

Pension Benefit Guaranty Corporation

88-3

March 22, 1988

REFERENCE:

[\*1] 4205(c) - Retail Food Industry Provision  
4220(a) - MPPAA Authorized Amendments After September 25, 1983  
4220(c) - Unreasonable Risk of Loss

OPINION:

We are writing in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") on the significance of the PBGC's review of plan amendments under section 4220 of the Employee Retirement Income Security Act, as amended (ERISA). Specifically, you ask about the standard for, and the legal effect of, the PBGC's review and approval of plan amendments under section 4220.

In the situation you describe, a food industry multiemployer plan was amended to adopt the "35-percent rule" authorized by ERISA section 4205(c). As required by that section, the plan amendment also included a provision for abatement of the partial withdrawal liability under certain circumstances. The plan was amended within the three-year "window period" provided in section 4220(a) of ERISA for adopting amendments without obtaining the PBGC's approval. You represent that, since the expiration of the window period, the PBGC has approved similar, if not identical, amendments for other plans.

An employer is now challenging the validity of the [\*2] plan's amendment, principally on the grounds that the abatement provision fails to provide the full relief required by section 4205(c). You ask whether the PBGC's approval of (or failure to disapprove) a post-window period amendment constitutes a judgment that the amendment is lawful under ERISA, and whether the PBGC's approval of (or failure to disapprove) a post-window period amendment can be used as evidence that another plan's similar or identical amendment is lawful under ERISA.

Under section 4220, certain amendments to multiemployer pension plans that are adopted after September 25, 1983, may be put into effect only with the PBGC's approval, or if the PBGC fails to disapprove the amendment within 90 days after receipt of a copy of the amendment and the request for approval. Section 4220 applies to amendments made under section 4205(c), and paragraph (c) of section 4220 details the scope of the PBGC's review of amendments submitted pursuant to that section. Paragraph (c) provides that the PBGC shall disapprove an amendment only if it determines that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC.

Because section 4220(c) [\*3] clearly states that the sole criterion for the PBGC's disapproval of amendments is unreasonable risk of loss to plan participants and beneficiaries or to the PBGC, approval by the PBGC of an amendment under section 4220 constitutes a determination only as to the application of that criterion. It does not, except to the very limited extent described below, constitute a ruling on whether the amendment is consistent with ERISA and PBGC rulings. The enclosed PBGC letter approving a plan amendment under section 4220 illustrates this point.

Before making the risk determinations with respect to an amendment submitted for approval under section 4220, the PBGC does review the amendment to determine whether, on its face, it is authorized by one of the provisions of the statute specified in section 4220. See ERISA § 4220(a). If the amendment fails this threshold review, the PBGC disapproves it because it is not authorized by title IV of ERISA, rather than because it fails the risk of loss test under section 4220(c). However, this facial review does not involve any interpretation of the amendment or application of the amendment to a specific factual situation.

For example, upon receipt [\*4] of an amendment under section 4205(c), the PBGC would review the amendment to ascertain that it included a rule for reducing withdrawal liability that was not on its face inconsistent with the statutory requirements for that abatement rule. If the amendment failed to include an abatement rule, or included a rule predicated on the plan's contribution base units exceeding their post-withdrawal levels for a period of time other than two years following the withdrawal, the PBGC would reject the amendment as not being authorized by section 4205(c).

Finally, it follows from the preceding discussion that a section 4220 letter issued to a particular plan approving its

adoption of an amendment under section 4205(c) is probative only of the fact that the amendment is facially consistent with that section and does not create an unreasonable risk of loss to that plan's participants and beneficiaries or to the PBGC with respect to that plan.

I hope this response has been of assistance. If you have further questions, please contact the attorney handling this matter, John Foster. His telephone number is 202-778-8850.

Gary M. Ford  
General Counsel