OPINION 80-67A
3(14)G
408(a)
PTE 78-19

NOV 13 1980

Mr. Theodore R. Groom
Mr. Lawrence J. Hass
Groom and Nordberg
Suite 450
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Messrs. Groom and Hass:

This is in response to your letter of June 6, 1980 requesting an advisory opinion on behalf of The Prudential Insurance Company of America, The Equitable Life Assurance Society of the United States, John Hancock Mutual Life Insurance Company, Connecticut General Life Insurance Company, and Aetna Life Insurance Company (hereinafter referred to collectively as the Company(ies)) that certain transactions do not constitute prohibited transactions under the Employee Retirement Income Security Act of 1974 (ERISA).

Your letter sets forth the following facts and representations describing the transactions at issue. Many insurance contracts issued to employee benefit plans provide for allocating amounts received under the contract to a separate account established by the insurance company issuing the contract. Most separate account contracts provide that the results of favorable or adverse investment experience are credited or charged, directly and fully, to the accounts of participating contract holders. Several insurance companies have developed pooled separate accounts which invest primarily or solely in real estate, and an increasingly common way of investing these assets in real estate is to invest in partnerships that own and manage, or develop, individual commercial properties or in corporations organized for the same purposes. (The partnerships and corporations are hereinafter referred to as the entities).

You represent that, typically, the owners of the entity are the insurance company, acting on behalf of the separate accounts, and an unrelated real estate developer or manager. Although the insurance company's ownership interest is allocated to the separate account, the insurance company holds legal title to the interest in the entity, and the separate account has the beneficial interest in the entity. You represent that once the entities are established, they engage in ongoing real estate activities that may result in additional transactions involving the separate account. For example, the entity may from time to time have a need to borrow funds or to obtain additional contributions of capital which may present a desirable investment opportunity for the separate account.

You have asked for an advisory opinion to the effect that where a 50 percent or more interest in an entity is legally owned by a Company as fiduciary for the benefit of a separate account, the entity is not, itself, a party in interest with respect to a plan invested in that separate account. Similarly, you request an advisory opinion that such an entity not be considered an affiliate of the Company for purposes of Prohibited Transaction Exemption 78-19.

Section 3(17) of ERISA defines the term separate account to mean an account established and maintained by an insurance company under which income, gains and losses, whether or not realized, from assets allocated to such account are, in accordance with the applicable contract credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

In a Notice of Proposed Exemption published on October 11, 1977, (42 FR 54886), 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. Under section 3(14)(A) of ERISA, a fiduciary is included in the definition of a party in interest; and an entity 50 percent or more of which is owned directly or indirectly by a fiduciary is also a party in interest by reason of section 3(14)(G) of ERISA.

Ownership of 50 percent or more of an interest in an entity which interest is legally owned by a Company and allocated to a separate account for the benefit of employee benefit plans holding separate account contracts under which the results of favorable or adverse investment experience are credited or charged, directly and fully, to the accounts of participating plans does not cause the entity to be a party in interest for purposes of section 3(14)(G) of ERISA with respect to additional transactions between the entity and the separate account because the ownership interest in the entity is a plan asset the investment experience of which is directly allocated to participating plans. Similarly, an interest in an entity owned by a company and allocated to a separate account, as described above, does not cause the entity to become an affiliate of the Company for purposes of Prohibited Transaction Exemption 78-19.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs