

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



SEP 16 1977

OPINION 77-69/70 A

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

3(38)
402
405(c)
406(b)(1)

Dear Mr. Berger:

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-3586A.

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



SEP 16 1977

OPINION 77-69/70 A

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

3 (38)
402
405 (c)
406 (b) (1)

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-3586A.

Sincerely,

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

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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 Incorporated --
Investment Manager Responsibilities

Gentlemen:

Enclosed is a request for an advisory opinion that: (1) The Equitable Life Assurance Society of the United States ("Equitable"), as a named fiduciary and investment manager with respect to the Central States, Southeast and Southwest Areas Pension Fund ("Fund"), is not liable for the acts and omissions of the other investment managers of the Fund in connection with their day-to-day management of the assets of the Fund; (2) even though Equitable is a named fiduciary with respect to the Fund, it may also serve as an investment manager with respect to the Fund, as defined in section 3(38) of the Employee Retirement Income Security Act of 1974 (ERISA); and (3) if Equitable and the Victor Palmieri and Company Incorporated ("VPCO"), an investment manager with respect to the Fund, reallocate investment management responsibility for any of the real estate-related assets of the Fund, Equitable will not be liable as an investment manager for the management of the assets reallocated from Equitable to VPCO, and VPCO will not be liable as an investment manager for the assets reallocated from VPCO to Equitable.

- 2 -

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. Haas 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

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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
Victor Palmieri and Company Incorporated and
The Equitable Life Assurance Society of the
United States -- Investment Manager Respon-
sibilities

Gentlemen:

Enclosed is a request for an advisory opinion that:
(1) The Equitable Life Assurance Society of the United States ("Equitable"), as a named fiduciary and investment manager with respect to the Central States, Southeast and Southwest Areas Pension Fund ("Fund"), is not liable for the acts and omissions of the other investment managers of the Fund in connection with their day-to-day management of the assets of the Fund; (2) even though Equitable is a named fiduciary with respect to the Fund, it may also serve as an investment manager with respect to the Fund, as defined in Section 3(38) of the Employee Retirement Income Security Act of 1974 ("ERISA"); and (3) if Equitable and the Victor Palmieri and Company Incorporated ("VPCO"), an investment manager with respect to the Fund, reallocate investment management responsibility for any of the real estate-related assets of the Fund, Equitable will not be liable as an investment manager for the management of the assets

ARNOLD & PORTER

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

reallocated from Equitable to VPCO, and VPCO will not be liable as an investment manager for the assets reallocated from VPCO to Equitable.

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 requests, please be in touch with the undersigned (872-6784), Peter Schmidt (972-6834), or Lauralee Matthews (872-6791) of this firm.

Respectfully submitted,


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
Investment Manager Responsibilities

It is respectfully requested that the Department of Labor issue the following advisory opinion: (1) that The Equitable Life Assurance Society of the United States ("Equitable"), as a named fiduciary and investment manager with respect to the Central States, Southeast and Southwest Areas Pension Fund (the "Fund"), is not liable for the acts and omissions of the other investment managers of the Fund in connection with their day-to-day management of the assets of the Fund; (2) that even though Equitable is a named fiduciary with respect to the Fund, it may also serve as an investment manager with respect to the Fund, as defined in section 3(38) of the Employee Retirement Income Security Act of 1974 (ERISA); and (3) that if Equitable and the Victor Palmieri and Company Incorporated ("VPCO"), an investment manager with respect to the Fund, reallocate investment management responsibility for any of the real estate-related assets of the Fund, Equitable will not be liable as an investment manager for the management of the assets reallocated from Equitable to VPCO, and VPCO will not be liable as an investment manager for the assets reallocated from VPCO to Equitable.

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

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to this request, including a description of the Fund, Equitable and VPCO, and 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 the request.

Statement of Facts

(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 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 Association; Cleveland Draymen Association, Inc.

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

and Northern Ohio Motor Truck Association, Inc.^{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 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

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

^{3/} We understand that negotiations between the Teamsters and employers 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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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.

(b) Background of this Request

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.

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

^{4/} 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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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.^{5/}

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 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.

^{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).

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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 of plan benefits and (b) payment of administrative expenses), under direct continuing control of independent professional investment managers as defined in 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

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managers.^{6/} 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 by 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's 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 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. . . .

* * *

^{6/} 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.

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 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

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. 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 one minor exception, it had no affiliation or relationship with the Central States Fund.^{7/}

(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.

(e) The New Investment Management Arrangements

In order to carry out the central part of their agreement with the Department and the Service of March 14, 1977, and the conditions 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 with Equitable, VPCO, Lazard Freres & Co. (Lazard), Mercantile National Bank at Dallas (Mercantile), and Crocker Investment Management Corp (CIMCO). The master agreement (attached as Exhibit A) established the

^{7/} 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.

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).

Pursuant to the terms of the agreement, Equitable and VPCO may agree on variations in the allocation of real estate-related assets described above if, in their combined judgement, the variations would not be adverse to the interests of the Fund. In case of such a variation or reallocation, Equitable and VPCO may also agree on an appropriate reallocation of their investment management fees.

Equitable will also assume the role of Fiduciary for the Fund, which will require Equitable to fulfill a number of

- 11 -

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 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. Equitable also cannot decrease its allocation below 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 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 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.

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 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 herein, it is requested that the Department issue an advisory opinion that:

(1) Equitable, as a named fiduciary and investment manager with respect to the Fund, is not liable for the acts and omissions of the other investment managers of the Fund in connection with their day-to-day management of the Fund's assets;

(2) Even though Equitable is a named fiduciary with respect to the Fund, it may also serve as an investment manager

with respect to the Fund as defined in ERISA section 3(38);
and

(3) If Equitable and VPCO reallocate investment management responsibility for the real estate-related assets of the Fund, Equitable will not be liable as an investment manager for the management of the assets reallocated from Equitable to VPCO, and VPCO will not be liable as an investment manager for the assets reallocated from VPCO to Equitable.

Discussion

- (1) Equitable, as a named fiduciary and investment manager with respect to the Fund, is not liable for the acts and omissions of the other investment managers if the Fund in connection with their day-to-day management of the Fund's assets.
-

As indicated above, Equitable's functions as a named fiduciary with respect to the Fund are detailed in agreements with the Fund Trustees and include, as here relevant, the responsibility to monitor the performance of the investment managers of the Fund (other than Equitable), and to develop the investment objectives and policies to be followed by all of the Fund's investment managers. Equitable has no responsibility under the agreements for the day-to-day management of the assets that are under the management of the other investment managers. In this regard, section 8.04 of the master agreement provides that:

Each investment manager shall have sole and exclusive authority to manage, acquire and dispose of those Fund assets delivered to and accepted by it for management in accordance with the provisions of its Investment Management Agreement.

Therefore, Equitable should not be deemed to have investment management responsibility with respect to assets managed by other investment managers merely because Equitable has oversight responsibilities with respect to such investment managers or because Equitable will be an investment manager for other Fund assets.

As a general rule, a fiduciary of an employee benefit plan has only those functions and responsibilities with respect to the plan that are specified in the plan instruments (including the agreements pursuant to which such persons perform their fiduciary functions for the plan). This general rule is contained in section 3(21)(A) of ERISA, which states that, "a person is a fiduciary with respect to a plan to the extent" he has or exercises fiduciary authority or responsibility and is reiterated in the Department's regulations defining the term "fiduciary" with reference to investment advisers (29 CFR 2510.3-21(c)(2)). Thus, a person charged solely with the management of plan assets would not be responsible as a fiduciary for the administration of the plan, and a person responsible for the management of a specified segment of plan assets would not be responsible for the management of the remaining plan assets.

There are, however, certain exceptions to the general rule stated above. One of these exceptions is ERISA section 403(a), which provides that when plan assets are held in trust (as is the case here), the plan trustees have the exclusive authority to manage and control the assets of the plan, except

in the case of a directed trust (section 403(a)(1)), or where the assets are put under the control of a duly constituted investment manager or managers (section 403(a)(2)). Thus, if the trust is not a directed trust and if no investment managers have been appointed, the plan trustees are automatically given sole authority and responsibility for day-to-day management of plan assets. Further, unless the plan instruments specifically provide otherwise, no other plan fiduciaries (e.g., the plan administrator) have such authority or responsibility. Even if the performance of the trustees is being monitored by a second fiduciary, the second fiduciary's responsibility will be limited to acting in accordance with the prudent man rule, etc. in the performance of his or her oversight duties, unless the plan instruments extend such duties beyond mere oversight. Thus, the second fiduciary would not be subject to liability for losses arising from the day-to-day management of plan assets if he or she has been prudent in the performance of his or her oversight responsibilities.

The exclusive authority and discretion of plan trustees to manage plan assets can be limited under ERISA section 403(a)(2) if a duly constituted investment manager or managers has been appointed. However, since the general rule is that a fiduciary only has the responsibility and authority expressly given to him and since section 403(a) provides that trustees shall generally have exclusive asset management authority and responsibility, it follows that the authority or responsibility

of any investment manager is limited solely to the authority and responsibility expressly delegated to such investment manager. In the case at hand, since Equitable has been appointed as investment manager with respect to only 25 percent of the Fund's securities-related assets and approximately one-third of the Fund's real estate-related assets, Equitable would not be subject to liability as an investment manager with respect to the remaining Fund assets.

The general rule regarding the management of plan assets (i.e., that it is solely the responsibility of the plan trustees unless properly delegated to others), should also be applied with respect to Equitable's role as a named fiduciary of the Fund with general investment oversight and policy-making responsibility. Equitable's authority, responsibility and liability as named fiduciary in the asset management area is limited to the performance of those duties expressly assigned to Equitable, i.e., monitoring, removal and appointment of other investment managers and the development of investment policies and objectives. In performing these named fiduciary duties, it will be Equitable's responsibility to, among other things, review periodically the performance of each investment manager to determine whether they have followed the objectives and policies of the Fund in making investments and whether they have achieved the investment goals expected of them. Based on this review, Equitable will determine whether to continue or terminate each securities investment manager and whether it is appropriate to increase

or decrease the assets allocated to each securities investment manager. Equitable will also develop and periodically refine the investment objectives and policies of the Fund consistent with the evolving needs of the Fund.

Since these named fiduciary duties do not include the actual management of assets allocated to others, Equitable would not have liability as an investment manager for the acts and omissions of those who do in fact have day-to-day investment management responsibility over such assets. Equitable is only required to perform its functions as a named fiduciary in a prudent and otherwise proper fashion.

Accordingly, based on the facts and representations set forth herein, Equitable, as a named fiduciary and an investment manager of the Fund, should not be deemed to be liable for the acts and omissions of the other Fund investment managers in connection with their day-to-day management of the Fund's assets.

- (2) Even though Equitable is a named fiduciary with respect to the Fund, it may also serve as an investment manager with respect to the Fund.

The new arrangements for the management of the Fund's assets provide that Equitable will be the named fiduciary for the Fund with responsibility to monitor the performance of the other Fund investment managers and to remove (and appoint) the other investment managers (except VPCO). We understand that the plan instruments will be amended by the Trustees in accordance with section 402(a)(2) of ERISA to so provide.

The June 30, 1977 agreements provide that Equitable will be an "investment manager" for the Fund with responsibility for managing 25 percent of the Fund's securities-related assets and approximately one-third of its real estate-related assets. As an investment manager, and in the performance of its functions as a named fiduciary, Equitable will be subject to oversight by the Trustees of the Fund.

In this regard, the definition of the term "investment manager" contained in ERISA section 3(38) provides that:

The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2)) --

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who is (i) registered as an investment advisor under the Investment Advisers Act of 1940; (ii) is a bank, as defined in that Act; or (iii) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

The question is whether the parenthetical language in the definition means that a named fiduciary of a plan cannot also be an investment manager for the plan.

Although no apparent purpose for this parenthetical is given in either ERISA or the Conference Report, it is our view that this section was not intended to prohibit named fiduciaries from also serving as investment managers. Rather, we believe that the parenthetical language was merely intended to indicate that in order for a person to be an investment manager for a

plan, he must be more than a mere trustee or a named fiduciary - he must be a professional who meets the standards of section 3(38)(B) of ERISA.

The combination of ERISA sections 3(38), 402(c)(3), 403(a)(2) and 405(d)(1) provides the only mechanism whereby plan trustees (in addition to all other plan fiduciaries) can be relieved of authority, responsibility and liability for the management of plan assets. This "mechanism" is the appointment of an investment manager or managers, as defined in ERISA, to assume the asset management function for the plan. If the appointment of the investment manager(s) is made by an appropriate named fiduciary pursuant to a provision in the plan authorizing the appointment (section 402(c)(3)), and if the authority to manage the assets of the plan is delegated to the investment manager(s) in accordance with section 402(a)(2), the trustees will be relieved of liability for the acts and omissions of the investment manager(s) pursuant to section 405(d)(1).

In our view, because of the broad exculpation from liability for plan trustees that is afforded by this "mechanism," Congress believed it necessary to include a requirement in ERISA that investment managers meet certain minimum qualifications or standards that would tend to indicate that a person serving as an investment manager has appropriate expertise in the management of assets and investments. Thus, section 3(38) requires that an investment manager be either a registered investment adviser (subject, therefore, to regulation by the

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U.S. Securities and Exchange Commission), a bank (subject to regulation on the state and federal level), or an insurance company qualified under the laws of more than one State to perform asset management functions (and, therefore, subject to state regulation).

If a person meets these requirements, he is qualified to serve as a plan investment manager and should be permitted to do so regardless of any other positions he might hold with respect to the plan. By including the parenthetical in section 3(38), Congress merely intended to indicate that a non-professional, even if he holds the position of plan trustee or named fiduciary, cannot be an investment manager who would thereby relieve other plan trustees of liability for the management of plan assets. Such a trustee or named fiduciary would have to meet the same minimum qualification standards to be an "investment manager" that any other person who might wish to serve as an investment manager would have to meet.

In this regard, although Equitable is a named fiduciary with respect to the Fund, it is also qualified to be an "investment manager" under section 3(38) because it is registered as an investment adviser under the Investment Advisers Act of 1940 and because it is an insurance company qualified to manage, acquire and dispose of plan assets under the laws of more than one State. Accordingly, we believe that Equitable may serve as both a named fiduciary of the Fund, with oversight

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responsibility with respect to all Fund investment managers other than Equitable, and as an investment manager of the Fund subject to oversight by the Fund Trustees.

- (3) If Equitable and VPCO reallocate investment management responsibility for the real estate-related assets of the Fund, Equitable and VPCO will not be liable as investment managers for the management of the assets reallocated to the other.

Under the agreements, Equitable and VPCO may, in the course of their management of the Fund's real estate-related assets, agree to vary the initial allocation of such assets prescribed in the agreements. A question has arisen, however, as to whether Equitable remains liable as an investment manager for the day-to-day management of assets reallocated from Equitable to VPCO, and whether VPCO remains liable for the day-to-day management of assets reallocated from VPCO to Equitable.

As discussed above, we believe that the general rule is that a fiduciary only has the authority and responsibilities given to him or her in the plan instruments and that under section 403(a) of ERISA the trustees of a plan generally have exclusive asset management authority, except to the extent the trust is a directed trust or such authority, in whole or in part, is specifically delegated to investment managers. Thus, Equitable and VPCO, as investment managers for the Fund, have only those investment management responsibilities that are expressly

delegated to them in the plan documents (in this case, the agreements with the Fund and the amendments to the trust instruments to be made pursuant to those agreements). Initially, Equitable's investment management responsibility with respect to real estate-related assets is limited specifically to those assets located, for the most part, east of the Mississippi River, and VPCO's responsibility covers those assets located west of the Mississippi. Although Equitable is responsible for monitoring VPCO's performance, this monitoring responsibility does not subject Equitable to liability for the acts and omissions of VPCO (see the discussion of issue No. 1 above).^{8/}

As noted above, Equitable and VPCO have the authority to agree on reallocations of assets. This will normally occur when Equitable and VPCO agree that, under the particular facts and circumstances, a particular asset can be better managed by the other investment manager. In our view, once a reallocation is made, the prior investment manager would no longer be responsible for the investment management of the asset and would not have liability for losses stemming from the acts and omissions of the new investment manager with respect to the reallocated asset.

This view is confirmed by §8.04 of the Master Agreement (Exhibit A) which provides that:

^{8/} VPCO does not have monitoring responsibility with respect to Equitable's performance; accordingly, VPCO is not liable for the acts and omissions of Equitable.

Each investment manager shall have sole and exclusive authority to manage, acquire and dispose of those Fund assets delivered to and accepted by it for management in accordance with the provisions of its Investment Management Agreement.

Thus, the June 30, 1977 agreements recognize that it may be beneficial for the Fund to permit a reallocation of real estate-related assets (see Exhibit A, §2.05) and that, if such a reallocation does occur, it will relieve the manager (either Equitable or VPCO) who gives up the reallocated asset from responsibility and liability for the management of the asset (Exhibit A, §8.04).

This situation is comparable to the situation where a trustee plan retains an investment manager to manage the plan's assets. If the manager should resign or be terminated, the trustees would automatically assume full investment responsibilities. The terminated investment manager would have no responsibility or liability for the acts or omissions of the trustees in managing the plan's assets. The same would be the case if a new investment manager were hired to replace the old one. This is because a person is a fiduciary under the definition of the term in section 3(21)(A) of ERISA only "to the extent" of the fiduciary authority and responsibility that he has or exercises; he is not a fiduciary beyond that point.

This position was articulated by the Labor Department in its regulations defining the term "fiduciary" with reference to investment advisers (including investment managers). 29 CFR 2510.3-21(c). In §2510.3-21(c)(2), the Department stated

that a person who is a fiduciary by reason of being an investment adviser shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have or exercise any fiduciary authority or responsibility. Thus, once a person ceases to be an investment manager with respect to a particular plan asset, he does not incur liability for acts and omissions of other fiduciaries in the management of that asset because he is no longer a fiduciary with respect to such asset.^{9/}

^{9/} The concept of allocating fiduciary responsibilities between two or more fiduciaries, including responsibilities relating to asset management, is not foreign to ERISA. Thus, section 405(b) (1) (B) of ERISA provides, with reference to trustees, that:

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

In addition, the Conference Report states that:

It is customary for those who manage and control the plan to allocate their responsibilities and, within limits, designate others to carry out the daily management of the plan. The conference substitute established special rules which will enable fiduciaries to continue to allocate and delegate their responsibilities. However, allocation or delegation is to be allowed only if the plan provides for it (or provides procedures for it) . . . H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 297 (1974).

Accordingly, if Equitable and VPCO reallocate investment management responsibility for the real estate-related assets of the Fund, Equitable will not be liable as an investment manager for the management of the assets reallocated from Equitable to VPCO, and VPCO will not be liable as an investment manager for the assets reallocated from VPCO to Equitable.

Conclusion

It is respectfully requested that the Department of Labor issue the following advisory opinion: (1) that The Equitable Life Assurance Society of the United States ("Equitable"), as a named fiduciary and investment manager with respect to the Central States, Southeast and Southwest Areas Pension Fund (the "Fund"), is not liable for the acts and omissions of the other investment managers of the Fund in connection with their day-to-day management of the assets of the Fund; (2) that even though Equitable is a named fiduciary with respect to the Fund, it may also serve as an investment manager with respect to the Fund, as defined in section 3(38) of the Employee Retirement Income Security Act of 1974 (ERISA); and (3) that if Equitable and the Victor Palmieri and Company, Inc. ("VPCO"), an investment manager with respect to the Fund, reallocate investment management responsibility for the real estate-related assets of the Fund, Equitable will not be liable as an investment manager for the management of the assets reallocated

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from Equitable to VPCO, and VPCO will not be liable as an investment manager for the assets reallocated from VPCO to Equitable.

If it is contemplated that the Department of Labor 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 either Theodore R. Groom or Lawrence J. Hass, attorneys for Equitable, or Paul S. Berger, attorney for VPCO.

Sincerely,

Paul S. Berger

Attorney for

Victor Palmieri and Company
Incorporated

Theodore R. Groom

Attorney for

The Equitable Life Assurance Society
of the United States

Enclosure: Exhibit A -- Master agreement between the Trustees
of the Fund, Equitable and VPCO

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 without necessarily agreeing with the legal analysis set forth therein, the following is the opinion of the Department of Labor with respect to the three requests for an advisory opinion contained in your letter:

(1) The Equitable Life Assurance Society of the United States (Equitable), as a named fiduciary and investment manager with respect to the Central States, Southeast and Southwest Areas Pension Fund (the Fund), is not responsible for the day-to-day management of the assets of the Fund that are under the management of other investment managers. Article 8.04 of the Agreement provides that each investment manager has exclusive authority with respect to the management of Fund assets delivered to it for management. Equitable, to the extent it is a fiduciary of the Fund by virtue of being an investment manager for a portion of the Fund's assets, is not a fiduciary with respect to the Fund assets delivered to another investment manager of the Fund and is therefore not responsible for the day-to-day management of the Fund assets which were delivered to the other investment managers. See 29 CFR 2510.3-21(c)(2). Similarly, while Equitable, as the named fiduciary of the Fund with the duty to appoint, remove and monitor the Fund's investment managers, is a fiduciary in this capacity with respect to all the assets of the Fund which are accepted for management by investment managers, it is not responsible for the day-to-day

management of such assets by the other investment managers, but must be prudent in appointing such managers and in continuing to retain them as investment managers. See section 405(c)(2)(A) of the Employee Retirement Income Security Act of 1974 (ERISA); Conference Report No. 93-1280, 93rd Congress, 2d Session, at pages 301-302.

(2) Equitable may serve as both a named fiduciary of the Fund with oversight responsibility with respect to all Fund investment managers other than Equitable, and as an investment manager of the Fund subject to the oversight of the Fund trustees, provided that the instruments governing the Fund are amended in accordance with the provisions of sections 402(a)(1), 402(c)(1) and 402(c)(3) of ERISA to explicitly so provide.

Section 3(38) of ERISA defines an investment manager as "any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2)) -- (A) who has the power to manage, acquire, or dispose of any asset of a plan" and who meets certain other requirements. A question has been raised as to whether the parenthetical language of section 3(38) should be read as a prohibition against a named fiduciary of a plan also serving as an investment manager for plan assets. We are of the view that the parenthetical expression "other than a trustee or named

fiduciary" does not prohibit a named fiduciary from serving as an investment manager for plan assets, but rather that the parenthetical expression is intended to clarify the circumstances under which a person is an investment manager. A person who is a named fiduciary or trustee with respect to the plan does not become an investment manager of the plan merely by virtue of meeting the three requirements set forth in subsections A, B and C of section 3(38), but must be appointed as an investment manager. In our view, the parenthetical expression serves to reinforce the distinction between trustee or named fiduciary functions, on the one hand, and investment manager functions, on the other hand. Under the statutory scheme (a) an investment manager as such does not have named fiduciary or trustee powers to allocate or designate its investment management function for plan assets to other persons (unless the investment manager is explicitly appointed as a named fiduciary with respect to such assets pursuant to section 402(a)(2) of ERISA with power to allocate and designate under section 405(c)(1) of ERISA) and (b) an investment manager who is a named fiduciary and who has the power to allocate or designate

its investment management function to other persons may not, as named fiduciary, monitor its own performance as an investment manager or in making any such allocation or designation, absent an appropriate exemption from the restrictions of section 406 of ERISA.

(3) If Equitable and Victor Palmieri and Company Incorporated (VPCO) reallocate investment management responsibility for the real estate-related assets of the Fund, Equitable and VPCO will not be responsible as investment managers for the management of the assets reallocated to the other provided that the instruments governing the Fund are appropriately amended to provide for such reallocation because, as stated in the discussion contained in (1) above, an investment manager for a portion of a plan's assets is not a fiduciary with respect to assets of the plan delivered to another investment manager. In the ordinary situation, such an allocation by and between investment managers would be ineffectual to rid the investment manager of his responsibility to manage because investment managers who are not explicitly appointed as named fiduciaries with respect to the same assets with the power to allocate and designate with respect to the investment management responsibility cannot allocate investment management responsibility or designate other fiduciaries to handle such responsibility. See sections 3(38), 402(a)(2) and 405(c)(1) of ERISA and the discussion contained in (2) above. However, in this

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situation, the plan documents (if appropriately amended) and the Agreement contemplate that Equitable, as named fiduciary, would have the power to designate investment managers, including itself, for all Fund assets provided the conditions of the Agreement are met (see Articles 1.03, 1.05 and 2.05 of the Agreement). Therefore, the allocation would be a valid designation by Equitable under the plan documents of an investment manager for the assets so allocated.

The response to the issue raised in this paragraph (3) does not address the issue raised in your July 29, 1977 submission as to whether any such designation by Equitable would contravene section 406(b)(1) of ERISA.

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