



Alice League, Esq.
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Federal Reserve Employee Benefits System
744 Broad Street, Suite 2100
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2006-05A
ERISA SEC.
3(32)

Dear Ms. League:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether certain employee benefit programs of the Federal Reserve System are excluded from the requirements of Title I under section 4(b)(1) of ERISA as “governmental plan[s]” within the meaning of section 3(32) of ERISA.¹

Your correspondence and the materials supplied in support of your inquiry contain the following facts and representations. The Federal Reserve System (Federal Reserve or System), our nation’s central bank, was created by the Federal Reserve Act of 1913 “to provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes.” Federal Reserve Act, Ch. 6, 38 Stat. 251 (1913). The System’s central banking responsibilities include: conducting the nation's monetary policy; supervising and regulating banking institutions and protecting the credit rights of consumers; maintaining the stability of the financial system; and providing certain financial services to the U.S. government, the public, financial institutions, and foreign official institutions. The System’s budget is not subject to the approval of Congress. Unlike many federal government agencies whose operations are funded through the congressional appropriations process, the operations and other expenses of the Federal Reserve System are deducted from its revenues and any remaining amount is transferred to the U.S. Department of the Treasury.

¹ The plans that are the subject of your request are: (1) Retirement Plan for Employees of the Federal Reserve System; (2) Thrift Plan for Employees of the Federal Reserve System; (3) Retirement Plan for Employees of the Federal Reserve System Benefits Equalization Plan; (4) Thrift Plan for Employees of the Federal Reserve System Benefits Equalization Plan; (5) Long Term Disability Income Plan for Employees of the Federal Reserve System; (6) Life and Survivor Income Insurance Plan for Employees of the Federal Reserve System; (7) Personal Accident Insurance Plan for Employees of the Federal Reserve System; (8) Group Universal Life Insurance Plan for Employees of the Federal Reserve System; (9) Long Term Care Insurance Plan for Employees of the Federal Reserve System; (10) Business Travel Accident Insurance Plan for Employees of the Federal Reserve Banks; (11) Supplemental Retirement Plan for Selected Officers of the Federal Reserve Banks; and (12) Health Benefits Program for the Federal Reserve Banks.

The Federal Reserve System is composed principally of the Board of Governors of the Federal Reserve System (Board of Governors or Board) and twelve regional Federal Reserve Banks. The Board of Governors is comprised of seven members appointed by the President of the United States and confirmed by the United States Senate. The Federal Reserve Banks (Reserve Banks) are structured as twelve federally chartered corporations located in regions of the country denominated Federal Reserve districts.

The Board's primary functions include formulating the nation's monetary policy and overseeing the operations of the Reserve Banks. The Board has the power to promulgate and enforce federal banking regulations and assess related civil penalties that are payable to the United States. The Board is financed by a levy on the Reserve Banks. The Board is required to submit annual reports to Congress regarding Board operations and must publish weekly reports concerning the condition of the Reserve Banks. The Board must order an annual independent audit of the financial statements of each Reserve Bank and the Board. The Board's financial accounts are also subject to audit by the U.S. Government Accountability Office.

The Reserve Banks are structured as self-supporting corporations that act as operating arms of the System. Their primary functions include administering nationwide banking and credit policies, serving as a banker for the U.S. Treasury, distributing the nation's currency and coin, operating a nationwide payments system, and supervising and regulating member banks and bank holding companies. The Reserve Banks are wholly owned by private-sector commercial banks (which, as members of the Federal Reserve, are known as member banks). In terms of assets and personnel, most of the Federal Reserve System is in the Reserve Banks. Virtually all of the System's assets, liabilities, revenues, and expenses are carried on the books of the Reserve Banks, and approximately 95 percent of the over 25,000 employees of the System are employed by the Reserve Banks.

You represent that the Federal Reserve's part-public, part-private composition evolved from efforts to ensure our central bank's balanced consideration of public and private interests at national and regional levels. Further, although the Reserve Banks are privately owned corporations, they differ from private sector entities in important ways. The Federal Reserve Act gives a nine-member board of directors at each of the Reserve Banks powers of supervision and control over the Reserve Bank, but it also grants the Federal Reserve Board of Governors the power to exercise oversight authority and general supervision over the management, operations and activities of the Reserve Banks. Member banks in each district elect three directors, who represent member banks, and three directors, who represent the public, but the Federal Reserve Board of Governors appoints three directors, including the chairman and deputy chairman of each board, who also represent the public. Thus, of each Reserve Bank's nine directors, only three are designated by the Act to represent the interests of the stockholding member banks. The other six are designated by the Act to represent the public interest. Also, the Federal Reserve has the power to approve top-level Reserve

Bank employees (including Bank presidents) and their salaries, suspend or remove any Reserve Bank officer or director, and approve the annual budgets of the Reserve Banks.

In addition, Reserve Banks differ fundamentally from private corporations. The ownership of all stock of the Reserve Banks does not confer on member banks the typical attributes of private sector control and financial interest. The issuance of Reserve Bank stock is made pursuant to federal law and may be held only by member banks of the Reserve Bank's respective district. Member banks are required to purchase a statutorily determined amount of Reserve Bank stock as a condition for membership. Stockholders do not exercise control over the Reserve Bank and Reserve Bank stock may not be sold or publicly traded on a stock exchange. Member banks may receive dividends on Federal Reserve stock, but these dividends are set by federal law. Reserve Bank profits, if any, are paid to the U.S. Treasury after funding the operations of the Board and dividend payments.

Your request concerns twelve employee benefit plans through which the System provides pension, medical and other welfare benefits to eligible employees and their beneficiaries. All eligible employees (and their beneficiaries) of the System may participate in nine of these plans, but only Reserve Bank employees (and their beneficiaries) may participate in the other three plans.² You represent that the primary reason for this distinction is that the Board and its employees are eligible to participate in the Federal Employee Health Benefits Program (FEHB Program), but employees of the Reserve Banks are not. None of the System plans permit participation by non-System employees. The System plans are funded either entirely by employer contributions or by a combination of employer and employee contributions, except for the Personal Accident Insurance Plan, Group Universal Life Insurance Plan, and Long Term Care Insurance Plan which are described as "Voluntary Employee Pay All Plans."

The System established a Committee on Plan Administration (Committee) and conferred substantial authority on the Committee to administer the twelve System plans that are the subject of this letter. The Committee consists of five members. The Federal Reserve Board of Governors appoints two members from its membership. The presidents of the Reserve Banks collectively appoint the other three members of the Committee. The Committee has authority to adopt policies and procedures necessary for the administration of the System plans. Under that authority, the Committee delegated many of its administrative functions to the Office of Employee Benefits of the Federal Reserve Employee Benefits System, which is responsible for carrying out the day-to-day affairs of the System plans on behalf of the Committee.

² The plans that are the subject of this letter are listed in footnote. 1, *supra*. The three plans in which only Reserve Bank employees may participate are: (1) Business Travel Accident Insurance Plan for Employees of the Federal Reserve Banks; (2) Supplemental Retirement Plan for Selected Officers of the Federal Reserve Banks; and (3) Health Benefits Program for the Federal Reserve Banks.

Pursuant to section 4(b)(1) of ERISA, the provisions of Title I of ERISA do not apply to a “governmental plan” as defined in ERISA section 3(32). Section 3(32) defines “governmental plan,” in pertinent part, as “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.” The terms “political subdivision,” “agency,” and “instrumentality” are not defined in ERISA, and no regulations issued pursuant to ERISA interpret those terms. Accordingly, whether an entity is a political subdivision, agency or instrumentality of government for purposes of ERISA section 3(32), depends on the facts and circumstances of the relationship between government and the entity whose benefit arrangement's status as a “governmental plan” is in issue.

In Advisory Opinion 96-07A, the Department concluded that a Federal Home Loan Bank plan was a governmental plan within the meaning of ERISA section 3(32) excluded from Title I coverage. The Department noted the Bank was a “mixed ownership Government corporation” over which the U.S. Government exerts substantial, although not total, control, including selection of its Board members, approval of its finances and operations, and control over the continuance of its existence. In finding the Bank to be an “entity described in section 3(32) of Title I of ERISA - i.e., an agency or instrumentality of the Government of the United States,” the Department concluded that the “degree of governmental involvement in the operation of the Bank cannot be considered merely regulatory, even in such a highly regulated trade or industry as banking.”

You represent that various federal courts have determined that the Federal Reserve Board is an agency or instrumentality of the United States Government for purposes of other federal laws. *See, e.g., Szumny v. American General Finance*, 246 F.3d 1065, 1069 (7th Cir. 2001) (“Because the Federal Reserve Board is the agency charged with [the Truth In Lending Act’s] administration, we accord its regulation deference.”); *Research Triangle Institute v. Board of Governors of the Federal Reserve System*, 132 F. 3d 985, 989 (4th Cir. 1997) (doctrine of sovereign immunity as applied to Federal Reserve Board). Federal courts have also determined the Reserve Banks to be agencies or instrumentalities of the United States Government, but their part-public, part-private composition has resulted in some courts finding the Reserve Banks to be non-governmental entities under the specific terminology used in certain federal statutes. *Compare Brink’s, Inc. v. Board of Governors of the Federal Reserve System*, 466 F.Supp. 116 (D.D.C. 1979) (Reserve Bank a government instrumentality for purposes of the Service Contract Act) and 2 U.S. Op. Off. Legal Counsel 211 (1978) *with Katsiavelos v. Federal Reserve Bank of Chicago*, 859 F. Supp. 1183 (N.D. Ill. 1994) (Reserve Bank not “executive agency” subject to the Rehabilitation Act of 1973). *See also Federal Reserve Bank of St. Louis v. Metrocentre Improvement District No. 1*, 657 F.2d 183 (8th Cir. 1981), *judgment aff’d without opinion*, 455 U.S. 995 (1982) (status of Reserve Bank as a federal instrumentality with immunity from state and local taxation determined by different test than federal agency status under Federal Tort Claims Act);

In Re Hoag Ranches, 846 F.2d 1225, 1227 (9th Cir.1988) (“Many financial institutions are federally chartered and regulated and are considered federal instrumentalities, without attaining the status of government agencies within the meaning of federal procedural rules.”); *Scott v. Federal Reserve Bank of Kansas City*, 406 F.3d 532 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1433 (2006).

Several Federal Reserve plans have been determined to be “governmental plans” for purposes of ERISA, the Code, and other federal laws. You submitted a copy of a letter dated March 23, 1976, in which the IRS, with the concurrence of the Department, concluded that certain tax qualified deferred compensation plans maintained by the Federal Reserve System were “governmental plan[s]” within the meaning of section 414(d) of the Code. In addition, you provided copies of more recent IRS determinations finding various retirement plans of the Federal Reserve System to be “exempt governmental deferred compensation plan[s]” within the meaning of section 3121(v)(3) of the Code. Similarly, the Pension Benefit Guaranty Corporation, by letter dated October 2, 2001, concluded that the Retirement Plan for Employees of the Federal Reserve System was a “governmental plan” for purposes of section 4021(b)(2) of Title IV of ERISA. You also noted that the “Federal Reserve Employees Retirement Plans” were designated “government pension plan[s]” under the Government Pension Plan Protection Act. *See* 31 U.S.C. § 9502. Finally, the U.S. District Court in *Berini v. Federal Reserve Bank of St. Louis*, 420 F. Supp. 2d 1021 (E.D. Mo. 2005), held that the Reserve Bank of St. Louis was an “instrumentality” of the Government of the United States within the meaning of ERISA section 3(32) and that Federal Reserve System plans covering the Bank’s employees were governmental plans exempt from Title I under section 4(b)(1) of ERISA.

Based on the above and your representations, it is the position of the Department that the Federal Reserve System is an agency or instrumentality of the Government of the United States for purposes of section 3(32) of ERISA. We also assume based on your representations that the twelve employee benefit plans that are the subject of your request were established and are maintained by the System and that the plans cover only System employees. Accordingly, it is the opinion of the Department, based on the information you submitted, that the twelve employee benefit plans that are the subject of your request are “governmental plan[s]” within the meaning of section 3(32) of ERISA that are excluded from coverage under Title I by section 4(b)(1) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and, accordingly, is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter relates solely to the application of Title I of ERISA to the plans that are the subject of your request and is not determinative of any particular tax treatment under the Code. You have not asked for an opinion on, and this letter should not be read as expressing any opinion with respect to, the governmental plan status under ERISA of any employee benefit plan separately

maintained by a Federal Reserve Bank. This letter also should not be read as expressing any opinion on the status of the Board or the Reserve Banks as agencies or instrumentalities of government for purposes of any other law.

Sincerely,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations