[redacted]

June 11, 1986

By Messenger

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

Dear Mr. Sharpe:

Pursuant to our telephone conversation of May 6, 1986, we are writing to you on behalf of [redacted]

[redacted] an insurance company organized under the laws of [redacted]. It offers, among other things, variable annuity contracts [redacted] established [redacted] and [redacted] (collectively [redacted] pursuant to New Jersey law for the purpose of holding assets attributable to certain variable annuity contracts. The net purchase payments received under variable annuity contracts are placed in the [redacted] which in turn invest only in shares of [redacted] an open-end, diversified, series, management investment company registered under the Investment Company Act of 1940 as amended (the "1940 Act"). Shares of [redacted] are sold only to [redacted]

[redacted] a stock life insurance company, is a wholly-owned subsidiary of [redacted] is a wholly-owned subsidiary of [redacted]. Both companies issue variable life insurance contracts and recently have begun issuing variable annuity contracts. Net purchase payments received for the variable life and variable annuity contracts are placed in separate accounts established by the companies (collectively [redacted] Separate Accounts"), which in turn invest only in shares of [redacted] an

open-end, diversified, series, management investment company registered under the 1940 Act. Shares of [redacted] are sold only to [redacted] and to the [redacted]

Until recently, variable life separate accounts were not permitted under the federal securities laws to invest in the same underlying mutual fund as variable annuity separate accounts. Accordingly, [redacted] and [redacted] were established as separate mutual funds, although they have corresponding portfolios and the investment objectives and policies are the same for corresponding portfolios of both [redacted] Because a single mutual fund may now serve as the underlying investment medium for both variable annuity and variable life separate accounts, the Boards of Directors of [redacted] have deemed it advisable for reasons of cost-efficient management to merge [redacted] into [redacted] Subject to shareholder approval of the merger and to the conditions stated in the merger agreement, including the grant of exemptive relief by the Securities and Exchange Commission, P[redacted] would acquire all of the assets of [redacted] in exchange for the issuance of [redacted] shares to the shareholders of [redacted] and [redacted] assumption of the liabilities of [redacted] The exchange will be at the respective net asset values of the corresponding portfolios, and values under variable annuity and variable life contracts will not be affected by the merger.

We have little doubt that the parties and the proposed transaction meet the size thresholds established in Section 7A(a) of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a(a), and that absent an exemption the transaction would be subject to the Act's premerger notification requirements. In our view, however, the rules promulgated under the Act exempt this transaction, and we are writing to request the Staff's confirmation of our interpretation of the rules.

The applicable exemptive provision is contained in 16 C.F.R. § 802.30, which exempts intraperson transactions. That rule says in part:

> "An acquisition . . . in which, by reason of holdings of voting securities, the acquiring and acquired persons are . . . the same person, shall be exempt from the requirements of the act."

The rules define the term "person" as "an ultimate parent entity and all entities which it controls directly or indirectly." 16 C.F.R. § 801.1(a)(1). [redacted] are the sole legal owners of [redacted] voting securities. [redacted] and th[redacted] Separate Accounts, which are in turn Separate Accounts of a wholly-owned subsidiary of [redacted] and of a wholly-owned subsidiary of that subsidiary, are the sole legal owners of [redacted] voting securities. We note that the first example of an exempt transaction that accompanies section 802.30 is that

of a corporation which merges its two wholly owned subsidiaries. While our situation is not wholly analogous to that described in the example, both are similar in that pre-existing ownership or control by a parent entity of both the acquiring and acquired parties removes the possibility that the merger could have anti-competitive effects.

The intraperson transactions exemption is framed in terms of the identity of the acquiring and acquired persons "by reason of holdings of voting securities." The rules generally define "hold" in terms of beneficial ownership. Thus, section 801.1(c)(1) provides:

> "Subject to the provisions of paragraphs (c)(2) through (8) of this section, the term 'hold' (as used in the terms 'hold(s),' 'holding,' 'holder' and 'held') means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means." 16 C.F.R. § 801.1(c)(1).

While the rules do not provide a definition of beneficial ownership, the statement of basis and purpose for the rules states that the existence of beneficial ownership is to be determined on a case-by-case basis, by considering the various indicia of beneficial ownership. 43 Fed. Reg. 33452, 33458 (1978). Such an approach produces a mixed picture in our case. For example, while [redacted], as legal owners of the voting securities of [redacted] vote the stock, the 1940 Act and rules thereunder reserve to the contract owners the right to instruct how the stock should be voted. Further, [redacted] has long recognized that it is the beneficial owner of the securities held in its Separate Accounts for purposes of the reporting requirements of Section 13(d) of the Securities Exchange Act of 1934 ("Exchange Act"), and, in varying capacities, under Section 16(a) of that Act. 15 U.S.C. §§ 78m(d), 78p(a). We recognize, however, that the statement of basis and purpose for the rules says that the concept of "beneficial ownership" as applied under section 801.1(c) overlaps with, but is not identical to the definition of beneficial ownership promulgated by the SEC under section 13(d) of the Exchange Act. 43 Fed. Reg. 33452, 33458 (1978). Moreover, the contract owners receive the economic benefit and incur the risk of loss of value from the investments of the Separate Accounts in the underlying Funds.

We need not, however, rely on the argument that [redacted] and its wholly-owned subsidiaries are the beneficial owners of all shares of [redacted] to support our view that the proposed merger would be an exempt intraperson transaction. As noted above, section 801.1(c) states that its general definition of "hold" is subject to the provisions contained in paragraphs (c)(2) through (8). The modifications of the general definition contained in those paragraphs — in particular, section 801.1(c)(7)

lead to us to the conclusion that the proposed merger is exempt under section 802.30.

Section 801.1(c)(7) states that:

> "An insurance company shall hold all assets and voting securities held for the benefit of any general account of, or any separate account administered by, such company." 16 C.F.R. § 801.1(c)(7).

Moreover, paragraph (c)(5) of the Rule states that:

> "Except as provided in paragraph (c)(4) of this section, beneficiaries of a trust, including a pension trust or a collective investment fund, shall not hold any assets or voting securities constituting the corpus of such trust." 16 C.F.R. § 801.1(c)(5).

Thus, the rule makes clear that its general measure of who "holds" voting securities, beneficial ownership, is inapplicable where those securities are the assets of a collective investment fund, and specifically where they are the assets of separate accounts of an insurance company. Rather, [redacted] hold the voting securities of the two [redacted] as section 801.1(c)(7) clearly indicates. Further, because [redacted] controls [redacted] it holds the voting securities held by them by virtue of their Separate Accounts. This conclusion flows directly from section 801.1(c)(8), which states that:

> "A person holds all assets and voting securities held by the entities included within it; in addition to its own holding, an entity holds all assets and voting securities held by the entities which it controls directly or indirectly." 16 C.F.R. § 801.1(c)(8).

Thus the acquiring and acquired persons are the "same person" within the meaning of section 802.30.

Finally, we note that the policies underlying the antitrust laws are not implicated at all by this merger. Although two mutual funds which are sold directly to the public could be said to be in competition with each other, such is not the case with [redacted] Each is simply the mechanism through which the net premiums under variable contracts are invested. No purchaser ever makes a choice between investing in one or the other of these two funds. Purchasers instead choose between the variable annuity contracts and the variable life insurance contracts issued by [redacted] and the variable annuity contracts and variable life

insurance contracts issued by other insurance companies. The merger of these two funds does not affect in any way the nature or extent of that competition.

We therefore conclude that the proposed merger would be an exempt intraperson transaction. We respectfully request that the Staff confirm to us our interpretation of the pre-merger notification rules as they apply to the proposed merger.

Sincerely,