

October 7, 2002

Mr. Louis Campagna  
Chief, Division of Fiduciary Interpretations  
Office of Regulations and Interpretations  
Pension and Welfare Benefits Administration  
U.S. Department of Labor  
Room 5669  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Re: Request for Advisory Opinion

Dear Mr. Campagna:

On behalf of the National Coordinating Committee for Multiemployer Plans (“NCCMP”), a national, nonpartisan, non-profit organization of multiemployer pension, health and welfare plans and their labor-management sponsors, and its member multiemployer plans, the undersigned submits this request for an advisory opinion pursuant to ERISA Proc. 76-1.

Specifically, the NCCMP requests that the Department issue an advisory opinion concerning the collection of delinquent employee contributions to a multiemployer 401(k) plan, which will permit the fiduciaries of such multiemployer 401(k) plans to adopt and maintain written collection procedures requiring reasonable, diligent, and systematic collection efforts as are appropriate under the circumstances to recover such employee contributions in the same manner now permitted for employer contributions under Prohibited Transaction Class Exemption 76-1. Additionally, where, after such reasonable, diligent, and systematic collection efforts, the trustees determine that employee contributions are uncollectible, in whole or in part, they may terminate further collection efforts. Lastly, we request that the advisory opinion confirm that multiemployer 401(k) plans may require employers to remit contributions no later than the 15<sup>th</sup> business day following the month in which the employee contributions are received by the employer as established in 29 CFR 2510.3-102.

The applicant is a national organization representing several hundred multiemployer pension, welfare and other benefit funds, including several local and national multiemployer 401(k) pension benefit plans. It is our understanding that the collections issue has impeded the creation of more multiemployer 401(k) plans. The

participants of multiemployer 401(k) plans defer and withhold a portion of their wages through payroll deduction for contribution to their individual 401(k) plan accounts. The administrative costs of these multiemployer plans are met through an assessment on the interest income of the individual accounts of the participants. Pursuant to the collective bargaining agreement and the plan documents, the employers of the participants are required to remit these employee contributions by a certain date. Failure to remit the employee contributions by the employer may result in the assessment of interest and liquidated damages on the employer and potential liability under the provisions of ERISA 515.

Since employee contributions to a multiemployer 401(k) plan become plan assets no later than the 15<sup>th</sup> business day of the month following the month in which they are withheld from the pay of the employee by the employer, the employer holding plan assets beyond this deadline is a de facto fiduciary and a disqualified person with respect to those assets. Retention of employee contributions/plan assets by a fiduciary not only constitutes a fiduciary breach under ERISA § 404 but also violates IRC § 4975(c)(1)(E), which prohibits any direct or indirect act by a disqualified person who is a fiduciary whereby he deals with income or assets of a plan in his own interest or for his own account. The failure to remit timely employee contributions could also violate IRC § 4975(c)(1)(B) as the delinquency could be considered an extension of credit by the multiemployer 401(k) plan to the delinquent employer.

While the vast majority of employers whose employees participate in a multiemployer 401(k) plan meet their obligation to remit the employee contributions to the plan trust account in a timely manner, there are inevitably occasions where an individual employer fails to remit the employee contributions within the precise time frame set by the regulations and the collective bargaining agreement. Because these are frequently the same employers that contribute to other collectively bargained benefit plans, multiemployer 401(k) plans face the same problems of collecting delinquent employee contributions from participating employers of varying size, financial strength, administrative ability, and geographic location as those other plans.

Multiemployer 401(k) plans are typically one of a group of employee benefit plans maintained under the same collective bargaining agreement by the same or nearly the same union or unions and the same or nearly the same employers. Typically, the other plans have been in existence for many years. Some were created as early as the 1940s and 1950s. The due date for contributions to these plans may vary in accordance with the collective bargaining agreements that reflect industry custom. Those dates typically range from the 15<sup>th</sup> day of the month to the 30<sup>th</sup> of the month following the month in which the work generating the contributions was performed.

ERISA confirmed the fiduciary duty of Trustees to collect delinquent employer contributions. Class Exemption 76-1 recognized that despite contractual and legal requirements, easy access by plans to the courts for collection purposes and penalties for late payments, some amounts would still be paid late or not paid at all. The industries

covered by multiemployer plans include many small employers, which may file for bankruptcy or simply disappear under financial stress.

In recognition of these realities, PTE 76-1 provides that a trustee's legal obligations to collect delinquent employer contributions are satisfied if the plan made reasonable, systematic and diligent collection efforts that are appropriate under the circumstances. Therefore, trustees of a multiemployer plan are not obligated to spend plan assets pursuing a collection action with little likelihood of success. Under the exemption, they balance the merits of the case and the likelihood of actually collecting the money owed (due to the financial condition of the employer) with the cost of collection. So, for example, trustees could determine that it is not a prudent expenditure of plan assets to bring a lawsuit for a small amount due where the employer could not be located or appeared (after an appropriate investigation under the circumstances) to be in danger of going out of business. Trustees could also accept less than the full amount due or accept extended payment arrangements if it appeared that either of these actions would result in the greatest net benefit to the plan taking into account such factors as the time value of money, costs of collections, and likelihood of success of the collection effort.

Arguably, the limitation of the exemption in PTE 76-1 to employer contributions and the Plan Asset Regulations found at 29 CFR 2510.3-102 combine to place multiemployer 401(k) plans in the same position faced by other multiemployer plans prior to PTE 76-1. With the 1997 plan asset regulations, multiemployer 401(k) plans are now obliged to require that employee contributions be received no later than the 15th business day after the end of the month when contributions were deducted from the pay of an employee. Declining to issue a special rule for multiemployer funds, the Department determined that "the maximum time period for pension plans in the final regulation was sufficient to accommodate multiemployer plans." 64 Fed. Reg. 41227 (August 7, 1996).

Although the new rule was designed to address the abuses of certain employers who sponsored single employer 401(k) plans and withheld employee contributions for their own benefit, it also imposed certain obligations on multiemployer plans that did not exist prior to 1997. Since the employee contributions are plan assets as soon as they can be "reasonably segregated" from the employer's general accounts, the individual employer is now a fiduciary to the affected plan with respect to those assets. The use of those plan assets by a fiduciary or a party in interest could constitute a prohibited transaction under IRC section 4975(c)(1)(B), (D), and (E). Additionally, the trustees of the affected multiemployer 401(k) plans, as co-fiduciaries, must take affirmative steps to correct the breach of their co-fiduciary or face joint and several liability for the fiduciary breach of the offending employer under ERISA section 405.

Under the 1997 regulation, it could be argued that trustees of multiemployer 401(k) plans are obliged to pursue delinquent employee contributions under standards apparently less accommodating to the realities of the industries covered by these plans. Relying on the language of the regulation, many collective bargaining agreements require employers to remit 401(k) contributions on a monthly basis on a date intended to meet

the 15<sup>th</sup> business day requirement of the regulations. A more narrow reading of the regulation could require multiemployer 401(k) trustees to require employers to remit on the more rigid basis of as soon as the employee contributions are reasonably segregated. Such a requirement adds costs to plans and employers and complicates a collection regime established in good faith to meet the needs and requirements of the collective bargaining parties and the multiemployer 401(k) plan.

While most multiemployer plans have adopted a delinquency procedure to address the issue of delinquencies, the plan asset regulations appear to mandate that trustees must pursue delinquent 401(k) contributions until the employee contributions are remitted without regard to the costs and impact on the plan. In pursuing those delinquent employee contributions, multiemployer funds can easily incur administrative and legal expenses far in excess of the actual delinquency. While multiemployer 401(k) plans may seek damages not only from the corporate entity but also the responsible corporate officer, recovery will not be possible where the delinquent employer has closed operations or filed for bankruptcy protection. In some circumstances, the costs to pursue delinquent 401(k) contributions will exceed any reasonable expectation of recovery. Since the administrative costs of multiemployer 401(k) plans are generally funded from the interest income generated by the participants, the costs of such collection efforts result in a reduction in the investment earnings of all participants in the multiemployer 401(k) plan.

The position of the Department of Labor with regard to late 401(k) contributions was recently clarified with the promulgation of the Voluntary Fiduciary Correction Program (“VFCP”). 65 Fed. Reg. 14163 (March 15, 2000). As indicated by the VFCP, any failure of an employer to remit employee contributions to a 401(k) plan requires correction and payment of either lost profits or earnings. For a multiemployer 401(k) plan, the required corrections of the VFCP create significant administrative and legal costs for the plan and its trustees. While ERISA 502(g)(2) provides for recovery of contributions, liquidated damages, interest, costs, and reasonable attorneys fees in cases involving delinquent contributions to a multiemployer plan, ERISA section 515 does not require a court to award lost profits or earnings for violations of ERISA section 515. As a result, the trustees of the affected multiemployer 401(k) plan must also bring an action for fiduciary breach with the section 515 case and convince the court that it is entitled to the recovery of lost profits or earnings. Such a scenario will complicate multiemployer collections litigation beyond the straightforward procedure contemplated by Congress in the Multiemployer Pension Plan Amendments Act of 1980. See Central States Pension Fund v. Gerber Truck Services, Inc., 870 F.2d 1148, 1153 (7<sup>th</sup> Cir. 1989).

For example, an employer who remits contributions 10 days after the due date is liable for the greater of lost earnings or restoration of profits under the VFCP correction. To comply with the required VFCP correction, the Fund must calculate the greater of lost earnings or restoration of profits from the due date to the date the deferral is received. The Fund must then notify the delinquent employer of the penalty and attempt to collect the money in addition to the interest and liquidated damages provided by the Trust Agreement. If the employer does not respond to the Fund Office letters, the Trustees, as

co-fiduciaries of the delinquent employer must bring a legal action to collect the lost earnings/restoration of profits or face potential liability for co-fiduciary breach. Since administrative and legal costs are paid from the investment experience of the multiemployer fund, pursuit of a delinquency results in a reduction in earnings for all plan participants.

The issuance of the Plan Asset Regulations and the creation of additional obligations and penalties did not change the economic realities of the industries typically covered by multiemployer plans. Some small number of employers will still be delinquent, go bankrupt, or disappear. However, there is an argument that Trustees of multiemployer 401(k) plans are not able to fulfill their fiduciary obligations by consideration and prudent balancing of appropriate factors permitted by PTE 76-1. For example, on a rigid interpretation of the regulations, the Trustees of a multiemployer 401(k) plan must commit plan assets to collect lost earnings/interest on a small contribution that is a few days late. If the collection fails, those assets used to pursue the collection are taken from the earnings that would otherwise be allocated to individual participants' accounts.

Given this situation, the NCCMP seeks an advisory opinion that the class exemption provided under PTE 76-1 includes employee contributions to multiemployer 401(k) plans that adopt collection procedures similar in scope and detail to those required by PTE 76-1 to collect delinquent employer contributions owed to multiemployer 401(k) plans. The NCCMP requests specific language that PTE 76-1 that would exempt trustees of a multiemployer 401(k) plan from the provisions of both IRC section 4975(e) and ERISA section 406.<sup>1</sup> Under the proposed advisory opinion, the provisions of IRC section 4975 and ERISA section 406 would not apply to those multiemployer 401(k) plans that adopt and maintain a written collection procedure requiring reasonable, diligent, and systematic collection efforts as are appropriate under the circumstances to recover such employee contributions. Additionally, where, after such reasonable, diligent, and systematic collection efforts, the trustees of a multiemployer 401(k) plan determine that employee contributions are uncollectible, in whole or in part, they may terminate further collection efforts.

Please contact the undersigned if you should have any questions or require any additional information. The NCCMP would welcome an opportunity to meet with the Department to discuss the issues underlying this request. Thank you for your consideration of this request.

Very truly yours,

Randy G. DeFrehn  
Executive Director

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<sup>1</sup>Under Sections 102 and 105 of the Reorganization Plan No. 4 of 1978, the Internal Revenue Service is bound by the advisory opinions of the Department of Labor as they relate to the prohibited transaction provisions of IRC § 4975.

cc: NCCMP Working Committee