

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



May 22, 1997

97-16A
ERISA SEC. 406(b)(3)

Stephen M. Saxon
Groom & Nordberg
1701 Pennsylvania Avenue, N.W.
Suite 1200
Washington, DC 20006

Dear Mr. Saxon:

This is in response to your request for an advisory opinion concerning the application of section 406(b)(3) of the Employee Retirement Income Security Act (ERISA) to the receipt of certain fees by the Aetna Life Insurance and Annuity Company (ALIAC), an indirect subsidiary of Aetna Insurance Company, Inc. (Aetna). In particular, you request an opinion that ALIAC's receipt of fees from mutual funds that are unrelated to Aetna for recordkeeping and other services in connection with investments by employee benefit plans in the unrelated funds does not violate section 406(b)(3) under the circumstances described in your request.

ALIAC is a life insurance company domiciled in Connecticut, as well as a registered broker-dealer and a registered investment adviser. You represent that ALIAC sponsors and manages the Aetna Mutual Funds 401(k) Program (the 401(k) Program), which offers sponsors (other than Aetna) of participant-directed defined contribution plans (Plans): a) a volume submitter plan document; b) recordkeeping and related administrative services through Aetna 401 Retirement Plan Services (ARPS), ALIAC's business unit; c) investment options selected by ALIAC consisting of no-load or low load mutual funds from various fund families that are unrelated to Aetna (Unrelated Funds), Aetna Series Funds (a series of mutual funds within a diversified open-ended investment company registered under the Investment Company Act of 1940 (ICA)), and group annuity contracts (GACs) issued by Aetna Life Insurance Company (ALIC), an affiliate of ALIAC;¹ and d) directed trustee or custodial services provided by a bank that is unrelated to Aetna (the Bank). You represent that Unrelated Funds from three different mutual fund families are currently available and that additional families may be added in the future. You further represent that, in the future, Unrelated Funds may also pay fees to ALIAC for "marketing services."²

Plan fiduciaries who are independent of and unrelated to ALIAC, ALIC, and their affiliates are responsible for selecting the investment options to be offered to Plan participants from among the Unrelated Funds, Aetna Series Funds, and several options under the GACs. You further represent that neither ALIAC, ALIC, nor any other affiliate of Aetna (or any of its employees) provides investment advice or recommendations, within the meaning of ERISA section 3(21)(A)(ii), to Plan fiduciaries or participants regarding the advisability of either selecting any of the investment options for the Plans, or investing in any of the investment options that are available under the Plans.

ARPS, ALIAC's business unit, will, pursuant to a plan services agreement, provide some or all of the following services to Plans:

¹ You represent that ALIC utilizes several separate accounts in connection with the GACs, and have assumed for purposes of the advisory opinion request that the assets of these separate accounts would be deemed to be plan assets pursuant to the Department's regulation at 29 CFR 2510.3-101.

² The Department does not express any opinion concerning the effect, if any, of the receipt by ALIAC of fees for marketing services that may be added in the future.

1) one-time installation services, which may include assistance in preparation of Plan documents, participant communication materials, and government filings, and installation of Plan and participant level records into the ARPS recordkeeping systems;

2) basic non-discretionary administrative and recordkeeping services, e.g., (a) enrolling participants, (b) maintaining participant and Plan-level account records, (c) balancing and allocating contributions, loan repayments, and forfeitures among accounts, (d) processing distributions and withdrawals, (e) reconciling Plan and participant activity on a daily basis, (f) preparing periodic account activity statements for participants and Plan fiduciaries, (g) providing participant communication materials, (h) providing toll-free telephone access permitting participants to obtain current balance and investment information, change investment elections, and initiate loans, withdrawals and terminations, (i) performing certain tax qualification testing on a semi-annual basis, and (j) preparation of certain tax reporting forms;

3) recordkeeping and administrative support services for an employer stock fund, or for existing non-convertible GICs held by a Plan pending maturity (which are not associated with the GACs); and

4) optional services, e.g., (a) processing of participant loans, rollovers, lump sum and installment distributions, and qualified domestic relations orders, (b) additional tax qualification testing, (c) assistance in preparation of Plan-level government filings, and (d) recordkeeping and administrative support services for an employer stock fund and/or non-convertible GICs.

You represent that ARPS is not a "plan administrator" as defined in ERISA section 3(16)(A).

You indicate that the 401(k) Program service charges are fully disclosed in the marketing materials describing the 401(k) Program that are provided to Plan fiduciaries. Plans entering into the 401(k) Program pay ARPS a one-time charge for installation services, and annual charges for standard administrative and recordkeeping services, based on the number of participants. Additional services are available on a fee-for-service basis, at the election of the Plan fiduciary. Either party may terminate the arrangement without penalty on 60 days written notice. ALIC receives fees for administration and management of the GACs, including the separate accounts maintained in connection with the GACs. ALIAC receives advisory and administrative fees for investment management and related services provided to the Aetna Series Funds, pursuant to agreements between the Aetna Series Funds and ALIAC, which you represent are standard in the mutual fund industry.³

ALIAC has entered into various contracts with the Unrelated Funds (or their advisers or distributors) pursuant to which shares issued by the Unrelated Funds are purchased on behalf of Plans from the distributors of the Unrelated Funds or directly from the Unrelated Funds. Pursuant to these agreements, ALIAC receives from the Unrelated Funds (or their advisers or distributors) payments in consideration of (1) ARPS's provision of shareholder services (including participant-level recordkeeping) and other administrative services in connection with Plan investments in the Unrelated Funds, and (2) reductions in the Unrelated Funds' shareholder servicing and other administrative expenses (e.g., transfer agency fees) made possible by ARPS's provision of such services. These payments are based on a percentage of Plan assets invested in each Unrelated Fund through the 401(k) Program, and are paid either as administrative expenses by an Unrelated Fund (or by a servicing agent, adviser, or distributor from which the Unrelated Fund obtains its administrative services), or pursuant to a written plan described in Securities and Exchange Commission (SEC) Rule 12b-1, 17 C.F.R. 270.12b-1 (a 12b-1 Plan). The total administrative expenses paid by Unrelated Funds, including fees paid pursuant to 12b-1 Plans, are described to shareholders in prospectus

³ In this letter the Department expresses no opinion regarding the fees paid by the Aetna Series Funds to ALIAC.

materials. ALIAC discloses its receipt of fees from the Unrelated Funds (or their investment managers or other affiliates) in marketing and other disclosure materials provided to Plan fiduciaries. In particular, ALIAC will provide existing and prospective Plan customers a statement disclosing that ALIAC receives, or may receive, fees from many, but not all, of the Unrelated Funds, their managers or other affiliates (described as a percentage of assets under management with the Unrelated Funds). The statement will enumerate the services that ALIAC provides to the mutual funds and the rate of fees paid. The statement will also provide a toll-free telephone number to request more detailed information concerning which funds pay fees and an estimate of how much ALIAC may receive or has received during a particular time period. ALIAC will update the disclosure whenever there is any material change.

ALIAC reserves the right to modify the agreement with the Plan, including the list of Unrelated Funds available for investment, by giving 60 days written notice to the Plan's named fiduciary. If ALIAC decides to delete or replace an Unrelated Fund, ALIAC will notify the fiduciary of each Plan affected by the change. This notice would generally be sent by first class mail or fax. The notice would: (1) explain the proposed modification to the Unrelated Funds menu; (2) fully disclose any resulting changes in the fees paid to ALIAC by the Plan, or by any other entity with respect to Plan assets invested in the affected Funds; (3) identify the effective date of the change; (4) explain the Plan fiduciary's right to reject the change or terminate the agreement; and (5) reiterate that, pursuant to the contract provisions agreed to by the Plan fiduciary, failure to object will be treated as consent to the proposed change.

In addition, ALIAC may, depending on the facts and circumstances, send the notice by certified mail, include additional information and notice of the proposed deletion or substitution in other mailings to the Plan fiduciary (e.g., in periodic newsletters, in materials provided to assist the Plan fiduciary in notifying participants of the change, or in an invoice), or follow up its notice of a Fund deletion or substitution by telephone or other contact with the Plan fiduciary. Any or all of these procedures might be taken with respect to a particular Plan or implemented for all Plans affected by a deletion or substitution of a Fund.

You represent that if a Plan fiduciary rejects the proposed deletion or substitution, ALIAC would not be authorized to make the proposed deletion or substitution effective with respect to that particular Plan. In such circumstances, upon written notice of termination, the Plan fiduciary is afforded an additional 60 days to convert the Plan to another service provider. You represent, however, that in most cases ALIAC would seek to avoid terminating the agreement and losing a customer by negotiating to address the concerns of a Plan fiduciary that has rejected a proposed modification to the Unrelated Funds menu.

You also represent that ALIAC may determine, based on the particular facts and circumstances, to provide more than the minimum 60 days notice of the proposed change, waive some or all of the agreement's 60-day period for notice of termination by a Plan, and/or, if administratively feasible, agree to continue to provide services to a particular Plan beyond the 60-day termination period without deleting or substituting any Unrelated Funds pending the Plan's conversion to a new service provider if additional time is required to complete a conversion. Any of these or other measures might be taken with respect to particular Plans, or implemented for all Plans affected by a deletion or substitution of an Unrelated Fund. You thus represent that a Plan fiduciary will have a reasonable period of time within which to convert to a new service provider.

You have requested an opinion that the receipt of fees by ALIAC from the Unrelated Funds would not violate ERISA section 406(b)(3).⁴ Section 406(b)(3) provides that:

⁴ Under Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Internal Revenue Code of 1986 (the Code) has been transferred, with certain exceptions not here relevant, to the Secretary of Labor, and the Secretary of the Treasury is

A fiduciary with respect to a plan shall not receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

The Department has taken the position that if a fiduciary does not exercise any authority or control to cause a plan to invest in a mutual fund, the mere receipt by the fiduciary of a fee or other compensation from the mutual fund in connection with the plan's investment would not in and of itself violate section ERISA 406(b)(3) (See, Advisory Opinion 97-15A, May 22, 1997)

Whether the receipt of such fees by ALIAC involves violations of section 406(b)(3) turns first on whether ALIAC is a fiduciary with respect to the investing Plans. ALIAC receives fees from an Unrelated Fund for its own account that are based on a percentage of the Plan assets invested in the Unrelated Fund. Such fees are paid to ALIAC by the Unrelated Fund or a related party in connection with a transaction (the purchase and sale of securities issued by the Unrelated Fund) involving the assets of the Plans.

The circumstances under which ALIAC provides recordkeeping and administrative services to Plans, you believe, would not cause ALIAC to be considered a fiduciary. You seek assurance, however, that ALIAC will not be deemed to be a fiduciary with respect to a Plan merely because ALIC, an affiliate under common control with ALIAC, may be considered a fiduciary of the Plan by virtue of providing investment management services for Plan assets invested in an ALIC separate account.

ERISA section 3(21)(A) provides that a person is a fiduciary with respect to a plan to the extent that he/she (i) exercises any discretionary authority or control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or responsibility in the administration of the plan. Section 3(21)(B) provides that neither an investment company registered under the ICA, nor its investment adviser or principal underwriter shall be deemed to be fiduciaries or parties in interest with respect to a plan solely by reason of the plan's investment in securities issued by the investment company, unless the plan covers employees of the investment company, investment adviser or principal underwriter.

Interpretive Bulletin 75-8 (IB 75-8, 29 C.F.R. 2509.75-8) provides additional guidance concerning what types of functions will make a person a fiduciary with respect to a plan. In particular, question-and-answer D-2 states that a person who performs purely ministerial functions, such as preparation of employee communications material, preparation of government reports, and preparation of reports concerning participants' benefits, among others, within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have or exercise any discretionary authority or control regarding the management of the plan or its assets.

Pursuant to these provisions, a determination of whether a person is a fiduciary with respect to a plan requires an analysis of the types of functions performed and actions taken by the person on behalf of the plan to determine whether particular functions or actions are fiduciary in nature and therefore subject to ERISA's fiduciary responsibility provisions. As a result, the question of whether ALIAC is a "fiduciary" within the meaning of section 3(21)(A) of ERISA is inherently factual and will depend on the particular actions or functions ALIAC performs on behalf of the Plans.

bound by interpretations of the Secretary of Labor pursuant to such authority. Therefore, references in this letter to specific sections of ERISA should be read to refer also to the corresponding sections of the Code.

You represent that ALIAC is not a trustee or administrator of the Plans, and provides only non-discretionary administrative and recordkeeping services pursuant to detailed administrative guidelines described in the Plan services agreement. Based on this representation, it would appear that, in most respects, ALIAC would not be a fiduciary with respect to Plans that are a party to such service agreements. ALIAC, however, retains some authority over the investment options selected by the Plans under the 401(k) Program in that it may, in its discretion, delete or substitute Unrelated Funds. In such instances, you represent that, before implementing a change in Funds with respect to any given Plan, ALIAC will provide advance notice to the appropriate Plan fiduciary regarding the change, including any changes in the fees to be received by ALIAC. If the Plan is permitted to maintain its investments in a deleted or replaced Fund, the advance notice will disclose any increased charges attributable to the retention by the Plan of the deleted or replaced Fund. In connection with this notice, you represent that Plan fiduciaries are afforded up to 120 days, or more, to reject the change and terminate ALIAC's services without penalty.

It is the view of the Department that a person would not be exercising discretionary authority or control over the management of a plan or its assets solely as a result of deleting or substituting a fund from a program of investment options and services offered to plans, provided that the appropriate plan fiduciary in fact makes the decision to accept or reject the change. In this regard, the fiduciary must be provided advance notice of the change, including any changes in the fees received, and afforded a reasonable period of time within which to decide whether to accept or reject the change and, in the event of a rejection, secure a new service provider. On the basis of your representations that ALIAC provides the appropriate Plan fiduciary advance notice of the deletion or substitution of Funds and a reasonable period of time following receipt of the notice (here, at least 120 days) within which to reject the change in Funds and secure a new service provider,⁵ as described in your letter, it is the view of the Department that ALIAC would not become a fiduciary solely as a result of deleting or substituting an Unrelated Fund under such circumstances, provided that the actual decision to accept or reject the change in Funds is made by the Plan fiduciary.

You have assumed that ALIC, an affiliate under common control with ALIAC, is a fiduciary with respect to the Plans by virtue of exercising authority or control over Plan assets invested in separate accounts maintained by ALIC. There is nothing, however, in your submission to indicate that ALIAC is in a position to (or in fact does) exercise any authority or control over those assets. Accordingly it does not appear that ALIAC would be considered a fiduciary merely as a result of its affiliation with ALIC.

Finally, it should be noted that ERISA's general standards of fiduciary conduct also would apply to the proposed arrangement. Under section 404(a)(1) of ERISA, the responsible Plan fiduciaries must act prudently and solely in the interest of the Plan participants and beneficiaries both in deciding whether to enter into, or continue, the above-described arrangement with ALIAC, and in determining which investment options to utilize or make available to Plan participants and beneficiaries. In this regard, the responsible Plan fiduciaries must assure that the compensation paid directly or indirectly by the Plan to ALIAC is reasonable, taking into account the services provided to the Plan as well as any other fees or compensation received by ALIAC in connection with the investment of Plan assets. The responsible Plan fiduciaries therefore must obtain sufficient information regarding any fees or other compensation that ALIAC receives with respect to the Plan's investments in each Unrelated Fund to make an informed decision whether ALIAC's compensation for services is no more than reasonable.

⁵ What constitutes a "reasonable period" within which to terminate an arrangement and change service providers will depend on the particular facts and circumstances of each case. There may be situations in which a time period shorter than 120 days may constitute a "reasonable period."

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Bette J. Briggs
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations