

**U.S. Department of Labor**

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



Reply to the Attention of:  
Barry Newman  
(202) 523-8971

OPINION NO. 82-11A  
Sec. 408(b)(5)(B)

FEB 3 1982

Mr. Henry Lawrie, Jr.  
Hopkins, Sutter, Mulroy, Davis & Cromartie  
One First National Plaza  
Chicago, Illinois 60603

Re: Allstate Insurance Company  
Allstate Life Insurance Company  
Identification No: F-1769

Dear Mr. Lawrie:

This is in response to your letters of December 19, 1980 and July 17, 1981, regarding the application of Section 408(b)(5)(B) of the Employee Retirement Income Security Act of 1974 (ERISA).

The following representations are included in your submission. Allstate Insurance Company (Allstate), a wholly owned subsidiary of Sears, Roebuck and Company (Sears), is licensed in all fifty states of the United States and issues most forms of property, casualty and liability insurance as well as accident and health insurance on both an individual and group basis. Allstate Life Insurance Company (Life) is a wholly owned subsidiary of Allstate and is also licensed in all fifty states to write life insurance, accident and health insurance and annuities on both an individual and group basis.

Both Allstate and Life actively solicit the sale of insurance coverage to the general public, and, in addition, are insurers of the life, disability, and medical payments portions of employee welfare benefit plans (the Plans) maintained by Sears and by corporations owned by Sears. Historically, Allstate has been the insurer of the medical payments portions of those Plans while Life has been the insurer of the life and disability portions. For the year 1979, Allstate and Life generated \$4,925,086,418 in total premiums of which \$43,497,757 was written in connection with Plans maintained by Allstate for the benefit of its own employees and \$185,710,661 was written in connection with other Plans in Sears controlled group.

After subtracting the premiums written by Allstate as the employer maintaining a Plan from both the numerator and denominator of the percentage test imposed by section 408(b)(5)(B) of ERISA, the ratio of premiums and annuity considerations attributable to contracts written by Allstate and Life for all Plans and their employers in the Sears group of corporations to the total of all premiums and annuity considerations for all lines of insurance written by Allstate and Life was approximately 3.8%.

The management of Allstate has decided to concentrate all accident and health insurance in Life for the purposes of increased efficiency and better risk management. Under an indemnity reinsurance agreement, effective January 1, 1981, Allstate ceded to Life, as reinsurer, 100 percent of the risk under each group accident and health policy issued by Allstate. Commencing on January 1, 1981, as occasion permits, group insurance and health policies will, subject to the agreement of the group policy holder, be rewritten with Life as the direct insurer.

The indemnity reinsurance agreement will not effect the rights or interests of the Plans insured by the contracts issued by Allstate or impact upon Plan costs. Allstate will continue to be directly responsible to the Plans and their participants for the administration and fulfillment of obligations contained in the insurance contracts and no direct contractual relationship will be created between Life and the Plans by this agreement.

You have requested an advisory opinion which provides that to the extent premiums paid by a Plan are already included in the numerator and denominator of five percent fraction of section 408(b)(5)(B) of ERISA, indemnity reinsurance premiums paid from one insurer to another within an affiliated group for the reinsurance of the risk related to that Plan will not again be included in the numerator or denominator of that fraction.

Section 406(a) of ERISA 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 a direct or indirect sale or exchange of any property between the plan and a party in interest or the transfer to or use by or for the benefit of, a party in interest, of any assets of the plan. Section 406(b) further provides that a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account; or in his individual or in any other capacity act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

However, section 408(b)(5)(B) states that the prohibitions provided in section 406 shall not apply to:

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 party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

The indemnity reinsurance premiums paid by one member of the Sears controlled group to another member of that group do not affect the amount of business the insurance companies have done with any Plan. Each Plan continues to pay the same premium and is still entitled to one recovery from the original insuring Company when an insurable event occurs. In addition, this reinsurance arrangement is not a contract for life insurance, health insurance or annuities but merely the assumption of risk by another company. Therefore, the premiums and annuity considerations paid by the Plan for life insurance, health insurance and annuities, once included in the numerator and denominator for the purposes of the 5% test imposed by section 408(b)(5)(B), would not be included in the numerator and denominator for a second time when the insurer, in an intercompany transfer, reinsures the insurance risk of these contracts.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. 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