

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION NO. 83-34A  
Sec. 414(c)(2), 414(c)(3)

JUN 24 1983

Douglas O. Kant  
Assistant Counsel  
John Hancock Mutual Life Insurance Company  
Post Office Box 111  
Boston, MA 02117

Re: John Hancock Separate Account No. 1  
Mortgage and Real Estate Class (the Separate Account)  
Identification No. F-2675

Dear Mr. Kant:

By letter dated June 13, 1983, you requested an advisory opinion that, by reason of section 414(c)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), section 406 of ERISA would not apply to the sale by the Separate Account to the John Hancock Mutual Life Insurance Company's general account of certain interests in mortgages and parcels of real estate that are jointly owned by the Separate Account and the general account.

In your request, you represent the following. The Separate Account is a separate account of the Company under section 3(17) of ERISA. Some of the investors in the Separate Account are employee benefit plans under ERISA section 3(3). Whenever the Company exercises authority or control respecting the management or disposition of assets these plans have invested in the Separate Account, it is a fiduciary under ERISA section 3(21)(i) of those plans, and a party in interest of those plans.

You also represent the following. The interests that are the subject of the proposed sale are undivided fractional ownerships in whole mortgages or parcels of real property that represent sharings of each of the rights inhering in ownership. The owner of one of these interests cannot independently enforce the rights of ownership. Accordingly, its interest in the investment is seldom readily marketable. Even if a buyer can be found, the price is likely to reflect a prohibitive discount from the interest holder's fraction of the fair market value of the whole mortgage or the entire parcel of real estate. As a practical matter, the only way an interest can be disposed of is through letting it mature (if it is an interest in a mortgage) or by selling the whole investment, which happens rarely. The Separate Account has held these interests since before July 1, 1974, and at all times thereafter. It acquired the interests under terms that were no less favorable to it than would have been those of whole investments acquired at the same time. The proposed sale would be for not less than fair market value to the Separate Account.

Under ERISA section 401(b)(2), the assets of a plan include the assets of a separate account in which the plan has invested. Under section 406(a)(1)(A) of ERISA, a fiduciary of a plan may not cause the plan to engage in a transaction if he or she knows or should know that the transaction is a direct or indirect sale of property between the plan and a party in interest of the plan. Under section

406(b)(1) of ERISA, a fiduciary of a plan may not deal with the assets of the plan in his or her own interest or for his or her own account. Under section 406(b)(2) of ERISA, a fiduciary of a plan may not act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Accordingly, a sale between the Separate Account and the general account would, absent an exemption, be a prohibited transaction under section 406.

ERISA section 414(c)(3) provides that section 406 shall not apply to a sale before June 30, 1984, by a plan to a party in interest of property described in section 414(c)(2) if the plan receives no less than the fair market value of the property at the time of the disposition. Section 414(c)(2) exempts a lease or joint use of property involving a plan and a party in interest under a binding contract in effect on July 1, 1974, if the lease or joint use remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if the execution of the contract was not, at the time of the execution, a prohibited transaction under section 503(b) of the Internal Revenue Code or the corresponding provisions of prior law.

It is the Department's opinion that, for purposes of section 414(c)(3), if the conditions of section 414(c)(2) of ERISA are met, the interests described in your application for an advisory opinion are joint uses of property described in section 414(c)(2) of ERISA. Thus, if the conditions of section 414(c)(3) of ERISA are met, section 406 of ERISA would not apply to the proposed sale.

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the Procedure explains the effect of an advisory opinion.

Sincerely,

Alan D. Lebowitz  
Assistant Administrator for Fiduciary Standards  
Pension and Welfare Benefit Programs