

Pension Benefit Guaranty Corporation

86-6

March 11, 1986

REFERENCE:

[\*1] 4204 Sale of Assets  
29 CFR 2643 Variances or Exceptions from Bond Requirements

OPINION:

This is in response to your request for reconsideration of Opinion Letter 85-31, issued by the Pension Benefit Guaranty Corporation ("PBGC") on December 30, 1985, and for a waiver of the requirements under section 4204(a)(1)(B) and (C) of the Employee Retirement Income Security Act ("ERISA") regarding the furnishing of a bond or escrow and the use of certain contract language in connection with a sale of assets.

Opinion Letter 85-31 considered the application of subpart B of the PBGC's regulation on Variances for Sales of Assets (29 CFR Part 2643) to a sale that met all the requirements of section 4204 of ERISA except those in paragraphs (a)(1)(B) and (C). The sale was closed in June 1981 under a contract signed in November 1980; the plan demanded withdrawal liability from the seller in February 1983; the seller first raised the issue of section 4204 with the plan in September 1983; and the plan sued the seller for withdrawal liability (and has since obtained a judgment against the seller).

Opinion Letter 85-31 concluded that subpart B of the regulation did not apply to the sale, citing the fact that [\*2] a bond or escrow had not been furnished by the beginning of the first plan year following the date of sale. The opinion letter stated that, in general, the furnishing of the bond or escrow by the beginning of the first plan year after the sale was requisite to the applicability of section 4204, and thus to the applicability of subpart B of the regulation. This conclusion is supported by language in PBGC Opinion Letter 83-8 and in the preamble to subpart B of the regulation.

You point out in your request, however, that in the same preamble, the PBGC stated (at 49 FR 22636) that the:

critterion [for waiving the bond/escrow and contract language requirements] set forth in . . . § 2643.12, incorporates without change PBGC's class exemption for certain sales occurring prior to January 1, 1981. . . . PBGC issued this exemption on August 10, 1982 (47 FR 34662) in the matter of RGZ, Inc. et al and then amended it on December 12, 1983 (48 FR 55359) in the matter of A. A. Brown et al.

You state that [i]n both RGZ, Inc. and A. A. Brown, a bond or escrow never was obtained . . . ." You argue that since the timely furnishing of a bond or escrow was not a condition to the [\*3] class exemption granted in RGZ and Brown, and since § 2643.12 incorporated that class exemption without change, the timely furnishing of the bond or escrow cannot be a condition to the applicability of § 2643.12.

The RGZ and Brown cases did not focus specifically on the question of whether a bond or escrow had been furnished by the beginning of the first plan year after the sale, since in neither case was the plan contesting the applicability of section 4204. The PBGC agrees, however, that to insist on the furnishing of a bond or escrow by that date would circumscribe significantly the usefulness of the exemption for pre-January 1, 1981 sales. The PBGC is therefore of the opinion that, for cases under § 2643.12, the furnishing of a bond or escrow by the beginning of the first plan year following the date of sale is not a necessary pre-condition. Opinion Letter 85-31 should be considered modified accordingly.

However, a seller may, nevertheless, lose the benefit of section 4204 of ERISA if it does not timely assert section 4204 as a defense to a plan's claim for withdrawal liability. To do that in a case like the instant one, the seller must apply for a waiver [\*4] of the bond/escrow and contract language requirements and raise the section 4204 defense in a timely manner. (Sections 4219 and 4221 of ERISA set forth the time limits for contesting a plan's determination of withdrawal liability.) Whether an employer has a right to a waiver under § 2643.12 is moot if the waiver is sought after the time for asserting section 4204 as a defense has passed.

Finally, you have requested the PBGC to grant a waiver of the bond/escrow and contract language requirements. We are unable to do so. Under § 2643.2 of the regulation, the PBGC cannot (with one minor exception not applicable here) consider a request for a waiver that is based on satisfaction of any of the tests in subpart B of the regulation (including § 2643.12). Such a request must be made to the plan. A request for a waiver based on some other grounds may be made to the PBGC. However, in that event the PBGC may consider the request only if it is submitted prior to the beginning of the first plan year after the sale, or, failing that, if the bond or escrow was furnished before that date.

If you have any further questions about this matter, you may call Deborah Murphy of the PBGC's Corporate [\*5] Policy and Regulations Department at 202-956-5050.

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