

Pension Benefit Guaranty Corporation

86-8

March 24, 1986

REFERENCE:

[*1] 4001(b) Definitions. Employer and Controlled Group

OPINION:

I apologize for our delay in responding to your inquiry regarding the proper method for determining withdrawal liability when the liable employer is a group of trades or businesses under common control ("controlled group") within the meaning of section 4001 of ERISA, 29 U.S.C. § 1301. Your letter suggests two alternatives: (1) aggregating the contribution data for all members of the controlled group, calculating the potential withdrawal liability of the group based on this data, and "allocating" a portion of this liability to each member of the controlled group or (2) calculating potential withdrawal liability based on each member's contributions as if each member was a withdrawing employer and then aggregating each member's liability to arrive at the withdrawal liability for the entire controlled group. You indicate that your client, a multiemployer plan, has used the first method in the past but has inquired about the possible use of the second method.

ERISA section 4001(b)(1) requires that a controlled group be treated as a single employer under Title IV of ERISA. This definition of "employer" applies for all purposes under [*2] Title IV, including the provisions added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). PBGC Opinion Letter 82-13.

The second of the two methods you describe is inconsistent with the statutory definition of "employer." The second method incorrectly treats each member of the controlled group as a separate employer by determining liability for that member based on its contribution data. In many cases failure to calculate liability of the group as a whole based on its aggregate contribution obligation will lead to erroneous determinations of the amount of withdrawal liability (or of whether a withdrawal has occurred). For example, as you recognize, the de minimis rule under section 4209 reduces the withdrawal liability of an "employer"; applying the de minimis rule separately to liabilities calculated for each controlled group member might lead to the erroneous result of multiple reductions for a single employer. Similarly, the fraction used for calculating partial withdrawal liability under section 4206 is based on "the employer's" contribution base units, even if the partial withdrawal results from the withdrawal of a facility operated by only one member of [*3] the controlled group. Therefore, subject to the qualification noted below, only the first of the methods you describe is correct.

Our approval of the first method does not extend to your client's practice of "allocating" the withdrawal liability among the members of the controlled group. To the extent that such allocation limits the plan's recourse against each member of the controlled group, it is inconsistent with the fact that the members of a controlled group are jointly and severally liable to the plan for the full withdrawal liability of the group, just as members of a controlled group are jointly and severally liable to PBGC for liability under ERISA section 4062, 29 U.S.C. § 1362, arising from termination of one member's single-employer plan. Although members of a controlled group may be concerned about allocating withdrawal liability among themselves and may assert rights of contribution or indemnification against each other, such issues do not affect a plan's right to assert joint and several liability against all members of the controlled group.

I hope this is helpful. If you have questions, please contact the attorney handling this matter, Ronald Goldstein of our [*4] Corporate Policy and Regulations Department, at the above address or (202) 956-5050.

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General Counsel