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Pension and Welfare Benefit Programs

[Prohibited Transaction Exemption 78-5]

CLASS EXEMPTION FOR TRANSACTIONS INVOLVING COLLECTIVELY BARGAINED MULTIPLE EMPLOYER APPRENTICESHIP AND TRAINING PLANS.

Prohibited Transaction Exemption

AGENCY: Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This class exemption exempts from sections 408(a)(1) (A), (C), and (D) of the Employee Retirement Income Security Act of 1974 (the Act) certain transactions between collectively bargained multiple employer apprenticeship plans and employers making contributions to these plans or employee organizations any of whose members are covered by the plans if certain conditions are met. It appears to the Department that without the relief provided by this exemption, such apprenticeship plans would have difficulty operating in accordance with the purposes for which they were es-

established. The exemption affects employers making contributions to such plans, sponsoring employee organizations, and persons who are participants in such plans.

DATE: The exemption is effective January 1, 1975.

FOR FURTHER INFORMATION CONTACT:

Mr. Rudolph Nussl, Department of Labor, Washington, D.C., 202-523-8974 (this is not a toll-free number).

SUPPLEMENTAL INFORMATION:

On July 29, 1977, notice was published in the *FEDERAL REGISTER* (42 FR 38794), that the Department of Labor (the Department) had under consideration a proposed class exemption from the restrictions of sections 406(a)(1) (A), (C), and (D) of the Act for transactions involving: (1) the purchase of personal property by a collectively bargained multiple employer-employee welfare benefit plan maintained for the purpose of providing apprenticeship or other training programs (hereinafter referred to as an apprenticeship plan) from an employer who contributes to such plan (hereinafter referred to as a contributing employer) or a wholly owned subsidiary of such an employer; and (2) the leasing of real property (excluding office space) or personal property by an apprenticeship plan from a contributing employer or a wholly owned subsidiary of such an employer. The exemption was requested in applications filed by the International Union of Operating Engineers, on behalf of 45 local affiliated apprenticeship and/or training plans and the Laborers' Training and Retraining Trust fund for Northern California. The applicants represented that apprenticeship and other training plans are an essential element in providing trained workers for the industries in which they operate. The proper functioning of these plans requires that, from time to time, they purchase goods and lease equipment or other property for use in the programs which they maintain. It has been customary for these plans, which are jointly sponsored by unions and employers, to obtain such goods and rentals from employers who are contributors to the plans. All such employers are signatories to collective bargaining agreements with the sponsoring unions.

The exemption was proposed in accordance with the procedure set forth in ERISA Procedure 75-1 (40 FR 12471, April 28, 1975) and all interested persons were invited to submit comments on the proposed exemption. The public comments received in response to this request generally supported the proposed exemption, although some commentators urged that it be expanded to provide exemptive relief for transactions between ap-

prenticeship plans and parties in interest other than contributing employers (and their wholly owned subsidiaries) and for transactions prohibited by section 406(b)(2) of the Act. These and other comments are discussed below.

OTHER PARTIES IN INTEREST

The exemption, as proposed, would have provided relief for certain transactions between apprenticeship plans and contributing employers. Several comments urge the Department to expand the parties in interest from which, pursuant to the exemption, an apprenticeship plan could purchase goods or lease equipment or other property. Specifically, it was suggested that an apprenticeship plan be permitted to obtain goods and rentals from an association of which a contributing employer is a member (hereinafter referred to as a related employer association), from an employee organization any of whose members' work results in contributions being made to the apprenticeship plan (hereinafter referred to as a sponsoring employee organization) and from a multiple employer plan which is a party in interest with respect to the apprenticeship plan or related to the apprenticeship plan by reason of the existence of trustees common to both the apprenticeship plan and the multiple employer plan (hereinafter referred to as a related multiple employer plan).

After consideration of these comments, the Department has decided to expand the proposed exemption to permit apprenticeship plans to lease real property other than office space,¹ and to lease personal property incidental to the lease of such real property, from sponsoring employee organizations. It has been represented that there is a widespread need among apprenticeship plans for facilities to train apprentices. Many apprenticeship plans typically have insufficient capital to build such training centers, and, thus, their only realistic alternative is to enter into leasing arrangements. Traditionally, apprenticeship plans have leased such training facilities from, among others, the employee organizations which sponsor such plans. Sponsoring employee organizations have an interest in ensuring the continued existence and financial stability of the apprenticeship plans which they sponsor. Whereas persons unrelated to apprenticeship plans may be unwilling or uninterested in leasing property to such plans, sponsoring employee organizations often are willing to devote the necessary time and expense to provide apprenticeship plans

with the needed training centers and facilities.² Accordingly, the Department believes that permitting apprenticeship plans to lease real property, including the lease of personal property incidental to the lease of such real property, from sponsoring employee organizations under all the conditions of the exemption is appropriate.

At this time, the Department has decided not to extend exemptive relief to transactions for the purchase or lease of personal property (other than incidental to the lease of real property) by apprenticeship plans from sponsoring employee organizations or for the lease of real property (other than office space) or purchase or lease of personal property by an apprenticeship plan from a related employer association. The comment letters did not supply enough information to demonstrate to the Department that such transactions are sufficiently common to justify class-wide relief.

With respect to transactions for the lease of real property (other than office space) or purchase or lease of personal property by an apprenticeship plan from a related multiple employer plan, the Department notes that section C of Prohibited Transaction Exemption 76-1 (PTE 76-1) (41 FR 12740, March 28, 1976) already provides exemptive relief for transactions for the leasing of office space and sale or leasing of goods by a multiple employer plan to another multiple employer plan which is a party in interest with respect to such plan,³ provided certain conditions are met. Subject to the conditions of PTE 76-1, then, a multiple employer apprenticeship plan is not prohibited by the prohibitions of section 406(a) from the lease of office space or the purchase or lease of goods from a related multiple employer plan. The only transaction not already exempt from the prohibitions of section 406(a) under section C of PTE 76-1 is the lease of real property other than office space between related multiple employer plans. The comments, however, did not make a showing that relief beyond that provided by PTE 76-1 is justified or necessary and, accordingly, the Department has determined not to expand the ap-

¹One commentator indicated that few unrelated parties would be willing to enter into long term leases with an apprenticeship plan because of their concern that the plan might not receive additional necessary funding after the conclusion of the collective bargaining agreement.

²It should be noted, however, that not all related multiple employer plans are parties in interest with respect to each other. For example, if plan A merely has the same contributing employer(s), the same sponsoring employee organization(s), the same participants and the same trustees as plan B, and plan A and plan B have no other relationships, plan A and plan B are not parties in interest with respect to each other.

³Section 408(b)(2) of the Act and regulations issued thereunder, § 2550.408b-2 (42 FR 32389, June 24, 1977), already permit a plan to lease office space from a party in interest if certain conditions are met.

apprenticeship exemption at this time to permit multiple employer apprenticeship plans to lease real property other than office space from related multiple employer plans.

TRUSTEES AND SECTION 406(b)(2)

Several comments urge the Department to delete from the proposed exemption the condition contained in section II(a)(1) thereof which provided that:

Neither the contributing employer, the wholly owned subsidiary of the employer nor any affiliate of such employer or subsidiary is a fiduciary with respect to the apprenticeship plan on the date of the transaction or has been a fiduciary respecting the apprenticeship plan at any time during the 2 years preceding the date of the transaction.

The comments represent that the structure of certain industries is such that the trustees of multiemployer apprenticeship plans representing contributing employers are drawn from the larger employers in the industry and these employers generally have available the largest pool of property for sale and lease to apprenticeship plans. Thus, it is asserted that adoption of proposed section II(a)(1) would exclude these employers from engaging in sale and lease transactions with apprenticeship plans to the detriment of such plans.

After considering these comments, the Department has decided not to adopt proposed section II(a)(1). The Department is taking this action because the imposition of the restriction contained in that section would diminish substantially the usefulness of the exemption to apprenticeship plans and the other conditions of the exemption provide sufficient protection for apprenticeship plans engaging in the same and lease transactions described herein.

While deletion of proposed section II(a)(1) will permit transactions between apprenticeship plans and contributing employers and sponsoring unions under circumstances where affiliates of such employers or members of such unions serve on the board of trustees administering the plan, the Department emphasizes that the exemption, as adopted, does not contain relief from section 406(b) of the Act. In this regard, the Department has received comments which urge that the proposed exemption be expanded to include relief from the prohibition of section 406(b)(2) of the Act. Section 406(b)(2) prohibits a fiduciary with respect to a plan from acting, in his individual or in any other capacity, in any transaction 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.

Exemption from section 406(b) is not necessary for many of the transactions

in which apprenticeship plans purchase or lease property from parties in interest because such transactions are with parties who are not fiduciaries and do not involve the approving fiduciary in transactions which would be prohibited by section 406(b). Moreover, section 408(a) of the Act states that the Department may not grant an exemption from section 406(b) of the Act without affording an opportunity for a hearing. Such a hearing with respect to this exemption would further delay its adoption in final form. Consequently, for these reasons, the Department has determined to adopt the exemption without providing relief from section 406(b) of the Act. Interested persons may wish to bring to the attention of the Department, by application in accordance with the procedure established in ERISA Proc. 75-1 (40 FR 18471, April 28, 1975), as amended (42 FR 57183, November 1, 1977), their views as to whether the exemption, as adopted, should be amended to include relief from any of the prohibitions of section 406(b) of the Act, and, if so, the reasons therefor.

With respect to the absence of relief from section 406(b) of the Act, the Department notes the following. Section 406(b)(1) of the Act prohibits a fiduciary of a plan from dealing with the assets of a plan in his own interest or for his own account. It would constitute a prohibited transaction under section 406(b)(1) of the Act for a trustee of an apprenticeship plan who was, for example, an employee, officer, director or other affiliate of a contributing employer to participate in a decision of the plan to purchase or lease property from such contributing employer. Similarly, a trustee of a plan who was a member or officer of the union sponsoring the plan would engage in an act described in section 406(b)(1) of the Act by participating in a decision of the plan to lease property from such union. However, by removing himself from all consideration by the plan whether or not to engage in the transaction and by not otherwise exercising any of the authority, control or responsibility which makes him a fiduciary to cause the plan to engage in the transaction, the trustee (who is associated with the contributing employer or sponsoring employee organization selling or leasing the property to the plan) could avoid engaging in a section 406(b)(1) prohibited transaction.

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 does not relieve a fiduciary or party in interest with respect to a plan to which the ex-

emption is applicable from certain other provisions of the Act 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 require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act;

(2) This exemption does not extend to transactions prohibited under sections 408(a)(1)(B) and (E), 408(a)(2) or 409(b) of the Act; and

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption or transitional rule is not dispositive of whether the transaction is in fact a prohibited transaction.

EXEMPTION

In accordance with section 408(a) of the Act and the procedures set forth in ERISA Proc. 75-1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following determinations: (a) the exemption is administratively feasible; (b) the exemption is in the interests of the plans affected and their participants and beneficiaries; and (c) the exemption is protective of the rights of participants and beneficiaries of the affected plans. Accordingly, the following exemption is granted, effective January 1, 1975, under the authority of section 408(a) of the Act and in accordance with the procedures set forth in ERISA Proc. 75-1.

Section I.—Transactions Covered by this Exemption. (a) The purchase of personal property by a multiple employer welfare benefit plan maintained for the purpose of providing apprenticeship or other training programs (hereinafter referred to as an apprenticeship plan) from an employer who makes contributions to such plan (hereinafter referred to as a contributing employer) or from a wholly owned subsidiary of such an employer.

(b) The leasing of personal property by an apprenticeship plan from a contributing employer or from a wholly owned subsidiary of such an employer.

(c) The leasing of real property (other than office space within the contemplation of section 408(b)(2) of the Act) by an apprenticeship plan from a contributing employer, a wholly owned subsidiary of such an employer, or from an employee organization any of whose members' work results in contributions being made to the apprenticeship plan (hereinafter referred to as a sponsoring employee organization).

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(d) The leasing of personal property incidental to the leasing of real property by an apprenticeship plan from a sponsoring employee organization.

Section II.—Conditions. The transactions described in section I above are exempt only if:

(a) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be;

(b) The transaction is appropriate and helpful in carrying out the purposes for which the plan is established or maintained;

(c) The apprenticeship plan which enters into any of the transactions described in section I above maintains or causes to be maintained for a period of 6 years from the termination of any such transaction such records as are necessary to enable the persons described in paragraph (d) of this section to determine whether the conditions of this exemption have been met, except that:

(1) This paragraph (c) and paragraph (d) below will not apply to transactions effected prior to July 24, 1978, and

(2) A prohibited transaction will not be deemed to have occurred, if due to circumstances beyond the control of the fiduciaries of such apprenticeship plan, such records are lost or destroyed prior to the end of the 6-year period; and

(d) Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the act, the records referred to in paragraph (b) of this section are unconditionally available at their customary location for examination during normal business hours by (1) the Department of Labor, (2) any contributing employer, (3) any employee of a contributing employer, (4) any sponsoring employee organization, (5) any person receiving benefits under the apprenticeship plan, and (6) any duly authorized employee or representative of a person described in (1) through (5) of this paragraph.

Section III.—Definitions. For purposes of this exemption the term "multiple employer welfare benefit plan" means a welfare plan which is a multiemployer plan within the meaning of section 3(37) of the Act, or a welfare plan which meets the requirements of at least subsection 3(37)(A)(i), (ii) and (v) of the Act.

Signed at Washington, D.C., this 24th day of May 1978.

IAN D. LANOFF,
Administrator, Pension Welfare
Benefit Programs, Labor-Management
Services Administration,
Department of Labor.