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June 27, 1986

BY MESSENGER

Mr. Wayne Kaplan
Pre-Merger Notification Office
Bureau of Competition
Federal Trade Commission, Room 303
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Jun 27 8

Re: Proposed Merger of [redacted]

Dear Mr. Kaplan:

I am writing to supplement this firm's letter of June 11, 1986 to Mr. Sharpe of your office regarding the above-referenced transaction and to confirm our conversation of June 25, 1986.

As noted in the letter of June 11th, our view is that the proposed merger is an exempt intraperson transaction because of 16 C.F.R. § 801.1(c)(7), which provides that an insurance company holds all assets and voting securities held for the benefit of any general account or any separate account administered by the insurance company. All of the shares of [redacted] are held by separate accounts of [redacted], separate accounts of wholly owned insurance company subsidiaries of [redacted] or in general account. The promulgation of this provision was explained as follows:

> "Because of the degree of control which insurance companies typically exercise over their general and separate accounts, all assets and voting securities held for the benefit of any general or any separate account administered by such companies are, under § 801.1(c)(7), deemed holdings of the insurance company. These accounts are treated in a manner similar to that accorded to collective investment funds administered by a bank or trust company. Thus, all holdings of all such accounts are aggregated whenever the insurance company makes any acquisition for the benefit of any of those accounts." 43 Fed. Reg. 33459 (July 31, 1978).

Therefore, under 16 C.F.R. § 802.30, the acquiring and acquired entity are deemed to be the same person and hence the transaction is exempt from the pre-merger filing requirement of the Hart-Scott-Rodino Act.

You have asked whether the right of the owners of the variable contracts funded by the separate accounts to instruct the separate accounts how to vote the separate accounts' holdings of the shares of the underlying mutual funds might warrant excepting this situation from the general rule of Section 801.1(c)(7). As we discussed, however, the existence of such voting rights in variable contract owners is typical of insurance company separate accounts. In Prudential v. SEC, 326 F.2d 383 (3d Cir. 1964), the court held that insurance company separate accounts investing in securities were investment companies subject to the provisions of the Investment Company Act of 1940 (the "1940 Act"), including the provisions of the 1940 Act providing for shareholder voting. Since that time, separate accounts have registered with the SEC as investment companies. Separate accounts that directly invest in diversified portfolios of securities have registered as management investment companies under the 1940 Act. Owners of contracts funded by such separate accounts have the right to vote their interests in such separate accounts. Some separate accounts, such as the ones involved in the present transaction, invest not in a diversified portfolio of securities but rather in the shares of a single mutual fund that is not available for direct public investment. These separate accounts register as unit investment trusts under the 1940 Act. While investors in unit investment trusts do not have voting

rights per se, the rules of the SEC provide for so-called "pass through" voting rights under which variable contract owners instruct the separate accounts how to vote shares of the underlying mutual fund.

A limited class of insurance company separate accounts investing in securities are excluded from the definition of investment company and hence not subject to the provisions of the 1940 Act, including the provisions relating to voting rights. Section 3(c)(11) of the 1940 Act, as amended, excludes the following from the definition of investment company:

> "Any separate account the assets of which are derived solely from (A) contributions under pension or profit-sharing plans which meet the requirements of section 401 of the Internal Revenue Code of 1954 or the requirements for deduction of the employer's contribution under section 404(a)(2) of such Code, (B) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 5 of the Securities Act of 1933 by section 3(a)(2)(C) of such Act, and (C) advances made by an insurance company in connection with the operation of such separate account."

This exclusion is available only for a limited class of separate accounts funding certain employee benefit plans. In this situation, the only contractholders usually are the trustees of the participating plans and the rights and obligations of the account and trustee are defined by the contracts governing the arrangement.

As we agreed, it would drain 16 C.F.R. § 801.1(c)(7) of virtually all meaning if it were interpreted to apply only to the narrow class of separate accounts excluded from the 1940 Act by Section 3(c)(11) thereof. Accordingly, Section 801.1(c)(7) must apply notwithstanding the existence of the contract owners' right to provide voting instructions. On the basis of this further information, we understand that your office concurs in our opinion that the proposed merger is not subject to the filing requirements of the Hart-Scott-Rodino Act. Unless you contact us

to discuss this matter further, we will proceed on the basis of that understanding.

Very truly yours,

[redacted]

[redacted]

OK
Wayne Kaplan
6/30/76