Dexter Hofing LLC

PBGC Opinion Letters
Multiemployer Issues

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DH ACTUARIAL CONSULTING

Contents

Section One

Introduction

The purpose of this report is to serve as a research aid for actuaries and lawyers working in the area of multiemployer pension plans. Although the body of PBGC Opinion Letters is fairly limited, we have never seen a culling of such letters which pertain exclusively to multiemployer pension plans. In this report, we have gathered 130 PBGC Opinion Letters related to multiemployer pension plan issues. We have also provided a very brief summary of each Letter to enable a practitioner to more efficiently find letters relevant to any particular issue. And, of course, this entire report is searchable using normal Acrobat functions.

As shown in the table below, the vast majority of Letters related to multiemployer pension plans were issued by 1988 in the wake of the passage of MEPPA in 1980. After that, such letters were issued relatively infrequently and none were issued after 2002.

Year	Letters Issued		Year	Letters Issued
1980	2		1992	4
1981	10		1993	2
1982	24		1994	4
1983	11		1995	2
1984	4		1996	0
1985	20		1997	1
1986	17		1998	0
1987	7		1999	0
1988	7		2000	1
1989	4		2001	1
1990	3		2002	1
1991	5			

We hope that this report will prove useful.

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Section Two

Summaries

This section provides brief capsule descriptions of the PBGC Opinion Letters included in this report. Hopefully, these descriptions will be sufficient to indicate which Letters are relevant to a particular issue of interest for a practitioner. In the pdf version of this report, clicking on the Letter number will bring one directly to that Letter.

80-16 Discusses what constitutes a successor plan for determining phase-in of PBGC guarantees.

80-22 Discusses what constitutes a termination of a multiemployer plan.

81-1 If, prior to 9/26/81, a plan elects not to be a multiemployer plan, a withdrawing employer is not subject to multiemployer withdrawal liability (but may be subject to § 4063 liability).

81-12 Contributions in denominator of withdrawal liability fractions should not be counted twice (e.g., if for year x but paid in year x+1).

81-14 Discusses circumstances in which PBGC will partition a plan.

81-15 Allowed a plan to withdraw a notice of intent to terminate.

81-19 Asset sale by an employer subject to the building and construction rules would not normally trigger a withdrawal.

81-27 Discusses the requirements before a plan is required to transfer assets and liabilities to another plan pursuant to § 4235.

81-32 Letter of credit satisfies the bonding requirement of § 4204(a)(1)(B).

81-33 Discusses building and construction. Little that is useful.

81-34 Merger rules in § 4231 do not apply to merger of a pension fund and a welfare fund.

81-41 Definition of "trades or businesses under common control" has the same meaning as in

§ 414(c) of the Internal Revenue Code. Discusses various partial withdrawal issues but does not appear to go deeply into any issues.

82-2 Discusses issues that constitute a withdrawal. Not very useful.

82-4 Sale of stock of a subsidiary company doesn't constitute a withdrawal.

82-5 Generally cessation of operations at a facility due to a shutdown of the facility will not constitute a partial withdrawal.

82-8 The phrase "the amount of the unfunded vested benefits allocable to an employer…" in § 4225 does not refer to the same amount as referred to in § 4211. If plan can't determine the amount, they are limited to collecting the amount from the schedule in § 4225(a)(1)(B).

82-9 Question regarding what constitutes the building and construction industry. Opinion letter notes that the House report on MEPPA indicates that the term should be given the same meaning as in the administration of the Taft-Hartley Act.

82-10 Discusses situation where all liabilities of a terminated multiemployer plan are to be settled by lump sum payments or purchase of annuities.

82-12 PBGC approval is not required for a merger of multiemployer plans. Notice, however, is required at least 120 days before the effective date of the merger.

82-13 Definition of "employer" – talks about trades or businesses under common control.

82-14 Contributions for numerator of allocation fractions in § 4211 are based on when obligation to contribute arose, not on when contributions are paid.

82-15 § 4232 and § 4234 related to transfer of assets and liabilities do not require a multiemployer plan to transfer assets when requested to by an employer

82-19 Discusses termination of multiemployer plan due to merger into a defined contribution plan.

82-20 Discusses bonding requirement in relation to the trucking industry withdrawal rule in § 4203(d)(3).

82-21 Discusses whether strikes (legal or illegal) or lockouts constitute withdrawals

82-22 Discusses what constitutes a "facility" for partial withdrawal purposes. Generally means a discrete location

82-24 Discusses various issues in connection with a terminated multiemployer plan. Addresses a question regarding modifying § 4219(c) rules with opinion that it is no permissible.

82-27 Plan can't default the employer when issues are in dispute. This applies to the period before arbitration is requested as well as the period after arbitration is requested.

82-32 Describes procedure for selecting arbitrator when parties can't agree in the absence of

PBGC regulations.

82-33 Discusses allocating a portion of liability to pre-1980 withdrawals.

82-34 Decrease in excess of assets over liabilities from year to year does not create positive bases under the presumptive method.

82-35 Selling some facilities under a given collective bargaining agreement while keeping others does not trigger a partial withdrawal. Opinion letter also includes some obsolete information regarding credit for prior withdrawals.

82-37 Discusses the issue of the entity that constitutes the employer in a complex outsourcing situation.

82-38 Question was posed regarding whether officers or shareholders have any responsibility for withdrawal liability in the event of a bankruptcy. PBGC responded that this is a matter of state law but that in general shareholders are not liable for the debts of a corporation.

82-39 General question about dispute procedure. Not very useful.

82-40 Sale of assets where buyer continues to contribute does not receive the protection of § 4218 regarding changes in corporate structure but must comply with § 4204 to avoid a withdrawal.

83-4 Dispute over the validity of a withdrawal liability demand (as opposed to over the amount) is subject to arbitration.

83-8 Purchase of a two-year bond to cover the first two of the five years required under § 4204(a)(1)(B) satisfies the requirement of § 4204. However, if at any time in the five year period the bond is not maintained, the requirements are no longer satisfied.

83-10 Discusses calculation of complete withdrawal liability when there was a previous § 4204 agreement with respect to a portion of the operations.

83-11 Discusses a question regarding whether forming a wholly owned subsidiary which assumes obligation to contribute to the plan triggers a withdrawal (it doesn't).

83-13 Discusses definition of "building and construction".

83-17 Abatement rules during period pending PBGC regulations.

83-18 Incorporation of a previously unincorporated employer does not constitute a withdrawal.

83-19 Covers issues related to plans with no UVB. (a) UVB is zero whenever assets exceed the value of vested benefits. (b) Under the presumptive method, you can have withdrawal liability even if the UVB is zero.

83-20 Partial cessation of the employer's contribution obligation does not occur when an employer transfers work to another location for which contributions to the same plan are required.

83-21 Discusses applicability of the building and construction rule.

83-23 Raises the question regarding whether "substantially all" was measured by number of employers or dollar value of liabilities of those withdrawing (raised in the context of the de minimis rule in § 4209(c)(1)). PBGC said that the plan sponsor is initially responsible for determining what constitutes "substantially all" and that PBGC would not interject itself into the process by issuing an opinion.

84-5 Discusses § 4204 of in the context of buying assets of a bankrupt employer and not posting a bond.

84-7 Various controlled group questions and whether certain transactions trigger a withdrawal.

84-8 Discusses whether a withdrawal occurs when a construction industry employer ceases to contribute when CBA expires but continues to perform work through subcontractors. Basically, withdrawal does not occur unless the CBA had required contributions for work performed by subcontractors.

84-9 Discusses who is the employer in a situation where one employer is the common law employer while another has the obligation to contribute under a CBA.

85-1 Quarterly payment is equal to exactly one-quarter of the annual payment. Discusses how plan should adjust for payments other than quarterly. Note that 85-1 describes the adjustment incorrectly (corrected in 85-18). Discusses issue of interest for period between date of withdrawal and date of demand.

85-3 Employee contributions are not included in the withdrawal liability allocation fractions.

85-4 Discusses credit to be granted under § 4206 for prior partial withdrawals.

85-5 Discusses construction industry exemption in the context of a situation where the contractor stops doing work directly but subcontracts all work.

85-12 Discusses how "retail food industry" is defined for purposes of § 4205(c).

85-13 Partial withdrawal fraction is properly calculated on CBUs rather than contributions even when rates for different segments differ.

85-14 Discusses "joint employer doctrine" under the National Labor Relations Act and whether a company that outsources work to a leasing company may be subject to withdrawal liability.

85-15 Discusses a specific § 4204 situation and whether avoid/evade might apply.

85-16 Question regarding whether or not an eighteen-month bargained contribution holiday constitutes a partial withdrawal.

85-17 Question regarding whether sale can retroactively be amended to comply with § 4204. States that it is a plan's responsibility to determine whether a withdrawal has occurred, including

whether the conditions have been met in a timely fashion.

85-18 Corrects 85-1. Quarterly payment is equal to exactly one-quarter of the annual payment. Discusses how plan should adjust for payments made other than quarterly.

85-20 Discusses bond waivers under § 4204. Regulations do not apply to the liquidation bond required if seller liquidates.

85-22 Discusses effect of reciprocity agreements on withdrawal liability.

85-23 Plan can't default the employer during the 90 day period for requesting review.

85-24 If plan terminates and purchases annuities for all participants from an insurance company that later becomes insolvent, PBGC would not be authorized to pay benefits.

85-25 Discusses reversion of assets to the employers when a single-employer plan terminates and transfers assets and liabilities to a multiemployer plan.

85-27 Discusses use of pre-MEPPA hours in determining § 4219(c) payment (probably no relevance today).

85-29 Discusses situation with various corporation transactions including spinoffs and whether or not those trigger withdrawals.

85-30 Terminated multiemployer plan cannot transfer assets and liabilities pursuant to a reciprocity agreement.

85-31 Failure to obtain a bond invalidates a § 4204 sale (see also 86-6).

86-2 Addressed a question as to what constitutes a facility for purposes of determining what CBUs get excluded due to a pre-1980 closure of the facility. In this case, PBGC stated that an individual retail store constituted a facility. Also stated that the statute did not give the plan the ability to make its own definition of "facility". Discusses definition of "facility" in general.

86-4 When contributions cease because of a strike but a withdrawal doesn't occur because of § 4218(2), and there is a subsequent withdrawal, the withdrawal date is not determined as the date when § 4218(2) ceased to apply but follows the normal definitions of withdrawal date.

86-5 Transfer of surplus assets from a multiemployer plan to another trust after plan termination.

86-6 Reconsideration of 85-31 adding additional discussion to the issue of the § 4204 bonding requirement.

86-7 States that a decertification does indeed cause a withdrawal. Mentions that, as required by MEPPA, PBGC was then studying the necessity of adopting special rules in cases of union-mandated withdrawal from multiemployer pension plans.

86-8 Discusses the fact that all employers in a controlled group constitute a single-employer for withdrawal liability purposes.

86-10 When an employer is a joint-employer (e.g., as part of an employee leasing company), that employer has a withdrawal when no longer required to contribute to the plan.

86-11 Requirement for multiemployer plan to refund withdrawal liability that was overpaid due to a calculation error is limited to the situation where the employer requests review and arbitration.

86-12 States the multiple streams of payments for partial withdrawals seems inconsistent with legislative history. States that they are preparing proposed regulations that will address the issue.

86-17 For § 4205 purposes, a partial cessation does not occur when a company stops performing work but then outsources the work to a third party

86-18 PBGC refused to reconsider 86-2. Discussed validity of opinion letters.

86-19 PBGC generally won't get involved in disputes where a right of civil action exists.

86-20 Primarily discusses abatement rules that should apply for abatements that occurred prior to issuance of the regulations. States that abatement is not intended to forgive withdrawal liability payments that were in arrears on the abatement date.

86-21 Discusses various issues regarding complete withdrawal when a partnership is the employer. Also posed a factual question about what constitutes transfer of work or closure of a facility.

86-22 (a) No approval needed to change to a statutory withdrawal liability method. (b) Hybrid method (combination of two or more statutory methods) would require approval by PBGC. (c) Switch to 10 year period rather than 5 as allowed under statute doesn't require approval.

86-23 Talks about abatement issue when employer withdraws and then later buys a division that contributes to the same plan.

86-24 (a) Discusses what constitutes nonforfeitable benefits. Draws distinction between "vested" and "nonforfeitable". (b) States that there is no requirement that actuarial assumptions for withdrawal liability be the same as for funding.

87-1 Discusses when a bankruptcy triggers a withdrawal.

87-2 Discusses what constitutes an "asset" to allow for an asset sale subject to § 4204.

87-3 Discusses the effect of pre-1980 withdrawals on withdrawal liability for a later withdrawal.

87-5 Discusses construction industry withdrawal rules.

87-8 Outsourcing and effect on withdrawal liability.

87-12 Transfer of liabilities to a single-employer plan but no transfer of assets. Letter discusses effect on withdrawal liability. Also touches on possible waiver of mass withdrawal.

87-13 Discusses merging a defined contribution multiemployer plan into a defined benefit multiemployer plan.

88-1 § 4204 does not require that liability of purchaser be calculated using the presumptive method. Purchaser's liability is calculated under regular rules.

88-2 Discusses the effect of § 4225 in a construction industry plan situation when a sale of assets is involved.

88-3 Discusses significance of PBGC approval under § 4220

88-5 Discusses what events occurring after the mass withdrawal valuation date may be included in the reallocation liability.

88-6 § 4235 only contemplates the transfer of assets for active employees.

88-7 Discusses sales of assets between Related Parties as defined in IRC § 267(b) when such related parties are not within the same controlled group. Sounds like that triggers a withdrawal and § 4204 doesn't apply since the sale isn't between unrelated parties.

88-8 Clarification of 86-4 where employer withdrew from an association agreement and continued bargaining with union and contributing to plan. Subsequently withdrew in next plan year. Issue is which year the withdrawal occurred in. PBGC basically said it's a labor law issue.

89-2 Reciprocity issues. Employer is not considered a contributing employer in any fund other than the one to which it is bound to contribute under a CBA. But PBGC went into great length in discussing the possibility that a contrary position might apply in some situations.

89-3 Question was posed regarding whether a mass withdrawal on the last day of the third year would still include the employer. PBGC said the three years include the last day of the third year and the employer would be included.

89-5 Discusses that certain death benefits (including pre-retirement spouse benefits) are not nonforfeitable unless the participant is already dead.

89-8 Discusses contractual modifications to withdrawal liability method and the validity thereof (i.e., employer agreeing to different terms than provided for in the statute).

90-1 Discusses various circumstances arising after a § 4204 sale such as a 2nd subsequent sale and various restructurings. PBGC discusses ways in which such transactions may not trigger a withdrawal.

90-2 (a) It is permissible to calculate § 4219 payment multiplying high rate by high CBUs on a

location-by-location basis. (b) Same rule can apply to remaining employers in a plan terminated by plan amendment. (c) Plan can't substitute other assumptions for those mandated in the case of a mass withdrawal. (d) In general correction of errors in valuations can only be made prospectively in calculating withdrawal liability.

90-4 Interest rate changes after the mass withdrawal valuation date can't be taken into account in the determination of reallocation liability. Also discusses what formal steps must have been taken for benefit increase to be eligible for PBGC guarantees.

91-2 Discusses "nonforfeitable" vs "vested" and talks about what benefits can be continued after mass withdrawal.

91-3 (a) Discusses § 4204 in general, (b) states that failure of an employer to object to a withdrawal liability estimate does not bar the employer from objecting to an issue upon actual withdrawal.

91-6 Discusses trustees' ability to modify withdrawal payment terms to take into account financial conditions of the employer (e.g., allow a longer time for payment).

91-7 (a) In general PBGC believes that new issues can be raised after the request for review is submitted. (b) Arbitration date isn't tolled by raising additional issues. (c) PBGC says that employer can raise issues that weren't brought up in the request for review but that it is not absolutely free to raise additional issues. (d) Further guidance on when a plan can change its demand after-the-fact.

91-8 Deals with missing participants in terminated multiemployer plan that is distributing all assets.

92-1 Various withdrawal liability issues (a) situations in which sales or closures of divisions do not trigger a partial withdrawal, (b) allocation of contribution history after corporate transactions, (c) while 70% decline due to a stock sale will not trigger a partial withdrawal normally, it may if the decline is not solely due to the sale. When a stock sale of a division follows a closure of another division, contributions get allocated by the plan on a reasonable basis. If prior closed divisions aren't part of the sale, a withdrawal may possibly be triggered by the transaction.

92-2 Discusses issue of estimated assessment followed by an "actual". Demanding payment turns it into an assessment rather than an estimate. The "actual" is then a supplement to the assessment which is limited as described in 90-2.

92-3 Discusses bond requirement under § 4204 in the event of liquidation of the seller or distribution of assets of the seller.

92-4 Discusses bond requirement under § 4204 in the event of liquidation of the seller or distribution of assets of the seller. Also discusses various issues related to § 4204 primarily

focusing on required contract language.

93-2 Discusses calculation of withdrawal liability in the event of a 70% decline.

93-3 Discusses interpretation of limitation in § 4225 in light of *Trustees of the Amalgamated Insurance Fund v. Geltman Industries*.

94-2 Whether interest and principal on late PBGC premium payments can be paid from plan assets.

94-3 Determining whether a mass withdrawal has occurred. Effect of mass withdrawal on 20-year payment cap and de minimis.

94-5 Corrections are allowed retroactively when the effect is to reduce a previous erroneous assessment. Summarizes 90-2 with wording suggesting UVB can't be increased retroactively when it is found to be incorrect.

94-8 It is reasonable to include in reallocation liability (presumptive) withdrawal liability for employers who were not assessed because of the construction rule.

95-2 Discusses 70% partial withdrawals under the building and construction rule.

95-3 Partial withdrawal credit under § 4206 when contributions are average over more than five years.

97-1 Foreign entities that are part of the controlled group are jointly liable for withdrawal liability.

00-1 Request to change withdrawal liability method from direct attribution when plan is fully funded to avoid charging withdrawal liability.

01-2 Multiemployer plan with only one employer continues to be a multiemployer plan.

02-1 PBGC authority to terminate a plan (not clear if this applies to multiemployer).

Section Three

PBGC Opinion Letters – Full Text

Pension Benefit Guaranty Corporation

80-16

September 23, 1980

REFERENCE:
1015(f) (IRC § 414) Definitions & Special Rules. Multiemployer Plan
4021(a) Plans Covered. Requirements of Coverage
4022(b)(2) Benefits Guaranteed. Successor Plan

OPINION:

This is in response to your request for our opinion with respect to the status of the Pension Plan to be put into effect between A Company and Local Unions No. * * * ("A Plan") under the Employee Retirement Income Security Act of 1974 ("ERISA"). Specifically, you inquire whether the A Plan would be a "successor plan" within the meaning of sections 4021(a) and 4022(b) of ERISA.

You have informed us that there is currently in effect a multiemployer plan (the "Plan") as described in Section 414(f) * * * the Internal Revenue Code of 1954, which is covered under * * * le IV. The Plan is maintained by, and covers employees of, * * * Company ("A"), * * * Company ("B"), and * * * Company ("C"). A * * * Company is a division of * * * Company, Inc. ("D").

D, B, C, and the Union have agreed to split the Plan into separate plans and to increase the benefit levels under these plans. Each separate plan will cover retired, deferred vested and active participants in the Plan who were or are employed by the [*2] employer who will maintain the separate plan. Each separate plan will assume the liabilities of the Plan attributable to the separate plan's participants. You have stated that the Plan's assets at present exceed the vested benefits thereunder and that Plan assets will be distributed to the separate plans in proportion to the Plan's accrued liabilities which will be assumed by the separate plans.

You have informed us that Plan participants whose rights as retirees or deferred vested employees derive solely from service with former contributing employers will receive paid-up annuities in connection with the split up.

The question has been raised whether the A Plan (and, similarly, each of the other two separate plans) would * * * a "successor plan" within the meaning of Sections 4021(a) and 4022(b) of ERISA so that for purposes of the phase-in of guaranteed benefits in the event of the subsequent termination of the A Plan, the time the A Plan will have been in effect would include the time the Plan was in effect. You have indicated that the Union originally requested that the Plan remain in existence to insure that certain Plan benefits "will be fully guaranteed by the PBGC" in [*3] the event of a subsequent termination.

Section 4022(b)(2) provides that, for purposes of the phase-in of guaranteed benefits, the time a successor plan has been in effect includes the time a previously established plan was in effect. Section 4021(a) provides, in pertinent part, that "a successor plan is a plan which covers a group of employees which includes substantially the same employees as a previously established plan, and provides substantially the same benefits as that plan provided." In the instant case, after the split up, the A Plan will cover all the employees employed by A that were covered under the Plan. Accordingly, in our view the A Plan will cover a group of employees which includes substantially the same employees as a previously established plan.

Regarding the second element of the successor plan test, one of the factors the PBGC considers in determining whether a plan provides "substantially the same benefits" as a previously established plan is whether it assumes the defined benefit liabilities from the previously established plan. Article VI of the A Plan agreement provides for a transfer to and assumption of all the defined benefit liabilities of the Plan [*4] attributable to A employees; to this extent the second element of the successor plan test is met.

Based on the facts and circumstances of this case, we conclude that the A Plan will constitute a successor plan for purposes of Title IV of ERISA.

I trust that the above has answered your inquiry. If you have any other questions, please contact * * * of this Office

at (202) 254-4873.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

80-22

December 16, 1980

REFERENCE:
4041A Multiemployer Termination
4041A(a)(2) Multiemployer Termination. Termination - Mass Withdrawal

OPINION:

This is in response to the Notice of Intent to Terminate filed by you on April 21, 1980, as Chairman of the Board of Administration (the "Board") of the Retirement Benefit Plan * * * with Certain Commercial Employers (the "Plan"), a multiemployer plan. In brief, you proposed to terminate the Plan as of April 30, 1980, while freezing benefit accruals as of December 31, 1979, and continuing employer contributions to the Plan through October 31, 1980. As explained more fully below, the Pension Benefit Guaranty Corporation (the "PBGC") has determined, based on all the information disclosed, that the Plan did not terminate as of April 30, 1980.

As we understand the facts, the Plan was established pursuant to collective bargaining in 1956 between * * * Union No. * * * (the "Union") and the * * * Union Employers' section of the * * * Inc. and other * * * employers (the "Employers"). It is jointly administered by the Board with an equal number of members appointed by the Union and the Employers. The Plan has been amended [*2] often and was entirely restated in 1976 to comply with the various requirements of ERISA. The Plan was most recently qualified by the Internal Revenue Service in October, 1977.

Over at least the last nine years, the only reference to the Plan in the collective bargaining agreements between the Union and Employers has been a single provision prescribing the Employers' obligation to make monthly contributions and defining their level. The current collective bargaining agreement came into effect on November 1, 1977 and expired on October 31, 1980.

On April 15, 1980, the Board, finding that the number of contributing employers and covered participants had declined significantly, adopted a Resolution to Terminate the Plan. Under the Resolution, the date of Plan termination would be April 30, 1980, but employer contributions would continue until the expiration of the collective bargaining agreement, October 31, 1980. In addition, the Resolution ceased benefit accruals retroactively to December 31, 1979.

The Board notified PBGC by letter received on April 21, 1980, of its intention to terminate the Plan on April 30. In subsequent conversations with PBGC employees, the Administrative [*3] Agent for the Board has stated that this multiemployer plan would not seek discretionary coverage under Title IV of ERISA, even though a preliminary estimate indicated Plan liabilities exceeding assets by about $600,000.

In a case such as this, PBGC must look to various indicia of plan status to determine whether a termination has occurred. The fact that the Board attempted to terminate the Plan by resolution is one indicia, but is not necessarily controlling in PBGC's determination of the date or fact of plan termination. Other important factors in that determination are the cessation of employer contributions, compliance with plan provisions regarding termination, and cessation of benefit accruals and vesting.

A critical element in this case is that the Board's Resolution explicitly makes no alteration in the obligation of each participating employer to contribute to the Plan through October, 1980. As a result, contributions have continued to be made to the Plan each month since April, 1980. It has been the position of the PBGC that the continuation of the contribution obligation and the payments pursuant to that obligation is one of the key indicia that a plan is ongoing. [*4] Inasmuch as the obligation and the payments to the Plan continue unchanged pursuant to the collective bargaining agreement and the Resolution until October 31, 1980, it is PBGC's view that no termination can have occurred as of April 30. At best, the actions of the Board could be viewed as a freeze of the Plan on April 30, 1980, in anticipation of termination as of November 1, 1980.

Moreover, there is no indication in the information provided to us by you that the provisions of the Plan pertaining to termination were followed. Plan Section 9.2 provides:

"Subject to the provisions of any applicable collective bargaining agreement, the Plan may be discontinued or terminated by the Employers or the [PBGC] . . . ." [Emphasis supplied.] *

* The definition of the word "employer" in Section 1.16 of the Plan clearly does not mean the Board or some other limited group, but means all employers signatory to the Plan.

The applicable collective bargaining agreement contains no provisions concerning the rights and obligations of the Union and Employers to terminate the Plan. Section 9.2 of the Plan also explains that the Employers may terminate the Plan at any time as long as such [*5] action does not contravene the terms of the collective bargaining agreement. Further, the Plan provides that the date of termination is established by the employers, the PBCC, or-by the court. In spite of the Board's assertion in the Resolution that Section 9.2 of the Plan empowers it to terminate the Plan, a thorough reading of all plan provisions indicates no such authority, not even by implication.

Further, there is no indication in the information provided to us by you that the termination procedure was commenced by the participating Employers in the Plan. Nor is there evidence that the employers sought to alter their obligations under the collective bargaining agreement to prevent ongoing contributions after the "termination."

For the above reasons, PBGC finds that the Plan did not terminate on April 30, 1980. Therefore, we will take no action with respect to the Notice of Intent to Terminate filed on April 21, 1980.

In light of PBGC's determination, we wish to call the Board's attention to a recent change in the law affecting multiemployer plans. On September 26, 1980, President Carter signed into law the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"). [*6] Under the MPPAA the cessation of the obligation of all employers to contribute under a plan constitutes a withdrawal of all employers from the plan. Section 4041A(a)(2) of ERISA, as amended. Thus, if the Union and Employers in collective bargaining should agree not to continue the contribution obligation to the Plan after October 31, 1980, such a withdrawal will occur, and under the new liability provisions in the MPPAA, the employers would have withdrawal liability to the Plan.

This letter constitutes an "initial determination" subject to reconsideration under the PBGC's administrative review regulation, 29 CFR Part 2618 (copy enclosed). If you wish to file for reconsideration, you must do so in writing within 30 days of the date of this letter.

Mitchell L. Strickler
Acting General Counsel

Pension Benefit Guaranty Corporation

81-1

January 28, 1981

REFERENCE:
[*1] 4403

OPINION:

This is in reference to your recent letter and your December 23, 1980 telephone conversation with Gerald E. Cole, Assistant Executive Director for Policy and Planning, and David Weingarten, of my staff.

Your letter raises several questions concerning sections 4063, 4201 through 4225, and 4403 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "Act"). I understand, however, that as a result of your telephone conversation with Messrs. Cole and Weingarten, you now have only one question for which you would like a written response. You asked about the impact of an election under section 4403 with respect to a prior employer withdrawal that, at the time of the withdrawal, was subject to the new employer withdrawal liability provisions in sections 4201 through 4225 of the Act.

Section 4403 provides that before September 26, 1981, certain plans may elect not to be treated as multiemployer plans. Section 4403(c) provides that such an election is effective as of September 26, 1980. Therefore, if a plan makes a legally effective section 4403 election, the plan would not be treated as a multiemployer plan [*2] as of the date of the employer withdrawal. Accordingly, the employer withdrawal would not be subject to the new employer withdrawal liability provisions. However, the employer withdrawal may be subject to section 4063.

I trust this information is of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

81-12

May 13, 1981

REFERENCE:
[*1] 4211 Withdrawal Liability

OPINION:

Thank you for your letter requesting clarification of PBGC's interim regulation on Alternative Allocation Methods (26 C.F.R. Part 2652).

Section 4211(c)(3)(B)(ii) of the Employee Retirement Income Security Act of 1974, as amended, provides that the denominator of the rolling-5 method is --

. . . the total amount contributed under the plan by all employers for the last five plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

Section 4211(c)(2)(C)(ii)(II) contains an almost identical denominator for the modified presumptive method.

For purposes of these denominators, § 2652.6(a) of the regulation defines "total amount contributed" to mean "the amounts considered contributed to the plan for the plan year for purposes of section 412(b)(3)(A) of the Internal Revenue Code." Under section 412(c)(10) of the Internal Revenue Code and Treasury regulation § 11.412(c)-12, any contributions made by an [*2] employer within 8 1/2 months after the end of a plan year are considered made for that previous plan year for purposes of minimum funding, without regard to the year in which the employer is obligated to make the contribution under a collective bargaining agreement.

As you suggest in your letter, the definition of "total amount contributed" includes both amounts contributed by all employers for the last five years and "the amount of any contributions owed with respect to earlier periods which were collected in those plan years." The footnote in the preamble to the interim regulation (46 Fed. Reg. at 4895) states that these delinquent contributions should not be included a second time if they have already been treated as amounts paid for the plan year for funding purposes.

I hope this has been of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

81-14

May 26, 1981

REFERENCE:
[*1] 4063 Liability of Substantial Employer for Withdrawal
4063(d) Liability of Substantial Employer for Withdrawal. Partitioning of Plan
4064 Liability of Employers in Multiple Employer & Multiemployer Plans

OPINION:

This is in response to your request that the Pension Benefit Guaranty Corporation (the "PBGC") partition the * * * and * * * Pension Plan (the "Plan") pursuant to section 4063(d) of the Employee Retirement Income Security Act of 1974 ("ERISA").

As we understand the pertinent facts, at all relevant times, the Plan was a multiemployer plan covered under Title IV of ERISA. A Inc. * * * and B Company * * * withdrew from the Plan on March 31, 1977. During the five years prior to the withdrawal, A and B each made about 15 percent of the total plan contributions. As of March 31, 1977, the Plan's assets were approximately $3.9 million. The Plan's unfunded guaranteed benefits were approximately $2.0 million. A's section 4063 liability, as of the date of withdrawal, is approximately $300,000. B's liability is also about $300,000.

Section 4063(d) authorizes PBGC to partition a plan upon the withdrawal of an employer or employers and treat a portion of the plan as a terminated plan and [*2] the remainder as a separate plan. PBGC is required to allocate the plan fund equitably between the two plans.

In deciding whether to partition a plan, the PBGC must first determine that an employer's withdrawal from the plan "has resulted, or will result, in a significant reduction in the amount of aggregate contributions to the plan. . ." Section 4063(d). The PBGC must then determine that partitioning "is consistent with the purposes of this section 4063 and section 4064 and is more appropriate in the particular case." Section 4063(d).

The PBGC has determined that it will not partition a plan to which more than one employer contributes unless it finds: (1) as a result of a withdrawal or withdrawals, contributions to or under the plan will be required to be increased unreasonably in order to meet the minimum funding standards of ERISA or to pay benefits when due, (2) participants would not be unduly prejudiced by a partition, and (3) partitioning would not significantly increase the risk of loss to the PBGC.

After examining the information that you provided, PBGC has determined that contributions to the Plan would not be required to increase unreasonably in order to meet ERISA's [*3] minimum funding standards or to pay benefits when due as a result of the withdrawals of A and B. Therefore, PBGC will not exercise its discretion to partition the Plan.

I hope this information is of assistance.

Robert E. Nagle
Executive Director

Pension Benefit Guaranty Corporation

81-15

May 28, 1981

REFERENCE:
[*1] 4041(a) Termination by Plan Administrator. Filing of Notice of Intent to Terminate

OPINION:

In response to your telephone conversation with * * * of this office on May 19, 1981, concerning the * * * and * * * Pension Plan, PBGC agrees to consider your notice of intent to terminate the plan as withdrawn. The reason for this decision is as follows.

On December 26, 1979, PBGC received a notice of intent to terminate the plan effective February 29, 1980. You have informed us that no further action was taken to terminate the plan and that the plan continues to be operated as an on-going plan. Thus employers continue to make, and the plan accepts, contributions pursuant to their collective bargaining agreements; and plan participants continue to receive credit under the plan for service with contributing employers. Therefore, the plan has not terminated. You indicated to that you considered it appropriate to withdraw the notice of intent to terminate, subject to PBGC's approval. Under the circumstances you have described, it is consistent with Title IV of ERISA to permit the withdrawal of your notice of intent to terminate the plan.

On September 26, 1980, Congress amended ERISA by the Multiemployer [*2] Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208. These amendments, which substantially altered the law with respect to multiemployer plans, will apply to your plan. If you have further questions concerning this matter, please contact * * * at (202) 254-4873.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

81-19

July 1, 1981

REFERENCE:
[*1] 4001(b) Definitions. Employer and Controlled Group
4203 Complete Withdrawal
4204 Sale of Assets
4225 Limitation on Withdrawal Liability

OPINION:

This is in response to your letter requesting general guidance concerning the potential withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") of a construction contractor who sells a trade or business in the construction industry.

Your first two questions appear to relate to the applicability of the "sale of assets exception" in Section 4204 to the construction industry complete withdrawal provisions of Section 4203(b) and to the limitations on withdrawal liability in Section 4225. You pose the case of a construction contractor contributing to a construction industry plan who makes an arms-length sale of all the assets of the business. We assume that the seller is not under common control with any other trades or businesses under Section 4001(b) of ERISA.

In the case of a construction industry plan, a complete withdrawal occurs, per ERISA Section 4203(b)(2), if:

"(A) an employer ceases to have an obligation to contribute under the plan, and

"(B) the employer --

"(i) continues to perform work in the jurisdiction [*2] of the collective bargaining agreement of the type for which contributions were previously required, or

"(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

In the case that you have presented, it appears that after the sale of the assets of the business the seller would not continue to perform work in the jurisdiction of the collective bargaining agreement, so that there would not be a complete withdrawal under Section 4203. Since there is no withdrawal under Section 4203, there is no need to consider the application of Section 4204 or Section 4225.

Your final inquiry is whether our answer would be different if the seller owned two companies in a controlled group relationship and sold one of them. We assume that one company would be in the construction industry, but you have not supplied us with facts concerning the business of the other company or its relation to the construction industry plan. Accordingly, we do not have sufficient information to respond.

I hope we have been of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

81-27

August 28, 1981

REFERENCE:
[*1] 4203 Complete Withdrawal
4205 Partial Withdrawals
4231 Mergers & Transfers Between Multiemployer Plans
4234 Asset Transfer Rules
4235. Transfers Pursuant to Change in Bargaining Representative
4235(a). Transfers Pursuant to Change in Bargaining Representative
4235(g). Transfers Pursuant to Change in Bargaining Representatives

OPINION:

You have requested an opinion from the Pension Benefit Guaranty Corporation (the "PBGC") on the effect of Section 4235 of the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364 (1980)) ("ERISA as amended") on a proposed merger of certain union locals.

You have informed us that the proposed merger involves certain locals of the * * * (the "Union"). The jurisdiction of Union Local 1 generally covers the geographic area of * * *. Four employers currently hire members of Union Local 1 and these employers make contributions to the captioned fund * * *.

Further, the jurisdiction of Union Local 2 and Union Local 3 generally covers the geographic area of * * *. Approximately one hundred employers currently hire members of Union Locals 2 and 3, and make contributions [*2] to the Local Union No. 2 and * * *, Local Union No. 3 * * * (the "Joint Fund").

As you have described the proposed merger, Union Local 1 proposes to merge with Union Locals 2 and 3. As a result, the four employers who hire Union Local 1 members would cease making contributions to the * * * Fund on behalf of members of Union Local 1. From your description, it appears that these four employers would begin making contributions to the Joint Fund on behalf of members of Union Local 1. Members of Union Local 1, in any case, would cease to participate in the * * * Fund and would begin to participate in the Joint Fund.

You have also stated that as a result of the merger the * * * will begin work under a * * * contract; that Union Local 1 would cease to represent its members in collective bargaining with the four employers; and that Union Local 2 or Union Local 3, or both, would become the collective bargaining representative to those four employers. You have not specified, however, whether this change in representative will be certified under the Labor Management Relations Act of 1947, 29 U.S.C. § 141.

Under the facts presented above, you have asked for PBGC's opinion whether Section [*3] 4235 of ERISA as amended will apply. The purpose of Section 4235 is to provide special rules for the specific situation in which an employer undergoes withdrawal from a plan because the union bargaining with that employer, has been changed as a result of the certification of a different union. The critical fact for the applicability of Section 4235, therefore, is whether the change of bargaining representative has been certified.

Section 4235(a), 29 U.S.C.A. § 1415(a) (1981 Supp.), provides as follows:

In any case in which an employer has completely or partially withdrawn from a multiemployer plan (hereafter in this section referred to as the "old plan") as a result of a certified change of collective bargaining representative occurring after April 28, 1980, if participants of the old plan who are employed by the employer will, as a result of that change, participate in another multiemployer plan (hereafter in this section referred to as the "new plan"), the old plan shall transfer assets and liabilities to the new plan in accordance with this section.

This subsection sets forth four elements which must exist before the "old plan" (here, the * * * Fund) is required to transfer [*4] assets and liabilities to the "new plan" (here, the Joint Fund), in accordance with the special rules of Section

4235.

First, there must be a complete or partial withdrawal from the * * * Fund, within the meaning of Section 4203 or Section 4205 of ERISA as amended, 29 U.S.C.A. § § 1383, 1385 (1981 Supp.).

Second, the change of representative must be a "certified change of collective bargaining representative" as specified in Section 4235(g) of ERISA as amended. The National Labor Relations Board has jurisdiction of such determinations.

Third, the employer's withdrawal from the * * * Fund, whether "complete" or "partial," must occur as a result of the certified change of representative.

Finally, employees formerly covered by the * * * Fund must begin participation in the Joint Fund to meet the fourth condition for application of Section 4235.

From the facts you have provided us, it appears that the first and fourth elements are present in your transaction. We have no evidence, however, that a certified change in bargaining representative has occurred. Therefore all conditions have not been met and Section 4235 does not apply to your proposed transaction. Of course, whether [*5] or not the special conditions of Section 4235 are met, a transfer of assets and liabilities may be arranged by mutual agreement of the two funds pursuant to Sections 4231 and 4234, of ERISA as amended, 29 U.S.C.A. § § 1411, 1414 (1981 Supp.).

If you have any questions concerning this letter, please telephone * * * the attorney assigned to this matter, on (202) 254-4895.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

81-32

1981 PBGC LEXIS 9

September 25, 1981

REFERENCE:
[*1] 4204 Sale of Assets
4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security

OPINION:

This responds to your request for an advisory opinion concerning satisification of the escrow requirement of Section 4204(a)(1)(B) of ERISA. Specifically you wish to know whether the deposit of a letter of credit in an escrow account may satisfy the requirement.

Section 4204(a)(1) provides that a withdrawal from a multiemployer plan "does not occur solely . . . as a result of a bona fide, arm's-length sale of assets to an unrelated party" provided that certain conditions are met. Section 4204(a)(2)(B) provides one of the conditions:

(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 issued by a corporate surety company that is an acceptable surety for purposes of Section 412 of this Act, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of --

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale [*2] of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale. . . . [Emphasis added.]

In our view a letter of credit held in escrow satisfies the requirements of Section 4204(a)(1)(B). We note, however, that it is within the plan's discretion whether a given institution is an acceptable party to hold a letter of credit in escrow under Section 4204(a)(1)(B). The plan sponsor is responsible under Section 4204 for determining the acceptability of any agreements such as those which you provided for our examination.

Mitchell L. Strickler
Deputy General Counsel

Pension Benefit Guaranty Corporation

81-33

September 22, 1981

REFERENCE:
[*1] 4203 Complete Withdrawal

OPINION:

This is in response to your letter requesting an opinion concerning the application of the special withdrawal liability rule for the building and construction industry under the Employee Retirement Income Security Act, as amended by the Multimeployer Pension Plan Amendments Act of 1980 ("ERISA"). Specifically, you have asked whether certain activities of the * * * and the * * * are eligible for this rule.

Under section 4203 of ERISA, a construction industry employer incurs withdrawal liability only when it is no longer obligated to contribute under the plan, and "continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or resumes such work in that area within five years after the date on which the obligation to contribute under the plan ceases. In addition, the section 4203 construction industry provision applies only if "substantially all the employees with respect to whom an employer has an obligation to contribute under the plan work in the building and construction industry, and the plan primarily covers employees in the building and construction industry."

ERISA [*2] does not specifically define those activities that are included within the term "building and construction industry". The House report on the Multiemployer Act does indicate that, in applying this special rule, the term should be "given the same meaning as has developed in administration of the Taft-Hartley Act." H.R. REPT. No. 96-869, Part I 76 (April 2, 1980).

Accordingly, if the activities of * * * or * * * are encompassed by the term "building and construction industry" under Taft-Hartley Act, then they would be similarly treated under ERISA.

We hope this information will be useful to you. Should further questions arise, please contact us.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

81-34

1981 PBGC LEXIS 8

October 18, 1981

REFERENCE:
[*1] 4231 Mergers & Transfers Between Multiemployer Plans

OPINION:

This is in response to your letter asking whether a multiemployer Pension Fund and a multiemployer Welfare Fund may be merged pursuant to Section 4231 of the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, ("MPPAA") Pub. L. 96-364, 94 Stat. 1208 (September 26, 1980), 29 U.S.C. § 1411, to form a combined entity for purposes of plan administration at present and ultimately merge the assets of the plans.

Section 4231 establishes certain requirements for a merger or transfer of assets between multiemployer pension funds. It does not apply to a merger of a pension fund and a welfare fund, cf.- PBGC Regulation § 2670.2 "Multiemployer Plan", 46 Fed. Reg. 27332 (May 19, 1981).

I understand you have already contacted the Internal Revenue Service and the Department of Labor concerning the possible implications of a merger of a pension fund with a welfare fund and that both agencies discussed possible problems with you informally.

Please contact * * * of my staff at (202) 254-4873 or the above address if you have any questions.

I hope we have been of assistance. [*2]

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

81-41

December 16, 1981

REFERENCE:
4203 Complete Withdrawal
4205 Partial Withdrawals
4205(a)(1) Partial Withdrawals. Contribution Decline
4205(a)(2) Partial Withdrawals. Partial Cessation
4205(b) Partial Withdrawals. Cessation of Contributions
4212 Obligation to Contribute - Special Rules
4212(c) Obligation to Contribute - Liability

OPINION:

We have received your letter in which you asked the Pension Benefit Guaranty Corporation ("PBGC") to rule on several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., as amended by the Act).

It is clear under the Act that the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to [*2] be resolved first through arbitration and, if necessary, in the courts. Given this scheme for enforcement of the Act, the PBGC will ordinarily avoid interjecting itself in such a determination by issuing an opinion on the application of the law to particular transactions.

The PBGC will, however, continue its practice of answering legal questions regarding the Act. In this regard, with respect to your question regarding the definition of "employer", we point out that Section 4001(b) provides that all trades or businesses under common control shall be treated as a single employer. PBGC's regulation on trades or businesses under common control, 29 CFR Part 2612, provides that "trades or businesses which are under common control" has the same meaning as in section 414(c) of the Internal Revenue Code ("IRC") and the regulations issued thereunder. Accordingly, if certain entities are under common control as defined in section 414(c) of the IRC, they would constitute the "employer" for purposes of Title IV of ERISA.

The remainder of your questions relate to whether there is a complete or partial withdrawal under the circumstances you outlined. Section 4203 provides, inter alia, [*3] that a complete withdrawal occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan or * * * (2) permanently ceases all covered operations under the plan.

The rules governing partial withdrawals are contained in Section 4205. Since Section 4205(a)(1), which provides for a partial withdrawal if there is a 70% contribution decline, does not apply to plan years beginning before April 29, 1982, there can be no partial withdrawal under this section until the end of the first plan year beginning on or after April 29, 1982. However, a contribution decline at the present time may result in a partial withdrawal under Section 4205(a)(1) in a future plan year because the contribution decline is measured at the end of a 3-year test period, and the first two years of that period can begin before April 29, 1982.

Section 4205(a)(2) provides that a partial withdrawal occurs if there is partial cessation of the employer's contribution obligation. Section 4205(b)(2)(A)(i) provides that there is a partial cessation of the employer's contribution obligation if "the employer permanently ceases to have an obligation to contribute under one or more but fewer [*4] than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location". Your questions on the type of work for which contributions were previously required under the collective bargaining agreement, and whether an employer continues to perform such work in the jurisdiction of the agreement or transfers such work to another location are factual issues

to be resolved in accordance with the statutory scheme.

Section 4205(b)(2)(A)(ii) provides that there is a partial cessation if "an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased". Generally, a cessation of operations at a facility by an employer due to a sale of the facility, under circumstances where the employer continues to contribute to the plan for other facilities, will not in [*5] itself constitute a partial withdrawal under Section 4205(b)(2)(A)(ii).

Note that under Section 4212(c), if a principal purpose of any transaction is to evade or avoid liability under Part 1 of Subtitle E of Title IV of ERISA, that part shall be applied (and liability shall be determined and collected) without regard to such transaction.

I hope this response is helpful. If you have any further questions, please call me or * * * of my staff at (202) 254-3010.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-2

January 27, 1982

REFERENCE:
[*1] 4203 Complete Withdrawal
4205(b) Partial Withdrawals. Cessation of Contributions
4218 Withdrawal - No occurrence
4218(2) Withdrawal - Suspension of Contributions

OPINION:

This is in response to your inquiry concerning whether certain events which may occur as a result of collective bargaining between an employer and a union would constitute a withdrawal from the multiemployer plan in which the employer participates under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("ERISA").

Specifically, your letter presents three questions, concerning negotiations between a union and an employer involving a national multiemployer agreement ("Agreement"). First, you ask whether there is a complete or partial withdrawal when, as the result of some form of renegotiated Agreement, existing employees (or perhaps employees over a specified age or with greater seniority) continue to be covered by the Plan and future employees (or employees under a specified age or with lesser seniority) will be covered by a new individual pension plan. As part of that question, you indicate that the employer would continue to have an obligation to [*2] contribute to the Plan, and that there would be no resulting 70% contribution decline (as defined in ERISA section 4205(b)(1)) nor any partial cessation of the obligation to contribute to the Plan (as defined in ERISA section 4205(b)(2)(A)).

Second, you ask whether there is, for the purposes of ERISA section 4218(2), any difference between a dispute that results from a breakdown in negotiations seeking to revise an Agreement and a dispute that results from a cancellation or termination of an Agreement. Finally, assuming negotiations concerning the Agreement reach impasse, you ask whether an employer's suspension of contributions as a result of such impasse would constitute a complete or partial withdrawal under ERISA section 4203(a) and 4205, respectively.

Under ERISA the plan sponsor has the responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and the amount of any liability arising therefrom. ERISA further provides that any dispute between a plan sponsor and an employer on these issues is to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of ERISA, it would [*3] be inappropriate for the PBGC to give its opinion on the application of the law to a particular transaction. The PBGC will, however, continue its practice of issuing general interpretations of the law.

With respect to your first question, a change such as your letter suggests in employee coverage would not generally constitute a complete withdrawal under section 4203 of ERISA. Whether a partial withdrawal results will depend on the specific impact of the transaction and the subsequent level of the employer's participation in the plan.

With respect to your remaining questions, ERISA section 4218 provides in relevant part:

"Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from the plan solely because --

* * *

(2) an employer suspends contributions under the plan during a labor dispute involving its employees."

Thus, an employer that temporarily ceases contributions during a labor dispute involving its employees will not have a withdrawal. However, it should be noted that, as one of the sponsors of the Multiemployer Act pointed out --

". . . if the facts and circumstances of a particular situation indicate that contributions [*4] have ceased permanently -- for example, all employees covered under the plan have been permanently replaced or the facility has been closed --

the fact that the cessation of any contribution obligation was precipitated by a labor dispute does not mean that no withdrawal has taken place" (126 Cong. Rec. H7898, Aug. 26, 1980) (remarks of Rep. Thompson)).

If you have any further questions concerning this matter, please contact * * * of this office, at 202-254-6476.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-4

February 10, 1982

REFERENCE:
4218(1)(A) Withdrawal - Change of Business Structure

OPINION:

We have received your letter in which you asked the Pension Benefit Guaranty Corporation ("PBGC") to rule on several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter an certain provisions which you propose to include in the sales agreement between the parties involved in those transactions. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., as amended by the Act).

It is clear under the Act that the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of the Act, [*2] it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to these particular transactions. The PBGC, however, will continue its practice of answering legal questions regarding the Act.

In that regard we point out that the sale by a parent corporation of the stock of a subsidiary corporation presents a question of statutory interpretation that we feel is appropriate to address. The legislative history to the Act contains the following example which indicates that there is no withdrawal liability solely as a result of a sale by a parent of stock of a subsidiary which was obligated to contribute to a multiemployer plan and continues such contributions after the sale:

"The bill treats an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. A withdrawal does not occur, however, where an employer ceases to exist merely by reason of a change is form or structure, as long as the employer is replaced by a successor employer and there is no interruption [*3] in the successor employer's contributions to the plan or obligation to contribute under the plan. A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S." 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6. (emphasis supplied).

This example is an obvious reference to section 4218(1)(A) of ERISA which provides that an employer shall not be considered to have withdrawn from a plan solely because the employer ceases to exist by reason of "a [*4] change in corporate structure described in section 4062(d)" as long as no interruption in employer contributions or obligations to contribute under the plan occurs. Thus Congress clearly intended that a sale of stock of a subsidiary corporation is such a change in form or structure and that under section 4218 a withdrawal from a multiemployer plan does not occur when a parent sells that stock of a subsidiary corporation that contributes to a multiemployer plan and such contributions continue after the sale.

If you have any questions or wish to discuss these matters further, please contact * * * of this office at (202) 254-4895.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-5

February 18, 1982

REFERENCE:
4203 Complete Withdrawal
4205 Partial Withdrawals
4205(a)(1) Partial Withdrawals. Contribution Decline
4205(a)(2) Partial Withdrawals. Partial Cessation
4205(b) Partial Withdrawals. Cessation of Contributions
4212(c) Obligation to Contribute - Liability

OPINION:

This is in response to your letter in which you asked the Pension Benefit Guraranty Corporation ("PBGC") to explain several provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. § 1001 et seq., as amended by the Act).

It is clear under the Act that the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and, if necessary, in the courts. Given this scheme for enforcement of the [*2] Act, the PBGC will ordinarily avoid interjecting itself in such a determination by issuing an opinion on the application of the law to particular transactions. The PBGC will, however, continue its practice of answering general interpretive questions regarding the Act.

Your questions relate to whether there is a complete or partial withdrawal under the circumstances you outlined. Section 4203 provides, inter alia, that a complete withdrawal occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan or (2) permanently ceases all covered operations under the plan.

The rules governing partial withdrawals are contained in Section 4205. Since Section 4205(a)(1), which provides for a partial withdrawal if there is a 70% contribution decline, does not apply to plan years beginning before April 29, 1982, there can be no partial withdrawal under this section until the end of the first plan year beginning on or after April 29, 1982. However, a contribution decline at the present time may result in a partial withdrawal under Section 4205(a)(1) in a future plan year because the contribution decline is measured at the end of a 3-year test period, [*3] and the first two years of that period can begin before April 29, 1982.

Section 4205(a)(2) provides that a partial withdrawal occurs if there is partial cessation of the employer's contribution obligation. Section 4205(b)(2)(A)(i) provides that there is a partial cessation of the employer's contribution obligation if "the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location". Section 4205(b)(2)(A)(ii) provides that there is a partial cessation if "an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased". Generally, a cessation of operations at a facility by an employer due to a shutdown of the facility, under circumstances where [*4] the employer continues to contribute to the plan for other facilities, will not constitute a partial withdrawal under Section 4205(b)(2)(A)(ii).

Note that under Section 4212(c), if a principal purpose of any transaction is to evade or avoid liability under Part 1 of Subtitle E of Title IV of ERISA, that part shall be applied (and liability shall be determined and collected) without regard to such transaction.

I hope this response is helpful. If you have any further questions, please call me or * * * of my staff at (202) 254-

3010.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-8

March 25, 1982

REFERENCE:
[*1] 4201 Withdrawal Liability Established
4201(b) Withdrawal Liability Established. Withdrawal Liability - Definition
4202 Determination & Collection of Liability
4211 Withdrawal Liability
4225(a) Limitation on Withdrawal Liability. Sale of Assets

OPINION:

This responds to your letter in which you requested our opinion as to the meaning of "the unfunded vested benefits attributable to employees of the employer" as used in Section 4225(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). Specifically, you are concerned about interpretations to the effect that this amount is the same amount as determined under Section 4211 of ERISA to be "the amount of the unfunded vested benefit allocable to an employer . . . ." We conclude that the two amounts are not the same.

Section 4202 of ERISA requires, upon the withdrawal of an employer that the plan sponsor "determine the amount of the employer's withdrawal liability." Section 4021(b) of ERISA defines withdrawal liability as "the amount determined under Section 4211 to be the allocable amount of unfunded vested benefits, adjusted . . . [*2] in accordance with Section 4225." [Emphasis added.]

Section 4225(a) of ERISA provides a limitation on the withdrawal liability of an employer whose withdrawal from a multiemployer plan resulted from a "bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party." In this circumstance the employer's liability is limited to the greater of: (1) "a portion . . . of the liquidation or dissolution value of the employer" determined in accordance with a schedule of marginal rates ranging from 30% to 80% (Section 4225(a)(1)(A), (a)(2)); or (2) "the unfunded vested benefits attributable to employees of the employer." (Section 4225(a)(1)(B)). The plain language of the statute makes it clear that "the unfunded vested benefits attributable to employees of the employer" under Section 4225(a)(1)(B) is not identifical to the amount of the unfunded vested benefits allocable to an employer" under Section 4211. For example, even the "direct attribution" allocation method under Section 4211(c)(4) allocates to the employer a share of unfunded vested benefits which are not attributable to employees of the employer. Moreover, if the two amounts [*3] were identifical, Section 4225(a) would be meaningless -- it would never reduce liability below the amount allocated to the employer under Section 4211.

If the plan sponsor does not or cannot make the determination required under Section 4225(a)(1)(B), the employer's liability is limited to the amount determined in accordance with the schedule provided in Section 4225(a)(2). In any event, the plan sponsor is obligated to apply Section 4225(a), where appropriate. The failure to do so would be inconsistent with Title IV of ERISA, and would be reversible in the dispute resolution process under the Multiemployer Act.

I hope this adequately responds to your question. If you have further questions on this matter, please contact * * * of my staff at the above address or at (202) 254-4873.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-9

March 26, 1982

REFERENCE:
[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
4203(f) Complete Withdrawal. Special Withdrawal Liability Rules
4208(d) Reduction of Partial Withdrawal Liability. Building & Construction Industry Exemption

OPINION:

Your letter, on behalf of the plan sponsor, concerning the application of Section 4203(b), 4208(d) and 4203(f) of the Employee Retirement Income Security Act (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), 29 U.S.C. § § 1383(b), 1388(d), 1383(f), to the * * * Pension Plan ("Plan") has been referred to us by the Department of Labor. You request a determination that the plan is a plan for the building and construction industry within the meaning of § § 4203(b) and 4208(d) for purposes of determining the occurrence of a "withdrawal" from the Plan. In the alternative, you request that the Plan be permitted to adopt withdrawal liability rules similar to the rules for building and construction industry plans pursuant to § 4203(f).

Under the Multiemployer Act, the plan sponsor has the initial responsibility to decide such questions consistent with his fiduciary responsibilities. Any disputes between the [*2] plan sponsor and a withdrawing employer are to be resolved through statutory review, arbitration and, if necessary, court proceedings. PBGC will ordinarily avoid interjecting itself in such proceedings by issuing an opinion on the application of the law to a particular set of facts. PBGC will, however, continue to provide guidance on general interpretative questions regarding the Act.

In this regard, with respect to your question regarding the meaning of "building and instruction industry" ERISA does not specifically define those activities that are included within the term "building and construction industry". The House report on the Multiemployer Act does indicate that, in applying this special rule, the term should be "given the same meaning as has developed in administration of the Taft-Hartley Act," H.R. Rept 96-869 (Part I) (House Educ. & Labor Comm.), p. 76 (April 2, 1980). See also, Summary & Analysis of S. 1076 (Senate Labor Comm.), p. 14 (April, 1980). Accordingly, if the activities of the contributing employers in the * * * Plan are encompassed by the term "building and construction industry" under the Taft-Hartley Act, then they would be similarly treated [*3] under ERISA.

With respect to your second request, ERISA § 4203(f), 29 U.S.C. § 4203(f), authorizes PBGC to prescribe regulations under which plans in industries other than construction or entertainment may adopt special withdrawal rules similar to those in § § 4203(b) and 4208(d). PBGC will issue a regulation in this area in the future.

I trust this will help you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-10

March 26, 1982

REFERENCE:
[*1] 4001(a)(3) Definitions. Multiemployer Plan
4041A Multiemployer Termination
4203 Complete Withdrawal
4219(c)(8) Notice & Collection of Withdrawal Liability - Cessation of Payments

OPINION:

This is in reference to your Notice of Termination concerning the * * * Pension Plan (the "Plan") and to your telephone conversations with * * * of the Office of the Executive Director. You have asked the Pension Benefit Guaranty Corporation (the "PBGC") to authorize the distribution of all Plan assets in full satisfaction of all nonforfeitable benefits under the Plan. You propose to purchase annuities from an insurance company for all participants, other than for those participants whose nonforfeitable benefit has a value less than $1750. You propose to make a lump sum payment of the entire nonforfeitable benefit under the Plan to those participants whose nonforfeitable benefit has a value less than $1750.

As we understand the pertinent facts, the Plan is a multiemployer plan, as defined in section 4001(a)(3) of the Employee Retirement Income Security Act of 1974, as amended (the "Act"). The Plan has terminated under section 4041A(a)(2) of the Act as a result of the withdrawal of every employer from [*2] the Plan (within the meaning of section 4203) or the cessation of the obligation of all employers to contribute under the Plan ("termination by mass withdrawal"). The date of Plan termination is December 11, 1981. The Plan year is the period of twelve calendar months beginning March 1 and ending the last day of February (Plan, section 1.10).

Section 4041A of the Act governs the payment of benefits to participants in terminated plans. Section 4041A(c) provides that the plan sponsor of a plan terminated by mass withdrawal shall -- "(1) limit the payment of benefits to benefits which are nonforfeitable under the plan as of the date of the termination, and (2) pay benefits attributable to employer contributions, other than death benefits, only in the form of an annuity, unless the plan assets are distributed in full satisfaction of all nonforfeitable benefits under the plan."

PBGC authorization of your proposed distribution in full satisfaction of all nonforfeitable benefits under the Plan is not required. To make your proposed distribution, the plan sponsor of the Plan must determine each participant's entire nonforfeitable benefit under the Plan and must ensure that each participant [*3] receives a distribution in a permissible form for such amount. In this regard, we note that the purchase of annuities from an insurance company in satisfaction of nonforfeitable benefits under a multiemployers plan terminated by mass withdrawal constitutes a permissible distribution of plan assets under section 4041A. Similarly, payment of a lump sum to those participants whose entire nonforfeitable benefit under the Plan has a value less than $1750 also constitutes a permissible distribution of plan assets under section 4041A.

We note that under section 4219(c)(8) "an employer's obligation to make withdrawal liability payments to the plan ceases at the end of the plan year in which plan assets on hand (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation." The PBGC has determined that for purposes of section 4219(c)(8), a distribution of plan assets in full satisfaction of all nonforfeitable benefits under the plan establishes that plan assets on hand (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan.

We request that if a distribution is made in full satisfaction [*4] of all nonforfeitable benefits under the plan, that the PBGC be notified, within 60 days thereafter, of the date of the distribution. Please send such notification to the Division of Case Classification and Control, Office of Program Operations (542), Pension Benefit Guaranty Corporation, 2020 K Street, N.W., Washington, D.C. 20006. This notification will enable the PBGC to remove the Plan from the PBGC-1 and premium billing mailing list.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-12

April 7, 1982

REFERENCE:
[*1] 4231(b) Mergers & Transfers Between Multiemployer Plans - Effects of Requirements
4231(c) Mergers & Transfers Between Multiemployer Plans - Requirements of Section

OPINION:

Thank you for your letter reporting the merger of the above-mentioned funds. This letter corrects the earlier letter to you from * * * Case Officer and confirms PBGC's later telephone advice.

Title IV, Subtitle E, Part 3 of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (Sept. 26, 1980), 29 U.S.C. § 1411 et seq. (1981 Supp.), sets forth provisions relating to the merger or transfer of multiemployer plan assets or liabilities. These provisions do not require that PBGC approve a proposed merger of multiemployer plans prior to its effectuation. The provision for PBGC review in Section 4231(c) of ERISA, as amended, 29 U.S.C.A. § 1411(c) (1981 Supp.) is voluntary and provides a plan administrator with assurance that a proposed merger will not violate ERISA Sections 406(a) or 406(b)(2), 29 U.S.C.A. § 1106(a), 1106(b)(2), if PBGC determines that statutory requirements are satisfied.

PBGC must, of course, [*2] be given notice of the merger at least 120 days before the effective date of the merger and the transaction must comply with the provisions of Section 4231(b). The report that you have submitted is an appropriate notice for this case.

I trust this will help you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-13

April 12, 1982

REFERENCE:
[*1] 4001(b) Definitions. Employer and Controlled Group
4201 Withdrawal Liability Established
4205 Partial Withdrawals

OPINION:

This is in response to your inquiry regarding the definition of the term "employer" under Title IV of the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). You ask whether the "employer" for purposes of ERISA sections 4201 and 4205, relating to partial withdrawals by employers from multiemployer pension plans, includes all trades or businesses under common control. We conclude that the term "employer" as defined in ERISA Section 4001(b) applies for all purposes under Title IV of ERISA, including a determination by a plan sponsor of whether a complete or partial withdrawal has occurred.

The term "employer" for purposes of ERISA Title IV, including those sections added by the Multiemployer Act, is defined in section 4001(b):

For purposes of this title, under regulations prescribed by the corporation [the PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades [*2] and businesses as a single employer.

When Congress added the multiemployer provisions of Title IV of ERISA, it specifically indicated its intention that the definition of "employer" in section 4001(b) continue to apply to a group of trades or businesses under common control.

Under current law, a group of trades or businesses under common control, whether or not incorporated, is treated as a single employer for purposes of employer liability under Title IV. Thus, if a terminating single employer plan is maintained by one or more members of a controlled group, the entire group is the "employer" and is responsible for any employer liability. The leading case in this area is Pension Benefit Guaranty Corporation v. Ouimet Corp., 470 F. Supp. 945 (D. Mass. 1970) [aff'd 630 F.2d 4 (1st Cir. 1980 cert. denied, 450 U.S. 914 (1981)], in which the court correctly held that all members of a controlled group are jointly and severally liabile for employer liability imposed under section 4062 of ERISA. The bill does not modify the definition of "employer" in any way, and the Ouimet decision remains good law.

126 Cong. Rec. S11672, 96th Cong., 2d Sess. (Aug. 16, 1980). [*3]

That this definition of employer also extends to businesses which contribute to multiemployer plans is made clear by the report of the Senate Labor Committee:

A group of trades or businesses under common control as described in ERISA section 4001(b) is treated as a single employer if fewer than all the businesses in a controlled group withdraw.

S. 1076 The Multiemployer Pension Plan Amendments Act of 1980: Summary of Analysis and Consideration, Senate Committee on Labor and Human Resources, (Committee Print, April 1980), p. 13. See also, Report of the House Committee on Ways and Means on H.R. 3904 (Rept. 96-869, Part II, April 23, 1980), p. 16 ("the controlled group . . . would be considered an employer with an obligation to contribute to the plan").

Therefore, in order to determine whether a complete or partial withdrawal has occurred within the meaning of ERISA sections 4203 and 4205, contributions of the entire commonly controlled group must be taken into account by the plan sponsor.

I hope this response is helpful to you. If we can be of further assistance please let us know.

Henry Rose

General Counsel

Pension Benefit Guaranty Corporation

82-14

April 20, 1982

REFERENCE:
[*1] 4211(b)(3) Withdrawal Liability - Proportional Fraction
4212(a) Obligation to Contribute - Definitions

OPINION:

This responds to your letter pertaining to methods for computing employer withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "Act"). Your first question concerns the permissibility of using different contribution periods in calculating the numerator and denominator of an employer's fractional share of the amount of a plan's unfunded vested benefits for the last plan year ending before April 29, 1980.

As we understand the facts, employers' obligations to contribute to certain plans are determined at the end of each month. Those contributions are normally paid during the following month (and become delinquent if they are not).

Under these circumstances, an employer that withdraws from such a plan may make its final contributions for a plan year during the following year. You ask whether it is permissible to allocate to a withdrawing employer a fraction of the plan's unfunded vested benefits, using as the numerator the actual cash received from the employer during the plan year, adjusted to account for delinquent contributions.

Section 4211(b)(3) [*2] of the Act states that:

An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last Plan year ending before April 29, 1980, is the product of -

(A) such unamortized amount; multiplied by -

(B) a fraction -

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before April 29, 1980, ...

The numerator of the employer allocation fraction must be based on the amount of contributions required to be made for the most recent 5 plan years. The amount of contributions required to be made for a period is the sum of the amounts which the employer was obligated to contribute for that period.

Section 4212(a) of the Act defines "obligation to contribute" as

an obligation to contribute arising --

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

Does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Thus, the numerator in the employer allocation fraction may not be based solely [*3] on cash receipts during a plan year unless the employer, during that year, has fulfilled all its contribution commitments to the plan for that year under applicable collective bargaining agreements and labor-management relations law. (However, the numerator for the plan year should not include any amount received that is attributable to a delinquency in the payment of a previous year's contributions.) The amount of such commitments is to be determined under the provisions of the documents under which the plan is operated, including collective bargaining arguments.

We recognize that it may be difficult to interpret the documents under which a plan is operated to determine the meaning of "contributions required to be made by the employer under the plan" for a period, especially where the plan has not been amended to adopt an allocation method under section 4211. To clarify how the numerator is to be computed

under a particular plan, it may be advisable for a plan amendment or a plan rule to be adopted to state how the phrase is to be construed.

With regard to the denominators of a plan's employer allocation fractions, the Pension Benefit Guaranty Corporation's Regulation Allocating [*4] Unfunded Vested Benefits, 29 C.F.R. § 2642.6, permits the plan several choices for the contribution period to be used in calculating them. The Regulation does not require that the period selected for use in calculating a plan's denominators be the same as that employed in computing its numerators. Your second question is whether the sum of the allocation fractions for a plan, if determined for each contributing employer as of a certain date, will equal one. While such a result is possible, it is not required by the allocation rules. However, the presumptive method, like the other statutory methods for determining an employer's allocable share of a multiemployer plan's unfunded vested benefits, will allocate to employers substantially all of a plan's unfunded vested benefits.

I hope this is of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-15

April 30, 1982

REFERENCE:
[*1] 4201 Withdrawal Liability Established
4211(e) Withdrawal Liability - Reduction
4232 Transfers to Single Employer Plan
4232(d) Transfers to Single Employer Plan. Guaranteed Benefits
4232(e) Transfers to Single Employer Plan. Transferee Plan
4234 Asset Transfer Rules

OPINION:

This is in response to your letter to the Internal Revenue Service, which was referred to this agency, the Pension Benefit Guaranty Corporation ("PBGC"), for a response. Sections 4232 and 4234 of the Employee Retirement Income Security Act of 1974 ("ERISA") to which you refer in your letter were added to Title IV of ERISA by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

We understand that * * * Corporation * * * * * * is a contributing employer to the * * * Pension Fund (the "Plan"), a multiemployer plan. desires to withdraw the assets and liabilities attributable to its employees from the Plan and establish a single employer plan for these employees. Your question is whether Sections 4232(d) and (e) and 4234 of the MPPAA require the Plan to separate the assets and liabilities attributable to * * * and to transfer such assets and liabilities to a newly-created single employer plan if requested by [*2] * * *.

Section 4232 and 4234, which apply to transfers between a multiemployer plan and a single employer plan, do not require, directly or indirectly, that a multiemployer plan transfer assets and liabilities upon the request of a contributing employer. n1

n1 Section 4234 also applies to assets transferred between multiemployer plans.

Section 4234 provides that a transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan. Multiemployer plans are required to provide rules regarding the transfer of assets to another plan. (See House Explanation, Report 96-869 Part II). The rules need not require a transfer of assets and liabilities upon an employer's request. If there is a transfer of assets and/or liabilities, the transfer must satisfy rules established and applied uniformly. If the transfer of plan assets is in connection with a transfer of plan liabilities, the rules cannot unreasonably restrict the transfer of plan assets. Section 4232(d) governs PBGC's guarantee of benefits when liabilities are transferred to a single employer plan. Section 4232(e) generally prohibits a transfer [*3] of liabilities to a single employer plan without the consent of that plan's sponsor.

Recently you spoke to * * * of PBGC's Office of Program Operations and asked two additional questions. Your first question relates to the consequences of * * * withdrawal from the Plan and establishment of a single employer plan. You should be aware that Section 4201 of ERISA provides that withdrawn employer will have liability to a * * * multiemployer plan in the event of a complete or partial withdrawal. If there is a transfer of liabilities to a single employer plan in connection with a withdrawal, Section 4211(e) of ERISA provides that withdrawal liability would be decreased by the value of the transferred unfunded vested benefits. Your second question is whether a single employer plan may provide future benefit accruals only. This question is properly within the jurisdiction of the Department of Labor and the Internal Revenue Service, and we suggest that you contact on eof those agencies.

We hope this response is helpful. If you have any further questions, please call me or * * * Staff Attorney, at 202-254-3010.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-19

July 21, 1982

REFERENCE:
[*1] 4041A(a) Multiemployer Termination. Termination

OPINION:

This is in reference to your notice concerning the merger of the * * * Pension Fund, a multiemployer plan covered under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") into the * * * * * * Annuity Fund, a multiemployer plan that is not covered under Title IV. The former plan is a defined benefit plan, which you state has sufficient assets to satisfy nonforfeitable benefits under the plan. The latter is an individual account plan. The Pension Benefit Guaranty Corporation (the "PBGC") has determined that the merger of the defined benefit plan into the individual account plan constitutes a termination of the defined benefit plan under section 4041A(a) of ERISA. Accordingly, participants' nonforfeitable benefits under the defined benefit plan must be provided in accordance with Title IV.

Under ERISA, the assets of a terminated multiemployer plan covered under Title IV may be distributed in full satisfaction of all nonforfeitable benefits under the plan as of the date of plan termination. PBGC authorization of a distribution is not required, if the rules and procedures outlined below are followed. [*2]

Each participant must receive his or her benefit in the form of an annuity unless the participant elects, in writing, another form of distribution provided by the plan. A participant may be offered additional forms of distribution (e.g., lump sum payment of the commuted value of the annuity or transfer of such value to an individual account plan) permitted by the plan document. When a participant is afforded the opportunity to elect alternative forms of distribution, he or she must be advised of the estimated amounts of the annuity and of the alternative forms of distribution, and that PBGC will not guarantee the benefit payable in an alternative form.

A participant need not be offered an annuity option if the value of his or her benefit does not exceed $1750. Even if a participant is not required to be offered an annuity under the above rules, in a case where the plan termination is effected by the conversion of the plan into a defined contribution plan, a participant must nevertheless be given the option of receiving his or her nonforfeitable benefit in a lump sum; the participant cannot be required to have his or her benefits transferred to the individual account plan. [*3]

Finally, we request that if a distribution in made in full satisfaction of all nonforfeitable benefits under the Plan, that the PBGC be notified, within 60 days thereafter, of the date of the distribution. Please send such notification to the Division of Case Classification and Control, Office of Program Operations (542), Pension Benefits Guaranty Corporation, 2020 K Street, N.W., Washington, D.C. 20006. This notification will enable the PBGC to remove the Plan from the PBGC-1 and premium billing mailing list.

I hope this information is of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-20

July 27, 1982

REFERENCE:
[*1] 4203(d) Complete Withdrawal. Trucking Industry Exemption

OPINION:

This responds to your request for PBGC's opinion as to whether a letter of credit may satisfy the bond or escrow requirement of Section 4203(d)(3)(B)(ii) of ERISA. That section establishes special withdrawal rules for qualifying trucking industry multiemployer pension plans. We conclude that a letter of credit in the required amount can satisfy the requirement.

Section 4203(d) provides that trucking industry employers, which cease to perform work in the jurisdiction of trucking industry pension plans to which they are obligated to contribute are not considered to have withdrawn from the plan within the meaning of Section 4203(a) if certain conditions are met: (1) the employer furnishes for 60 months a bond or an amount in escrow for 50% of what would have been its withdrawal liability; and (2) during the 60 months PBGC does not determine that the plan has suffered substantial damage to its contribution base as a result of the cessation of contributions.

In our view a letter of credit, held for the requisite period of time and the terms of which are satisfactory to a plan, satisfies the security requirements of Section 4203(d)(3)(B)(ii). [*2] We note, however, that it is the responsibility of the plan sponsor to determine the acceptability of the specifics of any letter of credit arrangement.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-21

July 27, 1982

REFERENCE:
[*1] 4203 Complete Withdrawal
4218(2) Withdrawal - Suspension of Contributions

OPINION:

This responds to your inquiry concerning whether certain types of labor disputes involving an employer's employees would constitute a withdrawal from a multiemployer plan in which the employer participates under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("ERISA"). Your letter cites three types of labor disputes: a strike or a lockout as a result of a strike against another employer; an "offensive" lockout by an employer after an impasse; and an illegal strike by the union with employees being discharged or permanently replaced.

Under ERISA the plan sponsor has the responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and the amount by any liability arising therefrom. ERISA further provides that any dispute between a plan sponsor and an employer on these issues is to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of ERISA, it would be inappropriate for the PBGC to give its opinion on the application of the law [*2] to a particular transaction. The PBGC will, however, continue its practice of issuing general interpretations of the law.

Under ERISA section 4203(a) a complete withdrawal occurs when an employer:

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan. [Emphasis added.]

On the other hand, ERISA section 4218 provides in relevant part:

Nothwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because --

(2) an employer suspends contributions under the plan during a labor dispute involving the employees.

Section 4203 and 4218 indicate that the cessation with respect to the plan must be permanent for a withdrawal to occur.

In explaining sections 4218, one of the sponsors of the Multiemployer Act pointed out --

". . . if the facts and circumstances of a particular situation indicate that co tributions have ceased permanently -- for example, all employees covered under the plan have been permanently replaced or the facility has been closed -- the fact that the cessation of any contribution obligation was precipitated by [*3] a labor dispute does not mean that no withdrawal has taken place." [126 Cong. Rec. H7898, Aug. 26, 1980; remarks of Rep. Thompson.]

I hope that this letter is of assistance to you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-22

August 3, 1982

REFERENCE:
[*1] 4205(b) Partial Withdrawals. Cessation of Contributions
4212(c) Obligation to Contribute - Liability
4219 Notice & Collection of Withdrawal Liability
4221 Resolution of Disputes

OPINION:

This responds to your request for our opinion concerning the application of the partial withdrawal rule contained in Section 4205(b)(2)(A)(ii) of ERISA. Specifically you request clarification of the meaning of the term "facility"; i.e., "whether the term refers to a discrete geographic location or whether it has a broader application." We conclude that the term ordinarily refers to a discrete geographic location for purposes of this rule. Section 4205(b) provides in relevant part:

(b) For purposes of subsection (a) --

* * *

(2)(A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year --

* * *

(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased. (Emphasis added.)

Thus, the statute is clear that work of the same type [*2] must continue at the same facility for which contributions were previously required. It is our view that this ordinarily refers to a facility which continues operations at a discrete location. However, there may be circumstances under which the plan sponsor will determine that a shift of operations from one location to another constitutes a continuation of operations at the facility. See also Section 4212(c) of ERISA. If the plan sponsor makes such a determination, and if the employer objects, the matter must then be resolved through the dispute resolution procedures described in Sections 4219 and 4221 of ERISA.

I hope this is of assistance to you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-24

August 5, 1982

REFERENCE:
[*1] 4001(a)(3) Definitions. Multiemployer Plan
4041A(a) Multiemployer Termination. Termination
4041A(a)(1) Multiemployer Termination. Termination - Plan Amendment - Credited Service
4041A(a)(2) Multiemployer Termination. Termination - Mass Withdrawal
4041A(a)(3) Multiemployer Termination. Termination - Plan Amendment - Individual Account Plan
4041A(c)(2) Multiemployer Termination. Annuity Requirement
4041A(f)(1) Multiemployer Termination. Lump Sum Payments
4042 Termination by PBGC
4201 Withdrawal Liability Established
4209 De Minimis Rule
4219(c) Notice & Collection of Withdrawal Liability - Payment
4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass Withdrawal
4219(c)(7) Notice & Collection of Withdrawal Liability - Alternate Payment
4219(c)(8) Notice & Collection of Withdrawal Liability - Cessation of Payments
4224 Alternate Method for Payment
4225 Limitation on Withdrawal Liability

OPINION:

This is in response to your recent letter requesting an opinion concerning the application of the Employee Retirement Income Security Act of 1974, as amended (the "Act") to the termination of the * * * Pension Fund (the "Plan").

You state in your letter that the Plan is a [*2] multiemployer plan as defined in section 4001(a)(3) of the Act. Your letter states that the trustees of the Plan intended to adopt an amendment before June 30, 1982, which ceases the crediting of service for all purposes under the Plan as of June 30, 1982, and reduces accrued benefits to the level in effect on June 30, 1981. All contributing employers were expected to withdraw from the Plan on or before June 30, 1982. As of June 30, 1981, the Plan had assets of * * * and vested accrued benefits of * * * (valued at PBGC single employer termination rates).

Different obligations and rules apply under the Act depending on the type of multiemployer plan termination. Under section 4041A(a) of the Act, a multiemployer plan termination occurs as a result of--

(1) the adoption . . . of a plan amendment which provides that participants will receive no credit for any purpose under the plan for service with any employer after the date specified by the amendment;

(2) the withdrawal of every employer from the plan, within the meaning of section 4203, or the cessation of the obligation of all employers to contribute under the plan; or

(3) the adoption of an amendment to the plan which causes [*3] the plan to become a plan described in section 4021(b)(1).

If all employers withdraw from a plan, or otherwise cease to be obligated to contribute, the plan is subject to the rules that apply to a termination described in section 4041A(a)(2) ("termination by mass withdrawal"), even if the plan had previously terminated within the meaning of section 4041A(a)(1) or (3).Thus, if all employers withdraw from the Plan, the rules for plans terminated by mass withdrawal will apply.

The first issue you raised was whether the PBGC wished to become trustee of the Plan upon termination. While section 4042 of the Act provides that the PBGC may be appointed trustee of a terminated multiemployer plan, whether the PBGC will seek such an appointment is determined by the facts and circumstances of each case. At the present time, the PBGC has insufficient facts to determine whether it will seek to be appointed trustee of the Plan.

You also inquired about post termination administration of the Plan if the PBGC does not become trustee and whether the Plan can expend all of its liquid assets to purchase annuities. The Act requires a plan sponsor of a plan terminated by mass withdrawal to continue [*4] to administer the plan until a trustee is appointed under section 4042 of the Act or until plan assets are distributed in full satisfaction of all nonforfeitable benefits. Examples of duties required during the continued administration of such a plan include determining and collecting withdrawal liability in accordance with sections 4201 through 4225 of the Act, monitoring the plan's financial outlook pursuant to section 4281 of the Act, and when necessary, adjusting the plan's benefit levels pursuant to section 4281 of the Act. The plan sponsor may delegate, in accordance with the applicable governing documents of the plan, administrative functions regarding the payment of benefits and collection of withdrawal liability to other persons, such as a salaried or contract administrator.

Section 4041A(c)(2) of the Act provides that except as provided in section 4041A(f)(1), the plan sponsor of a plan terminated by mass withdrawal shall "pay benefits attributable to employer contributions, other than death benefits, only in the form of an annuity, unless plan assets are distributed in full satisfaction of all nonforfeitable benefits under the plan."

This provision means that benefits [*5] must be paid in periodic installments from plan assets. A plan sponsor may only provide benefits in an alternative form (e.g., purchase annuities from an insurance company or distribute a lump-sum payment) if: (1) plan assets are distributed in full satisfaction of all nonforfeitable benefits (section 4041A(c)); (2) the entire nonforfeitable benefit of a participant does not exceed $1,750 (section 4041A(f)(1)); or (3) PBGC determines that the distribution is not adverse to the interest of the plan's participants and beneficiaries generally and does not unreabonably increase PBGC's risk of loss (section 4041A(f)(1)).

The limitation regarding the method of providing benefits in section 4041A(c)(2) is necessary to preserve plan assets in order to protect the benefits of participants not now in pay status, and to prevent an unreasonable loss to the PBGC. Utilizing a terminated plan's liquid assets to purchase annuity contracts for some participants jeopardizes the benefits of other participants. As you acknowledged in your letter, if all or a substantial portion of a plan's assets are used to purchase annuity contracts, the plan's ability to meet benefit payments for other participants [*6] would be exclusively, or largely dependent, on the stream of withdrawal liability payments. The benefits of these other participants would be jeopardized because the withdrawal liability payments may not be sufficient to provide the level of benefits that would have otherwise been available.

The PBGC also incurs a greater risk because assets that would otherwise have been available to provide guaranteed benefits are distributed from the plan. If the withdrawal liability payments are not sufficient to pay guaranteed benefits, the PBGC has to provide financial assistance. Such assistance might not have been required if the plan had retained the assets and made only periodic benefit payments from those assets. Furthermore, if the plan had retained its assets it may have realized experience gains (e.g., interest and mortality) that would have enabled it to avoid insolvency, or to at least reduce PBGC's exposure.

You have also asked whether the Plan could adopt a rule under sections 4219(c)(7) and 4224 of the Act, by which all employers' withdrawal liability payment schedules would be for the same period of time. You indicated that the desired result from such a rule would be to [*7] prevent windfall advantages to employers whose obligation to make withdrawal liability payments may cease under section 4219(c)(8) of the Act prior to the satisfaction of their withdrawal liability.

Section 4219(c) of ERISA prescribes the schedule for the payment of withdrawal liability. Sections 4219(c)(7) and 4224, which are virtually identical, permit plans certain latitude regarding the satisfaction of an employer's withdrawal liability. Section 4224 provides that:

"[a] multiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with this Act and with such regulations as may be prescribed by the corporation."

The legislative history indicates that the purpose of providing latitude in the area of collection of withdrawal liability was to enable trustees to weigh the cost of collection against the expected return in order to maximize net recovery.

"[Section 4224] authorizes plans . . . to provide an alternative method for payment of withdrawal liability. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary [*8] duties and characteristic of a responsible creditor concerned with maximizing the total ultimate recovery at supportable

costs. Thus, for example, where it is prudent and in the participants' interest, plan trustees may decide to settle a withdrawal liability dispute for less than the full amount claimed, to cooperate with an employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment of further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount likely to be recovered." [126 Cong. Rec. H7889 (daily ed., August 26, 1980) (remarks of Rep. Thompson.)]

We conclude that your proposal is inconsistent with the Act and is not permissable under section 4224 or 4219(c). Under your proposal the annual payment of certain withdrawn employers would be reduced and their payment period extended to coincide with the payment periods of other withdrawn employers. Your proposal would reduce the annual income of the Plan and increase the risk of insolvency and noncollection of withdrawal liability.

Finally, you inquired whether employer contributions [*9] made to the plan from July 1, 1981, through June 30, 1982, could be treated as advance payment by the employers toward the satisfaction of their withdrawal liability in view of the fact that the Plan Trustees are reducing accrued benefits to the level in effect on June 30, 1981.

First, it is important to note that section 4041A(a)(1) of the Act provides that a multiemployer plan termination occurs as a result of the adoption of a plan amendment which provides that participants will receive no credit for any purpose under the plan for service with any employer after the date specified by such amendment. That section does not authorize Plan trustees to reduce benefits retroactively. See, Internal Revenue Code, section 411(d)(6).

Employer contributions made from July 1, 1981, through June 30, 1982, are obligations that arose under collective bargaining or related agreements. They are not withdrawal liability payments pursuant to section 4219. An employer's withdrawal liability obligation arises only when the employer withdraws from a multiemployer plan.

In the case of a withdrawal, other than a withdrawal to which section 4219(c)(1)(D) applies, an employer's withdrawal liability [*10] is generally determined as of the end of the plan year preceding withdrawal. An employer's allocable share of the plan's unfunded vested benefits is determined as of that date. Although Congress provided for various reductions to be made in determining an employer's liability (e.g., the De Minimis rule in section 4209 and the rules in section 4225), it did not provide a reduction for contributions made after the end of the year preceding withdrawal.

Section 4219(c)(1)(D) applies in the case of a termination by mass withdrawal. That section requires the total unfunded vested benefits in the plan to be allocated among withdrawing employers. Treating contributions made prior to the date of plan termination as advance withdrawal liability payments would be inconsistent with section 4219(c)(1)(D) because it would result in the allocation of less than 100 percent of the plan's total unfunded vested benefits.

We hope this information is of assistance to you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-27

October 12, 1982

REFERENCE:
[*1] 4219(c)(5) Notice & Collection of Withdrawal Liability - Default
4221 Resolution of Disputes

OPINION:

This responds to your inquiry whether, under the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), Pub. L. No. 96-364 (1980), "acceleration of future installments" of withdrawal liability can occur "if any installment is not paid before completion of the administrative process through arbitration."

The Multiemployer Act does not explicitly use the term "acceleration." Instead, Section 4219(c)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Act, provides in pertinent part as follows:

In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. [29 U.S.C. § 1399(c)(5) (Supp. IV 1980) (emphasis added).]

Here, we address only the definition of the term "default" which is set forth in Section 4219(c)(5)(A) of ERISA, 29 U.S.C. § 1399(c)(5)(A).

Section 4221(a)(1) of ERISA, 29 U.S.C. § 1401(a)(1) (Supp. IV [*2] 1980), requires that disputes over withdrawal liability, between a withdrawn employer and a pension plan, shall be resolved through arbitration.

Section 4221(b)(1) of ERISA, 29 U.S.C. § 1401(b)(1), provides:

If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection. [Emphasis added.] Additionally, the second sentence in 29 U.S.C. § 1401(d) implies that if arbitration is pursued, an employer will be treated as being delinquent in the making of a contribution under the plan only if the employer fails to make timely payment in accordance with the arbitrator's final decision. Finally, the legislative history of the arbitration provision specifically states that acceleration does not result from the failure to make payments before arbitration is concluded:

Pending the resolution of the dispute, the employer is required to pay withdrawal liability as originally determined by the plan, but the failure to pay an installment before the arbitration [*3] is concluded would not accelerate the payment of future installments.

Joint Explanation of the Senate Committee on Finance and the Senate Committee on Labor and Human Resources, Congressional Record, July 29, 1980, at S10120 (emphasis added).

Although the considerations noted above are most directly applicable to nonpayment of withdrawal liability during the period after arbitration is requested, such considerations support a similar result with respect to nonpayment of withdrawal liability during the period before arbitration is requested.

In sum, assuming an employer pursues its statutory right to arbitration in good faith, the employer is not subject to a demand for immediate payment of the entire amount of withdrawal liability, for failure to make withdrawal liability payments during both the period before arbitration is requested and the period between the request for arbitration and the arbitrator's final decision. During either period, however, interest will accrue on late payments from the due date until the date on which payment is made. See 29 U.S.C. § 1399(c)(3).

If you have any further questions, please telephone * * * of this office on (202) 254-4895 or write [*4] to him at the above address.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-32

October 28, 1982

REFERENCE:
[*1] 4221 Resolution of Disputes

OPINION:

This responds to your letter requesting our opinion concerning arbitration over withdrawal liability as required by Section 4221 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 Pub. L. 96-364, 94 STAT. 1208 (September 26, 1980) ("Multiemployer Act"). Specifically you wish to know what procedure to follow, in the absence of a PBGC regulation on the subject, when the parties to a dispute do not agree on the selection of an arbitrator.

Under Section 4221 of ERISA arbitration of withdrawal liability disputes is to be conducted in accordance with fair and equitable procedures to be promulgated by the PBGC. While PBGC is working on such a regulation, there is no need to await its publication. In the interim, multiemployer plan sponsors and employers may use any reasonable procedures, such as those established by the American Arbitration Association and the Federal Mediation and Conciliation Service. See Section 405(a) of the Multiemployer Act, 94 STAT. 1303.

Section 4221(b)(3) provides that arbitration proceedings be conducted in the same manner and subject [*2] to the same limitations as an arbitration proceeding carried out under title 9, United States Code. Therefore, if the parties are unable to agree on the naming of an arbitrator or to fair and equitable arbitration procedures they may apply to the court for appropriate relief.

I hope this has been of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-33

October 28, 1982

REFERENCE:
[*1] 4217 Applicability of MPPAA to Certain Pre-1980 Withdrawals

OPINION:

This responds to your request for a written opinion from the Pension Benefit Guaranty Corporation (the "PBGC") regarding the meaning of the term "facility" as used in Section 4217 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Act.

Section 4217 of ERISA provides, in pertinent part, as follows:

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable--

(2) to work performed at a facility at which all covered operations permanently ceased before April 29, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account. [29 U.S.C. § 1397(a)(2).]

You have outlined an example in while a national food store chain maintained * * * retail food stores in a particular metropolitan [*2] area, closed * * * of these stores prior to April 29, 1980, and closed the remaining stores in 1982. You have requested our opinion how employer contributions to a multiemployer pension plan, allocable to work performed at the * * * stores which closed prior to April 29, 1980, would be treated under Section 4217.

Under the Multiemployer Act the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of the Act, it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to particular transactions. The PBGC, however, will continue its practice of answering general interpretive questions regarding the Act.

The question whether Section 4217 of ERISA applies to the closing of a single store, or only to the closing of a group of stores in a defined georraphical [*3] area, is such a general interpretive question. It is our opinion that the term "facility" in Section 4217 of ERISA, in the context of the retail food industry, ordinarily means a single store. Thus, a single retail food store which is permanently closed ordinarily would be "a facility at which all covered operations permanently ceased," within the meaning of Section 4217(a)(2) of ERISA, regardless of whether all of the retail food stores operated by a national chain in a given city were closed. However, there may be circumstances in which the plan sponsor may determine that a shift of operations from one location to another constitutes a continuation of operations at a facility. A dispute over such a determination would, as mentioned above, be subject to arbitration.

This general interpretation of the term "facility" is consistent with an explanation in the legislative history of the meaning of the term for purposes of the partial withdrawal rule. In its report on a bill (H.R. 3904) which eventually became the Multiemployer Act, the Ways and Means Committee of the House of Representative stated that "[f]or purposes of partial withdrawal rules . . . the term means an economic [*4] unit, generally at a single physical location, where business is conducted or industrial operations are performed." H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 18 (1980), reprinted in [1980] U.S. Code Cong. and Ad News 3007.

I hope this information is of assistance to you. If you have any further questions, please telephone * * * of this office on (202) 254-4895, or write to him at the above address.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-34

November 10, 1982

REFERENCE:
[*1] 4211 Withdrawal Liability
4211(b)(1) Withdrawal Liability - Computation

OPINION:

This responds to your inquiry on the operation of the presumptive method of allocation under § 4211 of the Multiemployer Pension Plan Amendments Act of 1980. Section 4211(b)(1) provides that the amount of unfunded vested benefits allocable to an employer that withdraws from a multiemployer pension plan is the sum of three items:

(1) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for each plan year ending after April 28, 1980;

(2) the employer's proportional shares of the unamortized amount of the plan's unfunded vested benefits as of the end of the plan year ending before April 29, 1980; and

(3) the employer's proportional shares of the unamortized amounts of any reallocated unfunded vested benefits.

Where a plan has always had assets in excess of liabilities, the amounts under items (2) and (3) would be zero. It the relationship between plan assets and liabilities had fluctuated, however, while always remaining in excess of liabilities, an argument could be mand that the amount calculated under item (1) would be greater than zero. We think [*2] this argument is without merit. It would treat annual changes in the plan's "fundedness" regardless of whether the plan was fully funded for vested benefits, as equivalent to changes in unfunded vested benefits and would give no meaning in this context, to the term "unfunded." In addition, fluctuations in assets, albeit always in excess of liabilities, would alone account for withdrawal liability in situations where the plan had always been, and continued to be fully funded. We see no reason in either the policies underlying the act, or the statutory language, for such an anomalous result:

In our view, it is far more consistent with the statutory language and purposes to construe annual changes where the value of plan assets never falls below liabilities as zero. So, for example, a plan which has always been fully funded which goes from $1 million overfunded to $1/2 million overfunded, would record a zero change in the value of unfunded vested benefits for that year.

We hope this information has been helpful to you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-35

November 15, 1982

REFERENCE:
[*1] 4202(a)(2) Determination & Collection of Liability
4206 Adjustment for Partial Withdrawal
4211(c) Withdrawal Liability - Allocation by Amendment

OPINION:

This responds to your request for our interpretation of the partial withdrawal liability provisions under Title IV of the Employee Retirement Income Security Act of 1974 as amended ("ERISA"). Specifically you ask whether a partial withdrawal occurs under Section 4205(a)(2) of ERISA, 29 U.S.C. § 1385(a)(2) when an employer sells some of its facilities, covered under a collective bargaining agreement, but continues to perform work at other facilities covered by the same agreement under which contributions are required to a multiemployer pension plan.

An employer partially withdraws from a plan under Section 4205(a)(2) when there is "a partial cessation of the employer's contribution obligation." Such partial cessation is defined in paragraph (2) of Section 4205(b). Paragraph (2)(A)(i) provides that there is a partial cessation when --

the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under [*2] the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location[.]

For this rule to apply, an employer must cease to have an obligation to contribute for all operations covered by that collective bargaining agreement; otherwise the employer has not permanently ceased to have an obligation to contribute under the collective bargaining agreement and has not withdrawn.

Paragraph (2)(A)(ii) provides that there is a partial cessation when --

an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.

If the selling employer does not continue to perform at one or more of the same facilities for which contributions were previously required to the plan, this rule does not apply.

Your second question concerns how a plan would calculate withdrawal liability for a complete withdrawal under the "rolling 5" rule of Section 4211(c)(3) of ERISA [*3] if the employer had previously partially withdrawn prior to the adoption of this rule. Section 4206(b)(1) of ERISA provides that in the event of a subsequent withdrawal, any withdrawal liability "shall be reduced by the amount of any partial withdrawal liability" previously assessed. Thus, the plan sponsor, in the event of a subsequent withdrawal, must first calculate the withdrawal liability under the allocation method then in force, and then reduce that amount by the amount of partial withdrawal liability previously assessed.

Section 4206(b)(2) of ERISA authorizes the PBGC to issue regulations providing for adjustments to this calculation accounting for, inter alia, "factors for which it determine adjustment to be appropriate, so that the liability . . . properly reflects the employer's share of liability with respect to the plan." Such regulations have not yet been issued.

I hope this has been of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-37

December 9, 1982

REFERENCE:
[*1] 4201 Withdrawal Liability Established
4203 Complete Withdrawal
4204 Sale of Assets

OPINION:

This responds to your request that the Pension Benefit Guaranty Corporation ("PBGC") rule on several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., as amended by the Act).

You represent the A Pension Fund (the "fund"), which is a multiemployer pension plan covered under Title IV of ERISA. Your questions concern liabilities allocable under ERISA to employers of the employees who clean the G Building, an office building in downtown for which contributions are received by the Fund. Specifically, you wish to know who constitutes an employer for purposes of assessing this liability.

Prior to January 14, 1981, the G Building was owned by the B Company, and managed by C * * *, Inc. * * *. G Building was identified as the employer on the relevant signature page of the collective bargaining agreement. The agreement was signed for the G Building by C * [*2] * *, inc. B Company did not own any other building at which Fund participants were employed. C was engaged, as of January 14, 1981, as managing agent at at least two other buildings where Fund participants were employed. C supervised, hired and fired the G Building cleaning employees, paid them their wages, and made contributions to the Fund on their behalf. The expenses of employing the G Building employees were reimbursed to C * * *, dollar-for-dollar, by the B Company.

On January 14, 1981, the G Building was sold by the B Company to D * * *, Inc. In the agreement of sale between the B Company and D * * *, Inc., B Company assigned the labor agreement to the purchaser of the building. Subsequent to that date, continued to manage the G Building under a "Property Management Agreement" which purported to establish an independent contractorship rather than an agency relationship.

C continued to be reimbursed by the building owner for the expenses of employing the cleaning employees, who were now directly employed by C * * *.

In April, 1981, the employees of C became employees of E * * *, Inc., which assumed the cleaning and security functions at the Building, and which also [*3] assumed the labor agreement applicable to Local employees employed at the G Building.

Under the Act the initial responsibility for determining whether any Particular action constitutes a withdrawal from a multiemployer plan, the amount of any liability resulting therefrom, and the identity of the liable employer lies with the plan. The Act further provides that any disputes between a plan and an employer on these issues are to be resolved first through arbitration, subject to review in the courts. Given this scheme for enforcement of the Act, the PBGC prefers not to interject itself in such determinations by issuing an opinion on the application of the law to the particular transactions you describe. The PBGC, however, will continue its practice of answering general interpretative questions regarding the Act.

Section 4201 of ERISA establishes that an employer is liable to a multiemployer pension plan if it withdraws from the plan. Section 4203 of ERISA defines a withdrawal as a permanent cessation of "an obligation to contribute under the plan." While Title IV does not directly define the term "employer," Section 4001(b) does provide that it includes all trades or businesses [*4] under common control. Thus, if an entity is found to have had an obligation to contribute to the Fund and to have ceased to have such obligation (or ceased covered operations), liability attaches to that entity and all trades or businesses under common control with it.

Section 4212(a) of ERISA defines "obligation to contribute" as

an obligation to contribute arising--

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labormanagement relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

The legislative history of the Act indicates that an employer has an "obligation to contribute" to a plan if the employer has agreed to make contributions to the plan on behalf of workers for work performed:

The committees intend that the term obligation to contribute under a collective bargaining, or related, agreement apply to any situation in which an employer has directly or indirectly agreed to make contributions to a plan. This includes cases in which the employer signs a collective bargaining agreement or a related agreement such as a participation [*5] agreement or memorandum of understanding, and cases in which the employer agreed to be bound by an association agreement. 126 Cong. Rec. 11672 (1980).

You also ask whether a withdrawal has occurred as a result of any of the sales you describe. In many instances, a sale of assets will result in a complete or partial withdrawal because the seller has ceased covered operations and has ceased to have an obligation to contribute for such operations. However, see ERISA Section 4204(a)(1), which provides that, if certain conditions are met, a sale of assets which otherwise would trigger withdrawal liability will not be considered a complete or partial withdrawal.

I hope this response in helpful to you.

Henry Rose
General Counsel.

Pension Benefit Guaranty Corporation

82-38

December 14, 1982

REFERENCE:
[*1] 4211 Withdrawal Liability
4219 Notice & Collection of Withdrawal Liability
4221 Resolution of Disputes

OPINION:

This responds to your letter raising the question of whether officers or shareholders may be held liable for a corporation's liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.

In your letter, and in a subsequent telephone conversation with * * * of this office, you indicated that your company had made contributions into the Local * * *, * * * Pension and Trust Fund until about a year ago. You also indicated that your company filed a Chapter 11 Bankruptcy petition in 1978, that in November 1981 the company's plan of arrangement was confirmed and that at that time, "union officials accepted a 10% repayment on approximately a $20,000 balance owed to the pension fund." Now you have received a letter from the "union" stating that * * * has incurred withdrawal liability in the amount of $210,000. You are concerned as to how this amount was reached and as to whether you or other principals can be held personally liable.

Under ERISA, any employer that completely or partially withdraws from a multiemployer plan must pay its share of the plan's [*2] unfunded liability. The exact amount of this contingent liability is determined under ERISA Section 4211.

Under ERISA, the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan. If the plan sponsor makes such a determination, and if the employer objects, the matter must then be resolved through the dispute resolution procedures described in Sections 4219 and 4221 of ERISA.

With regard to your question as to individual shareholder responsibility for withdrawal liability, we note that ERISA has no special rules regarding shareholder or officer liability. Accordingly, this issue is usually determined by State law,

which generally provides that shareholders are not liable for the debts of a corporation. You should, however, be aware that the laws of every state contain exceptions to this general principle.

If you have any questions on this matter, please contact * * * of this office at (202) 254-4895.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-39

December 20, 1982

REFERENCE:
[*1] 4201 Withdrawal Liability Established
4202 Determination & Collection of Liability
4219 Notice & Collection of Withdrawal Liability
4221 Resolution of Disputes

OPINION:

This responds to your letter to Congressman concerning withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act") which amends the Employee Retirement Income Security Act of 1974 ("ERISA"). The Congressman has requested that the Pension Benefit Guaranty Corporation ("PBGC") assist you. The purpose of this letter is to explain your rights when withdrawal liability is assessed by a pension plan.

In your letter you state that on * * *, Your Board of directors decided to terminate your corporation, Inc. Liquidation commenced in * * * and formal dissolution occurred in * * * A notice to creditors was published and six months later on * * *, no claims having been received, the corporation ceased to exist pursuant to law.

You further state that prior to dissolution, the corporation contributed on behalf of its employees to the * * * Pension Plan. In * * * as a consequence of the corporate dissolution, the pension plan assessed the former shareholders approximately $60,000 (later increased [*2] to $80,000) in withdrawal liability pursuant to the Multiemployer Act.

The Multiemployer Act provides that an employer that withdraws (ceases making contributions) from a multiemployer pension plan may be liable for a share of the plan's unfunded vested benefits. Section 4201 of ERISA, 29 U.S.C. § 1381. The plan sponsor (ordinarily the trustees) of the pension fund are required by law to assess liability against a withdrawn employer. Section 4202 of ERISA, 29 U.S.C. § 1382.

If an employer disputes the liability determination of the plan, it may petition the plan for review. Section 4219(a)(2) of ERISA, 29 U.S.C. § 1399(a)(2). If the dispute continues, arbitration is required. Section 4221 of ERISA, 29 U.S.C. § 1401. Finally, the arbitrator's decision is reviewable by the federal courts. Section 4221(b)(2) of ERISA, 29 U.S.C. § 1401(b)(2). During this process the employer may raise defenses such as the amount or even the existence of liability.

Your final question concerns whether there are any legislative efforts toward eliminating withdrawal liability as applied to withdrawals which occurred prior to the enactment date of the Multiemployer Act. One such effort is H.R. [*3] 7233, the "Multiemployer Retirement Income Protection Act of 1982."

For further assistance on this matter please contact * * * of my office at the above address or (202) 254-4873.

I hope we have been of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

82-40

December 27, 1982

REFERENCE:
[*1] 4062(d) Liability of Employer in Single Employer Plans. Corporate Reorganizations
4203 Complete Withdrawal
4204 Sale of Assets
4218 Withdrawal - No occurrence

OPINION:

This in response to your recent letter to Edwin Jones, regarding section 4218 of the Multiemployer Pension Plan Amendments Act of 1980, which amended the Employee Retirement Income Security Act of 1974. Your letter poses the question whether section 4218 of the Act shields an employer from withdrawal liability in a sale of assets where the seller's name, plant, employees, and inventory are simply taken over and continued by the purchaser. You state that the purchaser has continued to contribute to the multiemployer pension plan on behalf of all of the seller's unit employees except one. The plan has asserted that the seller has "withdrawn" from the plan, and is claiming withdrawal liability in connection with the event. You assert that the purchaser is a "successor" within the meaning of section 4218 of the Act and should be deemed the original employer. In your view, no withdrawal has occurred.

Under section 4203, a withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan, [*2] or permanently ceases all covered operations under the plan. Under the facts you describe, and assuming that the seller does not continue to contribute to the plan on behalf of employees or operations in which it has an ownership interest of 80% or more, the selling employer has permanently ceased to have an obligation to contribute under the plan. Congress recognized in section 4204 of the Act, however, that where a purchaser in an arms-length bona fide sale of assets continues to contribute to the plan on behalf of substantially the same contribution base units, and assumes the contribution history (and thereby the liability history) of the seller for the year of the sale and the preceding four years, the plan is not harmed, and therefore no withdrawal should occur. Accordingly, section 4204 provides that where the requisite conditions of that section are met, no withdrawal shall occur.

You rely instead on section 4218. In our view, this reliance is misplaced. Section 4218 provides that a withdrawal shall not occur if an employer ceases to exist by reason of a change in corporate structure described in section 4062(d) or a change to an unincorporated form of business, so long [*3] as there is no interruption of employer contributions or obligations under the plan. The kinds of corporate restructuring referred to in section 4062(d) are reorganizations which involve "a mere change in identity, form or place of organization, a liquidation into a parent corporation, or a merger, consolidation or division. These types of restructuring are inapposite to the facts of the case you present. In the situations described in section 4218, the entity contributing to the plan after the transaction is considered to be the same as the entity contributing prior to the transaction. Consequently, the entity after the sale is responsible for the allocable unfunded vested benefits for years both before and after the transaction. In your case however, the seller's obligation to the plan would totally cease as of the date of the sale. In this situation, Congress intended the seller to pay his allocated share of the plan's unfunded vested benefits, i.e., that share which was accrued during his participation in the plan. The purchaser has no obligation for this past liability and is treated as a new employer contributing to the plan with respect to the transferred operations. [*4] Thus, unless the seller is considered to have withdrawn from the plan, the seller's share of the plan's unfunded vested benefits would fall on the remainder of the contributing employers. This is precisely the result Congress sought to avoid with the passage of the Multiemployer Act.

The PBGC has issued a regulation governing the exemption procedures under section 4204 and a class exemption which may be relevant to your facts. Should the seller and purchaser agree to comply with the terms of section 4204, withdrawal liability on the seller might be avoided. Copies of these documents are enclosed.

I hope this information has been helpful. If I can be of further assistance to you, please do not hesitate to contact me.

Henry Rose

General Counsel

Pension Benefit Guaranty Corporation

83-4

January 25, 1983

REFERENCE:
[*1] 4219 Notice & Collection of Withdrawal Liability
4221 Resolution of Disputes

OPINION:

This responds to your inquiry whether the validity of a demand for payment of withdrawal liability is subject to review and arbitration under Sections 4219(b)(2) and 4221 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364 (1980), 29 U.S.C. § 1399(b)(2), 1401 (Supp. IV 1980).

You state in your letter that review by the plan sponsor and arbitration of the amount of withdrawal liability would be "premature" until your client receives a "valid demand" for payment of withdrawal liability. The determination by the plan sponsor to issue a demand to your client, however, is clearly a "determination made under sections 4201 through 4219." See 29 U.S.C. § 1401(a)(1).

Your client's disagreement with the plan sponsor over the validity of the demand for withdrawal liability thus creates a "dispute between an employer and the plan sponsor" within the meaning of 29 U.S.C. § 1401(a)(1). The statute makes it clear that all such disputes "shall be resolved through arbitration." Id.

I hope this is of assistance. [*2] If you have further questions concerning this matter, please telephone * * * of my staff on (202) 254-4895.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-8

March 25, 1983

REFERENCE:
[*1] 4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security

OPINION:

This responds to your request for an advisory opinion. The question is whether a purchaser of assets fails to comply with ERISA § 4204(a)(1)(B) in the first plan year after the sale if the purchaser provides to the plan a bond which is in effect only for the first two plan years beginning after the sale of assets, but agrees that for the third - fifth plan years it will renew the bond, purchase a new bond, place an appropriate amount in escrow or obtain an exemption from the bond * * * requirement.

It is our opinion that the failure to provide a bond or other security under § 4204(a)(1)(B) in the first plan year after the sale for the entire five year period provided in § 4204(a)(1)(B) will not, by itself, result in non-compliance with § 4204(a)(1)(B). There is compliance with § 4204(a)(1)(B) as long as there is an appropriate amount of security in place during the five year period. However, if at any time during the five year period the plan does not have such security, then the arrangement does not comply with the requirements of § 4204 of ERISA.

I hope this answers your inquiry. Should you have any questions [*2] concerning this matter please contact * * * of my staff at (202) 254-4895.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-10

May 12, 1983

REFERENCE:
[*1] 4204 Sale of Assets
4206 Adjustment for Partial Withdrawal
4211 Withdrawal Liability

OPINION:

This is in response to your request for an opinion regarding the calculation of withdrawal liability for a partial withdrawal where there has occurred a sale of assets which meets the requirements of section 4204 of the Multiemployer Pension Plan Amendments Act of 1980.

Under the multiemployer provisions of ERISA, the initial responsibility for determining the amount of any such liability lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved by arbitration subject to review in the courts. Thus the PBGC does not interject itself in this process by issuing an opinion on the application of the law to a particular transaction. The PBGC will, of course, answer general interpretative questions regarding the Act.

Section 4204 of the Act provides that a complete or partial withdrawal under that section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party, the seller ceases covered operations or ceases to have an obligation to contribute for such operations [*2] if certain conditions are met. Under this section, the seller remains contingently liable for "an amount equal to the payment that would have been due from the seller but for this section" if the purchaser withdraws from the plan before the last day of the fifth plan year beginning after the sale and fails to make any withdrawal liability payment when due. Under section 4204(b)(1), the liability of the purchaser is to be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the previous four years the amount the seller was required to contribute. Thus, this subsection attributes to the purchaser the contribution history of the seller for the year of the sale and the four plan years preceding the sale.

In the event that the sale of assets meeting the requirements of section 4204 constitutes the entire contribution obligation of the seller, the seller with not be liable for a withdrawal. Thus, the seller receives, in effect, a complete credit for any withdrawal liability that would otherwise have been due. However, if the sale under section 4204 is with respect to only a portion of the operations for which the employer has an obligation [*3] to contribute, the question is raised whether future liability calculations should take into account all the operations, including those sold under section 4204, or whether there should be a credit for the sale in light of the purchaser's assumption of the contribution history for the sold operations.

After careful consideration, it is our view that credit should be given the seller for a section 4204 sale of a portion of its covered operations. Absent such a credit, calculation of an employer's liability for a partial or complete withdrawal where assets have been sold under section 4204 would not reflect the purpose of section 4204. That purpose is to avoid primary liability with respect to a sale of assets if the terms of section 4204 are met.

Thus, if there is a later complete withdrawal, the calculations under section 4211 for computing withdrawal liability should reflect the fact that there is a transfer of contribution history pursuant to section 4204(b)(1) to the purchaser of the sold operations and will be used to compute the purchaser's withdrawal liability if it should withdraw. Similarly, if an employer should have a partial withdrawal under section 4205 the liability [*4] calculations for the partial withdrawal, which are set forth in section 4206, should reflect appropriate adjustments in the section 4206(a)(2) fraction with respect to a section 4204 sale. The calculations themselves, under section 4211 and section 4206, should reflect as nearly as possible Congress' intention that where liability may be assessed against a purchaser, it will not also be collected from the seller, giving the plan double recovery for the same contribution base upits.

However, we call to your attention section 4212(c) of the Act, which provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability should be determined and

collected without regard to such transaction."

I hope this letter has been of assistance. If you have any further questions, please do not hesitate to contact me or * * *, of my staff, at 254-6476.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-11

May 16, 1983

REFERENCE:
[*1] 4062(d) Liability of Employer in Single Employer Plans. Corporate Reorganizations
4203 Complete Withdrawal
4205 Partial Withdrawals
4218 Withdrawal - No occurrence

OPINION:

This responds to your recent letter requesting a ruling regarding withdrawal liability under Sections 4203, 4205 and 4218 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1301 et seq. (1976) (amended by Pub. L. No. 96-364 (1980)) ("ERISA"). Specifically you wish to know if an employer ("A") who contributes to a multiemployer plan withdraws from the plan as a consequence of forming a wholly-owned subsidiary ("B") which assumes A's obligations to the plan for the same operations and employees for which A was obligated to contribute.

Under the Act the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, the amount of any liability resulting therefrom, and the identify of the liable employer lies with the plan. The Act further provides that any disputes between a plan and an employer on these issues are to be resolved first through arbitration, subject to review in the courts. Given this scheme for enforcement of the Act, the [*2] PBGC prefers not to interject itself in such determinations by issuing an opinion on the application of the law to the particular transactions you describe. The PBGC, however, will continue its practice of answering general interpretive questions regarding the Act.

Section 4218 provides that a withdrawal shall not occur solely because an employer ceases to exist by reason of a change in corporate structure described in Section 4062(d) as long as there is no interruption of employer contributions or obligations under the plan. The kinds of corporate restructuring referred to in Section 4062(d) are changes which involve (1) "a mere change in identity, form, or place of organization," (2) "a liquidation into a parent corporation," and (3) a merger, consolidation, or division." In our view the creation of a subsidiary corporation is a transaction described in Section 4062(d).

I hope this response is helpful to you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-13

June 10, 1983

REFERENCE:
[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption

OPINION:

This is in response to your recent letter to the Pension Benefit Guaranty Corporation concerning the application of section 4203(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") to the * * * and * * * Pension Funds ("the Funds").

In your letter you represent that:

(1) The Funds involve approximately 880 employers and cover about 2,600-3,000 participants who are employed in construction and related activity.

(2) Contributing employers are engaged in the contracting and subcontracting of work done in connection with the construction, alteration, painting, or repair of buildings, docks, sewers, structures, highways, excavations, or similar work, and the supply of materials utilized by employers engaged in such work, including asphalt, concrete, cement or other similar material or supplies.

(3) About 2 percent of all contributing employers are construction equipment vendors who employ mechanics to repair cranes and other equipment used in construction projects. These employers have about 300 covered employees, about half of whom perform repair and maintenance work on-site.

(4) [*2] About 34 of the employers, with about 50 covered employees, operate concrete and asphalt plants, some which are located at the site of a construction project, or in close proximity to the project.

Based on these representations, you ask our opinion on the following questions:

(1) Under the facts and circumstances described, do the Funds primarily cover employees in the building and construction industry within the meaning of section 4203(b)?

(2) Under these circumstances, may the bargaining parties consistent with Title IV of ERISA agree that Act section 4203(b) applies to an employer who is obligated to contribute to the Funds where substantially all of the employees for whom that employer is obligated to contribute, perform work in the building and construction industry?

(3) Accordingly, do you find anything in the contract proposal (Exhibit A) relating to section 4203(b) improper or illegal from the point of view of Title IV of ERISA?

With respect to your first question, ERISA does not specifically define those activities that are included within the term "building and construction industry". The Senate report on section 4203(b) indicates that PBGC and plan sponsors should [*3] refer to labor-management relations law in defining the term "building and construction industry." Summary & Analysis of S. 1076 (Senate Labor Comm.), p. 14 (April 1980). PBGC is currently in the process of developing a regulation on section 4203(b), which will define the activities that are included within the building and construction industry, as well as the terms "primarily" and "substantially all", which are critical to the implementation of section 4203(b).

Our understanding of the cases under the labor-management relations law is that the term "building and construction industry" includes, but is not necessarily limited to, work performed at the site of a building or other structure in connection with the erection, alteration of the building or other structure. cf. Carpet, Linoleum & Soft Tile Local Union 1247, et al., 156 NLRB 951 (1966). You have represented that only about 8 percent of the employees covered under the plans are engaged solely in work performed off the site of construction projects. Thus, since 92 percent of the covered employees perform work at the site, it would appear that the Funds primarily cover employees in the building and construction [*4] industry under section 4203(b).

With respect to your second question, if substantially all of the employees with respect to whom an employer is obligated to contribute under a plan perform work in the building and construction industry ("construction employer"), the special withdrawal rule in section 4203(b) applies by operation of law to that employer, if the plan primarily covers employees in the building and construction industry. The adoption of an agreement by the bargaining parties is not necessary to give effect to the rule in section 4203(b) in that case, but we know of nothing in Title IV which would prohibit the adoption of such an agreement.

Finally, you ask whether the provisions in the contract proposal, designated as Exhibit A, relating to section 4203(b) are improper or illegal from the point of view of Title IV of ERISA. The contract proposal provides that section 4203(b) shall apply to an employer who is obligated to contribute to the Funds if substantially all of the employees for whom the employer is obligated to contribute perform work in the building and construction industry, as that term is defined in subparagraph B of the contract proposal. The contract [*5] proposal further provides that the understanding as to the applicability of section 4203(b) shall be effective, retroactive to April 28, 1980, subject to applicable statute, interpretative rule or regulations.

As previously noted, we know of nothing in Title IV which would prohibit the adoption of an agreement by the bargaining parties that section 4203(b) applies to a "construction employer." As to the definition of the term "building and construction industry" in subparagraph B of the contract proposal, the PBGC has not yet issued any regulation, opinion or ruling on that term for purposes of Title IV. We are currently in the process of developing a regulation defining that term for purposes of section 4203(b). Once that regulation is issued and becomes final, plans will have to implement section 4203(b) in accordance with the regulation. In this regard, we note that the contract proposal is specifically made subject to applicable statute, interpretative rule or regulations.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-17

August 1, 1983

REFERENCE:
[*1] 4207 Reduction or Waiver of Complete Withdrawal Liability

OPINION:

This responds to your letter concerning Section 4207 of the Employee Retirement Income Security Act. Specifically, you inquire whether an employer that withdraws from a plan and subsequently renews its obligation to contribute to the plan would continue to be subject to withdrawal liability, and if so, whether the "trust fund is empowered to waive any withdrawal liability in such a circumstance".

In our view, plans have authority to adopt reasonable rules governing collection of withdrawal liability, including abatement. This authority is subject to the terms of regulations to be issued by PBGC under Section 4207 in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan.

Congress also recognized that the PBGC would require time to develop the regulations -- more than 60 of them -- that it is specifically required or authorized to promulgate under the Multiemployer Pension Plan Amendments Act of 1980 * * * ("Multiemployer Act"). In order not to delay the effective functioning of the 1980 amendments, Congress provided in Section [*2] 405(a) of the Multiemployer Act:

if the way in which any [Multiemployer Act] amendment will apply to a particular circumstance is to be set forth in regulations, any reasonable action during the period before such regulations take effect shall be treated as complying with such regulations for such period.

Therefore, pending the issuance of PBGC regulations, plans may adopt reasonable rules to waive or reduce withdrawal liability when a withdrawn employer reenters the plan. Such rules must include whatever restrictions or conditions are contained in PBGC's regulations under Section 4207 beginning on the effective date of such regulations.

I hope this response is helpful to you.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-18

August 5, 1983

REFERENCE:
[*1] 4203 Complete Withdrawal
4218(1)(A) Withdrawal - Change of Business Structure

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation concerning the application of Sections 4203 and 4218 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § § 1383 and 1398. Specifically you wish to know whether the incorporation of a sole proprietorship constitutes a withdrawal from a multiemployer pension plan where the successor corporate employer continues to contribute to the plan on behalf of its employees for the same operations for which contributions were previously contributed by the sole proprietor. We conclude that a withdrawal does not occur under such circumstances where there is a substantial identity between the predecessor and the successor employer.

Under Section 4203 a contributing employer withdraws from a multiemployer plan if it (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan.

Section 4218, however, provides that --

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely [*2] because -

(1) an employer ceases to exist by reason of -

(A) a change in corporate structure described in section 4062(d), or

(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .

Section 4062(d) which is referred to in Section 4218, provides in paragraph (1) --

If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the employer to whom this section applies.

It is our view that when there is no interruption in employer contributions or the obligation to contribute, incorporation of a previously unincorporated employer (e.g., a sole proprietorship or a partnership) may constitute a covered reorganization if there is substantial identity between the predecessor and the successor employers. But see Section 4212(c) of ERISA. A dispute over such a determination regarding the occurrence of a withdrawal would be subject to the arbitration provision of Title IV.

I hope this has been [*3] of assistance. If you have further questions on this matter, please contact * * * of my staff at this address or (202) 254-4873.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-19

August 11, 1983

REFERENCE:
[*1] 4211 Withdrawal Liability
4211(b)(2)(A) Withdrawal Liability - Sum of Proportional Shares
4213 Actuarial Assumptions
4213(c) Actuarial Assumptions. Unfunded Vested Benefits - Definition

OPINION:

This responds to your inquiry concerning PBGC opinion letter number 82-34 dated November 10, 1982. That letter relates to the operation of the presumptive method of allocating withdrawal liability under section 4211 of the Multiemployer Pension Plan Amendments Act of 1980.

In that opinion letter, we stated that annual changes in a plan's unfunded vested benefits (UVB) are zero so long as plan assets have always exceeded the value of vested liabilities. We were and are of the opinion that the term "unfunded" has no meaning when assets exceed plan liabilities.

You ask whether, any time a plan's assets exceed its vested liabilities, the UVB is zero regardless of whether the magnitude of the asset surplus has increased or decreased during the preceding year. We believe the UVB is zero under those circumstances. Moreover, the source of the change in asset surplus is also immaterial. For example, consider a plan with assets of $5 million at the end of each of three consecutive plan years with corresponding [*2] vested liabilities of $2 million, $4 million and $3 million. The UVB is zero at the end of each year.

You also ask whether, under the presumptive method, the possibility of withdrawal liability is eliminated any time assets exceed liabilities. Under the presumptive method, an employer's withdrawal liability is determined as a proportionate share of the plan's UVB as of the end of the last plan year ending before April 29, 1980, plus a share of the change in UVB as determined under section 4211 for each year the employer is obligated to contribute. It follows, therefore, that a zero UVB in one year does not necessarily eliminate potential withdrawal liability.

Consider the following example:

End of Plan Year	Plan UVB
1979	$1 million
1980	2 million
1981	3 million
1982	4 million
1983	

Depending on an employer's contribution pattern, a withdrawal during 1984 could result in withdrawal liability. The amount is determined as a share of the $1 million plus a share of the change in plan UVB (see section 4211(b)(2)(A)) for each of the next four years. The employer would receive a "credit" for the improvement in funding during 1983, but the credit could be smaller than [*3] the employer's share of the past "charges" determined pursuant to the statutory withdrawal liability allocation method.

Section 4213(c) defines unfunded vested benefits as the value of nonforfeitable benefits under the plan less the value of plan assets. In opinion letter 82-34 we said the term unfunded has no meaning when assets always exceed plan liabilities. Your inquiry has caused us to consider the more general question. In our view, the plan's UVB is zero whenever assets are not less than vested liabilities. In the example above, therefore, the plan UVB for 1983 is zero even if assets are greater than liabilities.

Finally, you asked whether our letter of November 10, 1982 represents an "official" PBGC position. A legal opinion issued by the General Counsel is authoritative.

We appreciate your comments concerning the handling of contributions made under reciprocity agreements for allocation fraction purposes. They will be helpful to us in our consideration of this issue.

We hope this information is of assistance to you.

Edwin M. Jones
Executive Director

Pension Benefit Guaranty Corporation

83-20

September 2, 1983

REFERENCE:
[*1] 4205(a)(2) Partial Withdrawals. Partial Cessation
4205(b) Partial Withdrawals. Cessation of Contributions

OPINION:

This responds to your letter requesting the opinion of the Pension Benefit Guaranty Corporation concerning partial withdrawals from a multiemployer pension plan under Section 4205(b)(2)(A)(i) of ERISA. Specifically, you wish to know whether a partial withdrawal occurs when an employer which operates two terminals in a metropolitan area, each under a separate collective bargaining agreement requiring contributions to the same multiemployer plan, closes one but continues to perform the work of the closed terminal through the remaining metropolitan terminal and through other outlying terminals of the employer.

Under the multiemployer provisions of ERISA the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Thus it would be inappropriate for the PBGC [*2] to interject itself in such a determination by issuing an opinion on the application of the law to a particular transaction. However, PBGC will continue its practice of answering general interpretive questions regarding the Act.

Section 4205(a)(2) provides that there is a partial withdrawal by an employer when there is a partial cessation of the employer's contribution obligation. Section 4205(b)(2)(A)(i) provides that there is a partial cessation of the employer's contribution obligation from a multiemployer plan when--

[an] employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location. . . .

Thus a partial cessation occurs under this provision when contributions cease under a collective bargaining agreement and either of two circumstances occurs: the employer (1) continues to perform the same type of work within the agreement's jurisdiction; [*3] or (2) transfers the same work to another location.

It is the PBGC's view that for this provision to apply the work that the employer continues to perform must be work for which contributions are not required under the plan. This view is supported by the contemporaneous explanation by Congressman Thompson, the floor manager of the multiemployer amendments, given on the date the amendments passed the House of Representatives.

Examples of these two situations are where an employer bargains out of making contributions to a plan that the employer was previously required to make under a collective bargaining agreement that is otherwise in effect with respect to other requirements, or where an employer's collective bargaining obligation has ceased altogether but the employer continues to perform work of the same type which was previously covered by the agreement and for which contributions were required without the obligation to contribute to that plan, or where work that was undertaken at one geographic location for which contributions to a plan were made is transferred by the employer to another of his plants at a different geographic location where contributions to a plan for the work [*4] performed are no required.

It is important to emphasize and to understand that in no case do these rules impose liability on an employer for merely ceasing or terminating an operation; rather, they address only situations where work of the same type is continued by the employer but for which contributions to a plan which were required are no longer required. [House Floor Explanation (Congressional Record p. H7900, August 26, 1980)]

Thus, in the situation you pose, when an employer closes one terminal and shifts the work of that terminal to other

terminals which are covered by other collective bargaining agreements under which contributions are made to the plan, there is no partial cessation of the employer's contribution obligation under Section 4205(b)(2)(A)(i) on account of the shift. If, however, any of the work is shifted to a location where contributions are not required to the plan, then a partial cessation of the employer's contribution obligation will occur.

Further, when the employer performs other work for which contributions are not made under the plan within the jurisdiction of the collective bargaining agreement of the closed terminal a partial cessation of the [*5] employer's contribution obligation will occur if the work is of the same type as the work performed at the closed terminal. As noted above, disputes over such questions as what constitutes the jurisdiction of any specific collective bargaining agreement or what constitutes work of the same type are to be resolved through the statutory dispute resolution process.

I hope this has been of assistance. If you have further questions on this matter, please contact * * * of my staff of this address or at (202) 254-4873.

Mitchell L. Strickler
Acting General Counsel

Pension Benefit Guaranty Corporation

83-21

September 8, 1983

REFERENCE:
[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
4203(f) Complete Withdrawal. Special Withdrawal Liability Rules

OPINION:

This responds to your letter concerning the applicability and scope of Section 4203(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA").

Section 4203(b)(1) provides:

Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if -

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan -

(i) primarily covers employees in the building and construction industry, or

(ii) is amendment to provide that this subsection applies to employers described in this paragraph.

In your letter you indicated that employees of your clients manufacture concrete blocks, carry blocks to a storage yard or to a loading area, transport blocks to [*2] construction sites, and unload blocks at the contribution site. You also indicated that the multiemployer plan, to which your clients contribute, has adopted a specific "construction industry exemption" and has represented that this exemption covers the employees of your clients.

ERISA does not specifically define those activities that are included within the term "building and construction industry". The Senate report in Section 4203(b) does indicate that PBGC and plan sponsors should refer to labor-management relations law in defining the term "building and construction industry". Summary & Analysis of S. 1076 (Senate Labor Comm.), p. 14 (April 1980). PBGC is currently in the process of developing a regulation on Section 4203(b), which will define that activities that are included within the building and construction industry, as well as the terms "primarily" and "substantially all", which are critical to the implementation of Section 4203(b). A copy of PBGC's advance notice of rulemaking on this issue is enclosed (Enclosure A).

Our understanding of the cases under the labor-management relations law is that the term "building and construction industry" includes, but is [*3] not necessarily limited to, work performed at the site of a building or other structure in connection with the erection, alteration of the building or other structure. cf. Carpet, Linoleum & Soft Tile Local Union 1247, et al., 156 NLRB 951 (1966).

In a case where an employer does perform work in the building and construction industry and substantially all the employees with respect to whom such employer has an obligation to contribute under the plan perform work in such industry, ERISA § 4203(b)(1)(B)(ii) permits a plan amendment which will subject such employer to withdrawal liability only if the provisions of § 4203(b)(2) apply. n1

n1 § 4203(b)(2) provides:

A withdrawal occurs under this paragraph if -

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer -

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of resumption.

You should be aware that under limited [*4] circumstances rules similar to those for the construction and entertainment industries may apply to plans in other industries. Section 4203(f) of ERISA provides:

(1) The corporation [PBGC] may prescribe regulations under which plans in industries other than the construction or entertainment industry may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules -

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

The PBGC has adopted procedural rules (Enclosure B) under which a plan may request approval of a plan amendment providing for special withdrawal liability rules similar to those applicable to the construction an entertainment industries. The PBGC has also issued an advance notice [*5] of proposed rulemaking (Enclosure C) relating to possible PBGC regulatory standards for approval of plan amendments providing for special withdrawal liability rules.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

83-23

September 23, 1983

REFERENCE:
[*1] 4209(c) De Minimis Rule. Exceptions to De Minimis Rule

OPINION:

This responds to your request for an opinion with regard to the definition of "substantially all" in § 4209(c)(1) and (2) of the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), and to the related questions you raised.

Section 4209(c)(1) prevents the applicability of the "de minimis" rule "to an employer who withdraws in a plan year in which substantially all employers withdrew from the plan" (emphasis added). Similarly § 4209(c)(2) prevents the applicability of the "de minimis rule" in any case in which "substantially all employers withdrew from the plan during a period of one or more plan years pursuant to an agreement or arrangement to withdraw . . ." (emphasis added). You ask whether "substantially all employers" is measured in terms of the number of employers or the dollar value of the liabilities of those withdrawing.

The MPPAA places the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and for determining the amount of any liability resulting therefrom [*2] on the plan sponsor. Similarly the plan sponsor, consistent with his or her fiduciary responsibilities, would be initially responsible for determining such questions as the meaning of "substantially all" in § 4209. If a plan sponsor makes any such determination, and the employer objects in any way, ERISA provides in § § 4219 and 4221 a procedure for resolving the dispute. Thus the PBGC does not interject itself in this process by issuing an opinion on the application of the law to a particular transaction.

Mitchell L. Strickler
Acting General Counsel

Pension Benefit Guaranty Corporation

84-5

May 21, 1984

REFERENCE:
[*1] 4204 Sale of Assets

OPINION:

This responds to your request for the PBGC's opinion concerning the application of ERISA § 4204 to a purchase of assets from a bankrupt employer (the "seller") that contributed to a multiemployer plan. You have indicated that the buyer of the assets (the "buyer") will continue the operation of the seller and contribute to the same multiemployer plan to which the seller contributed. However the buyer will not post a bond nor will the sales contract provide secondary liability for the seller. Your question is whether in these circumstances the buyer would be responsible for the seller's withdrawal liability when the buyer "does not obligate itself" under § 4204.

Section 4204 provides that if certain conditions are met, withdrawal liability is not imposed on an employer solely for cessation of the employer's covered operations or of its contribution obligation when such cessation results from a bona fide, arm's-length sale of assets to an unrelated party. The conditions that must be met for § 4204 to apply are that (1) the purchaser have a contribution obligation for substantially the same number of contribution base units for which the seller was obligated (2) [*2] the purchaser provide a bond or escrow account meeting specified requirements and (3) the contract for sale create a specified secondary liability in the seller. If all of these conditions are not met then § 4204 does not apply. Since you have indicated that the buyer will not comply with the bond/escrow and sales contract requirements, this transaction would not meet the requirements for application of § 4204.

I hope this has been of assistance.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

84-7

December 20, 1984

REFERENCE:
[*1] 4001(b) Definitions. Employer and Controlled Group
4203 Complete Withdrawal
4212(c) Obligation to Contribute - Liability

OPINION:

We have your letter raising several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act").

Your first question concerns whether a withdrawal from a multiemployer pension plan will occur when corporation X organizes a wholly-owned subsidiary corporation Y and transfers to it all of the assets of one of its divisions. Section 4203 of ERISA provides that a withdrawal from a multiemployer plan has occurred when an employer permanently ceases to have an obligation to contribute under the plan, or permanently ceases all covered operations under the plan. (Section references herein are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., as amended by the Act). Section 4001(b) defines an "employer" to include all trades or businesses under common control, and the PBGC's regulation on trades or businesses under common control, 29 C.F.R. Part 2612, provides that "trades or businesses which are under common control" has the same meaning as in Section 414(c) of the Internal [*2] Revenue Code ("IRC") and the regulations issued thereunder. Accordingly, if certain entities, such as X and Y, are under common control as defined in Section 414(c) of the IRC, they constitute the "employer" for purposes of Section 4203 of ERISA and no withdrawal will have occurred as a result of a transfer of assets from X to Y.

Your second question concerns the sale by X of all of the stock in its subsidiary corporation Y to your client A, an unrelated corporation which continues contributions to the plan on behalf of Y. You advise that neither X nor A has made any other contributions to the plan., nor does either intend to make other contributions to the plan. You ask whether, as a result of the stock sale, X and Y would incur withdrawal liability under ERISA.

It is clear that Congress intended that no withdrawal occur solely because a parent employer sells the stock of a subsidiary, so long as the subsidiary continues to make its contributions to the plan. The legislative history to the Act contains the following analysis:

A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of [*3] S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S. 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6.

Therefore, the sale of stock of Y to A does not effect a withdrawal, as long as Y continues to make its contributions to the plan.

Finally, with regard to the transaction you describe, we note that under Section 4212(c), if a principal purpose of any transaction is to evade or avoid liability under Part 1 of Subtitle E of Title IV of ERISA, that part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

84-8

December 27, 1984

REFERENCE:
[*1] 4203 Complete Withdrawal
4203(b) Complete Withdrawal. Building & Construction Industry Exemption

OPINION:

This responds to your request for the PBGC's opinion concerning withdrawal from a construction industry pension plan within the meaning of Section 4203(b) of ERISA. You have stated that a general contractor was obligated under a collective bargaining agreement to make contributions to a plan for the contractor's common-law employees. At the expiration of the collective bargaining agreement the contractor continues to operate as a general contractor but employs no employees who perform building and construction activities. Rather, all work under the general contractor is performed by subcontractors who may or may not have an obligation to contribute to the plan on behalf of their employees. Specifically you wish to know whether a withdrawal occurs under these circumstances. We conclude that these circumstances alone would not constitute a withdrawal under Section 4203(b).

Under Section 4203(b)(2), a withdrawal from a construction industry plan occurs only if the employer (1) ceases to have an obligation to contribute under the plan and (2) continues to perform work in the jurisdiction [*2] of the collective bargaining agreement of the type for which contributions were previously required by it. Thus, in the situation you describe a withdrawal occurs only if work performed by subcontractors is deemed to be work performed by the general contractor of the same type for which it had previously had an obligation to contribute. In our view this will be the case only if the general contractor would have been obligated to contribute under the terms of its old contract for work performed by subcontractors; i.e., if the old contract were still in force, the general contractor would be liable for contributions based on the subcontractor's work.

Of course, such determinations concerning whether a withdrawal has occurred and the identity of the liable employer are in the first instance the responsibility of the plan sponsor. See Section 4202 of ERISA. Should a dispute arise concerning such a determination, it must be resolved through the statutory dispute resolution process. See Sections 4219 and 4221 of ERISA. Please note that under Section 4212(c) a transaction, a principal purpose of which is to evade or avoid liability, may be disregarded by a plan sponsor in making [*3] its withdrawal liability determination.

I hope this has been of assistance. If you have further questions please contact * * * of my staff at the above address or at 202-254-4873.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

84-9

December 27, 1984

REFERENCE:
[*1] 4001(b) Definitions. Employer and Controlled Group
4203 Complete Withdrawal
4203(a) Definition of Complete Withdrawal
4211 Withdrawal Liability

OPINION:

This responds to your request for the PBGC's opinion concerning the meaning of "employer" as that term is used in Title IV of ERISA with respect to withdrawals from multiemployer pension plans. You note that in the garment industry a contractor is generally the common law employer of employees covered under the pension plan while a jobber or manufacturer, who contracts with the contractor for work to be performed, often has the obligation under its collective bargaining agreement to contribute to the pension plan based on such work. You wish to know which of these under the circumstances you describe is the employer for purposes of Title IV's withdrawal liability provisions.

Section 4203(a) of ERISA provides that a withdrawal from a multiemployer plan occurs when an employer: (1) permanently ceases to have an obligation to contribute or (2) permanently ceases covered operations under a plan. Title IV does not define "employer" for purposes of assessing withdrawal liability. However, Section 3(5) of Title I provides that employer "means [*2] any person acting directly as an employer or indirectly in the interests of an employer, in relation to an employee benefit plan. . ." (emphasis supplied). In our view this is an appropriate definition for determining whether a business is liable under Title IV under the circumstances you describe. * Thus, a jobber or manufacturer that has an obligation to contribute has withdrawn from a plan when its obligation ceases or it ceases covered operations. If a withdrawal should occur, the amount of the jobber/manufacturer's allocable share of unfunded vested benefits would be determined under Section 4211 based on the contributions it was required to make to the plan.

* Title I definitions are limited "[f]or purposes of this title"; thus, they are not necessarily applicable to Title IV. See Nachman v. PBGC, 446 U.S. 359, 370 and n.14 (1980). However, in the absence of an express Title IV definition or regulatory guidance by PBGC, guidance may be sought in Title I where it does not conflict with the purposes of Title IV.

Likewise a contractor which has an obligation to contribute will be liable if it ceases to have such an obligation or ceases covered operations. [*3] This will be true even though one or more jobber/manufacturers also have an obligation to contribute on behalf of the contractor's employees and even though the jobber/manufacturers generally make such contributions. The amount of the contractor's liability, however, is based on the contributions it was actually required to make. Thus, in a case where the jobber/manufacturers made all contributions and the contractor was required to make none, the contractor's allocable share under Section 4211, and thus its withdrawal liability, would be zero.

I hope this has been of assistance. If you have further questions, please contact * * * of my staff at the above address or at (202) 254-4873.

Henry Rose
General Counsel

Pension Benefit Guaranty Corporation

85-1

January 4, 1985

REFERENCE:
[*1] 4219(c) Notice & Collection of Withdrawal Liability - Payment

OPINION:

This responds to your request for advice concerning three ambiguities or flaws you believe you have identified in the procedures for computing withdrawal liability payments set forth in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act" or "Act"), 29 U.S.C. § § 1381-1461 (1982).

Your first question concerns the amortization period for payments for withdrawal liability which is defined in Section 4219(c)(1)(A). Your concern is that the Multiemployer Act fails to define the deferment period between the date an employer withdraws and the date on which the employer's first payment is presumed to be made, for purposes of computing the amortization schedule. The Act provides: "the period of years necessary to amortize the amount [of withdrawal liability] in level annual payments . . . [shall be] calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs . . . . Actual payment shall commence in accordance with paragraph (2)." [*2] 29 U.S.C. § 1399(c)(1)(A)(i) (1982) (emphasis added). Paragraph 2 of subsection 4219(c) states: "withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand . . . ." 29 U.S.C. § 1399(c)(2) (1982) (emphasis added). And subsection (b)(1) makes clear that the demand and the schedule for payments shall be issued to the employer "[a]s soon as practicable after . . . withdrawal . . . ." 29 U.S.C. § 1399(b)(1) (1982) (emphasis added).

Your second question concerns the meaning of the phrase "equal installments" in Section 4219(c)(3) of ERISA, 29 U.S.C. § 1399(c)(3) (1982). You have correctly noted that the same paragraph permits a plan to adopt rules governing the frequency of level payments in the schedule issued to the withdrawing employer. We have concluded that if a plan adopts such rules, the plan is authorized to include an appropriate interest factor. Payments made more or less frequently than on a quarterly basis would therefore have a present value equivalent to the value of the amount specified in Section 4219(c)(1)(C) of ERISA, 29 U.S.C. § 1399(c)(1)(C) [*3] (1982), as if paid on the quarterly basis specified in 29 U.S.C. § 1399(c)(3). However, the plain meaning of 29 U.S.C. § 1399(c)(3) requires that payments made in quarterly installments should be one fourth of the amount of the annual payment under 29 U.S.C. § 1399(c)(1)(C), without adjustment for "present value."

For example, if an employer's annual payment of withdrawal liability computed under 29 U.S.C. § 1399(c)(1)(C) were $12,000, payment of that amount in four equal quarterly installments pursuant to 29 U.S.C. § 1399(c)(3) would require quarterly payments of $3,000. However, if plan rules provided for equal monthly payments rather than quarterly, the monthly payments would be adjusted by an appropriate interest factor. Since the payments would be more frequent than quarterly, the amount of each monthly payment would be reduced by an appropriate interest factor. Instead of paying exactly $1,000 each month for three months to yield a quarterly payment of $3,000, the employer would pay somewhat less than $1,000 each month so that the present value of the stream of monthly payments is equal to the present value of a stream of quarterly payments of $3,000 each. [*4]

Similarly, to the extent the employer made payments less frequently than on a quarterly basis, the amount of each individual payment would be increased by an appropriate interest factor.

Your third question concerns the meaning of the term "facility" in Sections 4205(b)(2)(A)(ii) and 4217(a)(2) of ERISA, 29 U.S.C. § § 1385(b)(2)(A)(ii), 1397(a)(2) (1982). We have previously issued opinion letters concerning the meaning of that term in Section 4205(b)(2)(A)(ii) of ERISA (Opinion Letter No. 82-22, August 3, 1982), and of that term in Section 4217(a)(2) of ERISA (Opinion Letter No. 82-33, October 28, 1982). Copies of these opinion letters are enclosed for your reference. We observed in both opinion letters that there may be circumstances in which the plan sponsor may determine that a shift of operations from one location to another constitutes a continuation of operations

at a facility, and that such a determination would be subject to arbitration.

I hope this information is of assistance to you. If you have any further questions, please telephone * * * of this office on (202) 254-3010, or write to him at the above address.

Henry Rose [*5]
General Counsel

Pension Benefit Guaranty Corporation

85-3

January 30, 1985

REFERENCE:
[*1] 4211 Withdrawal Liability

OPINION:

This responds to your request for the PBGC's opinion concerning section 4211 of ERISA as it relates to the allocation of unfunded vested benefits in multiemployer pension plans to which employee contributions are made by employees of some but not all of the contributing employers. You state that your plan is such a plan, but that employees of your employer do not make contributions. The level of benefits is set in accordance with the negotiated level of contributions from each source. You wish to know whether such a pension plan may include employee contributions in the allocation fractions determined pursuant to Section 4211 in determining an employer's withdrawal liability. Alternatively, you wish to know whether a portion of an employer's contributions may be deemed to be employee contributions and therefore excluded from the numerator of the employer's allocation fractions upon its withdrawal.

As you note, vested benefits under a plan to which both employers and employees contribute will be supported by both sources of income and, as in your case, may be based directly on these contribution levels. In such cases if only employer contributions are [*2] counted in the allocation fractions, an employer whose employees make no contributions may, upon withdrawal, be allocated a share of unfunded vested benefits which is greater than the share of an employer whose employees earn identical benefits based on the same level of contributions part of which, however, is paid by its employees. You suggest that an equitable allocation can be achieved only if the statute is interpreted to allow appropriate adjustments to the fractions.

Section 4211 (b)(2)(E)(ii) defines the allocation fraction under the presumptive rule as a fraction --

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

Substantially the same fraction is found [*3] in Sections 4211(b)(3)(B), (C)(2)(B)(ii), (C)(2)(C)(ii), (C)(3)(B), and (C)(4)(D)(ii).

Each of the above fractions is based on a ratio of employer contributions. The PBGC has previously addressed the question of what constitutes an employer contribution for purposes of the denominators of the statutory allocation fractions in its Interim Regulation on Allocating Unfunded Vested Benefits, 29 C.F.R. 2642. In 29 C.F.R. § 2642.6(a) "contributions made" and "total amount contributed" are described as "amounts considered contributed to the plan for purposes of section 412(b)(2)(A) of the Internal Revenue Code." The regulation further states that "[e]mployee contributions, if any, should be excluded from the totals."

In our view "contributions required to be made by the employer" for purposes of the numerator of the allocation fractions are also exclusive of employee contributions. However, whether amounts contributed by an employer may be deemed employee contributions and thus excluded would depend on the facts and circumstances of each case. This determination must be made in the first instance by the Plan sponsor and is subject to the statute's dispute resolution procedures. Thus, [*4] it would be inappropriate for the PBGC to interject itself in this process by issuing an opinion on the facts of your withdrawal. The PBGC by this letter takes no position on whether amounts contributed by an employer are ever excludable as employee contributions.

I hope this has been helpful. If you have further questions on this matter, please contact * * * of my staff at the above address or at (202) 254-4873.

Edward Thomas Veal
Acting Director, Legal Department

Pension Benefit Guaranty Corporation

85-4

January 30, 1985

REFERENCE:
[*1] 4201(b)(1) Withdrawal Liability Established. Unadjusted Amount of Unfunded Vested Benefits
4206(a) Adjustment for Partial Withdrawal. Reduction of Liability
4206(b)(1) Adjustment for Partial Withdrawal. Reduction of liability for subsequent withdrawal

OPINION:

This responds to your request for the PBGC's opinion concerning Section 4206(b)(1) of ERISA. That section requires, when an employer has been assessed liability in a prior plan year for a partial withdrawal, that the employer's liability for any subsequent withdrawal be reduced by the amount of the previously assessed partial withdrawal liability. You wish to know how this reduction is to be made by a pension plan.

You describe two methods by which the partial withdrawal reduction might be applied. Under Method 1 a plan calculates withdrawal liability for the subsequent withdrawal as directed by Section 4201(b)(1) (without regard to the prior year's partial withdrawal) and then reduces the current amount of withdrawal liability by the amount of the previously assessed liability as required by Section 4206(b)(1).

Method 1

Step 1: Calculate allocable amount of unfunded vested benefits (§ 4211).

Step 2: Subtract de [*2] minimis deductible, if any (§ 4209).

Step 3: If partial withdrawal has occurred, multiply by partial withdrawal fraction (§ 4206(a)).

Step 4: Make any additional adjustments required by Section 4201(b) (§ § 4219, 4225).

Step 5: Reduce withdrawal liability by the amount of any previously assessed partial withdrawal liability (§ 4206(b)(1)).

Method 2 on the other hand subtracts the amount required by Section 4206(b)(1) in the course of calculating withdrawal liability under Section 4201(b)(1). Indeed Method 2, as you describe it, subtracts the Section 4206(b)(1) amount from the amount calculated under Section 4211 and adjusted under Section 4209 first and then applies the partial withdrawal reduction fraction determined under Section 4206(a) to the result.

Method 2

Step 1: Calculate allocable amount of unfunded vested benefits (§ 4211).

Step 2: Subtract de minimis deductible, if any (§ 4209).

Step 3: Subtract amount of any previously assessed partial withdrawal liability (§ 4206(b)(1)).

Step 4: If partial withdrawal has occured, multiply by partial withdrawal fraction (§ 4206(a)).

Step 5: Make any additional adjustments required by Section [*3] 4201(b) (§ § 4219, 4225).

As you suggest, Method 1 is correct and Method 2 is clearly erroneous.

Section 4201(b)(1) defines withdrawal liability as the result of four potential adjustments to an employer's allocable amount of unfunded vested benefits (which is calculated under Section 4211).The second of these adjustments (Section 4201(b)(1)(B)) is made in accordance with Section 4206 in the case of a partial withdrawal. Section 4206(a) makes clear that this adjustment is made by multiplying "the amount determined under Section 4211, and adjusted under Section 4209" (the first adjustment) by a fraction described in Section 4206(a)(2). Thus by its plain language, Section 4206(a) precludes the prior use of Section 4206(b)(1) in this adjustment process.

Section 4206(b)(1) itself makes clear that it is not an adjustment under Section 4201(b)(1). Section 4206(b)(1) states that "any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent year shall be reduced." Frist, it is an adjustment to withdrawal liability, i.e. a further adjustment to the Section 4201(b)(1) amount. Second, it applies to either a partial or complete [*4] withdrawal while Section 4201(b)(1)(B) applies only to a partial withdrawal. Thus, Section 4206(b)(1) is not an adjustment under Section 4201(b)(1) at all, much less an adjustment to be made prior to application of the Section 4206(a) fraction.

Accordingly it is our opinion that the reduction in an employer's withdrawal liability required by Section 4206(b)(1) on account of a previous partial withdrawal assessment must be made after the employer's subsequent withdrawal liability is calculated in accordance with Section 4201(b) (without regard to Section 4206(b)(1)).

If you have further questions concerning this matter please contact * * * of my staff at the above address or at (202) 254-4873.

Thomas Veal
Acting Director, Legal Department

Pension Benefit Guaranty Corporation

85-5

January 30, 1985

REFERENCE:
[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
4212(c) Obligation to Contribute - Liability

OPINION:

This responds to your request for the PBGC's opinion concerning the application of the construction industry rule under Section 4203(b) of ERISA. Specifically, you wish to know whether an employer is liable under that rule when the employer ceases making contributions to a construction industry pension plan but continues in business performing all of its construction work through subcontractors.

Section 4203(b) provides that a construction industry employer that contributes to a construction industry pension plan does not withdraw from the plan unless the employer "ceases to have an obligation to contribute under the plan, and . . . continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required . . . ." You pose two situations and ask whether they constitute withdrawals.

First, an employer continues to be obligated to contribute to a plan under a collective bargaining agreement but ceases to perform construction work directly and thus ceases making contributions to the plan. Rather, [*2] it subcontracts the work (which may or may not be covered under the plan). Under these circumstances there is no withdrawal, because the employer has not ceased to have an obligation to contribute for any work that it may perform.

Second, an employer terminates its obligation to contribute and ceases to perform construction work directly. As above, it subcontracts the work instead. Under these circumstances there is no withdrawal unless the employer would have been obligated to make contributions for work performed by subcontractors under the terminated agreement. If contributions would not have been required, there would be no withdrawal, because the employer would not be continuing to perform work of the type for which contributions were previously required.

Please note, however, that Section 4212(c) of ERISA provides that a plan may disregard a transaction if a principal purpose of the transaction is to evade or avoid liability. It is the plan sponsor's responsibility in the first instance to determine whether a withdrawal has occurred and the identity of the liable employer. Disputes arising over such withdrawal liability determinations must be resolved under the dispute [*3] resolution procedures of Sections 4219 and 4221 of ERISA.

I hope this is of assistance. If you have further questions, please contact * * * of my staff at the above address or (202) 254-4873.

Thomas Veal
Acting Director, Legal Department

Pension Benefit Guaranty Corporation

85-12

May 28, 1985

REFERENCE:
[*1] 4205(c) Partial Withdrawal. Retail Food Industry Provision

OPINION:

This responds to your request for the PBGC's opinion concerning the meaning of the term "retail food industry" as it is used in Section 4205(c) of ERISA (concerning partial withdrawals in that industry). Specifically you wish to know whether the retail food industry encompasses the food service industry.

Section 4205(c) applies to "a plan in which a majority of the covered employees are employed in the retail food industry." Therefore, the distinction you suggest is relevant, if at all, only in determining whether a plan is covered by this special partial withdrawal rule. If the plan is covered, all contributing employers, regardless of type, would also be covered.

Congress did not define the retail food industry for purposes of Title IV, nor is there any indication in the legislative history of the multiemployer amendments as to what Congress intended. As you note, however, the Standard Industrial Classification published by the Department of Commerce does define two subcategories under the retail food industry. In our view sources such as this would be helpful to a plan's determination of whether it is covered by the [*2] special rule. Relying on such a source the plan might decide that food service employees must be counted for purposes of its determination. Such a determination, of course, is subject to the dispute resolution procedures described in Sections 4219 and 4221 of ERISA.

I hope this is of assistance. If you have further questions on this matter, please contact * * * of my staff at the above address or at (202) 254-4873.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-13

May 28, 1985

REFERENCE:
[*1] 4203(d) Complete Withdrawal. Trucking Industry Exemption
4205 Partial Withdrawals
4206 Adjustment for Partial Withdrawal
4208 Reduction of Partial Withdrawal Liability

OPINION:

This responds to your request for PBGC's opinion concerning calculation of partial withdrawal liability. Specifically you note that the allocation fraction under Section 4206 of ERISA is computed as a ratio of contribution base units rather than contributions. You suggest that the allocation may thus be "disproportionate," and you ask whether the PBGC proposes to resolve the problem.

You correctly note that where one segment of an employer's operations contributes at a lower rate than other segments, its partial withdrawal liability share, computed under Section 4206 using a ratio of contribution base units, will be greater than if a ratio of contributions were used.

The legislative history does not disclose why Congress chose to base the pro-ration fraction on contribution base units rather than contributions. However, the use of such a measure is fully consistent with its use under Section 4205 to define a 70% contribution decline for purposes of determining a partial withdrawal and with its use under Section [*2] 4208 to determine whether a reduction of partial withdrawal liability is permitted. The PBGC has no authority to alter this provision by regulation.

Your second question involves whether a specific pension plan is a "trucking industry" plan within the meaning of Section 4203(d). As we understand it that plan has taken the position that it is not. It is the PBGC's policy not to take a position or interfere with such a determination. Rather, if a dispute over this should arise, its resolution is left to the dispute resolution process described in Sections 4219 and 4221.

I hope this has been of assistance. If you have further questions please contact * * * of my staff at the above address or (202) 254-4873.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-14

May 28, 1985

REFERENCE:
[*1] 4203 Complete Withdrawal
4212(a) Obligation to Contribute - Definitions

OPINION:

This responds to your letter regarding the "joint employer doctrine" under the National Labor Relations Act ("NLRA") as it may apply under Title IV of ERISA. Specifically, you ask whether a company that is not a signatory to an agreement under which contributions are required to be made to a multiemployer pension plan, but is a "joint employer" for purposes of the NLRA with such a company, can be liable for a complete or a partial withdrawal under Section 4201 of ERISA.

The company whose liability is at issue ("your client") leases its employees from a firm that specializes in employee leasing (the "leasing firm"). The leasing firm is a signatory to a collective bargaining agreement pursuant to which it contributes to a multiemployer pension plan (the "Plan"). Your client has neither signed the agreement nor contributed to the Plan. There is no corporate affiliation or common ownership between the two companies. However, you state that your client exercises such close supervision and control over the day-to-day working conditions of the leased employees that in your opinion your client is a joint employer [*2] for purposes of the NLRA. Further, you represent for purposes of your inquiry to the PBGC that, as a joint employer, your client is bound under labor law by any collective bargaining agreement covering the leased employees, and therefore may, like the leasing firm, be obligated to contribute to the Plan. You ask whether your client would be liable under the withdrawal liability provisions of Title IV of ERISA if, because of changes in business conditions, your client terminates the leasing arrangement.

Under Title IV an employer is liable for a withdrawal from a multiemployer plan when it permanently ceases to have an obligation to contribute or permanently ceases all covered operations under the plan. Section 4203 of ERISA. Section 4212(a) of ERISA defines "obligation to contribute" as an obligation arising under one or more collective bargaining agreements or as a result of a duty under applicable labor-management relations law.

You have represented that your client is an employer (joint employer) which may have an obligation under the NLRA to contribute to the Plan. If such an obligation were found to exist, your client would be subject to Title IV's withdrawal liability [*3] provisions. Thus, a permanent cessation of its obligation to contribute would constitute a withdrawal from the Plan, and its liability would be calculated in accordance with Section 4201 of ERISA. Please note, however, that the amount of an employer's liability is based on its allocable share of unfunded vested benefits determined under Section 4211 of ERISA. This amount is generally proportional to contributions required to be made by the employer. Consequently, if no contributions were required to be made by the employer, there would ordinarily be no liability.

You have also stated that the termination of your client's leasing arrangement may result in the leasing company laying off its employees, resulting in a complete or partial withdrawal by the leasing company. You ask whether this will affect the potential liability of your client. You have represented, however, that your client is not a trade or business which is under common control with the leasing firm within the meaning of Section 4001(b) of ERISA. Thus, your client and the leasing firm would not constitute a single employer and their obligations and liabilities under Title IV would be determined separately. [*4]

Of course, the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and the identity of the liable employer lies with the plan sponsor. ERISA further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved by arbitration subject to review in the courts.

I hope this response is of assistance. If you have further questions concerning this matter, please contact * * * of my staff at the above address or at (202) 254-4873.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-15

May 31, 1985

REFERENCE:
[*1] 4204 Sale of Assets
4212(c) Obligation to Contribute - Liability

OPINION:

This responds to your request for the PBGC's opinion concerning Section 4204 of ERISA. Specifically you wish to know whether Section 4212(c) applies to a transaction involving a sale by an employer of an unincorporated division under Section 4204 when the sole purpose of applying Section 4204 is to avoid the seller's immediate withdrawal liability. Similarily, you wish to know whether Section 4212(c) applies if the division is first incorporated and then its stock is sold. In other words, can a plan disregard these transactions and impose liability on the seller because the sale violates the "principal purpose" rule of Section 4212(c)?

Section 4212(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected), without regard to such transaction." Section 4204, on the other hand, provides a statutory exception to the general rule that an employer is liable if it ceases to contribute to a multiemployer pension plan. The purpose of Congress in providing Section 4204 was to allow an employer to [*2] avoid liability if a sales transaction meets the statutory conditions. Thus, the application of Section 4204 to a sales transaction does not by itself violate Section 4212(c). A plan, however, may find under all the circumstances of the transaction that Section 4212(c) was violated. A dispute in such a case would be subject to the dispute resolution procedures of Sections 4219 and 4221.

Likewise, as PBGC Opinion Letter 82-4 explains, the sale of the stock of a subsidiary is permitted without liability being incurred under the Act. Thus, if a division of a corporation is first incorporated and then sold, the transaction does not automatically violate 4212(c). However, as explained above, Section 4212(c) may be applied by a plan, if all the circumstances of the transaction so warrant, to disregard the transaction.

I hope this has been of assistance to you. If you have further questions concerning this matter, please contact * * * of my staff at the above address or (202) 254-4873.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-16

June 3, 1985

REFERENCE:
[*1] 4203(e) Complete Withdrawal. Date of Complete Withdrawal
4205 Partial Withdrawals
4205(a) Partial Withdrawals. Definition of Partial Withdrawal

OPINION:

In your recent letter you describe a situation in which a union enters into a concessions agreement with an employer that has previously made contributions to a multiemployer pension plan. You stated in your telephone conversation with my staff that one aspect of the agreement is that for an eighteen month period the employer will not make pension contributions to the plan for participants at the smaller of its two facilities. At the end of the eighteen-month period, if the employer is still in business, contributions will become due retroactively. All contributions have been paid in full for past years.

You ask specifically whether entry into the agreement would effect a partial withdrawal under Section 4205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act").

Section 4205(a) of ERISA states that a partial withdrawal by an employer occurs when:

(1) there is a 70 percent contribution decline (in the employer's contributions to [*2] the plan), or

(2) there is a partial cessation of the employer's contribution obligation.

It is our understanding that the 70 percent test is not implicated in the factual situation you have presented. Nevertheless, a partial cessation of the contribution obligation may occur when the employer permanently ceases to have an obligation to contribute under the plan, either under one of several collective bargaining agreements or with respect to work performed at one of several facilities. Section 4205(b)(2)(A).

The Multiemployer Act places the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and for determining the amount of any liability resulting therefrom on the plan sponsor, and the PBGC does not interject itself into this process by issuing an opinion on the application of the law to a particular transaction. If a plan sponsor makes any such determination respecting a withdrawal, and the employer objects in any way, ERISA provides in § § 4219 and 4221 a procedure for resolving the dispute.

Thus, the plan sponsor, consistent with his or her fiduciary responsibilities, would be initially responsible for [*3] determining such questions as what is considered "permanent" under Section 4205. The determination is, however, generally based on all the facts and circumstances of a particular case. Relevant considerations in the instant case include the duration of the cessation of contributions and the likelihood of a resumption of contributions.

We note also that the Multiemployer Act does not specify a period within which a multiemployer plan may determine that a withdrawal has occurred. Consequently, if the plan determines that a withdrawal has occurred, it is not precluded from finding at a later date that a withdrawal occurred at some earlier point. See Section 4203(e) of ERISA.

This opinion is not intended to serve as an interpretation of the terms of the plan described in this case or as a statement on the possible applicability of Title I of ERISA or of any other statute. We also express no view concerning the rights under the plan of employees working under the concessions agreement.

I hope this has been of assistance. If you have any further questions please contact * * * at the above address or at (202) 254-4895.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-17

June 10, 1985

REFERENCE:
[*1] 4204 Sale of Assets

OPINION:

This responds to your request for the PBGC's opinion concerning Section 4204 of ERISA. Specifically you wish to know whether a seller and a purchaser can retroactively bring a sale of assets within the coverage of Section 4204 by posting an appropriate bond and by amending the sales contract.

Under Section 4204 a complete or partial withdrawal does not occur as a result of a bona fide, arm's length sale of assets to an unrelated party if (1) the purchaser has an obligation to contribute for substantially the same number of contribution base units for which the seller had an obligation to contribute; (2) the purchaser provides a bond for 5 plan years following the sale; and (3) the contract for the sale provides that the seller is secondarily liable to the plan if the purchaser withdraws during those 5 plan years and fails to pay its liability.

If an employer ceases to contribute to a plan as a result of a sale of assets that fails to meet the conditions described above, then a withdrawal may occur. Further, if the conditions are initially met, but there is a subsequent failure of condition, then the plan find that a withdrawal has occured as of the date of the [*2] seller's cessation of contributions. An example of when this may occur is when the purchaser fails to maintain a bond or escrow. See PBGC Opinion Letter 83-8 (March 25, 1983).

Thus, it is a plan's responsibility to determine whether a withdrawal has occurred, including whether the conditions of Section 4204 are met. Further, it is the PBGC's view that the plan has discretion in determining whether a condition has been met in a timely fashion. Of course any dispute concerning a plan's determination of the applicability of Section 4204 is subject to the dispute resolution procedures contained in Sections 4219 and 4221 of ERISA.

I hope this has been of assistance. If you have further questions concerning this matter please contact * * * of my office at the above address or at (202) 254-4873.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-18

July 24, 1985

REFERENCE:
[*1] 4219(c)(3) Notice and Collection of Withdrawal Liability. Annual or Quarterly Payment Schedule

OPINION:

On January 4, 1985, we wrote to you expressing our opinion as to the correct interpretation of certain provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") about which you had raised questions. Our opinion was published as Opinion Letter 85-1. We have decided that we should clarify some statements in our opinion because they may be misleading.

One of the questions you raised concerned the meaning of the phrase "equal installments" in ERISA section 4219(c)(3). We opined that withdrawal liability payments made more or less frequently than quarterly should have a present value equal to the present value of the quarterly payments called for by the statute. To illustrate this concept, we gave an example in which the annual withdrawal liability payments were $12,000 and the quarterly payments under section 4219(c)(3) were accordingly $3,000. We then discussed a monthly payment schedule and made the following statements:

". . . Since the payments would be more frequent than quarterly, the amount of each monthly payment would be reduced by an appropriate interest [*2] factor. Instead of paying exactly $1,000 each month for three months to yield a quarterly payment of $3,000, the employer would pay somewhat less than $1,000 each month so that the present value of the stream of monthly payments is equal to the present value of a stream of quarterly payments of $3,000 each.

"Similarly, to the extent the employer made payments less frequently than on a quarterly basis, the amount of each individual payment would be increased by an appropriate interest factor."

These statements assume that the quarterly payments would be made at the end of each quarter, and that the monthly payments (made during the quarter) would thus result in the plan's receiving payment in advance. Similarly, they assume that payments made less often than quarterly would be made in arrears. Typically, however, the situation is the reverse. The first monthly payment will be made on the date when the first quarterly payment would have been due, and the plan will thus receive payment in arrears. On the other hand, if payments are less frequent than quarterly, the first payment will be more than the plan would have received on the same date under a quarterly schedule, [*3] so the plan will be getting paid in advance.

Whether payments to be made other than quarterly should be reduced or increased to make them actuarially equivalent to the quarterly payments specified in the statute depends not on whether they are more or less frequent than quarterly but on whether they result in the plan's receiving payment earlier or later than it would have on a quarterly schedule.

Accordingly, we are revising that portion of Opinion Letter 85-1 quoted above to read as follows:

". . . If the first monthly payment in each quarter were to be made on the date when the quarterly payment for that quarter would otherwise have been due, the plan would be receiving payment more slowly than under a quarterly schedule. Instead of paying exactly $1,000 each month ($3,000 per quarter), the employer would pay somewhat more than $1,000 each month so that the present value of the stream of monthly payments is equal to the present value of a stream of quarterly payments of $3,000 each.

"Similarly, suppose that the plan rules called for semi-annual payments. If the payment for each six-month period were to be made on the date when the first quarterly payment for that six-month [*4] period would otherwise have been due, the plan would be receiving payment more quickly than under a quarterly schedule, and the employer would pay somewhat less than $6,000 each six months."

I hope this makes our earlier opinion letter clearer. If you have any questions about this letter, please call or write * * * of our Corporate Policy and Regulations Department. * * * telephone number is * * *.

Edward Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-20

August 2, 1985

REFERENCE:
[*1] 4204 Sale of Assets
4204(a)(1) Sale of Assets. Conditions for Exemption from Withdrawal
4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security
4204(a)(1)(C) Sale of Assets. Secondary Liability of Seller
4204(a)(2) Sale of Assets. Subsequent Withdrawal by Purchaser
4204(a)(3) Sale of Assets. Bond Requirement on Liquidation of Seller
4204(a)(3)(A) Sale of Assets. Complete Liquidation of Seller
4204(c) Sale of Assets. PBGC Grant of Variances or Exemptions from Bond Requirements
29 CFR 2643 Variances and Exemptions

OPINION:

This is in response to your letter in which you asked the opinion of the Pension Benefit Guaranty Corporation ("PBGC") concerning Section 4204 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1384. More specifically, your question concerned the requirements for avoiding withdrawal liability under that section.

The facts, as you present them, are that an employer (the "Seller") obligated to contribute to a multiemployer pension plan (the "Plan"), as defined by Section 4001(a)(3) of ERISA, 29 U.S.C. § 1301(a)(3), sold its assets to an unrelated entity (the "Buyer") in an arm's-length transaction. You state [*2] that under the terms of the sales agreement (the "Agreement"):

"(1) The [Buyer] agreed to assume the Seller's obligation to contribute to the Plan.

"(2) The [Buyer] agreed, unless otherwise exempted, to provide to the Plan for a period of five plan years starting with the first plan year after the sale of assets, a bond or escrow in an amount equal to the greater of (i) the average annual contribution required to be made by the Seller to the Plan for the three plan years preceding the plan year in which the sale of assets occurred, oir (ii) the annual contribution that the Seller was required to make to the Plan for the last plan year before the plan year in which the sale of assets occurs.

"(3) The Seller agreed that if the [Buyer] completely or partially withdraws from the Plan during the five years beginning after the sale, the Seller will be secondarily liable to the Plan if the [Buyer] fails to pay its withdrawal liability to the Plan.

"(4) Since the Seller was liquidated immediately after the sale, the [Buyer] agreed to provide to the Plan on behalf of the Seller, at the [Buyer's] sole cost and expense, a bond or escrow in an amount equal to the present value of the withdrawal [*3] liability the Seller would have had but for the special asset sale exemption in Section 4204 of ERISA."

You state that these provisions were drafted into the Agreement in order to satisfy Section 4204(a)(1) of ERISA, thereby avoiding the imposition on the Seller of withdrawal liability resulting from the sale of the Seller's assets.

You further indicate that the Buyer qualifies under 29 C.F.R. § § 2643.11 and 2643.14 for the exemption from the requirements set out in subparagraphs 4204(a)(1)(B) and (C) that the Buyer post a bond and that the sales agreement impose secondary withdrawal liability on the Seller. Specifically, you state that the Buyer satisfies the "net tangible asset test" set out in 29 C.F.R. § 2643.14. You ask whether the satisfaction of that test also exempts the now-liquidated Seller from the requirement of posting a bond under Section 4204(a)(3)(A) of ERISA.

Section 4203 of ERISA provides, among other things, that complete withdrawal from a multiemployer pension plan occurs when a contributing employer ceases to have an obligation to contribute to the plan. Section 4201(a) of ERISA provides that upon complete withdrawal from such a plan, ordinarily an employer [*4] is liable to the plan for

withdrawal liability. Section 4204 of ERISA provides an exception to the general rule imposing withdrawal liability, in the case of a "bona fide, arm's-length sale of assets to an unrelated party . . ." where certain conditions are met. Section 4204(a)(1) provides three separate requirements which, briefly stated, are that:

1. The buyer has an obligation to contribute substantially similar to that of the seller;

2.The buyer posts a bond or escrow; and

3. The sales contract provides for secondary liability of the seller to the plan if the buyer withdraws from the plan within five years from the sale of assets.

In addition, Section 4204(a)(2) of ERISA provides that, in any event, if the buyer withdraws from the Plan within five plan years, the seller will be liable to the plan for the withdrawal liability the seller would have owed but for Section 4204 if the buyer fails to pay the withdrawal liability when due. Section 4204(a)(3)(A) provides that, upon liquidation or distribution of the seller or the seller's assets within five years of the sale, the seller must post a bond equal to the present value of the withdrawal liability that would have been [*5] imposed on the seller but for Section 4204.

Section 4204(c) authorizes the PBGC by regulation to vary the requirements of Section 4204(a)(1)(B) [the buyer's bond requirement] and (C) [the requirement of a contract provision imposing secondary liability on the seller]. The PBGC has done so at 29 C.F.R. Part 2643. One of the tests which has been set out for variance from the requirement oif Section 4204(a)(1)(B) and (C) is the net tangible asset test, 29 C.F.R. § 2643.14, which you state has been met in the present case.

Thus, as you present the situation, the Buyer has met the requirements for waiver of the requirement of obtaining a buyer's bond and of inserting a seller's secondary liability provision in the sales contract. You ask whether this waiver also exempts the Seller from posting the liquidation bond required by Section 4204(a)(3).

The PBGC has been granted specific statutory authority to waive the two requirements of a buyer's bond and of the seller's contractual secondary liability. ERISA Section 4204(c). The PBGC has done so by regulation. 29 C.F.R. Part 2643. However, no such explicit statutory authority exists for the PBGC to waive either the seller's liability [*6] under Section 4204(a)(2) or the required seller's liquidation bond under Section 4204(a)(3). We note that the seller's liability under Section 4204(a)(2) is independent, although potentially overlapping, of the seller's contractual secondary liability under Section 4204(a)(1)(C), only the latter of which is explicitly waivable by the PBGC. Moreover, as the regulation and the preamble to both the proposed and final versions of the regulation make clear, the exemptions provided in 29 C.F.R. Part 2643 apply only to Section 4204(a)(1)(B) and (C), and not to any other portion of the statute. 48 Fed. Reg. 6555 (February 14, 1983) and 49 Fed. Reg. 22635 (May 31, 1984).

We, therefore, conclude that the exemptions established by satisfaction of one of the tests set out in 29 C.F.R. Part 2643, Subpart B do not exempt the Seller from the obligation of posting a liquidation bond under Section 4204(a)(3). The decision whether to waive the obligation of the Seller to post a liquidation bond is one that must be made by the Plan. As you are aware, Multiemployer Bulletin Number 2, published by the PBGC, provides guidance on the waiver of the seller's liquidation bond by a plan.

In reaching [*7] this conclusion, we make no determination as to the correctness of your factual statements or conclusions. The determination as to whether a withdrawal has occurred is to be made in the first instance by the plan sponsor, subject to the statutory dispute resolution procedures. By this letter, the PBGC only seeks to provide general guidance on the interpretation of Title IV of ERISA based on your statements, representations, and conclusions.

In your letter, you further request that, if the PBGC determines that the requirements of Section 4204(a)(3) are not waived by satisfaction of one of the tests set out in 29 C.F.R. Part 2643, Subpart B, the PBGC approve a proposed Plan rule. We point out that the adoption of a Plan rule is not a matter subject to approval by the PBGC. Consequently, we express no opinion with respect to your proposed rule.

I hope this has been of assistance to you. If you have any further questions on this matter, please contact * * * of my staff at the above address or at (202) 254-3010.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-22

September 11, 1985

REFERENCE:
[*1] 4243 Reorganization Funding

OPINION:

This is in response to your request for an opinion of the Pension Benefit Guaranty Corporation (the "PBGC") as to whether the * * * Reciprocal Agreement * * * operates so as to impose on certain employers and defined contribution pension plans the minimum contribution requirements of Section 4243 of the Employee Retirement Income Security Act of 1974 ("ERISA") or the withdrawal liability provisions of Section 4201 of ERISA.

As we understand the facts, the Reciprocity Agreement is entered into by the union and employer trustees of pension plans, both defined benefit and defined contribution, whose participanats are represented by the * * *. The Reciprocity Agreement provides for the transfer to the "home plan" of an employee of contributions made on behalf of that employee by his employer when he is employed outside the jurisdiction of the * * * local union to which he belongs. The transfer must be pursuant to a written authorization by the employee. Under the Reciprocity Agreement, the plan under which work is performed is liable to the "home plan" only to the extent of contributions made and collected.

Your inquiry deals with the situation in which [*2] contributions are made by an employer to a defined contribution plan and are in turn transferred from the defined contribution plan to a defined benefit plan. The employers contributing to the defined contribution plan are not parties to the Reciprocity Agreement. The applicable collective bargaining agreement, entered into by the * * * local and a local chapter of the * * *, does not make reference to the Reciprocity Agreement, nor does the pension plan document.

You specifically asked whether, in view of the Reciprocity Agreement, if the defined benefit plan is in reorganization, the minimum contribution requirement or other requirements of ERISA impose any obligation on the defined contribution plan (other than the transfer of contributions) or on its contributing employers (beyond that of making contractually required contributions to the defined contribution plan). You also asked whether, in view of the Reciprocity Agreement, if the defined benefit plan is terminated at a time when it is underfunded, and all participating employers withdraw subject to withdrawal liability, the employers contributing to the defined contribution plan are subject to withdrawal liability and [*3] whether the defined contribution plan is subject to withdrawal liability or other liability under ERISA.

As * * * of my staff indicated in his * * *, letter to you, it is the general position of the PBGC that it is the plan sponsor's responsibility in the first instance to determine whether a withdrawal has occurred and to determine the identity of the liable employer. Disputes arising over such withdrawal liability determinations must be resolved under the dispute resolution procedures of Sections 4219 and 4221 of ERISA.

With this caveat, we can provide some general guidance. With respect to employers, we note that Section 4203 of ERISA defines a withdrawal by an employer, inter alia, as a permanent cessation "of an obligation to contribute under the plan." Section 4212(a) of ERISA defines "obligation to contribute" as

an obligation to contribute arising --

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labormanagement relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

The legislative history of ERISA indicates that [*4] an employer has an "obligation to contribute" to a plan if the employer has agreed to make contributions to the plan on behalf of workers for work performed. In the words of Senator Williams:

The committees intend that the term obligation to contribute under a collective bargaining, or related, agreement apply to any situation in which an employer has directly or indirectly agreed to make contributions to a plan. This includes cases in which the employer signs a collective bargaining agreement or a related agreement such as a participation agreement or memorandum of understanding, and cases in which the employer agreed to be bound by an association agreement.

126 Cong. Rec. 11672 (1980).

Thus, it appears that withdrawal liability was intended to apply only to employers, as employers are the entities that generate contributions to multiemployer plans.

While Title IV does not define "employer" (other than in Section 4001(b)) we think it clear that a multiemployer pension plan is not an "employer" within the meaning of Title IV with respect to its participants who are employees of its contributing employers (while such a plan presumably would be the "employer" of its own employees, [*5] this situation is clearly distinguishable from that posited by you). Accordingly, defined contribution plans would not be liable for withdrawal liability for a transfer of assets from a multiemployer plan to another plan under the facts presented in your letter. Section 4234 of ERISA pertains to such transfers and notes that transfers may occur pursuant to written reciprocity agreements. Thus, with respect to defined contribution plans the existence of a reciprocity agreement would not impose any minimum contribution requirement under the facts presented in your letter.

Section 4243 of ERISA does not by its own operation impose any obligation to contribute to a plan on any person. While its application by a plan in reorganization may affect the specific amount owed by a contributing employer to such a plan, that employer's responsibility to contribute to that plan is determined by the pertinent collective bargaining agreements and by applicable law generally, including such regulations as may be promulgated by the Secretary of Labor and by the Secretary of the Treasury under Sections 418B and 418C of the Internal Revenue Code. You may therefore wish to contact the Assistant [*6] Secretary of Labor for Pension and Welfare Benefit Programs and the Assistant Internal Revenue Commissioner for Employee Plans and Exempt Organizations for additional guidance.

I hope I have been of assistance. If you have any questions please contact the attorney assigned to this matter, * * *, at (202) 254-4895.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-23

September 12, 1985

REFERENCE:
[*1] 4219 Notice & Collection of Withdrawal Liability
4219(b) Notice and Collection of Withdrawal Liability - Assessment and Review
4219(c) Notice and Collection of Withdrawal Liability - Payment
4219(c)(5) Notice & Collection of Withdrawal Liability - Default

OPINION:

This responds to your request for the PBGC's interpretation of its requlation governing default for non-payment of withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980.

ERISA Section 4219 establishes the rules for notice and collection of withdrawal liability due to a multiemployer plan, including the assessment of interest for overdue and defaulted liability payments. Under Section 4219(b), a plan sponsor assesses withdrawal liability by notifying the employer of the amount of the liability and schedule of payments and demanding payment in accordance with the schedule. The first payment is payable no later than 60 days after the date of the demand, even if the employer requests a review of or appeals the amount of the liability or the schedule of payments (Section 4219(c)(2)). In the event of a default, a plan sponsor may, [*2] pursuant to Section 4219(c)(5), require immediate payment of the outstanding balance of the employer's withdrawal liability plus accrued interest on the total outstanding liability from the due date of the first missed payment. Under Section 4219(c)(5)(A), a default occurs if the employer fails to make a withdrawal liability payment within 60 days after notice from the plan sponsor that the payment is overdue. (Section 4219(c)(5)(B) provides that plan rules may define "default" to include additional events that indicate a "substantial likelihood that an employer will be unable to pay its withdrawal liability.")

The PBGC's regulation, at 29 C.F.R. § 2644.2(a) and (b), restates the statutory rules on when a withdrawal liability payment is overdue and when a default occurs. Section 2644.2(c) establishes rules that "shall apply with respect to the obligation to make withdrawal liability payments during the period for plan review and arbitration and with respect to the failure to make such payments" (emphasis supplied). These rules provide, in part, that no default for non-payment may be declared until the 61st day after the last of: (1) the expiration of the period for requesting [*3] plan review; (2) if an employer requests plan review, expiration of the period for requesting arbitration; or (3) when arbitration is timely initiated either by the plan or the employer or both, issuance of the arbitrator's final decision. (This limitation does not apply to a default for a reason other than non-payment.) Your question is whether this regulatory limitation on default declarations, which applies "during the period for plan review and arbitration" under the explicit terms of the regulation, also applies during the 90-day period within which the employer may request plan review pursuant to Section 4219(b)(2)(A).

The regulatory phrase at 29 C.F.R. § 2644.2(c), "during the period for plan review and arbitration," necessarily encompasses the 90-day period for requesting plan review. A contrary interpretation would render inoperative in all cases the first time limitation set forth in the regulation, i.e., the 61st day after the expiration of the period for requesting plan review. Moreover, as was noted by the PBGC in its preamble to the final version oif the regulation at issue, "declaring a default, and thus requiring immediate payment of withdrawal liability plus [*4] interest, is a very serious remedy which ought not to be invoked while an employer is exercising its statutory right to contest the plan's determination." 49 Fed. Reg. 22644 (1984). It follows that this "very serious remedy" may not be invoked before an employer even has a full opportunity to request plan review and thereby initiate "its statutory right to contest the plan's determination." Finally, the proposed version of the regulatory limitation on default declarations was described by the PBGC as "reflect[ing] the Congressional intent that withdrawal liability should not be accelerated for non-payment of installments before the arbitrator has issued a final decision." 48 Fed. Reg. 6559 (1983) (citations omitted). Any interpretation of the PBGC's regulation that would permit default declarations during the 90-day period for requesting plan review would frustrate that intent.

I hope this has been of assistance to you. If you have further questions concerning this matter, please contact of my staff at the above address or (202) 254-4889.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-24

October 3, 1985

REFERENCE:
[*1] 4061 Benefit Payments by PBGC
4261 Financial Assistance

OPINION:

This is response to your letter of * * *. In your letter, you state that the trustees of a defined benefit multiemployer pension plan are contemplating terminating the plan and providing for the payment of all accrued benefits through the purchase of commercial annuities. You ask whether, if the insurance carrier becomes insolvent, the Pension Benefit Guaranty Corporation ("PBGC") would pay the participants' benefits "to the extent allowed by law."

Under section 4061 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, the insurable event for multiemployer plans is the inability of an insolvent plan (i.e. a plan that is unable to pay benefits when due for a plan year) to pay guaranteed benefits when due. A plan that has terminated and provided for the payment of all accrued benefits through the purchase of commercial annuities is, by definition, not insolvent. Accordingly, in the situation you posit, the PBGC would not be authorized to pay benefits.

I hope the foregoing information is of assistance to you. If you have any further questions about [*2] this matter, you may call * * * at 202-254-4860.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-25

October 11, 1985

REFERENCE:
[*1] Joint Implementation Guidelines

OPINION:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) on whether the asset reversion guidelines of May 23, 1984, apply to a transfer of assets and liabilities from a single-employer pension plan to a multiemployer plan, with a resulting termination of the single-employer plan.

In your fact situation, a company that currently maintains a single-employer plan covering its union employees is involved in collective bargaining negotiations over an expired collective bargaining agreement. As part of the negotiations, the company has proposed a termination of its single-employer plan, with a resultant reversion of excess assets to the company (as permitted by the plan document). The union that represents the company's employees is willing to agree to the termination subject to certain conditions, one of which is that the company become a participant in, and transfer assets and liabilities to, a multiemployer pension plan to which the union is already a party. The multiemployer plan in question is fully funded.

As you mention in your letter, the PBGC, in cooperation with the Department of Labor and the Internal [*2] Revenue Service, has issued asset reversion guidelines to deal with various issues raised in connection with an employer's receipt of surplus assets following the termination of a defined benefit pension plan. It is the agencies' interpretation that an employer cannot invoke the termination and asset distribution provisions of Title IV of the Employee Retirement Income Security Act (ERISA) merely by taking steps that, in form, appear to bring about a termination of a plan, when, in substance, the transaction does not constitute a full termination. Accordingly, the guidelines state the agencies' determination that, among other things, the law requires that the benefits of participants in an ongoing plan following a so-called "spin-off/termination" be fully vested and annuitized.

Exceptions to the application of these provisions depend on the circumstances of a transaction. The transaction you describe, a transfer from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan, is not generally a transaction to which the spin-off/termination requirements of the guidelines apply. However, if the transaction lacks a substantial [*3] business purpose and instead is intended as a means to recover surplus plan assets without satisfying the plan termination requirements of Title IV of ERISA, the PBGC will not recognize the termination under Title IV. A valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer. An intent to circumvent the termination requirements can be indicated by many factors including, but not limited to, the size of the transferor employer relative to the other employers participating in the multiemployer plan, the stability and financial health of the multiemployer plan, and the amount of assets relative to the liabilities that are transferred to the multiemployer plan.

The conclusions set forth in this letter are limited to Title IV of ERISA. Any opinions relating to Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

I hope this information is of assistance to you. If you have further questions, please contact the attorney handling this matter, * * *, of the PBGC's Corporate Policy and Regulations Department. * * * telephone number is (202) 254-4860.

Edward R. [*4] Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-27

December 2, 1985

REFERENCE:
[*1] 4217(a) Applicability of MPPAA to Certain Pre-1980 Withdrawals. Applicability in Other MPPAA Provisions 4219(c)(1) Notice and Collection of Withdrawal Liability. Withdrawal Liability Payment Amounts

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) as to whether section 4217(a) of the Employee Retirement Income Security Act, as amended (ERISA), applies to the determination of the annual withdrawal liability payment under ERISA section 4219(c)(1).

Section 4217(a) states:

For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions and the number of contribution base units, of such employer properly allocable--

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or [*2] for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

Section 4217(a) clearly applies to determinations under sections 4211 and 4206(a) (the computations of unfunded vested benefits for complete and partial withdrawals) and under section 4205 (the determination of whether a partial withdrawal has occurred). There is nothing in that provision, however, to suggest that it applies to the determination of the annual payment amount and amortization schedule under section 4219(c)(1). Accordingly, it is the opinion of the PBGC that section 4217(a) does not so apply, except to the extent that the application of that provision to sections 4211 and 4206(a) affects the computations under section 4219(c)(1).

Thus, application of section 4217(a) decreases the amount of unfunded vested benefits calculated under section 4211, and it is this smaller amount that is to be amortized in accordance with section 4219(c)(1). In addition, the annual payment amount for partial withdrawal liability is calculated (pursuant to sections 4219 (c)(1)(E)) using the section 4206(a)(2) fraction that is used to calculate the unfunded vested [*3] benefits for a partial withdrawal. As stated above, the computation of this fraction is modified by section 4217(a).

While this interpretation results in a different application of section 4217(a) with respect to calculating the annual payment amount for a complete withdrawal and for a partial withdrawal, it is our view that this interpretation is supported by the legislative history, equitable considerations and the underlying purposes of the statute.

As you may be aware, the ERISA legislative history contains a reference to the applicability of section 4217(a) to section 4219(c)(1). This reference is found in the following colloquy between Representative Rostenkowski (D-Ill.) and Representative Thompson (D-N.J.):

Mr. ROSTENKOWSKI: Mr. Speaker, I rise to confirm with my distinguished colleague, the gentleman from New Jersey (Mr. Thompson), the withdrawal liability provisions. I am concerned with whether withdrawal liability provisions do not apply retroactively to events such as, for example, a closing of a facility which occurred prior to April 29, 1980 [since changed to September 26, 1980 by the Deficit Reduction Act of 1984], the effective date of the withdrawal liability [*4] provisions.

Specifically, I would like to confirm my understanding of section 4217. My understanding is that neither

contributions nor base units attributable to facilities closed before April 29, 1980, will be taken into account in any of the following determinations: First, whether or not a partial withdrawal, as defined in section 4205, has occurred; second, the amount of unfunded vested benefits allocable to a withdrawing employer pursuant to section 4211; third, the partial withdrawal adjustment set forth in section 4206; and fourth, the determination of annual liability payments pursuant to section 4219(c).

Is that correct, Mr. Chairman?

Mr. THOMPSON: If the gentleman will yield, yes, I will say to the gentleman from Illinois: that is correct.

(126 Cong. Rec. H9179 (daily ed., September 19, 1980).)

While the reference to section 4219(c) in this colloquy is ambiguous, we believe that paragraph (c)(1)(E) of section 4219 was the intended subject of this reference. Representative Rostenkowski was confirming that the section 4217(a) modification to section 4206 was to apply for all purposes under ERISA and not merely to calculations under only section 4206.

If section 4217(a) [*5] were applied directly to section 4219(c)(1), it would lead to arguably inequitable results with respect to complete withdrawals. Because the application of section 4217(a) would decrease the annual payment amount, the liability paid over 20 years (the maximum length of the amortization schedule) would be less than if section 4217(a) were not applied. For an employer whose amortization schedule exceeds 20 years, this means that the application of 4217(a) reduces its liability for a complete withdrawal. Such a reduction is not available to an employer who is assessed the same amount of unfunded vested benefits and who can apply section 4217(a), but whose scheduled of payments falls just under the 20-year cap. There is no indication in section 4217(a) or its legislative history that Congress intended thus to favor some employers over other similarly situated employers. In the absence of explicit statutory language mandating this result (e.g., section 4219(c)(1)(E)), the PBGC does not believe it should interpret ERISA in such a way as to create this disparate treatment of employers.

Moreover, we note that this differing treatment of partial and complete withdrawals makes sense [*6] in the overall statutory scheme. Amounts not assessed because of the 20-year cap against an employer that partially withdraws would be assessable against that employer in the event of a subsequent partial or complete withdrawal. On the other hand, in the case of a complete withdrawal, amounts in excess of the 20-year cap will generally never be assessable against that employer. The general statutory purpose of protecting multiemployer plans from the effects of employer withdrawals favors the approach of interpreting the statute in such a way as not to increase the amount of unassessable complete withdrawal liability.

I hope this information is of assistance to you. If you have further questions, please call or write the attorney handling this matter, * * *, of the Corporate Policy and Regulations Department. * * * telephone number is (202) 254-4860.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-29

December 5, 1985

REFERENCE:
[*1] 4062(d) Liability of Employer in Single Employer Plans. Corporate Reorganizations
4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4212(c) Obligation to Contribute - Liability
4218 Withdrawal - No occurrence

OPINION:

This letter is in response to your request for opinions on several issues arising under the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § § 1301 et seq. (1976) (as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980)) ("ERISA").

The facts as we understand them are as follows. X, is a signatory to six collective bargaining contracts with various locals of the * * * Union * * * on behalf of its * * * Division * * * and * * * Division * * *. Under these agreements, X is obligated to contribute to the * * * Fund * * *, a multiemployer plan. Each agreement provides that X may not sell its covered business (i.e., * * * or * * *) unless the buyer agrees to be bound by the collective bargaining agreement and to assume all obligations with respect to the Fund required under the agreement.

X and the controlled group of corporations of which it is the parent corporation (Y) * [*2] * * are engaged in five different businesses in the consumer products area, two of which are the * * * and * * * businesses. You state that the Y Group desires to divest itself of its * * * and * * * businesses in order to facilitate the better allocation of financial and managerial resources. With respect to its holdings in the * * * business, the Y Group proposes to spin off such holdings through a series of transactions. A, a dormant second tier subsidiary of X, will acquire most of the Y group's holdings, other than X's divisions and stock of a first tier subsidiary in the * * * business. B Corp., A's parent corporation and a first level subsidiary of X, then will distribute all of A's stock to X, making A a first tier subsidiary of X. X next will transfer its own division, which include * * * and * * *, and the stock of its first tier * * * subsidiary to A. Finally, X will distribute all of the stock of A to X's share-holders. At the conclusion of this transaction, A will be a publicly held corporation which is independent of the Y Group. A also will become a successor employer to X under the provisions of the collective bargaining agreements between X and the union. [*3] A will undertake X contributions to the Fund on behalf of * * * and * * * and X will cease to make contributions.

Your first question concerns whether, when X transfers the business of * * * to A, there will be a withdrawal from the * * * Fund under Section 4203(a) of ERISA. Under Section 4203(a), a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. In our view, there will not be a complete withdrawal from the * * * Fund because of this transfer. Immediately prior to this transfer X and A will be among the controlled group of corporations that constituted the employer with respect to the * * * Fund pursuant to ERISA Section 4001(b). A will continue to have an obligation to contribute to the * * * Fund after the transfer. Thus, the employer will continue to have an obligation to contribute under the plan and will continue covered operations, so that there is not a withdrawal under ERISA Section 4203(a).

Your second question concerns whether a withdrawal will occur when X distributes the stock of A to X's stock-holders. After the distribution of the stock, [*4] A will not be a member of X's controlled group of corporations. Section 4218 of ERISA provides that a withdrawal shall not occur solely because an employer ceases to exist by reason of a change in corporate structure described in Section 4062(d) of ERISA as long as there is no interruption of employer contributions or obligations under the plan. The kinds of corporate restructuring referred to in Section 4062(d) include a corporate "division." In our view, the distribution of A's stock to X's shareholders is a "division" within the meaning of Section 4062(a). Under Section 4218, A is considered to be the original employer. Accordingly, there will not be a withdrawal solely as a result of the distribution of A's stock to X stock-holders.

Finally, you ask whether the above-described transactions may be disregarded under Section 4212(c) of ERISA. Section 4212(c) provides that if a principal purpose of any transaction is to evade or avoid withdrawal liability, liability

shall be determined and collected without regard to such transaction. The plan administrator, not the PBGC, must make this determination in the first instance. However, it should be noted that the mere fact that [*5] a transaction falls within Section 4218 does not, by itself, make Section 4212(c) inapplicable. Rather, the plan administrator must consider all of the facts and circumstances surrounding the transactions in order to determine whether Section 4212(c) applies.

I hope that this response is helpful to you. If you have any further questions, please do not hesitate to call Assistant General Counsel, at (202) 254-4895.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-30

December 9, 1985

REFERENCE:
[*1] 4041A Multiemployer Termination
4041A(c) Multiemployer Termination. Distribution of Assets
4041A(f)(1) Multiemployer Termination. Lump Sum Payments

OPINION:

This is in response to your recent letter regarding a transfer of assets and liabilities from the * * * Local Union * * * Pension Trust Fund (the "Fund"), which is a terminated multiemployer pension plan, to other multiemployer pension plans pursuant to reciprocity agreements. As we understand the pertinent facts, the Fund terminated by the adoption of an amendment ceasing accruals for all purposes (ERISA section 4041A(a)(1) termination). Subsequent to the adoption of that amendment, the obligation of all employers to contribute to the Fund ceased. Because of the cessation of the obligation to contribute, the termination becomes a termination under section 4041A(a)(2), i.e., a plan termination by mass withdrawal, and the Fund is subject to the statutory rules that apply to such terminations.

Section 4041A governs the payment of benefits to participants in terminated multiemployer plans. Section 4041A(c) provides that, except as provided in section 4041A(f)(1), the plan sponsor of a plan terminated by mass withdrawal shall-- [*2]

n1) limit the payment of benefits to benefits which are nonforfeitable under the plan as of the termination, and

(2) pay benefits attributable to employer contributions, other than death benefits, only in the form of an annuity, unless the plan assets are distributed in full satisfaction of all nonforfeitable benefits under the plan.

Section 4041A(f) provides that:

The plan sponsor of a terminated plan may authorize the payment other than in the form of an annuity of a participant's entire nonforfeitable benefit attributable to employer contributions, other than a death benefit, if the value of the entire nonforfeitable benefit does not exceed $1,750. The [PBGC] may authorize the payment of benefits under the terms of a terminated plan other than nonforfeitable benefits, or the payment other than in the form of an annuity of benefits having a value greater than $1,750, if the [PBGC] determines that such payment is not adverse to the interest of the plan's participants and beneficiaries generally and does not unreasonably increase the [PBGC's] risk of loss with respect to the plan. (Emphasis supplied.)

The transfer of assets and liabilities from the Fund pursuant to reciprocity [*3] agreements would constitute benefit payments that are not specifically authorized under section 4041A(c), and, therefore, may be put into effect only if the PBGC approves under section 4041A(f). If you desire such an approval, you should submit evidence that clearly demonstrates that the transfer will not be adverse to the interest of participants and beneficiaries generally and will not unreasonably increase the PBGC's risk of loss with respect to the Fund.

If you have any questions on this matter please contact * * * at (202) 254-6138, or * * * at (202) 254-4860, of the Corporate Policy and Regulations Department.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

85-31

December 30, 1985

REFERENCE:
[*1] 29 CFR 2643 Variances or Exceptions from Bond Requirements
4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security
4204(a)(1)(C) Sale of Assets. Secondary Liability of Seller

OPINION:

This is in response to your recent letter describing a sale of assets transaction and requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to whether subpart B of the PBGC's regulation on Variances for Sales of Assets (29 CFR Part 2643) -- specifically § 2643.11 -- requires a multiemployer pension plan to waive the bond/escrow and contract language requirements of section 4204(a)(1)(B) and (C) of the Employee Retirement Income Security Act of 1974 ("ERISA") under the circumstances you describe.

Under section 4204(a)(1) of ERISA, a sale of assets by an employer that contributes to a multiemployer pension plan will not constitute a withdrawal from the plan if certain conditions are met. Your letter represents that the transaction in issue fulfills all but two of these conditions. The two conditions not met are that the purchaser furnish a bond or escrow for the five-plan-year period beginning with the first plan year after the sale, as required by section 4204(a)(1)(B), and [*2] that the sale contract provide for secondary liability on the part of the seller if the buyer withdraws within the five-year period and does not satisfy its liability to the plan, as required by section 4204(a)(1)(C).

In the situation you describe, a legally enforceable contract containing all of the terms and conditions of the sale was signed by the parties in * * * 1980; the sales was closed in * * * 1981; the plan demanded withdrawal liability from the seller in * * * 1983 * * * and revised the amount of its demand in 1983; and the seller first raised the issue of section 4204 with the plan in * * * 1983, more than two years after the sale. You indicate that the plan has brought an action to collect the withdrawal liability it claims from the seller.

Section 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. This principle is alluded to in PBGC Opinion Letter 83-8 of March 25, 1983, which states that "if at any time during the five year period the plan does not have [the required] security, then the arrangement [*3] does not comply with the requirements of § 4204 of ERISA." The transaction you describe thus does not fall within the ambit of section 4204.

Accordingly, subpart B of the PBGC's regulation on Variances for Sales of Assets has no bearing on the situation you describe. Not only does the regulation apply only to transactions under section 4204, but subpart B was not in effect until May 1984. Furthermore, the regulation contains nothing to alter the result that follows from the statute. Indeed, the preamble to the amendment that added subpart B to the regulation reaffirmed (at 49 FR 22639) the operative principle here: "if at any time during the five full plan years beginning after the sale, the purchaser either does not post the bond/escrow or obtain a variance from the requirement, then the transaction will not be in compliance with section 4204."

Your letter does not raise the question whether the parties to a sale of assets that occurs just at the end of a plan year should be held to a less exacting deadline for providing the bond or escrow, and we express no opinion on that question.

If you have any further questions about this matter, you may call * * * of the PBGC's Corporate [*4] Policy and Regulations Department at 202-956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-2

January 31, 1986

REFERENCE:
[*1] 4217 Applicability of MPPAA to Certain Pre-1980 Withdrawals
4402 Action Taken before Regulations Prescribed

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the meaning of the term "facility" as used in section 4217 of the Employee Retirement Income Security Act, as amended (ERISA), and whether a multiemployer pension plan has authority to adopt its own definition of that term. ERISA contains no definition of "facility".

In the situation you describe, a national chain (the "Company") operated over 50 retail stores in the * * *, area prior to the enactment of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). All but two of these stores were closed before September 26, 1980, the date of enactment of MPPAA. Your specific question is whether these stores constituted "facilities" within the meaning of section 4217 of ERISA.

You represent that each store was located at a discrete geographical location and was operated as a separate profit center and managed by a separate store manager. Each store was self-contained, meaning that it carried a full complement of food and related items typically found in a full-line supermarket. [*2]

You further represent that certain of the Company's employees at these stores were represented by local unions of the * * * International Association, now know as the * * * Union (the "Union") under three collective bargaining agreements. The Company made contributions to the * * * Union and Food Employers Pension Plan of * * * (the "Plan") in a lump sum representing the total amount due from the Company to the Plan during the relevant period. The plan document defines the term "facility" as "all store locations covered by a single collective bargaining agreement."

Section 4217 of ERISA provides, in pertinent part, as follows:

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable--

(2) to work performed at a facility at which all covered operations permanently ceased before September 25, 1980, or for which there was a permanent cessation of the [*3] obligation to contribute before that date,

shall not be taken into account. [29 U.S.C. § 1397(a)(2).]

In Opinion Letter 82-33 (October 28, 1983), the PBGC reviewed the question of whether section 4217 of ERISA applies to the closing of a single retail food store or only to the closing of a group of stores in a defined geographical area. The General Counsel concluded that the term "facility" in section 4217 of ERISA, in the context of the retail food industry, ordinarily means a single store. We hereby affirm that opinion. This interpretation is based on generally accepted economic terminology under which "facility" means a discrete economic unit of an employer. It is also consistent with the long-standing definition of the term "establishment" used in the Standard Industrial Classification Manual. Finally, as noted in Opinion Letter 82-33, this interpretation is consistent with the definition of "facility" that Congress considered promulgating with respect to the partial withdrawal rules. (See H.R. Rep. No. 869, Part II, 96th Cong., 2nd Sess. 18 (1980).) As you have noted, this definition and the accompanying explanatory text were dropped from the final version of MPPAA. [*4] This Congressional expression of the meaning of the term "facility" is therefore not dispositive of the issue. It was referenced in Opinion Letter 82-33 merely to demonstrate that the interpretation set forth in that letter was in accord with the commonly used meaning of "facility".

Opinion Letter 82-33 did not expressly address a plan's authority to adopt its own definition of the term "facility". It is out opinion that Congress did not grant plans the authority to adopt their own definitions of "facility." In earlier

versions of MPPAA, Congress permitted (or required) plans to define "facility." Since the bill that was ultimately enacted did not contain such a provision, we conclude that Congress decided against allowing plans to adopt their own definitions of "facility." This conclusion is supported by the fact that in other sections of ERISA, e.g., section 4219(c)(5)(B), Congress did expressly give plans the authority to provide their own definitions of specified terms.

We recognize, of course, that there are many undefined terms in ERISA and that in the absence of PBGC interpretations of those terms, plans might need to construct their own definitions in order to implement [*5] the law. This is permissible provided those definitions are reasonable. However, once the PBGC has issued its interpretation of a statutory term (as we did with respect to "facility" on October 28, 1982) plans are precluded from adopting their own definitions unless that power is specifically conferred by ERISA or by the PBGC. Moreover, where plans adopt definitions of statutory terms in contradiction to the PBGC's interpretations, the PBGC, in appropriate cases, will seek to intervene or file an amicus brief in a court proceeding to uphold its interpretation.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-4

February 28, 1986

REFERENCE:
[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4218(2) Withdrawal - Suspension of Contributions

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the effect of section 4218(2) of the Employee Retirement Income Security Act, as amended (ERISA). Specifically, you pose the following question:

"Where an employer ceases making contributions to a multiemployer plan solely because of a strike by its union-represented employees, and where it is determined that the employer ceased to be covered by the section 4218(2) labor dispute exemption in a subsequent plan year, is the year of withdrawal for purposes of calculating withdrawal liability owed to the plan, i) the plan year in which contributions ceased because of the strike, or ii) the plan year in which the section 4218(2) labor dispute exemption ceased to be applicable to the employer?"

As we understand your question, there is no dispute that a complete withdrawal has occurred and the sole issue is the date of the withdrawal. Based on this understanding, it is our opinion that the date of the withdrawal is the date on which the employer ceased to have an obligation [*2] to contribute under the plan or ceased all covered operations under the plan, even if, as is the usual case, that date is not the date on which section 4218(2) of ERISA ceased to apply to the employer.

Section 4203(a) of ERISA provides that a complete withdrawal from a multiemployer plan occurs if an employer either "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." In the context of an ongoing labor dispute, it is often impossible to determine whether there has been a permanent cessation of either covered operations or the obligation to contribute. Thus, section 4218(2) of ERISA provides as follows:

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because -

* * *

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

Section 4218(2) protects employers from unwarranted or premature assessments of withdrawal liability during a labor dispute. Without section 4218(2), withdrawal liability might be assessed at the outset of a labor dispute even though at that point it is [*3] generally not clear whether the cessation of the obligation to contribute or of covered operations is permanent or temporary.

If the dispute ends with the employer's obligation to contribute eliminated, it is clear that the cessation was permanent and that a withdrawal has occurred. (Moreover, if the employer has permanently ceased covered operations or ceased to have an obligation to contribute, rather than simply suspended contributions during a labor dispute, a withdrawal has occurred regardless of whether a labor dispute continues to exist.)

By its terms, section 4218(2) addresses only the issue of whether an employer "shall be considered to have withdrawn from a plan." Section 4218(2) does not attempt to define the date of a withdrawal that has been determined to have occurred.

Once it has been determined that a complete withdrawal has occurred, the date of the complete withdrawal is governed by section 4203(e) of ERISA, which provides:

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute

or the date of the cessation of covered operations.

Thus, in your case, if the date of the strike was the date on [*4] which covered operations or the obligation to contribute ceased, that date is used for purposes of calculating withdrawal liability.

This conclusion is consistent with basic features of ERISA's formulas for withdrawal liability, under several of which the amount of an employer's liability is based in part on the level of its recent contributions. In particular, under the method of section 4211(c)(3) of ERISA, 29 U.S.C. § 1391(c)(3), if the date of withdrawal were the date on which the section 4218(2) exemption ceased to apply to the employer, an employer that suspends contributions at the beginning of a labor dispute would frequently see its withdrawal liability reduced by the passage of time, thus gradually transferring its share of the plan's unfunded obligations to remaining and newly entering employers. (Indeed, if such an employer were determined to have withdrawn six years after the initial suspension of contributions it would escape withdrawal liability entirely.) Such a possibility exists, to a lesser extent, with other withdrawal liability formulas. Our conclusion prevents such a gradual transfer by assessing the employer the same withdrawal liability that it would have [*5] been assessed if the cessation of its obligation to contribute or of its covered operations had immediately been identified as permanent.

Your letter cites Marvin Hayes Lines v. Central States, Southeast and Southwest Areas Pension Fund, a case recently decided by the United States District Court for the Middle District of Tennessee, in support of your contention that the year of withdrawal in the circumstances you describe is the plan year in which the section 4218(2) labor dispute exemption ceased to be applicable to the employer. The Marvin Hayes Lines decision is currently being reviewed by the United States Court of Appeals for the Sixth Circuit. The PBGC has participated in the case as amicus curiae. The PBGC has urged the Court to remand the case to the District Court because, inter alia, we believe that the District Court did not adequately consider the proper date of the withdrawal. The Marvin Hayes Lines decision therefore does not change our conclusion regarding the question you have asked.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate [*6] Policy and Regulations Department. His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-5

March 6, 1986

REFERENCE:
[*1] 4044 Allocation of Assets
29 CFR 2673 Notice of Termination for Multiemployer Plans

OPINION:

This is in response to your request for a ruling by the Pension Benefit Guaranty Corporation ("PBGC") that the provisions of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") would not be violated by the transfer to a new trust, as described in your request, of surplus assets remaining after the satisfaction of all benefits under a multiemployer pension plan.

The plan in question has been terminated. (The PBGC will respond separately to the notice of termination, providing instructions regarding the method of closing out the plan.) The plan's assets which are held by an insurance company, exceed the value of all accrued benefits of all plan participants. After all plan liabilities for benefits have been discharged, the plan proposes to transfer the excess assets to a trust pending a decision on how to dispose of them.

Title IV of ERISA does not apply to assets remaining after the satisfaction, in accordance with Title IV and PBGC instructions, of all accrued benefits under a pension plan that has not provided for employee contributions. Hence a transfer of such assets to [*2] a separate trust to await further disposition would not violate the provisions of Title IV.

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

Edward R. Mackiewicz
General Counsel

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:

criterion [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.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-7

March 24, 1986

REFERENCE:
[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal

OPINION:

This responds to your request, as supplemented by your letter of March 11, 1986, for the opinion of the Pension Benefit Guaranty Corporation regarding the application of section 4203(a) of the Employee Retirement Income Security Act, as amended, (ERISA) to an employer that ceases to make contributions to a multiemployer pension plan following a union decertification. Specifically, you ask whether such an employer has any special defenses to withdrawal liability. You also ask whether the answer to that question would be affected by the facts that the employer's contributions to the plan exceeded the vested benefits of its employees, and the employer established a new plan for its employees that included past service credit.

Section 4203(a) of ERISA provides:

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer--

(2) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

Section 4203(a) thus makes no distinctions based on the causes of a cessation of an employer's obligation to contribute [*2] under a plan. Since section 4203 expressly provides special withdrawal rules in cases to which Congress did not want the general rule of section 4203(a) to apply, e.g., the entertainment industry and the building and construction industry, we conclude that the absence of any special provision in section 4203 (or elsewhere) for cessations caused by decertification elections indicates that Congress intended for the general provisions of section 4203(a) to apply to such cessations.

This conclusion is supported by the fact that Congress provided relief in section 4235 of ERISA for certain employers that completely or partially withdraw from a multiemployer plan as a result of a certified change of collective bargaining representative. Under section 4235(c), the employer's withdrawal liability to the plan to which it ceased making contributions because of a change in the collective bargaining representative is reduced to the extent the plan sponsor transfers to the new plan unfunded vested benefits allocable to the employer. This section clearly indicates that Congress intended for an employer that ceases contributions as a result of a decertification to be subject to withdrawal [*3] liability. If such an employer were not subject to the general withdrawal liability rule of section 4203(a), there would be no need for the relief provision in section 4235(c).

Your letter characterizes decertification as an involuntary withdrawal and cites legislative history that you believe indicates that Congress did not intend the withdrawal liability provisions to apply to involuntary cessations of contributions. The basic thrust of these citations, you seem to assert, is that the purpose of the Multiemployer Pension Plan Amendments Act of 1980 was to discourage voluntary withdrawals from multiemployer plans.

Without agreeing with your assertion that a decertification constitutes an involuntary withdrawal, it is, in any event, our view that this is too narrow a statement of MPPAA's purposes. These purposes include protection of plans when an employer withdraws, regardless of whether the withdrawal may be characterized as voluntary or involuntary. As the First Circuit stated in Keith Fulton & Sons v. New England Teamsters, 762 F.2d 1124, 1131 (1st Cir. 1984), modified on other grounds, 762 F.2d 1137 (1st Cir. 1985) (en banc):

The MPPAA and its legislative history [*4] show that Congress was concerned about the effect of any withdrawal, not just "voluntary" ones. Any withdrawal causes the same harm to the fund -- it was logical for Congress not to distinguish between them on the basis of voluntariness. [Emphasis in original.]

The court in Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Sup. 523, 526 (W.D. Wash. 1982), applied similar reasoning in upholding liability for a withdrawal that occurred when the union disclaimed any further intent to represent the employer's employees following a contested decertification election.

Although your letter relies on general statements of legislative purpose from the PBGC's Multiemployer Study Required by P.L. 95-214, specific statements in the Study expressly support the conclusion that withdrawal liability applies to withdrawals caused by decertification:

Liability would be assessed when a withdrawal occurs irrespective of the reason for the withdrawal, and irrespective of whether the union, the employer, or both initiate the withdrawal. Liability would be assessed, for example, when employees vote to decertify (footnote omitted) their bargaining representative [*5] or when the employer bargains out of a plan. (footnote omitted) (at p. 101).

This answer is not changed by the additional facts presented in your March 11 letter. In general, an employer in a multiemployer plan is not responsible only for the benefits of its own employees, but rather shares, with the other employers, a responsibility for all the plan's benefit obligations. Indeed, three of the four statutory methods for allocating a plan's unfunded vested benefits to withdrawing employers are based on the plan's unfunded vested benefits, not on the vested benefits attributable to a withdrawn employer's employees. Only in a plan using the direct attribution method (section 4211(c)(4)), is an employer's liability based on the unfunded vested benefits attributable to its employees; but even under this method, the employer is also liable for certain additional amounts.

With respect to your second point, we note that the pension arrangements an employer may make for its employees following a withdrawal from a multiemployer plan do not mitigate the harm to the plan caused by the withdrawal. Therefore, absent the type of situation described in section 4235(c) and section 4211(e), [*6] i.e., where the multiemployer plan transfers some of its unfunded vested benefits to a plan to be maintained by the withdrawing employer, the employer's establishment of a new plan for its employees does not affect the employer's withdrawal liability to the multiemployer plan.

Finally, we call to your attention section 412(a)(1)(B) of the Multiemployer Act, which directs the PBGC to study "the necessity of adopting special rules in cases of union-mandated withdrawal from multiemployer pension plans". The PBGC is currently conducting that study; as yet, no date for its completion has been set.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Ronald Goldstein, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-8

March 24, 1986

REFERENCE:
[*1] 4001(b) Definitions. Employer and Controlled Group

OPINION:

I apologize for our delay in responding to your inquiry regarding the proper method for determining withdrawal liability when the liable employer is a group of trades or businesses under common control ("controlled group") within the meaning of section 4001 of ERISA, 29 U.S.C. § 1301. Your letter suggests two alternatives: (1) aggregating the contribution data for all members of the controlled group, calculating the potential withdrawal liability of the group based on this data, and "allocating" a portion of this liability to each member of the controlled group or (2) calculating potential withdrawal liability based on each member's contributions as if each member was a withdrawing employer and then aggregating each member's liability to arrive at the withdrawal liability for the entire controlled group. You indicate that your client, a multiemployer plan, has used the first method in the past but has inquired about the possible use of the second method.

ERISA section 4001(b)(1) requires that a controlled group be treated as a single employer under Title IV of ERISA. This definition of "employer" applies for all purposes under [*2] Title IV, including the provisions added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). PBGC Opinion Letter 82-13.

The second of the two methods you describe is inconsistent with the statutory definition of "employer." The second method incorrectly treats each member of the controlled group as a separate employer by determining liability for that member based on its contribution data. In many cases failure to calculate liability of the group as a whole based on its aggregate contribution obligation will lead to erroneous determinations of the amount of withdrawal liability (or of whether a withdrawal has occurred). For example, as you recognize, the de minimis rule under section 4209 reduces the withdrawal liability of an "employer"; applying the de minimis rule separately to liabilities calculated for each controlled group member might lead to the erroneous result of multiple reductions for a single employer. Similarly, the fraction used for calculating partial withdrawal liability under section 4206 is based on "the employer's" contribution base units, even if the partial withdrawal results from the withdrawal of a facility operated by only one member of [*3] the controlled group. Therefore, subject to the qualification noted below, only the first of the methods you describe is correct.

Our approval of the first method does not extend to your client's practice of "allocating" the withdrawal liability among the members of the controlled group. To the extent that such allocation limits the plan's recourse against each member of the controlled group, it is inconsistent with the fact that the members of a controlled group are jointly and severally liable to the plan for the full withdrawal liability of the group, just as members of a controlled group are jointly and severally liabe to PBGC for liability under ERISA section 4062, 29 U.S.C. § 1362, arising from termination of one member's single-employer plan. Although members of a controlled group may be concerned about allocating withdrawal liability among themselves and may assert rights of contribution or indemnification against each other, such issues do not affect a plan's right to assert joint and several liability against all members of the controlled group.

I hope this is helpful. If you have questions, please contact the attorney handling this matter, Ronald Goldstein of our [*4] Corporate Policy and Regulations Department, at the above address or (202) 956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-10

April 10, 1986

REFERENCE:
[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4212(a) Obligation to Contribute - Definitions

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the withdrawal liability of "joint employers" under Title IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you ask whether a withdrawal occurs when an employer ceases making contributions to a multiemployer plan because it entered into an arrangement with another employer that provides employees and that makes some or all of the contributions for those employees. You also ask what contribution history is used in determining the withdrawal liability of the first employer when that employer contributed directly to a multiemployer plan only prior to the enactment of the Multiemployer Pension Plan Amendments Act ("MPPAA") and at all times after enactment was a joint employer with the other company, which eventually withdrew from the plan.

You represent that prior to 1977, A * * * made contributions directly to the * * * Fund * * *. In 1977, A entered into a leasing agreement with B * * * and B began making some contributions to the [*2] Fund for the employees it provided to A. A also made substantial contributions to the fund for those employees during its agreement with B.

B and A terminated their agreement in 1979, and * * * C entered into an agreement with A. Under their agreement, C made all of the contributions to the fund for the employees it provided A. C withdrew from the Fund in 1982. There is no corporate affiliation or common ownership between A and C or A and B. However, you state that A exercised such close supervision and control over the day-to-day working conditions of the employees provided by C and B that in your opinion A was a joint employer for purposes of the NLRA. Further, you represent that as a joint employer was bound under labor law by any collective bargaining agreement covering the employees provided by C and B, and therefore may, like C and B, have been obligated to contribute to the Plan.

Your first question is whether a withdrawal occurred when A entered into the agreements first with B and then with C. Under section 4203(a) of ERISA, a withdrawal from a multiemployer plan occurs when an employer permanently ceases to have an obligation to contribute or permanently ceases [*3] all covered operations under the plan. Section 4212(a) of ERISA defines "obligation to contribute" as an obligation arising under one or more collective bargaining agreements or as a result of a duty under applicable labor-management relations law.

The PBGC addressed a very similar question in Opinion Letter 85-14. In that letter, we concluded that if the first employer was a joint employer with the second employer with whom it entered into the leasing agreement, and if as a result the first employer had an obligation to contribute to the plan, then the first employer would incur a withdrawal upon the permanent cessation of its obligation to contribute. In the instant case, that would have occurred when C permanently ceased to be obligated to contribute. It follows, therefore, that A would not have incurred a withdrawal when it entered into the leasing agreements. This conclusion, of course, assumes that A was a joint employer with C and did have a duty to contribute under the NLRA.

Your other question is how withdrawal liability should be calculated for that withdrawal. The amount of an employer's withdrawal liability is based on its allocable share of unfunded vested benefits [*4] determined under section 4211 of ERISA. This amount is generally proportional to contributions required to be made by the employer. Since neither A and C nor A and B appear to constitute a single employer within the meaning of section 4001(b) of ERISA, A's obligatins and liabilities under Title IV would be determined separately from B's and C's.

Since B withdrew from the Fund prior to enactment of MPPAA it is not subject to withdrawal liability. While C withdrew after enactment of MPPAA, you represent that C was not required to contribute to the Fund prior to its relationship with A. Therefore, C's contribution history should encompass only the years after the agreement. With respect to A, the question is whether the years after its agreement with, when it was obligated to contribute as a joint

employer but was not required directly to contribute to the Fund, should be included in its contribution history. You contend that these years should be included.

Opinion Letter 85-14 also addressed this issue and concluded that there is a difference between "an obligation to contribute" and "contributions required to be made by the employer", the latter being the operative term for [*5] purposes of determining an employer's allocable share under section 4211. "An obligation to contribute" is a broader term that includes both the present requirement to make contributions to a plan and an obligation to contribute that is contingent upon an event that has not yet occurred.

It is, therefore, our opinion that years in which A had an obligation to contribute to the Fund but was not required to contribute should not be included in its contribution history for the purpose of calculating its withdrawal liability. Since you represent that A was required to contribute to the Fund only in the years prior to its agreement with C, those are the only years that should be included in its contribution history for purposes of calculating its withdrawal liability.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202)956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-11

May 13, 1986

REFERENCE:
[*1] 4219 Notice and Collection of Withdrawal Liability
4221 Resolution of Disputes
29 CFR 2644.2(c) Review or Arbitration of Liability Determination
29 CFR 2644.2(d) Overpayments

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the meaning of the PBGC's regulation on Notice and Collection of Withdrawal Liability, 29 CFR § 2644.2(d). Specifically, you ask whether that section requires a sponsor of a multiemployer plan to refund to an employer, with interest, excess withdrawal liability paid by the employer to the plan, in the event the plan sponsor on its initiative discovers an error in its withdrawal liability assessment against the employer but the employer failed to initiate the plan review and arbitration process of sections 4219 and 4221 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Section 2644.2(d) of the PBGC's regulations provides as follows --

If the plan sponsor or an arbitrator determines that payments made in accordance with the schedule of payments established by the plan sponsor have resulted in an overpayment of withdrawal liability, the plan sponsor shall refund the overpayment, with interest, [*2] in a lump sum.

You note that this language is broad and might be interpreted to require a refund in any case where a plan sponsor determines that the amount of its original withdrawal liability determination is erroneous, notwithstanding the fact that the employer has failed, within the time prescribed by law, to initiate review or arbitration. You also note, however, that the context of § 2644.2(d) suggests that the plan sponsor is required to refund an overpayment only where an error is discovered by the plan sponsor or arbitrator during the dispute resolution process provided in sections 4219 and 4221 of ERISA.

We agree that, read in its proper context, § 2644.2(d) does not require a plan sponsor to refund an overpayment when the employer has failed to initiate the plan review and arbitration process of sections 4219 and 4221. Section 2644.2(d) requires a refund when, "the plan sponsor or an arbitrator determines that there was an overpayment." The preceding paragraph, § 2644.2(c), provides rules on the employer's obligation to make withdrawal liability payments during the pendency of any plan review or arbitration proceeding. Read in context with § 2644.2(c) and considering [*3] the reference to an arbitrator's determination in § 2644.2(d), we believe it is clear that the plan sponsor's determination referred to in § 2644.2(d) is limited to the plan sponsor's determination in a plan review under section 4219.

This conclusion is consistent with section 403(c) of ERISA and section 401(a)(2) of the Internal Revenue Code, which provide that a plan sponsor of a multiemployer plan may, within six months of determining that there has been an overpayment of withdrawal liability, return the overpayment to the employer. Section 2644.2(d) creates an exception to this rule, the purpose of which is to encourage the timely payment of withdrawal liability while an employer is pursuing its statutory rights to challenge the assessment. Once those rights have been exhausted or the time for their exercise has expired, the purpose for this exception no longer exists and thus the exception should no longer apply.

I hope this has been of assistance. If you have further questions, please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General [*4] Counsel

Pension Benefit Guaranty Corporation

86-12

May 23, 1986

REFERENCE:
[*1] 4206(b)(1) Adjustment for Partial Withdrawal. Reduction of Liability for Subsequent Withdrawal
4219(c)(1)(E) Notice and Collection of Withdrawal Liability. Partial Withdrawal Liability Payments

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the application of sections 4206(b)(1) and 4219 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to the computation of the annual payments owed by an employer that has incurred successive partial withdrawals.

Your letter presents as an example an employer that has experienced two partial withdrawals under section 4205(a)(2), the first in 1983 and the second in 1984. You note that section 4219(c)(1)(E) clearly provides the proper method for calculating the annual payment for the first partial withdrawal. You observe, however, that if that same method is used for calculating the annual payment for the second partial withdrawal, the total of the two annual payments may, of a period, exceed the annual payments the employer would have owed for a complete withdrawal. You suggest two alternative methods of calculating the annual payment for the second partial withdrawal [*2] that would avoid this result.

We agree that section 4219(c)(1)(E) can be read to require, under certain circumstances, total annual partial withdrawal liability payments that exceed the annual payments that the employer would have been required to make for a complete withdrawal. However, as you observe, this result seems inconsistent with the legislative history on annual partial withdrawal liability payments. We are therefore not prepared to say at this time that the proper interpretation of section 4219(c)(1)(E) would produce this result.

We are planning to issue a proposed regulation that would address the proper method for calculating annual payments for partial and complete withdrawals following a partial withdrawal. Section 4224 of ERISA provides that:

A multiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with this Act and with such regulations as may be prescribed by the [PBGC].

Pending the PBGC's issuance of regulations on the manner in which annual payments for withdrawals following partial withdrawals are determined, plans may thus adopt rules under section [*3] 4224 to avoid anomalous situations that might otherwise result from the application of section 4219(c)(1)(E) so long as those rules are consistent with ERISA. After the PBGC issues its regulations, the plan's rules must also be consistent with those regulations.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-17

August 13, 1986

REFERENCE:
[*1] 4205(b)(2)(A) Partial Withdrawals. Definition of Partial Cessation

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the interpretation of section 4205(b)(2)(A)(i) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

In the situation you describe, a retail food chain operated a warehouse serving its stores in a defined geographical area. You represent that the warehouse functions were performed by employees of the food chain under a collective bargaining agreement pertaining only to that warehouse, which called for contributions to a multiemployer pension plan.

You state that the chain closed the warehouse in 1981. At that time the chain terminated the employees and ceased performing the warehousing functions they previously performed at that warehouse. According the your letter, the chain then entered into separate contracts with a produce wholesaler and a grocery wholesaler, both of which are unrelated to the chain in any way. Under these contracts, the wholesalers receive goods from vendors, warehouse them and respond to orders from the [*2] stores of the chain by selecting, assembling and delivering the goods to the stores. The wholesalers bill the chain for the goods delivered to the store.

You also represent that the wholesalers operate commercial wholesaling businesses and serve customers other than the chain involved in this case. All of the warehousing functions are performed by the wholesalers using their own employees and their own equipment. You indicate that the chain has no control over how or where the wholesalers operate. Finally, you represent that the chain operates another warehouse, serving its stores in a different geographic location. The employees in the chain's other warehouse operate under a collective bargaining agreement that calls for contributions to the multiemployer pension plan in question.

You ask whether an employer that permanently ceases covered work under one of its collective bargaining agreements and instead contracts to buy the service or product from an independent third party "transfers such work to another location" within the meaning of section 4205(b)(2)(A)(i) of ERISA.

Section 4205(a)(2) of ERISA provides that there is a partial withdrawal by an employer when there is [*3] a partial cessation of the employer's contribution obligation. Section 4205(b)(2)(A)(i) provides that there is a partial cessation of the employer's contribution obligation to a multiemployer plan when --

an employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location . . . .

Thus a partial cessation occurs under this provision when contributions cease under a collective bargaining agreement and either of two circumstances occurs: (1) the employer continues to perform the same type of work within the agreement's jurisdiction; or (2) he transfers the same work to another location.

You note that Congressman Thompson, the floor manager of MPPAA, explained the application of section 4205(b)(2)(A)(i). In a statement on the day MPPAA passed the House of Representatives, Congressman Thompson stated:

It is important to emphasize and to understand that [*4] in no case do these rules impose liability on an employer for merely ceasing or terminating an operation; rather, they address only situations where work of the same type is continued by the employer but for which contributions to a plan which were required are no longer required. Congressional Record, p. H 7900, August 26, 1980. (Emphasis added).

It is our opinion that the language of the statute, interpreted in light of this legislative history, indicates Congress's intent to limit section 4205(b)(2)(A)(i) to situations in which the same employer continues to perform work in the jurisdiction of the collective bargaining agreement or transfers the same type of work to another one of its own locations. An employer that permanently ceases covered work under one of its collective bargaining agreements and instead contracts to buy the service or product from an independent third party therefore does not "transfer such work to another location" within the meaning of section 4205(b)(2)(A)(i) of ERISA.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. [*5] His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-18

August 19, 1986

REFERENCE:
[*1] 4217(a)(2) Applicability of MPPAA to Certain Pre-1980 Withdrawals. Work Performed at a Facility

OPINION:

Dr. Utgoff has asked me to respond to your letter to her, dated June 6, 1986, in which you requested the withdrawal of PBGC Opinion Letter 86-2. That opinion, issued on January 31, 1986, discussed the meaning of the term "facility" for purposes of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). You asserted that,

In stating his opinion on the meaning of the term "facility," the PBGC's General Counsel attempted to transform the opinion into a regulation having the force and effect of law, seeking thereby to create new duties for plan fiduciaries . . . . By issuing an opinion letter that purports to preclude all plan fiduciaries from adopting and/or enforcing provisions in the documents and instruments governing plans, the PBGC has delegated to itself power far beyond that ceded by the Congress. [footnotes omitted]

You also objected to "the agency's threat to intervene where plan fiduciaries do not adhere to PBGC opinions, without regard to whether the fiduciaries have been had notice of such opinions". All this, you alleged, contravenes the requirements of due process [*2] under the Administrative Procedure Act (APA). You concluded with the intimation that your organization will seek unspecified "judicially imposed remedies" if the offending letter is not withdrawn.

Let me begin by stating, as clearly as I can, the PBGC's view of the force and effect of opinion letters issued by its General Counsel. The Corporation believes that it is entirely appropriate for it to respond to inquiries about the meaning of terms used in Title IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Your letter, indeed, refers to this practice as "laudable" and cites, without apparent disapproval, a number of PBGC opinion letters defining terms other than "facility". Opinion letters are based on the PBGC's view of the proper interpretation of the statute, a view that, according to judicial authorities, is entitled to great deference. Belland v. PBGC, 726 F.2d 839 (D.C. Cir. 1984), cert. denied U.S. , 105 S. Ct. 245 (1984); United Steelworkers of America v. Harris and Sons Steel Co., 706 F.2d 1289, 1296 (3d Cir. 1983); and Concord Control, Inc. v. International Union, UAW, 647 F.2d 701, 704 (6th Cir. 1981), cert. [*3] denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed.2d 590 (1980).

As your letter correctly pointed out, the PBGC can exercise its authority to issue regulations under Title IV of ERISA only in accordance with the procedures set forth in the APA. You did not, however, advance any serious argument for extending APA requirements to the issuance of opinion letters, nor did you distinguish Opinion Letter 86-2 from the numerous other opinions that the PBGC's General Counsel has issued over the years interpreting other provisions of Title IV.

Your objection to the legality of this particular letter seems to rest upon the fact that it "purports to preclude all plan fiduciaries from adopting and/or enforcing [plan] provisions" that are inconsistent with the PBGC's definition of "facility". Such a purported prohibition would indeed be erroneous if MPPAA gave plans broad leeway to define "facility" and the PBGC were attempting to limit that freedom. The facts, however, are somewhat different. As Opinion Letter 86-2 pointed out, Congress decided not to allow plans to adopt their own definitions of "facility". We recognize that, as a practical matter, prior to the PBGC's defining this [*4] term many plans would have needed to develop their own definitions of "facility" in order to implement certain of the statutory rules, e.g., sections 4205(b)(2)(A)(ii) and 4217(a)(2). However, since Congress chose not to give plans the authority to adopt their own definitions of "facility", once the PBGC issued its interpretation of the term, plans should be precluded from using their own, possibly inconsistent definitions. The restriction that you complain of thus arises from the statute, not from a PBGC opinion letter.

Equally unfounded is your objection - on unspecified grounds - to the PBGC's "threat" to support its interpretation of the statute by intervening or filing amicus briefs in appropriate cases. The PBGC's ability to take these actions is unrelated to its issuance of opinion letters, arising rather from its responsibility to see that Title IV of ERISA is properly interpreted. See ERISA, § 4301(g). I should note that the PBGC's intervention or filing of an amicus brief is not a

punitive action. No litigant has ever suggested, nor has any court ever hinted, that the PBGC may intervene or file as amicus in a case only if the parties have "notice" [*5] of a pertinent opinion letter.

In summary, you have not presented any persuasive grounds for reconsideration of Opinion Letter 86-2. If you wish to pursue this matter further, please contact the responsible attorney, Steven Rothenberg of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-19

August 26, 1986

REFERENCE:
[*1] 4221(e) Resolution of Disputes. Employer Informantion Request

OPINION:

This responds to your request that the Pension Benefit Guaranty Corporation (PBGC) review certain actions that you believe are in in violation of the Multiemployer Pension Plan Amendments Act (MPPAA). Specifically, you allege that a multiemployer pension plan is acting unreasonably and in violation of section 4221(e) of MPPAA by demanding payment of eleven hundred dollars before computing your client's potential withdrawal liability.

Section 4301(a) of MPPAA provides a right of civil action for any party adversely affected by another party's actions or omissions under MPPAA's provisions. Ordinarily, the PBGC does not become involved in disputes where this remedy is available. Further, in your situation, a court may be in a better position than the PBGC to evaluate the reasonableness of the pension plan's position.

If you have further questions, please contact the attorney handling this matter, John Foster, of the PBGC's Corporate Policy and Regulations Department. His telephone number is 202-956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-20

September 29, 1986

REFERENCE:
[*1] 4207 Reduction or Waiver of Complete Withdrawal Liability
29 USC 1461 Action Taken Before Regulations Prescribed
29 CFR 2647 Reduction or Waiver of Withdrawal Liability

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the proper application of our regulation on Reduction or Waiver of Withdrawal Liability, which went into effect on April 24, 1986 (51 FR 10300, March 25, 1986).

Your first set of questions concerns the application of the regulation to employers that reentered the plan from which they withdrew prior to the effective date of the final rule. You note that § 2647.8(a) of the regulation provides that the rule applies to employers that completely withdrew after September 25, 1980, and were performing covered work under the plan on April 24, 1986. Upon the application of such an employer, the plan is required to determine whether the employer satisfies the requirements for abatement of its complete withdrawal liability under the regulation. That section also provides that the general applicability of the rule to those employers shall not negate reasonable actions taken by plans prior to the effective date of the rule pursuant [*2] to plan rules, validly adopted under section 405(a) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), implementing the statutory abatement provision.

You also observe that the preamble of the regulation explains that the purpose in making the rule retroactive was to provide additional relief to employers and not to interfere with reasonable actions taken by plans. As an example, we noted that if an employer reentered a plan and satisfied the regulation's requirements for abatement prior to the regulation's effective date, and the plan had not adopted an interim rule, the employer would get the benefit of the regulation.

You assert that an employer that reentered a plan (prior to the issuance of the regulation) that had adopted reasonable interim abatement rules is not eligible for waiver or reduction of withdrawal liability in the several fact situations you hypothesize.

Section 2647.8(a) applies only to employers that reentered (prior to the effective date of the regulation) a plan that had not adopted reasonable rules implementing section 4207(a). Accordingly, an employer that reentered a plan (prior to the effective date of the regulation) that had adopted [*3] reasonable abatement rules (pursuant to section 405(a)) is not eligible for reduction or waiver of its withdrawal liability pursuant to the regulation for that reentry. This is true whether or not the employer was granted, or even applied for, abatement under the plan's rules.

You also ask how the filing deadlines under the regulation apply to an employer that reentered the plan prior to the effective date of the regulation. You note that § 2647.2(a) provides the general rule that applications for abatement must be filed by the first scheduled withdrawal liability payment falling due after the employer resumes covered operations. Section 2647.8(a) provides that employers that reentered, before the effective date of the regulation, the plan from which they withdrew, shall be eligible for abatement under the regulation in accordance with the rules of § 2647.8(a). You observe that § 2647.8(a) provides no deadline for filing an abatement application. You ask when employers that reentered before the effective date of the regulation must apply for abatement.

The language of § 2647.8(a) makes the filing deadline of § 2647.2(a) inapplicable to employers that reentered before the effective [*4] date of the regulation. Since § 2647.8(a) provides no express filing deadline, we believe that an application under that section should be considered timely if the employer files it within a reasonable time after its reentry. A determination of what is a "reasonable" time should take into account the length of time it might take the average employer to learn of the regulation (and specifically § 2647.8) and the length of time necessary to put together and submit an application for abatement. This determination is made, in the first instance, by the plan sponsor. Any disputes arising therefrom are to be resolved first through arbitration and then, if necessary, in the courts.

Your final question concerns the obligation of an employer that is granted abatement to pay withdrawal liability for the period prior to its reentry into the plan. You note that ERISA and the regulation generally are clear that withdrawal liability must be paid in accordance with the schedule established by the plan, notwithstanding any dispute the employer may have as to the existence or extent of the liability. You suggest, however, that § 2647.6(c)(2) of the regulation might be read to postpone an employer's [*5] obligation to make pre-reentry withdrawal liability payments that are in arrears at the time of reentry until the employer incurs a subsequent withdrawal.

This is neither the intended meaning, nor, we believe, the better reading of § 2647.6(c)(2). That rule provides only that the unfunded vested benefits allocable to a withdrawing employer for its previous withdrawal should be reduced to reflect payments made against that prior liability. That rule is not authority for withholding payments due prior to reentry. We believe § 2647.2(c)(1) and (c)(4) make clear that abatement relieves the obligation to make withdrawal liability payments only with respect to payments due after reentry.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-21

September 29, 1986

REFERENCE:
[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4205 Partial Withdrawals
>4205(b)(2)(A)>

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation on several questions regarding the calculation of withdrawal liability with respect to partners and the application of section 4205 of the Employee Retirement Income Security Act, as amended (ERISA), to circumstances you present.

Your first set of questions relates to partnerships that share vacum coolers used to prevent spoilage of newly harvested * * * You represent that due to the cost and immobility of vacuum coolers, employers typically enter into agreements for the use of the coolers. Each employer has its own employees and its obligation to contribute to the Pension Trust is determined by its own collective bargaining agreement. A vacuum cooler partnership has its own employees and collective bargaining agreement. Your questions concern withdrawal liability of such a partnership for operations under its collective bargaining agreement.

You state that vacuum cooler arrangements are very fluid, with each partner's percentage during any given season depending on the amount of * * [*2] * it processes through the vacuum cooler. Because * * * growers often change their fields from year to year, it is not unusual for members of a vacuum cooler partnership to change on a yearly basis or even for such a partnership to be formed for a single season only. You assert that the unfunded vested benefit liability of continuing partnerships may be partly attributable to hours worked by partnership employees for the benefit of former partners.

Your first set of questions assumes that a partnership that is obligated to contribute to a multiemployer plan withdraws from the plan. You ask first whether the former members of the partnership are liable for any withdrawal liability. It is our opinion that an employer that is a partnership does not completely withdraw from the plan, as described in ERISA section 4203(a), until the partnership dissolves or otherwise permanently ceases to have an obligation to contribute under the plan. At that time, withdrawal liability should be assessed against only the partners at the time of the withdrawal. Former members of the partnership are not liable for any withdrawal liability.

You next ask whether the partnership's withdrawal liability [*3] is determined exclusively by the collective bargaining agreement(s) in force at the time of withdrawal and whether partners at the time of withdrawal are solely liable for any withdrawal liability. Withdrawal liability is determined by the collective bargaining agreements of the partnership during the period used to calculate withdrawal liability under the allocation method used by the plan. Partners at the time of withdrawal are solely liable for any withdrawal liability.

Your next question is whether the partnership's unfunded vested benefits are reduced by the unfunded vested benefits attributable to former partners. Unfunded vested benefits attributable to former partners are not deducted from the partnership's unfunded vested benefits, unless responsibility for its period of participation is expressly assumed by a former partner. Since the partnership included those partners at the time the unfunded vested benefits were accrued, the partnership's unfunded vested benefits at the time of withdrawal should also include the unfunded vested benefits attributable to the former partners.

You also ask how withdrawal liability should be allocated among partners in the type of partnership [*4] described above. ERISA does not address the allocation of withdrawal liability among individual members of the employer, e.g., trades or business under common control, or partners. Rather, all members of the employer at the time of the withdrawal are jointly and severally liable for the withdrawal liability.

Your final question in this set concerns the ability of the plan to assign unfunded vested benefits to an individual partner. Since the partnership is the employer, withdrawal liability must be assessed against it alone. Unfunded vested benefits attributable to individual partners may not be assigned to them by the plan and later used to increase their

withdrawal liability in a new or related business.

Your second set of questions concerns * * * growers. You represent that * * * have traditionally been harvested in the field, taken to a packing shed and from the packing shed to the market. You indicate that recently a trend toward packing in the field has developed, which eliminates the need for the packing shed. This trend has resulted in the replacement of shed packing employees with field packing employees. While shed employees are unionized and covered by your pension [*5] plan, you represent that most field packing employees are non-unionized and those who are unionized are covered by another pension plan.

The first two questions related to this fact situation are whether an employer who moves his * * * packing operations from a packing shed to his field "continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required" or "transfers such work to another location," for complete and partial withdrawal liability purposes. These questions are relevant only to whether the employer had a partial withdrawal under section 4205(b)(2)(A)(i) of ERISA, and the answers to these questions depend upon a factual question, i.e. whether packing in the field is the same type of work as packing in the shed for purposes of section 4205(b)(2)(A)(i). Section 4205(b)(2)(A)(i) provides that a partial withdrawal occurs if an employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective [*6] bargaining agreement of the type for which contributions were previously required or transfers such work to another location.

Under the multiemployer provisions of ERISA, the initial responsibility for deciding factual questions necessary to determine whether any particular action constitutes a withdrawal from a multiemployer plan lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. If packing in the field is the same type of work as packing in the shed and the employer permanently ceases to have an obligation to contribute for that work under one or more but fewer than all of its collective bargaining agreements, there is a partial withdrawal under section 4205(b)(2)(A)(i). Whether such work is within the jurisdiction of the collective bargaining agreement or transferred to another location will depend on the language of the collective bargaining agreement. In either event, there is a partial withdrawal under section 4205(b)(2)(A)(i).

Your final question is whether an employer that moves packing operations from the shed [*7] to the field incurs a partial withdrawal under section 4205(a)(2). That section provides that there is a partial withdrawal if there is a partial cessation of the employer's contribution obligation. Section 4205(b)(2)(A) defines two types of partial cessations of the employer's contribution obligation. Whether a partial withdrawal has occurred under the "bargaining unit takeout" provision (section 4205(b)(2)(A)(i)) depends on the answers to the two preceding questions. Whether a partial withdrawal has occurred under the "facility takeout" provision (section 4205(b)(2)(A)(ii)) depends upon what constitutes a "facility" in these circumstances. In Opinion Letter 86-2, we stated that under generally accepted economic terminology, the term "facility" means a discrete economic unit of the employer. The plan sponsor (and, if necessary, an arbitrator and the courts) must apply this definition to the facts in your case to determine whether there is a partial withdrawal under section 4205(b)(2)(A)(ii).

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. [*8] His telephone number is (202) 956-5050.

Edward R. Macklewicz
General Counsel

Pension Benefit Guaranty Corporation

86-22

October 14, 1986

REFERENCE:
[*1] 4211(b) Withdrawal Liability - Presumptive Method
4211(b) Withdrawal Liability - Allocation by Amendment
4211(c)(5) Withdrawal Liability - PBGC Approval of Alternative Methods

OPINION:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) with regard to three questions concerning the statutory methods for allocating a multiemployer pension plan's unfunded vested benefits to withdrawing employers under section 4211 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Section 4211(b) describes an allocation method called the "presumptive method" that is to be used by any plan (other than a plan described in section 4211(d)) unless the plan is amended to adopt a different method. Section 4211(c)(2), (c)(3), and (c)(4) describe three alternative allocation methods that may be adopted by plan amendment; section 4211(c)(5) provides for the adoption of methods other than those described in the statute. ERISA does not explicitly provide for the adoption of the presumptive method by a plan that is using another allocation method.

Section 4211(c)(5) gives the PBGC authority to regulate the adoption of modifications to the four [*2] statutory methods described in section 4211(b), (c)(2), (c)(3), and (c)(4), and the adoption of allocation methods other than the four statutory methods. Section 4220 subjects to PBGC approval any plan amendment authorized by sections 4201-4219 of ERISA, other than amendments that are covered by section 4211(c)(5).

The PBGC has exercised its authority under ERISA section 4211(c)(5) by issuing its Interim Regulation on Allocating Unfunded Vested Benefits (29 CFR Part 2642). The PBGC has also issued a regulation on Procedures for PBGC Approval of Plan Amendments (29 CFR Part 2677) pursuant to ERISA section 4220. The latter regulation exempts from its approval procedures any plan amendment for which the PBGC has granted a class approval. On September 25, 1984 (49 FR 37686), the PBGC published a class approval of any plan amendment that adopts one of the three alternative allocation methods described in section 4211(c)(2), (c)(3), or (c)(4) of ERISA.

Your first question is whether a plan using one of the four statutory allocation methods must get PBGC approval to adopt a different statutory method. If the new method is one of the three alternative methods decribed in section 4211(c)(2), [*3] (c)(3), and (c)(4), no approval need be obtained because the adoption of any of those three methods is covered by the class approval of September 25, 1984. If the new method is the presumptive method described in section 4211(b), no approval need be obtained because the amendment is not one described either in section 4211(c)(5) or elsewhere in sections 4201-4219, and therefore the PBGC has no authority to regulate or disapprove the amendment. It is not important which allocation method is being used before the change, or even whether the method in use before the change is one of the statutory methods or some other method.

Your second question is whether the adoption of an allocation method that is a combination of two or more of the statutory methods would require PBGC approval. A hybrid method combining features of two or more of the statutory methods is not itself a statutory method. Thus the adoption of a hybrid method is allowable, if at all, only under ERISA section 4211(c)(5) and the Interim Regulation on Allocating Unfunded Vested Benefits. That regulation permits certain amendments to a plan's allocation method without PBGC approval, but the adoption of a hybrid method [*4] is not among the amendments so allowed. Accordingly, the adoption of a hybrid method would require PBGC approval. As with your first question, it is not important what the plan's allocation method is before the change.

Your third question is whether a particular allocation method is a statutory method. We assume that the point of this question is whether PBGC approval is needed to adopt the method. The method, described in a motion adopted by the plan trustees and enclosed with your request, provides that the plan adopt:

the two-pool method for computing withdrawal liability as set forth in Section 4211(c)(2) of ERISA as amended

by the Multiemployer Pension Plan Amendments Act of 1980 and that an employer's allocable share of the liability for unfunded vested benefits be determined by using ten years instead of five years for determining the contribution numerator and denominator as provided under Section 4211(c)(5)(C).

Thus your question is whether the use of a ten-year fraction with the allocation method described in section 4211(c)(2), instead of the five-year fraction described in that section, changes the method in such a way that it may be adopted only with PBGC approval. [*5]

As noted above, the adoption of the allocation method described in section 4211(c)(2) does not require PBGC approval. Section 4211(c)(5)(C) of ERISA permits a plan to be amended to use ten-year rather than five-year fractions in its allocation method "[u]nless the [PBGC] by regulation provides otherwise." The PBGC has not adopted any restrictions on amendments under section 4211(c)(5)(C). Accordingly, such amendments may be made without PBGC approval.

If you have any further questions about this matter, you may call Deborah C. Murphy of the PBGC's Corporate Policy and Regulations Department at 202-956-5050 (after October 13: 202-778-8850).

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-23

October 15, 1986

REFERENCE:
[*1] 4207(a) Reduction or Waiver of Complete Withdrawal Liability. Regulation Authority.
29 CFR 2647 Reduction or Waiver of Withdrawal Liability.

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) regarding the application of the PBGC's regulations issued under Section 4207(a) of the Employee Retirement Income Security Atc, as amended (ERISA). Specifically, you ask whether, under 29 CFR § 2647.8(d), a withdrawn employer "otherwise combines with an employer that has an obligation to contribute to the plan from which the first employer withdrew," when the withdrawn employer purchases the assets of a division of another contributing employer.

In the fact situation you present, an employer withdraws from a multiemployer plan, thereby incurring withdrawal liability. Later, the employer acquires the assets of a division of another employer. Before and after this acquisition, the employees in this division are covered by the multiemployer plan and contributions are made on their behalf. The purchasing employer, in combination with the purchased division, meets the requirements for waiver of its withdrawal liability under 29 CFR 2647.4, [*2] but does not meet the additional requirements placed on combined entities by 29 CFR § 2647.8(d).

Section 2647.8(d) governs the waiver of withdrawal liability for an employer who has reentered a multiemployer plan as the result of any consolidating transaction with a contributing employer, e.g., merger, purchase of assets, etc. It permits waiver of withdrawal liability only if the contribution base units of the eligible employer (i.e., the employer after the transaction) in the measurement period equal at least the contribution base units of the employer that did not withdraw in the last plan year ending before the measurement period plus an amount equal to 30 percent of the base year contribution base units of the employer that withdrew. Thus, this test looks to an overall increase in the plan's contribution base units.

Because § 2647.8(d) expressly states that it applies when an employer "merges or otherwise combines" with another employer, this phrase includes the purchase of the assets of the covered operations of another employer as described in you inquiry. The phrase "otherwise combines" casts a broad net to cover those acquisitions and other transactions that cannot be [*3] strictly classified as mergers, but nevertheless have the potential for increasing a withdrawn employer's contribution base units without increasing the contribution base units received by the plan.

If you have further questions, please contact the attorney handling this matter, John Foster, of the PBGC's Corporate Policy and Regulations Department. His telephone number is 202-778-8850.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

86-24

October 31, 1986

REFERENCE:
[*1] 4213 Actuarial Assumptions
4213(c) Actuarial Assumptions. Unfunded Vested Benefits - Definition

OPINION:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) as to the proper method of determining withdrawal liability under the Employee Retirement Income Security Act of 1974 (ERISA) in the case of a multiemployer pension plan that provides optional ancillary benefits in addition to the basic benefits. Specifically, you ask what actuarial assumptions should be used to determine the amount of unfunded vested benefits on which withdrawal liability is based, and whether the calculation of unfunded vested benefits should take into account "vested" ancillary benefits and assets "attributable" to them.

The ancillary benefits in question are provided only for the employees of employers that make specified payments to the plan in addition to the contributions required of them to support the basic benefits. However, we understand that the ancillary benefits are payable from the same general fund as the basic benefits.

The term "unfunded vested benefits" is defined in section 4213(c) of ERISA as the value of nonforfeitable benefits under the plan, [*2] less the value of the assets of the plan. The term "nonforfeitable benefit" is defined in section 4001(a)(8) of ERISA. Although that provision does not explicitly mention either basic or ancillary benefits, it is the PBGC's opinion that the term is intended to apply only to basic benefits. Therefore, ancillary benefits, whether "vested" or not, should not be taken into account in determining unfunded vested benefits. On the other hand, where all plan assets are in a single fund for the payment of all benefits, there is no basis for excluding any part of the assets from the determination of unfunded vested benefits. The full amount of plan assets, whether derived from contributions for basic benefits or from additional payments made for ancillary benefits, is to be subtracted from the value of nonforfeitable (basic) benefits to arrive at unfunded vested benefits.

You indicate that the plan has been computing unfunded vested benefits for withdrawal liability purposes using the PBGC's interest assumption for terminated trusteed single-employer plans and question whether this is appropriate, since these assumptions "are not for multiemployer plans and . . . generate lower liabilities," [*3] and since the assumptions are not the same as those used for purposes of section 412 of the Internal Revenue Code of 1954 (the Code).

There is no requirement that the actuarial assumptions used to determine withdrawal liability be the same as those used for purposes of section 412 of the Code. Section 4213(b) of ERISA states merely that

[i]n determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability . . ., the plan actuary may . . . rely on the most recent complete actuarial valuation used for purposes of section 412 of the . . . Code . . . .

(Emphasis supplied.) This is a permissive, not a mandatory, provision. Thus, the fact that the assumptions used to compute withdrawal liability are not the same as those used under section 412 of the Code does not of itself make those assumptions improper.

Section 4213(a) of ERISA permits the PBGC to issue regulations prescribing actuarial assumptions to be used in calculating withdrawal liability. No such regulations have been issued. In the absence of such regulations, section 4213(a) requires simply that

[w]ithdrawal liability . . . shall be determined by each plan on the [*4] basis of . . . actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan . . . .

The PBGC is not in a position to advise actuaries what assumptions are appropriate in each individual case. In particular, the PBGC cannot advise you whether and, if so, how the actuarial assumptions used to determine withdrawal liability under the plan should take into account the plan's experience in receiving and making payments under its ancillary benefit provisions and expectations about its anticipated experience.

If you have any further questions about this matter, you may call Deborah C. Murphy of the PBGC's Corporate Policy and Regulations Department at 202-778-8850.

Edward R. Mackiewicz
General Counsel

Pension Benefit Guaranty Corporation

87-1

January 23, 1987

REFERENCE:
[*1] 4203(e) Date of Complete Withdrawal
4205(b)(1)Partial Withdrawals
70 Percent Decline
4205(b)(2)(A) Partial Withdrawals
Definition of Partial Cessation

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation (PBGC) as to the circumstances under which a bankruptcy proceeding may give rise to withdrawal liability under Sections 4203 and 4205 of the Employee Retirement Income Security Act, as amended (ERISA).

Section 4203 of ERISA defines a complete withdrawal from a multiemployer plan as occurring when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. Section 4205(b)(2) provides that a partial withdrawal occurs in certain circumstances where the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements or permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities. Section 4205(b)(1) provides that a partial withdrawal also may occur as a result of a sustained 70 percent decline in the employer's [*2] contribution base units.

Filing a petition for reorganization under Chapter 11 of the Bankruptcy Code does not constitute a withdrawal. By itself the filing of a reorganization petition does not affect the employer's obligation to contribute, covered operations, or contribution base units.

Section 1113 of the Bankruptcy Code does allow a debtor in possession to reject its collective bargaining agreement, including its obligation to contribute to a multiemployer plan, if specified conditions are met. In specified circumstances, Section 1113 also allows the bankruptcy court to authorize implementation of interim changes in the collective bargaining agreement prior to court approval of rejection. However, this section does not permit unilateral changes in a collective bargaining agreement until the requirements for rejection or for interim changes have been met. Until that time, the obligation to contribute under a collective bargaining agreement continues.

If an employer in a Chapter 11 reorganization stops contributing to a multiemployer plan after being authorized under Section 1113 either to reject its collective bargaining agreement or to implement interim changes in the [*3] collective bargaining agreement, then an inquiry into the facts and circumstances of the situation is needed to determine whether a withdrawal has occurred, including whether the cessation of the obligation to contribute is permanent. If the employer permanently ceases covered operations for any reason, including the conversion of a Chapter 11 reorganization to a Chapter 7 liquidation or the entry of an order of relief in an involuntary Chapter 7 bankruptcy, a withdrawal will have occurred.

Assuming a withdrawal has occurred, the date of the withdrawal is determined under ERISA, not under the Bankruptcy Code. Thus, if the withdrawal is based on a permanent cessation of covered operations, the date of withdrawal is the date when operations ceased. See Section 4203(e) of ERISA. It does not relate back to the date of filing of a Chapter 11 petition or an involuntary Chapter 7 petition if operations continued thereafter. Similarly, if the withdrawal is based on a permanent cessation of the obligation to contribute, the date of withdrawal is the date when the obligation to contribute ceased. See Section 4203(e) of ERISA. It does not relate back to the date of filing of a [*4] Chapter 11 petition even if the obligation to contribute ultimately was rejected under Section 1113. See Trustees of Amalgamated Insurance Fund v. McFarlin's Inc., 789 F.2d 98, 104 n.2 (2d Cir. 1986) (withdrawal liability "does not derive from the collective bargaining agreement but from [ERISA]. . . .").

Of course, the initial responsibility for determining whether any particular action constitutes a withdrawal from a

multiemployer plan lies with the plan sponsor. ERISA further provides that a dispute between a plan sponsor and an employer on this issue is to be resolved by arbitration, subject to review in courts.

I hope this response has been of assistance. If you have further questions, please contact the attorney handling this matter, John Foster of the Corporate Policy and Regulations Department. His telephone number is 202-778-8850.

John H. Falsey
Acting General Counsel

Pension Benefit Guaranty Corporation

87-2

January 28, 1987

REFERENCE:
[*1] 4204 Sale of Assets

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation ("the PBGC") on the application of Section 4204 of the Employee Retirement Income Security Act, as amended ("ERISA" or "the Act"). Specifically, you ask whether ERISA Section 4204 applies when a manufacturer and distributor ("the seller") partially or completely ceases participation in a multiemployer plan by selling its distribution rights to local distribution companies ("the purchasers") and assigning to the purchasers leases for vehicles used in delivery of the seller's product.

Under ERISA Section 4204, a complete or partial withdrawal does not occur as a result of a bona fide, arm's-length sale of assets to an unrelated party if (1) the purchaser has an obligation to contribute for substantially the same number of contribution base units for which the seller had an obligation to contribute; (2) the purchaser provides a bond or establishes an escrow for five plan years following the sale; and (3) the contract for the sale provides that the seller is secondarily liable to the plan if the purchaser withdraws during those five plan years and fails to pay its withdrawal [*2] liability.

Anything of value, including distribution rights and leases, may be an asset within the meaning of ERISA Section 4204. In the situation you describe, it appears that the distribution rights and leases are an integral part of the purchasers' performance of the work that gave rise to the seller's obligation to contribute to the plan and the purchasers will be obligated to contribute with respect to such work. In such a case, the PBGC's opinion is that the sale of these assets would constitute a sale of assets within the meaning of Section 4204, and that section would apply to the transaction if the other requirements of that section are met.

The PBGC has not independently verified the facts set forth in your letter and does not opine whether the distribution arrangement constitutes a sale. ERISA provides that the determination of factual questions arising under ERISA Sections 4201-4219 is, in the first instance, the responsibility of the plan sponsor. The Act further provides that an employer's dispute of the plan sponsor's determination is to be resolved first through arbitration, subject to review in the courts.

If you have further questions, please contact the attorney [*3] handling this matter, John Foster, of the PBGC's Corporate Policy and Regulations Department. His telephone number is 202-778-8850.

John H. Falsey
Acting General Counsel

Pension Benefit Guaranty Corporation

87-3

February 3, 1987

REFERENCE:
[*1] 4217 Applicability of MPPAA to Certain Pre-1980 Withdrawals
4217(a)(2) Applicability of MPPAA to Certain Pre-1980 Withdrawals
Work Performed at a Facility

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") on the application of Section 4217(a)(2) of the Employee Retirement Income Security Act, as amended ("ERISA"). Specifically, you ask whether the sale and subsequent independent operation of one department of an employer require that department to be treated as a separate facility under Section 4217(a)(2).

As you represent the facts, an employer ("the selling employer") operated three departments for which it was obligated to contribute to a multiemployer plan ("the plan"). In 1976, the selling employer sold one department, known as the * * * Department. The * * * Department was functionally integrated with the other two departments before the sale, but was operated as a separate facility by the purchaser. Later, when the selling employer was contemplating selling the rest of its covered operations, it asked the plan to compute its withdrawal liability. (The plan uses a modified version of the direct attribution method to compute [*2] unfunded vested benefits allocable to an employer.) In making its computation, the plan included the assets and liabilities attributable to all the covered work performed at the * * * Department before the sale. The selling employer objected to the plan's computation of withdrawal liability, asserting that all liabilities attributable to the * * * Department must be excluded from the computation on the ground that the * * *. Department constituted a separate facility for which there was a permanent cessation of the obligation to contribute before September 26, 1980.

Section 4217 of ERISA provides, in pertinent part, as follows:

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable --

(2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the [*3] obligation to contribute before that date, * * * shall not be taken into account.

29 U.S.C. § 1397(a)(2).

This statutory wording clearly indicates that the relief of Section 4217(a)(2) is conditioned on the cessation of the covered operations or the obligation to contribute with respect to an employer's facility. In this case, if the * * * Department was not a facility, but only a part of a larger facility, * * * Section 4217(a)(2) offers no relief. It is the PBGC's opinion that, as a matter of law, the determination of whether the Department was a facility within the meaning of Section 4217(a)(2) should be based solely on the facts and circumstances relating to the selling employer's covered operations. The sale and subsequent operation of the * * * Department by the purchaser have no relationship to these covered operations, and thus those facts are not pertinent to deciding if the * * * Department was a facility of the selling employer within the meaning of Section 4217(a)(2).

Of course, the initial responsibility for reviewing the facts and circumstances relating to the seller's claim that the Department was a separate facility lies with the plan sponsor. ERISA further [*4] provides that any dispute between a plan sponsor and an employer is to be resolved by arbitration, subject to review in the courts.

If you have further questions, please contact the attorney handling this matter, John Foster, of the PBGC's Corporate

Policy and Regulations Department. His telephone number is 202-778-8850.

John H. Falsey
Acting General Counsel

Pension Benefit Guaranty Corporation

87-5

July 19, 1987

REFERENCE:
[*1] 4203(a) Complete Withdrawal General. Definition of Complete Withdrawal
4203(b)(2) Definition of Withdrawal from Construction Industry Plan
4212(a) Obligation to Contribute - Definitions

OPINION:

This letter responds to your recent request for an opinion concerning withdrawal from a construction industry pension plan.

In your letter, you wrote that you represent a large retailer who normally uses general contractors to build new stores and to handle major renovations of existing stores. The contractors are usually signatories to collective bargaining agreements and pursuant thereto make contributions to a multiemployer pension plan. You also indicated that your client directly hires individuals from a union hiring hall to do final "fixturing" and to complete other minor work. When this occurs, your client signs existing bargaining agreements with the union involved. Usually the agreements expire by mutual consent at the end of a particular job, but if a union refuses to agree to such a limitation, your client signs a normal agreement without limitations, but later repudiates the agreement.

In answering your letter we are assuming that the pension plans to which your client contributes [*2] are construction industry plans, even though you do not explicitly state that to be the case. Under section 4203(b)(2) of the Employee Retirement Income Security Act, as amended (ERISA), a withdrawal from a construction industry plan occurs only if the employer (1) ceases to have an obligation to contribute under the plan and (2) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required by it, or resumes such work within 5 years after the cessation of the obligation to contribute without also renewing the obligation. The obligation to contribute ceases when the relevant collective bargaining (or related) agreement no longer applies to the employer, whether by the actions of the signatory parties or otherwise. This determination must be made on the basis of the facts of a particular case. If after being obligated to contribute to a construction industry plan, an employer ceases to perform covered work in the collective bargaining jurisdiction for whatever reason, no withdrawal has occurred. A withdrawal occurs only if the employer performs such work without being obligated to contribute.

You [*3] should be aware that determinations concerning whether a withdrawal has occurred and the amount of any liability are, in the first instance, the responsibility of the plan sponsor, not the PBGC. See section 4202 of ERISA. If a dispute arises concerning a plan's determination, the dispute is to be resolved through arbitration and, if necessary, the courts. See sections 4219 and 4221 of ERISA.

I hope this letter has been of assistance. If you have further questions, please contact Philip Hertz of my staff at the above address or at (202) 778-8821.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

87-8

August 14, 1987

REFERENCE:
[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4212(a) Obligation to Contribute - Definitions

OPINION:

This is in response to your recent letter and telephone call requesting the views of the Pension Benefit Guaranty Corporation (the "PBGC") on whether a complete or partial withdrawal under Sections 4203 and 4205 of ERISA took place in connection with a situation which has been occurring in the * * * industry.

Specifically, you write:

Company A and Company B and others are parties to a multi-employer pension plan established with Union C under a collective bargaining agreement which requires both A and B and the employers to hire members of Union C from the same hiring halls. Employer A is in financial difficulty but does not want to go out of business or cannot sell the company. Employer A enters into a contract with Employer B under which employer B will perform the work generated by employer A using employees from Union C. Employer B pays the wages and makes the required pension fund contributions for employees engaged in Company A generated business as well as Company B generated business. As a result, no manhours or pension contributions are lost. At all times [*2] Company A remains a party to the collective bargaining agreement and the multi-employer pension plan.

You have asked whether a withdrawal would occur when Employer A contracts out the work to Employer B.

Under ERISA, the initial responsibility for determining whether any particular action constitutes a withdrawal from a multi-employer plan, the amount of any liability resulting therefrom, and the identity of the liable employer lies with the plan sponsor. ERISA further provides that any disputes between a plan and an employer on these issues are to be resolved first through arbitration, subject to review by the courts. Given this scheme for enforcement of ERISA, the PBGC prefers not to interject itself in such determinations by issuing an opinion on the application of the law to particular transactions. The PBGC, however, will continue its practice of answering general interpretative questions regarding the Act.

Generally Section 4203(a) of ERISA provides that a complete withdrawal from a multiemployer plan occurs when an employer: (1) permanently ceases to have an obligation to contribute or (2) permanently ceases covered operations under a plan. Section 4212(a) of ERISA defines [*3] "obligation to contribute" as an obligation arising under one or more collective bargaining agreements or as a result of a duty under applicable labor-management relations law. It is the multiemployer plan's responsibility to apply these sections to particular fact situations, such as the one posited in your letter, and to determine whether a complete withdrawal or partial withdrawal (See ERISA Section 4205) has occurred.

In making any determination, you should be aware that there are some exceptions to the withdrawal liability criteria of Sections 4203 and 4205. For example, under Section 4204(a)(1) of ERISA, a complete or partial withdrawal of an employer does not occur solely because, as a result of a bona-fide, arm's length sale of assets to an unrelated party, the seller ceases covered operations or ceases to have an obligation to contribute for such operations. For your information we also refer you to Opinion Letters 85-14 and 86-10 (copies enclosed), which address certain situations involving so-called joint employers.

I hope this response is helpful. If you have any further questions, please feel free to call William Jackson of my staff at (202) 778-8850.

Gary M. Ford [*4]
General Counsel

Pension Benefit Guaranty Corporation

87-12

October 27, 1987

REFERENCE:
[*1] 4211(e) Withdrawal Liability - Reduction
4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass Withdrawal
4224 Alternate Method for Payment

General
4232 Transfers to Single Employer Plan

General
29 CFR 2648

OPINION:

This is in response to your request for guidance from the Pension Benefit Guaranty Corporation (PBGC) regarding a proposed transfer of benefit liabilities from a multiemployer plan to a single-employer plan, not accompanied by a transfer of assets. In connection with the transfer, all participants (including retirees and terminated vested employees) of the transferor plan who work or last worked for the employer would cease to be participants in the transferor plan and would become participants in the transferee plan.

The first question you raise is whether withdrawal liability may "be waived in favor of a different arrangement." We assume you are referring to withdrawal liability of the employer to whose plan the transfer would be made. Section 4211(e) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), provides that --

[i]n the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, [*2] the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

This provision reflects the fact that a transfer of vested benefit liabilities (to the extent not offset by a transfer of assets) reduces a plan's unfunded vested benefits much the same as a payment of withdrawal liability.

In addition, we note that, under section 4224 of ERISA, --

[a] multiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with [ERISA] . . . .

Further, plan fiduciaries have general authority to compromise disputed claims, abandon worthless claims, and otherwise conduct the plan's affairs so as best serve the interests of participants and beneficiaries. For example, as stated by Senator Williams, for himself and Senator Javits, during consideration of the Multiemployer Pension Plan Amendments Act of 1980 (which added sections 4201-4225 to ERISA) on August 26, 1980:

We do not intend to restrict plan sponsors' prudent exercise of [*3] judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. Thus, for example, where it is prudent and in the participants' interest, plan trustees may decide to settle a withdrawal liability dispute for less than the full amount claimed, to cooperate with the employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment or further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount likely to be recovered.

(126 Cong. Rec. 23288 (1980).) Going beyond section 4211(e), therefore, it is clear that withdrawal liability may "be waived in favor of a different arrangement" if, in the circumstances of a particular case, such action is consistent with ERISA and, in particular, the fiduciary responsibilities of the trustees waiving the liability. The PBGC does not determine whether [*4] particular arrangements are appropriate in particular cases.

The next question you raise is whether --

a company [may] be irrevocably released from withdrawal liability if something should happen to the company or the company plan in the future, or if there is a termination of [the multiemployer plan] by mass withdrawal of all contributing employers.

Again, we assume you are referring to the employer to whose plan the transfer would be made. It is not apparent how withdrawal liability might be triggered by what happens to the company or its plan in the future. If a single-employer plan terminates within five years after it receives a transfer of liabilities from a multiemployer plan, the multiemployer plan may have a liability to the PBGC under section 4232 of ERISA. However, such an event would not give rise to withdrawal liability on the part of the employer since it would not constitute a withdrawal. The termination of the single-employer plan would, instead, expose the employer to possible termination liability to the PBGC and to the plan participants and beneficiaries under section 4062 of ERISA.

If, following a transfer of liabilities to a withdrawing employer's plan, [*5] the employer's withdrawal is determined to have been part of a mass withdrawal (or to have occurred within the same year as a mass withdrawal), the employer may become liable to the multiemployer plan for additional amounts (over and above its initial withdrawal liability) under section 4219(c)(1)(D) of ERISA and the PBGC's regulation on Redetermination of Withdrawal Liability Upon Mass Withdrawal (29 CFR Part 2648).

Two other questions you raise are whether the trustees of the transferor plan are "being put at risk if the proposed arrangement results in a greater contribution requirement for other employers" and whether the proposed arrangement would "establish a precedent that would have to be followed for other employers." These questions are outside the scope of Title IV of ERISA.

Finally, you ask --

assuming that each pensioner and participant executes a release to the [multiemployer plan] absolving [that plan] of any liability for pension benefits (e.g. in the event that the employer's [single-employer plan] terminates with insufficient assets to pay participants a pension) does such release in fact absolve [the multiemployer plan] of any liability to these participants and [*6] pensioners.

This question is also outside the scope of Title IV. However, as noted above, the transferor plan may be liable to the PBGC under section 4232 of ERISA if the transferee plan terminates with insufficient assets within five years after the transfer, and that liability cannot be released by the participants.

The foregoing comments are limited to those aspects of your request that fall within the scope of Title IV of ERISA. You may wish to seek guidance from the Department of Labor regarding questions of fiduciary responsibility under Title I of ERISA. If you wish to discuss this matter further, you may call Deborah C. Murphy at 202-778-8850.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

87-13

November 23, 1987

REFERENCE:
[*1] 4231 Mergers & Transfers Between Multiemployer Plans
4231(c) Mergers & Transfers Between Multiemployer Plans - Requirements of Section
4235(g) - Definitions
29 CFR 2615 Reporting & Notification Requirements for Reportable Events
29 CFR 2672

OPINION:

We are writing in response to your request for advice from the Pension Benefit Guaranty Corporation ("PBGC") regarding a transaction involving two multiemployer plans. According to your request, one of the plans is a defined benefit plan (the "DB Plan") and the other is a defined contribution plan (the "DC Plan").

Your request states that a new local union has been established to represent a number of employees who have heretofore been participants in the DB and DC Plans. You state that, as a consequence, the number of active participants in the DB and DC Plans is decreasing, contributions to the plans have decreased, and some employers have withdrawn. The boards of trustees of the DB Plan and the DC Plan have therefore voted to merge the DC Plan into the DB plan. You have asked us several questions in connection with this transaction.

You first ask whether "reportable event" reports must be submitted to the PBGC with respect to the decline [*2] in the number of participants covered by the Plans or with respect to the merger and transfer of assets. Under § 2615.1(b) of the PBGC's Regulation on Reporting and Notification Requirements for Reportable Events (29 CFR § 2615.1(b)(1981)), the PBGC does not require reportable event reports for multiemployer plans. In addition, no reportable event report is required for the DC Plan because, according to your request, it is an individual account plan, and pursuant to section 4021(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), it is therefore excluded from coverage under Title IV of ERISA.

You next ask whether 120 days' notice of the merger must be given to the PBGC under ERISA section 4231 and whether the PBGC will make a determination under section 4231(c) as to whether the merger satisfies the requirements of section 4231. Section 4231 of ERISA and the PBGC's Regulation on Mergers and Transfers Between Multiemployer Plans (29 CFR Part 2672 (1983)) apply only to mergers and transfers where, both before and after the transaction, all plans involved are multiemployer plans covered under Title IV of ERISA. Because the DC Plan is not covered under [*3] Title IV, the 120-day notice requirement of section 4231 does not apply to the merger of the DC and DB Plans, and the PBGC will not make a determination under section 4231(c) regarding the merger.

Finally, you ask whether the change in collective bargaining representative is a "certified" change that triggers an obligation to transfer assets under ERISA section 4235. Under section 4235(g)(2), a "certified change of collective bargaining representative" is a change of collective bargaining representative certified under the Labor-Management Relations Act or the Railway Labor Act. The PBGC does not certify changes in collective bargaining representatives. Consequently, whether such a change occurred is a factual question that the PBGC cannot answer. Of course, as noted above, the DC Plan is not subject to Title IV of ERISA, and therefore is not subject to the requirements of section 4235 in any event.

The foregoing comments relate only to issues arising under Title IV of ERISA. Your request raises other issues as well. We suggest that you consult with the Department of Labor regarding questions under Title I of ERISA and with the Internal Revenue Service regarding questions [*4] under the Internal Revenue Code of 1986. If you have any questions regarding this letter, please call Deborah C. Murphy of this Office at 202-778-8850.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

88-1

1988 PBGC LEXIS 1

January 11, 1988

REFERENCE:
[*1] 4204(b)(1) - Liability of Purchaser
4211(b) - Withdrawal Liability - Presumptive Method

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to whether section 4204 of the Employee Retirement Income Security Act, as amended ("ERISA"), requires that the withdrawal liability of a purchaser to which that section applies be computed using the statutory presumptive method of section 4211(b), rather than the method adopted by the multiemployer pension plan in question.

Section 4204(b)(1) provides that the liability of a purchaser under section 4204:

shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 years.

This provision does not otherwise amend the rules for determining withdrawal liability found in sections 4201-4225 of ERISA. The legislative history that accompanies this provision also does not indicate any Congressional intent to vary these rules. Therefore, it is our opinion that a purchaser's liability is to be determined under the plan's duly adopted allocation method, as modified by section 4204(b)(1).

I hope this [*2] has been of assistance. If you have further questions, please contact the attorney handling this matter, John Foster, at (202) 778-8850.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

88-2

March 22, 1988

REFERENCE:
[*1] 4203(a) -Definition of Complete Withdrawal
4203(b) - Building and Construction Industry Exemption
4225 - Limitation of Withdrawal Liability
4225(a) - Sale of Assets
4225(e) - Multiple Withdrawals

OPINION:

We are writing in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to whether section 4225 of the Employee Retirement Income Security Act, as amended ("ERISA"), applies to an employer subject to the definition of withdrawal set forth in section 4203(b) of ERISA ("a construction industry employer") that sells its assets following a withdrawal from a multiemployer pension plan.

Under section 4203(b), a complete withdrawal of a construction industry employer occurs if the employer both ceases to have an obligation to contribute to the plan, and

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

ERISA § 4203(b)(2)(B). The quoted portion of this definition contrasts [*2] with the general definition of complete withdrawal, ERISA § 4203(a), which is triggered, inter alia, by a permanent cessation of operations covered under the plan, rather than by a continuation or resumption of work.

The amount of an employer's withdrawal liability is computed under section 4211 of ERISA, subject to certain adjustments enumerated in section 4201. Section 4225(a) of ERISA prescribes one of these adjustments. Section 4225(a) provides that "[i]n the case of [a] bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party," the unfunded vested benefits allocable to certain employers should not exceed a specified amount. While Congress did restrict the applicability of section 4225 in certain circumstances (see, for example, ERISA section 4211(d)(2)), no restriction was provided on the applicability of this provision to building and construction industry plans and employers. Therefore, we do not believe that ERISA provides a categorical exception from section 4225 for construction industry employers that withdraw from construction industry plans.

It is our view, however, that section 4225(a) applies [*3] only when the withdrawal is "attributable to" a sale of assets, and not when the sale and the withdrawal are merely coincidental. As noted above, the special sale rule in section 4225(a) only comes into play in calculating an employer's withdrawal liability. It is therefore reasonable to conclude that there must be a connection between the sale and the withdrawal. This interpretation is directly supported by section 4225(e), which deals with the application of section 4225 in the case of multiple withdrawals and by its terms applies only "[i]n the case of one or more withdrawals of an employer attributable to the same sale . . ." (emphasis added). The legislative history of section 4225 further supports this position. See Senate Committees on Finance and on Labor and Human Resources, "Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980," § 5d, reprinted in 126 Cong. Rec. 20,195 (1980). See also ERISA § 4204(a).

In the typical case, we would not expect a construction industry employer's complete withdrawal, which by definition must involve a continuation or resumption of the employer's work, to be attributable to a sale of the employer's [*4] assets. A sale of the employer's assets would more likely cause work to cease, not continue or resume. Nonetheless, we believe there may be cases in which section 4225(a) would apply to a construction industry employer, n1 so the determination whether the section applies must be made on a case-by-case basis.

n1 For example, section 4225 could apply in the building and construction industry if an employer that had previously been performing both covered and non-covered work in an area sold all or substantially all of its assets to an unrelated party, thus ceasing the obligation to contribute to the plan, yet continued to perform non-covered work in the same area.

In the situation you posit, a construction industry employer ceased to be obligated to contribute under a construction plan but continued to perform covered work in the same area. Six months later it sold its assets to an unrelated party. While on the basis of these limited facts it does not appear that the employer's withdrawal was attributable to the sale of assets, this is not PBGC's decision to make. The question of whether a withdrawal was attributable to the sale of all or substantially all of an employer's [*5] assets is a matter to be determined by the plan sponsor based on all of the facts and circumstances. If an employer disputes the plan sponsor's decision, the employer may seek arbitration of the matter, with further review available in the appropriate court.

I hope this has been of assistance. If you have further questions, please contact the attorney handling this matter, John Foster, at (202) 778-8850.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

88-3

March 22, 1988

REFERENCE:
[*1] 4205(c) - Retail Food Industry Provision
4220(a) - MPPAA Authorized Amendments After September 25, 1983
4220(c) - Unreasonable Risk of Loss

OPINION:

We are writing in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") on the significance of the PBGC's review of plan amendments under section 4220 of the Employee Retirement Income Security Act, as amended (ERISA). Specifically, you ask about the standard for, and the legal effect of, the PBGC's review and approval of plan amendments under section 4220.

In the situation you describe, a food industry multiemployer plan was amended to adopt the "35-percent rule" authorized by ERISA section 4205(c). As required by that section, the plan amendment also included a provision for abatement of the partial withdrawal liability under certain circumstances. The plan was amended within the three-year "window period" provided in section 4220(a) of ERISA for adopting amendments without obtaining the PBGC's approval. You represent that, since the expiration of the window period, the PBGC has approved similar, if not identical, amendments for other plans.

An employer is now challenging the validity of the [*2] plan's amendment, principally on the grounds that the abatement provision fails to provide the full relief required by section 4205(c). You ask whether the PBGC's approval of (or failure to disapprove) a post-window period amendment constitutes a judgment that the amendment is lawful under ERISA, and whether the PBGC's approval of (or failure to disapprove) a post-window period amendment can be used as evidence that another plan's similar or identical amendment is lawful under ERISA.

Under section 4220, certain amendments to multiemployer pension plans that are adopted after September 25, 1983, may be put into effect only with the PBGC's approval, or if the PBGC fails to disapprove the amendment within 90 days after receipt of a copy of the amendment and the request for approval. Section 4220 applies to amendments made under section 4205(c), and paragraph (c) of section 4220 details the scope of the PBGC's review of amendments submitted pursuant to that section. Paragraph (c) provides that the PBGC shall disapprove an amendment only if it determines that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC.

Because section 4220(c) [*3] clearly states that the sole criterion for the PBGC's disapproval of amendments is unreasonable risk of loss to plan participants and beneficiaries or to the PBGC, approval by the PBGC of an amendment under section 4220 constitutes a determination only as to the application of that criterion. It does not, except to the very limited extent described below, constitute a ruling on whether the amendment is consistent with ERISA and PBGC rulings. The enclosed PBGC letter approving a plan amendment under section 4220 illustrates this point.

Before making the risk determinations with respect to an amendment submitted for approval under section 4220, the PBGC does review the amendment to determine whether, on its face, it is authorized by one of the provisions of the statute specified in section 4220. See ERISA § 4220(a). If the amendment fails this threshold review, the PBGC disapproves it because it is not authorized by title IV of ERISA, rather than because it fails the risk of loss test under section 4220(c). However, this facial review does not involve any interpretation of the amendment or application of the amendment to a specific factual situation.

For example, upon receipt [*4] of an amendment under section 4205(c), the PBGC would review the amendment to ascertain that it included a rule for reducing withdrawal liability that was not on its face inconsistent with the statutory requirements for that abatement rule. If the amendment failed to include an abatement rule, or included a rule predicated on the plan's contribution base units exceeding their post-withdrawal levels for a period of time other than two years following the withdrawal, the PBGC would reject the amendment as not being authorized by section 4205(c).

Finally, it follows from the preceding discussion that a section 4220 letter issued to a particular plan approving its

adoption of an amendment under section 4205(c) is probative only of the fact that the amendment is facially consistent with that section and does not create an unreasonable risk of loss to that plan's participants and beneficiaries or to the PBGC with respect to that plan.

I hope this response has been of assistance. If you have further questions, please contact the attorney handling this matter, John Foster. His telephone number is 202-778-8850.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

88-5

April 1, 1988

REFERENCE:
[*1] 29 CFR 2648 - Redetermination on Mass Withdrawal
29 CFR 2648.3 - Liability on Mass Withdrawal
29 CFR 2648.3(c) - Reallocation Liability 29 CFR 2648.6(b) - Amount of UVBs to be Reallocated
29 CFR 2648.6(c)(2) - Amount of Reallocation

OPINION:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the powers of trustees of a multiemployer pension plan under the Employee Retirement Income Security Act of 1974 ("ERISA") and the PBGC's regulation on Redetermination of Withdrawal Liability upon Mass Withdrawal (29 CFR Part 2648) (the "reallocation regulation").

The plan in question has been terminated by the withdrawal of all of its contributing employers. For such a plan, section 4209(c) of ERISA provides that certain withdrawn employers lose the benefit of the de minimis reduction that would otherwise apply to their withdrawal liabilities. Also, section 4219(c)(1)(D) of ERISA requires that the liabilities of withdrawn employers be determined without regard to the 20-year limitation on annual payments under section 4219(c)(1)(B) of ERISA and that the plan's total unfunded vested benefits be fully allocated among the withdrawn [*2] employers. The reallocation regulation implements these provisions.

Under the reallocation regulation, the withdrawal liability that is assessed without regard to the fact that there has been a mass withdrawal termination is called "initial withdrawal liability." The term for the additional withdrawal liability that arises from the fact that the de minimis reduction and the 20-year payment limitation do not apply is "redetermination liability." Finally, the liability arising from the requirement for full allocation is referred to in the reallocation regulation as "reallocation liability."

In general, the regulation contemplates that reallocation liability will be based on the plan's unfunded vested benefits as of the "mass withdrawal valuation date," which is the last day of the plan year in which the mass withdrawal termination occurs. The employers to be assessed reallocation liability are identified as of the "reallocation record date," set by the trustees, which may not be later than one year after the mass withdrawal valuation date. The deadline for determining reallocation liability is ordinarily one year after the reallocation record date but may be extended, as it [*3] has been for the plan in question. Demand for payment of reallocation liability is to be made within 30 days after the deadline for determining the amount of the liability. (The regulation permits plans to adopt different rules for determining reallocation liability, but your request makes no mention of such rules for the plan in question.)

You ask whether the trustees, in computing the reallocation liabilities of all withdrawing employers under the reallocation regulation, may consider certain events occurring after the plan's reallocation record date. The two types of events you mention are (1) a change in a withdrawing employer's financial condition (including the liquidation, dissolution or bankruptcy of the employer) and (2) an arbitration award with respect to a challenge to an employer's initial withdrawal or redetermination liability.

In considering these questions, it is important to distinguish between the time when an event or condition affecting reallocation liability occurs or exists and the time when the trustees, having learned of the event or condition, take it into account in computing the liability. In general, the trustees may make decisions about which withdrawing [*4] employers are to be assessed reallocation liability, and the amount of reallocation liability to be assessed to those employers, at any time before payment of the liability is demanded (whether or not the deadline for determining the liability has been extended); however, the trustees may not base those decisions on events that occur, or conditions that come into being, after the times specified in the reallocation regulation and ERISA.

An employer's financial condition may affect reallocation liability in various ways. For example, under § 2648.3(c)(1) and (c)(2) of the reallocation regulation, an employer is excluded from reallocation liability if, as of the

reallocation record date, the employer has been completely liquidated or dissolved or is involved in bankruptcy or insolvency proceedings. This is true even if the trustees do not learn of the liquidation, dissolution or bankruptcy until after the reallocation record date. Any liquidation, dissolution or bankruptcy of an employer after the reallocation record date may not be considered by the trustees in determining whether the employer is liable for reallocation liability under § 2648.3(c)(1) and (c)(2).

Under § 2648.6(c)(2), [*5] the trustees may determine that ERISA section 4225 limits the reallocation liability of an employer that has been involved in a sale, liquidation, or dissolution. In such a case, a portion of the reallocation liability that would otherwise be assessed to that employer may be reallocated among all other liable employers. The wording of ERISA section 4225(e) makes clear that section 4225(a) and (b) apply only where the employer's withdrawal is "attributable to" the sale, liquidation or dissolution in question. The determination of whether section 4225 applies must thus be based on whether the withdrawal that gives rise to the initial, redetermination, and reallocation liability was in connection with one of the events specified in section 4225. However, under § 2648.6(c)(2), as under § 2648.3(c)(1) and (c)(2), the trustees' determination itself may be made at any time before the demand for reallocation liability.

Section 2648.3(c)(3) is the only rule under which the time for making the trustees' determination ends before the time for demanding reallocation liability. Under § 2648.3(c)(3), an employer is excluded from reallocation liability if, as of the reallocation record date, [*6] the plan sponsor has determined that the employer's initial withdrawal liability or its redetermination liability is limited by section 4225 of ERISA. Section 2648.3(c)(3) provides specifically that the determination that section 4225 applies to the initial or redetermination liability must have been made on or before the reallocation record date. As with § 2648.6(c)(2), section 4225 must be applicable at the time of withdrawal.

The time when an arbitration award is made generally has no bearing on whether the trustees may consider it in determining reallocation liability (although an award obviously cannot be taken into account until it has been made). The significance of an arbitration award in this context is that it may represent a finding that an event or condition affecting reallocation liability occurred or existed at some (generally) earlier time. It is the timing of the events or conditions established by the award that is decisive as to whether the trustees may consider them.

You mention in particular arbitration awards with respect to challenges to an employer's initial withdrawal or redetermination liability. The outcome of such challenges, by determining the amount [*7] of withdrawal liability owed to the plan, can affect the amount of a plan's assets, and thus its unfunded vested benefits. Under § 2648.6(b), the amount of "unfunded vested benefits to be reallocated" for a plan, upon which the reallocation liability depends, is the amount of the plan's unfunded vested benefits, determined as of the mass withdrawal valuation date, with certain adjustments. Unless an arbitration award respecting an employer's initial withdrawal or redetermination liability is based on facts occurring or existing after the mass withdrawal valuation date (which would be unlikely), the trustees may consider it in determining the "amount of unfunded vested benefits to be reallocated" and thus the withdrawing employers' reallocation liability.

If you have any further questions about this matter, you may call Deborah C. Murphy at 202-778-8820.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

88-6

April 1, 1988

REFERENCE:
[*1] 4235 - Transfers Pursuant to Change in Bargaining Representative
4235(a) - Applicability
4235(b) - Notice Requirements; Appeal

OPINION:

We write in response to your request that the Pension Benefit Guaranty Corporation ("PBGC") advise you as to what benefit liabilities are to be transferred under section 4235 of the Employee Retirement Income Security Act of 1974 ("ERISA") upon a change in the collective bargaining representative of a group of employees. Specifically, you ask whether the transfer should include the benefits of "participants who are active-vested, pensioners and inactive-vested" or only the "active-vested" participants.

Section 4235(a) provides that where an employer withdraws from a multiemployer pension plan (the "old plan") because of a certified change of collective bargaining representative, --

if participants of the old plan who are employed by the employer will, as a result of that change, participate in another multiemployer plan (. . . the "new plan"), the old plan shall transfer assets and liabilities to the new plan in accordance with [section 4235].

Section 4235(b)(2) provides that --

[t]he plan sponsor of the old plan shall . . . notify the employer of . . [*2] . the old plan's intent to transfer to the new plan the nonforfeitable benefits of the employees who are no longer working in covered service under the old plan as a result of the change of bargaining representative. . . .

Both of these provisions refer only to active employees. Section 4235 contains no other provisions describing the participants for whom benefits are to be transferred. Accordingly, it is the opinion of the PBGC that section 4235 contemplates the transfer of benefit liabilities only for participants who are active employees.

This interpretation is supported by a policy consideration as well. Because inactive and retired participants do not in general have a voice in a change of collective bargaining representative, it is inappropriate to include them in a transfer that does not afford them the protections of section 4231 of ERISA, which, among other things, requires that affected participants' accrued benefits not be reduced as a result of a transfer. Section 4231 applies to a transfer that would otherwise fall within the purview of section 4235 only if the plan sponsors of the old and new plans so agree under section 4235(f)(1).

If you have any further questions [*3] about this matter, you may call Deborah C. Murphy of my office at 202-778-8820.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

88-7

May 2, 1988

REFERENCE:
[*1] 4204(d) - "Unrelated Party"

OPINION:

We write in response to your letter requesting the assistance of the Pension Benefit Guaranty Corporation ("PBGC") in connection with an assessment of partial withdrawal liability by the * * * (the "Trust") against the * * * Corporation * * *. The Trust asserts that * * * owes the Trust $ 71,131.69 in partial withdrawal liability pursuant to Section 4205 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Based on your letter and telephone conversations between members of my staff and yourself, it appears that the imposition of partial withdrawal liability results from X's sale of certain assets to Y's Corporation * * *. X and Y are considered to be related parties under section 267(b) of the Internal Revenue Code (the "Code"), but are not so closely related as to constitute a controlled group of corporations. You acknowledge that there was a partial withdrawal by X under section 4205 of ERISA, and state that X could have avoided the imposition of withdrawal liability under section 4204 of ERISA but for that section's requirement that the sale be made to an "unrelated party."

You conclude your letter by arguing that:

X is [*2] the unwitting and innocent victim of an unfair provision of the law. On the one hand, X and Y are not closely enough related to constitute a controlled group of corporations, in which event no withdrawal liability would have been asserted. On the other hand, the two corporations are too closely related to permit a less onerous alternative than withdrawal liability.

You first request that the PBGC find that X's sale to Y satisfied the requirements of section 4204 of ERISA.

Section 4204 provides that, where certain other conditions are met, a complete or partial withdrawal does not occur solely because, "as a result of a bona fide, arm's-length sale of assets to an unrelated party," the seller ceases covered operations or ceases to have an obligation to contribute. Section 4204(d) provides that, for the purposes of section 4204, "unrelated party" is defined either according to the provisions of section 267(b) of the Code or according to regulations promulgated by the PBGC using principles similar to section 267(b) of the Code. The PBGC has not yet promulgated such regulations. Therefore, the definition of "unrelated party" contained in section 267(b) of the Code is controlling. [*3] You state that X and Y are not "unrelated parties" within the meaning of section 267(b) of the Code. Thus, X's sale to Y does not fulfill the requirements of section 4204.

The PBGC has the authority to vary by regulation two requirements of section 4204, namely, the purchaser's bond or escrow required by section 4204(a)(1)(B), and the sale-contract provision required by section 4204(a)(1)(C). ERISA § 4204(c). The PBGC has promulgated such a regulation. 29 C.F.R. § § 2643.1-2643.15 (1987). Prior to the promulgation of this regulation, the PBGC had the authority to grant individual variances of these two requirements of section 4204. ERISA § 4204(c). Congress, however, did not authorize the PBGC to grant an individual variance with regard to the "unrelated party" requirement. Accordingly, the PBGC may not grant a variance of the unrelated party requirement to X for its transaction with Y.

You also request that the PBGC issue an advisory opinion that the Trust may waive the "unrelated party" requirement, and you request that PBGC specifically authorize the Trust to do so in this case. The plan sponsor, however, has the responsibility for determining the amount of withdrawal [*4] liability owed by an employer and for collecting this liability. ERISA § 4202. A plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability, if such rules are consistent with ERISA. ERISA § 4224. Plan fiduciaries also have general authority to compromise disputed claims, abandon worthless claims, and otherwise conduct the plan's affairs so as to best serve the interests of participants and beneficiaries. As stated by Senator Williams, for himself and and Senator Javits, during consideration of the Multiemployer Pension Plan Amendments Act of 1980 (which added sections 4201-4225 to ERISA) on August 26, 1980:

We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. Thus, for example, where it is prudent and in the participants' interest, plan trustees may decide to settle a withdrawal [*5] liability dispute for less than the full amount claimed, to cooperate with the employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment or further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount likely to be recovered.

126 Cong. Rec. 23288 (1980) (emphasis added). No provision of ERISA, however, expressly provides for a plan sponsor's waiver of withdrawal liability in circumstances such as X's withdrawal from the Trust. Nor does ERISA otherwise authorize a plan sponsor to waive withdrawal liability imposed by ERISA merely because it appears "fair" to do so. Rather, the plan sponsor must "maximiz[e] the total ultimate recovery at supportable costs." Id.

Should you have any further questions on this matter, please contact John Sutter of my office at the above address or (202) 778-8820.

Gary M. Ford
General Counsel

Pension Benefit Guaranty Corporation

88-8

May 2, 1988

REFERENCE:
[*1] 4203(e) - Date of Complete Withdrawal
4212(a) - Obligation to Contribute - Definitions
4218(2) - Withdrawal - Suspension of Contributions

OPINION:

We write in response to your request for an opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to the date of an employer's withdrawal from a multiemployer pension plan in the construction industry. In particular, you asked the PBGC for a "clarification" of Opinion Letter 86-4 (Feb. 28, 1986) "to fit the instant facts."

Section 4203(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provides that the withdrawal of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry occurs if --

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer --

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

According to your request: [*2]

[The] factual situation involves an Association Agreement which expired on June 15, 1983. The employer timely notified the Union of the withdrawal of its collective bargaining power from the association and upon the expiration of the Association Agreement began to bargain on its own with the Union. The employer continued to make contributions after the expiration of the Association Agreement through August 1983 when it notified the Pension Trust that it had reached impasse and ceased contributions. Thereafter, the employer continued the same type of covered work without making contributions as a non-union contractor.

As we understand the facts, there is no dispute that the employer ceased to have an obligation to contribute to the plan, and continued to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required. Therefore, there is no dispute that a complete withdrawal occurred. The sole issue is the date of the withdrawal. The employer contends that it withdrew on June 15, 1983, when the Association Agreement expired, and that its liability for withdrawal on that date is $ 201,565. The plan sponsor, [*3] however, determined that the employer withdrew when contributions to the plan ceased in September 1983, a date that falls in the subsequent plan year. Accordingly, it assessed liability in the amount of $ 308,294.

Under Section 4202 of ERISA, the initial responsibility for determining the date of a complete withdrawal lies with the plan sponsor. Section 4221 of ERISA then provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 shall be resolved through arbitration," subject to review in the federal courts. The PBGC does not interject itself into this dispute resolution process by issuing advisory opinions on the application of the law to particular facts. The PBGC, however, will continue its practice of answering general questions of interpretation under the Act.

Opinion Letter 86-4 addressed the question of the date of withdrawal in the context of the "labor dispute" exemption in Section 4218(2) of ERISA. The employer in that case initially suspended its contributions to the plan because of a strike by its union-represented employees, and the plan sponsor determined that [*4] the contribution suspension was covered by Section 4218(2). In the subsequent plan year, however, the plan sponsor determined that Section 4218(2)

no longer applied. The PBGC was asked for an opinion as to whether the date of withdrawal should relate back to the date that the employer initially suspended contributions as a result of the labor dispute or should be set in the subsequent plan year when the plan administrator determined that the labor dispute exception no longer applied. The PBGC responded, as a general matter of interpretation, that the date of the strike would be the date of the complete withdrawal under Section 4203(e) of ERISA if that "was the date on which covered operations or the obligation to contribute ceased."

Section 4203(e) of ERISA provides that "the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." In the case of the withdrawal of a construction employer from a multiemployer plan in the construction industry, only the date of the cessation of the employer's obligation to contribute is relevant. Section 4212(a) of ERISA defines "obligation to contribute" as an obligation [*5] arising under one or more collective bargaining (or related) agreements or as a result of a duty under applicable labor-management relations law. See 126 Cong. Rec. S11672 (daily ed. Aug. 26, 1980) (Senate floor explanation). In this case, the arbitrator must decide whether the obligation to contribute ceased on June 15, 1983, the date the Association Agreement expired, or was extended under principles of contract or labor law as a result of the employer's continued bargaining and contributions after that date. n1

n1 We do not understand either party to be arguing for a date of withdrawal earlier than June 15, 1983, and therefore express no opinion whether relevant principles of labor law could result in a cessation of the obligation to contribute on a date before the expiration of the Association Agreement in other circumstances.

If you have any further questions, please feel free to contact Jeanne Beck of my staff at the above address or at (202) 778-8824.

Gary M. Ford
General Counsel

89-2

February 14, 1989

REFERENCE:

[*1] 4201 Withdrawal Liability Established
4203 Complete Withdrawal
4205 Partial Withdrawals
4208(d) Reduction of Partial Withdrawal Liability. Building & Construction Industry Exemption
4212(a) Obligation to Contribute - Definitions
4231 Mergers & Transfers Between Multiemployer Plans
4234(c) Written reciprocity agreements

OPINION:

We write in response to your request for opinions of the Pension Benefit Guaranty Corporation ("PBGC") regarding the application of certain provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") to the adoption of a reciprocity agreement by a multiemployer defined benefit pension plan.

The reciprocity agreement in question is an agreement among several multiemployer pension plans maintained pursuant to collective bargaining agreements involving locals of a single construction industry union. Under the agreement, upon the request of an employee covered by one of the participating plans (the employee's "home fund") who is working temporarily in the jurisdiction of another participating plan (the "temporary fund"), the temporary fund must transfer to the employee's home fund contributions "made on his behalf" to the temporary fund by the temporary employer. The home [*2] fund must treat the transferred amounts "as the equivalent of Contributions" and grant the employee vesting and benefit accrual credit for the hours worked for the temporary employer. The agreement also contains the following provisions:

For purposes of the Pension Benefit Guaranty Corporation (PBGC), the Temporary Employee shall not be considered a participant in the [Temporary] Fund if [contributions on the employee's behalf] are transferred to the Temporary Employee's Home Fund.

No Participating Fund shall be liable to any other Participating Fund for any sum whatsoever except to the extent Contributions made on Temporary Employees are in fact collected.

No employer shall be considered a contributing employer in any Participating Fund or Funds other than the Fund or Funds to which he is bound to contribute pursuant to the terms of a collective bargaining agreement which he has signed or assented to.

One of your questions is whether the requirements of section 4231 of ERISA apply to transfers under the reciprocity agreement. Section 4231 prescribes rules governing the transfer of assets and liabilities generally between defined benefit multiemployer plans. However, section [*3] 4234(c) of ERISA provides that --

[t]his part [part 2 of subtitle E of Title IV of ERISA, including section 4231] shall not apply to transfers of assets pursuant to written reciprocity agreements, except to the extent provided in regulations prescribed by the corporation.

The PBGC has prescribed no regulations on this subject, and thus section 4231 is inapplicable to transfers of assets (and any accompanying liabilities) under any reciprocity agreement.

Your other question is whether the adoption of the reciprocity agreement by a defined benefit multiemployer plan makes that plan's contributing employers potentially liable for withdrawal liability to other defined benefit multiemployer plans participating in the agreement. When an employer under the adopting plan hires a temporary employee from another plan's jurisdiction, its contributions for that employee may be transferred to the employee's home fund under the reciprocity agreement. As you suggest, the employer might be considered to have an obligation to contribute to the home fund (notwithstanding the language to the contrary in the reciprocity agreement) and thus might be subject to potential withdrawal liability to the [*4] home fund if such a contribution obligation ceased. You ask for assurance that employers contributing to one plan would not, because of the reciprocity agreement, be exposed to possible withdrawal liability to

other participating plans.

Under ERISA, the initial responsibility for determining whether a particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. ERISA further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Thus it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to a particular transaction. However, the PBGC will continue its practice of answering general interpretive questions regarding Title IV of ERISA.

The reciprocity agreement in issue here purports to provide, in the sections quoted above, that when an employer's contributions for a temporary employee are transferred to a home fund, the employee is not a participant in the temporary fund and the employer is not a contributing [*5] employer in the home fund. However, ERISA contains provisions defining the terms "participant," "employer," and "obligation to contribute" that cannot be varied by agreement. Thus, while the provisions of the reciprocity agreement -- and of the collective bargaining agreement, plan, and other documents -- may have a bearing on questions regarding status as a participant or as an employer having an obligation to contribute, they are not of themselves dispositive of those questions.

Section 4201 of ERISA imposes withdrawal liability on employers that withdraw from a multiemployer plan in a complete or partial withdrawal. Under section 4203(a) of ERISA, a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. ERISA section 4203(b) provides a special rule for employers and plans in the building and construction industry (as therein defined) under which a complete withdrawal occurs only if the employer ceases to have an obligation to contribute under the plan, and either continues to perform work in the jurisdiction of the collective bargaining agreement of the type [*6] for which contributions were previously required, or resumes such work within five years after the obligation to contribute under the plan ceased, without renewing the obligation to contribute.

Under section 4205 of ERISA, a partial withdrawal occurs when an employer has a 70 percent contribution decline in each of three consecutive plan years; or, the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work; or, the employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities, while continuing to perform work at the facility of the type for which the obligation to contribute ceased. For employers and plans in the building and construction industry (as defined in section 4203(b)), ERISA section 4208(d)(1) makes an employer liable for a partial withdrawal only if the employer's obligation to contribute is continued for no more than an insubstantial [*7] portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.

Whether an employer has an obligation to contribute to a plan is thus central to any discussion of whether a withdrawal can occur. An employer cannot withdraw from a plan to which it has no obligation to contribute. Section 4212(a) of ERISA defines "obligation to contribute" broadly as an obligation to contribute arising under one or more collective bargaining (or related) agreements, or as a result of a duty under applicable labor-management relations law. The committees that considered the Multiemployer Pension Plan Amendments Act of 1980, which added sections 4201 - 4225 to ERISA, intended this definition to -- apply to any situation in which an employer has directly or indirectly agreed to make contributions to a plan . . . includ[ing] cases in which the employer signs a collective bargaining agreement or a related agreement such as a participation agreement or memorandum of understanding, and cases in which the employer agreed to be bound by an association agreement.

126 Cong. Rec. 23,287 (1980) (remarks of Sen. Williams) (emphasis [*8] supplied).

There is, however, other legislative history that may be read as limiting the breadth of this language where reciprocity agreements are concerned. In discussing the provision that became section 4234(c) of ERISA (quoted above), the House Committee on Education and Labor said:

The committee has exempted written reciprocity agreements from asset transfer rules, except to the extent the corporation determines application of the rules is necessary. The committee believes that it is important to encourage expansion of reciprocals to enhance pension portability.

H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. I, at 70 (1980). The PBGC believes that this comment evidences a Congressional intent that ERISA not be applied to reciprocity agreements in a manner that would discourage their use

as aids to pension portability. Clearly, the use of reciprocity agreements might be discouraged if, simply by contributing pursuant to a collective bargaining agreement for employees who elect to have contributions transferred to their home plans under a plan that adopted such a reciprocity agreement, an employer were exposed to potential withdrawal liability to other defined benefit plans [*9] to which contributions might be transferred under the agreement. Accordingly, it is the PBGC's opinion that an appropriately structured reciprocity agreement does not in and of itself create in any employer an obligation to contribute, within the meaning of section 4212(a), to any transferee plan.

On the other hand, the PBGC believes that circumstances could be created in which a reciprocity agreement -- either alone or in combination with other agreements -- could reflect an undertaking by contributing employers under one plan of an obligation to contribute to one or more other plans. Because it is impossible to predict the kinds of fact situations that might arise in this area, the PBGC considers it unwise to speculate about the nature of the circumstances in which such an undertaking might be found. However, the PBGC believes that the recurrent transfer of relatively large amounts under a reciprocity agreement could suggest the existence of an obligation to contribute; conversely, to the extent that transfers are relatively small and irregular, it would appear less likely that an obligation to contribute exists.

If you have any further questions about this matter, you may [*10] call Deborah C. Murphy of my office at 202-778-8820.

John H. Falsey
Acting General Counsel

Pension Benefit Guaranty Corporation

89-3

April 18, 1989

OPINION:
[*1]

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation (the "PBGC") as to whether the reallocation liability described in § 4219(c)(1)(D) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and 29 C.F.R. pt. 2648 applies: (1) to an employer that withdrew from a multiemployer plan (the "Plan") in the 1986 Plan year when the Plan terminates before the last day of the 1988 Plan year; and (2) to an employer that withdrew in the 1986 Plan year when the Plan terminates on the last day of the 1988 Plan year.

ERISA § 4219(c)(1)(D) requires that, upon a mass withdrawal from a multiemployer plan, there be a complete allocation of the total unfunded vested benefits of the plan. This allocation is to be consistent with rules issued by the PBGC. These rules are provided in 29 C.F.R. pt. 2648. Section 2648.3(c) of these rules identifies employers that, upon a mass withdrawal, are allocated the remaining unfunded vested benefits ("reallocation liability") after their initial liability and any redetermined liability have been assessed:

An employer shall be liable for reallocation liability if the employer withdrew pursuant [*2] to an agreement or arrangement to withdraw from a multiemployer plan from which substantially all employers withdrew pursuant to an agreement or arrangement to withdraw, or if the employer withdrew after the beginning of the second full plan year preceding the date of plan termination from a plan that terminated by the withdrawal of every employer. . . .

Thus, in the case of a mass withdrawal termination, each employer that withdrew in the year of the Plan's termination or during the two Plan years that precede the Plan year in which termination occurs is subject to reallocation liability. Accordingly, if the Plan terminates on any day during the 1988 Plan year, including the last day, reallocation liability applies to each employer that withdrew in the 1986 Plan year.

I hope this information is of assistance to you. If you have further questions, please contact the attorney handling this matter, John Foster, at (202) 778-8850.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

89-5

August 1, 1989

REFERENCE:
[*1] >4001(a)(8)>
4041A(f)(1) Multiemployer Termination. Lump Sum PaymentsMultiemployer Termination. Lump Sum Payments
4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass WithdrawalNotice & Collection of Withdrawal Liability - Payment on Mass Withdrawal
>29 CFR 2648>
>29 CFR 2675.12(c)>
>29 CFR 2676>

OPINION:

I am writing in response to your inquiry about the calculation of reallocation liability under 29 C.F.R. pt. 2648 following the termination by mass withdrawal of a multiemployer pension plan (the "Fund") covered by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended. You asked the Pension Benefit Guaranty Corporation ("PBGC") to confirm "that pre-retirement spouse and lump-sum death benefits and post-retirement lump-sum death benefits are 'forfeitable' and therefore, not to be included in the valuation of the Fund" under section 4219(c)(1)(D) of ERISA and 29 C.F.R. pt. 2676.

Section 4001(a)(8) of ERISA defines "nonforfeitable benefit" as:

a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act (other than submission of a formal application, retirement, [*2] completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this Act or the Internal Revenue Code of 1954.

Death of the participant is a condition of entitlement for each of the three types of benefits you described. Under a terminated plan like the Fund (which never provided for mandatory employee contributions), such benefits are nonforfeitable as of the date of plan termination only if the participant died before that date. Accordingly, the benefits about which you inquire are "nonforfeitable benefits" within the meaning of section 4001(a)(8) only if the participant's death occurred before the date of plan termination. Otherwise, the benefits are forfeitable. (The only exceptions to this principle are certain post-retirement lump-sum death benefits that are derived from a reduction of the participant's annuity benefit. These benefits are like other post-retirement survivor benefits in that nonforfeitability [*3] is dependent on the participant's having become entitled to receive an early or normal retirement benefit.)

Under certain circumstances, section 4041A of ERISA limits the payment of plan benefits to benefits which are nonforfeitable under the plan as of the date of plan termination. Section 4041A(f)(1) of ERISA provides that the PBGC may authorize the voluntary payment of benefits which are not nonforfeitable under the terms of a terminated plan, if the PBGC determines that such payment is not adverse to the interests of the plan's participants and beneficiaries generally and does not unreasonably increase the PBGC's risk of loss with respect to the plan. You have indicated that you have not yet determined whether the Fund will be precluded from paying forfeitable benefits by ERISA section 4041A. For your information, the PBGC has granted blanket approval under section 4041A(f)(1), permitting all terminated plans to pay qualified pre-retirement survivor annuities to the extent otherwise permitted by Subtitle E of Title IV. (See PBGC's regulation on Powers and Duties of Plan Sponsor of Plan Terminated by Mass Withdrawal, 54 Fed. Reg. 29,025, 29,029 (1989) (to be codified at [*4] 29 C.F.R. § 2675.12(c)).)

I hope this information is of help to you. If you have any additional questions, please contact attorney Deborah Bisco, who is handling this matter. Her telephone number is (202) 778-8824.

Carol Connor Flowe, General Counsel

Pension Benefit Guaranty Corporation

89-8

October 19, 1989

REFERENCE:
[*1] 4211 Withdrawal Liability.

OPINION:

We write in response to your request for an advisory opinion from the Pension Benefit Guaranty Corporation ("PBGC") as to whether a multiemployer pension plan's assessment of withdrawal liability pursuant to a contractual agreement with a contributing employer, without regard to whether the plan has unfunded vested benefits, is consistent with Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").

The plan in question would be formed by the merger of three existing plans, two of which are fully funded for vested benefits, and the third of which has unfunded vested benefits. You estimate that the merged plan's assets would slightly exceed its vested benefits. Under the allocation method proposed for the merged plan, a withdrawing employer's withdrawal liability would be the sum of two amounts, one determined with respect to the pre-merger period and the other with respect to the post-merger period. The pre-merger amount would be what the employer's withdrawal liability would have been under its pre-merger plan. Hence, this allocation method could result in withdrawal liability for employers formerly covered by the [*2] less well-funded plan even though the merged plan had no unfunded vested benefits.

In a previous letter to you, the PBGC stated its opinion that ERISA does not permit a multiemployer pension plan to assess withdrawal liability against a withdrawing employer when the plan has no unfunded vested benefits as of the end of the preceding plan year, regardless of the allocation method being used by the plan, and whether or not the plan is the result of a merger of other plans. This opinion was based on a Notice of Interpretation that the PBGC published in the Federal Register on December 31, 1986 (51 FR 47342), which has since been adopted by the U.S. Court of Appeals for the First Circuit in Berkshire Hathaway, Inc. v. Textile Workers Pension Fund, 10 EBC 2625 (1st Cir. 1989).

You propose, however, that as a condition of the merger, employers previously covered by the less well-funded plan would be required to enter into contracts permitting the merged plan to assess withdrawal liability against them without regard to whether the merged plan has unfunded vested benefits. In support of this proposal, you note that the contracting employers' waiver of the limitation on their potential [*3] withdrawal liability would be voluntary. You also suggest that the use of such contracts will benefit other employers by "insulating [them] from pre-merger liability of other plans" and will be "in the best interest of the plans' participants and beneficiaries." And you argue that, as a matter of policy, --

[t]rustees and contributing employers of plans with no unfunded vested benefits will be reluctant to merge with plans that have unfunded vested benefits if the merger creates a fully funded plan that is unable to assess withdrawal liability on employers who contributed to the underfunded plan.

You request the PBGC's opinion that the assessment of withdrawal liability pursuant to such contracts, regardless of whether the merged plan has unfunded vested benefits, would not be prohibited under Title IV of ERISA.

Under section 4202 of ERISA, the initial responsibility for determining whether a withdrawal occurs and the amount of any resulting liability lies with the plan sponsor. Section 4221 further provides that any dispute between a plan sponsor and an employer concerning a determination made under sections 4201 through 4219 is to be resolved through arbitration, subject [*4] to review in the courts. It would be inappropriate for the PBGC to interject itself into these statutory procedures by taking a position regarding the application of the law to the particular facts involved in your request. The PBGC will, however, continue its practice of answering general questions of interpretation under ERISA.

As you note in your request, Rep. Frank Thompson, Jr., during House debate on the Multiemployer Pension Plan Amendments Act of 1980, made the following remarks:

We also wish to make it clear that the statutory imposition of withdrawal liability is not intended to restrict the parties' freedom to agree to additional or supplemental measures to protect a plan from the consequences of an employer's withdrawal. For example, a plan may agree to accept an employee group with past-service credit only if the employer of such group guarantees that the existing liabilities assumed by the plan will be fully funded even if the cost would be greater than the employer's statutory liability. Of course, employers can also agree by contract to waive limitations on their statutory withdrawal liability.

126 Cong. Rec. 23,039 (1980).

The PBGC believes that this statement [*5] reflects Congress's intent that an employer may, consistent with the requirements of Title IV of ERISA, contractually waive limitations on its withdrawal liability. However, this raises an issue of the effect under ERISA section 4211 of an employer's failure to pay all or part of what might be called its "additional liability" -- that is, the additional amount that it has agreed to pay beyond what would otherwise have been its withdrawal liability. The PBGC notes, for example, that if a plan using the presumptive method of allocating unfunded vested benefits under ERISA section 4211(b) is unable to collect all or part of an employer's withdrawal liability, the withdrawal liability of other employers may be increased under section 4211(b)(1)(C) and (b)(4). The PBGC does not believe that Congress expected one employer's waiver of limitations on its withdrawal liability to increase other employers' potential withdrawal liability under the statute (although other employers might agree to such increases by contract). Accordingly, the PBGC believes that an employer's "additional liability" is not to be taken into account under section 4211 of ERISA in such a way as to increase the withdrawal [*6] liability of any other employer, except to the extent agreed to by that other employer.

Your request for the PBGC's opinion in this matter does not include a request for approval of the proposed allocation method under section 4211(c)(5) and 29 CFR Part 2642, and we have not treated it as making such a request. This letter, therefore, should not be construed as approving or disapproving your proposed allocation method under section 4211(c)(5) or Part 2642.

The foregoing comments deal only with issues raised under Title IV of ERISA. You should consult with the Department of Labor and the Internal Revenue Service with regard to questions arising under Title I of ERISA and the Internal Revenue Code respectively.

If you have any further questions regarding this matter, you may call Deborah C. Murphy of this office at 202-778-8820.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

90-1

March 20, 1990

REFERENCE:
[*1] >4069(b)>
4204 Sale of AssetsSale of Assets
>4204(a)(1)(A)>
4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of SecuritySale of Assets. Withdrawal - Posting of Security
4204(a)(1)(C) Sale of Assets. Secondary Liability of Seller Sale of Assets. Secondary Liability of Seller
>4204(b)(1)>
4218 Withdrawal - No occurrenceWithdrawal - No occurrence

OPINION:

We write in response to your request for an opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the application of section 4204 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), in a case where the buyer in a sale qualifying under that section re-sells the purchased operations before the expiration of the five-plan-year period commencing with the first plan year beginning after the first sale.

Your request involves the anticipated sale by your client, a corporation, of an unincorporated division (the "Division"). You state that the Division "employs [union]-represented employees for whom it contributes to an underfunded [multiemployer] pension plan." Your client acquired the Division and other assets in 1987 in a transaction ("first sale") that is assumed for purposes of your request [*2] and this opinion to have met the requirements of section 4204. Your client is now negotiating a sale of the Division to another corporation, and prefers to structure this sale ("second sale") as a sale of assets meeting the requirements of section 4204.

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

A complete or partial withdrawal of an employer (hereinafter in this section referred to as 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 (hereinafter in this section referred to as 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 issued by a corporate surety company that is an acceptable surety for purposes of section 412 of this Act, or an amount held [*3] in escrow by a bank or similar financial institution, satisfactory to the plan, in an amount equal to the greater of [the amount calculated under clause (i) or the amount calculated under clause (ii)]; and

(C) the contract 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.

A second sale that meets the requirements of section 4204 will not result in the withdrawal of the second seller. You ask, however, whether a second sale will result in the disqualification under section 4204 of the first sale, and trigger the withdrawal of the original seller. In this regard, you point out that a second sale will relieve the second seller of the obligation that it assumed as the purchaser in the first sale "to contribute to the . . . Plan for 'substantially the same number' of contribution base units" as the original seller, as section 4204(a)(1)(A) requires.

The circumstances [*4] of the first sale, about which we have no information, may be relevant to your inquiry since the legislative history of section 4204 indicates that the requirement of section 4204(a)(1)(A) was intended to "be applied

for a period of time after the transaction that is reasonable in light of the circumstances of the transaction." 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 16-17 (Comm. Print 1980). In addition, the circumstances of the second sale must be considered in light of the purposes of section 4204(a)(1)(A). That section was meant to "be read with a view to protecting the plan against significant harm as a result of a particular transaction." Id. at 16. It was intended to provide for uninterrupted contributions to the plan and "to protect the plan . . . against a significant diminution of its contribution base without compensation through withdrawal liability." Id.

The plan's contribution base is protected in the context of a second sale meeting the requirements of section 4204 by the new purchaser's assumption, pursuant to [*5] section 4204(a)(1)(A), of the "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." Moreover, in the event of a withdrawal by the new purchaser, that purchaser will be liable for withdrawal liability in an amount determined under section 4204(b)(1). The plan will also be protected by the secondary liability of the second seller under section 4204(a)(1)(C) and, under section 4204(a)(1)(B), by the bond or escrow provided by the new purchaser. Finally, the plan will be protected (for the remainder of the period of five plan years commencing with the first plan year beginning after the first sale) by the bond or escrow provided by the second seller when it purchased the assets in the first instance. However, to ensure that this protection will be adequate in the event of the new purchaser's withdrawal, it is necessary to consider how the amount of the new purchaser's bond or escrow, and the amount of the new purchaser's potential withdrawal liability, are to be determined.

Under section 4204(a)(1)(B), the amount of the bond or escrow that the [*6] purchaser in the second sale must provide is equal to the greater of --

(i) The average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs . . . .

Under these provisions, the amount of the bond or escrow provided by the purchaser in the first sale is based on the contributions required to be made by the original seller. In turn, the amount of the bond or escrow provided by the purchaser in the second sale will be based on the "average annual" or "annual" contribution required to be made by the second seller, who was the purchaser in the first sale, during the periods described in section 4204(a)(1)(B)(i) and (ii). In the circumstances you describe, however, the seller in the second sale has been required to contribute to the plan for fewer than two years. In such circumstances, it is our opinion that the amount of the bond or escrow to be [*7] provided by the purchaser in the second sale must be calculated with reference not only to the second seller's required contributions, but also to any contributions required to be made by the original seller during the 3-plan-year period described in section 4204(a)(1)(B)(i) (or the plan-year period described in section 4204(a)(1)(B)(ii), if relevant in the circumstances). In other words, the original seller's required contributions must be attributed to the seller in the second sale for purposes of calculating the amount of the bond or escrow provided by the purchaser in the second sale.

We believe that the same principles must apply with respect to determining the amount of the withdrawal liability of the purchaser in the second sale if that purchaser withdraws during the first five plan years commencing with the first plan year beginning after the second sale. In this regard, section 4204(b)(1) requires that --

the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years. [*8]

As with the amount of the bond or escrow determined under section 4204(a)(1)(B), the liability of the first purchaser in the event of a withdrawal within 5 plan years after the first sale is based on the contributions required to be made by the original seller in the year of the first sale and the 4 plan years preceding that sale. Similarly, the liability of the purchaser in the second sale, if the purchaser withdraws in the relevant period under section 4204(a)(1)(C), will be based on the second seller's required contributions in the year of the second sale and the four plan years preceding the second sale. However, if the second seller has not contributed to the plan for the relevant period by the time of the second sale, the liability of the purchaser in the second sale must reflect, to the extent relevant, the original seller's contribution history.

We believe that these results are consistent with the purpose of section 4204: "to assure the protection of the plan

with the least practical intrusion into business transactions." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., supra, at 16. Attribution of the original seller's contribution history to [*9] the second seller assures that the plan will be protected in the event of an early withdrawal by the purchaser in the second sale. See id. The plan will be protected by a meaningful bond (or escrow) provided by the purchaser in the second sale, and will be adequately compensated by withdrawal liability calculated just as it would have been if the first purchaser had withdrawn during the period described in section 4204(a)(1)(C).

Thus, it is our opinion that a second sale of assets will not trigger the withdrawal of the original seller if the second sale meets all the requirements of section 4204, as set forth above.

You have asked, in the alternative, whether the incorporation of the Division and the sale of the new subsidiary's stock, in a transaction that meets the requirements of section 4218 of ERISA, would result in the withdrawal of the original seller. Section 4218 provides that:

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because --

(1) an employer ceases to exist by reason of --

(A) a change in corporate structure described in section 4069(b) . . .

if the change causes no interruption [*10] in employer contributions or obligations to contribute under the plan . . . .

* * *

[A] successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

Among the changes described in section 4069(b) are "a mere change in identity, form, or place of organization" and "a merger, consolidation or division." In Opinion Letters 83-11 (May 16, 1983), 84-7 (December 20, 1984), and 82-4 (February 10, 1982), the PBGC expressed its opinion that neither the incorporation of a division nor the sale of the resulting subsidiary's stock brings about the withdrawal of the original (parent) corporation if the change causes no interruption in employer contributions or obligations to contribute under the plan. Nor, in our opinion, would such a sale result in the withdrawal of the original seller in this instance.

The incorporation of a division and sale of the resulting subsidiary's stock will result in the formation of a controlled group including at least the purchaser of the stock and the purchased subsidiary. That controlled group will become the "employer" for purposes of Title IV. See ERISA section 4001(b). Under the last sentence [*11] of section 4218 (quoted above), this new controlled group is considered to be the same as the previous contributing employer -- the original purchaser under section 4204. Thus, the contribution history used to determine the withdrawal liability of the controlled group in the event of withdrawal will be the same contribution history that would have formed the basis for withdrawal liability if the incorporation and stock sale had not occurred. And, as discussed above, that history includes the contribution history of the original seller under section 4204.

It is also the PBGC's opinion that under the last sentence of section 4218, a withdrawal and failure to pay withdrawal liability by the successor employer (the new controlled group) would be treated as if it were the act of the predecessor employer -- the purchaser in the first sale (under section 4204). Therefore, in the event of such a withdrawal and non-payment, the plan would be entitled to payment of the bond or escrow provided under section 4204(a)(1)(B) and the original seller's secondary liability. (The terms of the bond or escrow should provide for payment to the plan upon withdrawal and non-payment of withdrawal liability [*12] by the successor employer, and failure of the bond or escrow so to provide -- either explicitly or as a matter of interpretation -- would be equivalent to discontinuance of the bond upon the second sale, which would disqualify the first sale under section 4204, unless an appropriate replacement bond or escrow were in place.)

With the understandings set forth in this letter, it is our opinion that transactions like those you describe would not ordinarily result in the disqualification of the first sale of assets under section 4204.

Of course, the opinions in this letter are subject to the special rule in section 4212(c), which states that --

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and

liability shall be determined and collected) without regard to such transaction.

If you have any further questions about this matter, please call Deborah C. Murphy of my staff at (202) 778-8820.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

90-2

April 20, 1990

REFERENCE:
[*1] >4041A(e)>
4211 Withdrawal Liability.
>4211(b)>
>4211(c)(2)>
>4211(c)(3)>
4219 Notice & Collection of Withdrawal Liability.
>4219(c)(1)(C)(i)>
>29 CFR Part 2676>
29 CFR § 2676.15>

OPINION:

I write in response to your letter requesting advice concerning the assessment, calculation and collection of withdrawal liability by a multiemployer pension plan under section 4219 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1399, in connection with the termination of the plan. Specifically, you seek the PBGC's opinion regarding various policies and procedures that have been proposed by the plan trustees.

First, you seek our advice concerning the calculation of the amount of annual payments of withdrawal liability under ERISA § 4219(c)(1)(C)(i). This section requires a withdrawing employer to make an annual payment of withdrawal liability equal to the product of (i) the highest average annual number of contribution base units over a three consecutive plan year period during the ten plan years preceding the year of withdrawal, and (ii) the employer's highest contribution rate under the plan during the [*2] ten plan years ending with the year of withdrawal. The purpose of this section is to make the annual withdrawal liability payment approximate the highest annual contributions made by the employer prior to withdrawal.

In this regard, you note that certain employers contribute to the plan pursuant to several different collective bargaining agreements, each requiring a different rate of contributions to the plan. You cite certain instances in which some of these employers have been making contributions to the plan at a high rate under a contract covering only a few employees, while contributing at a lower rate under other contracts covering many more employees. For some employers, the lowest contribution rate under any of their contracts may be half that of their highest contribution rate. You note that a literal application of section 4219(c)(1)(C)(i) could require that the amount of annual payments of withdrawal liability be computed using the highest contribution rate under any of the employer's contracts. This could result in annual payments of withdrawal liability that greatly exceed the employer's highest annual contributions on an aggregate basis under all contracts during [*3] the prior ten plan years.

In order to avoid this result, you have asked whether the trustees may calculate the amount of the annual payment of withdrawal liability under section 4219(c)(1)(C)(i) by applying the formula described above on a contract-by-contract basis rather than using a cumulative approach. In other words, an employer's annual payment of withdrawal liability would equal the sum of the products described in section 4219(c)(1)(C)(i) computed separately for each of the employer's contracts.

This appears to be a question of first impression under the Multiemployer Pension Plan Amendments Act of 1980 that is not directly addressed under the statute or the legislative history. However, the purpose of the annual payment provision is to have the annual payment of withdrawal liability approximate the highest level of contributions made by the employer during the ten plan years preceding the withdrawal. Consequently, we believe that the trustees' adoption of a contract-by-contract approach in calculating the annual payment is reasonable and consistent with the intent of the statute.

Second, you have asked whether the trustees can adopt the contract-by-contract approach [*4] for purposes of

determining the amount of contributions to be made by continuing employers following plan termination under ERISA § 4041A(a)(1). Under ERISA § 4041A(e), a contributing employer in a multiemployer plan that is terminated by plan amendment must continue to contribute at a rate that equals or exceeds the employer's highest rate of contributions during the five consecutive plan years ending on or before the plan termination date. It is the PBGC's view that this section does not require an employer contributing at different rates under separate contracts to make contributions under all contracts at the highest rate provided under any of the contracts. The trustees' proposal to increase contribution rates across the board by a fixed percentage of the rates under each individual contract appears to comply with section 4041A(e), provided that each resulting individual contract rate is at least equal to the highest rate under that contract during the five consecutive plan years ending on or before the plan termination date.

Third, you have asked whether the trust may be amended to permit individuals other than ones associated with or employed by a participating employer [*5] to serve as trustees. This proposed amendment does not raise any issues under Title IV of ERISA, and the PBGC therefore expresses no opinion concerning its adoption.

Fourth, you have asked whether it would be possible to use interest rates other than those prescribed under § 2676.15(c) of the PBGC's regulation on valuing plan assets and liabilities following mass withdrawal (29 CFR pt. 2676) for purposes of calculating the value of benefits under the plan following a mass withdrawal of employers. Specifically, the trustees want to use the interest rate earned under guaranteed investment contracts or other dedicated assets to value the benefit liabilities allocated to those assets. This is not permitted under the mass withdrawal valuation regulation. When a plan has terminated by mass withdrawal, the likelihood that dedicated assets will be held to maturity is significantly reduced. Moreover, because the valuation performed following a mass withdrawal termination is the basis for the plan's final reallocation and assessment of withdrawal liability, it is essential that the valuation interest rate not be overstated.

Fifth, we understand that for the 1988 plan year the plan's [*6] enrolled actuary has reallocated unfunded vested benefit liability from December 31, 1979 through December 31, 1987 on the basis of current information, some of which differs from that used in prior years by reason of corrections to certain data, including contribution and controlled group data. You have asked whether this reallocation affects employers that have previously withdrawn, including those employers that have paid or are currently paying their withdrawal liability, and those who are still in the process of contesting their withdrawal liability.

Under three of the alternative statutory allocation methods (ERISA § § 4211(b), 4211(c)(2), 4211(c)(3)), the calculation of an employer's withdrawal liability is based (at least in part) on the value of the plan's unfunded vested benefits for the plan year immediately preceding the employer's withdrawal from the plan. If the trustees discover an error in the calculation of the plan's unfunded vested benefits for a prior plan year, the valuation for that prior year may not be changed retroactively. Any necessary correction of the plan's unfunded vested benefits should be reflected in the valuation that revealed the earlier error, [*7] or, if the error was not discovered in connection with a valuation, in the first valuation following the discovery. Any employer that withdraws in the plan year following the plan year to which the "corrected" valuation applies would be affected by the correction, by virtue of the operation of the statutory allocation methods.

However, where the plan discovers an error affecting the calculation of a particular employer's withdrawal liability (for example, where an audit reveals additional required contributions or where the plan learns of the existence of one or more controlled group members with an obligation to contribute), the employer would generally be subject to an additional assessment. A revised assessment correcting the error is appropriate where the original assessment is still the subject of litigation or arbitration.

If the employer contests the plan's right to revise its original assessment or issue a second assessment, this dispute, like other disputes involving withdrawal liability, must be resolved first through arbitration and then, if necessary, through the courts. In deciding whether the revised assessment should be allowed, the adjudicator should consider [*8] the relevant facts and circumstances, including whether the plan had access to the data necessary to correct the error at the time of the original assessment, whether the employer was aware or had reason to be aware of the error before the plan discovered it, whether the employer's objections relate to facts that were also applicable to the original assessment, and whether the employer would be prejudiced in maintaining its defense by the revised assessment. Generally, the last factor should be given the greatest weight.

Finally, you have asked whether upon its termination the plan must vest those employees who were not previously vested under the plan. From your letter, we understand that a plan participant does not become vested in his or her

accrued benefits under the plan until the participant has ten years of service for vesting purposes, at which time the participant becomes 100% vested in his or her accrued benefit. Section 411(d)(3) of the Internal Revenue Code of 1986, as amended (the "Code") provides that the right of participants to benefits accrued under the plan at the time of termination shall be nonforfeitable to the extent such benefits are funded. Therefore, [*9] if immediately prior to the date of plan termination the plan has unfunded vested benefits, additional vesting upon termination is not required under section 411(d)(3) of the Code.

I hope this letter is of assistance. If you have any additional questions, please contact Alan Siff of my staff at the above address or at (202) 778-8824.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

90-4

August 3, 1990

REFERENCE:
[*1] >4022A>
>4022A(b)(1)(A)>
>4022A(b)(2)(A)>
4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass Withdrawal.
>29 CFR 2648.6(b)>
>29 CFR 2676.2(a)>
>29 CFR 2676.13>
>29 CFR 2676.15>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation (the "PBGC") on issues raised in connection with the termination of the * * * by the mass withdrawal of all contributing employers (the "Employers").

You ask whether changes in interest rates occurring after the mass withdrawal valuation date may be taken into account in determining the amount of the Plan's unfunded vested benefits for the purpose of assessing reallocation liability. In support of your position that such changes should be taken into account, you cite PBGC Opinion Letter 88-5, which states that "trustees may make decisions about . . . the amount of reallocation liability to be assessed to [withdrawing] employers at any time before payment of the liability is demanded." You also recognize, however, that Opinion Letter 88-5 states that "the trustees may not base those decisions on events that occur, [*2] or conditions that come into being, after the times specified in the reallocation regulation and ERISA."

Pursuant to Section 4219(c)(1)(D) of ERISA and 29 C.F.R. § 2648.6, a plan that is terminating in a mass withdrawal is to reallocate the plan's unfunded vested benefits among the withdrawing employers. The plan's unfunded vested benefits are to be valued as of the plan's mass withdrawal date. 29 C.F.R. § § 2648.6(b), 2676.2(a). The amount of the plan's unfunded vested benefits is to be determined in accordance with the PBGC's regulation entitled "Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal." 29 C.F.R. Part 2676. Pursuant to 29 C.F.R. § 2676.13(a), the interest rate to be used in valuing plan benefits is determined pursuant to 29 C.F.R. § 2676.15. Under this section of the regulation, the interest rate to be used is established as of the plan's mass withdrawal valuation date. 29 C.F.R. § 2676.15(c). Accordingly, the PBGC regulations do not permit consideration of interest rate changes after the mass withdrawal valuation date in the plan's calculation of unfunded vested benefits for the purpose of determining reallocation liability upon a mass withdrawal. [*3]

You also seek the PBGC's views regarding whether a Plan amendment increasing benefits was adopted more than 60 months before the Plan's termination date of October 31, 1988. The amendment in question increased benefits for Plan participants effective September 1, 1983. You request that the PBGC consider the amendment to have been adopted on September 13, 1983, the date the contributing employers of the Plan and the Union representing Plan participants entered into an agreement to increase the level of contributions to be made by the employers. If the date you request is accepted, payment of the benefit increase would be guaranteed by the PBGC pursuant to Section 4022A of ERISA, 29 U.S.C. § 1322A. If, however, the date the Plan Trustees formally approved the benefit increase, December 2, 1983, is determined to be the adoption date of the amendment, payment of the benefit increase would not be guaranteed by the PBGC. Section 4022A(b)(1)(A) of ERISA, 29 U.S.C. § 1322A(b)(1)(A).

In a case such as this, the PBGC has historically required that the proponent of a date earlier than the formal date of adoption (here December 2, 1983) demonstrate through clear and convincing evidence that [*4] the amendment was actually adopted on an earlier date.

You have submitted evidence showing that:

1) On September 13, 1983, the Union and employers reached a written agreement (the Collective Bargaining Agreement or "CBA") providing that the employers' contributions to the Plan be increased by 5 cents per person-hour effective September 1, 1983, from 35 cents to 40 cents, and by another 5 cents per person-hour effective September 1, 1984, to 45 cents;

2) In early August, during negotiation of the CBA, * * *, the Plan's actuary, had been asked to determine the benefit level the Plan would be able to support if contributions were increased to 45 cents per person-hour. By Memorandum dated December 1, 1983 (the "Actuary's Report"), * * * advised the Trustees that, if the Plan reamortized its liabilities over a 15 year amortization schedule (to replace the ten years remaining on the Plan schedule then in use), a 45 cents per hour contribution rate would support a $ 1.00 increase per year of service in the Plan's monthly benefit level, with some margin for experience. The Actuary's Report also commented that a 39.1 cent contribution rate would support the current benefit level of the Plan. [*5] It noted that these conclusions were based on the assumption that the Plan's contribution base would remain stable, a fact that was inconsistent with the erosion of this base over the ten prior years. The Actuary's Report commented that if the contribution base continued to decline by 20 to 30 percent, "it would be difficult to recommend a substantial benefit increase";

3) On December 2, 1983, the Plan Trustees, after review of the Actuary's Report, unanimously approved a $ 1.00 increase per year of service in the Plan's benefit level (which increased the maximum benefit under the Plan by thirty dollars), effective September 1, 1983;

4) The handwritten notes of the Trustees' December 2, 1983 meeting, taken by the Plan's Counsel (the "Counsel's Notes"), indicate that, after the Actuary's Report was presented, * * *, a Union Trustee, stated that a benefit increase was promised in negotiations over the CBA, and that the Union would take action if an increase was not approved. In response, * * *, an Employer Trustee, stated that the employers in the negotiations pointed out that the first 5 cent increase in contributions should be used to shore up the condition of the Plan, and that [*6] the deferred contribution increase should be used to effect a benefit increase. After * * * stated that the Union would not ask for an increase after the September 1, 1984 contribution increase, the Trustees approved the benefit increase;

5) The Plan had a history of approving benefit increases simultaneously with increases in the rate of employer contributions. Such changes were made in 1971, 1974, 1977 and 1980. The 1980 increase provided for a partially deferred increase in the Employers' contribution rate, while the full amount of the increase in the Plan's benefit level was effective immediately; and

6) In a membership meeting concerning the September 1983 contract, the Union negotiators reported that "the pension would be increased by $ 30, or whatever the fund could stand after * * * did an actuarial evaluation and that this increase would be retroactive to September 1, 1983."

Item 6 above was presented in a March 29, 1990 letter to the PBGC from * * *. The other facts were deduced from the historical documents you submitted in support of your opinion request. You argue that these facts demonstrate that "[i]t was intended by the parties that the increase in contributions [*7] [included in the CBA] would be accompanied by a benefit increase under the Plan", and that, accordingly, September 13, 1983 should be considered the date the amendment was adopted. However, in order for such a benefit increase to be viewed as adopted by the Plan, there must be sufficient evidence to demonstrate that both the Union Trustees and the Employer Trustees agreed during negotiation of the CBA that such an increase be effective on a date more than 60 months before the Plan's termination date. The PBGC does not believe the evidence you have submitted demonstrates that such an agreement was reached before the December 2, 1983 Trustees' meeting, particularly in view of the fact that the Trustees debated the appropriate effective date of the increase at that meeting. Accordingly, absent any additional evidence on the effective date of the increase, the PBGC would conclude that the benefit increase was adopted on December 2, 1983, not September 13, 1983, and that the PBGC would not guarantee payment of the increase.

If you have further questions regarding this matter, please contact John Sutter of my staff at (202) 778-8821.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

91-2

February 1, 1991

REFERENCE:
[*1] >4001(a)(8)>
>4041A(c)(1)>
4041A(f)(1) Multiemployer Termination. Lump Sum Payments.
>29 CFR § 2675.12(c)>

OPINION:

You have asked for written information concerning questions posed by your constituent, * * *, in a letter to Mr. James B. Lockhart, III, Executive Director of the Pension Benefit Guaranty Corporation ("PBGC"), a copy of which was sent to you. Your letter was referred to this office, and we apologize for our delay in replying.

* * * letter to Mr. Lockhart concerns an amendment to eliminate certain preretirement survivor annuity ("QPSA") benefits from the Teamsters Local * * * Pension Plan * * * is apparently requesting PBGC approval, under 29 C.F.R. § 2675.17, for the payment of benefits not otherwise permitted under the law and regulations applicable thereto, as discussed below. Accordingly, * * * letter has been referred to our Corporate Policy and Research Department, which considers such requests for exceptions. We will send you a copy of our determination letter, when completed.

The correspondence forwarded by you to us also includes a letter from your constituent, * * *, concerning the amendment eliminating the QPSA and asking [*2] for information about the PBGC and "vested" benefits. As we understand the facts, the QPSA was eliminated for participants who had not died as of the plan termination date; * * * husband, * * *, was a participant who die on * * *, after the plan termination date; and * * * would have been entitled to receive a survivor annuity beginning on or after * * *, if the plan had not been amended. We hope the following information, giving an overview of the PBGC and of the applicable law, will be of use to you in responding to * * *.

The PBGC is an independent United States government agency established by Congress under the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") to ensure the payment of certain basic pension benefits in private pension plans. The agency is administered by a Board of Directors consisting of the Secretaries of Labor, Treasury, and Commerce, with the Secretary of Labor as Chairman. The Secretary of Labor has delegated the administrative responsibilities of the agency to the Executive Director. In administering the insurance program, the agency is aided by a 7-member Advisory Committee appointed by the President of the United States, the members [*3] of which represent labor, management, and the general public.

Under ERISA, the PBGC operates two separate insurance programs - the single-employer program and the multiemployer program. The insurance programs are financed through premiums paid by covered pension plans, amounts paid as employer liability when underfunded plans terminate, and income on the investment of those amounts. All administrative costs, including the salaries of agency employees, are paid with agency funds; no taxpayer moneys are used by the agency.

The plans that are covered by the PBGC insurance programs, the circumstances under which a covered plan may terminate, and the manner in which a plan completes the termination are set forth with specificity in ERISA. As a part of its statutory duties, the PBGC interprets the rules for terminating plans and exercises oversight over the operation and closeout of those plans.

The Teamsters Local * * * Plan is a multiemployer plan that is covered by the PBGC multiemployer insurance program. The plan was terminated on * * *, under section 4041A(a)(2) of ERISA by a mass withdrawal of all employers. According to * * * letter, the actuarial valuation for the Teamsters [*4] Local * * * Plan at * * *, shows that the plan's assets are insufficient to pay the plan's nonforfeitable benefits. According to the Summary of Material Modification dated * * *, the plan sponsor amended the plan to eliminate the QPSA from the plan.

ERISA sections 4041A(c)(1) and 4041A(f)(1) provide that the sponsor of a plan terminated by mass withdrawal may pay only benefits that were nonforfeitable on the date the plan * * * terminated, unless the PBGC authorizes the payment

of other benefits. The PBGC may authorize the payment of benefits other than nonforfeitable benefits only if it determines that the payment "is not adverse to the interest of the plan's * * * participants and beneficiaries generally and does not * * * unreasonably increase the [PBGC's] risk of loss with respect to the plan." Further, if a plan sponsor finds, at the end of any plan year, that the terminated plan's assets are not sufficient to pay when due all of the plan's obligations with respect to nonforfeitable benefits, the plan sponsor must amend the plan to reduce benefits. See, ERISA § 4281(c).

"Nonforfeitable benefits" are not the same as "vested benefits." Benefits become "vested" when a plan participant [*5] has completed the required number of years of service under the plan, and "vesting" means simply that the participant has the right to receive a retirement benefit even if he or she leaves the service of the employer before retirement age. A benefit, even though "vested", is not considered to be "nonforfeitable" until the participant has met all the plan's requirements for that particular benefit. ERISA section 4001(a)(8). Forfeitability is determined as of the plan's termination date. ERISA section 4041A(c)(1). In the case of a death benefit such as the QPSA in the Teamsters Local * * * Plan, the benefit does not come within the statutory definition of "nonforfeitable" unless the participant died before the plan termination date.

As noted above, ERISA section 4041A(c)(1) generally precludes the payment of nonforfeitable benefits, such as a QPSA for participants who are alive on the plan termination date, without PBGC approval granted pursuant to section 4041A(f)(1). In its regulations, the PBGC has given a blanket approval permitting all terminated plans to pay QPSA's with respect to participants who die after the plan termination date unless, and until, the plan sponsor finds [*6] that the plan's assets are insufficient to pay nonforfeitable benefits. See, Powers and Duties of Plan Sponsor of Plan Terminated by Mass Withdrawal, 54 Fed. Reg. 29025, 29026 (July 11, 1989) (codified as 29 C.F.R. Part 2675); 29 C.F.R. § § 2675.12 and 2675.22. Under the regulations, after determining that plan assets were insufficient to pay for all nonforfeitable benefits, the plan sponsor was required to eliminate that benefit from the Teamsters Local Plan.

Under section 2675.17 of PBGC's regulation, however, upon written application by the plan sponsor, the PBGC may authorize the payment of additional benefits if it finds that the proposed payment meets the conditions in ERISA section 4041A(f)(1). As noted above, we are treating * * * letter as a request for PBGC approval under the regulation of payment of the QPSA benefits and have referred his letter to the appropriate department for its consideration.

We hope this information is helpful to you. If you have any questions, please telephone Renae R. Hubbard of my staff at 202-778-8823.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

91-3

March 29, 1991

REFERENCE:
[*1] >4001(b)(1)>
4064 Liability of Employers in Multiple Employer & Multiemployer Plans.
>4069(b)>
4204 Sale of Assets.
4218 Withdrawal - No occurrence.
>4221(e)>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") on two questions under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") and the multiemployer plan provisions added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). You ask whether a company that sold assets to an unrelated company prior to the enactment of MPPAA will be treated as the same "employer" as the purchasing company when determining withdrawal liability upon the purchasing company's complete withdrawal from a multiemployer plan under MPPAA. You also ask whether a purchasing company's failure to object to a plan's treatment of the purchasing and selling companies as the same employer, when estimating potential withdrawal liability, bars the purchasing company from challenging such treatment following a notice and demand for payment of liability for an actual withdrawal. [*2]

As you are aware, section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues of withdrawal and withdrawal liability are to be resolved first through arbitration, and if necessary, in the courts. The PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions. However, the PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

1) In response to your first question, Title IV of ERISA as originally enacted, and as amended by MPPAA, has never contemplated imposing upon a purchasing company the contribution history of the selling company solely as a result of a bona fide arms' length sale of assets. Under ERISA, each contributing employer is normally responsible for its own contribution history under a plan. See PBGC Opinion Letter 82-40.

Prior to MPPAA, a withdrawal from an ongoing multiemployer plan did not always trigger liability. Liability was triggered only when a multiemployer plan terminated, and then, only those employers who withdrew within the five years immediately preceding the termination were responsible [*3] for that liability. See ERISA § 4064, 29 U.S.C. § 1363 (1976) (no longer applicable to multiemployer plans). n1

n1 However, substantial employers (i.e., 10 percent or greater contributors) that withdrew pre-MPPAA were required to post a bond or escrow as security in case the plan terminated within five years from the date of their withdrawal.

Under section 4064, each employer's liability was based on the ratio of the employer's required contributions during the five-year period preceding termination to all required contributions during that period. For purposes of section 4064, two or more businesses could be treated as the same "employer" under the controlled group provision (section 4001(b)), or the successorship provision (section 4062(d)), neither of which, by its terms, applied to a transaction involving nothing more than a sale of assets between unrelated businesses.

With the enactment of MPPAA, employers withdrawing from ongoing multiemployer plans can now have an immediate liability. ERISA § 4203 generally defines a complete withdrawal as occurring when an employer permanently ceases to have an obligation to contribute under the plan, or permanently ceases all [*4] covered operations under the plan. Under MPPAA, the controlled group provision (since recodified as ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1) (1988)) and the successorship provision (recodified as ERISA § 4069(b)), continue to apply in relevant cases. See ERISA § 4218. However, when a sale of assets results in the selling company no longer having an obligation

to contribute for covered operations under the plan, it is considered to have withdrawn (assuming it has no controlled group members with such an obligation), and is therefore subject to the withdrawal liability imposed under section 4201. That liability, of course, will be calculated with reference to the selling company's contribution history. See ERISA § 4211. In that situation, the purchaser company is plainly not responsible for the selling company's contribution history.

MPPAA, however, also added section 4204 to address sales of assets. Section 4204(b)(1) provides that, for purposes of determining its withdrawal liability in the event of its subsequent withdrawal, the purchaser of covered operations sold in compliance with section 4204 assumes the contribution history of the seller with respect to those [*5] operations for the year of the sale and the preceding four years. In a sale that does not comply with section 4204, the purchaser is normally regarded as having entered the plan with respect to the purchased operations as of the effective date of its obligation to contribute for those operations.

There was no equivalent to section 4204 prior to MPPAA. Thus, there is no statutory basis in Title IV for concluding that a pre-MPPAA sale of assets between unrelated businesses, standing alone, will result in the purchaser and the seller being considered the same employer for withdrawal liability purposes or the purchaser being responsible for the contribution history of the seller for withdrawal liability purposes.

2) You also ask whether the purchasing company's failure to object to the plan's treatment of the purchasing and selling company as one employer when estimating potential withdrawal liability bars the purchasing company from challenging that treatment when an actual withdrawal occurs.

Under ERISA § 4221(e), an employer may request from the plan sponsor an estimate of its potential withdrawal liability with respect to the plan. When the plan provides an employer with an estimate [*6] of its withdrawal liability under section 4221(e), no obligation to pay such liability occurs, nor does the employer waive any objections to the estimate by failing to dispute it. An "estimate" of withdrawal liability provided pursuant to a request under section 4221(e) is not binding upon either party.

Thus, the employer's failure to object to an estimate provided pursuant to section 4221(e) would not bar the employer from later challenging the determinations underlying the estimate when an actual notice and demand for payment of withdrawal liability is issued pursuant to ERISA § 4219(b)(1).

If you have any further questions about this matter, you may call David Kemps of my office at 202-778-8886.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

91-6

August 19, 1991

REFERENCE:
[*1] >4214>
>4214(b)>
4219(c)(7) Notice & Collection of Withdrawal Liability - Alternate Payment
4224 Alternate Method for Payment

OPINION:

I write in response to your letter requesting an opinion concerning the adoption of plan rules providing for terms and conditions for the satisfaction of an employer's withdrawal liability in accordance with Sections 4219(c)(7) and 4224 of Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § § 1399(c)(7) and 1404. Specifically, you seek the PBGC's opinion as to whether the trustees of a multiemployer pension plan can adopt plan rules modifying an employer's withdrawal liability payment schedule to take into account the financial condition of a withdrawing employer. You also request the PBGC's opinion as to what conditions or limitations should be imposed on withdrawing employers seeking to have their payment schedules modified.

As we understand the facts, the * * * Pension Plan * * * is a multiemployer pension plan that has been terminated by amendment pursuant to Section 4041A(a)(1) of ERISA, 29 U.S.C. § 1341A(a)(1). Several employers have requested to have their withdrawal liability payment schedule modified because payment [*2] in accordance with Section 4219(c) of ERISA, 29 U.S.C. § 1399(c), results in the employer being unable to continue in business. In such cases, the Trustees of the Plan believe that it may be prudent to modify a financially troubled employer's withdrawal liability payment schedule in order to allow the employer to continue in business and make additional withdrawal liability payments to the Plan. Accordingly, the Trustees of the Plan seek to adopt plan rules in accordance with Sections 4219(c)(7) and 4224 of ERISA, 29 U.S.C. § 1399(c)(7) and 1404, which will-allow them to modify a financially troubled employer's withdrawal liability payment schedule in order to maximize the net amount of withdrawal liability payments received.

Sections 4219(c)(7) and 4224 of ERISA, which are virtually identical, permit plans certain latitude regarding the satisfaction of an employer's withdrawal liability. Section 4224 of ERISA provides:

A multiemployer pension plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with [ERISA] and with such regulations as may be prescribed by the [PBGC].

29 U.S.C. § 1404. [*3] The PBGC has not promulgated regulations under this section.

The legislative history indicates that the purpose of the provision is to enable trustees to weigh the cost of collecting withdrawal liability payments against the expected return in order to maximize recovery.

[Section 4224] authorizes plans . . . to provide an alternative method for payment of withdrawal liability. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of a responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. Thus, for example, where it is prudent and in the participants' interest, plan trustees may decide to settle a withdrawal liability dispute for less than the full amount claimed, to cooperate with an employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment of further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount of liability likely to be recovered.

126 Cong. Rec. H7889 (daily ed., August 26, 1980) (statement [*4] of Rep. Thompson) (emphasis added).

The trustees' proposal to adopt plan rules which allow modification of a financially troubled employer's withdrawal liability payments is unlike the examples cited in the legislative history. The proposal does not involve compromising

a disputed claim, cooperating with other creditors in a contractual or court supervised renegotiation of an employer's indebtedness, or foregoing collection of withdrawal liability. Rather, the trustees seek a mechanism to deal with financially troubled employers before informal or court supervised insolvency proceedings become necessary.

We conclude that rules which allow the trustees of a multiemployer pension plan to modify and lower a financially troubled employer's withdrawal liability payment schedule are consistent with ERISA and permissible under Sections 4219(c)(7) and 4224. In situations where payments in accordance with Section 4219(c) of ERISA will cause an employer to liquidate, plan rules which authorize trustees to modify withdrawal liability payment schedules enable the trustees to collect a greater portion of the employer's total withdrawal liability. The employer can pay a lesser amount over a [*5] longer period of time. Such rules are consistent with Sections 4219(c)(7) and 4224 of ERISA because they recognize the discretion reserved for plan fiduciaries to facilitate the collection of withdrawal liability on behalf of the plan and its participants. Plan rules which provide alternative terms or conditions for satisfaction of withdrawal liability are allowable under Sections 4219(c)(7) and 4224 of ERISA if they are reasonable and maximize the net amount of withdrawal liability for the plan at supportable costs. We note that the proposed modification is structured to yield the total payment of withdrawal liability, albeit over a longer period of time.

The decision to modify and lower an employer's withdrawal liability schedule pursuant to plan rules adopted in accordance with Section 4219(c)(7) and 4224 of ERISA is subject to the fiduciary standards prescribed by Title I of ERISA. The trustees must look to what is best for the plan and its participants in adopting rules allowing modification of withdrawal liability payment schedules and in determining what terms and conditions should be imposed on a specific employer seeking to have its payment schedule modified. n1 See [*6] 29 U.S.C. § 1104. The United States Department of Labor is responsible for enforcing the fiduciary standards prescribed by Title I of ERISA. Any questions concerning the application of the fiduciary standards in a specific case should be referred to them.

n1 The trustees' decision to modify an employer's withdrawal liability payment schedule pursuant to rules adopted in accordance with Sections 4219(c)(7) and 4224 of ERISA possibly could be viewed as an extension of credit between the plan and a party in interest which is prohibited by Section 406(a)(1)(C) of ERISA, 29 U.S.C. § 1106(a)(1)(C). However, Section 4219(d) of ERISA provides that the prohibited transactions described by Section 406(a) of ERISA do not apply to actions permitted under MPPAA. See also 29 U.S.C. § 1108(b)(10).

We note that under Section 4214(b) of ERISA, 29 U.S.C. § 1394(b), plan rules authorized under Title IV of ERISA must operate and apply uniformly to all employers, although they may take into the employer's creditworthiness. Rules which take into account the creditworthiness of an employer should state with particularity the categories of creditworthiness the plan will use, the specific differences [*7] in treatment accorded employers in different categories, and the standards and procedures for assigning an employer to a category.

I hope this letter is of assistance. If you have any additional questions, please contact D. Bruce Campbell of my staff at the above address or at (202) 778-1918.

Carol Connor Flowe

General Counsel

Pension Benefit Guaranty Corporation

91-7

October 1, 1991

REFERENCE:
[*1] 4219(b) Notice and Collection of Withdrawal Liability. Withdrawal Liability - Assessment and Review
4221 Resolution of Disputes
>29 C.F.R. 2641>

OPINION:

We respond to your request for an advisory opinion from the Pension Benefit Guaranty Corporation ("PBGC") concerning the ability of employers to raise additional issues at various stages of the review and dispute resolution procedures under sections 4219(b) and 4221(a) of the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), 29 U.S.C. § 1381, et seq., as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208 (1980).

As soon as practicable after an employer's withdrawal from a multiemployer pension plan, the plan sponsor must notify the employer of the amount of liability and the schedule of liability payments, and demand payment. ERISA § 4219(b)(1). To contest that determination the employer must first seek review by the plan sponsor under § 4219(b)(2)(A); if the dispute is not resolved, § 4221(a)(1) provides that "[a]ny dispute . . . shall be resolved through arbitration." You ask whether an employer that fails to raise issues in an initial written request for [*2] review under § 4219(b) may later raise such issues for review by the plan, or in arbitration under section 4221. You also ask whether issues may be brought to the arbitrator for review after submission of the initial arbitration demand.

The statute provides that, no later than ninety days after receiving the plan sponsor's notice of liability, an employer may request review of specific matters relating to the determination of liability and the payment schedule, may identify inaccuracies in the determination of the amount of withdrawal liability, and may furnish additional relevant information. ERISA § 4219(b)(2)(A). The statute does not directly address whether the employer may raise new issues after submission of the initial request for review. Of course, if the initial request is submitted before the expiration of the ninety-day period, the employer may, within the remainder of the period, submit additional relevant information. Thereafter, the statute provides an opportunity for a "reasonable review" by the plan sponsor of any matters raised. New issues may become apparent during that review period, before the time for initiating arbitration expires. To the extent that such [*3] issues can then be raised by the employer and addressed by the plan sponsor, and perhaps resolved without the need for arbitration, the review process functions as anticipated. It is therefore our opinion that additional issues may be brought to the plan sponsor for review after submission of the initial request. n1

n1 The time for initiating arbitration continues to run during this period, and is not tolled by raising additional issues with the plan sponsor.

An employer may also raise in its arbitration demand additional issues omitted from the written request for review under § 4219(b). Neither the statutory provision establishing the arbitration mechanism, § 4221, nor the regulations implementing that provision, 29 C.F.R. Part 2641 (1990), limits the arbitration demand to issues raised in the employer's § 4219 request for plan sponsor review. Moreover, it is our opinion that an arbitrator may permit issues omitted from the arbitration demand under § 4221(a) to be raised at a later date in the arbitration proceeding in appropriate circumstances, provided that there is no undue prejudice to the plan sponsor or undue delay in the proceedings. Our conclusion is based on the [*4] nature of arbitration proceedings under the Act and arbitration rules.

The Act provides that "[a]n arbitration proceeding . . . shall be conducted in accordance with fair and equitable procedures to be promulgated by the [PBGC]." ERISA § 4221(a)(2). The PBGC's implementing regulation provides that "[i]f the employer initiates arbitration, it shall include in the notice of initiation a statement that it disputes the plan sponsor's determination of its withdrawal liability and is initiating arbitration. A copy of the demand for withdrawal liability and any request for reconsideration, and the response thereto, shall be attached to the notice . . . . In no case is compliance with formal rules of pleading required." 29 C.F.R. § 2641.2(d) (1990) (emphasis added).

Similarly, the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes (revised September 1, 1986) ("Arbitration Rules"), administered by the American Arbitration Association, which the PBGC approved pursuant to 29 C.F.R. § 2641.13, do not require the parties to adhere to formal rules of pleading. Under section 7(a) of the Arbitration Rules, a party's demand for arbitration need only give notice [*5] to the other party of its intention to arbitrate with a "brief description of the dispute and . . . the amount involved."

Therefore, it is clear that an employer is not required to perfect its case and flesh out every issue in its arbitration demand. By providing for discovery, the PBGC arbitration regulation anticipates that issues will be fleshed out. 29 C.F.R. § 2641.4(a)(2). Similarly, section 15 of the Arbitration Rules contemplates the subsequent "clarification of issues", and section 24 provides for the later submission of a more detailed statement of claim. Such provisions counterbalance the shortness of the time period for initiating arbitration, and ensure the full airing of all issues.

Although the employer need not perfect its case in its demand for arbitration, the employer is not absolutely free subsequently to raise additional issues. Whether an employer may raise additional issues after filing the initial demand is a procedural question, which the arbitrator should decide in a manner consistent with the Act's requirement that the arbitration be conducted "in accordance with fair and equitable procedures. . . ." ERISA § 4221(a)(2). As the PBGC noted in the preamble [*6] to the proposed rule implementing § 4221(a)(2), "the proposed regulation gives the arbitrator broad discretion in the manner in which he or she will conduct the hearing." 48 Fed. Reg. 31251, 31253 (1983). The PBGC reemphasized this point in the preamble to the final rule, stating that "[a]n arbitrator has wide latitude in conducting arbitration proceedings. . . ." 50 Fed. Reg. 34679, 34680 (1985). The final regulation also provides that "[t]he arbitrator shall establish the procedure for presentation of claim and response in such a manner as to afford full and equal opportunity to all parties for the presentation of their cases." 29 C.F.R. § 2641.5(e)(2).

Therefore, whether an employer may raise additional issues after it has filed its initial demand for arbitration should be decided by the arbitrator based on the facts and circumstances of the case. That decision must comport with the statutory provision requiring the arbitration proceeding to be conducted "in accordance with fair and equitable procedures", ERISA § 4221(a)(2), and the implementing regulation requiring the arbitrator to afford each side a full and equal opportunity to be heard. 29 C.F.R. § 2641.5(e)(2). Arbitrators [*7] operating under alternative procedures approved by the PBGC, 29 C.F.R. § 2641.13, should be guided by those procedures. See Manor Mines, Inc. v. UMW 1950 and 1974 Pension Plans, 5 E.B.C. 1708, 1712-13 (1984) (Polak, Arb.)(Arbitrator found it would be just and equitable to permit amendment of the claim).

As the PBGC stated in PBGC Op. Ltr. 90-2, where the issue was whether a plan should be permitted to revise a withdrawal liability assessment during the course of arbitration, the arbitrator "should consider the relevant facts and circumstances, including whether the plan had access to the data necessary to correct the error at the time of the original assessment, whether the employer was aware or had reason to be aware of the error before the plan discovered it, whether the employer's objections relate to facts that were also applicable to the original assessment, and whether the employer would be prejudiced in maintaining its defense by the revised assessment. Generally, the last factor should be given the greatest weight."

I hope this letter is of assistance. If you have further questions on this matter, please contact Jay Resnick of my staff at the above address or at (202) [*8] 778-8822.

Carol Connor Flowe

General Counsel

Pension Benefit Guaranty Corporation

91-8

December 9, 1991

REFERENCE:
[*1] 4041A Multiemployer Termination
4041A(c)(2) Multiemployer Termination. Annuity Requirement
4041A(f)(1) Multiemployer Termination. Lump Sum Payments

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") on several issues arising from the post-termination distribution of assets of the * * * Pension Plan (the "Plan"), a multiemployer defined benefit pension plan. In particular, your inquiry relates to the inability of the Plan to complete a final distribution of Plan assets under sections 4041A(c)(2) and (f)(1) of ERISA, because of its inability to locate certain Plan participants and beneficiaries.

You state that the Plan is terminating under section 4041A(a)(1) of ERISA pursuant to an amendment to the 1987 collective bargaining agreement between the * * * and the * * * District Council of North Central Texas. You indicate the Plan has assets sufficient to satisfy all outstanding benefit liabilities. The trustees of the Plan have attempted to notify all participants of the termination in order that Plan assets can be distributed. Not all participants can be located, and you request guidance on how to complete the distribution [*2] under these circumstances.

1) You ask what actions are required of a plan in making a reasonable effort to locate all participants for the purpose of making a final distribution of assets following termination of a multiemployer plan.

In your correspondence, you indicate the Plan trustees have attempted to locate the missing participants through various means. They have sent several notices to the participants' last known mailing addresses, searched internal records and local union records, and hired a "private locator service", which utilized social security records in attempts to locate the missing participants. You wish to know if these efforts satisfy the "reasonable efforts" standard established by the PBGC. See PBGC Opinion Letters 83-24 and 89-4).

When a multiemployer plan terminates by plan amendment, the plan sponsor may distribute plan assets in full satisfaction of all nonforfeitable benefits under the plan. ERISA § 4041A. PBGC Opinion Ltr. 82-19. The PBGC previously has interpreted analogous distribution requirements imposed by Title IV in the instance of single employer plan terminations to require a plan administrator to take reasonable steps to locate all [*3] participants for making a final distribution. See PBGC Opinion Letters 83-24 and 89-4. Plan administrators and other fiduciaries of terminating multiemployer plans have a similar obligation to take reasonable steps to locate participants and beneficiaries to whom assets should be distributed.

In addition, the Plan trustees should be aware that the Department of Labor has established additional guidelines regarding the satisfaction of Title I obligations in these circumstances. See, e.g. DOL Opinion Letter No. 11-86. Opinions relating to Title I of ERISA may be sought from the Department of Labor.

2) You ask whether the Plan, to satisfy final distribution requirements, must purchase annuities for missing participants or beneficiaries with accrued benefits in excess of $3,500. For missing participants with accrued benefits $3,500 or less, you ask whether the only option is to either purchase annuities or open individual interest-bearing bank accounts.

Under Section 4041A(c), (f), a plan sponsor distributing assets in full satisfaction of all nonforfeitable benefits must pay those benefits in the form of an annuity, unless the participant elects, with spousal consent, [*4] another form of distribution provided by the plan. See, e.g., PBGC Opinion Ltr. 82-19. If another form of benefit has not been chosen, and attempts to purchase annuities for such participants prove futile, a final distribution may be accomplished through a lump-sum payment to those participants where the present value of each participant's nonforfeitable benefit does not exceed $3,500. See ERISA § § 203(e), 4041A(f)(1), PBGC Opinion Letters 83-24 and 89-4.

When a participant cannot be located, the option of making the distribution through a lump-sum payment is not available. The PBGC and the Department of Labor have both opined that the only option available for completing the final distribution, when annuities cannot be purchased for missing participants, is through the opening of individual interest-bearing accounts for those persons at federally insured institutions. PBGC Opinion Letter 89-4; DOL Opinion Letter No. 11-86. For the reasons expressed in Opinion Letter 89-4, PBGC does not consider pooled interest-bearing accounts to be an optional form of distribution available at plan termination.

The PBGC, however, recognizes that plan trustees may confront difficulties [*5] in locating financial institutions willing to open individual interest-bearing accounts for missing participants, particularly where the benefit amounts are small. In the limited case where a multiemployer plan has made every reasonable effort to locate missing participants and to locate institutions that are either willing to provide annuities for these "lost" participants or to open individual interest-bearing accounts for them, but is still unable to make a final distribution in this manner, then the use of a pooled interest-bearing account may be appropriate. If such an account is opened, it must be maintained by a fiduciary designated by the plan trustees of the terminating plan, who continue to have ongoing fiduciary obligations until all participants are distributed their appropriate benefits. SeeRev. Rul. 89-87; ERISA § 4041A. This fiduciary will be responsible for keeping clear, up-to-date records of each participant's opening balance and earnings throughout the life of the account. Furthermore, this fiduciary, as well as the former trustees of the terminating plan, must remain available to make every reasonable effort to assist those participants who do come forward [*6] and claim their benefits. In the instance of the * * * Plan, where a successor plan is being established, thus continuing the existence of a fiduciary who will be able to fulfill the above obligations, the pooled interest-bearing account may be appropriate.

3) You ask whether undistributed missing participant assets may be temporarily rolled over into a successor defined contribution plan pending location of such participants.

Under appropriate circumstances, a multiemployer plan terminating by plan amendment may roll over the assets attributable to missing participants into a successor defined contribution plan pending the location of those participants. For such a transfer to satisfy the requirements for making a final distribution of plan assets, plan trustees and other plan fiduciaries must take measures to ensure that the benefits of missing participants, who have not consented to such a rollover, are properly protected. See ERISA § § 4041A(c), (f).

Pursuant to Section 4041A(f), the PBGC may authorize the payment of benefits to missing participants in the manner proposed if the plan sponsor of the terminating plan satisfactorily demonstrates that the proposed manner [*7] of payment is "not adverse to the interest of the plan's participants and beneficiaries generally" and "does not unreasonably increase the PBGC's risk of loss with respect to the plan." ERISA § 4041A(f)(1). Should the trustees of the terminating plan elect to transfer the assets of missing participants to a successor defined contribution plan, they must segregate those assets from the assets of the participants of the successor plan. Furthermore, the trustees must provide adequate assurance that the transferred assets will be shielded from possible diminution in value and will earn a rate of return at least comparable to that which would be earned in a federally-insured individual interest-bearing account.

Should the missing participant assets be rolled-over into the successor defined contribution plan, the plan trustees and fiduciaries of the defined contribution plan will be under the same fiduciary obligation with regard to those assets as they are with the assets of the other participants of that plan. See ERISA § § 401-414. You should direct inquiries regarding fiduciary obligations under Title I to the Department of Labor.

Such a rollover may implicate section 402(a)(5) [*8] of the Internal Revenue Code. Section 402(a)(5) permits an employee to roll over a qualified total distribution from one qualified trust or annuity to another qualified trust or annuity. However, under section 402, the employee must elect to make the rollover. You should direct inquiries involving the rollover requirements of section 402 of the Internal Revenue Code to the Internal Revenue Service.

4) You ask whether annuities purchased for missing participants must be in the form of a joint and survivor annuity. In addition, you ask whether the annuity must be in the form of a joint and survivor annuity in the absence of proof the missing participant is currently married.

Your question presupposes that the participant was married at the time of separation from service. Of course, participants who are not married at the time of separation from service, and who have remained unmariied at the time for commencement of benefit payments, are provided a straight life annuity, unless another form of benefit has been elected. Treas. Reg. § 1.401(a)-20, (Q-25). These individuals would not pose the problem suggested in your letter.

For participants who are married at the time of separation [*9] from service, the Retirement Equity Act of 1984

("REA") has established that annuities purchased for participants in terminated plans must be in the form of a joint and survivor annuity, unless the benefit form was waived in the manner specified in the statute, which requires, inter alia, signed spousal consent to the waiver. ERISA § 205(c); IRC § § 401(a)(11), 417(a)(2). Under certain circumstances, the spouse's consent to a waiver of the joint and survivor form of benefit is not required. For instance, if it is established to the satisfaction of a plan representative that there is no spouse or that the spouse cannot be located, spousal consent to waive the joint and survivor annuity is not required. Treas. Reg. § 1.401(a)-20, (Q-27).

You should direct inquiries relating to the requirements of REA and regulations promulgated thereunder to the IRS.

5) You have asked whether plan trustees can assume, in the absence of records indicating a deceased participant was married at the time of death, that the participant left no surviving spouse.

A participant who is married at the time of separation from service should be presumed to have remained married, at the date for commencement [*10] of benefit payments, unless notice is provided to the plan trustees of a change in marital status. Thus, should the participant die prior to the commencement of benefit payments under the plan, the plan must provide the surviving spouse with a qualified pre-retirement survivor annuity. See ERISA § 205(a)(2); IRC § 401(a)(11). However, if the plan trustees are unable to locate the surviving spouse after having taken reasonable steps to do so, or are unable to determine whether the spouse predeceased the participant, the provisions set forth in question 2 above would apply, and the plan trustees would be required to purchase an annuity for the surviving spouse, open an individual interest-bearing account in the surviving spouse's name, or, if appropriate, place the surviving spouse's benefit entitlement in the special pooled account described above. In the instance where the participant and spouse have made a valid election to waive the qualified joint and survivor annuity, or qualified pre-retirement survivor annuity with spousal consent, ERISA § 205(c)(1), (c)(2), and the election designates a beneficiary or form of benefits which may not be changed without spousal consent, [*11] ERISA § 205(c)(2), the plan trustees must take reasonable steps to locate that beneficiary to make a final distribution, and if unable to do so, must also follow the provisions set forth in question 2 above with regard to the beneficiary's benefits.

You should direct inquiries related to the requirements of REA and the regulations promulgated thereunder to the IRS.

6) You have asked whether there is an applicable time period in which a terminating plan must complete its final distribution of assets. Particularly, you ask whether a terminating multiemployer plan may take up to 18 months to complete the process of making a final distribution, if necessary, due to problems encountered in attempting to locate participants and beneficiaries, purchase annuities, and open individual (and in appropriate circumstances, pooled) interest-bearing accounts.

Under the multiemployer provisions of ERISA, a plan terminated by plan amendment continues indefinitely until plan assets have been distributed to participants and beneficiaries. SeeRev. Rul. 89-87. There is no applicable time period under Title IV in which a multiemployer plan, terminated by plan amendment, must make a final distribution [*12] of assets.

7) You ask whether plan trustees can presume a participant to be deceased if he is declared legally dead in an applicable state proceeding.

For purposes of Title IV, plan trustees must meet the "reasonable efforts" standard (see Q-1 above) when relying upon a state proceeding to determine that a missing participant is deceased. Whether or not the standard is met is determined on a case-by-case basis, and depends in part on the nature of the proceeding relied upon, its findings, and its standards of proof. We cannot give a specific opinion based upon the facts presented in your letter, and decline to establish a per se rule for the circumstances about which you inquire.

Plan trustees should be aware that the Department of Labor has established additional guidelines regarding the satisfaction of Title I obligations. See, e.g., DOL Opinion Letter No. 11-86. Opinions relating to Title I of ERISA may be sought from the Department of Labor.

If you have any further questions about this matter, you may call David W. Kemps at 202-778-8886.

Carol Connor Flowe

General Counsel

Pension Benefit Guaranty Corporation

92-1

March 30, 1992

REFERENCE:
[*1] >4001(b)(1)>
4203 Complete Withdrawal
4204 Sale of Assets
4204(a)(1) Sale of Assets. Conditions for Exemption from Withdrawal
4205 Partial Withdrawals
>4205(b)(1)>
4206 Adjustment for Partial Withdrawal
4211 Withdrawal Liability
4212(c) Obligation to Contribute - Liability
4218 Withdrawal - No occurrence

OPINION:

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") in regard to calculating liability for a complete or partial withdrawal under Sections 4203 and 4205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § § 1383 and 1385 (1989). Specifically, your question concerns the calculation of withdrawal liability in a situation where several members of a controlled group of corporations have an obligation to contribute to the same rultierployer pension plan and the controlled group members are sold or liquidated in a series of transactions.

As you are aware, Section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal liability are to be resolved first through arbitration, and, if necessary, in the courts. The [*2] PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions. However, the PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

In the hypothetical situation you present in your letter, parent company P has four wholly-owned subsidiaries, A, B, C and D. The four subsidiaries contribute to a multiemployer pension plan (the "plan") in equal periodic amounts under a single collective bargaining agreement.

In a series of transactions, P's controlled group ceases covered operations at each of the subsidiaries. First, P closes subsidiary A and does not continue operations previously performed by A. Second, P sells the assets of subsidiary B to an unrelated purchaser. The purchaser does not assume B's contribution obligation or make contributions to the Plan. Third, P sells the stock of subsidiary C to another unrelated purchaser. C continues in business and makes required contributions to the plan. Finally, P sells the stock of subsidiary D to a third unrelated purchaser. D continues operations and contributes to the plan for several years before [*3] going out of business. You request the PBGC's opinion as to the assessment of liability for a complete or partial withdrawal stemming from this series of transactions.

For purposes of determining whether a complete or partial withdrawal has occurred, all trades or businesses under common control are to be treated as a single employer. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1). Under Section 4203(a) of ERISA, 29 U.S.C. § 1383(a), a complete withdrawal generally occurs when an employer permanently ceases to have an obligation to contribute under a plan, or permanently ceases all covered operations under a plan. A partial withdrawal generally occurs when an employer has a 70% contribution decline in each of three consecutive plan years; or, the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work; or, the employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than [*4] all of its facilities, while continuing to perform work at that facility of the type for which the obligation to contribute ceased. ERISA §

4205(a) and (b), 29 U.S.C. § 1385(a) and (b). The methods for computing the amount of liability for a complete or partial withdrawal are set forth in Sections 4211 and 4206 of ERISA, 29 U.S.C. § § 1391 and 1386. In order to determine whether a complete or partial withdrawal has occurred and the amount of the resulting liability, contributions of the entire controlled group must be taken into account. 29 U.S.C. § § 1301(b)(1) and 1391.

As you point out in your letter, when subsidiary A is closed in the first transaction, there is no complete or partial withdrawal by the controlled group. Three members of the controlled group continue to have an obligation to contribute to the plan and continue covered operations. There is no partial withdrawal because, on the facts assumed, there has not been a 70% decline in contributions by the controlled group over a three-year period or a partial cessation of the controlled group's contribution obligation within the meaning of Section 4205(b)(2)(A) of ERISA, 29 U.S.C. § 1385(b)(2)(A). Thus, for purposes [*5] of calculating the amount of liability for a subsequent complete or partial withdrawal under Sections 4211 and 4206 of ERISA, 29 U.S.C. § § 1391 and 1386, A's contribution history remains part of the controlled group's contribution history.

The same holds true on the sale of B's assets to an unrelated purchaser. Even though the asset sale is not structured to meet the requirements of Section 4204 of ERISA, 29 U.S.C. § 1384, there is no complete or partial withdrawal because two other members of the controlled group continue to contribute to the Plan and there has been no 70% decline in contributions over three years or any partial cessation of the controlled group's contribution obligation under 29 U.S.C. § 1385(b)(2)(A). Again, the contribution history of B remains part of the controlled group's contribution history for purposes of calculating amounts of subsequent withdrawal liability.

The sale of the stock of subsidiary C to an unrelated purchaser that continues to make contributions to the plan would ordinarily fall within the ambit of Section 4218 of ERISA, which provides in relevant part:

Notwithstanding any other provision of this part, an employer shall not be considered [*6] to have withdrawn from a plan solely because --

(1) an employer ceases to exist by reason of --

(a) a change in corporate structure described in Section 4069(b) . . .

if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .

* * *

[A] successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398.

Among the changes described in Section 4069(b) of ERISA, 29 U.S.C. § 1369(b), are "a mere change in identity, form, or place of organization" and "a merger, consolidation or division." In Opinion Letters 82-4 (February 10, 1982), 83-11 (May 16, 1983), and 84-7 (December 20, 1984), the PBGC expressed its opinion that the sale of a subsidiary's stock does not bring about the withdrawal of the parent corporation, if the change causes no interruption in employer contributions or obligations to contribute under the plan.

Under the last sentence of Section 4218 of ERISA, a successor employer resulting from a restructuring described in that Section is considered the "original employer." This provision attributes the contribution history of the original employer [*7] to the successor employer resulting from the restructuring. In the typical case, the contribution history used to determine the withdrawal liability of the successor will be the contribution history that would have formed the basis for withdrawal liability if the restructuring had not occurred.

In your hypothetical, the sale of C's stock causes no interruption in contributions or obligations to the plan. C and its new controlled group, if any, and the P controlled group, continue to contribute to the Plan. Consequently, there is no complete withdrawal by the P controlled group, or by C and its new controlled group, if any. Pursuant to the last sentence of Section 4218, both the P controlled group and C and its new controlled group, if any, are "successor" employers. However, in a situation such as this where multiple entities in the same controlled group contribute to the same plan, and some, but not all, of the controlled group members who contribute to the plan are the subject of a change described by Section 4218 of ERISA, neither of the successors clearly should inherit the entire contribution history of the original employer. In such a case, it is the PBGC's opinion that [*8] the contribution history of the original employer

must be fully apportioned among the successor employers. The plan should make the allocation in a reasonable manner. For example, in the absence of a history of large transfers of operations or covered employees between members of the controlled group, or other unusual factors, the plan may allocate that contribution history in proportion to the contribution histories of the controlled group members that have an obligation to contribute and covered operations immediately before the Section 4218 transaction, or in your hypothetical 50% to C and 50% to the P controlled group.

Consequently, in the event of a subsequent complete withdrawal by the P controlled group, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to C and its new controlled group, if any. Likewise, in the event of a subsequent complete withdrawal by C and its new controlled group, if any, the amount of liability under Section 4211 of ERISA, 29 U.S.C. § 1391, is determined without reference to the contribution history allocable to the P controlled group.

You also inquired as [*9] to the effect of the sale of C's stock on determining whether a partial withdrawal occurs under Section 4205(a)(1) of ERISA, 29 U.S.C. § 1385(a)(1). Under your hypothetical, once C is sold, the contributions of the P controlled group decline by 75%. Generally, a partial withdrawal occurs whenever there is a 70% contribution decline in each of three consecutive plan years measured against a base year. See 29 U.S.C. 1385(b)(1). Under Section 4218 of ERISA, P's controlled group would not ordinarily incur a partial withdrawal in the third plan year following the sale of C's stock. However, in order to avoid partial withdrawal liability, the decline in contributions must be "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398.

In your hypothetical, it is not clear whether the decline in contributions is solely because of the sale of C's stock. The decline could be due, at least in part, to closing A and selling the assets of B to a purchaser who did not continue making contributions to the Plan. Whether a decline in contributions is solely because of a covered restructuring must be determined on the facts and circumstances of each case and should be [*10] addressed by arbitration subject to review by the courts. Relevant considerations might include the length of time between transactions, whether the transactions were related, and whether each transaction would have been subject to Section 4218 if viewed individually.

If the decline in contributions is determined to be solely because of the sale of C's stock, the contribution history transferred in the Section 4218 transaction is excluded from the base year calculations used to determine whether a 70% decline has occurred under Section 4205(b)(1)(B)(ii) of ERISA. If the decline in contributions is determined not to be solely because of the sale of C's stock, C's contribution history is included in the base year calculations.

In the final transactions D's stock is sold to a third unrelated purchaser who continues making contributions to the Plan on behalf of D's employees. After the stock sale, the P controlled group ceased covered operations and no longer has an obligation to contribute to the Plan. Under Section 4218 of ERISA, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's stock. As stated above, however, in order to avoid [*11] withdrawal liability, the controlled group must cease to have such operations or such obligations "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398. As discussed above, whether an employer's cessation is solely the result of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is not solely because of a covered restructuring, it incurs a complete withdrawal. However, D and its new controlled group, if any, would be a "successor" within the meaning of the last sentence of Section 4218. Consequently, a portion of the P controlled group's remaining contribution history must be allocated to D and its new controlled group, if any, under the principles discussed above. The P controlled group's liability is then determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C or D. C and its new controlled group, if any, remains responsible for the contribution history previously allocated to C.

Alternatively, if the [*12] controlled group's cessation is determined to be solely because of a covered restructuring, the controlled group is not subject to withdrawal liability even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. In that event, D and its new controlled group, if any, inherits the contribution history of the P controlled group that was not allocated to C.

You also ask if the result would be different if the assets of D are sold in a transaction that meets the requirements of Section 4204 of ERISA, 29 U.S.C. § 1384. Under Section 4204(a)(1) of ERISA, an employer will not incur liability for a complete or partial withdrawal "solely" because of the sale of all or a portion of its assets to an unrelated purchaser if the following conditions are met. First, the purchaser must have an obligation to contribute to the pension plan for substantially the same number of contribution base units as the seller. Second, the purchaser must provide a cash or

surety bond payable to the pension plan in the five years after the sale if the purchaser withdraws or fails to make required contributions. Third, the contract for sale must provide that [*13] if the purchaser withdraws in the five years after the sale and fails to pay its withdrawal liability, the seller is secondarily liable. 29 U.S.C. § 1384(a)(1).

Under Section 4204(b)(1) of ERISA, 29 U.S.C. § 1384(b)(1), the liability of the purchaser for a subsequent complete or partial withdrawal is determined as if the purchaser was required to contribute to the plan the amount the seller was required to contribute for the operations transferred for the year of the sale and the four previous years. Thus, the purchaser assumes the contribution history of the seller for the year of the sale and the four plan years preceding the sale, but only for the contribution history relating to the assets transferred in the sale.

In your hypothetical, if the assets of D are sold in a sale that meets the requirements of Section 4204 of ERISA, the P controlled group has ceased covered operations and no longer has an obligation to contribute to the Plan. Like the sale of stock situation discussed above, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's assets. However, under Section 4204(a)(1), as under Section 4218, in order to avoid withdrawal [*14] liability, the controlled group's cessation must occur "solely" because of a sale of assets. Again, the question of whether an employer's cessation is solely because of a particular transaction must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is solely because of the asset sale, the controlled group does not incur withdrawal liability even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. However, the controlled group is secondarily liable if D and its new controlled group, if any, withdraw from the Plan within 5 years of the asset sale and fail to make withdrawal liability payments. D and its new controlled group, if any, assume the contribution history relating to D's operations for the year of the sale and the previous four years.

If the controlled group's cessation is determined not to be solely because of the sale of D's assets, it incurs a complete withdrawal and its liability is determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original [*15] employer that was not transferred to C.

As a final matter, the opinions in this letter are subject to the special rule in Section 4212(c) of ERISA, which states:

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c). Depending on the facts, some of the same considerations as are relevant in determining whether a cessation is due "solely" to a restructuring or sale of assets may be relevant under Section 4212(c).

I hope this has been of assistance to you. If you have any further questions, please call D. Bruce Campbell of my staff at (202) 778-1918.

Carol Connor Flowe

General Counsel

Pension Benefit Guaranty Corporation

92-2

April 22, 1992

REFERENCE:
[*1] >4213(b)>
>4219(b)(1)>
>4221(e)>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to the effect, under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), of a multiemployer pension plan's notice to a withdrawing employer of estimated withdrawal liability based on an estimate of the amount of plan assets, followed by a notice of actual withdrawal liability based on a subsequently determined actual amount of plan assets.

Under the multiemployer provisions of ERISA, the initial responsibility for determining whether an employer has withdrawn from a multiemployer pension plan, and for determining and assessing any resulting withdrawal liability, lies with the plan sponsor. ERISA further provides that disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. It would be inappropriate for the PBGC to interject itself into these statutory procedures by issuing an opinion on the application of the law to a particular transaction. However, the PBGC will continue its practice of answering general questions of interpretation [*2] under ERISA.

ERISA treats the estimation of withdrawal liability in two contexts. Under section 4221(e), an employer may obtain from a plan at reasonable cost "an estimate of such employer's potential withdrawal liability with respect to the plan . . . ." And under section 4213(b), --

in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability . . . , the plan actuary may --

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of the Internal Revenue Code of 1954 and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

In Opinion Letter 91-3 (March 29, 1991), the PBGC opined that --

[w]hen [a] plan provides an employer with an estimate of its withdrawal liability under section 4221(e), no obligation to pay such liability occurs, nor does the employer waive any objections to the estimate by failing to dispute it. An "estimate" . . . under section 4221(e) is not binding upon [*3] either party.

No reason appears why this result should change if an estimate is provided after the employer withdraws, or if it is provided by the plan on its own initiative, rather than upon the employer's request.

On the other hand, there is no indication that withdrawal liability determined under section 4213(b) is to be treated differently from withdrawal liability determined in any other manner. None of the other ERISA provisions describing the calculation, assessment and collection of withdrawal liability -- for example, sections 4201(a), 4211, and 4219(b)(1) -- distinguishes between liability determined on the basis of "final" or "actual" data and liability determined on the basis of estimates, samples, or "best available" data pursuant to section 4213(b). Accordingly, the fact that a plan has relied on section 4213(b) in determining and assessing an employer's withdrawal liability does not make the plan's assessment of that liability on the employer any the less effective.

Thus, the effect of a plan's notice to a withdrawing employer of its "estimated" withdrawal liability based on an estimate of the amount of plan assets depends on whether the notice is a valid and [*4] effective assessment of withdrawal liability computed pursuant to section 4213(b) or is a mere informational communication akin to that contemplated by section 4221(e). If the notice is merely informational, and not an assessment of withdrawal liability, the plan's later assessment of "actual" liability is in fact its first assessment against the employer. On the other hand, if the first notice is an assessment -- despite the characterization of the amount assessed as "estimated" -- then its effect is the same as if it were based on "final" figures. Ordinarily, whether a particular notice is an assessment of withdrawal liability, rather than merely informational, depends on whether it effectually --

notif[ies] the employer of . . . the amount of the liability, and . . . the schedule for liability payments, and . . . demand[s] payment in accordance with the schedule.

ERISA section 4219(b)(1). n1 As the PBGC stated in Opinion Letter 83-4 (January 25, 1983), a dispute between an employer and a plan sponsor as to the validity of a withdrawal liability assessment is subject to ERISA's dispute resolution procedures.

n1 In some cases (where, for example, a company is in bankruptcy), a withdrawal liability assessment notice without a payment schedule or a demand for payment may nonetheless be effective. [*5]

Where the first of two notices of withdrawal liability with respect to the same withdrawal is in fact an assessment, the effect of a second assessment would be to amend, supplement, or supersede the first. The validity of such a reassessment would depend on the facts and circumstances of the case. ERISA sections 4219(b) and 4221(d) clearly contemplate changes to withdrawal liability assessments in the context of the statutory review process. As the PBGC stated in Opinion Letter 90-2 (April 20, 1990), a plan's --

right to revise its original assessment or issue a second assessment, . . . like other disputes involving withdrawal liability, must be resolved first through arbitration and then, if necessary, through the courts.

The PBGC also discussed in Opinion Letter 90-2 some of the circumstances in which a second assessment should or should not be given effect and in particular took the position that revisions to a plan's determination of the value of unfunded vested benefits (which would include the value of assets) ordinarily should not be allowed.

If you have any further questions about this matter, you may call Deborah Murphy of my office at 202-778-8820.

Carol Connor [*6] Flowe

General Counsel

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

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.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

93-2

July 7, 1993

REFERENCE:
[*1] 4205(a)(1) Partial Withdrawals. Contribution Decline.
>4205(b)(1)>
>4206(a)(2)(A)>

OPINION:

I write in response to your letter requesting guidance on the calculation of partial withdrawal liability following a 70-percent decline in contributions under Section 4206 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1386 (1992). Specifically, you request our opinion on what plan year's contribution base units make up the numerator of the fraction described at Section 4206(a)(2) of ERISA, 29 U.S.C. § 1386(a)(2).

Generally, a partial withdrawal occurs on the last day of a plan year in which an employer experiences a 70-percent contribution decline. ERISA § 4205(a)(1), 29 U.S.C. § 1385(a)(1). A 70-percent contribution decline occurs whenever an employer's contribution base units in each year of a "3-year testing period" do not exceed 30 percent of the employer's contribution base units in the "high base year." ERISA § 4205(b)(1)(A), 29 U.S.C. § 1385(b)(1)(A). For these purposes, the 3-year testing period includes the current plan year and the two immediately preceding plan years. ERISA § 4205(b)(1)(B)(i), [*2] 29 U.S.C. § 1385(b)(1)(B)(i). The contribution base units in the high base year is an average of the two highest yearly contribution base unit amounts in the 5 plan years immediately preceding the 3-year testing period. ERISA § 4205(b)(1)(B)(ii), 29 U.S.C. § 1385(b)(1)(B)(ii).

An employer's liability for a partial withdrawal is determined pursuant to Section 4206 of ERISA, 29 U.S.C. § 1386. In the case of a partial withdrawal occurring because of a 70-percent contribution decline, the first step is to calculate the amount of unfunded vested benefits allocable to the employer for a hypothetical complete withdrawal under Section 4211 of ERISA, 29 U.S.C. § 1391, determined "as if the employer had withdrawn in a complete withdrawal . . . on the last day of the first plan year in the 3-year testing period." ERISA § 4206(a)(1)(B); 29 U.S.C. § 1386(a)(1)(B). This figure is then adjusted by multiplying it by 1 minus a fraction the numerator of which is the employer's contribution base units for the plan year following the plan year in which the partial withdrawal occurs, and the denominator of which is the average of the employer's contribution base units for the 5 plan years immediately [*3] preceding the 3-year testing period. ERISA § 4206(a)(2)(A) and (B); 29 U.S.C. § 1386(a)(2)(A) and (B).

You ask whether the numerator of the fraction is the contribution base units for the plan year following the hypothetical complete withdrawal (i.e., the second plan year in the 3-year testing period), or the contribution base units for the plan year following the third plan year in the 3-year testing period. Under Sections 4205(b)(1) and 4206(a)(2)(A) of ERISA, 29 U.S.C. § § 1385(b)(1) and 1386(a)(2)(A), the answer is the latter.

As stated above, a partial withdrawal is deemed to occur on the last day of a plan year in which the employer's contribution base units in each year of a 3-year testing period do not exceed 30 percent of the employer's contribution base units in the high base year. ERISA § 4205(b)(1)(A), 29 U.S.C. § 1385(b)(1)(A). The three year test period includes the current plan year and the two immediately preceding plan years. ERISA § 4205(b)(1)(B)(i), 29 U.S.C. § 1385(b)(1)(B)(i). The "contribution base units for the plan year following the plan year in which the partial withdrawal occurs" referenced in Section 4206(a)(2)(A) of ERISA, 29 U.S.C. § 1386(a)(2)(A) [*4] (emphasis added), thus refers to the plan year following the last plan year in the 3-year testing period.

Using your example of a partial withdrawal occurring in 1992, an employer's liability is calculated using the amount of unfunded vested benefits allocable to the employer under Section 4211 of ERISA, 29 U.S.C. § 1391, for a hypothetical complete withdrawal occurring in 1990, the first plan year in the 3-year test period. This amount is then multiplied by 1 minus a fraction the numerator of which is the employer's contribution base units for 1993, and the denominator of which is the employer's average contribution base units for the years 1985 through 1989.

I hope this has been of assistance to you. If you have any further questions, please contact D. Bruce Campbell of my staff at (202) 778-1918.

Carol Connor Flowe, General Counsel

Pension Benefit Guaranty Corporation

93-3

October 14, 1993

REFERENCE:
[*1] 4225 Limitation on Withdrawal Liability.
4225(a) Limitation on Withdrawal Liability. Sale of Assets. Limitation on Withdrawal Liability.
>4225(b)>
>4225(d)>

OPINION:

We write in response to your inquiry. You ask whether the PBGC adheres to the interpretation of section 4225 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), set forth in its amicus curiae brief in Trustees of the Amalgamated Insurance Fund v. Geltman Industries, 784 F.2d 926 (9th Cir. 1986). In its brief, PBGC addressed the proper application of ERISA § § 4225(a) and 4225(b) where the withdrawn employer satisfies the prerequisites for the application of both subsections. PBGC expressed the view that an employer meeting the criteria in both subsections (a) and (b) may elect the limitation that yields the lesser of the amounts determined under the two subsections. The Ninth Circuit, however, reached a contrary conclusion. 784 F.2d at 929-30. For the reasons set out below, PBGC continues to believe that its interpretation of ERISA § § 4225(a) and 4225(b) is correct as a matter [*2] of law.

Under ERISA § 4225(a)(1)(A), an employer who withdraws in connection with a "bona fide sale of substantially all of [its] assets in an arm's-length transaction to an unrelated party" will ordinarily be permitted to retain a portion of its dissolution value. The Geltman court, however, citing "the language and . . . structure" and the "underlying policies of ERISA and MPPAA," concluded that an "insolvent" employer must be denied relief under subsection (a)(1)(A), because subsection (b) provides a different liability limit that is explicitly directed to "an insolvent employer undergoing liquidation or dissolution."

This analysis overlooks several pertinent points. First, when Congress intended to deny classes of employers relief under section 4225, it did so explicitly. See ERISA § 4211(d) (prohibiting application of section 4225 to employers who withdraw from coal-industry pension plans). Significantly, nothing in the language of section 4225 suggests that subsections (a) and (b) are mutually exclusive. n1 The two provisions have separate factual prerequisites, and provide different types of relief. So long as an employer satisfies the requirements of both subsections, [*3] it should qualify for relief under either rule, and its liability should not exceed the lesser of the amounts determined under the two subsections.

n1 Sections 4225(a) and (b) both begin with the phrase "in the case of an employer." The Geltman court suggested this phrase was "evidence that the sections are to operate exclusive of each other. . . ." This suggestion is manifestly incorrect. The phrase "in the case of" is used as an introduction to at least 30 provisions of MPPAA; in each such instance, it is used in its normal statutory sense, as a synonym for "when" or "if". 20A Words and Phrases 75 (1959 & Supp. 1983).

This conclusion is further supported by the technical definition of "insolvency" included in section 4225. Under section 4225(d)(1), "an employer is insolvent if [its] liabilities, including withdrawal liability under the plan (determined without regard to subsection (b)), exceed [its] assets (determined as of the commencement of the liquidation or dissolution)" (emphasis added). Section 4201(b)(1)(D) defines "withdrawal liability" as including adjustment pursuant to section 4225. Thus, the use of the term "withdrawal liability" in the definition [*4] of insolvency incorporates any reductions in withdrawal liability resulting from the application of section 4225 (including subsection (a)) except the reduction set out in section 4225(b), which is specifically excluded. n2

n2 The decision is therefore incorrect when it states that whether "an employer is an insolvent employer . . . is done by looking to the provisions of [section 4225(d)(1)] without regard to [section 4225(a)]." Geltman, 784 F.2d at 929.

PBGC believes that its interpretation of section 4225 is fully consistent with the "underlying policies of ERISA and MPPAA." Section 4225 is but one of several ERISA provisions that limit the amount of withdrawal liability imposed upon withdrawing employers. n3 Nothing in the congressional findings and policy declarations that preface MPPAA indicate that the withdrawal liability limitation provisions should be construed to maximize the liability of an employer. See MPPAA § 3, codified at 29 U.S.C. § 1001a. The same is true of the legislative history.

n3 See, e.g., ERISA § § 4203(b), (c), (d), and (f), 4204, 4207, 4208, 4209, 4210, 4217, 4218, 4219(c)(1)(B), 4224, and 4225. The Supreme Court has noted with approval Congress's efforts to moderate the impact of withdrawal liability on employers, including Congress's effort in section 4225. Connally v. PBGC, 475 U.S. 211, 225, 226 n.8 (1986). [*5]

Finally, the interpretation offered in Geltman makes little economic sense. Under the rationale of the decision, an employer whose liabilities exceeded its assets by only one dollar is "insolvent" and would automatically forfeit any relief under section 4225(a)(1)(A). In contrast, if the employer's assets were one dollar greater than liabilities, the full liability limitation would apply. n4 As discussed above, the application of the plain language of the statute avoids this sort of anomaly.

n4 The attached table, drawn from the PBGC's amicus brief, illustrates the dramatic increase in employer liability caused by the single dollar difference.

In conclusion, the plain wording of section 4225 dictates that an employer that meets the requirements of both subsections (a) and (b) is entitled to an assessment of withdrawal liability that does not exceed the lesser of the amounts determined under (a) and (b). Neither the legislative purpose nor principles of statutory construction compel a contrary conclusion. The PBGC therefore continues to adhere to the position stated in its brief amicus curiae.

I trust this responds to your question. If you have further questions [*6] regarding this matter, please contact Karen Morris of my staff at (202) 778-8822.

Carol Connor Flowe, General Counsel

ADDENDUM

Computation of Withdrawal Liability Under Arbitrator's Interpretation in Geltman Industries and Amelgamated Insurance Fund, of Section 4225

Assumptions:

1. The value of the employer's assets after the sale is $ 100,000.

2. The employer's liabilities other than withdrawal liability are $ 90,000.

3. The unfunded vested benefits allocable to the employer prior to the application of section 4225 are $ 10,000 in Example 1 and $ 10,001 in Example 2.

Maximum Withdrawal Liability Under § 4225(a)	Example 1	Example 2
1. (a)(1)(A): 30% of the liquidation value of the employer = .30X($ 100,000- $ 90,000)	$ 3,000	
2. (a)(1)(B): unfunded vested benefits attributable to employees of the employer $ 0 or undetermined		N/A
3. Greater of (a)(1)(A) or (B) (#1 or #2)	$ 3,000	

Maximum Withdrawal Liability under § 4225(b)		
4. (b)(1): 50% of allocable unfunded vested benefits = .50X$ 10,001		$ 5,000.50
5. (b)(2): additional amount due plan (remaining liquidation value after #4)	N/A	$ 4,999
6. Total collectible under (b) (sum of #4 and #5)		$ 10,000
7. Amount paid to Plan	$ 3,000	$ 10,000
8. Amount paid to creditors other than Plan	$ 90,000	$ 90,000
9. Amount retained by employer [*7]	$ 7,000	$ 0

Pension Benefit Guaranty Corporation

94-2

July 26, 1994

REFERENCE:
[*1] 4007 Payment of Premiums
4007(a) Payment of Premiums. Due Dates
4007(b) Payment of Premiums. Penalties and Interest

OPINION:

You have requested an opinion from the Pension Benefit Guaranty Corporation ("PBGC") whether interest and penalties assessed by PBGC for the late payment of premiums due under section 4007 of the Employee Retirement Income Security Act of 1974 ("ERISA") can be paid from the assets of a multiemployer pension plan or must be paid by the plan trustees personally or by the plan's sponsoring organizations or employer(s).

You state that your client, the board of trustees of a multiemployer pension plan, discovered that the plan's prior trustees and/or administrator had failed to count the number of plan participants accurately and, therefore, failed to pay the correct amount of premiums to PBGC within the time required by law. As a result, PBGC assessed interest and penalties of approximately $ 1,000.

ERISA section 4007(a) and (b) provide that --

(a) The designated payor of each plan shall pay the premiums imposed by the [PBGC] under [Title IV of ERISA] with respect to that plan when they are due. . . .

(b) If any basic benefit premium is not paid when it is due[,] [*2] the [PBGC] is authorized to assess a [penalty]. . . . If any premium is not paid by the last date prescribed for a payment, interest . . . shall be paid. . . .

ERISA section 4007(e)(1) provides that, in the case of a multiemployer plan, the term "designated payor" is the plan administrator. Thus, the plan administrator has the duty to ensure that PBGC premiums are paid in a timely fashion. Because the obligation to pay penalties and interest is triggered by a failure to make premium payments, the plan administrator has the duty to ensure the payment of penalties and interest as well. n1

n1 Section 4007(b) and (c) support this conclusion by authorizing the designated payor to apply for penalty waivers and authorizing the PBGC to bring a civil action for "the amount of the premium[,] penalty, and interest" if the designated payor fails to pay a premium when due.

Although the plan administrator has the duty of ensuring these payments are made, the payments -- including penalties and interest -- may be paid from plan assets. This point is made clear in the conference committee report on ERISA.

The plan is to be liable for both the premiums for coverage of benefits and for [*3] any penalty assessed for failure to pay premiums. Besides the penalty, the [PBGC] may also charge interest . . . for unpaid premiums that are past due.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 365 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5145. Of course, the payments may also be paid from other sources, such as the individual assets of the plan administrator or trustee or funds of a contributing employer.

This letter does not address issues that may be raised under Title I of ERISA by a trustee's or plan administrator's failure to pay PBGC premiums in a timely manner. You may wish to consult with the Department of Labor, which has responsibility for the interpretation and enforcement of the provisions of Title I, if you have any questions concerning such issues.

If you have any further questions regarding this matter, please call Denise Yegge of my staff at (202) 326-4124.

Carol Connor Flowe

General Counsel

Pension Benefit Guaranty Corporation

94-3

August 2, 1994

REFERENCE:
[*1] >4203(b)(1)>
4204(a)(3) Sale of Assets. Bond Requirement on Liquidation of Seller
4209(c) De Minimis Rule. Exceptions to De Minimis Rule
4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass Withdrawal
4221 Resolution of Disputes
>29 CFR 2648>
>29 CFR 2648.3>
>29 CFR 2648.9>

OPINION:

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the "* * *" Pension Plan (the "Plan"). PBGC has also received letters from several employers who have written to express their views on the factual and legal issues raised by your request.

The Trustees of the Plan have concluded that a mass withdrawal occurred in 1988 and have issued mass withdrawal liability assessments in accordance with sections 4209(c) and 4219(c)(1)(D) of the Employee Retirement Income Security Act of 1974 ("ERISA"),as amended. A number of employers have challenged the Trustees' conclusion. You request PBGC's opinion whether the Plan experienced a mass withdrawal by substantially all employers in 1988 and whether the circumstances support the conclusion that some of these employers withdrew pursuant to an "agreement or arrangement" [*2] to withdraw.

You advise that ten out of twelve employers withdrew from the Plan in the three-year period from 1986 through 1988. You represent that two employers withdrew in 1986, one in 1987, and seven of the nine remaining employers in 1988. Of the seven employers that withdrew in 1988, five belonged to the same employer association. Historically, each of these five employers had adopted collective bargaining agreements with the same terms and conditions. Under the agreements ratified for the three-year period beginning in 1988, the five employers ceased having an obligation to contribute to the Plan.

On July 1, 1989, the Plan terminated by amendment, pursuant to ERISA § 4041A(a)(1). At this point, two employers remained. In 1990, the Trustees determined that a mass withdrawal by substantially all employers had occurred in 1988. Mass withdrawal liability assessments were issued to each of the employers that withdrew between 1986 and 1988, in accordance with ERISA § § 4209(c) and 4219(c)(1)(D) and part 2648 of the PBGC's regulations.

As you are aware, section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal [*3] liability are to be resolved first through arbitration, and if necessary, in the courts. The PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions or disputes. We will, however, continue our practice of answering questions of general interpretation under Title IV of ERISA.

Generally, a mass withdrawal occurs on the withdrawal of every employer from a plan or by the withdrawal of substantially all employers from a plan pursuant to an agreement or arrangement to withdraw. ERISA provides special rules for calculating withdrawal liability following a mass withdrawal. Employers may lose the benefit of any applicable de minimis reduction under ERISA § 4209(c) and of any reduction due to the 20-year cap limitation under ERISA § 4219(c)(1)(D)(i). In addition, section 4219(c)(1)(D)(ii) requires that all unfunded vested benefits be allocated among the withdrawing employers, rather than limiting an individual employer's assessment to its allocable share of the unfunded vested benefits, as adjusted, as determined in accordance with ERISA § § 4201 and 4211. PBGC has issued a final regulation, 29 [*4] C.F.R. Part 2648, that establishes rules for the redetermination and reallocation of withdrawal liability following a mass withdrawal.

When a mass withdrawal occurs by the withdrawal of substantially all employers from a plan pursuant to an agreement or arrangement to withdraw, only those employers withdrawing pursuant to the agreement or arrangement to withdraw lose the benefit of any reduction due to the 20-year cap limitation and are subject to the full allocation (or reallocation) of the plan's unfunded vested benefits. ERISA § 4219(c)(1)(D); 29 C.F.R. § 2648.3(b)(2) and (c). However, every employer that withdraws in a plan year in which substantially all employers withdraw pursuant to an agreement or arrangement loses the benefit of the de minimis reduction, regardless of whether the employer withdraws pursuant to the agreement or arrangement. ERISA § 4209(c)(1); 29 C.F.R. § 2648.9.

When a mass withdrawal occurs by the withdrawal of every employer from a plan, slightly different rules apply. All employers withdrawing from a plan that terminates by the withdrawal of every employer lose the benefit of any reduction due to the 20-year cap limitation, regardless of when [*5] the employer withdraws from the plan. ERISA § 4219(c)(1)(D); 29 C.F.R. § 2648.3(b)(1). Under ERISA § 4219(c)(1)(D)(ii) and 29 C.F.R. § 2648.3(c), an employer is subject to the full allocation of the plan's unfunded vested benefits only if the employer withdraws from the plan after the beginning of the second full plan year preceding the date the plan terminates by the withdrawal of the last employer. Finally, because a year in which a plan terminates by the withdrawal of every employer is, by definition, a plan year in which substantially all employers withdraw from the plan, every employer that withdraws from a plan in that plan year is liable for any de minimis amounts. ERISA § 4209(c)(1); 29 C.F.R. § 2648.3(a)(1).

Thus, employers withdrawing in a mass withdrawal may pay greater amounts of withdrawal liability because the special rules negate the relief given to ordinary withdrawing employers under the de minimis rule and the 20 year payment cap. The full allocation of unfunded vested benefits also may increase a withdrawing employer's liability to a plan. As PBGC noted in the preamble to its proposed and final mass withdrawal liability regulations, the increase in [*6] withdrawal liability payable to a plan following a mass withdrawal is intended to encourage plan continuation by reducing the potential future liabilities of the remaining employers. 49 Fed. Reg. 45018, 45019 (1984); 51 Fed. Reg. 10314 (1986).

With this background, we turn to your questions. The first question you raise is whether "substantially all" employers withdrew from the Plan. The term "substantially all" is not defined by the statute or addressed by its legislative history in the context of ERISA § § 4209(c) or 4219(c)(1)(D). However, the term is used in a number of other provisions of subtitle E of Title IV of ERISA, including provisions that (1) provide special withdrawal rules for employers if substantially all covered employees work in a certain industry or if substantially all contributions to a plan are made by employers in certain industries, ERISA § 4203(b)(1)(A), (d)(2); (2) limit the amount of certain employers' withdrawal liability in the case of a bona fide sale of all or substantially all of their assets, ERISA § 4225(a)(1); and, (3) impose special bonding requirements on an employer seeking to avert a withdrawal if all or substantially all of the employer's [*7] assets are distributed, ERISA § 4204(a)(3).

A number of court decisions interpreting "substantially all" in the context of these other provisions have concluded the term means 85% or more. We disagree. If Congress had intended a strict numerical test, it could easily have included a percentage test in the statute. In determining whether a partial withdrawal has occurred, for example, Congress opted for a test based on a 70% decline in contribution base units in each of three consecutive plan years measured against a base year. ERISA § 4205(a)(1), (b)(1). Thus, Congress clearly knew how to fashion a strict numerical test. In the mass withdrawal context, however, and in other provisions of ERISA employing similar language, it chose to leave the determination to the plan sponsor, subject to arbitration and review by the courts.

The second issue you raise concerns what is meant by an "agreement or arrangement" to withdraw from a plan. Again, these terms are not defined by the statute. Plainly, however, an agreement or arrangement to withdraw need not be in writing or otherwise formalized. It can be inferred from the facts and circumstance surrounding the withdrawal.

For example, [*8] and "agreement or arrangement" is likely where nine out of ten employers withdraw from one plan over a three-year period to start another. On the other hand, if three employers liquidate in Chapter 7 bankruptcy proceedings, three employers sell their assets to buyers who do not have an obligation to contribute to the plan, and three withdraw to start their own plan, there probably is no "agreement or arrangement" to withdraw.

Often, a plan will not have access to information to determine whether substantially all employers withdrew pursuant to an agreement or arrangement. Accordingly, Congress specified, in ERISA § 4219(c)(1)(D), that an agreement or arrangement to withdraw from a plan is presumed whenever substantially all employers withdraw from a plan over a three-year period. This provision provides in pertinent part:

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

See also ERISA [*9] § 4209(d). Such evidence should, of course, include the reasons for the employer's withdrawal from the Plan and why its withdrawal was not a part of an agreement or arrangement to withdraw.

I hope this has been of assistance to you. If you have any further questions, please call D. Bruce Campbell of my staff at (202) 326-4125.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

94-5

September 27, 1994

REFERENCE:
[*1] 4211 Withdrawal Liability
>29 CFR 2644.2(d)>

OPINION:

I write in response to your letter requesting clarification of PBGC Opinion Letter 90-2 to the extent it addresses calculation of unfunded vested benefits for purposes of section 4211 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). There, we wrote that the value of unfunded vested benefits cannot be modified retroactively if the plan's actuary later finds an error in its calculation. Any adjustment to the value of the unfunded vested benefits would have only a prospective impact. Therefore, if faulty assumptions resulted in an understatement of unfunded vested benefits, employers who were underassessed withdrawal liability as a result would not generally be subject to an additional assessment.

You ask us to reevaluate that issue with respect to a mathematical or computational error that results in a withdrawal liability overpayment. You assert that a computer program used to generate an actuarial valuation was flawed so that the valuation did not correctly reflect the plan's actuarial assumptions The trustees of the plan do not wish to change any of the assumptions or data used for purposes of determining [*2] withdrawal liability. They wish only to run the same assumptions and data through corrected software. The corrected calculations will result primarily in reduced assessments, and the trustees do not intend to increase assessments even for the few employers whose withdrawal liability was understated because of the computer error. In particular, you have asked whether the trustees may refund a withdrawal liability overpayment resulting from such an error where the employer did not, or can no longer, request review and/or arbitration of the original assessment.

In Opinion Letter 90-2, we were referring to errors relating to mistaken or varying data or actuarial assumptions, rather than errors that are purely mathematical or computational in nature. Moreover, we assumed that the Trustees were considering additional assessments for underpayments, rather than refunds for overpayments, based on these errors.

Under applicable PBGC regulations, a plan sponsor is required to refund any amount of withdrawal liability paid by an employer that is subsequently determined to be an overpayment during the review and arbitration process. 29 C.F.R. § 2644.2(d). Because the purpose of this [*3] requirement is to encourage withdrawal liability payments to the plan while the liability is in dispute, the regulation does not require the refund of any amount determined to be an overpayment after the expiration of the time for review and arbitration. PBGC Opinion Letter 86-11 (May 13, 1986). Similarly, however, nothing in the regulation or in Title IV of ERISA precludes the refund of a withdrawal liability overpayment.

Of course, any such refund of a withdrawal liability overpayment must come within an exception to the exclusive benefit rule of Title I of ERISA, which provides that the assets of a plan are to be used for the exclusive benefit of plan participants and beneficiaries and shall never inure to the benefit of an employer. ERISA § 403(c); 29 U.S.C. § 1103(c). See also IRC § 401(a)(2). The Department of Labor has responsibility for interpreting ERISA § 403(c). We understand that you have requested the Department of Labor's opinion. We also note that the Department of Treasury has proposed regulations on this subject. Prop. Treas. Reg. 1.401(a)-3, 48 Fed. Reg. 10374 (1983). We will defer to their views on this issue.

I hope this letter is of assistance. [*4] If you have any additional questions, please contact D. Bruce Campbell of my staff at the above address or at (202) 326-4123.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

94-8

September 30, 1994

REFERENCE:
[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
>4211( )>
>4211( )(4)(B)>
4219 Notice & Collection of Withdrawal Liability
4221 Resolution of Disputes
>29 USC 1461 note>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC"). Your first request concerns a particular application of the principles set forth in the PBGC's Notice entitled "Multiemployer Pension Plans; Withdrawal Liability in Plans without Unfunded Vested Benefits," 56 Fed. Reg. 12288 (March 1991) (the "March 1991 Notice"), copy enclosed. Your second request concerns the determination of reallocated unfunded vested benefits with respect to certain plans covering employers in the building and construction industry.

With regard to your first request, PBGC believes that the application of the principles set forth in the March 1991 Notice to particular fact patterns and allocation methods is best left to plan sponsor review and arbitration under sections 4219 and 4221 of ERISA, subject to judicial review.

In your second request, you ask about an employer subject to the special "construction industry" withdrawal rule in section 4203(b) of [*2] ERISA who no longer participates in a plan but has not withdrawn under that rule. More specifically, you ask whether the unfunded vested benefits otherwise allocable to such an employer must be included in reallocated unfunded vested benefits when determining the withdrawal liability of withdrawing employers under the "presumptive rule" in section 4211(b) of ERISA.

Section 4211(b)(4)(B) of ERISA provides that "[e]xcept as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of --

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under title 11, United States Code, or similar proceedings[,]

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 4209, 4219(c)(1)(B), or 4225 against an employer to whom a notice described in section 4219 has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation. [*3]

As you know, PBGC has not issued regulations under this provision. However, section 405(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, 1303, permits plan sponsors to act in advance of PBGC's promulgation of regulations, so long as their actions are reasonable.

With regard to your particular question, section 4211(b)(4)(B)(iii) of ERISA does not explicitly require that an employer have withdrawn under section 4203 for the plan sponsor to determine that amounts with respect to that employer should be treated as reallocated unfunded vested benefits when calculating the withdrawal liability of another employer. Accordingly, it would be reasonable for a plan sponsor to determine that amounts are unassessable against an employer, within the meaning of section 4211(b)(4)(B)(iii) of ERISA, even though the employer has not withdrawn under section 4203(b) of ERISA. This approach would be consistent with the principle that, under any method of calculating withdrawal liability, the full amount of unfunded vested benefits under the plan should be allocated among the employers with respect to whom withdrawal liability may be assessed and collected. [*4] See ERISA §

4211(c)(5)(B) (requiring that alternative allocation methods prescribed by regulation provide for the allocation of substantially all of the plan's unfunded vested benefits among employers who have an obligation to contribute under the plan).

If you have further question about these matters, you may call James Beller of my office at 202-326-4076.

Carol Connor Flowe
General Counsel

Pension Benefit Guaranty Corporation

95-2

August 18, 1995

REFERENCE:
[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
4205(a)(1) Partial Withdrawals. Contribution Decline
4205(a)(2) Partial Withdrawals. Partial Cessation
>4205(b)(2)(A)>
>4208(d)(1)>

OPINION:

This is in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the interpretation of the special rule for partial withdrawals for certain employers and plans in the building and construction industry under section 4208(d)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1388(d)(1) (1988).

A partial withdrawal occurs when an employer has a 70-percent contribution decline in each of three consecutive plan years. ERISA § 4205(a)(1), 29 U.S.C. § 1385. A partial withdrawal also will occur if an employer permanently ceases to have an obligation to contribute to a plan under one or more but fewer than all of the employer's collective bargaining agreements, but continues to perform covered work within the jurisdiction of the collective bargaining agreement, or transfers such work to another location. ERISA § § 4205(a)(2) [*2] and 4205(b)(2)(A)(i), 29 U.S.C § § 1385(a)(2), 1385(b)(2)(A)(i). Further, a partial withdrawal occurs if the employer permanently ceases to have an obligation to contribute to a plan for work performed at one or more but fewer than all of its facilities, and continues to perform that covered work at the facility. ERISA § 4205(b)(2)(A)(ii), 29 U.S.C. § 1385 (b)(2)(A)(ii).

For employers and plans in the building and construction industry (as defined in ERISA § 4203(b), 29 U.S.C. § 1383(b)), section 4208(d)(1) makes an employer liable for a partial withdrawal only if the employer's obligation to contribute to the plan is continued for "no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required."

In your hypothetical, one member of the controlled group ceases to have an obligation to contribute to the plan, but continues performing work of the type for which contributions had previously been required within the craft and area jurisdiction of the bargaining agreement. n1 You ask whether certain contribution thresholds constitute an "insubstantial portion" within the meaning [*3] of section 4208(d)(1). Specifically, you ask whether there is liability for a partial withdrawal where there is a 45-percent or 60-percent decline in contribution base units of a controlled group of trades or businesses within the building and construction industry.

n1 For purposes of Title IV of ERISA, all trades or businesses under common control constitute a single employer. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1).

Your letter does not indicate whether both members of the controlled group operate in the craft and area jurisdiction of the same collective bargaining agreement. If they do not, the employer would incur liability for a partial withdrawal. This occurs because the controlled group member continues to work in the craft and area jurisdiction of the collective bargaining agreement for which contributions were previously required but has no obligation to contribute for such work. Thus, the employer's contribution obligation is necessarily for an "insubstantial portion" of that work.

In contrast, further analysis is necessary to determine whether a partial withdrawal occurs where the two controlled group members operate within the same craft and area jurisdiction [*4] and only one member ceases to have an obligation to contribute to the plan. In such cases, a determination must be made as to whether the obligation to contribute is for more than an "insubstantial portion" of the employer's work.

PBGC offers no opinion as to whether any given percentage of work constitutes an "insubstantial portion." Many provisions of ERISA contain specific numerical thresholds and tests governing withdrawal liability determinations. See,

e.g., ERISA § 4209(a), 29 U.S.C. § 1389(a) (allowing in certain multiemployer plans a reduction of unfunded vested benefits allocable to a particular employer by the lesser of 3/4 of 1-percent of the unfunded vested obligations or $ 50,000); ERISA § 4208(a)(1), 29 U.S.C. § 1308(a)(1) (reducing partial withdrawal liability for an employer who has been obligated to contribute at least 90-percent of the total contribution base units for the high base year for two consecutive plan years following partial withdrawal); ERISA § 4208(b), 29 U.S.C. § 1308(b) (reducing partial withdrawal liability for an employer who has been obligated for two consecutive plan years following partial withdrawal to contribute at least 30-percent of the [*5] total contribution base units for the high base year, where the total obligations to contribute for those two plan years are at least 90-percent of the contribution base units for the high base year). Congress did not specify a comparable numerical test in section 4208(d)(1). Accordingly, such fact-specific determinations are the responsibility of the plan sponsor. ERISA § 4202, 29 U.S.C. § 1382. Any dispute between the plan sponsor and the employer over the validity of that determination are to be resolved first through arbitration and then by district court review. ERISA § 4221, 29 U.S.C. § 1401.

As this office has consistently noted, PBGC will not interject itself into these procedures by issuing opinions on the application of the law to particular facts. PBGC Opinion Letter 94-3, 2 (1994); PBGC Opinion Letter 89-2, 2 (1989); PBGC Opinion Letter 88-8, 2 (1988); PBGC Opinion Letter 82-9, 1 (1982). We will, however, continue our practice of answering questions of general interpretation under Title IV of ERISA.

I hope that this has been of assistance to you. If you have any further questions, please contact [*6] Stanley M. Hecht at (202) 326-4125.

James J. Keightley

General Counsel

Pension Benefit Guaranty Corporation

95-3

December 22, 1995

REFERENCE:
[*1] 4206(b)(1) Adjustment for Partial Withdrawal. Reduction of Liability for Subsequent Withdrawal
>4206(b)(2)>
>4211(c)(2)>
>29 CFR 2649>
>29 CFR 2649.4>
>29 CFR 2649.8>

OPINION:

I am writing in response to your request for the Pension Benefit Guaranty Corporation's ("PBGC") views with regard to the application of section 4206(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1386(b), and the regulations thereunder, 29 C.F.R. pt. 2649, to a multiemployer pension plan that uses a variation of the "modified presumptive method" for computing withdrawal liability. Section 4206(b) governs computation of withdrawal liability where an employer has previously incurred a partial withdrawal. You requested PBGC's concurrence that the plan's method of calculating the amount of employers' withdrawal liability where section 4206(b) applies "is not per se permissible, but that, just as with all other variations from the methods set forth in the regulation, it will be permissible if its results in application 'properly reflect the employer's share of liability with respect to a plan,'" quoting ERISA section 4206(b)(2).

The methods for computing an employer's [*2] allocable share of unfunded vested benefits for purposes of determining withdrawal liability are set forth generally in ERISA section 4211, 29 U.S.C. § 1391. The "modified presumptive method" is set forth in ERISA section 4211(c)(2). Simplifying somewhat, that method calls for the calculation, under ERISA section 4211(c)(2)(B), of the employer's share of unfunded vested benefits for the plan year preceding the 1980 amendments to ERISA, amortized over 15 years, and, under ERISA section 4211(c)(2)(C), of the employer's share of unfunded vested benefits for the plan year before the withdrawal. In each case, the employer's share is based on the ratio of its required contributions to all contributions for the preceding 5 plan years. The employer's allocable share of unfunded vested benefits for determining withdrawal liability is the sum of these amounts.

Pursuant to section 4211(c)(5)(C), unless PBGC regulations provide otherwise, "a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used" for any fraction in a computation "method authorized under this section for determining an employer's allocable share of unfunded vested benefits under [*3] this section." Your letter states that the plan has adopted the modified presumptive method, but uses a 10-year period rather than a 5-year period in the fraction set forth in ERISA section 4211(c)(2)(C) to determine the employer's allocable share of unfunded vested benefits.

ERISA section 4206(b)(1) provides generally that when an employer has incurred liability for a partial withdrawal, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of the partial withdrawal liability for the earlier year. The reduction may be referred to as the "Credit." ERISA section 4206(b)(2) provides that PBGC "shall prescribe such regulations as may be necessary to provide for proper adjustments" in the Credit for changes in unfunded vested benefits, changes in contribution base units, and "any other factors for which [PBGC] determines adjustment to be appropriate," so that the liability for a withdrawal in a later year, after application of the Credit, "properly reflects the employer's share of liability with respect to the plan."

The amount of the Credit for plans using the modified presumptive method [*4] is set forth in 29 C.F.R. § 2649.4. In general, it provides that the employer's share of unfunded vested benefits for the plan year preceding the 1980 amendments to ERISA is amortized over 15 years, and that the employer's share of unfunded vested benefits for the plan year before the withdrawal is reduced as if amortized in level annual installments over 5 years, beginning with the plan

year in which the prior partial withdrawal occurred. The sum of these numbers is then multiplied by a defined fraction in order to determine the amount of the Credit. Pursuant to PBGC regulations:

[a] plan that has adopted an alternative method of allocating unfunded vested benefits pursuant to section 4211(c)(5) of [ERISA] and part 2642 of this subchapter shall adopt, by plan amendment, a method of calculating the [Credit] that is consistent with the rules in § § 2649.3-2649.7 for plans using the statutory allocation method most similar to the plan's alternative allocation method.

29 C.F.R. § 2649.8.

Your letter states that the plan has adopted a variation of the Credit calculation method in § 2649.4, "but substituting the number '10' in every place where the number '5' appears in the [*5] Regulation." PBGC recognizes, and its regulation is designed to implement, the congressional mandate that the computation of the Credit should bring about a liability amount that "properly reflects the employer's share of liability with respect to the plan." The "proper" result of a calculation method, and the employer's "proper" share of liabilities, however, is not a mathematical absolute; it varies as a plan's situation and that of the employer change over time. That application of an objectively reasonable calculation method may seem harsh to a particular employer under its particular facts and circumstances, therefore, does not invalidate the method.

We recognize that it may be possible to create some alternative method for calculating withdrawal liability, or for calculating the Credit, that would, in some applications, yield results that would not "properly reflect the employer's share of liability with respect to the plan" as meant by ERISA section 4206(b)(2). In the multiemployer plan system created by Congress, such disputes over a plan's methodology are properly raised first in the plan sponsor review under ERISA. section 4219(b)(2) and later, if necessary, before an arbitrator [*6] and/or a reviewing court under ERISA section 4221.

I hope this information is of help to you. If you have any additional questions, please contact attorney Deborah Bisco, who is handling this matter. Her telephone number is (202) 326-4025.

James J. Keightley

General Counsel

Pension Benefit Guaranty Corporation

OPINION 97-1

May 5, 1997

REFERENCE:
[*1] 4001(b)(1)4001 Definitions
4201(a)4201 Withdrawal Liability Established
29 CFR 4001.3>4001.3>

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") concerning the application of the employer liability provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") to members of controlled groups located outside the United States.

Your request makes the following representations of fact. Company A is a privately-owned domestic holding corporation whose assets are its equity interests in several operating subsidiaries located throughout the world, including Company B, a domestic corporation. In September 1993, Company A and Company B (collectively, the "Debtors") petitioned for reorganization under Chapter 11 of the Bankruptcy Code.

Company B was obligated to contribute to the Plan, a "multiemployer plan" within the meaning of section 4001(a)(3) of ERISA. On January 1, 1994, Company B permanently ceased all covered operations or to have an obligation to contribute under the Plan within the meaning of ERISA § 4203(a). Subsequently, the Plan underwent a "mass withdrawal" within the meaning of 29 C.F.R. § 4001.2. The Plan [*2] filed bankruptcy claims against the Debtors for withdrawal liability, including liability allocable as a result of the mass withdrawal. The Debtors and the Plan entered into a settlement agreement that provided that the Plan would have an allowed general unsecured claim against Company B. The settlement agreement released certain entities that are under "common control" with Company B within the meaning of ERISA § 4001(b)(1). The settlement agreement expressly provided, however, that the release does not apply to eight wholly-owned subsidiaries of Company A that are incorporated and operate in the United Kingdom (collectively, the "UK Entities"). We assume that the settlement agreement was duly approved by the bankruptcy court.

You ask (i) whether the UK Entities constitute a "single employer" with the Debtors within the meaning of ERISA § 4001(b)(1), and if so (ii) whether the UK Entities' location outside the United States affects the principle that all controlled group members are jointly and severally liable for withdrawal liability.

As you know, section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal [*3] liability are to be resolved through arbitration. PBGC does not involve itself in such proceedings. However, PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

Section 4201(a) of ERISA provides that "if an employer withdraws from a multiemployer plan[,] . . . then the employer is liable to the plan in the amount determined under [part 1 of subtitle E of Title IV of ERISA] to be its withdrawal liability." Section 4001(b)(1) provides that for purposes of Title IV,

under regulations prescribed by [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1986 [("IRC")].

This principle of treating commonly controlled businesses as a single employer was subsequently reaffirmed during debates on the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). [*4] As the Senate floor sponsor stated:

Under current law, a group of trades or businesses under common control, whether or not incorporated, is treated as a single employer for purposes of employer liability under Title IV. Thus, if a terminating single employer plan is maintained by one or more members of a controlled group, the entire group is the "employer" and is responsible for any employer liability. The leading case in this area is Pension Benefit Guaranty Corporation v. Ouimet Corp., 470 F. Supp. 945 (D. Mass. 1979), [aff'd, 630 F.2d 4 (1st Cir. 1980), cert. denied, 450 U.S. 914 (1981),] in which the court held that all members of a controlled group are jointly and severally liable for employer liability imposed under section 4062 of ERISA. The bill does not modify the definition of "employer" in any way, and the Ouimet decision remains good law.

126 Cong. Rec. 23,287 (1980) (statement of Sen. Williams). In the years since MPPAA was enacted, the principle that withdrawal liability is a joint and several obligation of all controlled group members has become well settled. [*5] Your question concerns the application of this principle to foreign controlled group members.

Because it appears from your inquiry that Company A has a "controlling interest" in the UK Entities within the meaning of the section 414(c) regulations, the UK Entities would be under "common control" with the Debtors within the meaning of section 4001(b)(1) of ERISA and therefore treated with the Debtors as a single employer for purposes of section 4201(a). See 26 C.F.R. § 1.414(c)-2(a), (b)(1), (2)(A). It is our opinion that, as such, they would be jointly and severally liable for withdrawal liability.

In our view, your inquiry does not implicate extraterritorial application of ERISA. The Plan and its related trust are established and administered in the United States (see ERISA § 4021(a); IRC § 401(a)). The events that triggered liability under ERISA took place in the United States and involved the cessation of the contribution obligation or covered operations, under the Plan, of one or more United States entities. Thus, the liability in question represents the domestic application of United States law. The fact that this liability may ultimately include within its scope certain [*6] foreign affiliates does not compel a different conclusion, as by statute such affiliates are part of a "single employer." As the courts have correctly noted, Title IV's controlled group principle is intended to prevent business owners from avoiding liability by fractionalizing their business operations, and from juggling their activities to eviscerate the liability provisions of ERISA. These purposes would be ill-served by a controlled group principle that did not apply to *all* entities under common control.

Even if the question involved extraterritorial application of ERISA, we would reach the same conclusion. It is well settled that Congress has the power to enact laws that have extraterritorial application, but is presumed not to have exercised that power unless its intent to do so is clear from the statute. We think controlled group liability under ERISA was intended to have extraterritorial application, and that this is clear from the relevant statutes.

In original section 4001(b) of ERISA (now section 4001(b)(1)), Congress authorized PBGC to promulgate regulations governing the treatment of entities under common control. Those regulations are to be "consistent and coextensive" [*7] with certain Treasury regulations. Accordingly, when PBGC adopted regulations in 1976 to implement section 4001(b), it incorporated those Treasury regulations by reference. A few years later, in enacting MPPAA, Congress carried forward the controlled group principle for purposes of the new withdrawal liability rules. It did so again in 1986 when it enacted section 4001(a)(14) and amended section 4062(a) to codify the principle of controlled group liability in the context of termination of a single-employer plan, using slightly different terminology to describe the "employer." None of these legislative actions indicated any Congressional intent that controlled group liability be limited to domestic entities.

The PBGC regulations provide that two or more trades or businesses will be considered under common control (and hence a single employer) for purposes of Title IV of ERISA if they are "'under common control,' as defined in regulations prescribed under section 414(c) of the [IRC]." 29 C.F.R. § 4001.3(a)(1), (2). Section 414(c) of the IRC authorizes the Secretary of the Treasury to prescribe regulations based on "principles similar to the principles which apply in the case [*8] of subsection (b) [of section 414]."

Under section 414(b) of the IRC, employees of corporations that are "members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer." The Treasury Regulations under section 414(b) provide, in pertinent part, that

the term "members of a controlled group" means two or more corporations connected through stock ownership described in section 1563(a)(1), (2), or (3), whether or not such corporations are "component members of a controlled group"

within the meaning of section 1563(b).

26 C.F.R. § 1.414(b)-1(a). Thus, the governing Treasury regulation under section 414(b) does not incorporate the "foreign corporation" exclusion of section 1563(b)(2)(C). (That subsection excludes certain foreign entities from controlled group membership for purposes of filing consolidated tax returns.)

It follows that one of the "principles which apply in the case of subsection (b) [of section 414]" is that corporations connected through stock ownership under section 1563(a) shall be treated as a single employer, even if they might [*9] otherwise be excluded from the group under section 1563(b). And, true to Congress's mandate that the regulations under IRC § 414(c) be based on principles similar to those that apply under IRC § 414(b), the stock ownership tests set forth at 26 C.F.R. § 1.414(c)-1 et seq. substantially reflect the stock ownership tests of IRC § 1563(a), with no express exclusion of foreign entities.

Other sections of the IRC amply demonstrate that Congress knew how to specify a subgroup of corporations, such as "foreign corporations" or "domestic corporations," when that was its intent. See, for example, section 861(a)(1) (referring to "domestic corporations"); sections 881-84 (dealing with taxation of "foreign corporations"); and section 864(b) (providing rules for whether a "foreign corporation" is engaged in trade or business within the United States). Clearly, if Congress had intended to except foreign entities from the ambit of relevant controlled group provisions such as sections 414 and 1563(a) of the IRC or section 4001(b) of ERISA, it would have done so expressly. Instead, as noted above, the exclusion of foreign entities in section 1563(b) is to be disregarded when determining [*10] the membership of a "controlled group of corporations" under IRC § 414(b). This principle of expansive controlled group membership, which serves to effectuate the prophylactic purposes of controlled group liability, is embodied in the section 414(c) regulations as well. In sum, we think that section 4001(b)(1) of ERISA ultimately incorporates IRC provisions that generally apply to all corporations under common control, including foreign corporations. Accordingly, it would be our opinion that Congress intended for the controlled group principle under Title IV of ERISA to have extraterritorial application on the facts you have given.

The opinions stated herein are limited to Title IV of ERISA, and we express no view regarding jurisdictional issues relating to suits against foreign situs entities.

We hope the foregoing response is helpful. If you have any questions, please feel free to call Nathaniel Rayle of this Office at 202.326.4020, ext. 3886.

James J. Keightley
General Counsel

2000-1 §4211(b)
§4211(c)
§4214(a)
§4214(b)
§4220(a)
§4220(c)
29 C.F.R. §4211.11(a)

[PBGC Letterhead]

January 27, 2000

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") concerning the application of certain provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), to a proposed change in a multiemployer pension plan's withdrawal liability allocation method where the effect of that change would be to eliminate withdrawal liability for the remaining employers who contribute to that plan.

You represent that the Plan currently uses an alternate allocation method, based on the "atrributable" or "direct attribution" method as set forth in 29 U.S.C. § 1391(c)(4)(1994 and Supp. III 1997). The PBGC approved the Plan's current allocation method on October 18, 1992. The Plan is fully funded and will continue to be so for the foreseeable future. Since the effective date of MPPAA, 40 employers have withdrawn from the Plan, leaving 16 contributing employers. There are currently no outstanding withdrawal liability assessments. The aggregate unfunded vested benefits, for withdrawal liability purposes, as of December 31, 1997, was zero. You expect that the aggregate unfunded vested benefits for withdrawal liability purposes will continue to be zero for the foreseeable future.

You further represent that the Plan's trustees are concerned that under the Plan's current alternate allocation method, an employer with a significant number of retirees or past service credits may have withdrawal liability even though the Plan as a whole has zero unfunded vested benefits. As a result, the Trustees are considering a change of the withdrawal liability

allocation method to either the "one pool" or "twenty pool/presumptive" method. We assume you refer to the "rolling-5" and "presumptive" methods, respectively. 29 U.S.C. § 1391(b), (c)(3). For withdrawals in 1999, the withdrawal liability for all employers under the Plan would be zero using either of these methods.

As a general rule, an amendment authorized by MPPAA becomes effective only if the PBGC approves the amendment or fails to disapprove the amendment within 90 days after it receives notice and a copy of the amendment from the plan sponsor. 29 U.S.C. § 1400(a). The PBGC is to disapprove such an amendment only if it determines that the amendment creates an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC. 29 U.S.C. § 1400(c). The PBGC has determined that multiemployer pension plans, with the exception of certain pension plans covering employees in the building and construction industry, may without the PBGC's approval adopt by amendment any of the statutory allocation methods. 29 C.F.R. § 4211.11(a). Therefore, if the Plan's trustees elect to change the current alternate allocation method to a statutory allocation method described in 29 U.S.C. § 1391(b) or (c)(2)-(4), and the Plan is not a construction industry plan, the Plan's trustees may amend the Plan to adopt the change without PBGC approval.

You should also note that such a change may not be applied retroactively without the employer's consent. 29 U.S.C. § 1394(a). Such an amendment must also be applied uniformly with respect to each affected employer, and notice of the amendment must be given to each employer who has an obligation to contribute under the Plan and to all employee organizations representing employees covered under the Plan. 29 U.S.C. § 1394(b).

You asked whether the PBGC would consider the proposed change in the Plan's withdrawal liability allocation method to be a violation of the trustees' fiduciary duties. The PBGC's regulatory authority is limited to the application of Title IV of ERISA, whereas fiduciary questions arise under Title I of ERISA. We therefore do not express any view whether the proposed change in the Plan's withdrawal liability allocation method would implicate the trustees' fiduciary duties under Title I.

The Pension and Welfare Benefit Administration ("PWBA"), within the United States Department of Labor, is charged with the interpretation and enforcement of the fiduciary responsibility provisions of Title I of ERISA. Should you desire PWBA's opinion with respect to the trustees' fiduciary concerns, I suggest you

write to Robert J. Doyle, Director of Regulations and Interpretations, Pension and Welfare Benefit Administration, United States Department of Labor, 200 Constitution Avenue, N.W., Room N-5669, Washington, D.C. 20210.

I trust this response has been informative. If you have any questions, please feel free to call Ralph L. Landy of my staff at (202) 326-4020, extension 3090.

Sincerely,

/ s /

James J. Keightley
General Counsel

2001-2 §4001(a)(3)
§4001(a)(15)
§4005(a)
§4005(e)
§4005(f)
§4006(a)
§4022
§4022A
§4041
§4041A
§4042
§4048(b)
§4061
§4063
§4209(c)
§4219(c)
§4232
§4245(f)
§4261
§4281(d)
§4303
29 C.F.R. §4041A.21

[PBGC Letterhead]

March 16, 2001

Robert Rideout shared with me your February 6 letter to him and asked me to respond to it. You ask whether the (the "Fund") continues to be a multiemployer plan—both in general and particularly with respect to PBGC premium payments—now that there is only one employer required to make contributions to the Fund. You note that a second employer participates in the Fund and makes contributions thereto, but is not required to do so by a relevant collective bargaining agreement.[1]

[1] The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980), amended section 4001(a)(3) of ERISA to define "multiemployer plan" as a plan

In our view, a multiemployer plan retains its status as such even if the number of employers required to contribute to the plan decreases to a single employer. This is evident not only from the language of the statute and its implementing regulations, but also from differences in design between the multiemployer and single-employer statutory schemes.

Turning first to the language of ERISA, we note that there is no provision in MPPAA that allows for a change in plan status from multiemployer to single-employer, either before or after a plan terminates.[2] To the contrary, the text of MPPAA and its implementing regulations contemplate that under Title IV of ERISA, a multiemployer plan will retain its multiemployer status until the last employer incurs a complete withdrawal. This theme pervades the multiemployer rules on plan termination, withdrawal liability, fiduciary responsibility, and guaranteed benefits.

For example, under section 4041A, a multiemployer plan termination does not occur until the earlier of "the cessation of the obligation of all employers to contribute under the plan" or passage of a plan amendment which provides for

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> (A) to which more than one employer is required to contribute,
>
> (B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
>
> (C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation, except that, in applying this paragraph—
>
> (i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and
>
> (ii) for any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the term "multiemployer plan" means a plan described in section 414(f) of the Internal Revenue Code of 1954 as in effect immediately before such date....

29 U.S.C. § 1301(a)(3). By contrast, a "single-employer plan" is defined as "any defined benefit plan... which is not a multiemployer plan." 29 U.S.C. § 1301(a)(15).

[2] ERISA expressly permits a multiemployer plan to become another type of plan under certain extremely narrow circumstances, none of which are raised by your inquiry. These are discussed below.

"no credit ... for service with any employer." 29 U.S.C. § 1341A(a)(1), (2) (emphasis added). Similarly, MPPAA sets the date of a termination caused by employer withdrawal at the earlier of "the date the last employer withdraws" or the "first day of the first plan year for which no employer contributions were required under the plan." 29 U.S.C. § 1341A(b)(2) (emphasis added).

The withdrawal liability rules of MPPAA likewise contemplate that continuation of multiemployer plan status does not require participation by more than one employer. Section 4209(c), for example, ceases to apply in plan years after the year "in which substantially all employers" withdraw from a plan. 29 U.S.C. § 1389(c). See also section 4219(c), under which an employer's withdrawal liability payments are to be redetermined (without regard to the 20-year cap of section 4219(c)(1)(B)) if the employer withdrew in concert with "substantially all employers." 29 U.S.C. § 1399(c)(1)(D).

The provisions of MPPAA dealing with the responsibilities of the board of trustees and other fiduciaries similarly contemplate a retention of multiemployer status. The statute specifies that the duties of a plan administrator continue until "the plan assets are distributed in full satisfaction of all nonforfeitable benefits under the plan." 29 U.S.C. § 1341A(c)(2) (emphasis added). PBGC's regulation on the powers and duties of a plan sponsor following a mass withdrawal of "substantially all employers" further specifies that the plan sponsor shall continue to administer the plan pursuant to the multiemployer plan rules. 29 C.F.R. § 4041A.21. Neither the statutory or regulatory provisions would have meaning if the plan ceased to be a multiemployer plan solely because a single employer continued to have an obligation to contribute.

The guaranty provisions of ERISA also militate against a change in plan status. Section 4022 specifies that the single-employer guaranty rules apply to a single-employer plan "which terminates." By contrast, under section 4022A, PBGC's guaranty of benefits under a multiemployer plan applies to a multiemployer plan "which is insolvent" (regardless of whether it is terminated). Thus, for a plan to transform from a multiemployer plan into a single-employer plan would not only fundamentally alter the nature and timing of PBGC's guaranty with respect to the plan, it would also frustrate Congress's clearly expressed intention that the insurable events be different for the two types of plans. 29 U.S.C. § 1361. Furthermore, because a multiemployer plan remains ongoing after it terminates, a post termination devolution by a multiemployer plan into a single-employer plan creates the

anomalous possibility of a plan terminating twice, first as a multiemployer plan and then as a single-employer plan.[3]

Thus, under a textual analysis, it is plain that ERISA does not allow a multiemployer plan to devolve into a single-employer plan. This conclusion is buttressed by marked differences in the design and operation of the two regimes. A multiemployer plan terminates by occurrence of one of the events specified in ERISA § 4041A(a), whereas a single-employer plan can only terminate in accordance with sections 4041 and 4042. The date of plan termination for a single-employer plan is determined differently from that of a multiemployer plan (compare section 4048(b)(1) with section 4041A(b)), and just as a plan cannot terminate twice, it cannot have two termination dates. When a multiemployer plan terminates, it generally does not cease to exist but rather continues to collect contributions (and withdrawal liability) until the plan is sufficient. By contrast, when a single-employer plan terminates, it soon goes out of existence, and the employer obligation to contribute ceases.

The contrast between the multiemployer and single-employer programs does not stop there. The insurable event for a multiemployer plan is cash-flow insolvency, in which event the plan must seek financial assistance from PBGC. 29 U.S.C. §§ 1322A(a)(2), 1361, 1426(f), 1431, 1441(d). The insurable event for a single-employer plan is termination of the plan at a time when the plan's assets are insufficient to pay benefits at the guaranteed level. See 29 U.S.C. §§ 1322(a), 1341(b)(4), 1342(d)(1)(B)(iii), 1361; PBGC Op. Ltr. 91-1 (Jan. 14, 1991). When an employer withdraws from an underfunded multiemployer plan, it generally owes withdrawal liability, a concept unknown to the single-employer regime.[4] Premiums, too, are calculated differently for multiemployer and single-employer plans, and are allocated to separate funds, which may be used only for the respective guaranty program under which the premiums were paid. 29 U.S.C. §§ 1305(a), (e), (f), 1306(a), 1361. Finally, the nature and amount of PBGC's guaranty is also markedly different as between the two types of plans.

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[3] Section 4041's statement that it is the "exclusive" means of terminating a single-employer plan also strongly implies that a plan subject to its provisions has not yet been terminated.

[4] Section 4063 of ERISA describes a somewhat analogous form of liability in the single-employer context. See generally 29 U.S.C. § 1363(b).

It is also significant that Title IV of ERISA speaks directly to other possible changes in plan status. Conversion of a covered plan to an individual account plan constitutes a termination and thus subjects a plan to one or the other termination regime, depending on whether the plan is a single employer plan, see 29 U.S.C. §§ 1341(e), or multiemployer plan, see 29 U.S.C. § 1341A. Title IV also addresses mergers between multiemployer plans and single-employer plans. 29 U.S.C. § 1412. Title IV originally permitted certain plans that would become multiemployer plans under MPPAA's new definition irrevocably to elect single-employer plan treatment, so long as they did so within one year after MPPAA's enactment. 29 U.S.C. § 1453. These provisions describe specific circumstances under which a covered multiemployer plan could become another type of plan. That Congress attended to multiemployer plans changing status in certain limited situations strongly implies that a multiemployer plan cannot simply devolve into a single-employer plan in other situations, as when the number of employers is reduced to fewer than two. As the Senate Committee on Labor and Human Resources noted, MPPAA "clarifies that multiemployer status continues after termination even if, for instance, the termination is a result of all employers withdrawing from the plan." Senate Comm. on Labor and Human Resources, 96th Cong., The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 11 (Comm. Print 1980).

For the foregoing reasons, we conclude that a multiemployer plan does not devolve into a single-employer plan as a result of a reduction to less than two the number of employers required to contribute pursuant to a collective bargaining agreement. I hope this is helpful.

Very truly yours,

/s/

James J. Keightley
General Counsel

2002-1 §4041
§4042
§4047
§4261
26 C.F.R. §1.412(c)(1)-3

[PBGC Letterhead]

MEMORANDUM

December 10, 2002

TO: Steven A. Kandarian
Executive Director

FROM: James J. Keightley / s /
General Counsel

SUBJECT: Legal authority for PBGC to terminate a pension plan, then immediately restore it, in order to provide more lenient funding requirements

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You have asked us to analyze whether PBGC has legal authority to terminate and then restore a pension plan in order to implement more lenient funding requirements for the plan sponsor (assuming there are defensible grounds for termination in the first instance). In our view, PBGC has no legal authority to take such an unprecedented course of action.

Discussion

Section 4047 of ERISA is the basis for PBGC's authority to restore a terminated pension plan. It has two sentences. The first addresses a situation where a plan "is to be terminated" or "is in the process of being terminated." In such a case, PBGC is authorized to "cease" termination activities and restore the plan to its prior status if PBGC determines that the plan should not be terminated "as a result of such circumstances as [PBGC] determines to be

relevant." This sentence has no application to a plan as to which no termination activity is occurring; there is nothing to "cease." Even if it could somehow apply, such a "cessation" of termination activities would not help a plan sponsor seeking funding relief because the special funding rules for restored plans, discussed below, do not apply in such a case. *See* 26 C.F.R. § 1.412(c)(1)-3(a)(1) (the restoration funding method applies "in the case of certain plans that *are or have been terminated* and are later restored" by PBGC) (emphasis added).

The second sentence of section 4047 addresses the situation where a plan "has been terminated" under section 4041 or 4042 of ERISA. It empowers PBGC "in any such case in which [PBGC] determines such action to be appropriate and consistent with its duties under [Title IV], to take such action as may be necessary to restore the plan to its pre-termination status." As an initial matter, it seems clear that Congress envisioned that PBGC would exercise this authority, as it did in the LTV case, only *after* a pension plan has already terminated and PBGC decides, for some reason, that the termination should be undone.[1] Thus, it seems doubtful that this provision grants PBGC authority to determine, while a plan is still ongoing, that the plan should be terminated and in the next instant restored.

Even if this obstacle could be overcome, we think that PBGC's restoration authority, as broad as it is, is not broad enough to justify restoration solely for the purpose of giving an

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[1] The legislative history of section 4047 confirms this understanding. The 1974 Conference Report noted that this provision would allow PBGC to abandon termination proceedings "if the employer and plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58. This language clearly anticipates some change, occurring during termination proceedings or after termination, that would make termination "no longer" advisable. That concept is inconsistent with a "pre-packaged" termination-restoration.

employer a liberalized funding schedule. While section 4047 broadly authorizes restoration of a terminated plan whenever PBGC determines that restoration is "appropriate and consistent" with its Title IV duties, we do not believe it would be appropriate and consistent with PBGC's duties to use restoration in this manner.[2] It is Congress, and to a limited extent the IRS, that determine the minimum funding rules, not PBGC. Those statutory rules, which Congress has progressively tightened over the years, determine the length of time over which an employer must fund its pension liabilities. Moreover, the funding rules authorize the IRS, under specified circumstances of business hardship, to grant an employer a waiver of the funding requirements for the year in question. A termination-restoration transaction would run counter to that entire structure and would arrogate to PBGC the authority to determine minimum funding requirements.

The provisions governing the funding of restored plans were implemented in order to address the unique problems that arise when a plan is restored, not to authorize PBGC to grant funding relief. When a pension plan is restored, its funding requirements are established under companion regulations that PBGC and the IRS adopted in 1990 in connection with the LTV restoration. In its regulation, the IRS used its authority to "adapt the standards of section 412 to the extent necessary to provide rules for a special group of plans," and authorized PBGC to establish the funding schedule for restored pension plans, subject to important restrictions. 55 Fed. Reg. 42,705 (Oct. 23, 1990). This regulation (codified at 26 C.F.R. § 1.412(c)(1)-3) creates

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[2] PBGC formed an interdepartmental group in 1991 to analyze what grounds might justify restoration. Although no definitive list was ever finalized, the group generally agreed that the following grounds were among those that could warrant restoration: abuse of the insurance program, factual mistake, analytical mistake, changed financial circumstances, and changes in other circumstances such that the factors that led to termination no longer exist. Memorandum from David Lindeman to Diane Burkley et al. (June 10, 1991).

a "restoration method" that adapts the plan's underlying funding method to the "special circumstances that exist when a plan is restored." 55 Fed. Reg. 42,706.[3] The regulation creates a special "initial restoration amortization base," which consists of the unfunded liabilities of the plan as of its restoration, and provides that this base must be amortized pursuant to a "restoration payment schedule order," or "RPSO," issued by PBGC (PBGC's regulation is codified at 29 C.F.R. pt. 4047).

In authorizing PBGC to establish the funding schedule for restored plans, the IRS stressed the importance Congress placed on the tightened contribution requirements implemented in 1974 and 1987, and emphasized that the funding requirements of section 412 were not to be circumvented through issuance of a RPSO:

> It is also appropriate and essential to the effective administration of section 412 that the Secretary prescribe certain limits with respect to the restoration funding schedule in order to ensure that the schedule is consistent with and in furtherance of the congressional purposes underlying section 412.

55 Fed. Reg. 42,706-07. A variety of restrictions in the regulation serve to further this goal.[4]

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[3] Restoration creates unique problems with respect to plan funding. The plan's funding standard account is closed out at the time of termination, and must be reestablished at restoration. 55 Fed. Reg. 42,704. A plan ordinarily is underfunded upon termination, and the sponsor makes no contributions during the time it is terminated, resulting in even greater underfunding. As the IRS noted, "[t]his underfunding will be significantly increased if the plan has been administered as a terminated plan for an extended period of time." 55 Fed. Reg. 42,705.

[4] The initial restoration amortization base must be fully amortized over not more than 30 years. § 1.412(c)(1)-3(c)(2). PBGC may grant a deferral of an annual payment only if it determines that deferral is in the best interests of the participants and the insurance program, and that the plan sponsor and its controlled group members are unable to make the scheduled payments without experiencing temporary substantial business hardship. § 1.412(c)(1)-3(c)(4). PBGC may grant no more than five deferrals during the RPSO period, and may grant no more than three of these deferrals during the first ten years. Id. No deferral may extend the overall restoration payment period beyond 30 years. Any other PBGC modification of the RPSO must comply with the requirements of the regulation, including the minimum payment requirements

Nor is there anything in section 4047 (or elsewhere in ERISA or the Code) that authorizes PBGC to provide financial assistance to ongoing single-employer plans or to assist plans in avoiding the normal funding waiver application process. Indeed, although Congress explicitly amended ERISA to provide for financial assistance to multiemployer plans in 1980 (ERISA § 4261, 29 U.S.C. § 1431), it never authorized such assistance to single-employer plans.

In its 28 years of existence, PBGC has exercised its section 4047 restoration authority only once. In the LTV case, PBGC ordered restoration of three plans that had terminated nine months earlier after LTV created new "follow-on" pension plans that made up for the benefits not guaranteed by PBGC. This follow-on scheme, if not challenged, would have resulted in PBGC's effectively subsidizing an ongoing employer's pension program. Faced with this serious abuse of the pension insurance program, PBGC took the unprecedented step of restoring the previously terminated plans to LTV under section 4047. Three years of litigation ensued, with PBGC's restoration decision finally vindicated in the U.S. Supreme Court, followed by another three years of negotiations. The funding schedules that PBGC ultimately provided LTV took account of that extraordinary chain of events. In no way was the LTV restoration part of some termination-restoration package contrived to give LTV a break on its minimum funding obligations.

In sum, while PBGC has broad discretion to determine whether restoring a plan would

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and the 30-year restriction. § 1.412(c)(1)-3(c)(3). And PBGC must conduct a funding review of the plan at least annually, and PBGC's Executive Director must certify to the Board of Directors and to the IRS that it is in the best interest of the plan's participants and beneficiaries and the insurance program that the restored plan not be reterminated. § 1.412(c)(1)-3(i).

be appropriate and consistent with its duties under Title IV of ERISA, we believe that a purposeful effort to achieve an objective not permitted by the agency's governing statute – granting funding relief – would be overturned as exceeding our statutory authority. Indeed, PBGC's internal deliberations about what grounds might justify restoration produced strong concerns that the agency "could be criticized for using termination followed by a restoration with a RPSO as a way to dilute the minimum funding standards or to avoid the waiver process." Memorandum from David Lindeman to Diane Burkley et al. (June 10, 1991) at 7. Although there may be situations in which PBGC "could defensibly take into account the availability of a RPSO in deciding whether to restore," restoration "simply to permit a sponsor to evade the normal funding rules" would be indefensible. Id.[5]

[5] The former General Counsel reiterated this concern, stating: "[PBGC]'s actions would be governed by an arbitrary and capricious/abuse of discretion standard, and we could easily run afoul of those standards if it were shown that we terminated (and restored) simply to allow the sponsor a way to evade the normal minimum funding rules."

Dexter Hofing LLC

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