

SEP 9 1977

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

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-3591A.

Sincerely,

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

ARNOLD & PORTER

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WASHINGTON, D.C. 20036

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JULY 29, 1977

Exemption Application (Dual)
Office of Regulatory Standards
and Exceptions
Pension and Welfare Benefit Programs
U.S. Department of Labor
Washington, D.C. 20216

Commissioner of Internal Revenue
Attention: E:EP:T
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Request for an Advisory Opinion or Ruling or
Alternatively an Exemption Application Sub-
mitted by Victor Palmieri and Company Incor-
porated and The Equitable Life Assurance
Society of the United States -- Indemnifica-
tion Provisions

Gentlemen:

Enclosed is a request for an advisory opinion or ruling that the current reimbursement or payment by the Central States, Southeast and Southwest Areas Pension Fund ("Fund") of certain litigation-related expenses incurred by Victor Palmieri and Company Incorporated ("VPCO") and The Equitable Life Assurance Society of the United States ("Equitable") does not constitute a transaction prohibited by ERISA sections 406(a)(1)(B) or (D) and Code sections 4975(c)(1)(B) or (D). Alternatively, it is requested that the agencies issue an administrative exemption under section 408(a) of the Employee Retirement Income Security Act ("ERISA") and section 4975(c)(2) of the Internal Revenue Code ("Code").

ARNOLD & PORTER

Office of Regulatory Standards
and Exceptions
Commissioner of Internal Revenue
July 29, 1977
Page Two

This request and exemption application 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 new arrangements, which are generally believed to be an integral part of the government's efforts to reform the management of the Fund's assets, are scheduled to go into effect on September 1, 1977. Accordingly, it is absolutely essential that favorable action be taken on this request by that date. In order to expedite the processing of this request, we are prepared to meet with representatives of the agencies at any time to discuss it and to cooperate with and assist the agencies to the fullest extent possible.

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

Respectfully submitted,



Paul S. Berger
Attorney for
Victor Palmieri and Company
Incorporated

Enclosures

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

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August 3, 1977

Exemption Application (Dual)
Office of Regulatory Standards
and Exceptions
U.S. Department of Labor
Washington, D.C. 20216

Commissioner of Internal Revenue
Attention: E:EP:T
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Request for Advisory Opinion or Ruling or
Alternatively an Exemption Application Sub-
mitted by The Equitable Life Assurance Society
of the United States and Victor Palmieri and
Company Incorporated --
Indemnification Provisions

Gentlemen:

Enclosed is a request for an advisory opinion or ruling that the current payment by the Central States, Southeast and Southwest Areas Pension Fund ("Fund") of certain litigation-related expenses incurred by The Equitable Life Assurance Society of the United States ("Equitable") and Victor Palmieri and Company Incorporated ("VPCO") does not constitute a prohibited "lending" or "use of plan assets" between the Fund and a party in interest. Alternatively, it is requested that the agencies issue an administrative exemption under section 409(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 4975(c)(2) of the Internal Revenue Code ("Code") with respect to such payments.

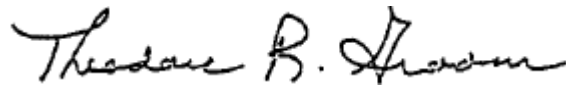
August 3, 1977

Page Two

This request and exemption application is part of the series of ruling, advisory opinion and exemption requests that Equitable and VPCO are submitting in connection with the new arrangements for independent management of the assets of the Fund. These new arrangements, which are generally believed to be an integral part of the government's efforts to reform the management of the Fund's assets, are scheduled to go into effect on September 1, 1977. Accordingly, it is absolutely essential that favorable action be taken on this request by that date. In order to expedite the processing of this request, we are prepared to meet with representatives of the agencies at any time to discuss it and to cooperate and assist the agencies to the fullest extent possible.

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

Respectfully submitted,

A handwritten signature in dark ink, reading "Theodore R. Groom". The signature is written in a cursive, slightly stylized font.

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

Enclosures

Exemption Application (Dual)
Office of Regulatory Standards and
Exceptions
Pension and Welfare Benefits Programs
United States Department of Labor
Washington, D.C. 20216

Internal Revenue Service
Attention: E:EP:T
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Request by The Equitable Life Assurance Society of
the United States and Victor Palmieri and Company
Incorporated for an Advisory Opinion or Ruling or
Alternatively a Class Exemption Relating to In-
demnification Payments in Advance of Judicial
Determination.

Gentlemen:

On behalf of The Equitable Life Assurance Society
of the United States ("Equitable") and Victor Palmieri
and Company Incorporated ("VPCO") it is hereby respect-
fully requested that the Department of Labor and the
Internal Revenue Service issue an advisory opinion or
ruling that the current payment by the Central States,
Southeast and Southwest Areas Pension Fund ("Fund")
of certain litigation-related expenses incurred by Equi-
table or VPCO does not constitute either a prohibited

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"lending" between the Fund and a party in interest, or a prohibited "use of plan assets" by a party in interest.

If it is determined not to issue the requested advisory opinion or ruling, it is alternatively requested that the agencies issue an appropriate administrative exemption under section 408(a) of the Employee Retirement Income Security Act ("ERISA") and section 4975(c)(2) of the Internal Revenue Code ("Code").

Effective on the closing date of agreements hereinafter described, Equitable will be the named fiduciary of the Fund with specified overall responsibilities for investment of the assets of the Fund. Equitable, VPCO and other organizations will be the investment managers for specific blocks of Fund assets with responsibility for the daily investment management decisions relating thereto. In order for the new fiduciaries to properly undertake these functions and to achieve the best investment results consistent with prudent management, it is necessary to obtain certain

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exemptions from, and interpretations with respect to, provisions of ERISA and the Code.

In this connection we describe and identify

- (a) the general structure of the Central States Plan;
- (b) the general background of the contractual arrangements -- i.e., those events and circumstances leading to the appointment of Equitable as named fiduciary and to the appointment of Equitable, VPCO and other independent organizations as investment managers; (c) Equitable and those organizations designated as investment managers of fund assets and their agreements with the Fund; and
- (d) the specific transactions here involved.

(a) The Central States, Southeast and
 Southwest Areas Pension 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

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Teamsters.*/ It was originally established in 1955 by trust agreement, amended from time to time thereafter, by and between 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, Inc.*/ 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 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.

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

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

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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.* 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

*/ 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.

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of all assets of the Fund was stated to be \$1,438,230,551.* The Fund is believed to be the second largest multi-employer plan in the United States today.

(b) Background of the Contractual Arrangements

The Teamsters Central States Fund has been the subject of investigation by the Labor Department, the Justice Department, the Internal Revenue 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.

*/ The information in the noted and immediately preceding paragraph is extracted from the Annual Report (Form 5500) of the Central States Plan filed by the Plan Administrator with the Internal Revenue Service and Department of Labor.

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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 Internal Revenue 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.*/

On March 14, 1977, IRS and DOL issued a joint release (USDL 77-232, IR-1775) announcing the resolution of certain issues respecting asset management of the

*/ 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 Subcommittee (March 21, 1977).

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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, IRS said that it would issue a determination letter requalifying the Fund and DOL said that it would terminate that portion of its investigation relating to procedures of the Fund respecting asset management.

Subsequently, on April 26, 1977, the IRS issued a determination letter announcing the qualification of the Plan and Fund for tax years beginning after December 31, 1976. 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

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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 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 VPCO and on Friday, June 17, 1977, the trustees of the Fund announced their decisions to select Equitable as managing fiduciary with primary responsibility for the investment and management of all fund assets and to select Equitable, VPCO and others as investment managers.*

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

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The contractual arrangements, described in greater detail in the following paragraphs, were executed by the Trustees on July 7, 1977, effective as of June 30, 1977.

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 testimony of Secretary of Labor Marshall before a subcommittee on 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.

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* * *

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 the 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.

* * *

We believe that the contractual structure [between the Fund and Equitable, VPCO 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 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

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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."

(c) Equitable, VPCO, and the Other Investment Managers, and the Contractual Arrangements With the Fund for the Management of Assets

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 I.D. No. is 13-5570651. It 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 were a total of \$22,430,472,618. Prior to its execution of the June 30, 1977 contracts, with a minor exception described below, it had no affiliation or relationship with the

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Central States Fund.* /

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 nonrail 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. No. is 95-2644662. It has had no prior affiliation with the Fund.

Lazard Freres and Co. ("Lazard") is an investment banking firm registered as an investment adviser under

* / 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.

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the Investment Advisers Act of 1940 with its principal office located at One Rockefeller Plaza, New York, New York 10020.

Mercantile National Bank at Dallas ("Mercantile") is a national banking association which is a wholly-owned subsidiary of Mercantile Texas Corporation. Its address is P. O. Box 5415, Dallas, Texas 75222.

Crocker Investment Management Corp. ("CIMCO") is a corporation registered as an investment adviser under the Investment Advisers Act of 1940 and is a wholly-owned subsidiary of Crocker National Corporation, and its principal office is located in San Francisco, California.

In order to carry out that part of their agreement with the Department and the Service of March 14, 1977, and the condition of the Fund's requalification letter 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

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with Equitable, VPCO, Lazard, Mercantile, and CIMCO.*/
These 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 manage-
ment 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.

*/ It might be noted that the Labor Department had
an interest in the quality of the investment managers
chosen. In the Senate testimony cited at page 10,
Secretary Marshall set forth several criteria which
the government required be met in the contractual arrange-
ment divesting the Trustees of management responsibility.
He stated one criterion as follows: "The arrangement
also had to involve managers who were competent and
who could withstand public scrutiny." Later in the
same prepared statement, Secretary Marshall listed the
investment managers which have been appointed, and
stated, "These institutions and their management
assignments were fully satisfactory to the Labor
Department."

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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). VPCO will also be responsible for preparing a study evaluating the Fund's asset management staff.

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. 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

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or decrease the portion of the securities-related assets allocated to such managers. Equitable cannot, however, allocate assets to itself for management if such allocation would increase the percentage of the securities-related assets under its management to above 25 percent. Further, when additional funds become available for investment in securities-related assets, it is Equitable's responsibility to allocate such additional assets to investment managers. Under the agreement, however, Equitable will receive one-fourth of such additional funds as may become available for new investment in securities-related assets.

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

The investment objectives and policies to be followed by all of the Fund's investment managers are

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to be developed by Equitable. Equitable can also give specific guidelines to any of the securities investment managers with respect to the management of a particular portion of the Fund's assets.

While the other investment managers will be subject, for the most part, to Equitable's oversight, Equitable's performance as fiduciary and investment manager will be monitored by the Trustees. As in the case of VPCO, however, 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.

At the present time, it is uncertain whether there will be any other Fund assets besides securities-related or real estate-related assets when Equitable and the other investment managers assume their responsibilities for the Fund. If there are "other assets" at that time, Equitable is empowered to appoint an investment manager (including itself) to manage such assets. In such a case, it is Equitable's intention to either

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appoint someone other than Equitable to manage the assets, manage the assets itself at no charge to the Fund, or manage the assets itself for compensation upon the approval of the Fund's Trustees.

These investment management arrangements encompass all of the assets of the Fund, except those assets held in the Fund's 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. Under the agreements, neither Equitable nor any of the investment managers have any responsibility with respect to the assets held in the Account.*/

*/ Subsequent references in this application to asset managers, investment managers, independent investment managers, etc. are not intended to include the manager of the Benefits and Administration Account.

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These 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.

Equitable and VPCO believe that the granting of the determinations applied for herein and in separate applications are essential if Equitable and VPCO are to assume their responsibilities for the Fund.

(d) Specific Transaction Here Involved

Article XI of the Master Agreement between Equitable, VPCO and the Fund provides the following indemnification provisions:

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"To the fullest extent permitted by law, the Trustees acting on behalf of the Fund agree to indemnify and hold harmless Equitable, each investment manager and the custodian (severally sometimes referred to hereinafter as a person or such person) from and against any losses, claims, damages or liabilities, joint or several, to which such person may be subject insofar as such losses, claims, damages or liabilities or actions in respect thereof arise by virtue of this Agreement, or the fiduciary duties and responsibilities undertaken pursuant to this Agreement, and will reimburse each such person for any legal or other expenses reasonably incurred by such person in connection with investigating, defending or preparing to defend any such loss, claim, damage, liability or action; provided, however, that the Fund shall not be liable in any such case to the extent that in the final judgment of a court of competent jurisdiction such person is found to have breached this Agreement or breached any duties or responsibilities undertaken pursuant to this Agreement. Expenses incurred in defending a civil or criminal action, suit or proceeding, if requested by such person, shall be paid by the Trustees in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by such person to repay such amount plus reasonable interest in the event that in the final judgment

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of a court of competent jurisdiction such person is found to have breached this Agreement or any duties or responsibilities undertaken pursuant to this Agreement, and proof satisfactory to the Trustees that such person is financially capable of repaying such amount in the event it is found liable for the amount alleged as damages in the action." Exhibit A, Article XI.

Similar provisions are contained in the Investment Management Agreements. (See, e.g., Article IX of the Investment Management Agreements for Real Estate-Related Assets, Exhibits B and C).

Because of the unique history of the Fund, it would not have been possible to retain highly-qualified, independent, professional managers without indemnification provisions which allow the current payment or reimbursement by the Fund of litigation-related expenses. The Fund and its Trustees have been the subjects of intensive government investigations and numerous lawsuits. There are many lawsuits currently pending which relate to Fund assets and are in various stages of litigation. Notwithstanding the fact that Equitable and VPCO are stable, independent entities with outstanding

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records of managing assets similar to those owned by the Fund, the history of litigation surrounding the Fund indicates that Equitable and VPCO may well be drawn into litigation concerning Fund assets at some time in the future. Such litigation could involve a number of lawsuits and considerable expenditure. As the Labor Department undoubtedly realized at the time the original contracts in this matter were drafted,^{*/} confirmation of the validity of the provisions in these contracts allowing reimbursement or payment of litigation-related expenses by the Fund in advance of a judicial determination is essential if Equitable and VPCO are to assume their responsibilities for the Fund.^{**/}

^{*/} See the discussion earlier of the Labor Department's role in overseeing formulation of the contractual arrangements between the Fund, Equitable, VPCO, other managers, and the custodian.

^{**/} This submission deals only with the question whether a prohibited "lending" of plan assets is involved in the current payments or reimbursements described above. A separate request for an advisory opinion has been submitted with respect to the validity of the indemnification provisions generally under ERISA sections 410 and 404(a). That request also deals with ERISA sections 406 and 408(c)(2), and Code sections 4975(c)(1) and (d)(10) (apart from the questions of "loan" and "use of plan assets" in connection with an "advance" addressed in this submission).

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ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) prohibit the "lending of money or other extension of credit between the plan and a party in interest [or disqualified person]." While, as indicated below, our interpretation is to the contrary, payment or reimbursement by the Fund of a fiduciary's litigation-related expenses in advance of a judicial determination could be considered a prohibited "lending". ERISA section 406(a)(1)(D) and Code section 4975(c)(1)(D) prohibit the "use by or for the benefit of, a party in interest, of any assets of the plan." Again, as indicated below, our interpretation is to the contrary, but payment or reimbursement in advance of a judicial determination of the expenses of litigation alleging a breach of a fiduciary duty could be considered a prohibited "use of plan assets". This submission requests an advisory opinion or ruling that no prohibited

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"lending" or "use of plan assets" is involved, or, in the alternative, an administrative exemption to cover the situations described herein.

In our view, the payment of current litigation expenses by the Fund is not a "lending of money". Such payment is merely the satisfaction of a contractual obligation to pay certain obligations incurred by plan fiduciaries. The fact that future events (i.e., a judicial determination that the fiduciary breached his fiduciary responsibilities^{*/} or other obligations assumed under the contract) could generate an obligation by the fiduciary to reimburse the Fund for such payment,^{**/}

^{*/} A fiduciary must reimburse the Fund (with interest) for payments made by the Fund if ultimately there is a judicial determination that the fiduciary breached a "responsibility undertaken pursuant to the contract". Since Equitable's and VPCO's fiduciary relationships with the Fund are entirely attributable to their "responsibilities undertaken pursuant to the contract", a breach of a fiduciary duty imposed by Part 4, Title I of ERISA would clearly constitute a breach of such contract responsibilities.

^{**/} Under the contractual provisions, a fiduciary is required to return (with interest) litigation expenses advanced by the Fund where a fiduciary breach is judicially determined.

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does not render the initial payment by the Fund a loan to the fiduciary. The logic of calling such payment a loan would just as well support calling the converse arrangement a loan running in the other direction. That is, if the Fund were required to reimburse the fiduciaries for litigation-related expenses only after a determination that there had been no breach, the current payment of expenses by the fiduciaries could be considered a loan from the fiduciaries to the plan. In our view, neither transaction described above should be considered a loan.

Payments by the Fund pursuant to the indemnification provisions will not be advances per se since payment will only be made currently for expenses actually incurred. Even if considered advances, however, the service provider regulations state that advances with respect to expenses covered by ERISA section 408(c)(2) and Code section 4975(d)(10)* are not prohibited

*/ The separate submission (described in the preceding footnote) on contractual indemnification provisions requests a ruling that payments or reimbursements pursuant to such contract provisions are expenses covered by ERISA section 408(c)(2) and Code section 4975(d)(10).

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transactions provided that the advances are reasonable with respect to the amount of the expense likely to be incurred, and that the party in interest accounts to the plan at the end of the period covered by the advance. Treas. Reg. § 54.4975-6(e)(5); 29 C.F.R. § 2550; 408c-2(b)(4). Payment of expenses actually incurred cannot involve amounts in excess of those "likely to be incurred". To this extent, the "advances" in question here clearly meet the "reasonableness" requirement of the regulations. The accounting requirement should be met by the fact that the fiduciary is not permitted to receive and the Trustees are not permitted to pay amounts in excess of expenses actually incurred, and by the fact that the fiduciary must reimburse the Fund for any payments already made if there is a judicial determination of a breach of contract responsibilities (including any fiduciary responsibility described by ERISA). Under the regulations, therefore, the payments or reimbursements in question would not be prohibited under any theory. It is also significant that no payment in advance of a judicial determination is permitted

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unless the fiduciary proves its ability to make any repayments ultimately required.*/

For the same reasons alleged in the separate submission on indemnification alluded to earlier,**/ payments or reimbursements in advance of a judicial

*/ It may be noted that, subject to limitations similar to those imposed here, the Delaware General Corporation Law allows corporations to make current indemnification payments of litigation-related expenses, even prior to judicial determination:

"Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section." Del. Code tit. 8, § 145(e) (emphasis added).

**/ See the two footnotes immediately preceding the last footnote.

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determination should not be considered a prohibited "use of plan assets." Given the unique and litigious history of this Fund, defending litigation (even in an individual fiduciary capacity where there is no ultimate determination of a fiduciary breach) is part of a Fund fiduciary's responsibilities to the Fund, and the payment of litigation expenses in this circumstance should be considered a "reasonable expense of administering the plan".

The interests of plan participants and beneficiaries will be detrimentally affected if current indemnification of Equitable and VPCO is not permitted. Equitable and VPCO were aware of the possibility of being drawn into litigation involving the Fund if they consented to serve as Fund fiduciaries. They are willing to accept this risk only because of the indemnification provisions of the June 30 agreements. However, an adverse decision with respect to a key aspect of the

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indemnification provisions could seriously disrupt the implementation of these agreements. As stated earlier, putting responsibility for the management of Fund assets in the hands of independent, professional managers has been the central goal of the government agencies in protecting the interests of participants and beneficiaries. Delay in closing would leave asset management in the hands of the Trustees, which could, among other things, result in reversal by the Internal Revenue Service of its determination to requalify the Fund.*/

Based on the facts and representations set forth herein, it is requested that the Department and the Service issue an advisory opinion or ruling that the current reimbursement or payment, pursuant to the June 30 contracts, by the Fund of litigation-related expenses incurred by Equitable or VPCO does not constitute a

*/ The IRS determination letter (cited supra at p. 8) conditions requalification on a transfer of asset management by December 31, 1977.

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transaction prohibited by ERISA sections 406(a)(1)(B) or (D) and Code sections 4975(c)(1)(B) or (D).

Exemption Request

If the agencies determine not to grant the requested interpretation, it is requested, for the reasons set forth above, that the agencies grant an administrative exemption from the restrictions of ERISA sections 406(a)(1)(B) and (D) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(B) and (D). A proposed draft of such an exemption is set forth in Exhibit X. Exhibit X also sets forth all the information required by ERISA Procedure 75-1 and Revenue Procedure 75-26.

To the best knowledge of Equitable and VPCO, the requests set forth above are not currently being considered by any field office of the Service in connection with an active examination or audit of a tax return of Equitable or VPCO. If it is contemplated that the agencies will neither issue the requested

advisory opinion/ruling nor grant the requested administrative exemption, a conference is hereby requested. If any further information is required in connection with these requests, please contact one or both of the undersigned.

Sincerely,

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

Paul S. Berger
Attorney for
Victor Palmieri and Company
Incorporated

Enclosures: Exhibits A - G - Agreements dated June 30, 1977
Exhibit H - Statement required by 26 C.F.R.
§ 601.201(e) (1)
Exhibit I - Statement required by 26 C.F.R.
§601.201(e) (5)
Exhibit J - Power of Attorney
Exhibit X - Information required by ERISA Proc.
75-1 and Rev. Proc. 75-26

Response of the Director,
Office of Regulatory Standards
and Exceptions

Based on the facts and representations stated in the foregoing letter and the exhibits attached thereto, and more particularly the facts and representations contained on pages 20 through 31 of your letter, and without necessarily agreeing with the legal analysis set forth therein, it is the opinion of the Department of Labor that the current reimbursement or payment, pursuant to the indemnification provisions in Article XI of the June 30 contracts, by the Central States, Southeast

and Southwest Areas Pension Fund of litigation related expenses properly and actually incurred by The Equitable Life Assurance Society of the United States or Victor Palmieri and Company Incorporated in the performance of their duties does not constitute a prohibited transaction under section 406(a) (1) (B) or (D) of the Employee Retirement Income Security Act of 1974 (ERISA) to the extent that the current reimbursement or payment of such expenses does not exceed amounts allowed under section 408(c) (2) thereof.

Section 406(a) (1) (B) of ERISA prohibits any direct or indirect lending of money or other extension of credit between a plan and a party in interest, and section 406(a) (1) (D) prohibits the transfer to, or use by or for the benefit of, a party in interest of any assets of a plan. Section 3(14) (A) defines the term party in interest to include a fiduciary. Accordingly, the extension of credit by a plan to a fiduciary, or the transfer of plan assets to a fiduciary, or the use of such assets by or for the benefit of a fiduciary, are prohibited transactions under section 406(a).

However, section 408(c) (2) of ERISA and the regulations thereunder (29 CFR 2550.408c-2) provide, in pertinent part, that nothing in section 406 shall be construed to prohibit any fiduciary from receiving reasonable advances for, compensation for, or reimbursement of expenses properly and actually incurred in the performance of his duties with the plan, provided that the provisions of 29 CFR 2550.408c-2 are satisfied.

We have conferred with representatives of the Internal Revenue Service (the Service) and they have advised us that the Service concurs with the interpretation contained in this response insofar as it relates to sections 4975(c)(1)(B) and (D) and 4975(d)(10) of the Internal Revenue Code of 1954 and 26 CFR 54.4975-6 thereunder.

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