

Pension Benefit Guaranty Corporation

86-3

February 14, 1986

REFERENCE:

[*1] 4044(d) Allocation of Assets. Distribution of Residual Assets
Joint Implementation Guidelines

OPINION:

This responds to your request for the PBGC's opinion concerning the contemplated recovery by the * * * (the "Employer") of assets of the * * * Pension Plan (the "Plan") which exceed the present value of total accrued benefits. The Employer seeks to recover the excess assets without terminating the Plan. For the reasons discussed below, the PBGC cannot approve the transaction as you describe it.

The facts, as we understand them, are essentially as follows: The Plan has purchased for each participant a deferred annuity (the "Annuities"). You represent that the Annuities will provide each participant with the full amount of his accrued benefit, as of January 1, 1985. The Employer will not terminate the Plan, but will allow it to continue in existence. The Plan will hold the Annuities as assets while participants continue to vest and accrue benefits. You ask whether completion of this transaction will allow the Employer to recover assets in excess of the present value of total accrued benefits.

Section 4044 of ERISA, which sets forth rules for the allocation of assets where there is a [*2] termination of a single employer defined benefit pension plan, is the sole provision in Title IV of ERISA which speaks to the issue of the distribution of residual assets to an employer.

Section 4044(d)(1) provides:

Any residual assets of a single employer plan may be distributed to the employer if -

- (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
- (B) the distribution does not contravene any provision of law, and
- (C) the plan provides for such a distribution in these circumstances.

However, Section 4044 by its terms does not apply to the transaction as you describe it, which does not involve the formal termination of the Plan. The Employer cannot invoke the provisions of Title IV that permit asset distribution merely by purchasing the Annuities without terminating the Plan. You state that the Employer has specifically decided not to terminate the Plan in a "termination/reestablishment" transaction.

The PBGC, in cooperation with the Department of Labor and the Internal Revenue Service, has issued asset reversion guidelines (the "Guidelines") which apply to termination/reestablishment transactions. The Guidelines address various [*3] issues raised in connection with an employer's receipt of surplus assets following the termination of a defined benefit plan. It is the agencies' interpretation that an employer cannot invoke the termination and asset distribution provisions of Title IV of ERISA merely by taking steps that, in form, appear to bring about a termination of a plan, when, in substance, the transaction does not constitute a full termination. Accordingly, the Guidelines state the agencies' determination that, among other things, the law requires that the benefits of participants in a terminated plan following a so-called "termination/reestablishment" be fully vested and annuitized.

You may wish also to consider the possible applicability to your proposed transaction of certain provisions of Title I of ERISA.

Section 403(c)(1) provides:

Except as provided . . . under Section 4042 and 4044 (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Section 404(a)(1) provides: [*4]

Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries.

However, the conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions as to the acceptability of this type of arrangement under Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

I hope this is of assistance. If you have further questions concerning this matter, please contact John Jacobs of my staff at the above address or at (202) 956-5023.

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General Counsel