U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs

Washington, D.C. 20216

OPINION 80-8A
408(b)(2), 406(a)(1)(B), 406(b)(2)

FEB 1 1980

Mr. Robert A. Georgine
National Coordinating Committee for Multiemployer Plans
Suite 603
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Re: Exemption Application D-443

Dear Mr. Georgine:

This is in reference to the above cited application for exemption from certain provisions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1) of the Code.

Responsibility for the various interpretations and exemptions requested in your application initially was divided between the Internal Revenue Service (the Service) and the Department of Labor. The Service was responsible for interpretations and exemptions relating to (1) purchases and leases of goods by multiple employer plans from parties in interest,[1] and (2) loans or other extensions of credit from parties in interest to such plans. The Department was responsible for interpretations and exemptions relating to (1) allocation of employer contributions between related multiple employer plans, and (2) reciprocity arrangements involving such plans. Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, the Department was given, with certain exceptions not here relevant, responsibility for issuing exemptions under section 4975(c) of the Code and interpretations with respect to the provisions of section 4975. Accordingly, this letter is being issued solely by the Department and relates to all of the issues raised in your request. Under the Reorganization, the Secretary of the Treasury is bound by the decisions of the Secretary of Labor with respect to the above sections of the Code.

[1] For the purposes of this letter the term "parties in interest" will refer to both "parties in interest" as defined in section 3(14) of the Act and "disqualified persons" as defined in section 4975(e)(2) of the Code.

1. Purchase or Lease of Goods from Parties in Interest.

A. You request an interpretation that section 408(b)(2) of the Act[2] "exempt(s) not only arrangements for office space and services, but also arrangements for the purchase or lease of goods necessary for the establishment and operation of a plan."

Section 408(b)(2) provides that a plan may contract or make reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor. In regulations issued under that section, the Department has expressed its opinion that the exemption provides relief for the furnishing of goods in the course of, and incidental to, the furnishing of services which satisfy the conditions of the exemption (See 29 CFR 2550.408b-2(b)). In the Department's opinion any purchase or lease of goods which is not in the course of, or incidental to, the furnishing of services exempt under section 408(b)(2) is not itself exempt under that section.

B. In the alternative, you request an exemption from the restrictions of sections 406(a) and 406(b)(2) of the Act for the purchase and lease of goods by multiple employer plans from parties in interest. You represent that collectively bargained multiple employer plans commonly purchase or lease from parties in interest, particularly contributing employers, goods which are necessary for plan operation and administration. You argue that if a plan covers all major manufacturers or distributors in a particular industry, it may not be possible for that plan to purchase or lease, from an unrelated party, certain goods which are necessary for the operation and administration of the plan. And, even if suppliers exist who are not parties in interest, you assert that such suppliers may not provide the plan with the best terms or highest quality goods.

The broad exemption you request does not appear to meet the statutory criteria set forth in section 408(a) of the Act. Among other things, you have not demonstrated that it would generally be (rather than that it might on some occasion be) in the interests of the plans and their participants and beneficiaries for multiple employer plans to purchase or lease goods from parties in interest. In addition, you have not demonstrated that any independent safeguards would be present to protect plan participants from the abuses which may arise in non arms-length transactions. Accordingly, we have tentatively decided not to propose this exemption.

Nevertheless, we recognize that it may be appropriate in some cases to permit multiple employer plans to purchase or lease goods from contributing employers when those goods are substantially unavailable from unrelated sources and are necessary for the establishment or operation of the plan. If you wish to pursue separately this aspect of your request, please feel free to submit additional information to support an exemption covering such transactions. Such information should include both a precise description and examples of situations to which the exemption

[2] References to provisions of the Act are intended to include references to parallel provisions of the Code.

would apply, which would demonstrate that there is a need for such relief, the manner in which the terms of such transactions would be determined and the independent safeguards that would exist to protect plan participants.

2. Loans to Plans from Parties in Interest.

You have requested: (A) an interpretation that a delinquency in the payment by a plan for goods, services or facilities furnished by a party in interest is not a prohibited transaction within the meaning of section 406 of the Act and (B) an exemption from certain restrictions of section 406 of the Act for interest free and interest bearing loans from parties in interest to multiple employer plans.

A. With respect to the requested interpretation, you assert that a delinquency by a plan in the payment for goods, services or facilities furnished by a party in interest is part of the transaction under which the delinquency arises. It is your view that the delinquency should not be treated as a separate prohibited transaction, either because the transaction is not prohibited or is covered by a statutory or administrative exemption.

Section 406(a)(1)(B) of the Act prohibits the direct or indirect lending of money or other extension of credit between a plan and a party in interest. It is the Department's position that a mere delinquency by a plan in the payment for goods, services or facilities is not a lending of money or other extension of credit within the meaning of that section if the primary transaction is the furnishing of goods, services or facilities. If the delinquency, however, is the result of an express or implied arrangement, agreement or understanding between a plan and a party in interest to lend money or otherwise extend credit, such delinquency would be, in the Department’s view, a prohibited extension of credit within the meaning of that section.

B. With respect to the requested exemption for interest free loans, please be advised that the Department has delivered to the Federal Register for publication a proposed class exemption which, if granted, would exempt certain interest free loans or extensions of credit by a party in interest to an employee benefit plan.

C. As to your request for a class exemption for interest bearing loans from parties in interest to multiple employer plans, other than those loans or extensions of credit described in paragraph (A) above, although you have provided several general examples of situations in which multiple employer plans might need both short and long term loans, we do not believe that you have demonstrated that an exemption to permit such loans meets the criteria set forth in section 408(a) of the Act.

The class exemption you request would be conditioned on, among other things, the terms of such loans being at least as favorable to the plans as would a loan from an unrelated party. We do not believe that this provides adequate protection for plan participants in that there are no independent means of ensuring that the proposed condition would exist. In addition, such a

condition would not ensure that the decision to enter into any transaction or the terms of any loan under such a class exemption would be in the interests of plan participants or that the terms of the loan would be properly enforced. For that reason, we do not believe you have demonstrated either that the class exemption would be protective of the rights of, or in the interests of, plan participants and beneficiaries, or that it would be administratively feasible. Accordingly, we have tentatively decided not to propose the requested class exemption. Of course, the Department's decision not to propose a class exemption does not preclude the application for individual exemptions relating to specific factual situations.

3. Allocation of Employer Contributions.

You represent that it is common for employers who contribute to multiple employer plans to make their contributions to several "related plans" by means of a single combined payment.[3] Payment is often made through a board of trustees, common to all of the plans, which allocates the contribution among the various plans. In some cases this allocation is made on the basis of a fixed formula established in the collective bargaining agreement. In other cases the common trustees have the discretion to vary the allocation formula on the basis of the current and anticipated needs of the various plans. In your view, allocation arrangements in general are in the interest of plans and their participants and beneficiaries because centralized collection and distribution is more efficient and reduces administrative expenses.

You request an interpretation that section 406(b)(2) of the Act does not apply either to discretionary allocations or to allocations based on a fixed formula. That section provides that a fiduciary with respect to a plan shall not in his or her individual or any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. In the alternative, you request an exemption from the restrictions of section 406(b)(2) for the allocation of employer contributions.

A. Where allocations are made on the basis of a fixed formula, you argue that the person performing the allocation should not be deemed a fiduciary solely by virtue of this function since he or she has no discretionary authority regarding the allocation. In addition, if the person performing the allocation is a fiduciary for another reason, you submit that there is no actual or potential conflict of interest because that person has no discretion with respect to the allocation. Finally, you argue that the allocation of contributions is not a transaction involving a plan because contributions do not become plan assets until after the allocation is made. In the Department's view, when trustees common to related plans allocate employer contributions among such plans on the basis of a fixed, nondiscretionary formula established in a collective bargaining agreement, which formula is binding upon the trustees, the trustees are not, solely by reason of such allocation, acting on behalf of or representing the plans to which the allocations

[3] By the term "related plans" we assume, for purposes of this letter, that you mean plans which are established by or maintained under the same collective bargaining agreement.

are made, or from which the allocations are withheld, within the meaning of section 406(b)(2) of the Act.

B. In those cases where trustees have discretion to allocate payments (i.e., to distribute contributions among various plans) you argue that, since employer contributions do not become plan assets until the allocation is made, the allocation itself is not a "transaction involving a plan" within the meaning of section 406(b)(2) of the Act. However, in the case where common trustees receive employer contributions for several related plans in a single payment, it appears to the Department that the discretionary allocation of those contributions among the plans by the common trustees is a transaction involving the plans. In addition, the allocation process could involve a section 406(b)(2) violation because the plans may have competing interests as to a fixed pool of money.[4]

C. In the alternative, you request a class exemption from the restrictions of section 406(b)(2) of the Act for the discretionary allocation of employer contributions under the circumstances described above. You argue that allocation arrangements in general are in the interest of plan participants because they reduce administrative costs. You also argue that discretionary allocation arrangements are protective of the rights of the plans and their participants and beneficiaries because such arrangements permit re-evaluation of funding needs on a frequent basis. You represent that collectively bargained plans typically provide fixed contributions and fixed benefits. As a result, it is important, in your view, for collective bargaining agreements to provide for flexibility in the funding of related plans during the period between contract negotiations in order to permit trustees of such plans to respond to situations in which the needs of participants for benefits under the related plans fluctuate.[5]

Although discretionary allocation arrangements may, in some cases, permit an efficient utilization of the assets of related plans, it appears to the Department that where trustees of related plans are involved in the discretionary allocation of funds among such plans, a conflict of interest may arise for which no independent safeguard has been offered to protect the interests of plan participants. In addition, you have not demonstrated that discretionary allocations would generally be in the interests of all the affected plans and their participants and beneficiaries.

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[4] Nothing in this letter is intended to express an opinion with respect to a case in which a collective bargaining agreement gives common trustees of several related plans the power to make prospective changes in the formula under which contributions are allocated among those plans.

[5] As we understand your argument, since the needs of the various plans to pay benefits fluctuate differently during the period when a contract is in effect, and since a contract generally provides for a fixed contribution formula that may be unrelated to a plan's periodic need to pay benefits, the common trustees of the plans should be able to divert contributions temporarily from one plan that does not have a present need to pay benefits (or that has a surplus of liquid assets) to another plan that does have such a need but that does not currently have sufficient assets.

Accordingly, on the basis of the information submitted, we have tentatively decided not to propose the requested class exemption.

4. Reciprocity Arrangements.

You represent that multiple employer plans may enter into reciprocity arrangements that provide for the coordination of benefit payments by related plans or the portability of benefits for participants who move from the jurisdiction of one plan to another. You also represent that such arrangements are typically established by agreements between plans, and are permitted, but not mandated, by collective bargaining agreements.

In those cases where plans coordinate benefits, generally each plan provides the benefit due under its terms. For example, a basic health care plan and a supplemental health care plan may enter into a coordination agreement that provides that a beneficiary may apply for benefits from both plans in one application and receive payment from one plan rather than two. The plan which makes the payment would be reimbursed by the other plan.

You provide two examples of portability or "benefit reciprocity" arrangements, both of which involve a "home" plan and one or more "away" plans. In the first example, which you refer to as a "money-follows-the-man" arrangement, contributions received by an away plan as a result of a participant's work in its jurisdiction are immediately transferred to the participant's home plan. Those contributions are computed under the terms of the away plan. Applications for benefits are sent to, and payments are made by, the home plan. In the second example, contributions are not transferred between plans, but are retained by the plans to which they are initially paid. A participant applies for benefits to each plan under which he or she is covered. The away plan transfer the benefits due under its terms to the home plan, which makes benefit payments in one check.

You assert that plans with common trustees may be prohibited from entering into such reciprocity arrangements by section 406(b)(2) of the Act, and therefore you request an administrative exemption from the prohibitions of that section. It appears that, as a general matter, the coordination of benefits arrangements and the type of "benefit reciprocity" arrangement described in the second example above may involve only the provision of administrative services by one plan to another. Prohibited Transaction Exemption 77-10 (42 FR 33918, July l, 1977) exempts from the restrictions of section 406(b)(2) of the Act the provision of administrative services by one multiple employer plan to another multiple employer plan that is related to it by virtue of having common trustees, if certain conditions are met.[6] Therefore, to the extent the transactions covered by your request involve the provision of administrative services from one plan to another, it appears that the request falls within the scope of matters

[6] Prohibited Transaction Exemption, 76-1 (41 FR 12740, March 26, 1976) exempts such transactions from the restrictions of sections 406(a) of the Act.

previously considered and resolved by the Department. Of course, whether a particular reciprocity arrangement meets the conditions of these exemptions depends on the specific facts and circumstances of the arrangement.

Additional exemptive relief may be appropriate for certain other "benefit reciprocity" arrangements, including "money-follows-the-man" arrangements of the type in your first example. On the basis of the information submitted, however, the Department has decided not to propose relief for such reciprocity arrangements at this time. Although the Department views favorably and recognizes the usefulness of facilitating reciprocity agreements, we do not believe that the limited information contained in your application is sufficient to permit us to make the required statutory findings. We believe that the following information would be helpful to the Department in making a final decision with respect to the relief requested for such arrangements. To facilitate consideration of this matter, we have designated a new file number for that part of your application relating to reciprocity arrangements; thus, any additional information submitted should be referenced to Application No. D 1766.

1. Specific examples of situations in which plans with common trustees would enter, or have entered into "benefit reciprocity" arrangements, and how prevalent it is for plans with common trustees to enter into such arrangements.

2. Details concerning the operation of typical "money-follows-the-man" arrangements, e.g.: how contributions on behalf of temporary participants are held by "away" plans; how earnings on those contributions are handled; when and how often those contributions are transferred to the home plan; how the plans' actuarial assumptions are or should be modified because of the arrangement; how benefits are computed; how the rules relating to participation, vesting and the accrual of benefits are applied in such arrangements; and how plans account for the expenses incurred under these arrangements.

3. Details concerning the operation of other types of "benefit reciprocity" arrangements, for which you believe relief should be granted.

4. Descriptions and specific examples of the documents that provide for these arrangements.

This and any other information you believe may be helpful should be sent to: Plan Benefits Security Division, Office of the Solicitor, Room C-4508, Department of Labor, Washington, D.C. 20216.

Sections 1A, 2A, 3A, and 3B of this letter constitute advisory opinions under ERISA Procedure 76-1. Accordingly, they are issued subject to the provisions of that procedure, including section 10 thereof (relating to the effect of advisory opinions).

With respect to those requested exemptions which we have tentatively decided not to propose, you may submit additional information which you believe may be helpful in determining whether the exemptions meet the statutory criteria set forth in sections 408(a) of the Act and 4975(c)(2) of the Code. You are also entitled to a conference with respect to such requested exemptions. Any additional information and requests for a conference must be received within 60 days of the date of this letter at the address set forth above.

If you have any questions, please contact Timothy Smith, Plan Benefits Security Division, Office of the Solicitor, (202) 523-6855.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs