

September 6, 2024

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**Via Certified Mail – Return Receipt Requested**

U.S. Department of Labor  
Employee Benefits Security Administration  
Office of Regulations and Interpretations  
Office Director Joe Canary  
200 Constitution Avenue, NW, Suite N-5655  
Washington, D.C. 20210

*Re: Puget Sound Pilots Association Multiple Employer Defined Benefit Pension Plan*

Dear Reader:

Pursuant to ERISA Procedure 76-1, this is a supplemental request made on behalf of the Puget Sound Pilots Association for an advisory opinion to specifically address: (i) whether the Puget Sound Pilots Association may be considered to be a bona fide “group or association of employers acting for an employer in such capacity” as that phrase is used in the definition of the term “employer” in section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), for purposes of establishing and maintaining a tax-qualified multiple employer defined benefit pension plan (“MEP”) consistent with the definition of a “bona fide group or association of employers” in section 2510.3-5(b) and section 2510.3-55(b) of the Department of Labor Regulations; and (ii) whether a Puget Sound pilot, a self-employed individual who forms a limited liability company (“LLC”), treated as a partnership, or another corporate entity that receives earned income for services performed by the pilot as a pilot, may be considered to be a “working owner” of a trade or business without common law employees consistent with the dual treatment of working owners as employers and employees in section 2510.3-55(d) of the Department of Labor Regulations and an “owner-employee” as described in section 401(c) of the Internal Revenue Code of 1986, as amended (the “Code”) and qualify as both an employer and an employee of the trade or business for purposes of participating in the MEP.

## I. Bona Fide Group or Association of Employers.

Historically, the Department of Labor has taken a facts-and-circumstances approach to determining whether a group or association of employers is a bona fide employer group or association that may sponsor an ERISA plan on behalf of its employer members. The guidance issued by the Department of Labor, largely from a collection of advisory opinions issued over more than three decades, has expressed the view of the Department with respect to whether, based on individual circumstances, a particular group or association was able to sponsor a multiple employer plan. While the language in the advisory opinions has been tailored to the issues presented to the Department in the specific arrangements involved, the interpretive guidance issued by the Department has consistently focused on three criteria: (i) whether the group or association has business or organizational purposes and functions unrelated to the provision of benefits (known as the “business purpose” standard); (ii) whether the employers share some commonality of interest and genuine organizational relationship unrelated to the provision of benefits (known as the “commonality” standard); and (iii) whether the employers that participate in a benefit program, either directly or indirectly, exercise control over the benefit program, both in form and substance (known as the “control” standard).

A variety of factors were provided in the guidance issued by the Department as relevant when applying the three general criteria to a particular group or association. The three factors include how members are solicited; who is entitled to participate and who actually participates in the group or association; the process by which the group or association was formed; the purposes for which it was formed; what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; who actually controls and directs the activities and operations of the benefit program; the extent of any employment-based common nexus or other genuine organizational relationship unrelated to the provision of benefits.

As explained in this supplemental request for an Advisory Opinion, the Puget Sound Pilots Association was formed by the Puget Sound pilots in 1935. The business purpose of the Puget Sound Pilots Association is to facilitate pilots who aid in the shipment of more than \$80 billion in cargo through the Puget Sound waters. The members of the Puget Sound Pilots Association are Washington State-licensed vessel captains who pilot vessels of various sizes and configurations through the Puget Sound waters, sharing a common interest and requirement in the business purpose of the Puget Sound Pilots Association. Licensed Puget Sound pilots are required on all foreign-flag commercial vessels, tankers, freighters, cruise ships, and container ships passing through those waters. They are also required on U.S. vessels engaged in foreign trade other than with Canada. The governing board of the Puget Sound Pilots Association consisting only of Puget Sound pilots and assisted by the Executive Director retained by the Puget Sound Pilots Association negotiate and advocate for



tariffs imposed on the vessels passing through the Puget Sound waters for several purposes including the compensation paid to the pilots and the retirement and disability benefits, payable under the Amended Retirement Program of Puget Sound Pilots, a pay-as-you-go or farebox defined benefit pension plan (the "Plan"). The pilots control the contributions made to fund the benefits payable under the Plan and the payment of the benefits payable under the Plan. Accordingly, the Puget Sound Pilots Association and the Puget Sound pilots satisfy the three criteria used by the Department of Labor to consider an association to be an employer as defined in section 3(5) of ERISA.

In Advisory Opinion 2007-06A (issued August 16, 2007) the Department of Labor said that the definitional provisions of ERISA as well as the overall statutory scheme recognize that an employee benefit plan may be established or maintained where a cognizable, bona fide group or association of employers acts in the interests of its employer members to establish a benefit program for the employees of member employers. *See, e.g.*, Advisory Opinion 2017-02AC (issued May 16, 2017), and Advisory Opinion 2003-13A (issued September 30, 2003).

In Advisory Opinion 2007-06A, the Department of Labor stated that a determination as to whether there is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered by the Department of Labor include: (i) how members are solicited; (ii) who is entitled to participate and who actually participates in the association; (iii) the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; (iv) the powers, rights, and privileges of employer members that exist by reason of their status as employers; and (v) who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the benefit program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program. *See, e.g.*, Advisory Opinion 2019-01A (issued July 8, 2019), Advisory Opinion 2017-02AC (issued May 16, 2017), and Advisory Opinion 2005-20A (issued August 31, 2005).

In Advisory Opinion 2019-01A (issued July 8, 2019) the Department of Labor stated that an important consideration with respect to whether an arrangement is a bona fide employer group or association is whether the person or group that maintains the employee benefit plan is tied to the employers and employees that participate in the plan by some common economic or representational interest and a genuine organizational relationship between the employers unrelated to the provision of benefits for purposes of section 3(5) of ERISA. *See, e.g.*, Advisory Opinion 2008-07A (issued September 26, 2008); Advisory Opinion 1996-25A (issued October 31, 1996).

In this case, a Puget Sound pilot who is a member of the Puget Sound Pilots Association is considered to be a working owner of a trade or business under section 2510.3-55(d) of the Department of Labor Regulations and section 401(c)(3) of the Code with a commonality of economic interest and a genuine organizational relationship unrelated to the provision of benefits under an employee benefit plan. These owner-employees are engaged in the same industry and profession – vessel pilots in the Puget Sound waters. In addition, they are required to be members of the Puget Sound Pilots Association.

The Department of Labor has also stated that control of the group or association must be vested solely in employer members for the group or association to be a bona fide group or association of employers for purposes of section 3(5) of ERISA. *See, e.g.*, Advisory Opinion 95-01A (issued February 13, 1995) and Advisory Opinion 88-07A (issued September 26, 2008).

The Puget Sound Pilots Association is comprised of all the working Puget Sound pilots, currently 54, and was formed by the pilots in 1935 as a formal organization with a Federal Employer Identification Number 91-1170751, managed by the pilots with formal by-laws and a governing body made up of pilots. The Puget Sound Pilots Association, of which only licensed Puget Sound pilots can be members, schedules the assignments for the pilots for the vessels, negotiates and advocates for the tariffs used for paying the compensation to the pilots and the retirement and disability benefits for the pilots pursuant to the Plan, an unfunded, pay-as-you-go benefit pension plan sponsored and maintained by the Puget Sound Pilots Association.

Each member of the Puget Sound Pilots Association is a self-employed Puget Sound pilot who receives earned income each year as defined in section 401(c) of the Code. The pilots are not employees of the Puget Sound Pilots Association or any other organization. Each pilot has formed or will form a corporate entity, such as a limited liability company (an “LLC”) treated as a partnership or an S corporation that provides earned income for the pilot based upon income earned from the services performed as a Washington State-licensed Puget Sound pilot. Each pilot participates in the current Plan and would participate in the proposed MEP, a funded, tax-qualified multiple employer defined benefit pension plan, which would be subject to the requirements in section 401(a) of the Code and the requirements in ERISA and would be established and maintained by the Puget Sound Pilots Association.

The Puget Sound pilots, and the corporate entities formed by the pilots have a commonality of economic interest and a genuine organizational relationship unrelated to the provision of benefits under the proposed MEP. The pilots are engaged in the same industry – pilots of vessels passing through the Puget Sound waters. In addition, only the corporate entities formed by the pilots would participate in the



proposed MEP which would be sponsored by the Puget Sound Pilots Association. The corporate entities formed by the pilots would determine the terms of the plan, the benefits payable under the plan, and the power to control the administration and interpretation of the plan through their authority to nominate, elect and remove the members of the governing board of the Puget Sound Pilots Association. The corporate entities formed by the pilots that would participate in the proposed MEP would have, therefore, either directly or indirectly, the power and authority to exercise control over the plan, both in form and in substance, and act as a bona fide employer group or association with respect to the plan. *See, e.g.*, Advisory Opinion 2019-01A (issued July 8, 2019); Advisory Opinion 2017-02AC (issued May 16, 2017).

The proposed MEP would replace the current Plan, an unfunded, pay-as-you-go defined benefit pension plan which is not subject to ERISA or the Code for tax-qualified retirement plans (the 54 pilots are independent contractors, so ERISA does not apply and the requirements for a tax-qualified retirement plan under the Code do not apply). The proposed MEP would provide substantially identical benefits, rights, and features that are in the current Plan, and the proposed plan would be funded and subject to the requirements under ERISA and the Code that apply to a tax-qualified retirement plan. The creation of a funded, defined benefit retirement plan has been mandated by the Washington State Utilities and Transportation Commission as part of its tariff setting process.

As previously stated, the benefits paid under the Plan are funded by tariffs imposed on the vessels that pass through the Puget Sound waters determined, in part, by the compensation paid to the pilots and the retirement benefits payable to the pilots who have retired. The cost of the current Plan and the need for tariffs to pay the benefits will continue to increase in the future with more pilots in the future and the retirement of more pilots under the current Plan. The proposed MEP would also initially be funded with tariffs, but because assets will be contributed to a tax-exempt trust described in section 501(a) of the Code for the funded, tax-qualified MEP, the assets and the earnings on the assets will eventually fully fund the benefits payable to the pilots under the proposed plan and no further tariffs would be needed in the future (resulting in less cost for the vessels passing through the Puget Sound waters).

Section 2510.3-55 of the Department of Labor Regulations contains the provisions defining what is a bona fide group or association of employers capable of establishing a multiple employer defined contribution pension plan. The facts and circumstances applicable to the Puget Sound Pilots Association as a “bona fide group or association of employers” capable of establishing a multiple employer plan satisfy the criteria in section 2510.3-55(b) of the Regulations that identify certain groups and associations that act as employers within the meaning of section 3(5) of ERISA and

distinguish those groups and associations from others that may not act as an “employer.”

Section 2510.3-55(b) provides that a bona fide group or association of employers capable of establishing a multiple employer pension plan (“MEP”) shall include a group or association of employers that meets the following requirements:

- (i) the primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees; however, the group or association also must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees; as a safe harbor, a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan, such as promoting common business interests of its members or the common economic interests in a trade or employer community and is not required to be a for-profit activity;
- (ii) each employer member of the group or association participating in the plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan;
- (iii) the group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality;
- (iv) the functions and activities of the group or association are controlled by its employer members, and the group’s or association’s employer members that participate in the plan control the plan, requiring control to be present both in form and in substance;
- (v) the employer members have a “commonality of interest” as described in section 2510.3-55(b)(2);
- (vi) the group or association does not make plan participation through the association available other than to employees and former employees of employer members, and their beneficiaries; and
- (vii) the group or association is not a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm, or owned or controlled by such an entity or any subsidiary or affiliate of such an entity.



Section 2510.3-55(b)(2) describes “commonality of interest” and provides that employer members of a group or association will be treated as having a “commonality of interest” if either: (i) the employers are in the same trade, industry, line of business or profession; or (ii) each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State).

The control of the group or association is vested solely in the employer members and is a bona fide group or association of employers for the purposes of section 3(5) of ERISA.

## II. Pilots Considered as Working Owners

The membership of the Puget Sound Pilots Association is comprised of Puget Sound pilots who have dual treatment of working owners as employers and employees as active pilots directly serving as vessel captains who are members of the Puget Sound Pilots Association. These pilots are engaged in the same industry and the same profession with a genuine organizational relationship unrelated to any employee benefit plan. The pilots, as previously discussed, have the power to control and direct the administration and operation of the Puget Sound Pilots Association and the proposed MEP.

In Advisory Opinion 99-04A (issued February 4, 1999) and Advisory Opinion 2006-04A (issued April 27, 2006) the Department of Labor stated that there is “nothing in the definitions of Title I of ERISA that would preclude a pension plan from extending plan coverage to working owners where such coverage is otherwise consistent with the documents and instruments governing the plan and does not violate any other provision of Title I of ERISA. The U.S. Supreme Court addressed the meaning of “participant” in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004). In that decision, the Court held that a working owner of a business may qualify as both an “employee” and a “participant” in a pension plan for ERISA purposes.

Section 2510.3-55(d)(1) describes the dual treatment of working owners as employers and employees and provides that a working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of the requirements in section 2510.3-55(b), including the requirement that each employer member of the group or association adopting the MEP must be a person acting directly as an employer of one or more employees who are participants covered under the MEP and that the group or association does not make participation through the group or association available other than to certain employees and former employees and their beneficiaries.

Section 2510.3-55(d)(2) defines the term “working owner” to mean any person who a responsible plan fiduciary reasonably determines is an individual:

- (i) who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual;
- (ii) who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and
- (iii) who either: (A) works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner’s trade or business, or (B) in the case of a multiple employer plan, has wages or self-employment income from such trade or business that at least equals the working owner’s cost of coverage for participation by the working owner and any covered beneficiaries in any group health plan sponsored by the group or association in which the individual is participating or is eligible to participate.

Section 2510-55(d)(3) provides that the determination under section 2510.3-55(d) must be made when the working owner first becomes eligible for participation in the MEP and continued eligibility must be periodically confirmed pursuant to reasonable monitoring procedures.

The Puget Sound pilots are self-employed, independent professionals affiliated by their profession as highly skilled, Washington State-licensed vessel captains. The pilots are working owners of their trade or business as vessel captains. As previously stated, the pilots are required to be members of the Puget Sound Pilots Association. The Puget Sound Pilots Association schedules the assignments for the pilots for the vessels, and negotiates the tariffs imposed on the vessels passing through the Puget Sound waters. The tariffs are determined in part by the compensation paid to the pilots and the retirement benefits paid to the retired pilots under the Plan, which is administered by the Association.

The Plan is not subject to the requirements of ERISA (the participating Puget Sound pilots are independent contractors) and the Plan is not a funded tax-qualified plan described in section 401(a) of the Code. The Plan provides that a retired pilot is entitled to receive a retirement benefit equal to 1.5% of the retired pilot’s “retirement base” multiplied by the number of that pilot’s years of service. The term “retirement base” means an amount equal to the average of the last three years of “distributable net income,” which is the projected annual income for an active pilot as determined from time to time in rate proceedings by the Washington State Utilities and Transportation Commission. All of the Puget Sound pilots are required to participate in the Plan and only the Puget Sound pilots are eligible to participate in the Plan.



The Puget Sound Pilots Association has authorized the adoption of a multiple employer defined benefit pension plan that would be a funded, tax-qualified plan described in section 401(a) of the Code established and maintained by the Puget Sound Pilots Association. The benefit payable under the tax-qualified plan would be substantially identical to the current benefit payable under the current unfunded, pay-as-you-go or farebox defined benefit pension plan. This would be accomplished by adjusting the 1.5% annual accrual rate in the existing defined benefit pension plan by the percentage that the retired pilot's "retirement base" exceeds the limit imposed by section 401(a)(17) of the Code on the amount of annual compensation that is used to calculate a participant's retirement benefit.

As an illustration, the following example, which uses a general estimate for the final average compensation of a pilot and the 2023 compensation limit, reflects the calculation of the retirement benefit that would be paid under the Plan. For a pilot who retired in 2023 with 20 years of service as an active pilot and an average compensation base over the last three years of his or her career of \$430,000, which exceeds the \$330,000 compensation limit in 2023 imposed by section 401(a)(17) of the Code by 30.303%, the 1.5% annual accrual rate in the existing pension plan would be increased by that percentage to 1.954545% to provide the pension benefit level promised in the existing pension plan. In this example, the 2023 retiring pilot's benefit would be \$129,000 ( $\$330,000 \times 1.954545\% \times 20$ ) on an annual basis, payable in substantially equal monthly installment payments of \$10,750. This simple calculation ensures that Puget Sound pilot retirees receive the level of benefit promised in the existing pension plan with a calculation that adjusts for two variables: (i) the annual net income figures that make up the retiree's compensation base, and (ii) the annually adjusted compensation limit imposed by section 401(a)(17) of the Code.

Additionally, each self-employed Puget Sound pilot has or will form an LLC or an S corporation and has or will establish a solo 401(k) plan and participate in the plan as both an employer and an employee. Each pilot currently participates in the Plan and would participate in the MEP as a working owner, and only the corporate entities of the pilots would be eligible to participate in the MEP as both a participating employer and a participant.

A draft of the Puget Sound Pilots Association multiple employer defined benefit pension plan and related trust agreement will be submitted to the Internal Revenue Service, along with IRS Form 8717, with a request for a favorable determination on the tax-qualified status of the plan and trust agreement under sections 401(a) and 501(a) of the Code.

The IRS may request a copy of the advisory opinion issued by the U.S. Department of Labor with respect to the identification of the Puget Sound Pilots Association as an "employer" under section 3(5) of ERISA for purposes of establishing

and maintaining the plan and the consideration of each pilot as a working owner of a trade or business without common law employees to be eligible to participate in the plan; consequently, we request an expedited advisory opinion from the U.S. Department of Labor for treating the Puget Sound Pilots Association as an employer under section 3(5) of ERISA and capable of establishing and maintaining a multiple employer defined benefit pension plan and treating each Puget Sound pilot as both an employer and an employee of a trade or business and considered to be a working owner for purposes of participating in the plan.

If you need any additional information or if you have any questions with respect to this request for an advisory opinion, please let me know.

Respectfully submitted,

LEECH TISHMAN FUSCALDO & LAMPL, LLC



Bruce J. McNeil