

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216



2 SEP 1977

Paul S. Berger, Esq.
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

OPINION 77-60/61 A

404(a)(1)(B)
405(a)(3)

Dear Mr. Berger:

In response to your letter of July 29, 1977, and the exhibits attached thereto, we have written our answer on the enclosed photocopy of your letter. By doing this we are able to avoid having to recite or summarize the facts you have set forth in your letter.

In future correspondence please refer to our Reference No. C-3585A.

Sincerely,

Fred W. Stuckwisch
Director, Office of Regulatory
Standards and Exceptions

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216



2 SEP 1977

Theodore R. Groom, Esq.
Groom and Nordberg
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

OPINION 77-60/61 A

404(a)(1)(B)

405(a)(3)

Dear Mr. Groom:

In response to your letter of August 3, 1977, and the exhibits attached thereto, we have written our answer on the enclosed photocopy of your letter. By doing this we are able to avoid having to recite or summarize the facts you have set forth in your letter.

In future correspondence please refer to our Reference No. C-3585A.

Sincerely,

Fred W. Stuckwisch
Director, Office of Regulatory
Standards and Exceptions

LAW OFFICES
GROOM AND NORDBERG
SUITE 450
1775 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

(202) 847-0620

THEODORE R. GROOM
CARLA A. NORDBERG, JR.
ROBERT X. PERRY, JR.
ROBERT B. HARDING
LAWRENCE J. HASS
LOUIS T. MAZAWAY
MICHAEL F. KELLEHER
LINDA A. SCHWARTZSTEIN

August 3, 1977

Advisory Opinion
Office of Regulatory Standards
and Exceptions
Pension and Welfare Benefit Programs
U.S. Department of Labor
Washington, D.C. 20216

Re: Request for Advisory Opinion
Submitted by The Equitable
Life Assurance Society of the
United States and Victor
Palmieri and Company, Inc.
Co-Fiduciary Liability for
"Subsequent" Breaches

Gentlemen:

Enclosed is a request for an advisory opinion with respect to the responsibilities of The Equitable Life Assurance Society of the United States ("Equitable"), as the managing fiduciary and an investment manager of the Central States, Southeast and Southwest Areas Pension Fund ("Fund"), and Victor Palmieri and Company, Inc. ("VPCO"), as an investment manager of the Fund, under sections 404(a)(1) and 405(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA). The advisory opinion requested is that if Equitable or VPCO obtains knowledge of a breach of fiduciary responsibility by another fiduciary of the Fund, which breach occurs subsequent to the date that Equitable or VPCO becomes a fiduciary with respect to the Fund, Equitable or VPCO will satisfy their responsibilities under sections 404(a)(1) and 405(a)(3) of ERISA if they comply with the procedures specified for Equitable and VPCO set forth below.

The procedure specified for Equitable is as follows:

- (1) In the case of a breach of fiduciary responsibility by an investment manager for the Fund (other than Equitable), Equitable will take

appropriate action (other than litigation) consistent with its authority and responsibilities with respect to the Fund, which action may include, but is not required to include, removal of such investment manager; and

- (2) Equitable will report the breach of fiduciary duty by any other fiduciary (whether or not such fiduciary is an investment manager) concurrently (i) to the Trustees of the Fund for appropriate action, including legal action, and (ii) to the Department of Labor.

The procedure specified for VPCO is as follows:

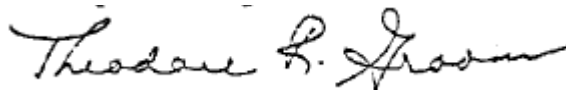
VPCO will report the breach of fiduciary responsibility by the other fiduciary concurrently (i) to the Trustees of the Fund for appropriate action, including legal action, and (ii) to Equitable, and (iii) to the Department of Labor.

This request is part of the series of advisory opinion, ruling, and exemption requests that Equitable and VPCO are submitting in connection with the new arrangements for independent management of the Fund's assets. These arrangements, which are an integral part of the Labor Department's efforts to safeguard the Fund's assets for the payment of pension benefits are scheduled to go into effect on September 1, 1977, but will be delayed if the issues raised in this and the other requests are not resolved by September 1, 1977.

Accordingly, we are prepared to meet with the Labor Department with respect to this request, and to cooperate and assist the Department to the fullest extent possible to expedite the resolution of this matter.

If there are any questions with respect to the enclosed advisory opinion request, please contact the undersigned or Lawrence J. Hass of this firm.

Respectfully submitted,



Theodore R. Groom
Attorney for
The Equitable Life Assurance Society
of the United States

cc: Morton Klevan, Esq.
Enclosures

ARNOLD & PORTER

1229 NINETEENTH STREET, N. W.

WASHINGTON, D.C. 20036

TELEPHONE (202) 872-6700

CABLE ARFOPO

TELEX 89-2733

PAUL S. BERGER

DIRECT LINE (202) 872-6784

JULY 29, 1977

Advisory Opinion
Office of Regulatory Standards
and Exemptions
Pension and Welfare Benefit Programs
U.S. Department of Labor
Washington, D.C. 20216

Re: Request for Advisory Opinion Submitted by
Victor Palmieri and Company Incorporated
and The Equitable Life Assurance Society of
the United States -- Co-Fiduciary Liability
for "Subsequent" Breaches

Gentlemen:

Enclosed is a request for an advisory opinion with respect to the responsibilities of The Equitable Life Assurance Society of the United States ("Equitable"), as the managing fiduciary and an investment manager of the Central States, Southeast and Southwest Areas Pension Fund ("Fund"), and Victor Palmieri and Company Incorporated ("VPCO"), as an investment manager of the Fund, under sections 404(a)(1) and 405(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The advisory opinion requested is that if Equitable or VPCO obtains knowledge of a breach of fiduciary responsibility by another fiduciary of the Fund, which breach occurs subsequent to the date that Equitable or VPCO becomes a fiduciary with respect to the Fund, Equitable or VPCO will satisfy their responsibilities under sections 404(a)(1) and 405(a)(3) of ERISA if they comply with the procedures specified for Equitable and VPCO set forth below.

ARNOLD & PORTER

Office of Regulatory Standards
and Exceptions
August 3, 1977
Page Two

The procedure specified for Equitable is as follows:

- (1) In the case of a Breach of fiduciary responsibility by an investment manager for the Fund (other than Equitable), Equitable will take appropriate action (other than litigation) consistent with its authority and responsibilities with respect to the Fund, which action may include, but is not required to include, removal of such investment manager; and
- (2) Equitable will report the breach of fiduciary duty by any other fiduciary (whether or not such fiduciary is an investment manager) concurrently (i) to The Trustees of the Fund for appropriate action, including legal action, and (ii) to the Department of Labor.

The procedure specified for VPCO is as follows:

VPCO will report the breach of fiduciary responsibility by the other fiduciary concurrently (i) to the Trustees of the Fund for appropriate action, including legal action, and (ii) to Equitable, and (iii) to the Department of Labor.

This request is part of the series of ruling, advisory opinion and exemption requests that VPCO and Equitable are submitting in connection with the new arrangements for independent management of the assets of the Fund. These arrangements, which are an integral part of the Labor Department's efforts to safeguard the Fund's assets for the payment of pension benefits are scheduled to go into effect on September 1, 1977, but will

ARNOLD & PORTER

Office of Regulatory Standards
and Exceptions
August 3, 1977
Page Three

be delayed if the issues raised in this and the other requests are not resolved by September 1, 1977.

Accordingly, we are prepared to meet with the Labor Department with respect to this request, and to cooperate and assist the Department to the fullest extent possible to expedite the resolution of this matter.

If there are any questions with respect to the enclosed requests, please be in touch with the undersigned (872-6784), Peter Schmidt (872-6834), or Lauralee Matthews (872-6791) of this firm.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'P. S. Berger', with a large, stylized initial 'P' and a long, sweeping underline.

Paul S. Berger
Attorney for
Victor Palmieri and Company
Incorporated

Request for Advisory Opinion
Submitted by
The Equitable Life Assurance Society of the United States
and Victor Palmieri and Company Incorporated
Co-Fiduciary Liability for "Subsequent" Breaches

It is respectfully requested that the Department of Labor issue an advisory opinion with respect to the responsibilities of The Equitable Life Assurance Society of the United States ("Equitable"), as the managing fiduciary and an investment manager of the Central States, Southeast and Southwest Areas Pension Fund ("Fund"), and Victor Palmieri and Company Incorporated ("VPCO"), as an investment manager of the Fund, under sections 404(a)(1) and 405(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The advisory opinion requested is that if Equitable or VPCO obtains knowledge of a breach of fiduciary responsibility by another fiduciary of the Fund, which breach occurs in its entirety subsequent to the date that Equitable or VPCO becomes a fiduciary with respect to the Fund, Equitable or VPCO will satisfy their responsibilities under sections 404(a)(1) and 405(a)(3) of ERISA if they comply with the procedures specified for Equitable and VPCO set forth below.

The procedure specified for Equitable is as follows:

- (1) In the case of a breach of fiduciary responsibility by an investment manager for the Fund (other than Equitable), Equitable will take appropriate action (other than litigation) consistent with its authority and responsibilities with respect to the Fund,

- 2 -

- which action may include, but is not required to include, removal of such investment manager; and
- (2) Equitable will report the breach of fiduciary duty by any other fiduciary (whether or not such a fiduciary is an investment manager) concurrently (i) to the Trustees of the Fund for appropriate actions, including legal action, and (ii) to the Department of Labor.

The procedure specified for VPCO is as follows:

VPCO will report the breach of fiduciary responsibility by the other fiduciary concurrently (i) to the Trustees of the Fund for appropriate action, including legal action, and (ii) to Equitable, and (iii) to the Department of Labor.

This request is submitted on behalf of Equitable and VPCO pursuant to ERISA Procedure 76-1 (41 FR 36281, August 27, 1976). Set forth below is (1) a statement of facts relevant to this request, including a description of the Fund, Equitable, and VPCO, the background of this request, and the new arrangements for the management of the Fund's assets; (2) a statement of the

advisory opinion requested; and (3) a discussion of the issues involved in this request.

Statement of Facts

A. The Fund

The Central States, Southeast and Southwest Areas Pension Fund is an employee pension benefit plan established and maintained pursuant to collective bargaining agreements between employers and certain affiliated unions of the International Brotherhood of Teamsters.^{1/} It was originally established in 1955 by trust agreement, amended from time to time thereafter, by and between the Central Conference of Teamsters, Central States Drivers Council, Southern Conference of Teamsters, and their affiliated local unions; and the Southeastern Area Motor Carriers Labor Relations Association; Southwest Operators Association; National Automobile Transporters Labor Council; Motor Carriers Employers Conference - Central States; Cartage Employers Management Associations; Cleveland Draymen Association, Inc.; and Northern Ohio Motor Truck Association.^{2/} In accordance with section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)), the Fund is jointly administered

¹ / The Fund's Employer I.D. No. is 36-6044243; its Fiduciary No. is 36-6514764.

² / Central States, Southeast and Southwest Areas Pension Plan, Effective January 1, 1976, Art. 1, Sec. 2.

- 4 -

by ten trustees, consisting of an equal number of employee and employer representatives. Until now, the Trustees have had exclusive authority and responsibility for the management of the Fund's assets.

More than 16,000 employers make contributions to the plan pursuant to approximately 30,000 separate collective bargaining agreements involving over 300 local union organizations.^{3/} For the Fund's plan year ending January 31, 1976, the Fund received in excess of \$300 million in employer contributions. The number of active and retired participants of the Fund as of January 31, 1976, was estimated to be in excess of 450,000, and for the plan year ending on that date, the Fund paid benefits in excess of \$210 million.

The Fund generally covers Teamster employment in 33 states located, as the name of the plan indicates, in the Central, Southeast and Southwest areas of the United States. As of January 31, 1976, the book value of all assets of the Fund was stated to be \$1,438,230,551.^{4/} The Fund is believed to be the second largest multiemployer plan in the United States today.

^{3/} We understand that negotiations between the Teamsters and employer associations which result in the National Master Freight Agreement effectively establish or set the pattern for the applicable contribution rate in most cases.

^{4/} The information in the noted and immediately preceding paragraph is extracted from the Annual Report (Form 5500) of the Fund for the plan year ending January 31, 1976, filed by the Plan Administrator with the Internal Revenue Service and the Department of Labor. The Fund's Annual Report for its plan year ending January 31, 1977 is required to be filed by August 31, 1977.

- 5 -

B. Background of this Request

The Fund has been the subject of investigation by the Department, the Justice Department, the Service, the Securities and Exchange Commission and other government agencies for a period of years. It has also been the subject of numerous Congressional inquiries and hearings. In published statements of government agencies, Congressional Committees, and the Fund's staff, and in other publicly available information, there has been widespread criticism and allegation of civil and criminal abuse in connection with the management of the Fund's assets.

During the last year, the following governmental actions, among others, have been announced:

By letter dated June 25, 1976, the District Director of the Internal Revenue Service for Chicago revoked the Fund's tax exempt status.

Between the date of the initial revocation letter and March 14, 1977, the Service delayed the application of the revocation four times while government attorneys and attorneys for the Fund engaged in a series of negotiations on problem areas.^{5/}

On March 14, 1977, the Department and the Service issued a joint release (USDL 77-232, IR 1775) announcing the resolution

⁵ /See IR-1637 (July 8, 1976); IR-1664 (August 30, 1976); IR-1699, (November 26, 1976); IR-1763, (February 25, 1977). See also, Statement of Daniel Shannon, Executive Director, Central States Pension Fund, Before the House Ways and Means Oversight Committee (March 21, 1977).

- 6 -

of certain issues respecting asset management of the Fund "in a manner that meets the government's objectives." Among other matters, the release stated:

The trustees of the fund have resolved to delegate to one or more investment managers (as defined in section 3(38) of ERISA) the control of all investments of the Fund.

Based on this and other matters announced, and subject to the engagement of professional investment managers and other conditions, the Service stated that it would issue a determination letter requalifying the Fund, and the Department stated that it would terminate that portion of its investigation relating to procedures of the Fund respecting asset management.

Subsequently on April 26, 1977, the Service issued a determination letter announcing the qualification of the Fund for tax years beginning after December 31, 1975. This determination letter was subject to a number of conditions which included the following:

8. The Trustees placing all Fund assets and receipts, including funds derived from liquidation of existing investments (except funds reasonably retained by the Fund for (a) payment of plan benefits and (b) payment of administrative expenses), under direct continuing control of independent professional investment managers as defined by Section 3(38) of ERISA. The Trustees will adopt appropriate amendments to the trust agreement to accomplish this condition and will expeditiously transfer the assets to the investment managers. Recognizing the complexities of the large investment portfolio, the completion date for accomplishing delivery of the investment assets

- 7 -

will be no later than December 31, 1977. However, the securities-related assets and the majority of the real estate-related assets will be made available to the investment managers for inspection, documentation and evaluation no later than June 30, 1977.

During this same period of time, representatives of the Fund were actively discussing arrangements with potential investment managers, including Equitable, and on Friday, June 17, 1977, the Trustees of the Fund announced their decision to select Equitable as Fiduciary for the Fund with responsibility for the management of all Fund assets, and to select Equitable and others as investment managers for the Fund.^{6/} The contractual arrangements, described in greater detail in following paragraphs, were executed by the Trustees on July 7, 1977, effective as of June 30, 1977.

Under these agreements, the investment managers and custodian have no contractual duty to investigate circumstances or events occurring prior to the time they become plan fiduciaries. These contracts specifically provide that neither Equitable, the other investment managers nor the custodian shall "be called upon to perform any general or special investigative functions with respect to any prior Fund transactions or investments, except

⁶ / Initially the Fund undertook negotiations with Crocker National Corporation, or an affiliate thereof, to be overall Fiduciary for the Fund; when these negotiations could not be completed to the satisfaction of both parties, the negotiations with Equitable commenced.

- 8 -

as may be required by applicable law in connection with the then current management of an investment asset of the Fund." (Ex. A at 8.06)

The selection of independent investment managers for the Fund was clearly regarded by the government as a crucial objective of governmental demands upon representatives of the Fund. This fact was attested to in the statement of Secretary of Labor Marshall before a subcommittee of the Senate Committee on Government Operations on July 18, 1977, in which he indicated that the "primary goal had to be the preservation of the Fund assets," and in which he also stated:

In many ways, the second objective (that day-to-day asset management be taken out of the hands of the Fund's trustees) was the most important. It was imperative that those who contributed to the Fund should not see their assets dwindle because of mismanagement.

* * * * *

At a meeting on March 11, the trustees decided to comply with the Government's demand. On March 12, we met with their representatives. On March 14 the Labor Department and IRS issued identical news releases announcing the terms of an agreement. The critical points were as follows: (1) that the trustees would reach agreement in principle as soon as possible with one or more independent investment managers of nationally recognized stature; . . .

* * * * *

We believe that the contractual structure (between the Fund and Equitable and other independent managers] provides a sound basis for proper future management of the Central States Fund's giant portfolio. It removes entirely asset management control from the trustees, yet retains their authority and

- 9 -

power to monitor performance. It provides sufficient security for the independent professional fiduciary and the investment managers to insure that they cannot be dismissed at the whim of the trustees, yet permits the trustees to dismiss them for cause. It leaves the affairs of a private sector fund in private sector hands, yet provides for lawfully authorized government assistance. It also contains a triggering device to insure government oversight in the event the trustees, Equitable or the investment managers need advice or help in matters relating to Fund management. And it contains great promise of ending, once and for all, the years of suspicion, allegations and demonstrable wrongdoing that have surrounded asset management of the Fund and the people associated with it.^{7/}

C. Equitable

The Equitable Life Assurance Society of the United States ("Equitable") is a mutual life insurance company whose principal office is located at 1285 Avenue of the Americas, New York, New York 10019. Its Employer Identification Number is 13-5570651. Equitable is a New York corporation subject to the insurance laws of New York, and it is registered as an investment adviser under the Investment Advisers Act of 1940. Equitable is the third largest life insurance company in the United States; as of December 31, 1976, its assets equalled \$22,430,472,618. Prior to its execution of the June 30, 1977 contracts, with one minor exception, it had no affiliation or relationship with the Fund.^{8/}

⁷ / Statement of Secretary of Labor F. Ray Marshall, Hearings on Teamster Central States Pension Fund Task Force, Senate Permanent Subcommittee on Investigations, July 18, 1977.

⁸ / The minor exception involves a ground lease between the Fund and Equitable which arose because of a mortgage foreclosure between Equitable and an unrelated third party.

D. VPCO

Victor Palmieri and Company Incorporated ("VPCO") is a corporation which has provided executive management services to various businesses and whose application for registration as an investment adviser under the Investment Advisers Act of 1940 is currently pending. It is presently managing assets and operating companies valued at more than \$1,500,000,000, including all the non-rail assets and operating companies of the Penn Central Transportation Company and those of Levitt and Sons, Inc. It has a principal office at 2021 K Street, N.W., Washington, D.C. 20006; its Employer I.D. Number is 95-2644662. It has had no prior affiliation with the Fund.

E. The New Arrangements for the Management of Fund Assets

In order to carry out the central part of their agreement with the Department and the Service of March 14, 1977, and the condition of the Fund's requalification letter of April 26, 1977 requiring independent investment managers for the assets of the Fund, the Trustees of the Fund have entered into a series of agreements dated June 30, 1977 with Equitable, VPCO, Lazard Freres & Co. (Lazard), Mercantile National Bank at Dallas (Mercantile), and Crocker Investment Management Corp (CIMCO).^{9/}

^{9/} In his statement before the Senate Permanent Subcommittee on Investigations on July 18, 1977, Secretary of Labor Ray Marshall stated that:

From the standpoint of the Government, the arrangement had to satisfy several criteria
The contractual structure had to be one which was workable and which met ERISA requirement.

He further stated that, "The arrangements also had to involve managers who were competent and who could withstand public scrutiny," and that, "These institutions and their management assignments were fully satisfactory to the Labor Department."

- 11 -

The agreements (attached as Exhibits A through G) establish the following arrangements for the management of the assets of the Fund.

The securities-related assets of the Fund (corporate stocks and debt securities, U.S. government securities, etc.) will be allocated for investment management initially to four investment managers: Equitable, Lazard, Mercantile, and CIMCO. Each investment manager will be allocated 25 percent of the total market value of the securities-related assets.

The real estate-related assets of the Fund (mortgages and properties), which comprise approximately 70 percent of the value of the assets of the Fund, will be allocated to Equitable and VPCO for investment management. Equitable will generally be responsible for the management of the assets located east of the Mississippi River (approximately one-third of the total value of the real estate-related assets), and VPCO will manage the assets located west of the Mississippi River (the remaining two-thirds of the Fund's real estate-related assets).

Equitable will also assume the role of Fiduciary for the Fund, which will require Equitable to fulfill a number of functions in addition to serving as investment manager, including the following. Equitable will have exclusive authority and responsibility to monitor the performance of the other securities investment managers, to appoint and remove any or all of such managers, and to increase or decrease the portion of the securities-related assets allocated to such managers. Equitable will

- 12 -

have similar responsibilities with respect to those persons who will serve as the custodians of the Fund's assets, and with respect to any investment managers that may be appointed to manage assets of the Fund other than securities-related and real estate-related assets.

Equitable, together with the Trustees, will also be responsible for monitoring VPCO's real estate investment management performance. However, within the initial five-year period of these new arrangements, VPCO can only be removed (by the Trustees) for cause and with the approval of the Secretary of Labor.

In performing its monitoring responsibilities, Equitable will generally rely on the accountant's report referred to in section 103(a)(3)(A) of ERISA and on the factual information, opinions, reports, and statements, including financial statements and other financial data, that Equitable receives from the Executive Director of the Fund, any Fund custodian, or any investment manager. Equitable has the right to make such further inquiries or take such further actions as it may determine necessary in connection with such monitoring responsibilities, including, but not limited to, the engagement of third parties to provide additional information and analyses. The agreements specifically provide, however, that Equitable is not responsible for direct participation in or supervision of the day-to-day operations or management decisions of any investment manager or custodian.

Equitable's performance as Fiduciary and investment manager will be monitored by the Trustees. As in the case of VPCO how-

ever, Equitable can be removed by the Trustees within the initial five-year period of the new arrangements only for cause and with the approval of the Secretary of Labor.

The administration of the Fund is within the sole authority and responsibility of the Fund Trustees, acting either directly or through the Executive Director of the Fund or the members of the Fund staff. The administration of the Fund includes, among other things, the establishment of benefit levels, the enforcement of collective bargaining agreements, the qualification, eligibility and payment of pension or other benefits, the actuarial soundness of the Fund, reporting responsibilities, and investment management of the Benefits and Administration Account.

The assets held in the Benefits and Administration Account are those which, in the determination of the Trustees, are needed by the Fund for payment of pension benefits, Fund administrative expenses, and an appropriate reserve therefor. The Benefits and Administration Account is managed by the Executive Director of the Fund under the supervision of the Trustees. Upon the request of the Executive Director of the Fund, Equitable is obligated to direct the transfer of monies to the Benefits and Administration Account. Neither Equitable nor any of the investment managers have any responsibility or authority with respect to any of the assets held in the Benefits and Administration Account.

Other than for specific responsibilities described in the agreements of June 30, 1977, Equitable has no other responsibilities or authority with respect to the Fund. For example,

- 14 -

Equitable is not authorized or empowered to remove VPCO as an investment manager; nor is it authorized to review, monitor or oversee the activities of the Fund Trustees or Executive Director.^{10/}

VPCO, as investment manager for real estate-related assets of the Fund, is responsible solely for the day-to-day management of the assets which are allocated to it. VPCO will also be responsible for preparing a study evaluating the Fund's asset management staff. VPCO, however, has no authority or responsibility to monitor or oversee the activities of any other fiduciary of the Fund, including Equitable, any other investment manager, the Trustees, the Executive Director, or any Fund custodian.

The new Fund investment management arrangements are scheduled to go into effect on the Closing Date of the Agreements, September 1, 1977. This date can be extended by Equitable or VPCO if either determines that it has not received all necessary rulings, exemptions and opinions of governmental authorities. However, if the Closing Date does not occur on or before November 1, 1977, the Trustees of the Fund can elect to rescind the agreements. In this regard, both Equitable and VPCO believe

^{10/} It is uncertain whether Equitable has authority to commence legal action on behalf of the Fund. Equitable is not specifically authorized to perform this function in any of the agreements and, therefore, may be precluded from commencing litigation on behalf of the Fund pursuant to section 404(a)(1)(D) of ERISA. See, however, section 502(a)(2) and (3) of ERISA.

- 15 -

that the receipt of a favorable response in reply to this request prior to the Closing Date is essential if Equitable and VPCO are to assume their responsibilities for the Fund.

Advisory Opinion Requested

Based on the facts and representations set forth in this submission, it is requested that the Department issue an advisory opinion that if Equitable or VPCO obtains knowledge of a breach of fiduciary responsibility by another fiduciary of the Fund, which breach occurs in its entirety subsequent to the date that Equitable or VPCO becomes a fiduciary with respect to the Fund, Equitable or VPCO will satisfy its responsibilities under sections 404(a)(1) and 405(a)(3) of ERISA if they comply with the procedures specified for Equitable and VPCO set forth below:

The procedure specified for Equitable is as follows:

- (1) In the case of a breach of fiduciary responsibility by an investment manager for the Fund (other than Equitable), Equitable will take appropriate action (other than litigation) consistent with its authority and responsibility with respect to the Fund, which action may include, but is not required to include, removal of such investment manager; and
- (2) Equitable will report the breach of fiduciary duty by any other Fund fiduciary (whether or not such fiduciary is an investment manager) concurrently (i) to the

- 16 -

Trustees of the Fund for appropriate action, including legal action, and (ii) to the Department of Labor.

The procedure specified for VPCO is as follows:

VPCO will report the breach of fiduciary responsibility by the other fiduciary with respect to the Fund concurrently (i) to the Trustees of the Fund for appropriate action, including legal action, (ii) to Equitable, and (iii) to the Department of Labor.^{11/}

Discussion of Issues

Equitable, VPCO, and the other new independent investment managers for the Fund have been retained by the Fund for essentially one purpose--to remove responsibility for the investment of Fund assets from the Trustees and to turn such responsibility over to independent professional investment managers of long experience and high integrity. These new investment management arrangements are the cornerstone of the Labor Department's efforts to reform the investment practices of the Fund; they do not cover any other aspects of the operation of the Fund. For

^{11/} In a separate submission, Equitable and VPCO are requesting an advisory opinion with respect to the responsibilities of Equitable and VPCO for breaches of fiduciary responsibility occurring prior to (and, perhaps, continuing after) the date on which Equitable and VPCO become fiduciaries with respect to the Fund.

- 17 -

example, they do not cover the administration of the Fund, the collection of employer contributions and enforcement of collective bargaining agreements, the payment of pension benefits, and the fulfillment of the Fund's reporting and disclosure obligations. Under the agreements of June 30, 1977, these functions have been retained by the Fund Trustees and are expressly not within the authority or responsibility of Equitable, VPCO, or the other investment managers.

In recognition of the central purpose for which the investment managers have been retained, the agreements do not expressly authorize or empower Equitable, VPCO or the other investment managers to commence litigation on behalf of the Fund to remedy breaches of fiduciary responsibility by other fiduciaries of the Fund. The lack of any mention of such litigating authority indicates that it was not contemplated in the course of negotiating these agreements that Equitable, VPCO or the other investment managers would assume responsibility in this area.

It should also be noted that inasmuch as Equitable, VPCO, and the other investment managers are not expressly authorized to commence legal action on behalf of the Fund for co-fiduciary breaches, the investment management fees that have been agreed to by the parties involved would not appear to be intended to cover the costs of such litigation. Further, there appears to be no provision in the agreements of June 30, 1977, for the reimbursement of such expenses by the Fund should they be incurred by Equitable,

VPCO or any other investment manager.^{12/}

In light of the purpose, structure and provisions of the June 30, 1977 agreements, it is important that it be made clear prior to the outset of these new investment management arrangements that neither Equitable, VPCO nor any other independent investment manager has any responsibility to institute litigation on behalf of the Fund to remedy co-fiduciary breaches of responsibility. Further, VPCO and the other independent investment managers do not have any monitoring obligations. At the same time, Equitable and VPCO believe that a mechanism should be established to deal effectively with co-fiduciary breaches when they occur so that appropriate remedies can be obtained for the Fund. Equitable and VPCO are desirous of establishing such a procedure, but they wish to be certain that compliance with such a procedure will constitute satisfaction of any ERISA fiduciary responsibilities imposed on them.

Discussion of the Law

Section 405(a)(3) of ERISA provides that:

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

* * * * *

^{12/} Compare this to the indemnification provisions of the agreements pursuant to which Equitable, VPCO and the other investment managers can be reimbursed for their expenses as a defendant in a law suit in which breaches of fiduciary duty (or other claims) are alleged against them.

- 19 -

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

In addition, section 404(a)(1)(B) provides that, as here relevant:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

* * * * *

(B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Pursuant to these provisions of ERISA, Equitable and VPCO (and the other investment managers of the Fund) would be required to take action to remedy a co-fiduciary breach of responsibility occurring in its entirety subsequent to the date they became fiduciaries with respect to the Fund if they obtain knowledge of such a breach. Common law recognized the need for fiduciaries to take certain action with respect to co-fiduciary breaches.^{13/}

Under ERISA, however, a new dimension has been added for obtaining remedies for breaches of responsibility by employee benefit plan fiduciaries. This new dimension is the authority given to the Department of Labor, an agency of the federal government with substantial resources, to bring civil actions on behalf

^{13/} See, e.g., 76 Am. Jur. 2d §§306 and 332.

of employee benefit plans to obtain monetary, injunctive and other equitable remedies in cases involving breaches of fiduciary responsibility.^{14/} No such authority existed in any government agency prior to ERISA. This new dimension is particularly important because the resources of the federal government are far greater than those of any private party or employee benefit plan to seek remedies for breaches of fiduciary responsibility.

In discussing the provisions of ERISA relating to liability for co-fiduciary breaches, the Conference Report accompanying ERISA acknowledges that a fiduciary who obtains knowledge of a co-fiduciary breach now has a range of options to consider in obtaining remedies on behalf of an employee benefit plan. According to the Conference Report, such steps might include notifying the plan sponsor of the breach, proceeding to an appropriate federal court for instructions, or bringing the matter to the attention of the Secretary of Labor. The Conference Report also points out, at page 300, that:

The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.

The Department of Labor has taken a position consistent with the views expressed in the Conference Report, in ERISA IB

^{14/} Section 502(a) of ERISA.

- 21 -

75-5 (29 CFR 2509.75-5), question-and-answer FR-10, which provides an example of a co-fiduciary breach and discusses possible alternatives for remedial action by the plan fiduciaries who have actual knowledge of such breach. The alternatives mentioned in FR-10 include obtaining an injunction from a federal district court under section 502(a)(3) of ERISA, notifying the Labor Department, or publicizing the breach of fiduciary responsibility by the co-fiduciary. Question-and-answer FR-10 also states that the fiduciary should take "all reasonable and legal steps to prevent the action" which constitutes a co-fiduciary breach and that section 405(a)(3) imposes a positive duty "to make reasonable efforts under the circumstances to remedy the breach."

Discussion of Request

In light of the unique circumstances of this case, it is our view that the procedures set forth above to be followed by Equitable and VPCO in cases where they obtain actual knowledge of a co-fiduciary breach constitute the "proper remedy . . . determined by the facts and circumstances" of this particular case, as contemplated in the Conference Report accompanying ERISA, and constitute "all reasonable and legal steps" as contemplated in question-and-answer FR-10. The recent history of the Central States Fund has been one of continuous investigations by Congress, the press, the Justice Department, the IRS, and the Labor Department. The Labor Department's investigation is still

- 22 -

continuing; in addition, the Justice Department has recently announced that it is conducting 12 separate investigations involving the Central States Pension Fund.^{15/} Under these circumstances, it is clearly duplicative and unnecessary for either Equitable or VPCO (or other investment managers) to be required to investigate co-fiduciary breaches and to commence costly litigation with respect thereto. Such a requirement would also unduly interfere with the investment managers accomplishing their "primary goal"--the "preservation of the Fund's assets."

In this regard, as noted earlier, Equitable, VPCO, and the other investment managers have not been retained by the Fund as litigators and the compensation that they are to be paid as investment managers does not purport to compensate them for litigation efforts with respect to co-fiduciary breaches. Of course, Equitable, unlike VPCO and the other investment managers, is responsible for monitoring the activities of the other investment managers and, where appropriate, for removing and replacing the other investment managers (other than VPCO). However, under the plan instruments, it is the responsibility of the Trustees of the Fund to bring litigation on behalf of the Fund to remedy co-fiduciary breaches. If such a responsibility were now to be imposed upon Equitable and VPCO, it would require a reconsideration of the entire arrangement pursuant to which Equitable

^{15/} BNA Daily Tax Report, July 21, 1977.

- 23 -

and VPCO have agreed to serve as managing fiduciary and investment managers for the Fund.

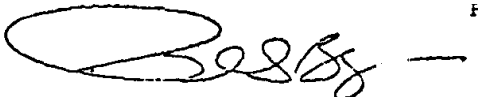
Accordingly, Equitable and VPCO believe that they should not be responsible for commencing litigation to remedy co-fiduciary breaches about which they obtain actual knowledge. Rather, the most appropriate and efficient method under the circumstances for remedying co-fiduciary breaches involving the Fund are the procedures set forth in this advisory opinion request specified for both Equitable and VPCO. These procedures contemplate that Equitable will satisfy its responsibilities to monitor the activities of Fund investment managers and to take removal action where appropriate and permitted. They also contemplate that the Trustees of the Fund will be given an opportunity to perform their responsibilities to take appropriate remedial action on behalf of the Fund, including litigation, in cases of co-fiduciary breaches. The procedures further provide that these matters be brought directly to the attention of the Labor Department so that it can monitor the actions taken to obtain remedies on behalf of the Fund. Because the Department of Labor has had a long and continuing involvement in reviewing and monitoring the operations of the Central States Pension Fund, the Labor Department is particularly well equipped to take appropriate action, if necessary, when in any of the situations which have been brought to its attention, appropriate remedial action by the Trustees has not been or is not being taken.

Conclusion

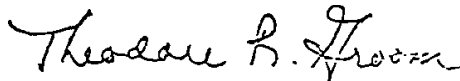
Accordingly, based on the facts and representations set forth herein, we believe that it is appropriate for the Department to issue an advisory opinion that if Equitable or VPCO obtains knowledge of a breach of fiduciary responsibility by another fiduciary of the Fund, which breach occurs in its entirety subsequent to the date that Equitable or VPCO becomes a fiduciary with respect to the Fund, Equitable or VPCO will satisfy its responsibilities under sections 404(a)(1) and 404(a)(3) of ERISA if they comply with the procedures specified above for either Equitable or VPCO.

If it is contemplated that the Department will not issue the requested advisory opinion, a conference is hereby requested. If any further information is required in connection with this request, please contact Theodore R. Groom or Lawrence J. Hass, attorneys for Equitable, or Paul S. Berger, attorney for VPCO.

Respectfully submitted,



Paul S. Berger
Attorney for
Victor Palmieri and Company
Incorporated



Theodore R. Groom
Attorney for
The Equitable Life Assurance
Society of the United States

Enclosures: Exhibits A - G -- Agreements dated June 30, 1977

Response of the Director,
Office of Regulatory Standards
and Exemptions

2 SEP 1977

Based on the facts and representations stated in the forgoing letter and the exhibits attached thereto, and more

particularly the facts and representations contained on pages 15 through 23 of your letter, and without necessarily agreeing with the legal analysis set forth therein, it is the opinion of the Department of Labor that where The Equitable Life Assurance Society of the United States (Equitable) and Victor Palmieri and Company Incorporated (VPCO) follow the procedures set forth on pages 15 through 16 of your letter, Equitable and VPCO will have, based on the facts and circumstances of this particular case, satisfied their responsibilities under sections 404(a)(1)(B) and 405(a)(3) of the Employee Retirement Income Security Act of 1974 with respect to their duty to remedy a known breach of trust.

Fred W. Stuckwisch
Director, Office of Regulatory
Standards and Exceptions