ERISA OPINION 167

(Same letter as P/O 77-05)

March 24, 1977

Dear :

Thank you for your letter concerning the Employee Retirement Income Security Act of 1974 (ERISA).

You state that one of the benefit plans underwritten by your company is the (named), Inc. Employees Pension Trust Plan. Mr. (X) is an agent of your company and you indicate he will receive commissions related to the life insurance contracts purchased by the Plan. You further indicate that Mr. (X) is the brother of the president of the corporation sponsoring the Plan. You ask whether a prohibited transaction under ERISA arises in this situation from the brother relationship.

Section 406(a)(1) of ERISA prohibits certain transactions between a plan and a party in interest. Section 3(14)(F) defines the term "party in interest" to include a relative of an individual who is a party in interest as described in section 3(14)(A), (B), (C), or (E). Section 3(15) defines the term "relative" as a "spouse, ancestor, lineal descendant, or spouse of a lineal descendant." Because this definition does not include the relationship of sibling, (X) is not a party in interest with respect to the Plan even though he is the brother of a person who might be a party in interest as described in section 3(14)(A), (B), (C), or (E). Your letter does not, however, provide sufficient information for us to determine whether Mr. (X) is a party in interest with respect to the Plan by reason of another relationship to the Plan. For example, it is unclear whether Mr. (X) is a fiduciary with respect to the Plan under section 3(21) of ERISA and, therefore, a party in interest under section 3(14)(A) of ERISA. Accordingly, we are unable to determine from the facts set forth in your letter whether Mr. (X)'s receipt of commissions in connection with the sale of insurance to the Plan constitutes a prohibited transaction under section 406 of ERISA.

Because your letter also raises questions under section 4975 of the Internal Revenue Code of 1954, we have conferred with representatives of the Internal Revenue Service and they concur in the views set forth above as they apply to that section.

Sincerely,