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

OPINION 80-13A
408(e)

MAR 5 1980

Mr. James B. Slusher
Associate General Counsel
Kansas City Life Insurance Company
Broadway at Armour
P.O. Box 139
Kansas City, Missouri 64141

Dear Mr. Slusher:

This is in reply to your letter of March 31, 1978 requesting an advisory opinion as to whether the sale of capital stock of Kansas City Life Insurance Company (the Company) held by the Trustees of the Kansas City Life Insurance Company Savings and Investment Plan (the Plan) directly to the Company amounts to a prohibited transaction within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA).

In your request you represent that the Plan is a profit-sharing plan in the form of a thrift or savings plan. The Plan was originally adopted by the Company effective September 1, 1972 and the copy of the Plan submitted indicates that it is the fifth amendment thereof adopted, having an effective date of January 1, 1978. According to the Plan documents, each participant may elect to contribute up to six percent of his annual compensation to the Plan, and, in turn, the Company is then required to contribute, for each participant, out of the Company's current or accumulated earnings and profits, an amount equal to fifty percent of each participant's contribution to the Plan. The Plan documents provide that the contributions of the Company can be made in the form of treasury stock or in shares of authorized but unissued stock of the Company. For purposes of fixing the value of contributions made with shares of treasury or unissued stock, the stock is valued at its bid price on the over-the counter market on a designated "valuation day" of the month when the company contribution becomes due, or, if the market is closed on that day, on the last preceding day during which it was open.

According to the Plan instrument, the Plan is comprised of several separate funds which can be contributed to separately for specifically designated investment purposes. The Company contributions are allocated to one special fund. Individual accounts are established for each individual participant in these several separate funds, and employee and employer contributions are then credited to the appropriate funds. The contributions to each fund are given an initial

value evidenced by a given number of units in each fund. Thereafter, determinations are made monthly as to the value of a unit with respect to each fund. The value of an individual participant's account is determined monthly by multiplying the number of units that that individual participant has in each fund by the value of a unit in each of the funds. Accordingly, pursuant to the Plan provisions, benefits distributed to an individual participant or his beneficiaries by reason of his death, retirement or disability are equal to the value of that participant's accounts in the various funds.

The Trustees are authorized to maintain a cash reserve in any amount they deem necessary in order to provide for current distribution of benefits. This cash reserve may consist of uninvested contributions of the Company and participants, or of proceeds from the sale of assets of the Trust. The Plan instrument specifically empowers the Trustees of the Trust funds to invest Plan assets in the capital stock of the Company, including but not limited to its treasury stock. The Plan, moreover, indicates that the Trustees are authorized to sell any securities held by the Trust to meet current benefit disbursements when the cash reserve is insufficient. The Trustees are empowered to sell property held in the Trust funds at public or private sales.

Section 406(a)(1)(A) of the Act, prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between a plan and a party in interest.

Section 3(14)(c) of the Act defines the term "party in interest" as an employer any of whose employees are covered by an employee benefit plan. Since the Company is an employer of employees covered by the Plan, the Company is a "party in interest" with respect to the Plan. Accordingly, on the basis of the information submitted, the proposed sale to the Company of its capital stock, held by the Plan, is a prohibited transaction within the meaning of section 406(a)(1)(A) of the Act, in the absence of a statutory exemption or administrative relief.

Notwithstanding the prohibition of section 406 of ERISA, section 408(e) of ERISA states, in pertinent part, that:

> Sections 406 and 407 shall not apply to the acquisition, sale or lease by a plan of qualifying employer securities (as defined in section 407(d)(5)) --
>
> (1) if such acquisition, sale, or lease is for adequate consideration,
> (2) if no commission is charged with respect thereto, and
> (3) if --
> (A) the plan is an eligible individual account plan (as defined in section 407(d)(3))…

Section 3(34) of ERISA defines an "individual account plan" as a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount

contributed to the participant's accounts, any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. On the basis of your representations and the information contained in your submissions, it is the Department's opinion that the Plan is an "individual account plan" within the meaning of section 3(34) of ERISA.

Section 407(d)(3)(A) and (B) of ERISA defines an "eligible individual account plan" to include an individual account plan which is a profit-sharing, stock bonus, thrift or savings plan, and which explicitly provides for acquisition and holding of "qualifying employer securities". Section 407(d)(5) of ERISA defines the term "qualifying employer security" to mean an employer security[1] which is stock or a marketable obligation. Since the Company is the employer of employees covered by the Plan, and the shares of stock issued by the Company are securities, as defined under section 2(1) of the Securities Act of 1933, such shares are qualifying employer securities within the meaning of section 407(d)(5) of ERISA.

On the basis of the information submitted, it is our opinion that the Plan is an individual account plan which is a "thrift" or "savings" plan. Since the Plan also explicitly provides for the acquisition and holding of the Company's capital stock, it is the Department's opinion that the relief provided in Section 408(e) of ERISA would be applicable to sales, by the Plan to the Company of capital stock of the Company, if the conditions of section 408(e) are met.

Regarding the first condition of section 408(e), section 5.02(a) of ERISA Procedure 76-1 states that the Department ordinarily will not issue an advisory opinion as to whether a certain consideration amounts to "adequate consideration". For that reason, the Department will offer no opinion as to whether the transaction described in your letter would be for "adequate consideration". On the basis of your representation that there will be no brokerage costs, and to that end no commission charged on the transaction, it is the Department's opinion that the second condition of section 408(e) will be met.

If the Plan, therefore, were to receive adequate consideration for the sale of the Company's capital stock, section 408(e) would exempt the sale from the prohibitions of section 406(a)(1)(A) of ERISA.

Our consideration of the proposed transaction does not relate to any provisions of ERISA not discussed in this letter. Thus, for example, we are not rendering any opinion as to whether the transaction is consistent with the general fiduciary responsibility provisions of section 404 of ERISA.

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[1] Section 407(d)(1) of ERISA, in pertinent part, defines the term "employer security" to mean a security issued by an employer of employees covered by the Plan. Under section 3(20) of ERISA, a "security" has the same meaning as such term has under section 2(1) of the Securities Act of 1933 (15 USC 77 b(1)).

Under Reorganization Plan No. 4 of 1978 (Executive Order 12108, 44 FR 1065) effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor, and the Secretary of the Treasury shall be bound by the rulings issued by the Secretary of the Labor pursuant to such authority. Accordingly, it is the Department's position that the opinion set forth herein applies, to the extent that it relates, to section 4975 of the Internal Revenue Code of 1954.

This letter is an advisory opinion under ERISA Procedure 76-1. Accordingly, the 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
Office of Fiduciary Standards