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Mark A. Mix
President

December 29, 2008

Kathleen Franks
Office of the Assistant Secretary for Policy
Room S-2312
U.S. Department of Labor
Washington, D.C. 20210

Re: Request for Information concerning VEBAs

Dear Ms. Franks:

These comments are submitted in response to the Department of Labor's Request for Information ("RFI") regarding Voluntary Employees' Beneficiary Associations ("VEBAs") providing health and welfare benefits to retired workers in the United States, published at 73 Fed. Reg. 72,841 (Dec. 1, 2008).

The Foundation is interested in these matters because it is a nationwide, charitable, legal defense organization, recognized exempt under § 501(c)(3) of the Internal Revenue Code and providing legal aid to workers abused by compulsory unionism arrangements. The Foundation's "primary activity in pursuit of [its charitable] goals is to provide legal aid to those workers who suffer discrimination through compulsory unionism arrangements." *National Right to Work Legal Def. & Educ. Found., Inc. v. United States*, 487 F. Supp. 801, 803 (E.D.N.C. 1979). The Foundation has provided legal aid in a health and welfare trust fund case involving breach of fiduciary duties and what may be called "social investing," *i.e.*, financing a union's headquarters building to the detriment of rank and file employees

An employer agreement to provide monies for a union VEBA violates the plain terms of Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, if the VEBA is not jointly trusteed by both management and union representatives. In other words, a VEBA that does not include employer trustees – *i.e.*, that has only union representatives and/or "independents" as trustees – violates Section 302(a)(1-2), and is not exempt under Section 302(c)(5-8).

The fact is that some VEBA schemes do not require that the VEBA have trustees appointed by the employer. Indeed, the purpose of some VEBA agreements is apparently to allow employers to "wash their hands" of their benefit responsibilities, turning them over to the

VEBA.

For example, the VEBA agreement between Dana Corporation and the UAW (Appendix K to the Settlement Agreement between Dana Corporation and International Union, UAW, dated July 5, 2007, attached hereto) requires that Dana "cause the sum of $428,900,000.00 in cash to be contributed to the UAW Union Retiree VEBA . . . [and] contribute to the VEBA shares of new common stock of reorganized Dana having a value of $48,700,000.00." (Appendix K, p. 48.) The UAW Union Retiree VEBA is to be administered as follows:

> The UAW Union Retiree VEBA shall be administered by an independent committee (the "Committee") which shall be the sponsor, "named fiduciary" and plan administrator of the UAW Union Retiree VEBA. The Committee shall consist of (i) three members not affiliated with the Company and appointed by the Union and (ii) four members who shall not have any affiliation with the Company or the Union and who shall consist of health care, employee benefits or ERISA experts or asset management experts or similarly qualified persons (Independent Committee Member). Prior to any termination of such an Independent Committee Member, the four Independent Committee Members shall recruit and select replacement Independent Committee Members to fill any vacancies among the four of them. Except as provided herein and in Letter No. 7 in Appendix S, **the Company shall have no responsibility for or involvement with respect to the establishment or administration of the UAW Union Retiree VEBA**. The Unions shall have the power to remove or replace the trustees it appoints.

(Appendix K, ¶ 8, pp. 52-53, emphasis added.) Dana's providing approximately $500 million to a UAW benefit plan in which Dana will have no representative fiduciaries violates the plain terms of Section 302. The statute prohibits employer contributions to union benefit plans that do not have equal representation between management and union.

Section 302(a)(1-2) make it unlawful for an employer to deliver "any money or other thing of value . . . (1) to any representative of any of his employees . . . or, (2) any labor organization." On its face, Dana's contribution of almost $500 million to the UAW Union Retiree VEBA certainly falls within the prohibitions of Section 302(a).

Section 302(c) exempts employer contributions or payments to union trust funds if certain conditions are met. Section 302(c)(5) states in pertinent part: "The provisions of this section shall not be applicable . . .(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of

such employer, and their families and dependents . . . *Provided,* That . . . . (B) . . . **employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon** and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office . . ." (Emphasis added.)

However, the UAW Union Retiree VEBA, as described in the Settlement Agreement, will lack equal representation between Dana and UAW trustees. The UAW Union Retiree VEBA, as so described, does not qualify for the Section 302(c)(5) exemption.

Case law supports this conclusion. "Strict" compliance with Section 302(c)(5)'s requirement that employees and employers be equally represented in administration of the fund is required. *Costello v. Lipsitz*, 547 F.2d 1267 (5th Cir. 1977). Lack of equal representation in a trust fund has been found unlawful in several cases. *See Nedd v. United Mine Workers of America*, 556 F.2d 190 (3rd Cir. 1977) (pension fund in violation of Section (c)(5)(B) requirement that employees and employers be equally represented in administration of union pension or welfare fund where union trustees were a majority for many years); *Quad City Builders Ass'n v. Tri City Bricklayers Union No. 7*, 431 F.2d 999 (8th Cir. 1970) (trust fund did not comply with Section (c)(5)(B) where some employer representatives were union members); *Holcomb v. United Automotive Ass'n of St. Louis, Inc.*, 852 F.2d 330 (8th Cir. 1988) (pension plan violated structural requirements of § 302 where union had no representation among trustees). The purpose for the equal representation requirement of Section 302 is to protect the interests of employees from exploitation by unscrupulous union officials. *See Denver Metropolitan Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Local No. 3 & Pipefitters Local No. 208*, 586 F.2d 1367 (10th Cir. 1988).

In the UAW Union Retiree VEBA, as described in the Dana Settlement Agreement, UAW power over approximately $500 million in trust assets would be limited only by ostensibly "independent" trustees – who could be fellow travelers with the labor union – who have no direct financial interest in ensuring that the UAW does not use trust assets as its own war chest. This arrangement is just the sort of union control over benefit plans that Congress sought to prohibit in Section 302.

As DOL recognizes in Part C of the RFI, in a recent agreement with the UAW and automobile manufacturers, there will be an eleven member board, five of whom will be "appointed by the UAW, and the other six individuals selected initially by the judge approving that settlement. Under the terms of the settlement agreement, a candidate for a vacancy among the six non-UAW-selected board positions would be selected by a favorable vote of nine of the existing board members with arbitration available in the event of deadlock, giving the UAW-selected members substantial control over the process. Such a structure would be a patent violation of LMRA Section 302.

We trust that these comments will be assist you in your consideration and formulation of regulations with respect to this new development in VEBAs. And, we trust that DOL will give primary consideration to protecting the present and future retirees who will be affected by their forced participation in these VEBAs.

Sincerely,

Mark A. Mix

MAM/sbw
Enclosure

Settlement Agreement

Between

Dana Corporation

and

International Union, UAW

July 5, 2007

APPENDIX K – RETIREE AND DISABILITY BENEFITS

1. Termination of Non-Pension Retiree Benefits for Union Retirees. The parties agree that the Company will terminate effective the later of January 1, 2008 or the effective date of a plan of reorganization ("Retiree Benefit Termination Date"), all non-pension retiree benefits of individuals who, as of the Retiree Benefit Termination Date, are retirees, surviving spouses and eligible dependents represented by the UAW ("Union Retirees"), provided, however, that the Company will continue to provide all non-pension retiree benefits to the Union Retirees under the terms of existing plans through the Retiree Benefit Termination Date. On the Retiree Benefit Termination Date, the Company will cease to sponsor or provide any non-pension retiree benefits for Union Retirees. Except as otherwise provided herein, the Company shall have no obligation to provide any non-pension retiree benefits to Union Retirees after the Retiree Benefit Termination Date, except for the payment of claims incurred by Union Retirees through the Retiree Benefit Termination Date and presented for payment no later than six months following the Retiree Benefit Termination Date.

2. Termination of Non-Pension Retiree Benefits for Active Union Employees. The parties agree that employees represented by the Union who have not retired as of the Retiree Benefit Termination Date shall not, after that date, have any eligibility for non-pension retiree benefits upon retirement, except as otherwise provided in Appendix L to this Agreement, except for such non-pension retiree benefits as may be provided by and through the UAW Union Retiree VEBA as defined below.

3. Termination of Disability Income and Medical Benefits for Union Disableds. The parties agree that the Company will terminate effective on the Retiree Benefit Termination Date all long term disability income and medical benefits ("LTD Benefits") of individuals who are represented by the UAW and who, as of the Retiree Benefit Termination Date, (i) are receiving LTD Benefits or (ii) have begun a period of disability that will result in qualification for LTD Benefits from the Company ("Union Disableds"), provided however that the Company will continue to provide all LTD Benefits to the Union Disableds under the terms of the now-existing plans through and including the Retiree Benefit Termination Date. On and as of the Retiree Benefit Termination Date, the Company will cease to sponsor or provide any LTD Benefits for Union Disableds, and except as otherwise provided herein, the Company shall have no obligation to provide any LTD Benefits to Union Disableds after the Retiree Benefit Termination Date.

4. In consideration of Paragraphs 1, 2 and 3 above, a Voluntary Employee Benefit Association ("VEBA") shall be established and funded, as follows:

   a. Establishing the UAW Union Retiree VEBA. As expeditiously as possible and in all events prior to the Retiree Benefit Termination Date the Unions shall establish a VEBA for and on behalf of all Union Retirees and Union Disableds (the "UAW Union Retiree VEBA").

   b. The UAW Union Retiree VEBA Contribution. Within two (2) (business days of the later of (a) the Retiree Benefit Termination Date and (b) having received written notice, including the VEBA trust documents, from the VEBA Trustees that (i) the UAW Union Retiree VEBA has been

established and (ii) the UAW Union Retiree VEBA can accept contributions made as instructed in such written notice, the Company shall (x) cause the sum of $428,900,000.00 in cash to be contributed to the UAW Union Retiree VEBA (the "Contribution Amount") by wire transfer as instructed in such written notice, and (y) contribute to the VEBA shares of new common stock of reorganized Dana having a value of $48,700,000.00 (or the maximum amount permitted under prevailing Department of Labor regulations governing VEBAs before qualifying as a "prohibited transaction," with the difference between such maximum amount and the $48,700,000.00 being contributed to the UAW Union Retiree VEBA in cash) (the "Stock Contribution"), which value shall be calculated based on the value per common share set forth in the disclosure statement as approved by the Bankruptcy Court. In no event will the Company's obligation for contributions under this Appendix "K" exceed $477,600,000.00 in total. The current VEBA trusts in place at Syracuse, Plymouth, Weatherhead, and the UAW Master will continue in place, and the assets of those trusts shall neither be transferred to the UAW Union Retiree VEBA, nor be part of the Contribution Amount, nor reduce the Contribution Amount. As of the Retiree Benefit Termination Date, the joint Board of Administration of each of the aforementioned individual VEBA trusts will determine the future uses of any remaining assets in coordination with the provisions of the UAW Union Retiree VEBA (and any schedule or form of benefits provided under the UAW Union Retiree

VEBA) and, to the extent necessary to empower each such Board of Administration to effectuate such determinations, the parties will amend the governing documents and agreements governing (a) the individual VEBA trusts and (b) the provision of benefits funded thereby.

c. Adjustment to the Contribution Amount. The Contribution Amount will be reduced by the amount of (i) non-pension retiree benefit claims incurred by the Company for Union Retirees on and after July 1, 2007 and (ii) any LTD Benefits incurred by the Company on behalf of Union Disableds on and after July 1, 2007. The amount of reduction in this section 4(c) will not include the amount of payment of any non-pension retiree benefit or LTD Benefit claims made for Union Retirees for claims incurred prior to July 1, 2007 or for Union Disableds for claims incurred prior to July 1, 2007 (claims run out) but will include any amount due and payable as of the date of contribution described in 4(b) above. (iii) In addition the Company will decrease the Contribution Amount for an estimated amount of non-pension retiree benefit claims for Union Retirees incurred but not paid on or after July 1, 2007 but not later than the date of the payment called for in 4(b) above. The additional reduction under (iii) of this section represents claims run out following at the date of contribution specified in 4(b) above. (iv) In addition, the Company will decrease the amount of the contribution for any amounts attributable to paragraph 5.b (but not the remainder of paragraph 5) of this Appendix K, and for administrative costs in excess of $25,000.00 for changes in the retiree

benefit programs made pursuant to paragraph 6 below. The Company will make a final payment, to the UAW Union Retiree VEBA based upon the amount of contributions less the actual amounts known for 4(c)(i), (ii), (iii) and (iv) but not longer than six months following the contribution date in 4(b) above.

5. Cooperation with the Union and Reimbursement of Certain Expenses. To the extent required or permitted by law, Dana and its successors and assigns shall furnish to the Committee (as defined in paragraph 8 below) such information and shall provide such cooperation as may be necessary to permit the Committee to effectively administer the plan of benefits provided to retirees, including, without limitation, the implementation and administration of voluntary premium deductions from the pension benefits of retirees, and the retrieval of data in a form and to the extent maintained by the Company regarding age, service, and pension eligibility, marital status, mortality, claims history, and enrollment information of Dana employees and retirees.

   a. Moreover, Dana shall cooperate with the Union and the Committee and undertake such reasonable actions as will enable the Committee to perform its administrative functions with respect to the UAW Union Retiree VEBA, including ensuring an orderly transition from Company administration of the retiree health care program to VEBA administration ("Administrative Transition").

   b. Dana shall be financially responsible for reasonable costs associated with the Committee's fees and expenses, and educational efforts and

communications with respect to Retirees conducted at the Union's request, creation of administrative procedures, initial development of record sharing procedures, the testing of computer systems, vendor selection and contracting, and other activities, incurred on and before the Retiree Benefit Termination Date.

c. It is understood that the costs associated with drafting the UAW Union Retiree VEBA trust agreement, seeking from the Internal Revenue Service a determination of the tax-exempt status of the UAW Union Retiree VEBA, plan design, and actuarial and other professional work necessary for initiation of the UAW Union Retiree VEBA and the benefits to be offered thereunder, shall all be payable pursuant to the certain Orders of the Bankruptcy Court concerning the payment of the Union's professional fees rather than being subject to payment pursuant to this agreement.

6. Changes in Benefits. At the direction of the Union, and after reasonable notice from the Union, the Company shall implement any changes in the non-pension retiree benefit programs that take effect on or after July 1, 2007.

7. COBRA. The Company will comply with Section 4980B of the Internal Revenue Code of 1986, as amended (the "Code"), Part 6 of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the regulations issued respectively there under (collectively, "COBRA") with regard to making available COBRA continuation coverage as described by Section 4980B of the Code and Section 602 of ERISA (or any successor provisions thereto) to Union Retirees. The parties acknowledge that a COBRA qualifying

event under Section 4980B(f) of the Code and Section 603 of ERISA will occur. The Company will offer an opportunity to elect COBRA continuation coverage to eligible Union Retirees provided, however, that this subparagraph shall not apply if: (i) it is otherwise not required by, inconsistent with or contrary to applicable law, (ii) the Company ceases to provide any group health plan to their employees, (iii) a Union Retiree fails to pay a COBRA premium or (iv) a Union Retiree becomes covered under any other group health plan (hereinafter "New Coverage"). Eligibility for coverage under a group health plan offered by the UAW Union Retiree VEBA shall not, by itself, in the absence of electing coverage under one of the group health plans, constitute New Coverage. A Union Retiree who does not initially elect COBRA continuation coverage shall waive any right to COBRA continuation coverage at a later date; provided, however, that, in the event a Union Retiree does not elect COBRA coverage as provided in this paragraph 7, nothing in this Agreement shall preclude a Union Retiree from electing COBRA continuation coverage in connection with any future COBRA qualifying event under the Code and ERISA. Nothing herein however, is intended nor should it be construed to limit, waive or augment any COBRA rights or benefits with respect to any Union Retirees.

8. UAW Union Retiree VEBA Committee. The UAW Union Retiree VEBA shall be administered by an independent committee (the "Committee") which shall be the sponsor, "named fiduciary" and plan administrator of the UAW Union Retiree VEBA. The Committee shall consist of (i) three members not affiliated with the Company and appointed by the Union and (ii) four members who shall not have

any affiliation with the Company or the Union and who shall consist of health care, employee benefits or ERISA experts or asset management experts or similarly qualified persons (Independent Committee Member). Prior to any termination of such an Independent Committee Member, the four Independent Committee Members shall recruit and select replacement Independent Committee Members to fill any vacancies among the four of them. Except as provided herein and in Letter No. 7 in Appendix S, the Company shall have no responsibility for or involvement with respect to the establishment or administration of the UAW Union Retiree VEBA. The Unions shall have the power to remove or replace the trustees it appoints.

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Review Comment

Docket Information

Docket ID DOL-2008-0004
Long Title Retiree Health Policy

Document Information

Document ID DOL-2008-0004-0001
Document Title Retiree Health Policy

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Comments

Comments of the National Right to Work Legal Defense Foundation, with attachment, are attached.

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