U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

March 23, 2005

2005-03A
ERISA SEC.
29 CFR 2510.3-101
and 408(b)(2)

Frank C. Sabatino
Stevens & Lee
1818 Market Street – 29th Floor
Philadelphia, PA 19103

Dear Mr. Sabatino:

This is in response to your request for an advisory opinion regarding the application of the prohibited transaction provisions of section 406 of the Employee Retirement Income Security Act, as amended ("ERISA") and section 4975 of the Internal Revenue Code ("Code") to certain transactions proposed by the Teamsters Pension Trust Fund of Philadelphia & Vicinity ("Pension Fund") and the Teamsters Health and Welfare Fund of Philadelphia & Vicinity ("Welfare Fund") (collectively, the "Funds").[1] Specifically, you ask whether the provision of administrative services to the Funds and to other multiemployer plans by a newly formed corporation, to be owned approximately 65% by the Pension Fund and approximately 35% by the Welfare Fund, would result in prohibited transactions under ERISA and the Code.

You represent that each of the Funds is a multiemployer plan established pursuant to section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5) ("LMRA") and the relevant provisions of ERISA. The Funds are maintained pursuant to collective bargaining agreements negotiated by unions affiliated with the International Brotherhood of Teamsters ("IBT"). All of the IBT-affiliated unions associated with the Funds are chartered by the IBT and governed by the same constitution and bylaws.

You state that fifteen IBT-affiliated unions have negotiated with approximately 500 employers to mandate contributions to the Welfare Fund. Thirteen IBT-affiliated unions have negotiated with approximately 450 employers to require contributions to the Pension Fund. The Welfare Fund provides medical and related benefits to approximately 9,752 active participants and 17,000 dependents, while the Pension Fund has approximately 11,500 active participants, 3,900 terminated vested participants, and 12,700 individuals receiving pensions. Each of the Funds has six trustees ("Trustees"), who are appointed in equal numbers by labor and management in accordance with

[1] Under Reorganization Plan No. 4 of 1978, 43 FR 47713 (5 U.S.C. App. 1 [1996]), 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. The Secretary of the Treasury is bound by interpretations of the Secretary of Labor pursuant to such authority. Therefore, references in this letter to specific sections of ERISA should be read to refer also to the corresponding sections of the Code.

MRA section 302(c)(5). Three of the Trustees are appointed by contributing employers and three are appointed by the IBT-affiliated unions. The same six individuals serve as the Trustees with respect to both Funds.

You note that, in addition to the IBT-affiliated unions, both Funds accept contributions with respect to 32 participants pursuant to a collective bargaining agreement negotiated by their employer with the Independent Dock Workers Union No. 1 ("IDU No. 1"), a union that is not affiliated with the IBT. You represent that the members of IDU No. 1 were previously represented by Teamsters Local Union No. 676 ("Local 676") and were participants of the Funds through this IBT-affiliated union. However, the members of Local 676 subsequently withdrew from the IBT and formed IDU No. 1. You state that, at the time IDU No. 1 was formed, the members of IDU No. 1 expressed an interest in continuing their participation in the Funds. The Trustees granted that request with respect to both Funds and continue to accept contributions on behalf of IDU No. 1. You represent that IDU No. 1 has no authority to appoint any trustees to either of the Funds and no control over the terms or governance of the Funds.

You state that, currently, administrative services for the Funds are provided primarily by the Funds' administrative operation, located in a building (the "Building") owned by the Welfare Fund in Philadelphia. The Welfare Fund has 29 employees, all of whom work at that location. The Pension Fund, which has 15 employees, pays rent to the Welfare Fund for its use of the Building.[2] You represent that although the Funds have taken measures to keep administrative expenses in check, the Trustees believe that a reorganization of the Funds' administrative operation could reduce these expenses further. The Trustees have proposed that the Funds establish a new corporation (the "Administrative Corporation") to provide administrative services to the Funds and to other multiemployer plans in the Philadelphia metropolitan area, thereby enabling the Funds to share these expenses with other plans and increasing the amount of assets available to pay benefits. The Trustees expect that the Administrative Corporation will be able to offer administrative services to other multiemployer plans at rates significantly lower than those offered by other third-party administrators on the open market. You represent that, if at any time the Trustees determine that the establishment or operation of the Administrative Corporation ceases to be of benefit to

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[2] You have represented that the Funds have the same trustees, and that, currently, employees of each of the Funds are covered by both Funds. Under section 3(14)(C) of ERISA, the term "party in interest" includes an employer any of whose employees are covered by the plan. Accordingly, the Welfare Fund, as an employer of employees covered by the Pension Fund, is a party in interest with respect to the Pension Fund, and vice versa. In the absence of an exemption, the leasing or sharing of office space, and/or the provision of administrative services between plans that are parties in interest with respect to one another results in a violation of section 406(a) of ERISA. In addition, transactions between plans with the same trustees result in violations of section 406(b)(2) of ERISA. The Department notes that exemptive relief may be available for these transactions under Part C of PTE 76-1 (41 Fed. Reg. 12740, (March 26, 1976)) and under PTE 77-10 (42 Fed. Reg. 33918 (July 1, 1977)), provided all conditions of those exemptions are satisfied. The Department is not opining on whether the conditions of those exemptions have been satisfied.

the Funds, the Trustees would have a fiduciary obligation to reform the arrangements, including, if the circumstances so warrant, re-establishing the Funds' administrative operations.

Under the proposed arrangement, the Funds would collectively own 100 percent of the outstanding stock of the Administrative Corporation, with each Fund owing an interest proportionate to that Fund's initial investment. The initial investments in the Administrative Corporation would include data processing and office equipment currently owned by each of the Funds, with the fair market value of each Fund's initial investment determined by Ernst & Young, LLP, the Funds' independent auditor and financial advisor.

The Administrative Corporation would be a "for-profit" corporation established pursuant to Pennsylvania law. The Board of Directors of the Administrative Corporation ("Directors") would consist of two individuals, each of whom is a Trustee of both the Pension Fund and the Welfare Fund. The other four Trustees of the Funds would be specifically charged under the Funds' plan documents with assessing the performance of the Administrative Corporation. You state that the Trustees' respective responsibilities to oversee the management and to monitor the performance of the Administrative Corporation would be clearly and separately apportioned among the Funds' six Trustees. You represent that the Trustees who are Directors of the Administrative Corporation would ensure that the net revenue earned by the Administrative Corporation is actually used to keep the administrative fees charged to the Funds as low as practicable and would not have any role in evaluating the Administrative Corporation's performance as a service provider to the Funds, and that the other four Trustees would be exclusively responsible for the monitoring function. The Funds' auditor would provide the four monitoring Trustees with a special report designed to assist them in their monitoring capacity.

You state that the fees to be paid by the Funds to the Administrative Corporation for administrative services would be determined in the following manner. Using the previous year's administrative expenses and the average number of participants as a base, a per member, per month cost would be determined. This per member, per month fee would be paid by the respective Fund and would be reviewed on a quarterly basis. Thus, the fees charged by the Administrative Corporation to the Funds would be roughly cost neutral at the outset of the conversion. You expect that the Administrative Corporation will find a ready market for its third-party administrative services among the relatively large number of Taft-Hartley plans in the Philadelphia area that have comparatively small participant bases. You represent that all of the net revenue earned by the Administrative Corporation from administrative services provided to other plans would be used to reduce the fees charged to the Funds by the Administrative Corporation.

We have determined that your request raises the following issues:

(1) Are the Funds a "related group of plans" for purposes of paragraph (h)(3) of the plan assets regulation at 29 CFR 2510.3-101?

The Department of Labor's plan assets regulation, at § 2510.3-101(h)(3), provides that when a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity. As explained in the preamble to the final regulation, this provision reflects the conclusion of the Department that, when a plan is the sole owner of an entity, there is no meaningful difference between the assets of the entity and the assets of the plan.[3] Paragraph (h)(4) of the plan assets regulation provides, in relevant part, that for purposes of paragraph (h)(3), a "related group" of employee benefit plans consists of every group of two or more employee benefit plans – each of which is either maintained by, or maintained pursuant to a collective bargaining agreement negotiated by, the same employee organization or affiliated employee organizations. In this regard, an "affiliate" of an employee organization is defined to mean any person controlling, controlled by, or under common control with such organization, and includes any organization chartered by the same parent body, or governed by the same constitution and bylaws, or having the relation of parent and subordinate.

Both Funds are maintained pursuant to a collective bargaining agreement negotiated by unions affiliated with the IBT. All of the IBT-affiliated unions associated with the Funds are chartered by the IBT and governed by the same constitution and bylaws of the IBT. The same six individuals are the Trustees of both the Welfare Fund and the Pension Fund. While you acknowledge that the Funds accept contributions on behalf of a small number of individuals who are members of IDU No. 1, which is not IBT-affiliated, you specifically represent that IDU No. 1 does not have authority to appoint any trustees to either of the Funds and does not have any control over the terms or governance of the Funds. As a result, the Funds are maintained by, or pursuant to, a collective bargaining agreement negotiated by the same employee organization, the IBT. The fact that IDU No. 1 is not IBT-affiliated, but contributes to the Funds, does not alter this conclusion where IDU No. 1 does not participate in the collective bargaining process and has no authority or control with respect to the maintenance of the Funds.

Based upon the representations set forth above, it is the Department's view that the Funds constitute a "related group of plans" for purposes of § 2510.3-101(h)(3) of the plan asset regulation. Accordingly, because the Funds would make the only capital

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[3] See 51 Fed. Reg. 41262, 41276 (Nov. 13, 1986).

contributions to the Administrative Corporation and would own 100% of the equity interests in the Administrative Corporation, the Funds' assets would include their equity interests in the Administrative Corporation and all of the underlying assets of the Administrative Corporation.

(2) Would transactions between the Administrative Corporation and the Funds constitute prohibited transactions under section 406 of ERISA?

Section 3(14) of ERISA defines the term "party in interest" with respect to a plan to include, among other things, a person providing services to such plan; an employer any of whose employees are covered by the plan; or a corporation, 50 percent or more owned directly or indirectly or held by a service provider or employer."[4] Section 406(a)(1)(A) of ERISA states that a fiduciary with respect to an employee benefit 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, exchange or leasing of any property between a plan and a party in interest. Section 406(a)(1)(C) and 406(a)(1)(D) state that a fiduciary with respect to an employee benefit 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 furnishing of services between the plan and a party in interest with respect to the plan, or a transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Section 406(b)(1) of ERISA prohibits a fiduciary from dealing with plan assets in his or her own interest or for his or her own account and section 406(b)(2) specifically prohibits a fiduciary in his or her individual or in any other capacity 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.

To the extent that the Funds are a "related group of plans" for purposes of the plan assets regulation at § 2510.3-101(h)(3), and the Funds own 100 percent of the Administrative Corporation, it is our view that the Administrative Corporation should be viewed as an asset of the Funds and therefore would not be a party in interest with respect to the Funds. Accordingly, consistent with the analysis set forth above, it is the opinion of the Department that, under the circumstances described, transactions between the Administrative Corporation and the Funds would not be prohibited under section 406 because, under the terms of the plan asset regulation, they would be treated as "intra-plan" transactions with respect to each of the Funds.[5]

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[4] See ERISA section 3(14)(B), (C) and (G), respectively.

[5] We are assuming for purposes of this opinion that the Funds will continue to be a "related group of plans" for purposes of § 2510.3-101(h)(3) and will continue to own 100 percent of the Administrative Corporation. If for any reason the Funds cease to be a "related group of plans" or cease to collectively own 100 percent of the Administrative Corporation, the analysis set forth in this advisory opinion would no longer apply.

(3) Would the provision of services by the Administrative Corporation to other plans result in violations of the prohibited transaction provisions of section 406 of ERISA?

Once the Administrative Corporation begins providing services to a plan, the Administrative Corporation and the Funds which own the Administrative Corporation become parties in interest with respect to that plan under ERISA section 3(14)(B) and (G), respectively. Absent a statutory or administrative exemption, fiduciaries of a plan would violate ERISA section 406(a)(1)(C) by obtaining services from a party in interest and ERISA section 406(a)(1)(D) by using plan assets to pay for those services.

Subject to the limitations of section 408(d) of ERISA, section 408(b)(2) exempts from the prohibitions of section 406(a) contracting or making reasonable arrangements for services (or a combination of services) with a party in interest 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" (§ 2550.408b-2(c)) and "reasonable compensation" (§§ 2550.408b-2(d) and 2550.408c-2) as used in section 408(b)(2) of ERISA.

With respect to the prohibitions in section 406(b) of ERISA, the Department's regulation at 29 CFR 2550.408b-2(a) states that section 408(b)(2) 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 section 408(b)(2) exempts from the prohibitions of section 406(a). As explained in § 2550.408b-2(e)(1), if a fiduciary uses the authority, control or responsibility which makes such person a fiduciary to cause the plan to enter into a transaction involving the provision of services which may affect the exercise of such fiduciary's best judgment as a fiduciary, a transaction described in section 406(b) would occur, and that transaction would be deemed to be a separate transaction not exempted by section 408(b)(2). However, § 2550.408b-2(e)(2) provides that if a fiduciary does not use any of the control, authority or responsibility which makes such person a fiduciary to cause a plan to pay a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary, no violation of section 406(b)(1) will occur. In general, whether a violation of section 406(b) occurs in the course of a fiduciary's selection of the Administrative Corporation to provide services to a plan is an inherently factual matter.[6]

More generally, the Department cautions that ERISA's general standards of fiduciary conduct apply to all fiduciary decisions made in connection with the proposed transactions. Section 404(a)(1) of ERISA requires, among other things, that a fiduciary

[6] See Advisory Opinion 97-23A, September 26, 1997.

discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries, and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. Accordingly, the appropriate plan fiduciaries must act "prudently" and "solely in the interests" of the plan participants and beneficiaries in making decisions relating to the establishment, operation and continuation of the Administrative Corporation.

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

Sincerely,

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