

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



May 2 1979

George L. Powell, Esq.
The Prudential Insurance Company of America
Prudential Plaza
Newark, NJ 07101

OPINION 79-26 A

406(a) (1)

408(b) (8)

Dear Mr. Powell:

On July 30, 1976 your authorized representative, Mr. Theodore R. Groom, submitted on your behalf a request for an advisory opinion concerning the effect of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) on the acquisition of contractual interests in the general account or in one or more pooled separate accounts of the Prudential Insurance Company of America (the Company) by an employee benefit plan in relation to which the Company is a party in interest. Specifically, Mr. Groom requested the Department's opinion that the acquisition of such contractual interests at the direction of a plan participant or a plan fiduciary other than the Company or its affiliates is not a prohibited transaction within the meaning of section 406 of the Act provided the Company receives no more than reasonable compensation.

An application for a ruling similarly interpreting section 4975 of the Internal Revenue Code of 1954 (the Code) was simultaneously submitted to the Internal Revenue Service by Mr. Groom. Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code, with certain exceptions not here relevant, has been transferred to the Secretary of Labor, and the Secretary of the Treasury is bound by the rulings issued by the Secretary of Labor pursuant to such authority. Therefore this response is issued solely by the Department and references to specific sections of the Act shall also refer to corresponding sections of the Code.

Information submitted with the request and in subsequent submissions indicates that for about fifteen years the Company has maintained separate accounts in which the contractual obligation of the Company is based on the investment results of the assets in the separate account. A contract held by a plan often involves the accumulation of funds in several separate accounts and in the Company's general account for that part of the contract that represents a fixed obligation

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of the Company. Many contracts permit the transfer of funds among the accounts at the direction of a plan fiduciary independent of the Company. A participating plan may also invest additional plan assets in the separate accounts or may purchase additional fixed benefit obligations from the Company. An investment management charge is paid to the Company (or an affiliate) for management of separate account assets, and fee structures based on a percentage of assets vary depending on the investment purpose and underlying portfolio of the separate account (e.g. common stocks, fixed income securities, real estate).

A party in interest is defined in section 3(14) of the Act to include a person who is a fiduciary in relation to an employee benefit plan or a person who is providing services to such a plan. In the Notice of Proposal of an Exemption (42 FR 54886, October 11, 1977) which was subsequently adopted as Prohibited Transaction Exemption 78-19 (43 FR 59915, December 22, 1978), the Department took the position that assets held in a separate account of an insurance company to support obligations under contracts purchased by an employee benefit plan are plan assets and that, thus, an insurance company maintaining such separate account is a fiduciary with respect to those plan assets and is a party in interest with respect to the plan.

Section 406(a)(1) of the Act, among other things, prohibits the direct or indirect sale, exchange or leasing of any property between a plan and a party in interest, the furnishing of goods, services, or facilities between the plan and a party in interest and the transfer to, or use by or for the benefit of, a party in interest, of any asset of the plan. Section 408(b)(8) of the Act, however, provides a statutory exemption from the prohibitions of section 406(a)(1) for any transaction between a plan and a pooled investment fund of an insurance company qualified to do business in a State if --

- (a) the transaction is a sale or purchase of an interest in the fund,
- (b) the insurance company receives not more than reasonable compensation, and
- (c) the transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

Prohibited Transaction Exemption 77-9 (42 FR 32395, June 24, 1977; amended 44 FR 1479, January 5, 1979) provides an exemption for the purchase, with plan assets, of an insurance or annuity contract from an insurance company. Section IV of the exemption requires that the transaction be effected in the ordinary course of business, that the terms of the transaction be as favorable to the plan as an arm's length

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transaction with an unrelated party would be, and that the total of all fees, commissions and other consideration received in connection with the transaction be reasonable. Section V of the exemption imposes additional conditions which limit the parties in interest who may avail themselves of the exemption, and require that the transaction be approved by an independent plan fiduciary, that various disclosures be made, and that records regarding the transaction be maintained.

Accordingly, based on the facts submitted, we conclude that:

- (1) The purchase by a plan of interests in one or more of the Company's separate accounts is exempt from the prohibitions of section 406(a) of the Act by reason of section 408(b)(8) of the Act if the transaction meets the conditions set forth in that section.
- (2) The purchase of other insurance or annuity contracts from the Company is exempt from the prohibitions of section 406(a) and (b) of the Act to the extent that the transaction complies with the conditions and requirements of Prohibited Transaction Exemption 77-9.

Mr. Groom had also requested an advisory opinion regarding the effect of the prohibitions of section 406 of the Act upon the Company's provision of services involving discretionary allocations of a plan's interest among various pooled separate accounts and/or the general account of the Company where the discretionary allocation by the Company is expressly permitted by the plan or by a fiduciary independent of the Company and the Company receives no more than reasonable compensation. However, by letter dated March 7, 1979 Mr. Groom indicated his intention to apply for an administrative exemption covering such discretionary asset management. Consequently your request for an advisory opinion on this issue is deemed withdrawn and we will take no further action on it.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely yours,

Alan D. Lebowitz
Assistant Administrator
Office of Fiduciary Standards