

Pension Benefit Guaranty Corporation

80-6

May 19, 1980

REFERENCE:

4043(b)(8) Reportable Events. Mergers, Consolidations & other Transfers of Plan Assets
4045 Recapture of Certain Payments
4062(b) Liability of Employer in Single Employer Plans. Amount of Employer Liability

OPINION:

This is in response to your questions regarding the applicability of several provisions of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") to the * * * Corporation (the "Company") in connection with a proposed sale of its * * * division.

The facts, as we understand them, are as follows. The Company and certain of its subsidiaries sponsor and maintain the * * * Employees' Retirement Plan (the "PVH Plan"). We assume that the PVH Plan is a tax-qualified, defined benefit pension plan subject to Title IV of ERISA.

The Company plans to sell substantially all of the assets of its * * * division to " * * *", a newly-organized corporation that is not affiliated with the Company. If the proposed sale is consummated, * * * intends to continue operating the * * * stores.

You have indicated that * * * will establish, effective as of the date of sale, a qualified pension plan (the " * * * Plan"), for the [*2] benefit of the * * * employees formerly included in the PVH Plan. The benefits under the * * * Plan will be substantially the same as those under the PVH Plan. Further, the participants transferred from the PVH Plan will be given credit under the * * * Plan for all service accrued under the PVH Plan. Finally, * * * will assume liability for the pension benefits accrued under the PVH Plan with respect to former * * * employees transferred to * * * and retired and terminated employees of * * *, and all assets of the PVH Plan attributable to these * * * participants will be transferred to the * * * Plan. We assume, for purposes of this letter only, that this transaction will comply with Section 414(1) of the Internal Revenue Code ("IRC") of 1954.

Initially, please note that the proposed transfer of assets is a reportable event described in Section 4043(b)(8) of ERISA.

You have asked whether the Company would have any liability to the PBGC under Title IV of ERISA if the * * * Plan terminates after the sale of the * * * division to * * *.

The Company will have no continuing liability with respect to the * * * Plan under Title IV of ERISA after the sale of the * * * division to * [*3] * * if:

(1) As of the closing date of the sale, the PVH Plan has sufficient assets to satisfy all benefits which are guaranteed by the PBGC under Title IV or

(2) If the assets of the PVH Plan are not sufficient to satisfy guaranteed benefits on such date, 30 percent of the statutory net worth of * * * (including its ownership of the assets of the * * * division) immediately after the closing is greater than the amount by which the assets of the * * * Plan are insufficient to satisfy guaranteed benefits.

You should be aware of the PBGC's view that net worth, as used in Section 4062(b) of ERISA, refers to an employer's fair market value, which in many cases may differ significantly from an employer's balance sheet or appraised values.

You have asked us for a determination of the extent of the liability which the Company would incur if the * * * Plan terminates after the date of sale when neither of the above-stated circumstances obtain on the date of sale. PBGC's action in the event of Plan termination will be determined by the facts and circumstances at the time of termination as well as the circumstances surrounding the sale. The amount of plan insufficiency and the financial [*4] conditions of the seller and buyer are not determinable until a plan actually terminates. Thus, PBGC cannot now make the determination that

you requested.

You have also asked whether the PVH Plan, or the PVH trust, would be subject to liability on account of the termination of the * * * Plan. Under your description of the facts, neither the PVH Plan nor the PVH Trust appears to be subject to contingent employer liability under Title IV of ERISA.

Finally, you have asked whether, in the event the * * * Plan terminates within three years after the sale of the * * * division, any payments made from the PVH Plan would be subject to recovery under Section 4045 of ERISA. In general, Section 4045(a) authorizes the PBGC, as trustee of a terminated pension plan, to recover certain payments (described in Section 4045(b)) made by the plan to a participant within a three year period immediately preceding the date the plan terminated. Under the circumstances you have described, payments made from either the PVH or the * * * plans to * * * participants or former PVH employees who transferred to the * * * Plan would be subject to recapture upon termination of the * * * Plan. However, in the [*5] absence of a termination of the PVH Plan, payments made from the PVH Plan to those participants who remained in the PVH Plan would not be subject to recapture solely by reason of the termination of the * * * Plan.

I hope this has been of assistance.
Henry Rose
General Counsel