

Pension Benefit Guaranty Corporation

75-121

December 19, 1975

REFERENCE:

[*1] 4021. Plans Covered
4042 Termination by PBGC
4068 Lien for Employer Liability

OPINION:

This is in response to your letter of October 22, 1975 inquiring as to the general nature of the operation of the Pension Benefit Guaranty Corporation ("PBGC") pursuant to Title IV of the Employee Retirement Income Security Act of 1974 ("the Act") and specifically the effect of a possible bankruptcy upon the operation of the PBGC. This will also serve to confirm our telephone conversations on November 25 and 26, 1975 wherein you informed me that * * * Company, Inc. had filed a petition for an adjudication of bankruptcy early in November and asked how you should proceed.

Section 4021(a) of the Act establishes the scope of the Act's termination insurance provisions. In general, coverage extends to any employee pension benefit plan which has met the requirements of the Internal Revenue Code governing "qualified" plans, unless the plan is specifically exempted by one of the provisions of Section 4021(b). That is, the Act provides in Section 4021 for mandatory coverage of defined benefit pension plans which are tax qualified either in fact or by reason of a determination by the Internal Revenue Service. [*2] The effective date of this coverage for single employer plans, in general, is September 2, 1974.

The Act, Section 4007, provides that the plan administrator "shall pay premiums to the PBGC." However, the PBGC will pay basic benefits even if premiums are not paid. Act, Section 4007(d).

The Act provides two procedures to be used in terminating a plan. Under one, where assets are sufficient to pay guaranteed benefits, the administrator is responsible for winding up the affairs of the Plan. Under the other procedure, when there is an insufficiency or potential insufficiency of assets, a trustee is responsible for liquidating a plan. In all terminations, plan assets have to be allocated as specified by the Act in Section 4044. The plan administrator is required to notify the PBGC at least 10 days prior to the proposed date of termination. This notification must be made in accordance with the PBGC's Notice of Intent to Terminate Regulation, a copy of which is enclosed. The Plan's assets and guaranteed benefit liabilities are then valued and a determination is made by the PBGC, within 90 days of the proposed date of termination, regarding the sufficiency of assets to pay guaranteed [*3] benefits. The 90-day period may be extended by agreement between the PBGC and the plan administrator.

On termination of a covered plan, if the PBGC determines that the Plan terminated after the appropriate effective date, then the PBGC will pay guaranteed basic benefits, if necessary, irrespective of the amount of corporate assets. (The final termination date is resolved after an analysis of all the relevant facts and circumstances. Cessation of benefit accruals and employer contributions are significant factors). The PBGC guarantees the payment of benefits vested under the terms of the Plan within limits specified in the Act. The guaranteed basic benefits are limited to the actuarial value at the time of termination of a monthly benefit in the form of a life annuity commencing at age 65, equal to the lesser of \$801.14 or 100 percent of a participant's high consecutive five-year average monthly gross income. The \$801.14 limit is to be adjusted by changes in the social security contribution and benefit base. Under plans and amendments less than five years old at termination, basic benefits are insured on a graduated basis.

An employer maintaining a plan that is unable to pay [*4] guaranteed basic benefits at termination is liable to the PBGC for payments it makes to cover these benefits. Any employer contributions which were in arrears prior to the plan termination, will generally be recovered by the PBGC pursuant to Title IV's employer liability sections in Subtitle D. In all cases, employer liability is limited to 30 percent of net worth. The PBGC has a lien on all the property of an employer "who refuses to pay, after demand" the liability resulting from PBGC payments made as a result of a plan termination. See Act Section 4068. If the employer is in bankruptcy, the PBGC's lien will be "treated in the same manner as a tax due and owing to the United States for purposes of the Bankruptcy Act . . ." Act, Section 4068(c)(2).

However, "the PBGC is not constrained in any way from acting with full authority once bankruptcy is filed." The initiation of bankruptcy proceedings does not affect the payment guarantee of basic benefits by the PBGC. There is no need to file an intent to terminate notice prior to the time the company files for bankruptcy so as to assure the guarantee of basic benefits by the PBGC. Similarly, the PBGC may, when there is an insufficiency [*5] or potential insufficiency of assets, have a trustee appointed to liquidate the Plan. Act, Sections 4042(e) and (f). Consequently, only the PBGC, not plan participants, is affected the pendency of a bankruptcy proceeding.

At the present time, we would advise you to have the Plan administrator officially notify the PBGC, pursuant to the PBGC's Notice of Intent to Terminate Regulation, of the termination of the Plan. An analysis of the documents accompanying the notice will enable the PBGC to determine how to proceed in this matter.

Should you wish any additional information please contact me at (202) 254-4895.