

Pension Benefit Guaranty Corporation

86-13

May 29, 1986

REFERENCE:

[*1] 4043(b)(8) Reportable Events. Mergers, Consolidations & other Transfers of Plan Assets
4062 Liability of Employer in Single Employer Plans
4064 Liability of Employers in Multiple Employer & Multiemployer Plans

OPINION:

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

As you have represented the facts, effective February 28, 1986, A Corporation * * * will spin-off its corporate divisions which are not involved in the * * * distribution business. A will transfer assets, liabilities, and personnel associated with those corporate divisions to wholly-owned subsidiaries, the shares of which will be transferred to a newly-formed parent corporation named B Corporation * * *. A is a publicly-owned corporation whose stock is widely held. In the spin-off, A stockholders will receive one share of B stock for each share of A which is owned. After the spin-off, B will not be related to A.

It is expected that the spun-off divisions will continue their business operations indefinitely and that the employees transferred in the spin-off will continue to be employed. [*2]

A sponsors a defined benefit pension plan, the * * * Plan * * *, which covers salaried employees and a number of hourly employees. The Plan will have approximately 2,532 participants immediately prior to the spin-off and approximately 1,038 immediately after the spin-off. The employees of the spun-off divisions and certain personnel at the corporate headquarters who participated in the A Plan will enter the B Plan, a plan newly established by B, which will assume the accrued liability to such employees under the A Plan. The B Plan will be a defined benefit plan with benefits identical to the A Plan's benefits. A's transferred employees will be given credit for past service for all purposes under the B Plan. As of the spin-off date, the A Plan will transfer assets to the B Plan, so that each plan will have assets approximately in proportion to its accrued liabilities. Both the A Plan and the B Plan will have assets in excess of the accrued benefits of their participants after the spin-off. You represent that neither A nor B has any intention of terminating its plan.

You requested our opinion on two matters in regard to the above transactions. First, in regard to the spin-off [*3] of the A Plan, you requested our opinion as to whether the only reportable event involved is a plan merger, consolidation, or transfer of assets, as described in ERISA Section 4043(b)(8). In the situation you have described, this would be the only reportable event in regard to the A Plan spin-off.

Second, in regard to the B Plan, you requested our opinion as to whether A will incur any employer liability under Sections 4062(b), 4062(e), or 4064 should the B Plan terminate with insufficient assets to pay benefits guaranteed under Title IV of ERISA.

You have stated in a telephone conversation with Angela Arnett of the PBGC's Legal Department that the circumstances of this spin-off and transfer transaction are identical in substance to those addressed in PBGC Opinion Letter 85-8, dated April 2, 1985. In that letter, we advised that, in our view, the principles applicable to sales transactions, stated in PBGC Opinion Letters 82-29 and 82-30, applied to the spin-off and transfer transactions described therein. In Opinion Letters 82-29 and 82-30, PBGC addressed the question of the potential employer liability of a controlled group seller where substantially all of the assets of the [*4] seller (or of the stock of a subsidiary corporation of the seller) was sold to a buyer who assumed the liabilities to the seller's (or the subsidiary corporation's) employees under the seller's plan. In Opinion Letter 82-29 we determined that:

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

(1) as of the closing date of the sale, a plan had sufficient assets to satisfy all benefits which are guaranteed by the PBGC under Title IV, or

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

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

If, as you have stated, the circumstances of the current transaction are identical to those of the transaction addressed in Opinion 85-8, [*5] these principles would apply to the current transaction.

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

We point out that in responding to requests for opinions such as Opinions 82-29, 82-30, and 85-8, it is not the practice of PBGC to verify the sufficiency of the plan or the net worth of the new employer who has acquired assets and/or stock. Therefore, PBGC expresses no opinion as to the asset sufficiency of the B Plan maintained by members of the B controlled group or as to the net worth of the controlled group. Further, for your information, we note that the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), amends Title VI of ERISA by adding section 4069 which provides that if a principal purpose of a transaction that takes place within 5 years before termination of a plan is to evade liability, the parties to the transaction and members of their controlled groups shall, under certain circumstances, be subject to liability under [*6] Title IV.

I hope this response is helpful. If you have any further questions, please contact Mrs. Arnett at the address given above or (202) 956-5023.

Edward R. Mackiewicz
General Counsel