and supervised and subject to periodic examination by a State agency within the meaning of 29 CFR §2520.103-4 (which provides an exemption from certain annual reporting requirements for assets held in an insurance company pooled separate account).¹ We regret the long delay in responding to your request.

In an advisory opinion dated February 10, 1975, the Department stated, in response to an inquiry made by you in a letter dated October 30, 1974, and on the basis of the representations made in that letter, that NHWRA is an "insurance company" within the meaning of section 403(b) of ERISA.² In considering your request for an opinion under section 3(38) of ERISA and 29 CFR §2520.103-4, we have relied on the representations made in your October 30, 1974, letter as well as your letters of July 7, 1975, and November 26, 1975.

NHWRA is a non-profit association incorporated and licensed as a retirement system under section 200 of the New York Insurance Law. Membership in NHWRA is limited to non-profit organizations in the United States and Canada devoted to charitable health or welfare work. The purpose of NHWRA is to provide pension benefits to employees of its members and its own employees. The benefits provided by NHWRA are based upon contributions made by employees and by the employer charities. Some of the benefits are funded through guaranteed deferred annuities under various group contracts entered into between NHWRA and its members, while other benefits are provided through deposit administration group annuity contracts.

Pursuant to section 200 of the New York Insurance Law, NHWRA is subject to supervision by the New York State Superintendent of Insurance, and this supervision is, in many respects, similar to the supervision exercised over domestic life insurance companies.

Section 3(38) of ERISA defines the term investment manager as any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2)) --

(A) who has the power to manage, acquire or dispose of any asset of a plan;

¹ Section 2520.103-4 when originally proposed was numbered as §2520.103-2 (40 FR 53710, November 19, 1975).

² Section 403(b) of ERISA provides, in part, that the requirement of section 403(a) that employee benefit plan assets be held in trust does not apply to any assets of an insurance company qualified to do business in a state or with respect to any assets of a plan that are held by such an insurance company.

- (B) who is (i) registered as an investment adviser under the Investment Advisers Act of 1940; (ii) is a bank, as defined in that Act; or (iii) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State;³ and
- (C) has acknowledged in writing that he is a fiduciary with respect to the plan.

Therefore, if NHWRA is an “insurance company” described in section 3(38)(B)(iii) of ERISA, it may serve as an “investment manager” to an employee benefit plan, provided that it meets the requirements of section 3(38)(A) and (C) with respect to such plan.

Because NHWRA appears to issue contracts to its members which provide insurance benefits for individual employees, it is the Department’s view that NHWRA is an “insurance company” for purposes of section 3(38) of ERISA.⁴ In your letter of July 7, 1975, moreover, you state that the NHWRA is qualified under the laws of New York and California to perform services described in section 3(38)(A) of ERISA. On the basis of this representation, we are of the opinion that NHWRA is an insurance company described in section 3(38)(B)(iii) of ERISA.

Under 29 CFR 2520.103-4(b) the exemption from certain annual reporting requirements set forth in that section applies only to a plan some or all of the assets of which are held in a pooled separate account (as defined therein) of an insurance carrier regulated and supervised and subject to periodic examination by a State agency. In view of the guaranteed deferred annuity contracts that NHWRA issues to its members, and in view of the supervision by the New York State Superintendent of Insurance to which the NHWRA is subject, we have concluded that the NHWRA is an insurance carrier regulated and supervised and subject to periodic examination by a State Agency for purposes of §2520.103-4(b).

The letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is 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

³ The term “State” is defined in section 3(10) of ERISA as including any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone.

⁴ In an advisory opinion dated February 5, 1980 (a copy of which is enclosed) the Department concluded that section 200 of the New York Insurance Law, as applied to the Savings Bank Retirement System (a trust formed under N.Y. Ins. Law §200), is not a law regulating insurance and is therefore preempted by ERISA. However, in its request for an opinion, the Savings Bank Retirement System specifically represented that it does not guarantee any of the benefits which are provided from its assets, and, accordingly, unlike NHWRA, it does not appear that the Savings Bank Retirement System issues insurance contracts.