

Pension Benefit Guaranty Corporation

92-4

June 18, 1992

REFERENCE:

[\*1]

§ 4204(a) § 4204(a)(1)(B) § 4204(a)(1)(C) § 4204(c) 29 CFR § 2643.11(a) 29 CFR § 2643.11(d)

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to the meaning and operation of section 4204(a)(1)(B) and (C) and 4204(c) of the Employee Retirement Income Security Act of 1974 ("ERISA") and regulations thereunder.

Section 4204(a)(1) of ERISA provides that:

A complete or partial withdrawal of an employer (. . . the "seller") under this section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party (. . . the "purchaser"), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if --

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond . . . , or an amount held in escrow . . . , in [a specified amount]; and

(C) the contract [\*2] for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid. n1

n1 Independently of the provisions of section 4204(a)(1)(C), section 4204(a)(2) provides that --

[i]f the purchaser . . . withdraws before the last day of the fifth plan year beginning after the sale, and . . . fails to make any withdrawal liability payment when due, then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for [section 4204].

Under section 4204(c), the PBGC "may by regulation vary" the bond/escrow and contract-language requirements of section 4204(a)(1)(B) and (C). n2 Pursuant to that authority, the PBGC has issued its regulation on Variances for Sale of Assets (29 CFR Part 2643). Section 2643.11(a) of the regulation provides that:

A purchaser's bond or escrow under section 4204(a)(1)(B) of [ERISA] and the sale-contract provision [\*3] under section 4204(a)(1)(C) are not required if the parties to the sale inform the plan in writing of their intention that the sale be covered by section 4204 of [ERISA] and demonstrate to the satisfaction of the plan that at least one of the criteria contained in § 2643.12, § 2643.13 or § 2643.14(a) is satisfied.

You first ask for --

an opinion of the scope of the contract for sale requirement of ERISA Section 4204(a)(1)(C), including a determination of whether language, such as the contract language contained in [a document submitted with the request], fulfills section 4204(a)(1)(C) for the application of the sale of assets exemption.

Section 4221 of ERISA provides that any dispute between a plan sponsor and an employer concerning a determination made under ERISA sections 4201 through 4219 -- which would include a determination under section 4204 based on the interpretation of a contract provision -- be resolved through arbitration, subject to review in the courts. Accordingly,

it would be inappropriate for the PBGC to express an opinion as to the adequacy of specific language under section 4204(a)(1)(C).

n2 No variance is provided for, however, with respect to the secondary liability requirement of section 4204(a)(2) that complements the contract-language requirement. [\*4]

You also ask that the PBGC confirm that --

once the Seller and Buyer demonstrate to the Plan that the transaction [meets one of the criteria referred to in § 2643.11(a) for variance of the bond/escrow and contract-language requirements], the Plan cannot insist that a bond be posted or that the contract for sale . . . agreement be renegotiated between the parties to set forth yet another agreement regarding the Seller's secondary liability.

In response to this request, we begin by noting that satisfaction of one of the three variance criteria referred to in § 2643.11(a) is not alone sufficient to entitle a seller and buyer to a variance; they must also give the plan written notice of their intent that the sale be covered by section 4204. A plan may therefore agree that one of the three variance criteria is met and yet properly refuse to grant a variance because an appropriate joint notice of intent has not been given.

One purpose of the joint notice requirement under § 2643.11(a) is to substitute for the contract-language requirement of section 4204(a)(1)(C) by confirming the seller's acceptance of its secondary liability under section 4204(a)(2). As explained in the preamble [\*5] to the proposed amendment adding Subpart B (§ § 2643.10 - 2643.15) to the regulation:

[T]he parties to a sale must inform the plan in writing of their intention to be covered by section 4204 of ERISA. In this way, both the seller and purchaser expressly consent to the various responsibilities they assume by operation of law. For example, if section 4204 applies, the seller assumes a secondary liability under section 4204(a)(2) . . . . One purpose of the sale-contract requirement is to require an affirmative action by the parties in order to trigger section 4204. Therefore, the requirement of a joint notice of intention minimizes the need for the sale-contract provision.

48 FR 6556 (February 14, 1983). It does not follow that a provision like that required by section 4204(a)(1)(C) must necessarily be in the joint notice, much less in the sale contract itself. It would be illogical to make fulfillment of the contract-language requirement a prerequisite to waiver of the same requirement. On the other hand, if the joint notice or the sale contract can be interpreted as rejecting the secondary liability rule of section 4204(a)(2), it may be necessary to clarify the seller's acceptance [\*6] of that secondary liability in order to meet the joint notice requirement of § 2643.11(a).

The bond/escrow requirement presents different issues. While a contract-language waiver is aimed at retroactively curing an omission, a bond/escrow waiver provides only prospective relief from the section 4204(a)(1)(B) requirement that the bond or escrow be maintained for the specified five-plan-year period. However, as the PBGC stated in Opinion Letter 85-31 (December 30, 1985), --

[s]ection 4204 of ERISA contemplates in general that a bond or escrow will be furnished at the beginning of the five-year period described in section 4204(a)(1)(B), and maintained throughout that period, unless and until it is waived.

(Emphasis supplied.) Section 2643.11(d) provides a limited exemption from the bond/escrow requirement for the period before a plan acts on a variance request if the request is submitted before the beginning of the first plan year following the sale. n3 Otherwise, a plan is justified in insisting that the requirement be met until it is waived, and in treating the sale as failing to come within the purview of section 4204 if the bond or escrow is not furnished at [\*7] the beginning of the five-plan-year period and maintained until the plan acts on the variance request.

n3 PBGC Opinion Letter 86-6 (March 11, 1986) also discusses a limited exemption applicable to pre-1981 sales under § 2643.12.

Finally, we note again (as we did above in connection with your contract interpretation question) that a dispute over a plan's determination not to grant a variance under section 4204 and the PBGC's regulation on Variances for Sale of Assets is subject to the dispute resolution procedures of section 4221.

If you have any further questions regarding this matter, you may call Deborah C. Murphy of this office at 202-778-8850.

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General Counsel