

**December 16, 2011**

Mr. Bruce Cooper
Pitta & Giblin, LLP
120 Broadway, 28th Floor
New York, New York 10271

2011-10A
ERISA SEC.
406

Dear Mr. Cooper:

This letter is in response to your request for an advisory opinion on behalf of the Cement and Concrete Workers District Council Labor Management Cooperation Trust Fund (Trust Fund) regarding possible prohibited transactions under section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and section 4975 of the Internal Revenue Code of 1986 (the Code).¹ Specifically, you ask whether contributions from the Trust Fund to the Cement and Concrete Workers District Council Pension Fund (Pension Plan) would be prohibited transactions.

You make the following representations in support of your request.

The Pension Plan is an employee benefit plan, as described in section 3(3) of ERISA, and a defined benefit plan, as described in section 3(35), providing retirement income to employees of contributing employers and holding assets in trust that are derived from employer contributions, subsequent investments, and earnings thereon. It is also a multiemployer plan that is maintained pursuant to one or more collective bargaining agreements.

The Trust Fund is an entity that is separate from, and holds assets that are not part of, the Pension Plan. The Trust Fund was jointly established by the Cement and Concrete Workers District Council, Laborers' International Union of North America, affiliated local unions (collectively, Union) and The Cement League (League), an employer association, pursuant to the "Agreement and Declaration of Trust Cement and Concrete Workers District Council Labor Management Cooperation Trust Fund" (Trust Agreement). The Union represents cement and concrete workers in the construction industry within the State of New York. The League, its members, and other employers operate businesses in the construction industry that employ cement and concrete workers. The Trust Fund is controlled, managed, and administered by a Joint Board of

¹ Under Reorganization Plan No. 4 of 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 should be taken as referring also to the corresponding sections of the Code.

Trustees (Board), which consists of two members who represent the Union and two members who represent the League. Two of the four Board members also serve as Pension Plan trustees.

The Union and the League created the Trust Fund, pursuant to the Trust Agreement, to implement certain purposes and provisions of the Labor Management Cooperation Act of 1978, as amended (LMCA). The Trust Fund was designed to conform to the requirements of section 302(c)(9) of the Labor Management Relations Act of 1947 (LMRA), as amended, 29 U.S.C. §186(c)(9), as an “industry wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.” Article II, section 2 of the Trust Agreement, sets forth the numerous purposes of the Trust Fund. These purposes include (1) identifying and expanding work opportunities for cement and concrete workers, (2) promoting the health and safety and the general economic competitiveness of the Union and employers within the territorial jurisdiction of the Union, (3) communicating with the public about issues of concern to cement and concrete workers and their employers, (4) conducting research and certain other activities to minimize workplace hazards, (5) cooperating with and supporting financially jointly trusted tax exempt fringe benefit funds for one or more of the trust's purposes, and (6) establishing standards for practices among the employers. The Trust Agreement defines “Employer” as any employer engaged in work coming within the jurisdiction of the Union who is obligated by a collective bargaining agreement to make contributions to the Trust Fund (hereinafter, Employers).

You represent that the Trust Fund was not established for the purpose of providing, nor does it provide, any benefit described in section 3(2) of ERISA. The Trust Fund never operated as if it was an ERISA-covered plan and no communications to employees have described the Trust Fund as an ERISA-covered plan. Furthermore, no provision in the Trust Agreement has been interpreted by the Board as authorizing the Trust Fund to provide any benefits within the meaning of section 3(2) of ERISA.

Trust Fund assets consist of funds received by the trustees (i.e., the Board) in the form of employer contributions and other assets that are received and held by the Board under the terms of the Trust Agreement. The Trust Fund is described as a target fund that is qualified as a tax exempt trust under section 501(c)(5) of the Code.² Further, the Trust Fund was not established to hold “plan assets” of the Pension Plan or any other employee benefit plan. Thus, you represent that the Trust Fund will not accept any contributions from ERISA-covered employee benefit plans. The Trust Fund is financed by monies that were initially to be paid into the wage package of employees of the Employers (the Employees). However, with the Employees’ approval, the Union and the League negotiated for the monies to be taken out of the contractual hourly wage

² Trust Agreement Art. II, Sec. 4.

increase of the Employees and, instead, to be paid by the Employers into the Trust Fund at a rate of \$0.40 per hour for all hours the Employees work.

You state that one of the goals of the Trust Fund is to help contractors that are parties to a collective bargaining agreement with the Union (Signatory Contractors) win construction projects that will employ Union cement and concrete laborers. As such, in a situation where a Signatory Contractor is bidding against a non-union contractor for a project and the Signatory Contractor believes use of monies from the Trust Fund is necessary to win the contract, the Signatory Contractor will apply to the Board for such use. If the Board approves, then all Signatory Contractors bidding on the project will be notified prior to the bid date as to how much of the Signatory Contractor's contributions to the Pension Plan the Trust Fund will pay. You provide the example that if, pursuant to the collective bargaining agreement, a Signatory Contractor's contribution to the Pension Plan is \$9.76 per hour for all hours worked by the Employees, the Contractor would contribute \$7.76 per hour and the Trust Fund would contribute \$2.00 per hour for all hours worked by the Employees on the project, for an aggregate sum of \$9.76. You represent that the Trust Fund will establish a set amount of hours for which it will contribute. Under these circumstances, the Signatory Contractor would file monthly remittance reports with the Pension Plan showing hours worked by all Employees and the pension benefits they earned.

Advisory Opinion Requested

You ask whether the Trust Fund's contributions to the Pension Plan would constitute prohibited transactions under section 406 of ERISA.

Section 406(a)(1) of ERISA prohibits, in pertinent part, a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect sale, exchange, or leasing, of any property between the plan and a party in interest (section 406(a)(1)(A)), lending of money or other extension of credit between the plan and a party in interest (section 406(a)(1)(B)), or a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan (section 406(a)(1)(D)).

Section 3(14)(G) of ERISA defines a "party in interest" with respect to a plan to include, among other entities, a trust or estate, the beneficial ownership of which is held by employers or fiduciaries of the plan. With respect to the Trust Fund, it should be noted that section 3(14)(G) states, in pertinent part, that such a trust would be a "party in interest" to a pension plan if 50% or more of the beneficial interest of the trust is owned, directly or indirectly, or held by employers any of whose employees are covered by such plan. Based on your representations, the Department does not believe that it has enough information to determine whether the Trust Fund is a "party in interest" under section 3(14)(G).

Generally, the transactions described in section 406(a) of ERISA involve direct or indirect uses of plan assets with parties in interest, often not at arm's length terms, that are potentially harmful to the plan. Payment of a cash contribution to a plan by a party in interest (or other person) is not a prohibited transaction under section 406(a). Therefore, it is the Department's view that the mere cash contribution by the Trust Fund to the Pension Plan would not violate section 406(a) of ERISA, even if the Trust Fund were a party in interest with respect to the Pension Plan.

Section 406(b)(1) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account. Section 406(b)(2) prohibits a fiduciary 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.

The prohibitions of section 406(b) generally involve either the use by a plan fiduciary of plan assets to benefit a fiduciary, or persons in whom the fiduciary has an interest that could affect the fiduciary's judgment, or a transaction where the fiduciary is in a position where its interests, or the interests of a party it represents, are in conflict with the interests of the plan.

In this regard, section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Based on the information and representations you provided, it appears that the Trust Fund does not and will not provide any benefit included in section 3(1) of ERISA.³ For this purpose, it is the Department's position that section 3(1)(B) of ERISA does not incorporate as a covered benefit every arrangement described in section 302(c) of

³ See Advisory Opinions 81-48A and 81-49A (May 28, 1981) as well as Advisory Opinion 2003-06A (Mar. 25, 2003).

LMRA. Rather, the Department clarified the definition of an “employee welfare benefit plan,” in 29 C.F.R. § 2510.3-1(a)(3), with regard to benefits described in section 302(c) of LMRA, by stating:

Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are “. . . holiday, severance or similar benefits.” Thus, the effect of section 3(1)(B) of the Act is to include within the definition of “welfare plan” those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).

Although this regulation was adopted prior to the amendment of section 302(c) of LMRA that added subsection 302(c)(9), the principle it articulates remains fully applicable. Only those arrangements described in section 302(c) of LMRA that provide benefits to participants or their beneficiaries would constitute employee welfare benefit plans. Further, there is no indication in the submission that the Trust Fund is an employee pension benefit plan within the meaning of section 3(2) of Title I of ERISA. Accordingly, subject to the limitation regarding the Trust Agreement referenced above and based on the information and representations you provided, it is the Department’s view that the Trust Fund is not an “employee benefit plan” under Title I of ERISA.⁴

Nor does it appear that the assets of the Trust Fund consist of the assets of an employee benefit plan. It is the position of the Department that, in situations outside the scope of the plan assets regulation (29 C.F.R. §2510.3-101), the assets of a plan generally are identified on the basis of ordinary notions of property rights under non-ERISA law. You represent that the Trust Fund will not accept any contributions from ERISA-covered employee benefit plans and that the Trust Fund was not established to hold the assets of any employee benefit plan. Based on the Trust Agreement, the Trust Fund's assets are available for various uses other than payment to the Pension Plan. It further appears that the Pension Plan has no beneficial or ownership right to the assets of the Trust Fund and that the contributions are made solely upon the approval of the Board of Trustees of the Trust Fund which has no obligation to use any of the funds for ERISA-covered plans. Accordingly, it does not appear that the assets of the Trust Fund

⁴ The absence of any explicit limitation in the Trust Agreement that would prevent the Trust Fund from providing welfare or pension benefits to participants or beneficiaries precludes us from assuring you that the Trust Fund will not be an employee benefit plan if the Trust Agreement is operated so as to provide a welfare or pension benefit within the meaning of Title I of ERISA.

consist of the assets of any employee benefit plan. Although the Trust Fund may incur contractual obligations to make payments to the Pension Plan, this alone would not make the Trust Fund's assets plan assets subject to ERISA.

As a result, it is the Department's view that the mere cash contribution by the Trust Fund to the Pension Plan also would not violate section 406(b) of ERISA, provided that Trust Fund is not an employee benefit plan under Title I of ERISA or the assets of the Trust Fund are not considered "plan assets" of an employee benefit plan subject to ERISA.⁵

This letter constitutes an advisory opinion under ERISA Procedure 76-1, and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter relates solely to the application of provisions of Title I of ERISA, and should not be read as expressing any opinion as to the applicability of other laws to the above described arrangements, including section 302(c) of the LMRA.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

⁵ The Department is expressing no opinion herein as to whether monies contributed to the Pension Plan by the Trust Fund would be considered an "employer contribution" for purposes of the Code.