

Pension Benefit Guaranty Corporation

77-164

September 8, 1977

REFERENCE:

[\*1] 4041 Termination by Plan Administrator  
4042 Termination by PBGC  
4022 Benefits Guaranteed  
29 CFR 2605. Guaranteed Benefits  
4064 Liability of Employers in Multiple Employer & Multiemployer Plans

OPINION:

This is in response to your letter to \* \* \* (the "PBGC"), regarding the termination of the \* \* \* (the "Plan"). Your letter set forth your opinion as representative of \* \* \*, a participating employer in the Plan.

It is noted that no statutory Notice of Intent to Terminate the Plan has been filed by the administrator of the Plan. Thus, voluntary termination proceedings pursuant to Section 4041 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1341 (Supp. V, 1975), have not been initiated as of the date of this letter. The PBGC is currently investigating the appropriateness of involuntary termination of the Plan pursuant to Section 4042 of ERISA, 29 U.S.C. § 1342, since the withdrawal of \* \* \* has caused the Plan to have no participating employer, a condition that would have triggered an automatic allocation of assets to participants if it had occurred prior to the enactment of ERISA. See, Plan, \* \* \* Article IX, Section 2.

You first ask whether the Plan is [\*2] exempt from coverage under Title IV of ERISA as a plan that did not provide for employer contributions on behalf of part of its participants since enactment of ERISA, or as an individual account plan. As I understand the pertinent facts, the Plan is a tax qualified pension plan to which more than one employer contributes. The Plan has consistently, from its commencement, provided for employer contributions, see, Plan, Article VII, Section 1, and Plan Amendments 2 and 4, and separate accounts have never been maintained for individual participants. See, Plan, Article VI, Section 3; Article IX, Section 3 as amended by Plan Amendment 3. Accordingly, the Plan is not excluded from coverage under \* \* \* Title IV of ERISA.

You next ask whether the benefits promised by the Plan are guaranteed under Title IV of ERISA, since you feel that the Plan did not guarantee benefits over or above the value of the fund, especially in light of the fact that the minimum vesting standards of Title I of ERISA may not have applied to the Plan at the time the last employer withdrew. In its Regulation on Guaranteed Benefits, 29 C.F.R. § 2605.6(a), the PBGC has defined nonforfeitable benefits subject [\*3] to PBGC's guarantee as those benefits for which a participant has satisfied the conditions precedent to entitlement; that is, once the participant has become vested in the benefit under the terms of the plan, it is nonforfeitable. For purposes of the guarantee, a limitation-of-liability provision such as that found in Article VII, Section 1(c) of the Plan, does not render vested benefits forfeitable; the prevalence of such provisions was one of the major reasons for the enactment of the plan termination insurance program in Title IV of ERISA.

Additionally, the effective date of the minimum vesting standards of Title I of ERISA does not control the effective date of the plan termination insurance program. Congress intended to insure all covered plans terminating after the effective date of Title IV, September 2, 1974, and, in fact, extended coverage retroactively to plans which terminated between July 1, 1974, and September 2, 1974. See, Section 4082(b) of ERISA, 29 U.S.C. § 1382(b).

You further stated that, since retirees of terminated employers ceased accruals prior to the enactment of ERISA, and contributions on their behalf ceased after their employers terminated participation [\*4] in the Plan, the benefits of such retirees should not be covered by Title IV of ERISA. Such retirees, regardless of the ongoing participation in the Plan by their employer, may look to the entire fund for benefit payments rather than to the contributions of their employer alone. Therefore, contributions made to the fund by any employer after their retirement were made on behalf of such retirees. See, e.g., Plan, Article IX, Section 2(a). Their rights to a guaranteed benefit under ERISA are not affected by the identity of their employer or the timing of his withdrawal from participation in the Plan.

Your final question asks about the possible allocation of employer liability in this case, and suggests parties to whom allocation would be appropriate. Employer liability in the case of termination of a plan to which more than one employer contributes is determined by Section 4064 of ERISA, 29 U.S.C. § 1364. That section applies to employers who maintain the plan at its termination or who made or were required to make contributions to the plan during the five years preceding its termination. The legislative history makes it clear that an employer "maintains" a plan at its [\*5] termination if he is making contributions at its termination. See, H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 380 (1974). The discretion given the PBGC in Section 4064 to determine employer liability on any other equitable basis must be exercised by the adoption of regulations. See, ERISA, Section 4064(b), 29 U.S.C. § 1364(b). The PBGC is currently examining the policy considerations relevant to a regulation on this subject. Your suggested alternative has been brought to the attention of those responsible for that effort.

I hope that this proves to be of assistance.

Henry Rose  
General Counsel