

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216



22 1977

OPINION 77-91

406(b)(2)

Dear :

This is in reply to your letter of August 20, 1976, which requested both a class exemption from and an interpretation of the prohibited transaction provisions contained in section 406(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act), for certain transactions involving collectively bargained multiple employer plans which have been established in accordance with the representation requirements of section 302(c)(5) of the Labor Management Relations Act, 1974 (LMRA) and fiduciaries and parties in interest of such plans.

You have requested exemptions for a variety of transactions between collectively bargained multiple employer plans and certain parties in interest to such plans. The transactions involve (1) joint use or leasing of office space and provision of administrative services, (2) sales and leaseings of goods, and (3) delinquent employer contributions. The parties in interest are participating employee organizations, employers and employer associations, and other multiple employer plans.

You have also requested our confirmation of your view that a violation of section 406(b)(2) will not occur in connection with certain transactions involving construction loans made by multiple employer plans to participating employers and loans made by multiple employer plans to unrelated borrowers who when utilize the services of participating employers in subsequent construction improvements.

As used herein, multiple employer plan has the same meaning as that set forth in the class exemptions published in the Federal Register on March 26, 1976

(41 FR 12740, hereinafter "the March 26, 1976 class exemptions"). All three classes of transactions for which exemptive or interpretive relief from section 406(b)(2) is being requested have been the subject of the March 26, 1976 class exemptions, or do not constitute transactions in contravention of section 406(a) of the Act.

With respect to your request for an exemption from the prohibitions of section 406(b)(2) for sharing of office space, administrative services or goods, leasing of office space, provision of administrative services, and the sale or leasing of goods, the Department presently is considering your application and we are looking toward the proposal of a class exemption.

With respect to your request for an exemption from the prohibitions of section 406(b)(2) for certain transactions involving trustees who are affiliates of contributing employers or officials of employer associations, you have noted that, because of the equal representation requirement of section 302(b) of the LMRA, trustees affiliated with participating employers or with an association representing such employers might be deemed to violate section 406(b)(2) of the Act by participating in the process leading up to a decision to defer, reduce or write-off a delinquent employer contribution, or in the decision itself, even though the conditions of the March 26, 1976 exemptions have been met. Your letter also notes that an exemption from section 406(b)(2) might be necessary to permit a plan to utilize the services of such trustees to aid in the collection process because such activity may be deemed to be in contravention of section 406(b)(2) of the Act.

The purpose of the prohibitions contained in section 406(b)(2) is to prevent "a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 309 (1974).

It is the view of this Department that a trustee of a jointly administered, multiple employer plan subject to section 302(c), LMRA who participates in the process leading up to a decision to defer, reduce or write-off a delinquent employer contribution, or in the decision itself, or otherwise aids in the collection process, would not be deemed to be acting on behalf of a party whose interests are adverse to the plan solely by reason of the fact that the trustee serves on the board as a representative of one or more participating employers. This is so even if such trustee is an affiliate of a participating employer or an association of such employers. In the situation you describe, the trustee does not have dual loyalties which could prevent him from acting solely in the interest of the plan's participants and beneficiaries. However, if the trustee is an affiliate of the employer who is delinquent in making its contributions to the plan, the trustee would be deemed to be acting on behalf of or representing a party whose interests are adverse to the plan and such participation would result in a violation of section 406(b)(2). Regarding this particular situation, your application has not presented sufficient safeguards against the conflict of interest which is clearly presented so as to warrant the proposal of an exemption.

You have also requested confirmation of your view that no violation of section 406(b)(2) of the Act will result solely by reason of a trustee of a jointly administered, multiple employer plan subject to section 302(c), LMRA being affiliated with a participating employer in the following two situations involving the making of a construction loan by the plan: (a) Where a loan is made to a participating employer in conformity with the conditions set forth in part B of the March 26, 1976 class exemptions, and (b) Where a loan is made to a borrower who is not a party in interest with respect to the plan but who then contracts for improvements to be constructed by a participating employer, in a situation in which there is no arrangement, agreement or understanding for a specific participating employer to furnish the construction, although it is clear in the context of the loan that some participating employer will be chosen to furnish such construction.

It is the view of this Department that in both of the above situations, no violation of section 406(b)(2) would result solely by reason of the presence of a trustee on the board who is an affiliate of the participating employer. In the situation described in (a) above, no violation of section 406(b)(2) occurs because under the conditions of the exemption, the board of trustees has no authority or control with respect to management or disposition of the plan assets used to make the loan. In the situation described in (b) above, absent any arrangement, agreement or understanding with respect to who will ultimately perform the construction financed by the loan, no violation of section 406(b)(2) occurs because there is no representation of a party whose interest is adverse to the plan in a transaction involving the plan. However, in either of the above situations, if the trustee does in fact represent a participating employer in a loan transaction with the plan, such action would contravene section 406(b)(2) of the Act.

To the extent that this letter may be deemed to be a tentative denial of the requested exemptions, section 5 of ERISA Proc. 75-1 provides that an applicant is entitled to a conference in Washington, D.C. in the event the Department contemplates not proposing a requested exemption. If you desire a conference, please notify the Department in writing at the following address: Department of Labor, Pension and Welfare Benefit Programs, Office of Regulatory Standards and Exceptions, Room C-4526, 200 Constitution Avenue, N.W., Washington, D. C. 20216; or call Mr. Daniel J. Shapiro, Department of Labor, (202) 523-7931, to arrange for the time and place of the conference.

In the event that you do not request a conference within 30 days from the date of the letter, you will be notified that the application file has been closed.

If you have any questions, please contact Mr. Shapiro.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions