N.D.A.G. Letter to Collins (May 18, 1992)

May 18, 1992

Mr. Sparb Collins
Executive Director
ND Public Employees
Retirement System
Box 1214
Bismarck, ND 58502-1214

Dear Mr. Collins:

Thank you for your November 25, 1991, letter concerning the eligibility requirements for investment providers to the state's deferred compensation plan as applicable to the Lutheran Brotherhood and the Knights of Columbus. I apologize for the delay in responding.

Specifically, you ask whether an organization that meets the deferred compensation plan provider licensing and participation requirements can offer products through the state's plan if the organization limits participation to employees of a specific religious denomination.

North Dakota Century Code (N.D.C.C.) § 54-52.2-03 provides:

> **54-52.2-03. Deferred compensation program - Administration - Contract for services.** The administration of the deferred compensation program for each state agency, department, board, commission, or institution is under the direction of the public employees retirement board. Each county, city, or other political subdivision shall designate an officer to administer the deferred compensation program or appoint the public employees retirement board to administer the program in its behalf. Payroll reductions must be made in each instance by the appropriate payroll officer. The public employees retirement board shall administer the deferred compensation program based on a plan in compliance with the appropriate provisions of the Internal Revenue Code and regulations adopted under those provisions.

Any firm desiring to offer investment services for the deferred compensation plan must submit an application pursuant to the requirements of N.D. Admin. Code ch. 71-04-06. Specifically, N.D. Admin. Code § 71-04-06-03 provides for the qualifications of sales representatives as follows:

> **71-04-06-03. Sales representatives.** All sales representatives of the provider approved by the retirement board to solicit employees must be fully

> trained to explain the various investment options available through the provider, be able to explain what the deferred compensation program is as found under section 457 of the Internal Revenue Code, and be licensed with the North Dakota state securities commissioner for the sale of registered or unregistered securities or the North Dakota state insurance commissioner for the sale of insurance contracts or policies, or both.

To answer your inquiry, it is necessary to determine whether the public employees retirement board may approve an organization as a deferred compensation plan provider without violating the establishment clause of the First Amendment of the United States Constitution when that organization only provides products to individuals of a particular religious denomination.

The establishment clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. Everson v. Board of Education, 330 U.S. 1, 15 (1947), summarizes the "essential precepts" of the establishment clause, which applies to the states under the Fourteenth Amendment, as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence [ ] person[s] to go to or remain away from church against [their] will or force [them] to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

The establishment clause has emerged as "more than a pledge that no single religion will be designated as a state religion [or] a mere injunction that governmental programs discriminating among religions are unconstitutional. [I]nstead, [it] primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Grand Rapid School Dist. v. Ball, 473 U.S. 373, 381 (1985) (quoting Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).

In recent years, the United States Supreme Court has recognized that total separation between government and any governmental acknowledgement of the role of religion in citizen's lives is not possible or desirable, and would in fact exhibit hostility rather than a constitutionally correct neutrality towards religion. See Lynch v. Donnelly, 465 U.S. 668, 672-673 (1984); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Allegheny County v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J. concurring).

Drawing on the "cumulative criteria developed by the Court over many years," the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. at 612, prescribed its tripartite criteria for evaluating the constitutionality of governmental actions under the establishment clause: first, the action must have a secular purpose; second, it must not have a principal or primary effect that advances or inhibits religion; third, it must not foster excessive governmental entanglement with religion. 403 U.S. at 612-613. Although individual Justices of the United States Supreme Court have expressed varying viewpoints on the continued utility and vitality of the Lemon criteria, nevertheless the Lemon analysis persists as the governing precedent and guide in this area. See Bowen v. Kendrick, 487 U.S. 589, 602 (1988) quoting Mueller v. Allen, 463 U.S. 388, 394 (1983).

There is little question that N.D.C.C. ch. 54-52.2 providing for a deferred compensation plan for public employees has a secular legislative purpose. The purpose is to establish a deferred compensation plan for the benefit of public employees.

It is also evident that N.D.C.C. ch. 54-52.2 passes scrutiny under the second part of the Lemon criteria in that it does not have a principal or primary effect that advances or inhibits religion.

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), is an analogous case. In Mergens, a plurality of the United States Supreme Court held that the establishment clause was not violated when a christian fellowship group was allowed to use school facilities for its after-school meetings. The Court reasoned that such activity was permitted as long as other groups were allowed the same access and if the school did not lead or direct the club or put some sort of stamp of approval on the club. See also Widmar v. Vincent, 454 U.S. 263, 272 (1981) ("[B]y creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there."); Everson v. Board of Education, 330 U.S. 1 (1947) (Holding that the expenditure of tax funds for transportation of nonpublic school students was constitutionally permissible as a general health and safety measure.); Marsh v. Chambers, 463 U.S. 783 (1983) (Holding that a state legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state did not violate the establishment clause.).

Finally, the practice of having a religious service organization provide investment advice as a deferred compensation plan provider does not threaten an excessive entanglement between church and state. Any routine regulatory interaction would involve no inquiry into religious doctrine which the establishment clause would prohibit. See Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 451 (1969). Further, there is not any delegation of state power to a religious body, see Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), and no "detailed monitoring and close administrative contact" between secular and religious bodies, see Aguilar v. Felton, 473 U.S. 402, 414 (1985).

Indeed, if the state would prohibit a religious service organization from operating as a deferred compensation plan provider, then it would demonstrate not neutrality but hostility toward religion. See generally Mergens, 110 S.Ct. at 2371.

Thus, it is my opinion that as long as an organization meets the licensing and participation requirements, it can offer products through the state deferred compensation plan even though it may limit participation to members of a specific religious denomination.

I trust this answers your inquiry.

Sincerely,

Nicholas J. Spaeth

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