U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

April 10, 2003 2003-05A

Alden J. Bianchi
Mirick O'Connell DeMallie & Lougee, LLP
1700 BankBoston Tower
100 Front Street
Worcester, MA 01608-1477

Dear Mr. Bianchi:

This is in response to your request for an advisory opinion under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) as to the proper disposition of a stock award received by Fred C. Church, Inc. ("Church") in connection with the conversion of the Principal Mutual Life Insurance Company (Principal) from a mutual to a stock company, a process known as a demutualization. Specifically, you ask whether under Title I of ERISA Church is entitled to retain the entire demutualization award paid to Church by Principal for a group annuity contract that was purchased in connection with the termination of a retirement plan that had been established and maintained by Church.

You represent that Church was established in 1865 and incorporated in 1969 as a Massachusetts corporation, engaged in the insurance business as an independent insurance agency. Church established the Retirement Plan for Employees of Fred C. Church, Inc. ("the Plan") effective as of January 1, 1969. The Plan was a tax-qualified, non-contributory defined benefit pension plan.

Church maintained the Plan continuously from 1969 until it was terminated effective as of May 16, 1990. You indicate that Church terminated the Plan in accordance with Title IV of ERISA, including filing the Standard Termination Certificate of Sufficiency and Agreement for Employer's Commitment to Make Plan Sufficient for Benefit Liabilities with the Pension Benefit Guaranty Corporation (PBGC) in accordance with section 4044 of ERISA (29 USC 1344). You indicate that the Internal Revenue Service (IRS) issued a favorable determination letter in connection with the Plan's termination on August 23, 1991. A guaranteed annuity contract was purchased from Principal (the termination annuity or annuity contract) on or about May 1, 1991, for $796,128.62 to satisfy the outstanding benefit obligations of the Plan at termination. After the termination annuity was purchased, the Plan still had assets in the amount of $118,925.02, which reverted to Church as excess assets on December 19, 1991. Church filed IRS Form 5330 with respect to the excess assets and paid tax on the reversion in 1991.

The termination annuity was a single premium guaranteed annuity contract that provided immediate and deferred guaranteed annuities for "members" under the annuity contract. The members under the termination annuity were the former participants and beneficiaries of the Plan whose benefits were vested on the Plan's termination. The members were identified by name and other pertinent information in the annuity contract. The annuity contract provided for a number of annuity options and forms of benefits. The annuity contract provided that Principal would deliver to each member an individual certificate setting forth a statement of the benefits to which the member is entitled.

You represent further that on March 31, 2001, the Board of Directors of Principal adopted a demutualization plan. When Principal demutualized, it exchanged policyholder's ownership interests in Principal for cash or stock. Under Principal's plan of demutualization, Principal registered 971 shares of Principal stock under Church's name, as the named contract holder of the termination annuity contract. Pending receipt of a response to its request for an advisory opinion letter, Church deposited the shares into a custodial account in a manner that you represent is

consistent with the procedures described in the Department's February 15, 2001, information letter to Theodore R. Groom.

You ask whether anything in Title I of ERISA precludes Church from retaining the stock Church, as the named contract holder of the group termination annuity contract for the Plan, received from Principal as a result of the demutualization.

Section 403(a) of ERISA provides that all assets of an employee benefit plan shall be held in trust by one or more trustees. Section 404(a)(1) of ERISA provides that fiduciaries must discharge their duties with respect to the plan prudently and solely in the interest of the participants and beneficiaries. Section 406 of ERISA provides, in part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan and that a fiduciary shall not deal with the assets of the plan in his own interest or own account or act in a transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan.

The application of section 403 of ERISA will generally depend on whether demutualization proceeds received by a policyholder constitute plan assets. Similarly, the application of sections 404 and 406 of ERISA will depend on the extent to which fiduciaries and parties in interest with respect to the plans deal with plan assets. In Advisory Opinion 2001-02A (Feb. 15, 2001), the Department opined with respect to the receipt of demutualization proceeds by an employer as the named policy holder of an insurance policy that provides benefits for an ongoing ERISA-covered plan that whether the proceeds are deemed to be plan assets is to be determined based on "ordinary notions" of property rights. The advisory opinion further stated that in the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, or where the policy is paid out of trust assets, it is the view of the Department that all of the proceeds received by the policyholder in connection with a demutualization constitute plan assets. The Department did not address the issue of the allocation of demutualization proceeds in connection with a terminal annuity contract for a defined benefit pension plan.

In Interpretative Bulletin 95-1, 29 CFR 2509.95-1, (IB 95-1), the Department provided guidance concerning certain fiduciary standards under part 4 of Title I of ERISA, applicable to the selection of annuity providers for the purpose of pension plan benefit distributions where the plan intends to transfer liability for benefits to the annuity provider. The Department noted in IB 95-1 that generally, when a pension plan purchases an annuity from an insurer as a distribution of benefits, it is intended that the plan's liability for such benefits be transferred to the annuity provider. The Department's regulation defining the term "participant covered under the plan" for certain purposes under Title I of ERISA also recognizes that such a transfer occurs when an annuity that fully guarantees each member's benefit rights in accordance with the Department's regulation is issued by an insurance company licensed to do business in a State. 29 CFR 2510.3-3(d)(2)(ii).

If, as you represent, the Plan was properly terminated [1] and all obligations and claims under the Plan were satisfied prior to the termination annuity contract provider's demutualization, there is no obligation under Title I of ERISA to treat demutualization proceeds as plan assets. Therefore, no violation of Title I of ERISA would occur if Church takes possession of the proceeds. The question of whether the employer or the beneficiaries of the termination annuity contract are the actual owners of the demutualization proceeds received by the employer as the named policyholder of the annuity is not within the jurisdiction of the Department of Labor under Title I of ERISA. Rather, this issue is governed by the terms of the contract and applicable state law.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,
Louis Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

[1] ERISA section 4044 governs the distribution upon termination of residual assets of a single employer's defined benefit plan. *See also* 29 CFR 2509.95-1.