U.S. Department of Labor Pension and Welfare Benefits Administration
Washington DC 20210

August 24, 1993

Mr. Frederick W. Rumack
Director of Tax & Legal Services
Buck Consultants
Two Pennsylvania Plaza
New York, New York 10121

93-22A
ERISA SECTION
103

Dear Mr. Rumack:

This is in response to your request that the Department of Labor (the Department) provide an advisory opinion on the proper method of preparing an annual report for a defined benefit pension plan (Plan) subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request guidance concerning the proper disclosure of information relating to assets held in an insurance company separate account.

You represent that the separate account in question is established pursuant to a specific group annuity contract (Contract) entered into by an employer and an insurance company to provide benefit payments under the Plan. Using formulas and procedures set by the Contract, the insurance company initially establishes a benefit payment reserve amount that is expected to exceed the benefit payments to be paid to individuals under the Plan. The insurance company determines this amount based on a roster supplied by the employer of individuals entitled to benefits under the Plan. The employer contributes to the separate account an amount equal to the benefit payment reserve amount. The employer may subsequently add additional individuals to the roster, subject to recalculation of the benefit payment reserve amount and provided that the additional payments would not cause the value of the separate account to fall below the recalculated benefit payment reserve amount. Payments due to individuals on the roster are paid out of the separate account, and the Plan may periodically withdraw from the separate account amounts in excess of the benefit payment reserve amount.

The employer has the right under the Contract to recommend the appointment of investment advisors with authority to direct the investment of assets held in the separate account. Acting under guidelines set by the Contract, the insurance company may reject such recommendations and must monitor the performance of investment advisors to ensure that investment guidelines set by the Contract are being observed.[1] Fees due to the insurance company and to investment advisors and custodians, including "annuity guarantee fees," "benefit transaction fees," "asset management fees," and "deferred contract set-up fees," are paid from the separate account.

The Contract may be discontinued only under specific circumstances detailed therein. If the value of the separate account falls at any time below the minimum amount that the insurance calculates will be necessary to pay the benefits due under the Plan to individuals on the roster, or for more than five consecutive days below the benefit payment reserve amount, or if the Contract's investment guidelines are violated, the insurance company will discontinue the Contract. In such an event, the insurance company will continue to make the required benefit payments, as specified in the roster, out of the separate account and will independently manage the separate account without reference to the Contract. The Plan may then elect to withdraw from the separate account any amount in excess of the benefit payment reserve amount.

Alternatively, if the Plan is no longer tax-qualified, or, at the insurance company's discretion if the minimum amount that the insurance calculates will be necessary to pay the benefits due under the Plan to individuals on the roster falls below $10,000,000, the Contract also will be discontinued, but the insurance company then will transfer to its general account the benefit payment reserve amount and continue to make the benefit payments required by the roster. Finally, the employer may choose to discontinue the Contract by purchasing, under guidelines set by the Contract, non-participating annuities for the individuals on the roster, from either the insurance company or another qualifying insurer. Such non-participating annuities will replace or satisfy, as appropriate, the insurance company's obligations under the Contract. You represent that payment of benefits under the Plan is not guaranteed through allocated contracts supported by assets in the general account of the insurance company.

The Department's regulation at 29 CFR § 2510.3-101(h)(1)(iii) states generally that, if a plan acquires or holds an interest in a separate account, other than a separate account in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account, the plan's assets include the separate account and each of the underlying assets of the separate account. Under the terms of the Contract, the amounts payable or credited to the Plan are affected by the investment performance of the separate account. Therefore, it is the position of the Department that the separate account and each of its underlying assets are plan assets.

Section 103 of ERISA and the Department's regulations at 29 CFR § 2520.103-1 et seq. generally require the annual report published by the administrator of an employee benefit plan to disclose the current value[2] of plan assets in schedules and statements, including a schedule of all assets held for investment purposes and a statement, aggregated by categories, of assets and liabilities.[3] The Annual Return/Report Form 5500 Series, including the Annual Return/Report Form 5500 and the Form 5500-C/R (a simplified report form for employee benefit plans with fewer than 100 participants at the beginning of the plan year), are the forms used by plan administrators to meet these requirements.[4]

You specifically requested guidance concerning the Plan's annual reporting requirements with respect to the Plan's statement of assets and liabilities, the Schedule A for the Contract, and the Plan's Schedule B.

The statement of assets and liabilities that must be completed for the Plan requires the disclosure of the total current value of all plan assets and liabilities for each asset category specified in the Form 5500 Series. No separate asset category is provided for a "separate account." Consequently, the value of each individual asset held in the separate account must be added to the value of all similar assets held by the Plan, and the aggregate value of those assets must be reported in the appropriate category. [5] For example, in completing the 1992 Form 5500, the plan administrator would include the value of U. S. Government securities held under the separate account in reporting item 31c(3) and the value of corporate stocks held under the separate account in reporting item 31c(5).

The Schedule A (Form 5500) for the Contract must disclose the aggregate current value of the assets held in the separate account as of the end of the Contract year ending with or within the plan year, in addition to certain other information such as, among other things, the name of the Plan and insurance carrier, and other data to identify the Contract.

The Plan's Schedule B (Form 5500) requires the disclosure of actuarial information, in particular the total current value of all plan assets as of the beginning of the plan year, including assets held in the separate account.[6]

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,

Robert J. Doyle
Director of Regulations
and Interpretations

[1] We express no opinion under the fiduciary responsibility provisions of Title I regarding the procedures set forth in the Contract for the appointment of investment managers.

[2] Section 3(26) of ERISA states:

> "The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 402(a)(2)) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination."

[3] See sections 103(b)(3)(A) and (C) of ERISA and 29 CFR § 2520.103-1(b) and (c).

[4] Based on your representations and on the terms of the Contract, it is the view of the Department that the alternative method of compliance for reporting described in 29 CFR § 2520.104-44 is not available to the Plan because, without regard to whether the Contract meets the other requirements of 29 CFR § 2520.104-44(b)(2), the Contract does not involve the payment of premiums "directly by the employer or employee organization from its general assets or partly from its general assets and partly from contributions by its employees or members."

[5] Assets held in a pooled separate account, as defined in 29 CFR § 2520.103-4, are treated differently. The value of individual assets held under a pooled separate account need not be combined with the value of like non-pooled separate account assets, provided the total value of the plan's units of participation in all pooled separate accounts are disclosed in the category for pooled separate accounts and other conditions are met, including the submission of the statement of assets and liabilities of the pooled separate account. See 1992 Annual Return/Report Form 5500 (item 31c(12), entitled "Value of interest in pooled separate accounts"); Form 5500-C (item 27); Form 5500-R (item 13); and instructions to the Form 5500 Series.

[6] Item 6c of the 1992 Schedule B (Form 5500) requires disclosure of this information. The Schedule B is generally required for plans subject to the minimum funding standards of Part 3 of Title I of ERISA.