Pension Benefit Guaranty Corporation

81-7

April 2, 1981

REFERENCE:
[*1] 4021. Plans Covered
4021(a) Plans Covered. Requirements of Coverage
4021(a)(1) Plans Covered. Tax Qualification in Practice
4021(a)(2) Plans Covered. Tax Qualification by IRS Determination
4022 Benefits Guaranteed
4022(b)(2) Benefits Guaranteed. Successor Plan
4062 Liability of Employer in Single Employer Plans

OPINION:

This is in response to your request for several opinions in connection with a contemplated restructuring of three pension plans maintained by a certain company (the "Company").

The facts, as we understand them, are as follows. The Company, which operates a number of divisions, maintains three Company-wide pension plans that are covered by Title IV of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"). Plan A covers hourly-rate and certain represented salaried employees and is maintained pursuant to collective bargaining agreements with several unions. Plan B primarily covers non-represented salaried employees. Plan C covers hourly-rate employees at certain plants. At present, none of the plans is sufficiently funded to provide benefits that would be guaranteed by the Pension Benefit Guaranty Corporation (the PBGC") under Title IV of ERISA in [*2] the event that the plans were terminated.

The Company is experiencing financial difficulties and, in an effort to resolve its problems, intends to restructure its business operations. To facilitate this process, the Company is contemplating a restructuring of its pension plans. Specifically, the Company intends to split the three plans into sixteen Divisional Plans. Under the proposed arrangement, the assets and liablities of Plan A would be allocated to six Divisional Plans. Each Divisional Plan would cover all retired, deferred vested and active participants of Plan A, who are active employees of, or who were last employed by, the applicable division. Similarly, the assets and liabilities of Plan B would be allocated to eight additional Divisional Plans. Each of these Divisional Plans would cover all retired, deferred vested and active participants of Plan B, who are active or former employees of the applicable division. The assets and liabilities of Plan C would be allocated to two more Divisional Plans covering all retired, deferred vested and active participants of Plan C, who are active or former employees of the applicable division.

You have stated that the amount [*3] of assets to be transferred to each Divisional Plan would be determined under the procedures set forth in Treasury Regulation section 1.414(1)-1 (1979). No participant's accrued benefit would be reduced in connection with the transfer, and each Divisional Plan would be subject to all liabilities for benefits attributable to participants assigned to it. Funding for each of the Divisional Plans would be computed separately and each of the plans would be subject to the minimum funding standards of section 412 of the Internal Revenue Code (the "Code") and section 302 of ERISA. Each Divisional Plan would be submitted to the Internal Revenue Service with a request for a determination of its qualified status under section 401(a) of the Code. Subject only to modifications that might arise during that determination process, the division of the plans would be irrevocable.

You have stated that the divisional groupings reflect business segments of the Company that compete in separate industrial markets. The Company believes that the restructuring of its pension plans would facilitate the establishment of varying benefit levels in response to the competitive pressures of each separate industry. [*4] Additionally, the Company expects that the new arrangement would quantify and segregate the liabilities and annual costs attributable to each business segment, and thus would better enable a potential purchaser of any particular segment to assess the financial effect of the acquisition.

Finally, you have indicated that if a reduction in pension costs becomes imperative, the Company may wish to terminate one or more of the Divisional Plans. You have asked the PBGC a number of questions regarding the possible termination of such plans.

First, you have asked us to confirm that section 4021 of ERISA would apply to each Divisional Plan from its inception so that benefits would be guaranteed by PBGC under section 4022 of ERISA in the event of the termination of any such plan. Section 4021(a) describes plans that are covered by the termination insurance program of Title IV of ERISA. In order to be covered, a plan must meet one of the tax qualification tests set forth in section 4021(a). A plan is covered pursuant to section 4021(a)(1) if it is engaged in commerce and has in practice met the Code requirements for qualification for five years. A plan is covered pursuant to section [*5] 4021(a)(2) if it is, or has been determined by the Secretary of Treasury to be, qualified under applicable Code sections. Section 4021(b) of ERISA sets forth certain exceptions to the coverage rules of section 4021(a).

You stated that none of the exceptions set forth in section 4021(b) would apply to the Divisional Plans. Additionally, you stated that the terms of each Divisional Plan would be identical in all material respects to the existing Company-wide Plans, which have satisfied the qualified retirement plan requirements of the Code since well before the enactment of ERISA.

A Divisional Plan that meets one of the tax qualification tests set forth in section 4021(a) of ERISA would be covered by Title IV, provided none of the exceptions to coverage specified in section 4021(b) applies and provided the plan is a bona fide pension plan. In this regard, we point out that a plan established in contemplation of termination would not, in our view, constitute a bona fide pension plan, and the termination of such a "plan" would not be an insurable event under Title IV of ERISA.

We note that the other questions you have raised are based on the assumption that the termination [*6] of a Divisional Plan would be an insurable event under Title IV. For the purpose of responding to these questions, we will make the same assumption.

You have asked whether each Divisional Plan would be 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 a Divisional Plan, the time such Divisional Plan would have been in effect would include the time the applicable predecessor plan was in effect.

Section 4022(b)(2) of ERISA 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, each Divisional Plan would cover all retired, deferred vested and active participants from the applicable Company-wide Plan who are active employees of, or who were last employed [*7] by, the applicable division. Accordingly, in our view each Divisional Plan would 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. You have stated that each Divisional Plan would, by its terms, be subject to all of the liabilities attributable to benefits accrued by divisional employees under the applicable Company-wide Plan. n1 Accordingly, the second element of the successor plan test is met.

n1 Please note that we are not offering an opinion as to whether an individual participant may have rights against an entity other than his or her Divisional Plan.

Based on the above and assuming that the Divisional Plans would in fact be bona fide pension plans, we conclude that the Divisional Plans would constitute successor plans for purposes of Title IV of ERISA.

You also asked about liability under Title IV of ERISA in connection [*8] with the sale of a division of the Company to an unrelated purchaser. You asked whether an unrelated purchaser would have any liability under Title IV if the Company were to terminate the applicable Divisional Plan prior to the sale. In this situation, the unrelated purchaser would have no liability to the PBGC under Title IV of ERISA. The Company would, of course, be liable to the PBGC under section 4062 of ERISA for the lesser of: (1) the amount by which plan assets are insufficient to fund the plan benefits guaranteed under Title IV of ERISA, or (2) 30 percent of the Company's net worth, determined as of a day the PBGC chooses, but within 120 days prior to the date of plan termination.

You also asked whether the Company would be liable under Title IV of ERISA in the event of a sale of a division to an unrelated purchaser who adopts, maintains, and subsequently terminates the applicable Divisional Plan. In this situation, the PBGC would not assert liability against the Company under Title IV with regard to the subject plan after the adoption of the plan by the purchaser, if either of the following conditions exist:

(1) As of the closing date of the sale, the plan has sufficient [*9] assets to satisfy all benefits that are guaranteed by the PBGC under Title IV; or

(2) If the plan's assets are not sufficient to provide guaranteed benefits on the closing date, thirty percent of the statutory net worth of the purchaser immediately after the closing is greater than the amount by which the assets of the plan are insufficient.

Finally, we understand that you are withdrawing your question regarding the application of the 30 percent of net worth limitation of section 4062 of ERISA to successive plan terminations.

I hope this will be of assistance to you.

Henry Rose
General Counsel