

**U.S. Department of Labor**

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



Reply to the Attention of:  
Barry Newman  
523-8971

January 26, 1982

Mr. Mark H. Kovey  
Scribner, Hall, Thornburg & Thompson  
Suite 700  
1875 Eye Street, N.W.  
Washington, D.C. 20006

Re: Transamerica Insurance Corporation of California (Transincorp)  
Transamerica Life Insurance and Annuity Company (Transamerica Life)  
Occidental Life Insurance Company of California (Occidental)

Identification No.: F-1887

Dear Mr. Kovey:

This is in response to your request for an advisory opinion concerning the application of the prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to sales of insurance contracts and annuities made by members of a controlled group of corporations to employee benefit plans covering employees of members of the group.

You have indicated that Occidental, Transamerica Life and Transincorp are California insurance corporations. Occidental and Transamerica Life are wholly owned subsidiaries of Transincorp, which in turn is a wholly owned subsidiary of Transamerica Corporation (Transamerica). Transamerica also owns a number of other subsidiaries which, together with the above mentioned insurance companies, comprise the Transamerica controlled group.

Occidental and Transamerica Life are qualified under California laws and regulations to engage in the accident and health and life insurance business. Occidental and Transamerica Life have issued a number of health and life insurance contracts to employee benefit plans which are maintained by employers that are members of the Transamerica controlled group. For the year 1980 the percentage of total premiums and annuity considerations received by Occidental and Transamerica Life for life and health insurance or annuity contracts for all of these employee benefit plans and their employers with respect to which Occidental and Transamerica Life are parties in interest by virtue of being owned, directly or indirectly by the employer maintaining the plans or by an entity which is a party in interest with respect to the plan, amounted to approximately 4.2% for Occidental and .1% for Transamerica Life (not including premiums or

annuity considerations written by Occidental or Transamerica Life as an employer maintaining the plan).

Transincorp is also qualified by the state of California to engage in the insurance business and has provided medical and dental insurance for a welfare plan which is maintained by Transamerica and two wholly owned subsidiaries of Transamerica. Sales of contracts to this welfare plan, the Group Insurance Plan for Salaried Employees of Transamerica Corporation (which plan also has additional insurance contracts with Occidental) accounts for the total insurance premiums received by Transincorp.

The gross premiums and annuity considerations received in 1980 by Occidental, Transamerica Life and Transincorp for life and health insurance and annuity contracts issued to plans and employers in the Transamerica controlled group, excluding the contracts issued to the plans of the referenced insurance companies themselves, was approximately 2.7% of the gross premium and annuity considerations received by these three companies for all lines of insurance.

You have requested an advisory opinion that the purchase from, or the continuance in force with, Transincorp, Transamerica Life, or Occidental insurance companies of a contract for life insurance, health insurance or annuities by any employee benefit plan covering employees of Transamerica Corporation or any member of the Transamerica controlled group is not a prohibited transaction under section 406 of ERISA or section 4975 of the Internal Revenue Code (the Code), by reason of the exemption contained in section 408(b)(5)(B) of ERISA and section 4975(d)(5)(B) of the Code.

Specifically, you have requested that the advisory opinion provide that the percentage formula contained in section 408(b)(5)(B) of ERISA and section 4975(d)(5)(B) of the Internal Revenue Code will not be applied separately to the insurance premium and annuity consideration receipts of Occidental, Transamerica Life and Transincorp.

Under Reorganization Plan No. 4 of 1978 (Executive Order 12108, 44 FR 1065) 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 Labor pursuant to such authority. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

Sections 406(a)(1)(A) and (D) of ERISA provide, in part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if the fiduciary knows or should know that such transaction constitutes a direct or indirect sale 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)(1) provides that a fiduciary to a plan shall not deal with the assets of the plan in his own interest or for his own account. A party in interest to a plan is defined in section 3(14)(E) of ERISA to include a corporation which owns, directly or indirectly, 50% of more or

the total value of all shares of stock in a corporation which is an employer any of whose employees are covered by such plan, and, under section 3(14)(G), a corporation in which 50% or more of the total value of all shares of stock is owned by a corporation described in section 3(14)(E).

Section 408(b)(5)(B) provides that the prohibitions of 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 --

(B) 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).

It would appear that Occidental, Transamerica and Transincorp are insurers which would meet the requirements of section 408(b)(5)(B) of ERISA and would be exempted under this provision from the prohibited transaction restrictions of section 406 for the sale of contracts for life insurance, health insurance or annuities to employee benefit plans covering employees of employers who are members of the Transamerica controlled group, provided that the plans pay no more than adequate consideration for such contracts and the percentage test of section 408(b)(B) is met.

The Joint Explanatory Statement of the Committee of Conference, H. Rep. 93-1280, 93rd Cong. 2nd Sess. (1974) at 314, describes the percentage test contained in section 408(b)(5)(B) as follows:

This (statutory exemption) applies if the total premiums and annuity considerations written by all such wholly-owned insurers for life insurance, health insurance, and annuity premiums purchased by all employers which are parties-in-interest and their plans are not more than 5 percent of the total premiums and annuity considerations written for all lines of insurance by these insurers. (Emphasis added)

In the opinion of the Department, the percentage test contained in section 408(b)(5)(B) of ERISA, is to be applied by determining the total premiums and annuity considerations derived from contracts written by all insurers which qualify for, and otherwise meet the conditions of, section 408(b)(5)(B) for life insurance, health insurance or annuities for all of the described plans and their employers (excluding premiums and annuity considerations received by an insurer for sales to its own plan) and dividing this amount by the total premiums and annuity considerations

written for all lines of insurance in that year by such insurers (excluding premium or annuity considerations received by an insurer for sales to its own plan). There is no requirement under section 408(b)(5)(B) that each insurer be considered separately from the other insurers described in this section.

Accordingly, Occidental, Transamerica Life and Transincorp would calculate the percentage required by section 408(b)(5)(B), on an annual basis by aggregating the appropriate premiums and annuity considerations received from all plans and their employers in the Transamerica controlled group and dividing this amount by the total premiums and annuity considerations written for all lines of insurance by all three insurers during the year (excluding those premiums and annuity considerations written by an insurer as the employer maintaining a plan).

If, as indicated in your submission, for the year 1980, the insurance and annuity contracts purchased from, or continued in force with, Occidental, Transamerica Life and Transincorp by employee benefit plans covering employees of the Transamerica controlled group represents 2.7 percent of gross premium and annuity considerations received by those three companies the percentage test contained in section 408(b)(5)(B) of ERISA would have been met for that year.

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, relating to the effect of advisory opinions.

Sincerely,

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