

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-4A
408(b)(5)(A)

DEC 24 1980

John W. Rossitter, Esq.
Connecticut Mutual Life Insurance Company
140 Garden Street
Hartford, Connecticut 06115

Re: Connecticut Mutual Life Insurance Company Field Office Employees
Retirement Plan and Trust (the Plan)
Exemption Application No. D-327

Dear Mr. Rossitter:

On October 30, 1975, you submitted the above-referenced exemption application and, in the alternative, a ruling request to the Department of Labor (the Department) and the Internal Revenue Service. Your submission concerns the prohibited transaction rules provided under sections 406 and 408 of the Employee Retirement Income Security Act of 1974 (the Act), and section 4975 of the Internal Revenue Code of 1954 (the Code). 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 and exemptions under section 4975 of the Code, with certain exceptions not here relevant, has been transferred to the Secretary of Labor. Accordingly, this response is being made solely by the Department.

Connecticut Mutual Life Insurance Company (Connecticut Mutual) is a mutual life insurance company chartered in Connecticut and operating in 49 states, offering life insurance, annuity, and disability income products. In 1973, the Plan was established by Connecticut Mutual and adopted by its General Agents in order to provide retirement benefits for the employees of the General Agents.

The Plan is a defined benefit offset pension plan which provides uniform eligibility and benefit standards for all agency office employees. The Plan is administered by Connecticut Mutual's "Employee Benefits Committee", which is appointed by its President. Persons who are the trustees of the Plan and members of the Committee are officers of Connecticut Mutual. They are selected by Connecticut Mutual. Connecticut Mutual has more than 100 General Agents. Each General Agent is granted a territory within which he is to recruit and train agents of Connecticut Mutual and provide them with office space and necessary clerical and administrative services. The General Agents are independent contractors who arrange for their own facilities and staff. It is represented that although the General Agents are independent contractors, their relationship to Connecticut Mutual is very close. They must conduct their agency operations in accordance with broad Connecticut Mutual policies and objectives, subject to close surveillance and management assistance by Connecticut Mutual.

The General Agent receives compensation from Connecticut Mutual in various forms. Like other agents, he is entitled to first year commissions, renewal commissions, and fees on policies written by him. He is also entitled to “overriding commissions” on business written through his agency by other agents. Furthermore, specific items of expense, such as rent and clerical salaries, are partially reimbursed by Connecticut Mutual pursuant to established expense allowances.

The participants in the Plan are the clerical employees of the General Agents. Contributions to the Plan are made (and deducted) by the General Agents. The General Agents are, however, fully reimbursed by Connecticut Mutual for their contributions. Furthermore, in the event that an agency is without a General Agent (due to death, retirement, or termination), Connecticut Mutual would become the employer of the agency’s employees and would directly make any necessary contributions. On several occasions, Connecticut Mutual has executed adoption agreements as an employer with respect to the Plan at times when an agency office included in the Plan is not headed by a General Agent and made the required contributions thereunder.

Contributions under the Plan are pooled and jointly invested by individual trustees who are appointed by the Employee Benefits Committee. Currently, all funds under the Plan are being invested by the trustees under a Connecticut Mutual Group Annuity Contract (Contract). The Contract is an “immediate participation guarantee” type contract under which contributions may be allocated to either an interest-bearing general account or to a segregated asset account.

Section 406(a) of the Act provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes one of certain prohibited transactions between the plan and a party in interest. The term “party in interest” is defined in section 3(14) of the Act to include a fiduciary, a person providing services to the plan, or an employer any of whose employees are covered by the plan. It seems clear under section 3(14) of the Act that Connecticut Mutual, as stated in your submissions, is a party in interest with respect to the Plan. Further, as stated in your submissions, the continuation of the relationship between Connecticut Mutual and the Plan pursuant to the Contract would constitute prohibited transactions under section 406(a) of the Act. Similarly, prohibited transactions would result under section 4975(c)(1) of the Code.

Section 408(b)(5) of the Act, however, provides a statutory exemption from the prohibitions of section 406 of the Act. It states, in part:

The prohibitions provided in section 406 shall not apply to:

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is –

(A) the employer maintaining the plan ...”¹

¹ Section 4975(d)(5) of the Code is a parallel exemption which is identical to section 408(b)(5) of the Act, except for the substitution of the term “disqualified person” for “party in interest” and minor differences in punctuation.

Thus, if Connecticut Mutual is “the employer maintaining the plan”, it would qualify for a statutory exemption from the prohibited transaction prohibitions with respect to the above-described contract. It is this interpretation that is the subject of the ruling request.

Section 3(5) of the Act defines “employer” to mean:

“any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.”

Section I(2) of the Plan document defines an “Employer” to be:

“... the General Agent who shall have adopted this Plan with the consent of the Committee, and who has not terminated or been succeeded as an Employer. Such term shall also include Connecticut Mutual Life Insurance Company when an agency office included in the Plan is not headed by a General Agent,...”

As stated above, Connecticut Mutual has executed adoption agreements as an employer with respect to the Plan, and made the required contributions thereunder, at times when an agency office included in the Plan was not headed by a General Agent.

In addition, by virtue of its sponsorship of the Plan and its designation, through its president, of the Employee Benefits Committee, which, in turn, appoints the individual trustees, Connecticut Mutual acts “in the interest of the employer, in relation to an employee benefit plan” within the contemplation of section 3(5) of the Act.

Accordingly, based on the facts as presented, we conclude that Connecticut Mutual is the “employer” with respect to the Plan for purposes of sections 408(b)(5) of the Act and 4975(d)(5) of the Code. Thus, the sale of contracts for life insurance, health insurance, or annuities from Connecticut Mutual to the Plan is exempt under sections 408(b)(5)(A) and 4975(d)(5)(A) from the prohibited transaction restrictions of section 406 of the Act and from the excise tax on prohibited transactions contained in section 4975(a) and (b) of the Code, provided the Plan pays no more than adequate consideration for such contracts.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of that 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