

December 8, 1976

Dear :

Thank you for your letter requesting an interpretation on behalf of the (named) Local # (the Union) regarding the proposed transaction described below. I regret the delay in responding to your letter.

The proposed transaction involves designating the (named) Credit Union, Inc. (the Credit Union) as the depository to receive monthly employer contributions for six funds established for Union members and to transmit such contributions to those funds. The six funds are: Health & Welfare Fund, Vacation Fund, Holiday Fund, Pension Fund, Joint Apprenticeship and Adult Education Fund, and Working Assessment Account.

You ask the following specific questions regarding the proposed transaction:

1. Are all six of the above listed funds covered by the Employee Retirement Income Security Act of 1974 (ERISA)?
2. Does the definition of "party in interest" in ERISA include the Credit Union on the basis that it is an affiliate of the Union or because its board members are employees and officers of the Union?
3. If the Credit Union is considered a party in interest, do the exemptions provided by section 408(b)(4) or (6) of ERISA apply to the transfer of fund assets to the Credit Union? (You also ask a number of questions elaborating upon this basic question.)
4. What changes should be made in the proposed Depository Agreement to allow this transaction to meet the requirements of section 408(b)(4) and (6) of ERISA?

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You advise that the Union has a Depository Agreement with the (named) Savings and Loan Company of (City, State) (Current Depository) and that the Agreement provides that the (City) Electrical Contractors (the employer group which has a collective bargaining agreement with the Union) shall deposit on the 15th of each month with the Current Depository amounts sufficient to cover contributions to the six funds listed above. At this time the (City) Electrical Contractors shall also send to the Current Depository transmittal information directing how such funds shall be disbursed. Each member of the (City) Electrical Contractors will send only one monthly check which will cover payments to all six funds. From the transmittal information, the Current Depository will then make the appropriate deposits to each fund. For convenience, the employers insist on only one check a month; therefore, the Current Depository must distribute the proper amounts to each fund.

You explain that the amounts received by the Current Depository for the Health & Welfare Fund and Pension Fund are only temporary deposits as the Current Depository acts only as a conduit and collection agency of the funds, rather than as an investment medium for the funds. Shortly after receiving the employers' checks each month, the Current Depository transfers the monies for the Health & Welfare Fund and Pension Fund to the (City) Trust Company into checking accounts for each of these two funds. Similarly, amounts received by the Current Depository for the Joint Apprenticeship and Adult Education Fund and the Working Assessment Account are also temporary deposits and are always distributed by the Current Depository by the end of the month in which they are received. The Joint Apprenticeship and Adult Education Fund money is deposited in a commercial checking account by the end of the month as soon as it is requested by the administrator of that Fund. The Working Assessment Account money is automatically deposited into the Union's commercial checking account by the end of the month. All withdrawals from any amounts held by the Current Depository must be made only after receiving withdrawal authorization from the applicable trustee or administrator. The Current Depository pays five percent

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daily interest, compounded quarterly, on amounts it holds for the funds and is reimbursed for administrative expense at the rate of 48¢ per month for each employee statement issued.

The Union proposes to change the depository in the future from the Current Depository to the Credit Union. You advise that the proposed agreement provides that the same funds will be established as in the present agreement and that the (City) Electrical Contractors will deposit the necessary amounts by the 15th of each month with one check accompanied by transmittal forms directing the distribution of the deposits. As with the Current Depository, the Credit Union will act as a conduit for the temporary deposits for the Pension Fund and Health & Welfare Fund and then will transfer such deposits to a commercial bank (in separate checking accounts) yet to be named. The Credit Union would hold these deposits for only one or two days and then send them to the commercial bank. At any time after the month's deposit is made, there could be as much as \$2,000,000 to \$3,000,000 held by the Credit Union for the Pension Fund and Health & Welfare Fund before the Credit Union transfers these amounts shortly thereafter, according to your estimate. As with the Current Depository, amounts paid to the Credit Union for the Joint Apprenticeship and Adult Education Fund and the Working Assessment Fund are also only temporary deposits and will be paid out by the end of the month in which the deposits are received to the proper Union checking accounts. The Credit Union will not pay any interest on deposits for these two funds since it is just performing an administrative function at no charge and acting as a conduit or collection agency for these funds. All deposits to the Credit Union for all six funds will be fully insured by _____, an agency of the (State).

You state that the Credit Union will pay five percent interest per annum on deposits for the Vacation Fund and Holiday Fund and will also provide, at its own cost, life insurance for each employee equal to the sum of his account in these funds, but not exceeding \$2,000. You believe that the value of this added benefit exceeds the difference in daily interest computation of the Current

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Depository and annual interest of the proposed depository agreement. You estimate that at the end of any fiscal year, there could be as much as \$2,000,000 in the Holiday and Vacation Funds before they are distributed at that time to the employees by the Credit Union. The Credit Union will also issue monthly statements to the employees and charge the exact cost of postage, forms, and stationery to these funds.

You state that all members of the Credit Union are either members of the Union or dependents of members of the Union. The Credit Union is run by a seven-member board, currently including Mr. (x), who is also an officer of both the Credit Union and the Union, an employee of the Credit Union, and a trustee of the Health & Welfare Fund. His wife is also employed by the Credit Union. You explain that members are elected to the Credit Union board and that membership on the Credit Union board is completely unrelated and separate to being an officer in the Union (also an elected position). No investments by the Credit Union can be made without prior approval of its board. You also advise that the depository is chosen by the joint conference which consists of five Union members and five representatives of the (City) Electrical Contractors.

With regard to your first question, section 4(a) of ERISA explains that, with certain exceptions not relevant to this case, Title I of ERISA shall apply to any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce, or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce, or (3) by both. The term "employee benefit plan" is defined in section 3(3) as an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" as any plan, fund, or program which was heretofore, or is hereafter established or maintained by an employer or by an employee organization, or by both, to

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the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

"Employee pension benefit plan" is defined in section 3(2) as any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (A) provides retirement income to employees, or (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan, or the method of distributing benefits from the plan.

Although you did not submit copies of the plan documents of the six funds listed above, or describe the nature of these funds, your letter indicates that all six funds were established pursuant to a collective bargaining agreement. If each of the six funds provides the types of benefits mentioned above and described in section 3(1) or section 3(2) of ERISA, all six funds would be covered by Title I of ERISA.

With regard to your second question, section 3(14) of ERISA lists ten categories of persons deemed to be parties in interest with respect to an employee benefit plan, as follows:

- (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

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- (B) a person providing services to such plan;
- (C) an employer any of whose employees are covered by such plan;
- (D) an employee organization any of whose members are covered by such plan;
- (E) an owner, direct or indirect, or 50 percent or more of--
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation
 - (ii) the capital interest or the profits interest of a partnership, or
 - (iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

- (F) a relative (as defined in paragraph (15) of any individual described in subparagraph (A), (B), (C), or (E));
- (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of--
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
 - (ii) the capital interest or profits interest of such partnership, or
 - (iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E)

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- (H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, or a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or
- (I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

Prohibited Transaction Exemption 76-1, published in the Federal Register on March 26, 1976 (40 FR 12740) states in Part C (page 12744) that two or more multiple employer plans are not parties in interest or disqualified persons with respect to each other merely because they are maintained by the same plan sponsors. ERISA IB 75-8, copy enclosed, explains in Question and Answer D-3 that a plan administrator or a trustee of a plan is a fiduciary.

Under section 3(14)(D) of ERISA, therefore, the Union is a party in interest with respect to all six plans. Union officers are parties in interest with respect to all six plans under section 3(14)(H). However, section 3(14) does not include within the categories of persons deemed to be parties in interest a person whose employees or directors are employees and officers of another party in interest. Since there is no ownership or family relationship between the Credit Union and the Union or between the Credit Union and its members who are Union officers and employees, subparagraphs (E), (F), (G), and (I) of section 3(14) do not apply in this case.

However, since your letter indicates that the Credit Union would serve as a trustee for the Vacation and Holiday Funds, the Credit Union would be a fiduciary with respect to these funds, in accordance with the explanation provided in Question and Answer D-3 of ERISA IB 75-8. Therefore, we conclude that the Credit Union would be a party in interest under section 3(14)(A) of ERISA with

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respect to these two plans. Furthermore, since your letter indicates that the Credit Union would provide collection and transfer services to the Health & Welfare Fund, the Pension Fund, the Joint Apprenticeship and Adult Education Fund, and the Working Assessment Account, we conclude that the Credit Union would be a party in interest under section 3(14)(8) with respect to these four plans.

We also wish to point out, with respect to Mr. (x)'s service as a trustee of the Health & Welfare Fund, as an officer of both the Credit Union and the Union, and as an employee of the Credit Union, that although section 408(c)(3) of ERISA permits an officer, employee, agent, or other representative of a party in interest to also serve as a fiduciary, section 406(b) prohibits a fiduciary with respect to a plan from (1) dealing with the assets of the plan in his own interest or for his own account, (2) acting in any transaction, in his individual or in any other capacity, involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receiving any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. Furthermore, we are expressing no opinions as to whether the proposed transaction described above meets the fiduciary requirements of section 404(a)(1) of ERISA or the requirements of the Labor Management Relations Act, 1947.

With regard to your third and fourth questions, the Department of Labor and the Internal Revenue Service have issued proposed regulations relating to section 408(b)(2), (4) and (6) of ERISA and the corresponding section of the Internal Revenue Code of 1954 (41 FR 31874 and 31838). A copy of each of these proposed regulations is enclosed for your convenience. Until these regulations are finalized, the Department will not issue interpretations or opinions regarding the application of this section of ERISA to factual situations such as you describe. We regret, therefore, that we cannot answer your third and fourth

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questions at this time. After the regulations are finalized, however, we will be glad to try to answer any questions you may wish to submit to us at that time.

Sincerely,

Enclosures: Copy of 41 FR 31874 and 31838
ERISA IB 75-8