

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