

Pension Benefit Guaranty Corporation 85-8

April 2, 1985

REFERENCE:

[*1] 4043(b) Reportable Event. Definition of Reportable Event 4043(b)(8) Reportable Events. Mergers, Consolidations & other Transfers of Plan Assets 29 CFR 2615 Reporting & Notification Requirements for Reportable Events 4062(b) Liability of Employer in Single Employer Plans. Amount of Employer Liability 4062(e). Liability of Employer in Single Employer Plans. Closing of Facility Affecting More Than 20% of Plan Participants 4064 Liability of Employers in Multiple Employer and Multiemployer Plans

OPINION:

This is in response to your inquiry concerning the effect of certain provisions of the Employee Retirement Income Security Act ("ERISA") as applied to the transactions described below.

As you have represented the facts, upon receipt of Internal Revenue Service approval, * * * Corporation * * * will spin-off its manufacturing subsidiaries, so that they will no longer be a part of the * * * controlled group. This will be done by creating a new corporation ("New Corporation"), which will act as a holding company for the stock of the spun-off * * * subsidiaries. * * * is a publicly owned corporation whose stock is widely held. * * * stockholders will receive shares in New Corporation equal to [*2] the number of * * * shares they own.

* * * sponsors a defined benefit pension plan ("* * * Plan") for most of the salaried employees and a number of hourly employees in the controlled group comprised of * * *, its manufacturing subsidiaries, and certain other subsidiaries. * * * Plan will have approximately 2,150 participants immediately prior to the spin-off, and approximately 1,984 immediately after the spin-off. The employees of the spun-off subsidiaries who participated in the * * * Plan will enter the New Corporation Plan, a plan newly established by New Corporation, which will assume the accrued liability to such employees under the * * * Plan. The New Corporation Plan will be a defined benefit plan with benefits identical to * * * Plan's benefits. * * * transferred employees will be given credit for past service for all purposes under the New Corporation Plan. As of the spin-off date, * * * Plan will transfer assets to the New Corporation Plan, so that each plan will have assets in proportion to its accrued liabilities. Both * * * Plan and New Corporation Plan will have assets in excess of the accrued benefits of their participants after the spin-off. You represent [*3] that neither * * * nor New Corporation has any intention of terminating its plan.

* * * is one of the subsidiaries which will be spun-off in the above transaction. * * * is the sole sponsor of its own union-negotiated, defined benefit plan called the Pension Plan for Hourly-Rated Employees of * * * at * * *, * * * ("* * * Plan"). After the spin-off, * * * will continue to be the sole sponsor of the * * * Plan. You represent that, as of March 1, 1984, the * * * Plan had unfunded guaranteed benefits in excess of \$1,000,000.

You requested our opinion on several matters in regard to the above transactions. First, in regard to the spin-off of the * * * Plan, you requested our opinion as to whether the only reportable event involved is a plan merger, consolidation or transfer of assets, as described in ERISA Section 4043(b)(8). In the situation you have described, this would be the only reportable event in regard to the * * * Plan spin-off.

In regard to the * * * Plan, you requested our opinion as to whether the only reportable event is the one described in 29 C.F.R. § 2615.23(a)(1)(ii). This regulation provides that a reportable event occurs when a single-employer plan has unfunded [*4] nonforfeitable benefits in excess of one million dollars and a contributing sponsor leaves or will leave the controlled group. As you have presented the facts, it appears that this transaction would be a reportable event under 29 C.F.R. § 2615.23(a)(1)(ii). See also 29 C.F.R. § 2615.23(a)(1)(iii).

In regard to both the New Corporation Plan and the * * * Plan you requested our opinion as to whether * * *, the former parent, or any of the remaining controlled group members, will incur any employer liability under Sections 4062(b), 4062(e), or 4064 should the New Corporation Plan or the * * * Plan terminate with insufficient assets to pay benefits guaranteed under Title IV of ERISA.

In Opinion Letters 82-29 and 82-30, PBGC addressed the question of the potential employer liability of a controlled group seller where either substantially all of the assets of the seller or the stock of a subsidiary corporation of the seller was sold to a buyer who assumed the liabilities to the seller's or the subsidiary corporation's employees under the seller's plan. In Opinion Letter 82-29 we determined that:

PBGC will not, as a general rule, seek from the seller employer liability under Section [*5] 4064 or 4062, with respect to a termination of a pension plan by a successor employer after the sale of substantially all of the seller's assets, if:

- (1) as of the closing date of the sale, a plan had sufficient assets to satisfy all benefits which are guaranteed by the PBGC under Title IV, or
- (2) [where] a plan's assets are not sufficient to provide guaranteed benefits on the closing date, 30% of the statutory net worth of the employer maintaining the plan immediately after the closing is greater than the sum of the plan asset insufficiencies of all the single-employer plans maintained by such employer. n1

n1 Opinion Letter 82-30 applied these principles to the sale of stock of a seller's subsidiary corporation.

This will advise you that, in our view, the principles applicable to sales transactions apply to the spin-off and transfer transactions that you have described. We point out that in responding to requests for opinions such as Opinion Letters 82-29 and 82-30, it is not the practice of PBGC to verify the sufficiency or the amount of insufficiency of the plan or the net worth of the new employer who has acquired the assets and/or stock. Accordingly, PBGC expresses [*6] no opinion as to the asset sufficiency or the amounts of any insufficiencies of the New Corporation plans maintained by members of the New Corporation controlled group or as to the net worth of the controlled group.

The application of Section 4062(e) is conditioned upon an employer's cessation of operations at a facility and a resulting separation from employment of more than 20% of all plan participants. Section 4062(e) would not apply to Corporation as a result of the spin-off.

I hope this response is helpful.

Edward R. Mackiewicz General
Counsel