U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216

Reply to the Attention of:

OPINION NO. 83-45A
Sec. 408(b)(2), 406(b)(1), 406(a)(1)(A), 406(a)(1)(C)

AUG 26 1983

John M. Vine, Esq.
Philip L. O'Donoghue, Esq.
Covington & Burling
Post Office Box 7566
Washington, D.C. 20044

Re: United Technologies Corporation
Identification Number: F-2485A

Gentlemen:

This is in response to your letter of August 20, 1982, in which you request on behalf of United Technologies Corporation (UTC) and its subsidiaries, advisory opinions concerning the provisions of sections 406 and 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code of 1954 (the Code) as they relate to certain transactions contemplated by employee benefit plans maintained by UTC and its subsidiaries.

You represent that the employee benefit plans of UTC and its subsidiaries that will be involved in the transactions are those plans (the Plans) that have adopted as a trust the Master Trust for Various Employee Benefit Plans of United Technologies Corporation and its Subsidiaries, under a Trust Agreement with Citibank, N.A., dated as of September 12, 1977, as amended (the Master Trust). As of the date of your letter, there were thirty-seven of these plans. The assets of the Master Trust are managed by a number of entities that are "investment managers" within the meaning of section 3(38) of ERISA. Each investment manager is responsible for managing a specified portion of the Master Trust that has been designated by the Pension Committee, a committee of UTC's board of directors. The Pension Committee is assisted in its duties by UTC's Pension Investment Committee which consists of officers and employees of UTC.

You further represent that it is contemplated that periodically the Pension Investment Committee will recommend to the Pension Committee that the Master Trust invest in specified real estate. If the Pension Committee accepts the Pension Investment Committee's recommendation, it will recommend to either an existing investment manager or a newly appointed investment manager that the manager make the investment on behalf of the Master Trust. The investment manager will consider the recommendation of the two committees but will have the sole responsibility for making or declining to make the recommended real estate investment. The investment manager will not be a subsidiary or affiliate of UTC.

You state that the Pension Investment Committee is presently considering a recommendation that the Master Trust acquire interests in office buildings and other commercial properties. These properties would be managed in one of two basic manners.

In the first instance, property will be leased to a single tenant under a master lease on an absolute-net

basis with the tenant obligated to maintain and repair the leased property. While the Plans (or an entity in which the Plans have an ownership interest), as lessor, will have the right to require the tenant to provide adequate maintenance and repair services, the tenant will have sole responsibility and authority to determine who will service the property and its equipment and the form and terms of any arrangement for these services. Payments for services will be made solely by the tenant and will have no effect on the payments to the lessor under the lease.

In the other instance, the property acquired by the Plans will not be leased to a single tenant, and the responsibility for repair and maintenance will remain with the lessor. In such cases, the investment manager responsible for the property will retain an independent property manager to manage the property. Each property manager will be generally responsible for the leasing, physical maintenance and day-to-day operation of the property. In particular, each property manager will have sole and complete authority to negotiate, execute and monitor service contracts for the property. There will be no understanding with the property manager, either explicit or tacit, limiting those eligible to provide services to the property. Prior to its retention by the investment manager, each property manager will not be a party in interest with respect to the Plans.

You further represent that UTC's subsidiaries are engaged in a variety of industries, including the manufacture, installation and servicing of components and equipment used in office and other commercial buildings. You acknowledge that all UTC subsidiaries are parties in interest with respect to the Plans.

On behalf of UTC, you seek the following advisory opinions:

> A. The furnishing of goods and services by a UTC subsidiary for the repair and maintenance of real property acquired by the Plans is not prohibited by section 406(a) of ERISA where the arrangements for the goods and services are made by a tenant under an absolute-net lease for the property and where the lease requires the tenant to repair and maintain the property.
>
> B. Services necessary for the maintenance and repair of real property investments that the Plans may acquire qualify as "services necessary for the establishment or operation of the plan …" within the meaning of section 408(b)(2) of ERISA and 29 CFR 2550.408b-2(b).
>
> C. Arrangements made with a UTC subsidiary by a tenant under an absolute-net lease or by an independent property manager for maintenance or repair of real property investments of the Plans are not prohibited by section 406(b) of ERISA.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

Section 406(a)(1)(A) and (C) of ERISA provide, in pertinent part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know that such transaction constitutes a direct or indirect sale of property, or a furnishing of goods, services or facilities between the plan and a party in interest with respect to the plan.

In contracting with a UTC subsidiary which is a party in interest defined in section 3(14) or ERISA, for repairs and maintenance, you represent in essence that the tenant under an absolute-net lease with the Plans would not be acting as agent for the landlord (Plans) but rather would simply be fulfilling its obligation under the lease. The tenant will be solely responsible for the maintenance and repair of the

property and only the tenant will have enforceable rights under any service contracts it enters into. A transaction for the receipt of services or goods would not be between the Plans and a party in interest with respect to the Plans, but, rather, would be a transaction between a tenant and a provider of the goods or services. Under these circumstances, the furnishing of goods and services by a UTC subsidiary for the repair and maintenance of real property acquired by the Plans would not be prohibited by section 406(a) of ERISA.

With respect to your second question, for those transactions that involve the assets of the Plans, section 408(b)(2) of ERISA exempts from the prohibitions of section 406(a) the payment by a plan to a party in interest, including a fiduciary, for a service (or a combination of services) if: (1) the service is necessary for the establishment or operation of the plan; (2) the service is furnished under a contract or arrangement which is reasonable; and (3) no more than reasonable compensation is paid for the service. Regulations issued by the Department clarify the terms "necessary service" (29 CFR 2550.408b-2(b)), "reasonable contract or arrangement" (29 CFR 2550.408b-2(c)) and "reasonable compensation" (29 CFR 2550.408c-2) as used in section 408(b)(2) of ERISA.

It is the view of the Department that the services necessary for the maintenance and repair of real property investments that the Plans may acquire are services generally encompassed by the statutory exemption contained in section 408(b)(2) of ERISA if the conditions contained therein and in section 2550.408b-2 of the regulations are satisfied. In this connection, questions of what constitutes a (particular) necessary service, reasonable contract or arrangement or reasonable compensation are inherently factual in nature and must be resolved by the trustees or other appropriate fiduciaries of the Plans. Section 5.01 of ERISA Advisory Opinion Procedure (ERISA Proc. 76-1, 41 FR 36281, August 27, 1976) states that the Department generally will not issue advisory opinions on such questions.

Regulation section 29 CFR 2550.408b-2(b) permits a person providing services to a plan to furnish a limited amount of goods which are necessary and incidental to the furnishing of such services. Therefore, the person providing maintenance and repair services in connection with real property investments that the Plans may acquire may furnish goods which would be incidental to such maintenance and repair. However, section 408(b)(2) of ERISA would not permit a party in interest to furnish (sell) goods to the Plans which would be in the nature of capital improvements to real estate. However, as you may be aware, the Department recently proposed (47 FR 56945, December 21, 1982) a class exemption under which the restrictions of section 406(a)(1)(A) through (D) of ERISA will not apply to a transaction between a party in interest with respect to an employee benefit plan and an investment fund in which the plan has an interest, and which is managed by a qualified professional asset manager (QPAM), subject to certain conditions. In addition, subject to specified conditions, the class exemption would also afford relief under ERISA sections 406(a) and 406(b)(1) so as to permit limited amounts of goods and services to be provided by sponsoring employers and their affiliates.

With respect to your third question, section 406(b) of ERISA provides that a fiduciary with respect to a plan shall not (1) deal with the assets of the plan in his or her own interest or for his or her own account, (2) in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his or her own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Regulation provisions under 29 CFR 2550.408b-2(a) indicate that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2). As explained in regulation 29 CFR 2550.408b-2(e)(1), a fiduciary may not use any of its authority, control or responsibility which makes

such person a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which the fiduciary has an interest which may affect the exercise of the fiduciary's best judgement as a fiduciary. A fiduciary would have an interest in a transaction which may affect his best judgement as a fiduciary if, among other things, he is dealing with a person who can terminate his relationship with the plan. See paragraph (f), example 5 of the above regulation. Whether a fiduciary has such an interest generally depends on the facts and circumstances of the particular case.

Based on the representations in your letter we have made the following determinations: (1) arrangements made with a UTC subsidiary by a tenant under an absolute net lease in the circumstances you describe would not be a transaction involving a fiduciary dealing with plan assets and therefore would not be prohibited by section 406(b)(1); and (2) whether arrangements made by a property manager with a UTC subsidiary for maintenance and repair in the circumstances you describe constitutes a violation of section 406(b)(1) is a factual question with respect to which we are unable to express an opinion. Specifically, we will not rule as to whether the property manager in such a situation has an interest in the transaction which may affect his judgment as a fiduciary.

This letter constitutes an advisory opinion under ERISA Proc. 76-1 and is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

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