



February 2, 1994

Ms. Naomi H. Truman
General Counsel
Housing Authority of the Birmingham District
1826 3rd Avenue, South
P. O. Box 55906
Birmingham, Alabama 35255-5906

94-01A ERISA
SECTION
3(32),4(b)(1)

Dear Ms. Truman:

This is in response to your request for an advisory opinion concerning whether a retirement plan established by the Housing Authority of the Birmingham District ("HABD") is a "governmental plan" within the meaning of section 3(32) of the Employee Retirement Income Security Act of 1974 ("ERISA").

You represent that HABD adopted the Housing Authority of the Birmingham District Money Purchase Pension Plan ("Plan") effective January 1, 1986. HABD is the Plan Administrator and the HABD Board of Commissioners is the Plan Trustee. The Plan is funded by employer contributions and mandatory employee contributions and covers only employees of HABD, who are treated as public employees under the Federal Insurance Contributions Act, Federal Unemployment Tax Act, and the laws of the State of Alabama. The assets of the Plan are invested in group annuity contracts.

Section 4(b)(1) of ERISA excludes governmental plans from coverage by Title I of ERISA. Section 3(32) of ERISA defines the term "governmental plan" to include "...a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

According to the information provided, the Plan was established and is maintained by HABD for its employees. It will be considered a governmental plan only if HABD is an agency or instrumentality of the Government of the United States or the Government of the State of Alabama or a political subdivision thereof, within the meaning of section 3(32). The terms "agency" and "instrumentality" are not defined in ERISA; nor are there any regulations under ERISA that interpret those terms. The specific facts and circumstances of the relationship between the particular entity and the government must be examined to determine whether the entity is an "agency or instrumentality" as required in section 3(32).

Your submission contains the following additional facts and representations. HABD was created in 1935 as a housing authority pursuant to the Housing Authorities Law, Act No. 56, Alabama Acts of 1935. Ala. Code sections 24-1-20 to -45 (1975). That law defines a "housing authority" as "[a] public body organized as a body corporate and politic in accordance with the provisions of this article for the purposes, with the powers and subject to the restrictions set forth." Ala. Code subsection 24-1-22(1) (1975).¹

HABD is governed by a five member Board of Commissioners. Each commissioner serves a five year term of office and is appointed by a majority vote of the City Council of the City of Birmingham.² The commissioners serve without compensation, except reimbursement for expenses incurred, and are immune from civil liability in the State of Alabama for acts or omissions within the scope of their official duties.

Alabama Code section 24-1-21 provides that the purpose of the Housing Authorities Law is to make unsafe, unsanitary or congested dwellings into acceptable housing for the public. HABD has the power, inter alia, "[t]o investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions [t]o act as agent for the federal government in connection with the acquisition, construction, operation or management of a housing project,...[t]o conduct examinations and investigations and to hear testimony and take proof under oath", and "[t]o issue subpoenas ...". Ala. Code subsections 24-1-27(1), (8), (27), and (28) (1975). Alabama Code section 24-1-28 provides that HABD shall have the right to acquire by eminent domain any property, real or personal, that it may deem necessary to carry out the purposes of the Housing Authorities Law. Property acquired by HABD is public property, exempt from levy under the laws of the State of Alabama.

You represent that approximately seventy-five percent (75%) of HABD's revenue is derived directly from federal tax funds through the United States Department of Housing and Urban Development ("HUD") Section 8 programs.³ In connection with such funding, you represent that all aspects of HABD's financial status are regulated and monitored by HUD. HUD provides funding and approves or disapproves, through the HABD budget for each fiscal year, the amount and manner of HABD's spending. Any changes in the budget, such as added job positions or certain HABD purchases, are subject to HUD approval. HUD also prescribes, through regulations, handbooks, and the Section 8 program contracts, the financial accounting methods to be used.⁴ All funds are subject to an audit by HUD. HABD is also subject to audits by the Office of the Inspector General of the United States and to full management review by HUD.

HABD has borrowing authority and may issue bonds for any of its corporate purposes pursuant to Ala. Code sections 24-1-31,-32, and -33. You represent that HABD's interest on obligations issued by HABD is treated as tax exempt and that HABD is a tax exempt organization, not subject to federal, state, or city tax.

Based on the facts, representations, and documents provided, HABD is a public corporation established pursuant to a state statute. HABD's statutory purpose is to provide acceptable public housing for lower income families. HABD exercises governmental powers, including the right of eminent domain, and HABD's property and revenues are exempt from federal, state, and local taxes. HABD is controlled and supervised by commissioners appointed by the City Council of Birmingham. In addition, because HUD federal tax funding is the source of 75% of HABD revenue, that federal agency extensively regulates HABD's finances and operations. It is therefore the opinion of the Department of Labor that HABD is a governmental agency or instrumentality within the meaning of ERISA section 3(32) and that the Plan is a governmental plan within the meaning of that section. Accordingly, the Plan is excluded from ERISA Title I coverage pursuant to section 4(b)(1) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA and is not determinative of any particular tax treatment under the Internal Revenue Code.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

¹ The Alabama Supreme Court has ruled that a housing authority incorporated pursuant to the Alabama Housing Authorities Law is an administrative agency, so that its realty and personality are exempt from ad valorem taxes, *In re Opinions of Justices*, No. 45, 235 Ala. 485, 179 So. 535 (1938); and that a housing authority is a "governmental entity" within the intended scope of an Alabama statute limiting governmental entity tort liability, *Guntersville Housing Authority v. Stephens*, 585 So.2d 887 (Ala. 1991).

² The Alabama Housing Authorities Law provides that commissioners are to be appointed by the mayor, but section 3.07(5) of the Alabama Mayor-Council Act of 1955, Act No. 452, permits the Birmingham City Council to make these appointments.

³ HUD is the principal Federal agency responsible for programs concerned with the Nation's housing needs, fair housing opportunities, and the improvement and development of communities. Title 24, HUD Code of Federal Regulations, refers to section 1437f of the U.S. Housing Act of 1937 (42 U.S.C. sections 1437 to 1437j) ("Act") as "Section 8". The purpose of the Section 8 program is to provide decent, safe, and sanitary housing for lower income families through the use of a system of housing assistance payments to public housing agencies.

In documents issued by HUD and submitted as your Exhibit 4, HABD is identified as a "public housing agency" ("PHA"). A PHA is defined in the Act at subsection 1437a(6) as:

...any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing.

HUD provides funding for new projects under the Section 8 program and increases the funding commitment for previously approved projects pursuant to contract authority provided by Congress. Section 8 programs require specific types of contracts depending on the parties, the project objectives, and the property in contract. If the property is covered by an "Annual Contributions Contract," ownership interests in the property are vested jointly in HABD and HUD. HABD may not acquire or dispose of this property without the express approval of HUD. HUD may take possession of all or any HARD property, rights, or interests in connection with the housing program.

⁴ HUD also extensively regulates HABD's personnel practices, including employee benefit plans, through HUD Handbook 7401.7, which provides requirements and guidance for administration of such matters by PHAs.