

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 83-38A
Sec. 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), 406(b)(2)

JUL 22 1983

Lawrence J. Hass
Groom and Nordberg
Suite 450
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Identification Number: F-2534A
Lincoln National Pension Insurance Company

Dear Mr. Hass:

This is in response to your request for an advisory opinion from the Department of Labor concerning the application of the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to the transfer of certain assets from the pooled separate accounts to the general account of Lincoln National Pension Insurance Company (Lincoln Pension).

Your letter contains the following facts and representations. Lincoln Pension is a stock life insurance company headquartered in Fort Wayne, Indiana. It is a subsidiary of Lincoln National Life Insurance Company which, in turn, is a subsidiary of Lincoln National Corporation, an Indiana insurance holding company, with total assets in excess of \$9 billion, as of December 31, 1981.

Lincoln Pension currently has seven pooled separate accounts, six of which were established under the authority of Lincoln Pension's Board of Directors as of November 16, 1981 for investment solely by ERISA-covered pension plans. These six are not registered under the Investment Company Act of 1940. Lincoln Pension has allocated money from its general account to most of its pooled separate accounts in order to aid in the start-up and management of these accounts. You represent that the purpose of this start-up ("seed money") procedure is to provide the new accounts with sufficient initial funds to achieve diversification of assets, investment flexibility and economies of scale for contractholders participating in these accounts.

Lincoln Pension has contributed a total of \$8.5 million to its seven pooled separate accounts including \$3.5 million to four of the six separate accounts established for ERISA plans now in operation. It is contemplated that all the seed money allocated to these separate accounts will eventually be removed by Lincoln Pension. The four ERISA plan separate accounts in current operation have assets and seed money as follows:

| | <u>ASSETS</u> | <u>SEED MONEY</u> |
|----------------------|---------------|-------------------|
| Separate Account #11 | \$2,767,161 | \$1 million |
| Separate Account #12 | \$1,546,326 | \$1 million |
| Separate Account #14 | \$2,545,582 | \$500,000 |

| | | |
|----------------------|-------------|-------------|
| Separate Account #17 | \$1,177,852 | \$1 million |
|----------------------|-------------|-------------|

When seed money was allocated to each pooled separate account, Lincoln Pension was credited with units of participation in the account based on the applicable unit values of the assets in the accounts.

Lincoln Pension is in the process of obtaining authorization to expand its authority in California to include its variable contract business. The California Insurance Code limits the amount of assets that a California domestic life insurance company may allocate to its separate accounts. As applied to Lincoln Pension's separate accounts, there will be a \$3.89 million overall limitation. Consequently, Lincoln Pension will be required to withdraw approximately \$4.61 million of seed money from its separate accounts in order to comply with the California limitation. Lincoln Pension plans an orderly withdrawal of this excess over a one year period. The removal of the seed money will take place by having Lincoln Pension redeem its participation units in each account for cash. It is anticipated that part of this cash will be derived from cash available in the account and part will come from the sale of assets over the course of the year. You represent that Lincoln Pension will not sell any investments in these accounts merely for the purpose of obtaining the cash needed to remove the excess seed money, and that the removal of seed money will not compromise in any way the funding and investment objectives of any of the accounts.

You have requested an advisory opinion that the transfer of seed money from Lincoln Pension's separate accounts to its general account will not, solely by reason of such transfer, be deemed to involve a violation of any of the prohibited transaction restrictions of ERISA, particularly sections 406(a)(1)(A) and (D) and sections 406(b)(1) and (2).

Section 406(a)(1)(A) of ERISA provides that a plan fiduciary shall not cause the plan to engage in the direct or indirect sale or exchange of any property between the plan and a party in interest.

Section 406(a)(1)(D) of ERISA provides that a plan fiduciary shall not cause 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) of ERISA provides that a plan fiduciary shall not deal with the assets of a plan in his own interest or for his own account.

Section 406(b)(2) of ERISA provides that a plan fiduciary shall not act, in his own capacity or any other capacity, 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.

Section 3(17) of ERISA defines the term separate account as an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

Section 401(b)(2) of ERISA provides that, for purposes of the fiduciary responsibility provisions of ERISA, in the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include the policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of the insurer. For purposes of this provision, the term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term

includes any surplus in a separate account, but excludes any other portion of a separate account.

The explanation of this provision in the Report of the ERISA Conference Committee at pages 296 and 297 is as follows:

"Additionally, it is understood that assets placed in a separate account managed by an insurance company are separately managed and the insurance company's payments generally are based on the investment performance of these particular assets. Consequently, insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets (but need not be held in trust). However, to the extent that insurance companies place some of their own funds in these separate accounts to provide for contingencies, this separate account 'surplus' is not to be subject to the fiduciary responsibility rules."

Accordingly, the seed money placed in Lincoln Pension's separate accounts would not be treated as assets of the plans which have invested in the separate accounts, and Lincoln Pension's redemption of its participation units in the separate accounts according to the rules governing the redemption rights of those participation units and in accordance with your representations does not constitute a violation of the prohibited transaction provisions of sections 406(a)(1)(A) and (D) and sections 406(b)(1) and (2) of ERISA, solely by reason of the transfer of seed money from the separate accounts to the general account.¹

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976). Accordingly, it 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

¹ We assume that there are no pending requests for redemption from investors in the separate accounts at the time Lincoln Pension withdraws the excess from such accounts. We are not expressing any opinion with respect to those cases where such requests are outstanding.