U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-51A
Sec. 401(b)(2), 3(17)

SEP 21 1983

Lawrence J. Hass
Groom and Nordberg, Chartered
1775 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20006

Re: Identification Number: F-2584A

Dear Mr. Hass:

This is in response to your request for an advisory opinion on behalf of the Prudential Insurance Company of America, the Equitable Life Assurance Society of the United States, John Hancock Mutual Life Insurance Company, the Connecticut General Life Insurance Company, Aetna Life Insurance Company, and the Mutual Life Insurance Company of New York. You have asked that the Department of Labor (the Department) issue an advisory opinion that assets held by insurance companies in certain separate accounts that are maintained solely in connection with fixed contractual obligations of an insurance company are not plan assets for purposes of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).

In your opinion request, you describe certain contracts for retirement plans that provide guarantees of return of the principal amount deposited under the contract (plus accrued interest) on a fixed date or dates in the future and the crediting of interest at a rate fixed under the contract. You also indicate that, in recent years, many insurance companies have established separate accounts to which funds deposited under such contracts are allocated. In addition, you indicate that an insurance company may also allocate the premium received in connection with certain nonparticipating fixed annuity contracts to a separate account. According to your letter, these contracts provide fixed annuity payments to retirees for life and the amount paid out under the contract is not affected by the investment performance of the separate account.

On September 15, 1981 the Department issued Prohibited Transaction Exemption 81-82 (PTE 81-82) which grants relief from the prohibited transaction provisions of section 406(a) and 407(a) of ERISA and sections 4975(c)(1)(A) through (D) of the Internal Revenue Code of 1954 (the Code) with respect to transactions involving certain "guaranteed contract separate accounts" established and maintained by life insurance companies solely in connection with guaranteed investment contracts and nonparticipating fixed annuity contracts issued to employee benefit plans. Also on September 15, 1981 the Department proposed exemptive relief from the provisions of section 406(b) of ERISA and section 4975(c)(1)(E) and (F) of the Code. That proposed exemption has not been granted.

You have asked for an advisory opinion to the effect that the assets in guaranteed contract separate accounts, as that phrase is defined in PTE 81-82, are not plan assets for purposes of Title I of ERISA.

Section 401(b)(2) of ERISA provides that 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 such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) 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.

Section 3(17) of ERISA provides that the term "separate account" means 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.

In the Department's view, a separate account would not hold "plan assets" for purposes of the fiduciary responsibility provisions of ERISA if it is maintained by an insurance company solely in connection with its fixed contractual obligations and if neither the amount payable (or credited to) the plan or to any participant or beneficiary of the plan (including an annuitant) is affected in any way by the investment performance of the separate account. Since it appears that the contracts described in your letter provide for fixed obligations of the insurance company and that the investment performance of the separate accounts described in your letter do not, in any circumstances, affect the insurance company's obligations to either the plan to which the contract is issued or to its participants and beneficiaries, such separate accounts would therefore not be considered to hold "plan assets." We note, however, that a conventional separate account (which holds contributions received from a plan and provides for the crediting of income on such amounts based upon the investment experience of the separate account) would not be considered to be maintained in connection with a fixed contractual obligation of the insurance company merely because assets of the separate account are ultimately applied to provide fixed annuities to participants, and the assets of such a separate account would be considered to be plan assets.

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