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Prohibited Transaction Class Exemption 76-1, March 25, 1976 (41 FR 12740).

Multiple employer plans: Delinquent employer contributions: Construction loans.—Certain arrangements are permitted between multiple employer plans and contributing employers involving delinquent employer contributions. Under this class exemption, provision may be made for (1) extension of time for making employer contributions, (2) acceptance of less than the full amount of a contribution owed by an employer in satisfaction of the employer's contribution to pay the entire amount, and (3) terminating efforts to collect contributions to an employer because such contributions are uncollectable, in whole or in part. The exemption also allows construction loans to be made by a multiple employer plan to a participating employer if the decision to make the loan is made on behalf of the plan by a bank, insurance company, or loan association.

Annotation references: See "Finding Lists."

Labor-Management Services Administration [Prohibited Transaction Exemption 76-1]

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 23798) 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(37) 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 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, 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 406 and 407(a) of the Act and section 4975(c)(1) of the Code.

There have been identified to 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 multiple employer 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 multiple employer 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 employer 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 does not relieve a 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 406(b) of the Act and section 4975(c)(1)(E) and (F) of the Code.

(3) The exemptions set forth herein are supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory exemptions and transitional rules. Furthermore, the fact that a transaction is the subject of an exemption is not dispositive of whether the transaction would have been a prohibited transaction in the absence of such exemption or, though it would have been a prohibited transaction, is exempt by operation of a statutory exemption or a transitional rule.

(4) Each class exemption contained herein is applicable to a particular transaction only if the transaction satisfies the conditions specified for the class in which it falls.

(5) The three class exemptions set forth herein are available by their terms not only for multiemployer plans, but also for other multiple employer plans which would be multiemployer plans under section 3(37) of the Act and section 414(f) of the Code, except that the amount of contributions made under the plan for a plan year by each employer making such contributions is not less than 50 percent of the aggregate amount of contributions made under the plan for that year by all employers making such contribution (as required by section 3(37)(A)(iii) of the Act and section 414(f)(1)(C) of the Code), or benefits are not payable with respect to each participant without regard to the cessation of contributions by the employer who had employed the participant (as required by section 3(37)(A)(iv) of the Act and section 414(f)(1)(D) of the Code). Thus, for purposes of these class exemptions, a plan will be deemed to be a multiple employer plan so long as more than one employer is required to contribute to the plan (section 3(37)(A)(i) of the Act and section 414(f)(1)(A) of the Code) and the plan is maintained pursuant to one or more collective-bargaining agreements between an employee organization or employee representatives and more than one employer (section 3(37)(A)(ii) of the Act and section 414(f)(1)(B) of the Code). This 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 multiemployer plans and should be treated in a similar fashion.

(6) 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.

A. *Delinquent employer contributions.* An 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 delinquency in participating employer contributions 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 making such contributions. In the course of their collection efforts, multiple employer plans frequently delay or extend the time for payment of contributions pursuant to understandings, arrangements, or agreements in circumstances where it appears that 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 406 and 407(a) of the Act and section 4975(c)(1) of the Code and that the class exemption relating to delinquent employer contributions was proposed in order to eliminate the uncertainty that may exist in this area and the adverse effects to plans and their participants and beneficiaries that may be caused by such uncertainty.

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 in a multiple employer plan 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 406 and 407(a) of the Act and section 4975(c)(1) of the Code. However, if the plan is not making systematic, reasonable and diligent efforts to collect delinquent contributions, or the failure to collect is the result of an arrangement, agreement or understanding, express or implied, between the plan and the delinquent employer, such failure to collect a delinquent employer contribution may be deemed to be a prohibited transaction.

Nevertheless, because participating employers have little, if any, control over the contribution collection efforts made by plans, paragraph (b) of the exemption now provides that participating employers shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code for prohibited transactions involving delinquent employer contributions, except in the case of arrangements, agreements or understandings which are clearly unreasonable. Thus, with this limited exception only plan fiduciaries will be liable for prohibited transactions involving delinquent employer contributions when such transactions are not exempt under the class exemption provided herein.

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 review of employer contribution accounts by means of, for example, reports and questionnaires from employers and field audits, and 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, or plan expenses for 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 found to be engaging in prohibited transactions under sections 406 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 interests of the plan and of its participants and beneficiaries to permit employers in appropriate situations to pay contributions after the date on which such contributions are due, often in periodic installments, as the only means by which it can reasonably be excepted 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 addition, many of the letters of comment have asserted that based on the poor financial condition of some delinquent employers and the expenses of collecting delinquent contributions from such employers, it is often found to be in the interests of multiple employer plans and of their participants and beneficiaries for the plan to discontinue collection efforts with respect to such employers and either to enter into an agreement for the 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 uncollectable.

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 writes off an employer contribution as uncollectable, may constitute prohibited transactions under sections 406 and 407(a) of the Act and section 4975(c)(1) of the Code.

Nevertheless, based on the information furnished and the representations made 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 grant 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 other 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 num-

ber 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 for transactions involving delinquent employer contributions should be made applicable to plans which are not collectively bargained. However, because plans which are not collectively bargained are not jointly administered within the meaning of section 302(c)(5) of the Labor Management Relations Act, 1947, the circumstances and safeguards involved in the collection of delinquent employer contributions by such plans may be different from those involved in collectively bargained, jointly administered multiple employer plans. The letter of comment did not contain sufficient information regarding this question and, therefore, the Department and the Service are not able at this time to grant a class exemption covering plans which are not collectively bargained. The agencies are, however, prepared to consider applications for an exemption for transactions involving the collection of delinquent employer contributions by employee benefit plans which are not collectively bargained.

It should be noted that even if a transaction is not in violation of, or is exempt from, the prohibited transaction provisions, any failure to make a contribution may result in a failure to meet the minimum funding standards contained in Part 3 of Title I of the Act and, where relevant, section 412 of the Code, and may subject the delinquent employer to a tax under section 4971 of the Code. Nothing in this class exemption shall be construed to exempt participating employers from the funding requirements of the Act or the Code.

Exemption. Accordingly, the following exemption is granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and 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:

Sec. I. Effective January 1, 1975—

(a) The restrictions of sections 406(a) and 407(a) of the Act shall not apply to:

(1) Any arrangement, agreement or understanding between a multiple employer plan and any employer any of whose employees are covered by such plan, whereby the time is extended for the making of a contribution by such employer to such plan, if the following conditions are met:

(i) Prior to entering into such arrangement, agreement or understanding, the plan has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution;

(ii) The terms of such arrangement, agreement or understanding are set forth in writing and are reasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the plan continued to attempt to collect such contribution through means other than such arrangement, agreement or understanding; and

(iii) Such arrangement, agreement or understanding is entered into or renewed by the plan in connection with the collection of such contribution and for the exclusive purpose of facilitating the collection of such contribution.

(2) Any arrangement, agreement or understanding between a multiple employer plan and any employer any of whose employees are covered by such plan, whereby the plan agrees to accept less than the entire amount of a contribution owed by such employer in satisfaction of such employer's obligation to pay the entire amount of such contribution, if the following conditions are met:

(i) Prior to entering into such arrangement, agreement or understanding, the plan has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution in its entirety; and

(ii) The terms of such arrangement, agreement or understanding are set forth in writing and are reasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the plan continued to attempt to collect such contribution through means other than such arrangement, agreement or understanding.

(3) A determination by a multiple employer plan to consider a contribution due the plan from any employer any of whose employees are covered by the plan as uncollectable, in whole or in part, and to terminate efforts to collect such contribution, if the following conditions are met:

(i) Prior to making such determination, the plan has made, or has caused to be made, such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution or any part thereof; and

(ii) Such determination is set forth in writing and is reasonable and appropriate based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the plan continued to attempt to collect such contribution or any part thereof.

(b) If an employer any of whose employees are covered by a multiple employer plan fails to make a required contribution to such plan when such contribution is due, or enters into an arrangement, agreement or understanding with such plan described in paragraph (a)(1) or (a)(2) with respect to the payment of such contribution, or if the plan makes a determination described in paragraph (a)(3), such employer shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to 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, except in the case of an arrangement, agreement or understanding described in paragraph (a)(1) or (a)(2), where the terms thereof are clearly unreasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred if the plan continued to attempt to collect such contribution through means other than such arrangement, agreement or understanding.

Sec. II. Definitions. For purposes of section I above, the term "multiple employer plan" shall mean an employee benefit plan which is a multiemployer 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.

B. Construction loans. Multiple employer plans, including those covering employees in the building and construction trades, have traditionally invested a percentage of their assets in construction loans as an appropriate investment in the interests of such plans and of their participants and beneficiaries and 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 permanent mortgage loans by a multiple employer plan to employers any of whose employees are covered by the plan ("participating employers"). However, the information that was provided to the Department and the Service as the basis for the proposal of the class exemption for construction loans on June 2, 1975, and the letters of comment submitted with respect to the proposal did not provide a sufficient basis for the granting of a class exemption for permanent mortgage loans. 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 commitments from such 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 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 4975(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 property owner contracts with an employer 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 IB 75-2 and TIR-1346 (February 6, 1975), that such loan would not constitute a prohibited transaction under section 406(a) of the Act and section 4975(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 plan's decision 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(38) 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 trustees of the plan. 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 savings and loan associations subject to regulation 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 plan investment committees, 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 plans and plan participants and beneficiaries. Accordingly, the exemption has not been modified to extend decision-making authority to internal plan 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 545), the exemption has been extended to permit federal 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 set forth in section II below 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 prior to June 3, 1975. The Department and the Service note that transactions which do not meet the conditions of this class exemption may nevertheless meet the conditions of sections 414(c)(1) and 2003(c)(2)(A) of the Act which provide an exemption from the prohibited transaction provisions of sections 406 and 407(a) of the Act and section 4975 of the Code until June 30, 1984 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 remains at least 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 law). Other modifications intended 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 those which are related to construction. 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 exemptions for loans common to other industries upon receipt of such applications.

Exemption. Accordingly, the following exemption is granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and 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:

Sec. I. Prospective. 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, provided 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(38) of the Act, or by a savings and loan association subject to regulation by the Federal Home Loan Bank Board, pursuant to such bank's, insurance company's, or savings and loan association's sole discretionary authority or control with respect to the management or disposition of the plan assets used to make such loan (as defined in section III(b)).

(c) Neither the plan, the participating employer to whom the loan is made, nor 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.

(e) Such loan satisfies the qualifications established by the bank, insurance company, or savings and loan association for making such loan from its own funds.

(f) 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 a person other than the plan to enable full repayment of such loan upon completion of construction.

(g) 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 35 percent of the fair market value of the assets of the plan.

(h) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (i) 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, due to circumstances 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(i) 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 (i) below.

(i) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (h) are unconditionally available at their customary 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.

Sec. III. Retroactive. 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 503(b) of the Code or the corresponding provisions of prior law.

(c) Except for paragraphs (f) and (g), such loan meets the requirements of section I of this exemption. The requirements of paragraphs (h) and (i) of section I 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(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 (1) section 3(37)(A)(iii) of the Act and section 414(f)(1)(C) of the Code, and (2) section 3(37)(A)(iv) of the Act and section 414(f)(1)(D) 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 performs these functions under broad investment guidelines from the plan, which may include instructions to the bank, insurance company, or savings and loan association generally to cause a part of the plan's assets to be invested in a certain type of loan, shall not prevent the bank, insurance company, or savings and loan asso-

ciation from being considered to have such "sole discretionary authority or control."

(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 incorporated 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 "50 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 "corporation" shall be read 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 administrative services, and the costs associated with such office space and services, with parties in interest and disqualified persons (as defined in section 3(14) of the Act and section 4975(e)(2) of the Code), such as an employee organization any of whose members are covered by the plan (a "participating employee organization"), an employer any of whose employees are covered by the plan (a "participating employer"), or an association of such employers (a "participating employer association"). Multiple employer plans also frequently share office space and administrative services with other multiple employer plans which may be parties in interest or disqualified persons with respect to such plan by reason of section 3(14) of the Act and section 4975(e)(2) of the Code.

In this regard, two or more multiple employer plans are not parties in interest or disqualified persons with respect to each other merely because they are maintained by the same plan sponsors. While the presence of trustees or fiduciaries who are common to more than one multiple employer plan does not make such plans parties in interest or disqualified persons to one another, a multiple employer plan may be a party in interest or a disqualified person with respect to another multiple employer plan (a) under section 3(14)(B) of the Act and section 4975(e)(2)(B) of the Code if it provides services to such other multiple employer plan, (b) under section 3(14)(H) of the Act and section 4975(e)(2)(H) of the Code if it holds, directly or indirectly, 10 percent or more of the shares of a person described, with respect to such other multiple employer plan, in subparagraph (B), (C), (D), (E), or (G) of section 3(14) of the Act or subparagraph (C), (D), (E), or (G) of section 4975(e)(2) of the Code, or (c) under section 3(14)(I) of the Act and section 4975(e)(2)(I) of the Code if it is a 10 percent or more (in capital or profits) partner or joint venturer of a person described, with respect to such other multiple employer plan, in subparagraph (B), (C), (D), (E), or (G) of section 3(14) of the Act of subparagraph (C), (D), (E), or (G) of section 4975(e)(2) of the Code.

One [sic] many occasions, office space and administrative services are furnished to a multiple employer plan by a participating employee organization, employer, or employer association, or by another multiple employer plan which is a party in interest or disqualified person with respect to the plan. The furnishing of office space or administrative services to a plan by such parties in interest or disqualified persons will generally be exempt from the prohibited transaction provisions of section 406(a) of the Act and from 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, if the conditions of section 408(b)(2) of the Act and section 4975(d)(2) of the Code are met.

In some instances, a multiple employer plan will secure office space and administrative services jointly with a participating employee organization, employer, or employer association, or with another multiple employer plan which is a party in interest or disqualified person with respect to the plan, and will share the costs of securing such office space or administrative services on a pro rata basis with respect to each party's use of such space or services. Such joint use of office space or administrative services does not constitute a prohibited transaction under either section 406(a) of the Act or section 4975(c)(1)(A) through (D) of the Code.

On occasion, however, a multiple employer plan will independently secure for its own use office space or administrative services, and will furnish part of such office space or administrative services to a participating employee organization, employer, or employer association, or to another multiple employer plan which is a party in interest or disqualified person with respect to the plan. Such transactions are prohibited transactions under section 406(a) of the Act and section 4975(c)(1)(A) through (D) of the Code for which no statutory exemption is provided. However, the class exemption set

forth below is intended to provide an exemption for such transactions under conditions designed to protect the interests of the plans involved and of their participants and beneficiaries.

The class exemption proposed on June 2, 1975 for such transactions related only to the provision by a plan of office space or administrative services to a participating employee organization, participating employer, or participating employer association, or to a related plan. Based on the representations contained in several letters of comment, the Department and the Service have determined to extend the exemption to the furnishing of goods, such as office furniture and supplies, by a plan to such persons.

In addition, in response to comments noting that multiple employer plans occasionally provide office space, services and goods to plans which are unrelated to such plan, the exemption as granted has been revised to permit a multiple employer plan to furnish office space, administrative services or goods not only to multiple employer plans with 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 pointed out in several letters of comment that multiple employer plans do not commonly engage in such transactions with persons other than participating employee 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 exemption, as set forth below, has been revised to replace the "arm's-length" condition with a reasonableness test which, solely for purposes of the exemption, provides that reasonable compensation need not include a profit which would ordinarily be received in an arm's-length transaction, but must be sufficient to reimburse the plan for its costs.

Questions were also raised in the letters of comment regarding the conditions of the exemption requiring that the plan be permitted to terminate the relationship for the provision of office space or administrative services on reasonably short notice under the circumstances and without penalty. This condition is designed to preclude plans from being locked into arrangements which may become disadvantageous to such plans. However, this condition should not be deemed 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 organization, participating employer, or participating employer association, or to another plan, if such lease provides that 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 considered 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 considered unreasonable for terminating a 20 year lease.

The language of the recordkeeping requirement of paragraph (d) of the exemption 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 exemption.

It was also noted in many comment letters that multiple employer plans which have common trustees or plan sponsors may on numerous occasions be prevented from sharing office space, administrative services or goods under circumstances 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 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. However, none of the comments provided a sufficient basis for the granting of an exemption in connection wtih this application. The Department is prepared to consider applications for a class exemption from the prohibitions of section 406(b)(2) of the Act with respect to such transactions when such applications are received by the Department.

Exemption. Accordingly, the following exemption is granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 184171, April 28, 1975) and Rev. Proc. 75-26, 1975-1 C. B. 722:

Sec. I. Prospective. Effective June 12, 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 the leasing of office space or the provision of administrative services or sale or leasing of goods by a multiple employer plan to a participating employee organization, participating employer, or participating employer association, or to 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 compensation for the leasing of such office space or the provision of such administrative services or the sale or leasing of goods. Solely for purposes of this exemption, "reasonable compensation" need not include a profit which would ordinarily have been received in an arm's-length transaction, but must be sufficient to reimburse the plan for its costs.

(b) The arrangement allows any multiple employer plan which is a party to the transaction to terminate the relationship on a reasonably short notice under the circumstances.

(c) With regard to the leasing of office space by a multiple employer plan to a participating employer, such transaction will be exempt from the provisions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of the Act only to the extent such provisions require that such office space constitute "qualifying employer real property" as that term is defined in section 407(d)(4) of the Act. The 10 percent limitation provisions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of the Act will apply to such transactions as if the employer real property involved in the transaction were "qualifying employer real property."

(d) The plan which is the lessor of such office space or which provides such administrative services or goods, maintains or causes to be maintained during the period of such lease or of such provision of services or sale or leasing of goods and for a period of six years from the date of 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 paragraph (e) 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, due to circumstances 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 participating employee organization, participating employer, participating employer association, or other multiple employer plan shall not be subject to the civil penalty which may be assessed under section 502(i) 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.

(e) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (d) are unconditionally available at their customary 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.

Sec. II. Retroactive. Effective January 1, 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 the leasing of office space or the provision of administrative services or the sale or leasing of goods by a multiple employer plan to a participating employee organization, participating employer, or participating employer association, or to another multiple employer plan which is a party in interest or disqualified person with respect to such plan, which occurred before June 12, 1975, or which occurred before October 1, 1975 pursuant to a binding arrangement entered into before June 2, 1975, provided that such transaction was—

(a) Of a type that was ordinarily and customarily engaged in by multiple employer plans before January 1, 1975; and

(b) At the time it was entered into, not a prohibited transaction within the meaning of section 503(b) of the Code or the corresponding provisions of prior law, except that solely for purposes of this exemption the terms of such arrangement need not provide for a profit which would ordinarily have been received by the plan in an arm's-length transaction, provided that the compensation received by the plan is otherwise reasonable.

Sec. III. Definitions. For purposes of sections I and II above, the term "multiple employer plan" shall mean an employee 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.