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November 20, 2024

**Via Email Steen.Frances@dol.gov and
Certified Mail, Return Receipt Requested**

Frances P. Steen
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite N-5655
Washington, DC 20210

Re: Department of Labor Advisory Opinion

Dear Frances:

We are responding to the correspondence from Michelle DeLappe on behalf of the Pacific Merchant Shipping Association (the “PMSA”), to the Office of Director Joe Canary, U.S. Department of Labor, dated November 1, 2024, to express our disappointment and our objection to the attempt made by the PMSA to interfere with the process of our request for an advisory opinion from the Department of Labor on behalf of the Puget Sound Pilots Association (the “PSPA”) for the two issues we raised in our request for the advisory opinion. We also write to correct the misstatements of fact made in that correspondence. A copy of our request for an advisory opinion has been enclosed for the purpose of clarity. While very little in the PMSA correspondence is relevant to the issues for which we requested the advisory opinion, we believe you may benefit from some general background relating to our request and some clarifications of the misstatements of fact contained in the correspondence from the PMSA.

I. The WUTC Orders Regarding PSPA’s Pension

To better understand the context of the PSPA request for an advisory opinion, we provide a brief explanation of the current defined benefit plan for the Puget Sound pilots and the orders of the Washington Utilities and Transportation Commission (the “WUTC”) with respect to the funded tax-qualified multiple employer defined benefit pension plan.

One of the first acts of Congress upon its creation was to enact the Lighthouse Act of 1789, the Act of August 7, 1789, Sess. I. Ch. 9, 1 U.S. Statute 53, 54 (1789). (It was actually the 9th Act of the Congress.) Contrary to normal principles of federal preemption, this Act reserved to the states the authority to regulate pilotage on vessels engaged in international trade. (Pilotage on U.S. vessels engaged in trade between U.S. ports is regulated solely by the U.S. Coast Guard.) Section 4 of the Act provides:

That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.

Congress recognized that pilotage is essentially a local operation that is better suited to state and local regulation, rather than regulation at the federal level. Viewed another way, the Lighthouse Act is Congress giving the authority to the states to regulate pilotage. In Washington State, this regulation takes the form of The Washington Pilotage Act, Ch. 88.16 RCW. Pursuant to the grant of authority from Congress, the Washington Pilotage Act is an exercise of the state's authority to charge the shipping companies for the costs of the pilotage system which protects the citizens of Washington State from the hazards and dangers brought into the U.S. waters by these foreign carriers.

The State of Washington has accepted this invitation from Congress and, like most other states, regulates pilotage as a state sanctioned monopoly. Under the Washington State Statute, Ch. 88.16 RCW, the Washington Utilities and Transportation Commission is authorized to set the tariff notifying those foreign shippers what they must pay to support the pilotage system needed to protect Washington State citizens.

Historically, pilots in Washington State, like the majority of pilots in the country, have unfunded defined benefit plans. In its first rate hearing held in 2020, the WUTC indicated its preference for a funded tax-qualified defined benefit program to provide retirement benefits for the Puget Sound pilots. The Order 09 issued by the WUTC pursuant to that hearing contains the following paragraphs:

191. We adopt Staff's recommendation to maintain the current pay-as-you-go program, but order PSP to initiate discussions for the purpose of developing a plan to transition to a fully funded, defined-benefit plan as well as full accrual accounting. By way of guidance, the retirement plan discussion should include, as PSP proposes, a comprehensive stakeholder evaluation and

participation study. We further require the discussions to address whether active pilots should be required to contribute directly to PSP's retirement fund.

192. We declined, however, to “broker” the dialogue, as PMSA requests. The discussion should be conducted as workshops facilitated by a mutually acceptable third party with expertise in retirement planning, such as an actuary, and should be concluded prior to PSP's next general rate case. To maintain fairness and avoid any appearance of preapproval, the Commissioners will not participate in the workshops but will evaluate any final recommendations proposed for review and approval. Specifically, any agreements, recommendations, or contested issues that arise from the workshops, and PSP's responses thereto, should be included in PSP's initial filing in its next general rate case.

193. We also deny PMSA's request to require PSP's participation study to consider outcomes other than a defined benefit plan. The workshop participants, rather than the Commission, should determine the scope and breadth of the study. PMSA is welcome to advocate for the inclusion of other retirement options in PSP study, but we are not persuaded that prescribing its contents at this juncture, without the benefit of initial stakeholder discussions, would be appropriate or productive.

194. We agree with Staff's assessment that PSP's current retirement plan is not comparable to Social Security because, unlike Social Security, the pilots do not make individual contributions. In addition, PSP's pension is entirely unfunded rather than backed by a trust account. As Staff correctly observes such a plan is fiscally unsound and vulnerable to changing economic conditions. **Accordingly, we find that a fully funded, defined-benefit retirement plan will best provide “security and confidence in the long-term viability of the promised retirement benefits to current and future pilots.”** (*Emphasis added*)

Consistent with the above order, the PSPA seeks an interpretation from the Department of Labor regarding whether the PSPA may be considered to be an “employer” within the meaning of section 3(5) of ERISA in an effort to develop a defined benefit plan that it can provide to the WUTC for funding approval. PMSA has made its opposition to a funded multiple employer defined benefit plan very clear at the WUTC. Its current attempt to influence your office is an effort on its part to foreclose the WUTC from further consideration of what, at this point, is the WUTC's

avored alternative to pursue its mission under Washington law. We urge your office to reject this approach and confine PMSA's economic arguments to their proper forum – the WUTC.

The WUTC remains very interested in the determination by the Department of Labor with respect to the proposed multiple employer defined benefit pension plan. This issue was raised again in the 2023 decision made by the WUTC that was included in Order 09 where the Commission stated:

211. There also remains some uncertainty as to whether PSP qualifies as an employer for purposes of the MEP. McNeil also provides draft determination letters that, among other points, seek a determination on whether PSP may qualify as an “employer” for purposes of administering the MEP under ERISA. These legal issues are outside of the Commission’s jurisdiction and clearly require a formal determination by the relevant federal agencies [referring to the Department of Labor and the IRS].

212. Given these circumstances, the Commission anticipates that PSP has already submitted an IRS Determination Letter Request and a Department of Labor Advisory Opinion Request with each respective federal agency. We require PSP to file the final version of these letters as a compliance filing in this Docket if the versions in the record have changed in any way. We also require PSP to file any responses by the respective federal agencies as an additional compliance filing(s) in this Docket as they become available. Further, PSP is required to file status updates as a compliance filing in this Docket every 60 days, beginning 60 days from the effective date of this Order. If both the IRS and Department of Labor issue favorable determination letters approving PSP’s proposed MEP, PSP may submit a subsequent filing to the Commission, which will be assigned a new Docket number, seeking to adjust tariff rates to recover MEP costs.

382. The Commission expects any such subsequent filing will account for offsetting savings resulting from the transition to the MEP as well as any costs. PSP may alternatively seek recovery of MEP costs in its next general rate case.

In light of the above direction from the WUTC, the PMSA should not be interfering in PSPA’s request for an advisory opinion from DOL on the MEP. If PMSA objects to tariff funding of an MEP, the appropriate forum to make such arguments is before the WUTC.

II. Funding of a Retirement Plan

Ms. DeLappe, on behalf of the PMSA incorrectly asserted that benefits under the retirement plan would be paid at the discretion of the PSPA and not by the tariffs set by the WUTC. She incorrectly asserted on page 4 of her correspondence, “PSP is in control of its own revenues and expenses.” Pilotage in the State of Washington is a regulated industry. PSPA is not in control of “its own revenue”. PSPA’s revenue comes only from the tariff and tariff decisions are reserved solely to the WUTC pursuant to Washington State law. The PSPA cannot undertake any significant financial commitment without the approval of the entity setting its tariffs. Indeed, the current pay-as-you-go unfunded defined benefit plan, the Amended Retirement Program of Puget Sound Pilots, was created through negotiations with the predecessor of the PMSA, The Puget Sound Steamship Operators, the PSPA and the Washington State Board of Pilotage Commissioners, which was then the Washington State agency setting the pilotage tariff. The WUTC has a detailed tariff review process expressly incorporating the expenses of the Puget Sound Pilots Association. The Washington State Statute, Ch. 88.16.035 RCW specifically states that in setting the tariff, the WUTC can consider the retirement expenses from the prior year.

III. Participation in the Retirement Plan

Ms. DeLappe, on behalf of the PMSA, also falsely asserted that the current pay-as-you-go defined benefit plan, the Amended Retirement Program of Puget Sound Pilots, is not restricted to only Puget Sound pilots. A plain reading of the Amended Retirement Program makes it clear that its provisions only apply to retired pilots. The former Executive Director of the PSPA, Walter Tabler, does receive a retirement benefit from the PSPA, but the benefit is made pursuant to his employment contract, not the Amended Retirement Program that applies only to the Puget Sound pilots. More importantly, this contractual obligation made with the PSPA will continue regardless of what funded tax-qualified defined-benefit plan is ultimately approved and adopted.

IV. The Proposed PSPA MEP

In the preamble for the final regulations issued by the Department of Labor on July 31, 2019, regarding the definition of “employer” under section 3(5) of ERISA, the Department stated that it was “publishing [the] final rule interpreting the term “employer” for purposes of ERISA section 3(5)” to facilitate “the adoption and administration of MEPs and thereby expand access to workplace retirement plans, especially for employees of small and mid-size employers and for certain self-employed individuals.”

The Department also stated that some commenters recommended expanding the scope of the Proposed Rule so that the final regulations would cover other

employee benefit plans. The commenters mentioned life, disability, and defined benefit pension plans in particular. At the same time, however, other commenters recommended that the rulemaking project remain limited to defined contribution plans. These commenters preferred that the Department continue a discussion with interested parties on whether and how to implement a future regulatory expansion to cover these other employee benefit plans. After a review of the comments, the Department stated that the “final rule is limited to defined contribution plans because the Department believes that consideration and development of any proposal covering other types of pension and welfare benefit plans or other persons or organizations as plan sponsors would benefit from public comments and additional consideration by the Department.

The preamble provides that the final regulations narrows the scope of the interpretation of the regulations but does not prohibit an association, like the PSPA, from being treated as an employer under section 3(5) of ERISA for purposes of sponsoring a multiple employer defined benefit pension plan.

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.

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 Internal Revenue Code of 1986, as amended (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 pay-as-you-go Amended Retirement Program and would participate in the proposed 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 as both an employer and an employee, and which would be sponsored and maintained by the PSPA.

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 funded tax-qualified multiple employer defined benefit pension plan. 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 plan which would be sponsored by the PSPA. 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 plan 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 plan would replace the current Amended Retirement Program, 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 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 plan would provide substantially identical benefits, rights, and features that are in the current Amended Retirement Program, 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 proposal for the funded, defined benefit retirement plan has been mandated by the WUTC as part of its tariff setting process.

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.”

V. Conclusion

Consequently, we request that the correspondence from the PMSA be entirely disregarded with respect to your consideration of our request for an 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.

In conclusion, we ask that you continue with your consideration of our request for an advisory opinion consistent with direction from the WUTC. If PMSA wishes to challenge the recovery of the benefits payable under the funded, tax-qualified defined benefit pension plan, it can raise its arguments in the proper forum, which would be before the WUTC.

Very truly yours,
LEECH TISHMAN FUSCALDO & LAMPL, LLC



Bruce J. McNeil

cc: Ivan Carlson - president@pspilots.org
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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