

Pension Benefit Guaranty Corporation

92-3

May 1, 1992

REFERENCE:

[*1] 4204(a)(3) Sale of Assets. Bond Requirement on Liquidation of Seller

OPINION:

We are responding to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") concerning Section 4204(a)(3)(A) and (B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1384(a)(3)(A) and (B). You ask whether a seller subject to Section 4204 must post a bond when it subsequently sells or transfers all its assets or a portion thereof to a purchaser, or transfers assets to a shareholder or corporate officer. More specifically, you ask whether these transactions are "distributions" triggering the bonding requirement of Section 4204(a)(3).

As your letter indicates, Section 4204 of ERISA provides an exception to the general rule imposing withdrawal liability when a contributing employer withdraws from a multiemployer plan in the case of the employer's "bona fide, arm's-length sale of [its] assets to an unrelated party . . ." where certain requirements are met. One of those requirements is that the sales contract between the employer selling assets (the "seller") and the purchaser must provide for the secondary liability of the seller to the plan for any withdrawal [*2] liability it would have had to the plan but for Section 4204, if the purchaser withdraws from the plan during the first five plan years beginning after the sale and fails to pay its withdrawal liability. Section 4204(a)(1), (2).

Section 4204(a)(3)(A) provides that if all, or substantially all, of the seller's assets are distributed, or the seller is liquidated before the end of the first five plan years beginning after the sale, then the seller must provide a bond or place an amount in escrow equal to the present value of the withdrawal liability the seller would have had, but for the operation of Section 4204. Absent such liquidation or distribution, Section 4204(a)(3)(A) does not require a bond or escrow when the seller sells its assets.

Generally, the purpose of Section 4204 is "to protect the plan . . . against a significant diminution of its contribution base without compensation through withdrawal liability." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Report on S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration at 16 (Comm. Print 1980). Correspondingly, the purpose of subsection (a)(3) is [*3] to ensure that the plan's secondary claim against the seller is not jeopardized by a diminution in the value of the seller as a result of a liquidation or a complete or partial distribution of assets. In its common and ordinary sense, a sale of assets entails an exchange of assets for cash or a thing of value. See *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571, 85 S. Ct. 1162, 1166 (1965). Such a sale would not jeopardize the plan's claim, provided fair value is obtained. Section 4204 was intended "to assure the protection of the plan with the least practical intrusion into business transactions." Senate Labor Summary, *supra*, at 16. Nonetheless, if a distribution or liquidation occurs concurrently with the sale, the requirements of Section 4204(a)(3) may be triggered at that time.

If only a portion of the seller's assets are distributed or liquidated during the five-year period, then the seller must provide a bond or escrow in accordance with regulations prescribed by the PBGC. See Section 4204(a)(3)(B). PBGC has yet to promulgate regulations prescribing the manner in which such a bond amount shall be calculated. Pending the issuance of PBGC regulations, [*4] the plan sponsor should act reasonably and in accordance with the purpose of the subsection. See Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 405(a), 94 Stat. 1208, 1303 (1980). A partial distribution of assets or liquidation will trigger Section 4204(a)(3)(B)'s bonding requirement when and to the extent the plan sponsor has reason to believe that a bond is necessary to ensure that assets are available to satisfy the seller's potential liability in light of the particular facts and circumstances at that time.

Your letter indicates that the fund in question requires contributing employers to post a bond whenever they sell assets or transfer assets to an officer or shareholder. Subsequently, you have informed us that this is the case only if the seller and purchaser have elected to treat the sale as one within Section 4204. As indicated above, Section 4204(a)(3)

requires a bond or escrow only when the transaction is within Section 4204 and when the seller's assets are concurrently or subsequently "distributed" or the seller is "liquidated." A sale of assets for fair market value in an arm's-length transaction to an unrelated party, without more, [*5] is not a distribution or liquidation as meant by Section 4204(a)(3). Your letter does not set forth specific facts regarding the particular distribution of assets or liquidation in question. At any rate, ERISA assigns initial responsibility to the plan sponsor for determining whether a withdrawal has occurred, determining liability, notifying the employer, and collecting the amount due. Sections 4202 and 4219(b)(1). The statute further provides that an employer's dispute with respect to the plan sponsor's determination is to be resolved through arbitration, subject to review in the courts. Section 4221; 29 C.F.R. § 2641.1.

I hope that this response has been helpful. If you have any further questions please do not hesitate to contact Russell Galer of my staff at (202) 778-8822.

Carol Connor Flowe

General Counsel