

DEPARTMENT OF LABOR

Pension and Welfare Benefit Programs

Prohibited Transaction Exemption 77-10]

EMPLOYEE BENEFIT PLANS

Class Exemption From Prohibitions Respecting Certain Transactions in Which Multiemployer and Multiple Employer Plans Are Involved Pursuant to Application Filed by National Coordinating Committee for Multiemployer Plans (Application No. L-562)

AGENCY: Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This exemption, which complements a class exemption issued in March, 1976 (41 FR 12740, March 26, 1976), enables a multiple employer plan to share office space and administrative services and goods, to lease office space or provide administrative services or to sell or lease goods to a participating employee organization, participating employer, or participating employer association, or to another multiple employer plan, provided certain conditions are met. In the absence of this exemption, certain aspects of these transactions might be prohibited by section 406(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act).

FOR FURTHER INFORMATION CONTACT:

Mr. Daniel J. Shapiro, Room C-4508, Plan Benefits Security Division, Office of the Solicitor, Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210. (202-523-7931).

SUPPLEMENTARY INFORMATION:

On May 3, 1977, notice was published in the FEDERAL REGISTER (42 FR 22428) that the Department of Labor had under consideration a proposed class exemption from the restrictions of section 406(b)(2) of the Act. The proposed class exemption, which was requested in an application (No. L-562) filed by the National Coordinating Committee for Multiemployer Plans, would have exempted the sharing of office space and administrative services and goods, 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 such multiple employer plan which is a party in interest with respect to such plan or plans.

The application was filed and the exemption was proposed in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). All interested persons were invited to submit comments on the proposed exemption.

COMMENTS RECEIVED

Several comments were received with regard to the proposed exemption, all supporting the grant of the exemption. Two commentators, while supporting the exemption, suggested certain changes.

1. *Leasing of office space.* Two commentators noted that the proposed class exemption was intended to be identical in scope to that granted in part C of Prohibited Transaction Exemption 76-1 (41 FR 12740, Mar. 26, 1976). In this respect, they observed that the proposed class exemption did not effectively permit plans to lease office space to participating employers. The comments also noted, as did the application, that the typical situation for which the exemption should be applicable involves the leasing of a single parcel of real property to an employer. Under this circumstance, however, the leasing of office space would fail to satisfy the definition of "qualifying employer real property" because it would not be geographically dispersed and, thus, would fail to meet one of the conditions imposed by the proposed exemption. The Department has accepted these comments. Accordingly, paragraph (b)(2) of section I of the proposal, which would have required more than one parcel of employer real property, has been deleted. As revised, the class exemption now affords relief from the prohibitions of section 406(b)(2) for the leasing of any office space by multiple employer plans to participating employers without regard to whether such office space constitutes qualifying employer real property under section 407(d)(4) of the Act. It is emphasized, however, that any such lease still must satisfy the conditions of section I(c) of part C of Prohibited Transaction Exemption 76-1 to be exempt from the provisions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of the Act.

2. *Sharing of office space, goods or services between related multiple employer plans.* One comment suggested that the proposed exemption be broadened to permit related plans, which are not necessarily parties in interest with respect to one another, to share office space, goods and administrative services on a pro-rata basis. The comment indicated that when related plans share office space, goods or administrative services on a pro-rata basis, even if they are not parties in interest (as defined in section 3(14) of the Act) with respect to one another, common trustees may face a problem under section 406(b)(2) because the trustees, in determining the allocation of costs, will be representing parties with adverse interests. The comment has been accepted and incorporated in this class exemption because the Department believes that it is desirable to have common trustees who are familiar with the industry and the relationships of the plans, and the exemption, as granted, contains sufficient safeguards so as to minimize potential abuses.

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 other party in interest with respect to a plan to which the exemption is applicable from certain other provisions of the Act, including any pro-

hibited 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 interest of the plan's participants and beneficiaries 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 406(a), 406(b)(1) and (3) and section 407(a) of the Act. However, see part C of Prohibited Transaction Exemption 76-1 (41 FR 12740, March 26, 1976) for an exemption from the restrictions of sections 406(a) and 407(a) for the transactions described herein.

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

(4) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

(5) In accordance with section 408(a) of the Act, and based upon the entire record, including the written comments submitted in response to the notice of May 3, 1977, the Department makes the following determinations:

- (i) The class exemption set forth herein is administratively feasible;
- (ii) It is in the interests of plans and of their participants and beneficiaries; and
- (iii) It is protective of the rights of participants and beneficiaries of plans.

EXEMPTION

Accordingly, the following exemption is hereby granted under authority of section 408(a) of the Act and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975):

Sec. I—Prospective. Effective June 12, 1975, the restrictions of section 406(b)(2) of the Act shall not apply to the sharing of office space, administrative services or goods or the leasing of office space or the provision of administrative services or sale or leasing of goods by a multiple employer plan established in accordance with the requirements for representation on the board of trustees imposed by section 302(c)(5) of the Labor Management Relations Act, 1947 (LMRA) to a participating employee organization, participating employer, or participating employer association, or to another such multiple employer plan which is a party in interest with respect to the plan or to which it is related by virtue of having common trustees, provided that the following conditions are met:

(a) With respect to the sharing of office space, administrative services and goods, the costs of securing such space, services and goods are assessed and paid on a prorata basis with respect to each

party's use of such space, services and goods.

(b) With respect to the leasing of such office space or the provision of such administrative services or other sale or leasing of goods, the plan receives reasonable compensation for such leasing, or the provision of such services or the sale or leasing of such 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.

(c) With respect to the sharing of office space, administrative services or goods or the leasing of office space or the provision of administrative services or the sale or leasing of goods, the arrangement allows any plan which is a party to the transaction to terminate the transaction on reasonably short notice under the circumstances.

(d) Any plan which shares office space, administrative services or goods or 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 sharing arrangement or 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 sharing arrangement or 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 plan shall not be subject to the civil penalty which may be assessed under section 502(1) of the Act 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 (1) the Department of Labor, (2) plan participants and beneficiaries, (3) any employer of plan participants and beneficiaries, and (4) any employee organization any of whose members are covered by the plan, or (5) any duly authorized employees or representatives of a person described in subparagraphs (1) through (4) of this paragraph.

Sec. II. Retroactive. Effective January 1, 1975, the restrictions of sections 406(b)(2) of the Act shall not apply to the sharing of office space, administrative services or goods or the leasing of office space or the provision of administrative services or the sale or leasing of goods by a multiple employer plan established in accordance with the requirements for representation on the board of trustees imposed by section 302(c)(5) of the LMRA to a participating employee organization, participating employer, or

participating employer association, or to another such multiple employer plan which is a party in interest with respect to the plan or to which it is related by virtue of having common trustees, 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 Internal Revenue 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 multiemployer plan within the meaning of section 3(37) of the Act, or a plan which meets the requirements of at least subsections 3(37)(A)(i), (ii) and (v) of the Act.

Signed at Washington, D.C., this 23rd day of June, 1977.

IAN D. LANOFF,
Administrator, Pension and
Welfare Benefit Programs,
Department of Labor.

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