EMPLOYEE BENEFIT PLANS

Class Exemptions from Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans Are Involved

On June 2, 1975, notice was published in the Federal Register (40 FR 23758) that the Department of Labor (the Department) and the Internal Revenue Service (the Service) had under consideration proposals to exempt certain classes of transactions in which multiemployer plans (as defined in section 3(7) of the Employee Retirement Income Security Act of 1974 (the Act) and section 414(f) of the Internal Revenue Code of 1954 (the Code)) are involved from the restrictions of sections 408(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code. The exemptions were proposed in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75-26, 1975-1 C.B. 722, and all interested persons were invited to submit comments on the proposed exemptions. The Department and the Service have given careful consideration to the comments which were received and have determined to grant the proposed exemptions, as modified, as set forth below.

As indicated in the notice of June 2, 1975, the Department and the Service have been informed that multiemployer plans engage in numerous transactions which are established and customary in nature, widespread in usage, and reasonable in their terms, but which may be prohibited transactions within the meaning of sections 408 and 407(a) of the Act and section 4975(c)(1) of the Code.

There have been identified by the Department and the Service several classes of such transactions. Three of these classes of transactions are the subject of the class exemptions set forth herein.

The Department and the Service have determined that class exemptions are necessary in the case of multiemployer plans and other collectively bargained multiemployer plans because such plans frequently engage in operationally similar transactions having common characteristics which are distinctive for multiemployer and other multiple employer plans generally, notwithstanding that a variety of industries with a multiplicity of parties and differing relationships are involved. Class exemptions are also justifiable for classes of transactions engaged in by multiemployer plans and other collectively bargained multiemployer plans because such plans are jointly administered within the meaning of section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)). For purposes of these class exemptions and except as otherwise specified below, multiemployer plans and multiple employer plans will hereinafter be collectively referred to as multiple employer plans, as that term is defined in Sec. II of the exemption relating to delinquent employee contributions, Sec. III of the exemption relating to construction loans, and Sec. III of the exemption relating to office space, administrative services and goods.

General Information. The attention of interested persons is directed to the following:

1. The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975(c) of the Code serves to relieve the fiduciary or other party in interest or disqualified person with respect to a plan to which the exemption is applicable from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interests of the plan’s participants and beneficiaries and in a prudent fashion in accordance with subsection (a) (1) (B) of section 404 of the Act; nor does it affect the requirement of section 401 (a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

2. The exemptions contained herein do not extend to transactions prohibited under section 408(b) of the Act and section 4975(c) (1) (E) and (F) of the Code.
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The written comments which have been submitted indicate that many multiple employer plans have adopted written procedures for the orderly collection of delinquent employer contributions which involve reasonable, diligent and systematic methods for the collection of delinquent employer contributions by means of, for example, the automatic contractual imposition on delinquent employers of charges for liquidated damages. Interest on plans with insurance features for the collection of delinquent contributions, the placing of employer contributions in escrow accounts prior to the date such contributions are due, the purchase of bonds by employers to guarantee the payment of contributions to a plan, or the institution of various forms of appropriate legal action.

Plans which do not establish and implement collection procedures which are reasonable, diligent and systematic may be subject to prohibited transactions under sections 408 and 407(a) of the Act and section 4975(c)(1) of the Code in failing to collect delinquent contributions.

Under certain circumstances multiple employer plans may find it necessary and in the interest of the plan and of its participants and beneficiaries to permit employers in appropriate situations to pay contributions after the date on which they are due, often in periodic installments, as the only means by which it can reasonably be expected that the plan ultimately will receive payments of such contributions, in light of the poor financial condition of the delinquent employer and the expenses that the plan would incur in continuing to attempt to collect the employer's entire contribution immediately.

In the written comments that have been submitted, the Department and the Service have indicated that multiple employer plans and their participants and beneficiaries for the plan to discontinue collection efforts with respect to such employers and either to enter into an agreement for payment of less than the full amount of the contribution due in satisfaction of the entire amount of the employer's contribution or to write off such employer's delinquent contribution as uncollectible.

Such arrangements, agreements or understandings whereby a multiple employer plan agrees to the late or delayed, payment of employer contributions, or payment of less than the full amount of such contribution, or those situations in which a plan which in good faith believes an employer contribution as uncollectible, may constitute prohibited transactions under sections 408 and 407(a) of the Act and section 4975(c)(1) of the Code.

Nevertheless, based on the information furnished and the representations made

A. Delinquent employer contributions.

Employer participating in a multiple employer plan (a 'participating employer') is generally obligated under the terms of the plan or of a collective bargaining agreement to make periodic contributions to the plan. Multiple employer plans are often confronted with the problem of collecting such contributions, particularly since such plans, by their very nature, have a multiplicity of participating employers of varying size and financial strength, and at times one or more participating employers may be delinquent in their respective contributions. The collection of the contributions made by such employers is often complicated by the fact that contributions are often substantial and due at periodic intervals. The collection of the full amount due the plan would be jeopardized were the plan to attempt to force immediate full payment.

In the notice of June 2, 1975, the Department and the Service stated that a question had been raised as to the extent to which such delinquencies, delays, or extensions constitute prohibited transactions under sections 408 and 407(a) of the Act and section 4975(c)(1) of the Code relating to delinquent employer contributions was proposed in order to eliminate the uncertainty that may exist in this area and the adverse effects of such provisions and their application in a multiple employer plan. It appears that the collection of the full amount due the plan would be jeopardized were the plan to attempt to force immediate full payment.

After considering the comments which have been submitted, it is the view of the Department and the Service that generally neither the failure of a participating employer to make a contribution to the plan when the contribution is due nor the failure of the plan to collect such a delinquent contribution constitutes a prohibited transaction under sections 408 and 407(a) of the Act and section 4975(c)(1) of the Code. The modification is based on information brought to the attention of the Department and the Service in several written comments that such plans engage in transactions which are similar to those engaged in by multiple employer plans and should be treated in a similar fashion.

In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of June 2, 1975, the Department and the Service make the following findings and determinations:

I. The class exemptions set forth herein are administratively feasible;
II. They are in the interests of plans and of their participants and beneficiaries; and
III. They are protective of the rights of participants and beneficiaries of plans.

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in the written comments, the Department and the Service find that it is administratively feasible, in the interests of plans and of their participants and beneficiaries, and protective of the rights of participants and beneficiaries of plans, to extend the exemption set forth in section I below with respect to such classes of transactions.

As noted in paragraph (5) of the General Information section of the Preamble, this class exemption covers not only multiemployer plans, but also plans under multiple employer plans. In this regard, an employer association which is the sponsor of an employee benefit plan which is not collectively bargained, but which has a significant number of unaffiliated employers contributing to the plan, submitted a letter of comment stating that its plan has many of the same problems regarding delinquent employer contributions that are encountered by multiemployer plans and, therefore, that the class exemption covering multiple employer plans should apply to such a plan, even though the employees may be employees of the employer association rather than employees of the employers who contribute to the plan. The Department and the Service agree with the position of the employer association and extend the exemption set forth in section I below with respect to such plans.

Section I. Definitions. For purposes of section I above, the term "multiemployer plan" shall mean an employee benefit plan within the meaning of section 3(31) of the Act and section 414(f) of the Code, or a plan which meets all of the requirements of such sections other than the requirements of section 414(a) of the Act and section 414(f) of the Code.

2. Construction loans. Multiple employer plans may be used as an alternative to plans that cover employees in the building and construction trades, have traditionally invested a percentage of their assets in construction loans as an appropriate investment in the long-range growth of the nation, and are of mutual benefit to the participating employers and beneficiaries as a means of providing work opportunities for plan participants. Several written comments urged that the class exemption for such loans be extended to include multiple employer plans. Accordingly, the exemption as proposed, and as granted herein, relates only to construction loans. It does not apply to permanent mortgage loans between multiple employer plans and participating employers, or to multiemployer plans other than those plans to participating employers to provide mortgage loans to persons who purchase improved real property from participating employers. As indicated in the notice of June 2, 1975, however, the Department and the Service are prepared, to consider any applications which may hereafter be made to the agencies for exemptions with respect to other classes of transactions.
of transactions involving multiple employer plans. A question was raised in several letters of comment with respect to whether a loan by a multiple employer plan to an owner of real property who is not a party in interest or disqualified person with respect to such plan would constitute a prohibited transaction under section 406(a) of the Act and section 4075(c) (1) (A) through (D) of the Code if the loan is for the purpose of enabling such property owner to make construction improvements on such real property and the participating employer in connection with an employee participating in the plan to make such construction improvements. It is the view of the Department and the Service, based on the principles enunciated in ERISA Title 75-2 and Title 13, 1976 (February 6, 1975), that such loan would not constitute a prohibited transaction under section 406(a) of the Act and section 4075(c) (1) (A) through (D) of the Code, although, of course, such a loan may give rise to a prohibited transaction if, for example, the loan is made in the context of an arrangement for a specific participating employer to furnish a portion of the construction, and such employer has a controlling influence over the participating employer to make the loan.

One of the conditions contained in the proposed exemption was that the decision by a multiple employer plan to make a construction loan to a participating employer must be made by a bank or insurance company which meets the requirements of section 3(39) of the Act, pursuant to its sole discretionary authority or control with respect to the management or disposition of the plan assets used to make such loan, in accordance with the standards established by such institution for making similar loans from its own funds, subject only to broad investment guidelines, if any, established by the bank or insurance company. The commenters cited a number of banks and insurance companies to support the statement that they have policies and procedures for making construction loans to owners of real property. It was suggested in the written comments that this condition should be expanded to permit the internal investment committee of a plan to make such decisions for the plan, and to permit bank and insurance associations to make such decisions for the plan, pursuant to regulations established by the Federal Home Loan Bank Board to make such decisions for a plan, under similar circumstances as those set forth with respect to banks and insurance companies. As regards the suggestion with respect to internal investment committee, the letters of comment and the information made available to the Department and the Service have not furnished sufficient supportive data to permit the Department and the Service to grant an expanded exemption, particularly with respect to the safeguards which should be imposed for the inclusion of internal investment committees in order to protect the rights and interests of other employers and beneficiaries. Accordingly, the exemption has not been modified to extend decision-making authority to internal investment committees. As noted above, however, the Department and the Service are prepared to consider any application which may hereafter be made to the agencies for exemptions with respect to classes of transactions involving multiple employer plans other than those transactions covered by the class exemptions granted herein.

With regard to federally chartered savings and loan associations, which are subject to extensive regulation by the Federal Home Loan Bank Board with respect to their real estate lending practices (see 12 CFR Part 345), the exemption has been extended to permit such savings and loan associations to make plan decisions for construction loans to participating employers under conditions similar to those imposed on banks and insurance companies.

The retroactive exemption contained in section 11(b) is effective with respect to all construction loans made by multiple employer plans to participating employers for which a multiple employer plan was committed under a binding contract in effect on June 3, 1973. The Department and the Service note that the conditions which do not meet the requirements of this class exemption may nevertheless be met by the conditions of sections 414(c) (1) and 2003(c) (1) of the Act. The provision of the prohibited transaction provisions of sections 408 and 407(a) of the Act and section 4075 of the Code until March 30, 1974 for a loan of money or other extension of credit between a plan and a party in interest or disqualified person under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), if such loan or other extension of credit is not as favorable to the plan as an arm's-length transaction with an unrelated party would be, and if the execution of the contract, the making of the loan, or the extension of credit was not, at the time of such execution, making, or extension, a prohibited transaction (within the meaning of section 503(b) of the Code or the corresponding provisions of prior years) under the exemption, to clarify the terms and conditions of the exemption have also been made.

In addition, many of the comments urged that the proposed exemption be extended to loans other than the types of transactions specified in the exemption. The Department and the Service do not consider it appropriate to extend the scope of this exemption to such loans on the basis of the comments received; however, they will consider applications for extensions of such exemptions to loans common to other industries upon receipt of such applications.

Exemption. Accordingly, the following exemption is granted under the authority of sections 406(d) and 407(a) of the Act and section 4975(c) (2) of the Code and in accordance with the procedures set forth in ERISA Section 75-1 (40 FR 18471, April 23, 1975) and Rev. Proc. 75-28, 1975-1 C.B. 722. Effective June 3, 1975, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c) (1) (A) through (D) of the Code, shall not apply to a loan made by a multiple employer plan to a participating employer, pro-
vided that the following conditions are met:

(a) The loan is a construction loan.
(b) The decision to make the loan is made on behalf of the plan by a bank or insurance company which meets the requirements of section 3(39) of the Act, or by a savings and loan association subject to regulation by the Federal Home Loan Bank Board, pursuant to a binding contract in effect prior to March 30, 1974 for a loan of money or other extension of credit between a plan and a party in interest or disqualified person under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), if such loan or other extension of credit is not, at the time of such execution, making, or extension, a prohibited transaction (within the meaning of section 503(b) of the Code or the corresponding provisions of prior years) under the exemption, to clarify the terms and conditions of the exemption have also been made.

(c) (1) The loan is made to the participating employer to whom the loan is made, not the employee organization any of whose members are covered by the plan has the power to exercise a controlling influence over the management or policies of such bank, insurance company or savings and loan association.

(d) The bank, insurance company, or savings and loan association commonly makes construction loans on similar terms and conditions from its own funds, and is regulated by the regulations established by the bank, insurance company, or savings and loan association for making such loan from its own funds.

(e) Before the loan is made, the participating employer to whom the loan is made and the plan have received a written commitment running to both the plan as construction lender and such employer for permanent financing from the plan. In the event of default, the plan is able to fully recover the repayment of such loan upon completion of construction.

(f) Immediately after the making of such loan, (1) the aggregate amount of investments (including loans) of the plan in such participating employer does not exceed 10 percent of the fair market value of the assets of the plan, and (2) the aggregate amount of investments of the plan in loans to all participating employers does not exceed 25 percent of the fair market value of the assets of the plan.

(g) The plan maintains or causes to be maintained for a period of six years from the date of such transaction under Section 11(b) above, records as are necessary to enable the persons described in paragraph (1) of this section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be deemed to have occurred if circumstances are beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period, and (2) such employer shall not be subject to the civil penalty which may be assessed under section 502(e) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (1) above.

(h) Notwithstanding anything to the contrary in subsections (a) (2) and (b) of section 504 of the Act, the records referred to in paragraph (1) are unconditionally available at their customary
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location for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by the plan.

Szc. The regulation. Effective from January 1, 1975, the restrictions of section 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to a loan made by a multiple employer plan to a participating employer, provided that the following conditions are met:

(a) Such loan was made on or before June 2, 1975, or was made after such date pursuant to a written commitment to make such loan which was binding on the plan on such date.

(b) At the time such loan was made, it was not a prohibited transaction within the meaning of section 50(b) of the Code or the corresponding provisions of prior law.

(c) Except for paragraphs (1) and (g), such loan meets the requirements of section 1 of this exemption. The requirements of paragraphs (b) and (i) of section 1 of this exemption shall be deemed met if met on or before May 23, 1976.

Sec. III. Definitions. For purposes of sections I and II above:

(a) The term "multiple employer plan" shall mean an employee benefit plan which is a multiemployer plan within the meaning of section 3(34)(b) of the Act and section 414(l) of the Code, or a plan which meets all of the requirements of such sections other than the requirements of either or both (1) section 3(37)(A) (11) of the Act and section 414(f) of the Code, or (2) section 3(37)(B)(iv) of the Act and section 414(f) of the Code.

(b) The term "sole discretionary authority or control with respect to the management or disposition of the plan assets used to make such loan" means that the bank, insurance company, or savings and loan association has sufficient authority or control with respect to such assets to enable it, without reporting to the plan, obtaining its approval or comments, or permitting it a veto, other than as may be necessary to comply with the conditions of this exemption, to entertain a proposal to make such loan, negotiate its terms, and make such loan. The fact that the bank, insurance company, or savings and loan association generally causes a participating employer or a participant in a plan to make such a loan does not mean that it has sufficient authority or control to make such a loan without complying with the conditions of this exemption.

(c) An affiliate of any participating employer shall be treated as the same entity as such participating employer. For this purpose a corporation or partnership is an affiliate of an unincorporated or unincorporated participating employer if it is a member of a controlled group which includes such participating employer; and a controlled group shall be defined in the same manner as the term "controlled group of corporations" is defined in section 1563(a) of the Code, except that "5 percent" shall be substituted for "80 percent" wherever the latter percentage appears in such section, and except that in the case of a partnership, the term "partnership" shall be defined as including a partnership, and the term "stock" shall be read as including a capital or profits interest in a partnership.

C. Office space, administrative services and goods. Multiple employer plans frequently share office space and other services with participating employers."
the same plan sponsor, but to any multiple employer plan which is a party in interest or disqualified person, regardless of plan sponsors.

As proposed, the conditions of the class exemption required that the terms of such transactions must be at least as favorable to the plan as an arm's-length transaction with an unrelated party would be. It was estimated by the Department of Labor that multiple employer plans do not commonly engage in such transactions with persons other than participating employer organizations, employers, or employer associations, or other multiple employer plans, and that it would not, therefore, be possible for many plans to make the "arm’s-length" evaluation required by the proposed exemption. Based on these comments, the Department has revised the "arm’s-length" condition to require that reasonably similar transactions in an arm’s-length transaction, but must be sufficient to reimburse the plan for its costs.

Questions were also raised in the let-

ers of comment regarding the condi-
tions of the exemption requiring that the plan be permitted to terminate the relationship for the provision of office space or administrative services on rea-

sonable notice without penalty. This con-

dition is designed to preclude plans from being locked into arrangements which may become disadvantageous to such plans. However, this condition should not be
designed to prevent a multiple employer plan from, for example, entering into a long-term lease for the provision of office space to a participating employee organi-

zation, participating employer, or par-

ticipating employer association, or to another multiple employer plan which the plan has the option to terminate such lease on reasonably short notice under the circumstances, notwithstanding the termination date set forth in the lease. Among the circumstances that would be con-

cidered in determining whether there is

a reasonably short notice period for the termination of such a lease is the length of the notice period as compared to the length of the lease. For example, a one-year notice period would not be consid-

ered unreasonable for terminating a 20

year lease.

The language of the recordkeeping re-

quirement of paragraph (d) of the ex-

ception has been modified to require only that a diligent and good faith effort be made to maintain the records necessary to verify compliance with the ex-

ception.

It was also noted in many comment

letters that the standards governing

which common trustees or plan sponsors may be prevented from sharing office space, ad-

ministrative services or goods under cir-

cumstances which would be beneficial to

the interests of the plans involved and of

their participants and beneficiaries by

reason of the provisions of section 406 (b) (2) of the Act which, as here relevant, prohibit a fiduciary with respect to a

plan from acting in any transaction in-

volving the plan on behalf of a party (or representing a party) whose inter-

ests are adverse to the interests of the plan or the interests of its participants or beneficiaries. The Department notes that the comments provided a sufficient basis for the granting of an exemption in connec-
tion with this application. The Depart-

ment is prepared to consider applications for a class exemption from the prohibi-
tions of section 406 of the Act, with respect to such transactions when such applications are received by the Depart-

ment.

Exemption. Accordingly, the following exemption is granted under the authority of section 406(a) and 407(a) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18417, April 28, 1975) and Rev. Proc. 75-26, 1975-1 C.B. 722.

(e) Notwithstanding anything to the contrary in subsections (a) and (b) of section 504 of the Act, the records referred to in paragraph (d) are un-

conditionally available at their customary locations for examination during normal business hours by duly authorized em-

ployees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficia-

ries, and (5) any employee organi-

zation any of whose members are covered by the plan.

Sec. II. Effective Jan-

uary 1, 1975, the restrictions of sections 406(a) and 407(a) of the Act and the tax-

es imposed by section 4975(a) (c) and (b) of the Code, by reason of section 4975 (c) (1) (A) through (D) of the Code, shall not apply to the leasing of office space or the provision of administrative services or sale or leasing of goods by a multiple em-

ployer plan to a participating employee organization, participating employer, or participating employer association, or another multiple employer plan which is a party in interest or disqualified person with respect to such plan, provided that the following conditions are met:

(a) The plan receives reasonable com-

pensation for the leasing of such office space or the provision of such admin-

istrative services or the sale or leasing of goods. Solely for purposes of this ex-

emption, "reasonable compensation" need not include a profit which would ordi-

narily have been received in an arm’s-

length transaction, but must be suf-

ficient to reimburse the plan for its costs.

(b) The arrangement allows any mul-

tiple employer plan to which a partic-

ipated employer plan is a party in in-

terest or disqualified person with re-

spect to such plan, to terminate the rela-

tionship on a reasonably short notice under the circumstances.

(c) With regard to the leasing of office space or the provision of administrative services, the contract must provide that such administrative services constitute "qualifying employer real property" as that term is defined in section 407(d) (4) of the Act. The 10 per-

cent limitation provisions of section 406 of the Code and the Act will apply to such transactions as if they were loans or security interests

(d) The plan which is the lessor of such office space or which provides such administrative services or goods, main-

tains or causes to be maintained during the period of such lease or of such pro-

vision of services or sale or leasing of goods and for a period of six years from the date of the termination of such lease or such provision of services or sale or lease of goods, such records as are necessary to enable the persons described in para-

graph (e) of this section to determine whether the conditions of this exemption have been met, except that (1) a pro-

hibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of the six-year period, and (2) such participating employee organization, participating employer, par-

ticipating employer association, or other multiple employer plan shall not be subject to the civil penalty amount assessed under section 521(1) of the Act, or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (e) below.

Sec. III. Definitions. For purposes of sections 101 and 102 above, the term "multiple employer plan" shall mean an em-

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ployee benefit plan which is a multi-employer plan within the meaning of section 3(37) of the Act and section 414(f) of the Code, or a plan which meets all of the requirements of such sections other than the requirements of either or both (a) section 3(37)(A)(iii) of the Act and section 414(f)(1)(C) of the Code, and (b) section 3(37)(A)(iv) of the Act and section 414(f)(1)(D) of the Code.

Signed at Washington, D.C. this 23rd day of March 1976.

JAMES D. HUTCHINSON,
Administrator of Pension and Welfare Benefit Programs,
U.S. Department of Labor.

DONALD C. ALEXANDER,
Commissioner of Internal Revenue.

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