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September 2, 1976

Dear :

This is in response to your letter in which you raised the following questions pertaining to Taft-Hartley Funds and the Employee Retirement Income Security Act of 1974 (the Act):

1. Does it constitute a prohibited transaction for the board of trustees of a Taft-Hartley plan to retain as counsel an attorney who is counsel to the union whose members are participants in the plan?
2. Does it constitute a prohibited transaction for the board of trustees of a Taft-Hartley plan to approve the plan's payment to the union of ten percent of the wages of those union officials who engage in collection activities for the plan against delinquent contributing employers, as contribution towards payment for the services of such union officials?
3. Does it constitute a prohibited transaction for the board of trustees of a Taft-Hartley plan to cause the plan to lease office space and to sublease part of this space to the union?

With regard to your first question, section 406(a)(1)(C) of the Act prohibits, among other things, the furnishing of services between a plan and a party in interest. Section 3(14) of the Act defines the term party in interest with respect to a plan to include, among others, a union whose members are participants in the plan, any officers, directors or employees of the union, and the attorney for the plan. Section 408(b)(2) of the Act, however, exempts the provision of services (including legal services) to a plan by a party in interest from the prohibited transactions provisions of section 406 if the services are necessary for the establishment or operation of the plan, and if the arrangements for the provisions of the services, and the compensation paid for the services, are reasonable. The Department, in conjunction with the Internal Revenue Service, has recently proposed regulations under section 408(b)(2) to clarify the terms of this exemption. A copy of the proposed regulations (29 CFR 2250.408b-2, 41 FR 31874, July 30, 1976) is enclosed. See also section 414(c)(4) of the Act.

With regard to your second question, it appears that the union is providing a service to the plan (collection of delinquent employer contributions) for which it is being reimbursed on the basis of the salaries of the union officials who actually perform these collection services. As noted above, section 406(a)(1)(C) prohibits the furnishing of services between a plan and a party in interest. Under the circumstances you describe, the union (a party in interest under section 3(14) of the Act) would be prohibited from providing this service. However, as noted above, an exemption for the provision of services to plans by parties in interest is provided in section 408(b)(2) of the Act if the conditions for the availability of the exemption are met.

With regard to your third question, section 406(a)(1)(A) of the Act prohibits the sale, exchange or leasing of any property between a plan and a party in interest. However, on March 26, 1976, the Department of Labor and the Internal Revenue Service granted class exemptions for several types of prohibited transactions, possibly including the transaction described in your third question. A copy of the class exemption (Prohibited Transaction Exemption 76-1) is enclosed. You will note that, beginning at 41 FR 12744, an exemption is granted for the provision of office space, administrative services and goods by a plan to a party in interest, if the conditions described in the exemption are met.

In addition, section 414(c)(2) of the Act provides that the prohibited transaction provisions of the Act will not apply until June 30, 1984, to a lease or joint use of property involving a plan and a party in interest pursuant to a binding contract in effect on July 1, 1974, if the lease or joint use remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be, and if the contract, when executed, was not a prohibited transaction under provisions of the Internal Revenue Code of 1954 applicable to such transactions prior to January 1, 1975 (section 503(b) of the Internal Revenue Code of 1954). If your transaction does not meet the conditions of Prohibited Transaction Exemption 76-1, this transitional exemption may be available in the situation you have described.

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Because your letter also raises questions under section 4975 of the Internal Revenue Code of 1954, we have conferred with representatives of the Internal Revenue Service and they have indicated their concurrence in the views set forth above as they apply to those provisions.

Your letter also included a request for a copy of the Act and all regulations which have been issued under the Act. These materials will be forwarded to you under separate cover.

Sincerely,