

Pension Benefit Guaranty Corporation

77-158

August 15, 1977

REFERENCE:

[*1] 4044 Allocation of Assets
4062 Liability of Employer in Single Employer Plans
4067 Arrangements for Payment of Employer Liability

OPINION:

This is in response to your letter of * * * to * * * of my staff concerning the above-mentioned plan (the "Plan").

On * * * the * * * as plan administrator, submitted a Notice of Intent to Terminate (the "Termination Notice") the Plan. n1 The Termination Notice was accompanied by your letter requesting that the Pension Benefit Guaranty Corporation (the "PBGC") consider a proposed alternative to termination of the Plan, which would involve a restoration of the Plan on a curtailed basis. In our letter of * * * we discussed the modifications that would have to be made in the proposal for the PBGC to permit the Plan to be restored.

n1 We will assume, for the purpose of this letter, that the Plan actually is one pension plan, rather than two. But see, Plan, Article 13.1.

Your * * * letter indicated that * * * has decided not to pursue the possibility of restoring the Plan on a curtailed basis. Accordingly, you have requested certain information concerning the processing of an insufficient plan. n2

n2 We were advised in your * * * letter that the Plan has insufficient assets, when allocated in accordance with Section 4044 of the Act, to pay all benefits under the Plan that are guaranteed. [*2]

You asked whether the PBGC would perform the allocation of Plan assets required by Section 4044 of the Employee Retirement Income Security Act of 1974 (the "Act"). You advise that * * * is * * * willing to pay the PBGC "reasonable compensation" for such services.

Section 4044 of the Act requires the plan administrator to perform the allocation of assets. The PBGC has no present intention of performing the Section 4044 allocation for a plan administrator in a normal termination case. However, the PBGC, will render technical and interpretive advice to the person performing the allocation, and, in the case of an insufficient plan, will review the allocation and require appropriate changes, if necessary, to ensure compliance with Section 4044. Accordingly, the Plan's actuary should perform the Section 4044 allocation and submit the allocation and the supporting participant data to the PBGC.

You also requested the PBGC: (1) to determine the amount of employer liability, and, (2) to provide you with information concerning the criteria the PBGC applies in making arrangements under Section 4067 of the Act for deferred payment of employer liability under Section 4062 of the Act. n3 [*3]

n3 The employer liability of * * * the two corporations that maintained the Plan, is determined under Section 4062, rather than Section 4064, because * * * are considered a single employer since they are trades or businesses under common control * * * under Section 4001(b) of the Act.

To determine the liability of * * * (the "Companies"), the PBGC will need to take the following action. One, review the Section 4044 allocation of assets. Two, determine the excess of the current value of the plan's benefits guaranteed under Title IV of the Act on the date of termination over the current value of the plan assets allocable to such benefits on the date of termination. Three, determine all the trades or businesses (whether or not incorporated) under common control with the Companies as defined in 29 CFR Part 2612 (1976). Four, determine whether employer liability under Section 4062 is limited by 30% of the combined net worth of the Companies and all other members of the controlled group. (If net worth is a limiting factor under Section 4062, we will determine the net worth of the controlled group).

For purposes of a net worth determination, the following information should be [*4] submitted for the Companies and all other members of the controlled group:

1. Balance sheets, income statements and cash flow statements for the five tax years prior to * * *
2. Balance sheets, income statements and cash flow statements available for the last accounting period, ending before * * *.
3. Recent or pending offers or sales agreements (with available appraisals) covering more than 25% of the assets held by the employer as of the date of termination, or any portion of its common or preferred stock.
4. A one-page summary of the nature and history of the Companies' business, including whatever the Companies perceive to be the most appropriate industry standards for determining the fair market values of the Companies.
5. A short statement regarding the Companies' business plans as of * * * and copies of any existing financial projections.
6. The Companies' estimate of its net worth as of * * * based on a fair market valuation, with whatever supporting documents they wish to submit.
7. Copies of any existing annual reports for * * * through * * *.

Instead of submitting the above-listed information, the Companies may submit a statement that their employer liability [*5] is not limited by 30% of the net worth, as of * * * of the controlled group. (A simple test for estimating the * * * maximum employer liability is to compare the value of all * * * vested benefits with the value of all plan assets.)

Employer liability payment terms are arranged on a case-by-case basis after liability is determined under Section 4062. The PBGC will allow deferred payments, upon request, only where a showing is made of hardship or necessity that, in our view, make deferred payments equitable and appropriate. Accordingly, if the Companies wish extended payment terms, they should submit financial information for themselves and all other members of the controlled group to document a claim of hardship or necessity.

The term for payment is relatively short, not extending beyond ten years, absent considerations of extreme financial hardship. An employer that is extended payment terms will usually be required to provide collateral acceptable to the PBGC. Currently, interest at a rate of 9 1/4% is charged on the outstanding principal amount of the employer liability under Section 4062.

Our present policy with respect to both immediate and deferred payment of employer [*6] liability arising under Section 4062 is to accept payment only in the form of cash.

If you have any questions concerning the above, please call * * * of my staff, who may be reached at * * *.

Henry Rose
General Counsel