

JUN 17 1993

PUBLIC

RESPONSE OF THE OFFICE OF
INSURANCE PRODUCTS
DIVISION OF INVESTMENT MANAGEMENT

Our Reference No. IP-4-93
Mutual of America Life
Insurance Company

Your letters of January 5, 1993 and July 22, 1992 request assurance that we would not recommend enforcement action to the Commission if Mutual of America Life Insurance Company (the "Company") offers a group variable accumulation annuity contract ("Contract") in connection with certain church-sponsored, defined benefit pension plans meeting the requirements of Section 414(e) of the Internal Revenue Code of 1986, as amended (the "Code"), without registering the Contract or the issuing separate account under the federal securities laws. ^{1/} Specifically, as explained in your letters, the Company intends to rely on the exemptions from registration afforded in connection with the funding of certain qualified plans under Section 3(a)(2) of the Securities Act of 1933 ("Securities Act"), Section 3(a)(12) of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 3(c)(11) of the Investment Company Act of 1940 ("Investment Company Act"). You represent that the Company will not issue a Contract unless it believes, upon reasonable inquiry, that the pension plan board or other body making the decision to invest in the Contract has such knowledge and experience in financial and business matters that it is able to represent adequately its interest and those of persons participating in the plan or has obtained the advice of a person (other than the Company) who, by virtue of knowledge and experience in financial matters, is able to represent adequately the interest of the plan and participants in such plan.

On the basis of the facts and representations in your letters, and without necessarily agreeing with your legal analysis, the Division of Investment Management will not recommend enforcement action to the Commission if the Company offers the Contract as proposed without registering the separate account under the Investment Company Act. This position is based particularly on the following conditions:

- (1) the separate account will be used for no other purpose than to fund (i) the church-sponsored pension plans and (ii) plans meeting the requirements of Sections 401 or 404(a)(2) of the Code;

^{1/} Your letter of July 22, 1992 indicates that your request is the same in all material respects as a no-action letter granted to Aetna Life Insurance Company (avail. May 21, 1984). Please be advised that, consistent with the position taken in that letter and in accordance with note 2 of your July 22 letter, this response does not in any way address the applicability of Section 3(a)(8) of the Securities Act to any interest held in the Company's general account.

(2) the Company will limit its offer or sale of the Contract to church-sponsored pension plans which are functionally equivalent to Section 401(a) plans and which do not involve the exercise of individual employee discretion, particularly with respect to choosing investment vehicles to fund the plans, allocating funds among subaccounts, or making withdrawals under the Contract;

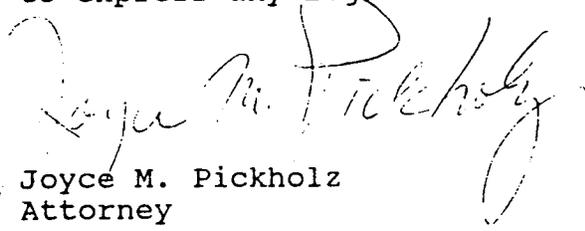
(3) the Contract will not be offered or sold in connection with retirement plans described in Sections 403(b) or 408 of the Code; and

(4) no part of the corpus or income of the church-sponsored plans shall be used or diverted to any purpose other than for the exclusive benefit of the employers' employees or their beneficiaries prior to the satisfaction of all the plans' liabilities to such employees and beneficiaries.

The Division of Corporation Finance has asked us to advise you that, based on the facts presented, but without necessarily concurring in your analysis, that Division will not recommend any enforcement action to the Commission if the Company, in reliance upon your opinion as counsel that registration is not required, offers and sells the Contract to the church-sponsored pension plans as described in your letters without complying with the registration provisions of the Securities Act. In reaching this position, the Division of Corporation Finance particularly notes that the Company will offer the Contract to church-sponsored pension plans only if such plans meet the conditions outlined in your letters.

The Division of Market Regulation has asked us to advise you that the staff will not recommend enforcement action to the Commission under the Securities Exchange Act if the Company treats the Contract as an "exempted security" as defined in Section 3(a)(12)(A)(iv) of that Act.

Because these positions are based on the representations in your letters, different facts or conditions might require a different conclusion. Further, this response only expresses the Divisions' positions on enforcement action and does not purport to express any legal conclusion on the questions presented.



Joyce M. Pickholz
Attorney
June 17, 1993



DIVISION OF
INVESTMENT MANAGEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

ACT ICIA of 1940
SECTION 3(c)(11)
RULE _____
PUBLIC
AVAILABILITY 06-17-93
June 17, 1993

Steven B. Boehm, Esq.
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D. C. 20004-2404

Re: Mutual of America Life Insurance Company

Dear Mr. Boehm:

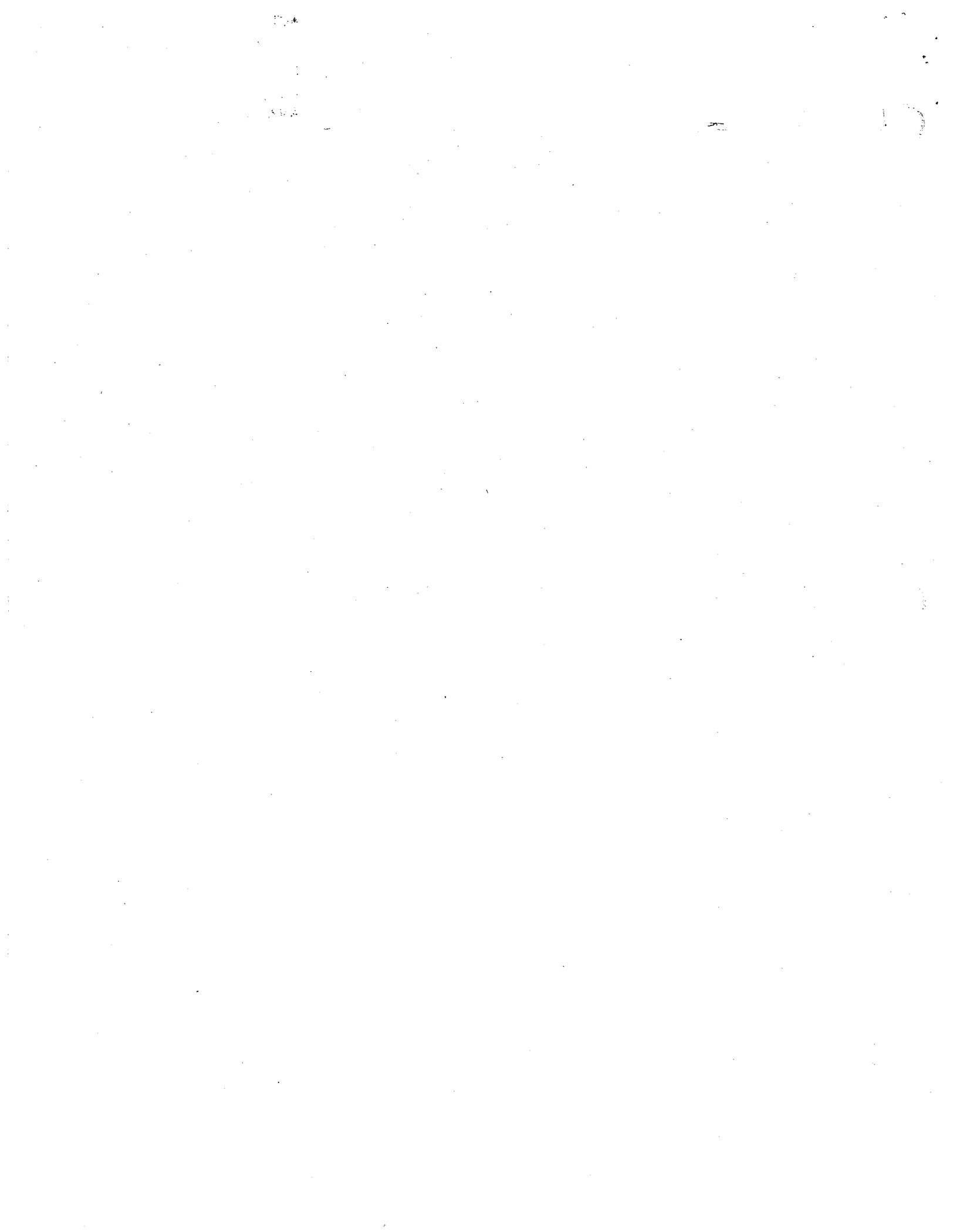
Enclosed is our response to your letters of July 22, 1992 and January 5, 1993. By incorporating our answer into the enclosed photocopy of your letters, we avoid having to recite or summarize the facts involved.

In any future correspondence on this matter, please refer to our Reference No. IP-4-93.

Sincerely,

Wendell M. Faria
Deputy Chief
Office of Insurance Products

Enclosure



SUTHERLAND, ASBILL & BRENNAN

1275 PENNSYLVANIA AVENUE, N. W.

WASHINGTON, D. C. 20004-2404

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999 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30309-3996
(404) 853-8000

January 5, 1993

DAVID R. WOODWARD
DIRECT LINE: (202) 383-0170

1933 Act - 3(a)(2)
1940 Act - 3(c)(11)

*Received
January 15, 1993*

Joyce M. Pickholz
Office of Insurance Products and
Legal Compliance
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Room 10163, Mail Stop 10-6
Washington, D.C. 20549

Re: Mutual of America Life Insurance Company--Offers
and Sales of Group Annuity Contract to Church
Pension Plans

Dear Ms. Pickholz:

Pursuant to our telephone conversation on December 24, 1992, this letter clarifies our letter of July 22, 1992, which, on behalf of our client, Mutual of America Life Insurance Company ("Mutual of America"), requested a letter from the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") stating that the Staff will not recommend that the Commission take any enforcement action if Mutual of America issues a group variable accumulation annuity contract (the "Contract") to certain church-sponsored pension plans under the circumstances set forth in that letter without complying with the registration provisions of the Securities Act of 1933 and offers interests in a separate account (the "Separate Account") under the Contract without registration under the provisions of the Investment Company Act of 1940.

In accordance with our conversation, this letter clarifies three points in our July 22 letter. First, this will confirm that Mutual of America will limit its offer and sale of the Contract to church pension plans which are functionally equivalent to Section 401(a) plans and which do not involve the exercise of individual employee discretion with respect to involvement in the Contract.

Second, we represent that the Separate Account will be used for no other purpose than funding (i) the church-sponsored pension plans described in our July 22 letter and (ii) Section 401 and 404(a)(2) plans and their contracts.

Joyce M. Pickholz

January 5, 1993

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Third, the Contract will not be offered in connection with retirement plans described in Sections 403(b) and 408 of the Internal Revenue Code of 1986.

If you have any other questions concerning this request, please call Gregory J. Lyons at (202) 383-0660 or the undersigned at (202) 383-0170.

Very truly yours,


David R. Woodward

cc: Robert L.D. Colby/Division of Market Regulation
Cecilia D. Blye/Division of Corporation Finance
Roger Napoleon/Mutual of America
Gregory J. Lyons

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July 22, 1992

DAVID R. WOODWARD
DIRECT LINE: (202) 383-0170

1933 Act - 3(a)(2)
1940 Act - 3(c)(11)

Clifford E. Kirsch
Office of Insurance Products and
Legal Compliance
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Room 10167, Mail Stop 10-6
Washington, D.C. 20549

July 22, 1992

Re: Mutual of America Life Insurance Company--Offers
and Sales of Group Annuity Contract to Church
Pension Plans

Dear Mr. Kirsch:

On behalf of our client, Mutual of America Life Insurance Company ("Mutual of America"), we respectfully request a letter from the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") that the Staff will not recommend that the Commission take any enforcement action if Mutual of America issues a group variable accumulation annuity contract (the "Contract") to certain church-sponsored pension plans under the circumstances set forth below without complying with the registration provisions of the Securities Act of 1933 (the "1933 Act") and offers interests in a separate account (the "Separate Account") under the Contract without registration under the provisions of the Investment Company Act of 1940 (the "1940 Act"). We believe that the request should be granted because it is consistent with a prior no-action position taken by the Staff and because no public policy interest would be served by requiring registration in this situation.

Mutual of America is an insurance company organized under the laws of the State of New York. It offers and sells pension, retirement, and related benefits on a group and individual basis for employees of not-for-profit, social welfare, charitable, religious, educational, and government organizations. The Separate Account is divided into nine distinct subaccounts, each of which corresponds to a different investment alternative. Assets allocated to a subaccount are invested at net asset value in an underlying investment company. Four subaccounts invest in funds of a registered, affiliated investment company of Mutual of America. Five subaccounts currently invest in shares of registered, unaffiliated investment companies. Prospectuses for

each of the investment companies in which Separate Account invests are distributed to plan sponsors or board of trustees of plans which are prospective purchasers together with a general descriptive brochure for the Contract.

The assets of the Separate Account are the property of Mutual of America. The Separate Account assets attributable to the Contract are not chargeable with liabilities arising out of any other business Mutual of America may conduct. The income, capital gains, and capital losses of the Separate Account are credited to or charged against the net assets held in the Separate Account without regard to the income, capital gains, and capital losses arising out of any other business that Mutual of America may conduct.^{1/} Mutual of America and the Separate Account are subject to supervision and regulation by the Superintendent of Insurance of the State of New York, and by the insurance regulatory authorities of each State in which Mutual of America is licensed to do business.

The Contract is designed to fund benefits provided by defined benefit pension plans that are qualified under Section 401(a) of the Internal Revenue Code (the "Code"), or that allow the deduction of the employer's contributions under Section

^{1/} See New York Insurance Law § 4240, authorizing life insurance companies domiciled in New York to establish separate accounts in conjunction with certain annuity and life insurance products, and New York Insurance Department Regulations 47 (11 NYCRR 50), 77 (11 NYCRR 54), 127 (11 NYCRR 44), and 128 (11 NYCRR 97), setting forth the standards under which insurers may establish and maintain such accounts. Section 4240(a)(12) states that, "if and to the extent so provided in the applicable agreements, the assets in a separate account shall not be chargeable with liabilities arising out of any other business of the insurer." Section 7435 of the Insurance Law, dealing with insolvent insurers, states that assets in separate accounts maintained under Section 4240 are not to be treated as part of the estate of the insurer and that separate account contract liabilities will be satisfied out of assets in the separate account. Sections 4240(a)(12) and 7435 have been interpreted by the New York Insurance Department to cause the assets in a separate account established pursuant to Section 4240 to retain their separate status in the event of the insolvency of the issuing insurer, to the extent provided in the policies or contracts issued in connection with the separate account. Thus, a liquidator of an insurer could not use the separate account assets to make up any deficiency in the insurer's general account except to the extent permitted by such policies and contracts.

Clifford E. Kirsch
July 22, 1992
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404(a)(2) of the Code, by providing monthly annuity payments which begin at a future date. The Contract permits contributions to be made, generally, in such amounts and at such times as may be required to fund a plan. Contributions may be accumulated on a completely variable basis, a completely fixed basis, or a combination variable and fixed basis. A plan may choose to allocate its contributions among the nine subaccounts of the Separate Account or Mutual of America's general account (the "General Account").^{2/} Amounts accumulated under the Contract may be applied to provide monthly annuity payments to participants under a plan. Annuity payments made under the Contract are made on a fixed basis only. The Contract is offered without registration under the 1933 Act in reliance upon the exemption provided for under Section 3(a)(2) of that Act, and the Separate Account is not registered under the 1940 Act in reliance upon the exemption provided under Section 3(c)(11) of that Act.

Certain large defined benefit retirement plans sponsored by churches have expressed an interest in investing in the Contract. Benefits under these plans are funded entirely by employer contributions. Each plan provides in whole or in part for defined benefits which must be paid to plan participants regardless of the investment performance of the plan's assets. The choice and supervision of investments for each church pension plan are made or are approved by the plan's pension board. With respect to each plan, either the plan's pension board is comprised of persons with significant financial sophistication and investment experience, or the board has access to professional investment advisers in connection with investment decisions. No such investment adviser is or will be affiliated with Mutual of America.

Mutual of America proposes to offer the Contract, including both General Account and Separate Account investment facilities, to certain of these church pension plans, subject to the following conditions:

1. The plan must be a "church plan" as that term is defined under Section 414(e) of the Code;

^{2/} By this letter, Mutual of America does not seek any assurances from the Staff as to the application of Section 3(a)(8) to any interest in the General Account.

2. The plan must have been established by an employer for the exclusive benefit of its employees^{3/} or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, and under such plan it must be impossible prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries;

3. The church plan pension board or plan sponsor, and not individual plan participants, will be responsible for choosing investment vehicles to be used to fund the plan, including, if applicable, the Contract and for making any decision to allocate funds among subaccounts or to withdraw funds from the Contract.

4. Mutual of America must have reasonable grounds to believe and, after making reasonable inquiry, shall believe immediately prior to issuance of the Contract that the church plan pension board or other body making the decision to invest in the Contract has such knowledge and experience in financial and business matters that it is able to represent adequately its interest and those of persons participating in the plan, or, in connection with entering into the proposed Contract, has obtained the advice of a person (other than Mutual of America, any affiliate of Mutual of America, or any person with a material business relationship with Mutual of America) who is, by virtue of knowledge and experience in financial and business matters, able to represent adequately the interests of the plan and participants in such plan; and

5. The plan must have assets of at least \$10 million.

DISCUSSION

Section 3(a)(2) of the 1933 Act exempts from the registration provisions of that Act any security arising out of a contract issued by an insurance company in connection with an

^{3/} Section 414(e)(3)(B) of the Code defines the term "employee" to include "a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry regardless of the source of his compensation." Thus, even if a participant in a church pension plan is not directly paid by the church or association of churches sponsoring the plan, that participant is nonetheless deemed an employee for purposes of Section 414(e).

employee benefit plan qualified under Section 401 of the Internal Revenue Code and with certain governmental plans defined in Section 414(d) of the Internal Revenue Code. Section 3(c)(11) of the 1940 Act provides a similar exemption under that Act for interests in insurance company separate accounts.^{4/}

In connection with these exemptions, Mutual of America has not been able to determine whether particular church pension plans meet the qualification requirements under Section 401(a) of the Code because most church pension plans, unlike most private pension plans, do not obtain letters from the Internal Revenue Service to confirm their status under Section 401(a). Furthermore, it is not entirely clear how the application of the requirements of Section 401(a) should be applied to church pension plans. The unique nature of church employment arrangements prevents many church pension plans from satisfying all of the technical Section 401(a) requirements applicable to private pension plans. Nonetheless, even if it cannot be conclusively shown that a church pension plan meets all of the Section 401(a) eligibility requirements, we believe that neither the Contract nor the Separate Account, if offered pursuant to the conditions described in this letter, needs to be registered under the 1933 Act or the 1940 Act to satisfy the policies underlying the exemptions provided by Section 3(a)(2) and 3(c)(11) of those Acts.

1. The Requested No-Action Position is Consistent with the Policies Underlying the Section 3(a)(2) and Section 3(c)(11) Exemptions

The Section 3(a)(2) and 3(c)(11) exemptions are based on the ability of certain qualified pension plans to fend for themselves in evaluating potential investment vehicles. The exemptions contemplate that investment decisions for the plans will be made by a plan sponsor or a board of plan trustees, which is presumed to possess such financial sophistication and bargaining power that it can protect the interests of plan participants without the need for an issuer to incur the expenses of complying with the specified disclosure and other procedures

^{4/} Section 3(c)(11) of the 1940 Act contains an exemption from the definition of "investment company" that is essentially parallel to the one provided in Section 3(a)(2) of the 1933 Act, except that Section 3(c)(11) also includes separate accounts that fund H.R.10 plans.

required by registration.^{5/} Finally, the administrative rules that preceded the enactment of the Section 3(a)(2) and 3(c)(11) exemptions were premised upon the assumption that the qualified plans to which unregistered investment vehicles could be sold would be large, and that the risk of paying defined benefits would fall on the employer.^{6/}

Mutual of America proposes to offer the Contract to certain church pension plans under conditions that are intended to assure that such offer will be made only to those plans that are functionally equivalent to the qualified plans described in Sections 3(a)(2) and 3(c)(11) in terms of the protections afforded participants which obviate the need for registration. Thus, Mutual of America's offer would be limited to plans under which a church pension board (or other plan sponsor), and not individual plan participants, is responsible for choosing investments to be used to fund the plan, including, if applicable, the Contract.

Additionally, Mutual of America must have reasonable grounds to believe that the church pension board or other plan representative responsible for deciding to invest in the Contract has such knowledge and experience in financial and business matters that it is able to represent adequately its interest and those of participants in the plan. A further condition limiting Mutual of America's offer of Contract only to church pension plans with assets in excess of \$10 million provides additional assurances with respect to the financial sophistication of the plans and their ability to exercise bargaining power in protection of their interests. Each church pension plan will be composed of individuals with experience in managing such investments or will have access to the advice of a professional investment adviser with respect to its investment under the Contract.

^{5/} See, SEC Division of Investment Management, Protecting Investors: A Half Century of Investment Company Regulation, Chapter 3, text at note 51 (p.132) (May 1992). For example, the bill adding qualified employee benefit plans managed by insurance companies to the Section 3(a)(2) exemption in 1970 specifically excluded H.R. 10 (or Keogh) Plans from the exemption "because of their fairly complex nature as an equity investment and the likelihood that they could be sold to self-employed persons, unsophisticated in the securities field." Senate Report No. 91-184 (May 21, 1969) accompanying the Investment Company Amendments Act of 1970. 1970 U.S. Code Cong. and Admin. News 4897, 4922.

^{6/} Id. at text following note 40 (p.130).

Clifford E. Kirsch

July 22, 1992

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Finally, Mutual of America is subject to supervision and regulation by the Superintendent of Insurance of the State of New York, and by the insurance regulatory authorities of each State in which Mutual of America is licensed to do business. Mutual of America will furnish each church plan the same materials it currently furnishes to all employee benefit plans that are qualified under Section 401 of the Code or that allows deduction of the employer's contributions under Section 404(a)(2) of the Code. The materials will include the Contract itself, explanatory materials prepared in connection therewith, prospectuses for the investment companies in which the Separate Account invests, and any other material requested by the plan relating to the operation of the Contract.

2. The Requested No-Action Position is Consistent with the Commissions's Policy

The Staff has previously granted no-action relief under Sections 3(a)(2) of the 1933 Act and 3(c)(11) of the 1940 Act to allow insurance contract funding of church pension plans in circumstances materially the same as those described in this letter. In that case, the plans at issue were functionally equivalent to Section 401(a) qualified plans, even though they did not meet all of the technical requirements of Section 401(a) of the Code.

In Aetna Life Insurance Company (avail. May 21, 1984) the Staff of the Division of Investment Management granted no-action relief in connection with facts that are materially the same as those set forth herein. In that instance, the Staff took a no-action position with respect to Aetna's proposed offer and sale of variable annuity contracts to certain Section 414(e) qualified church pension plans with assets over \$10 million and a financially sophisticated board of trustees which made or approved all investment decisions for their plan, including the decision to invest in an Aetna annuity contract. The Staff recognized that the conditions under which the Aetna contracts would be offered satisfied the policy of ensuring investor protection that underlies Section 3(a)(2) of the 1933 Act and Section 3(c)(11) of the 1940 Act. The conditions under which Mutual of America will offer the Contract to church pension plans are subject to the same material requirements as set forth in the Aetna letter.

Congress similarly recognized the policy underlying Section 3(a)(2) when it extended the exemption provided by that Section to governmental plans qualified under Section 414(d) of

the Code.^{7/} In a letter to Senator William Proxmire, the Chairman of the Senate Committee on Banking, Housing and Urban Affairs, Harold M. Williams, then Chairman of the Commission, explained the purpose of such amendments as follows:

Section 414(d) of the Internal Revenue Code provides special tax treatment for state and local employee benefit plans, and was added to the Code in 1978 in recognition of the fact that it is often difficult if not impossible for such plans to meet all the qualification requirements of Section 401. . . . Section 1 of the Bill would make exemption from registration for bank and insurance company funding of public pension plans turn upon the plans' compliance with the substance of Section 401 as it is material to the operation of the securities laws, rather than on their compliance with all the technical requirements of that Section. Thus, it would provide an exemption from registration for bank and insurance company funding of Section 414(d) plans which have been established for the exclusive purpose of providing retirement benefits to employees or their beneficiaries and whose funds are segregated and cannot be diverted to other purposes. . . .

Section 414(e) church plans, like Section 414(d) governmental plans, are essentially modified 401(a) qualified plans and are subject to all the provisions of Section 401(a) other than certain provisions from which they are specifically exempted by the Code. The flush language immediately following Section 401(a)(30) states that certain provisions of Section 401(a) apply only to pension plans that are subject to Code Section 411. Church plans, like Section 414(d) governmental plans, are not subject to Section 411,^{8/} which sets forth certain minimum vesting standards that must be met by 401(a) qualified plans. Therefore church plans qualify for the

^{7/} As pointed out in the supplemental no-action request letter of Aetna Life Insurance dated February 8, 1984, at no time during the legislative consideration of the 1980 amendments to Section 3(a)(2) was there any discussion of including or excluding church plans from those amendments. Accordingly, one cannot infer from the failure to include such plans in those amendments that Congress had concluded it would be inappropriate to extend the exemption to such plans.

^{8/} Code Section 411(e)(1)(B).

selective exemptions set forth in that Section.^{9/} Thus, unlike pension plans that are subject to Section 411, church plans need not:

1. provide a joint and survivor annuity benefit or a pre-retirement survivor annuity benefit if a participant dies before retirement;^{10/}
2. ensure that participants will receive a benefit, after a merger or consolidation of the church plan's trust with another trust, that is equal to or greater than the benefit to which the participant would have been entitled immediately prior to the merger or consolidation;^{11/}
3. restrict a participant's ability to assign his or her benefits;^{12/}
4. begin benefit payments (unless the participant elects otherwise) within 60 days of a participant's 65th birthday, tenth year anniversary of plan coverage, or termination of employment;^{13/}
5. prohibit decrease of plan benefit payments as a result of social security payment increases;^{14/}
6. prohibit reduction of employer-provided benefits as a result of a participant's withdrawal of benefits attributable to his employee contributions;^{15/} or
7. in the case of a defined benefit plan, obtain approval of the Pension Benefit Guaranty Corporation to

^{9/} The selective exemptions are from provisions paragraphs (11), (12), (13), (14), (15), (19), and (20) of Section 401(a).

^{10/} Code Section 401(a)(11).

^{11/} Code Section 401(a)(12).

^{12/} Code Section 401(a)(13).

^{13/} Code Section 401(a)(14).

^{14/} Code Section 401(a)(15).

^{15/} Code Section 401(a)(19).

make a qualified total distribution upon plan termination.^{16/}

Further, like Section 414(d) governmental plans, church plans are exempt from Code Section 410,^{17/} which provides that 401(a) qualified plans must meet certain minimum participation standards, requiring, among other things, that eligible employees over age 21 with more than one year of service with an employer be entitled to participate in the employer's pension plan.

None of these exemptions would cause a church plan to fail to provide the basic securities-related protections in the investment of plan assets that are afforded participants in a 401(a) plan. These exemptions merely relate to the timing and form of vesting and payment of benefits under pension plans. Indeed, as noted, Section 414(d) governmental plans, which are specifically exempted under Sections 3(a)(2) and 3(c)(11), enjoy precisely the same exemptions from Code Sections 401(a), 410, and 411 as do Section 414(e) church plans.^{18/} Thus, the church plans to which the Contract will be issued are required to provide the same basic protections to plan participants that the Commission and Congress have recognized as forming the basis of the exemptions provided by Section 3(a)(2) of the 1933 Act and Section 3(c)(11) of the 1940 Act.

Section 401(a)(1) requires that contributions under the plan be made by the employer, employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and income accumulated under such plan. The church pension plans to which the Contract will be offered will be funded entirely by employer contributions. Section 401(a)(2) requires that, under the trust formed pursuant to the plan, it must be impossible, prior to satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. The church pension plans to which Mutual of America will offer the Contract will comply with this requirement as well as with every other provision of Section 401(a) other than those specifically noted above.

^{16/} Code Section 401(a)(20).

^{17/} Code Section 410(c)(1)(B).

^{18/} See Code Sections 410(c)(1)(A) and 411(e)(1)(A) and the flush language immediately following Code Section 401(a)(30).

Clifford E. Kirsch

July 22, 1992

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In addition to the Aetna no-action letter, the Staff has previously extended the applicability of Section 3(a)(2) in instances where the protections afforded investors were similar to the protections ensured by that Section. The Staff issued a number of exemptive orders to H.R.10 plans that were not literally covered by Section 3(a)(2).^{19/} The H.R.10 plans that were the subject of those orders were each sponsored either by an employer engaged in furnishing a service of a type involving "such knowledge or experience in financial and business matters that the employer [was] able to represent adequately its interests and those of its employees,"^{20/} or by an employer that received the advice of experts who were financially sophisticated.^{21/} The position taken in those orders was later made generally applicable and codified as Rule 180.

Thus, the church pension plans described in this letter will have the same characteristics which Congress and the Commission have acknowledged to be the basis for the Section 3(a)(2) and 3(c)(11) exemptions of insurance company funding of employee benefit plans. Further, those church pension plans will meet the Section 401(a) requirements that Congress and the Commission have deemed to be most material to the federal securities laws. Therefore, we respectfully request that the Staff issue a letter stating that it will not recommend that the Commission take any action if Mutual of America offers and sells the Contract to church pension plans under the conditions described in this letter without compliance with the registration provisions of the 1933 Act, and, in the case of the Separate Account offered under the Contract, without compliance with the provisions of the 1940 Act.

^{19/} Those plans were already covered by Section 3(c)(11) of the 1940 Act which, unlike Section 3(a)(2), does not exclude H.R.10 plans from its exemption.

^{20/} Release No. 33-6247, 21 SEC Docket 132 (October 14, 1980); Rule 180(a)(2)(i).

^{21/} See e.g., Sidley & Austin, Release No. 33-6052 (April 6, 1979); Stroock, Stroock & Lavan, Release No. 33-6063 (April 27, 1979); Morrison & Forester Retirement Plan, Release No. 33-6226 (July 21, 1980); Monroe Clinic Employees' Retirement Plan, Release No. 33-6174 (Jan. 9, 1980).

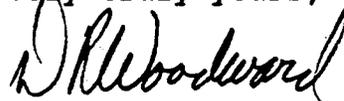
Clifford E. Kirsch

July 22, 1992

Page 12

If you require any additional information or have any questions concerning this request, please call Gregory J. Lyons at (202) 383-0660 or the undersigned at (202) 383-3170.

Very truly yours,

A handwritten signature in cursive script, appearing to read "D Woodward".

David R. Woodward

cc: Roger Napoleon/Mutual of America
Gregory J. Lyons

SUTHERLAND, ASBILL & BRENNAN

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January 5, 1993

1934 Act - § 3(a)(12)

DAVID R. WOODWARD
DIRECT LINE: (202) 383-0170

Robert L.D. Colby
Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Room 7115, Mail Stop 5-1
Washington, D.C. 20549

OFFICE OF CHIEF COUNSEL

JAN 05 1992

DIVISION OF MARKET REGULATION

Re: Mutual of America Life Insurance Company--Offers
and Sales of Group Annuity Contract to Church
Pension Plans

Dear Mr. Colby:

On behalf of our client, Mutual of America Life Insurance Company ("Mutual of America"), we have attached copies of two letters to the Division of Investment Management requesting a letter from the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") that the Staff will not recommend that the Commission take any enforcement action under the Securities Act of 1933 ("1933 Act") or the Investment Company Act of 1940 ("1940 Act") if Mutual of America issues a group variable accumulation annuity contract (the "Contract") to certain church-sponsored pension plans under the circumstances described in the attached letters.

We are expanding our no-action request to ask for assurance that the Staff will not recommend that the Commission take any enforcement action under the Securities Exchange Act of 1934 ("1934 Act") if Mutual of America treats the Contract as an "exempted security" under the 1934 Act as defined in Section 3(a)(12)(A)(iv) of that Act.

We believe that the expanded request should be granted because the definition of "exempted security" in Section 3(a)(12)(A)(iv) refers to conditions that are virtually identical to those contained in Section 3(a)(2) of the 1933 Act exempting certain securities from the registration requirements of that Act, and Section 3(c)(11) of the 1940 Act excluding certain pooled investment vehicles from that Act's definition of "investment company." (See Interfirst Bank Dallas, pub. avail. Apr. 4, 1983). Moreover, the expanded request is consistent with prior no-action positions taken by the Staff.

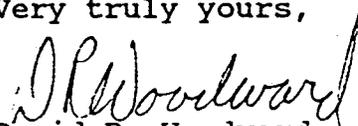
Robert L.D. Colby
January 5, 1993
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In The Idaho First National Bank (pub. avail. Oct. 11, 1988) and Interfirst Bank Dallas, supra, the Staff took no-action positions with respect to Section 3(a)(12) in connection with the operation, without registration under the 1933 or 1934 Acts, of bank collective trust funds which received assets from governmental plans that were not qualified under Section 401(a) of the Internal Revenue Code of 1986 ("Code"). Those situations are similar to the Separate Account's receipt of assets from church-sponsored pension plans as described in Mutual of America's attached no-action request. In this connection, Mutual of America represents that the church pension plans to which the Contract will be offered will not be funded in any part by an annuity contract described in Code Section 403(b) or Code Section 408.

Additionally, we note that, for the same reasons expressed in the attached no-action request concerning the 1933 Act and 1940 Act, no public policy interest would be served by refusing to treat the Contract as an "exempted security" under the 1934 Act.

If you require any additional information or have any questions concerning this request, please call Gregory J. Lyons at (202) 383-0660 or the undersigned at (202) 383-0170.

Very truly yours,


David R. Woodward

cc: Joyce M. Pickholz/Division of Investment Management
Cecilia D. Blye/Division of Corporation Finance
Roger Napoleon/Mutual of America
Gregory J. Lyons

Enclosures