Pension Benefit Guaranty Corporation

74-32

December 23, 1974

REFERENCE:
[*1] 4044(a) Allocation of Assets. Requirement of Following Statutory Allocation Provisions
4062(b) Liability of Employer in Single Employer Plans. Amount of Employer Liability

OPINION:

In response to your letter dated November 1, 1974, and addressed to the U.S. Department of Labor, Labor-Management Services Administration, we wish to advise you of the following.

You have asked whether the Act creates a "contingent liability, to the extent of 30 percent of the net worth of the employer, to assure adequate funding of a pension program." Not exactly. Under the Employee Retirement Income Security Act of 1974 ("the Act"), this Corporation insures participants in a covered pension plan against the possibility that they will not receive non-forfeitable, "basic" benefits promised by a plan in the event the employer terminates it without having funded those non-forfeitable, basic benefits (see section 4022(a) of the Act). The maximum benefit currently insured under the Act is $750.00 per month (section 4022(b)(3)).

If this Corporation is obliged to make payments to participants of a particular plan upon its termination, the employer who established the plan becomes liable to us for the difference [*2] between the current value of the plan benefits guaranteed under the Act and the value of the plan's assets allocable to those benefits on the date of termination. That liability, in turn, is limited to 30 percent of the employer's net worth (see section 4062(b)). Thus, while you are correct in stating that the statute creates a contingent liability upon the termination of a plan, the extent of that liability is somewhat narrower than that described in your letter, since it applies only to benefits guaranteed by the Act, i.e., vested, basic benefits. Furthermore, the statute authorizes the creation of an insurance scheme to protect employers against that contingent liability. Unfortunately, under the Act, contingent employer liability insurance protection cannot be made available until premiums for that insurance have been in effect for five years. This Corporation intends to do everything within its power to make that insurance protection available as soon as possible.

You have also asked whether the statute prohibits a qualified plan from terminating and distributing its funds in accordance with the provisions of the plan. You explain further that the question is raised "to [*3] determine if the Act is retroactive . . ."

The statute does establish rules governing the distribution of plan assets upon termination, Section 4044; and these rules apply to plans which were established before the Act was passed but which terminate after the date of enactment, September 2, 1974. These allocation rules supersede inconsistent plan provisions.

In general, the Act's allocation of assets provision enables the plan to discharge its insured liabilities and thus avoid or minimize payment by this Corporation with its attendant employer liability. Thus, those allocation rules seem to reflect Congress' determination to protect benefits for participants from the date of enactment forward. In effect, Congress determined to provide immediate insurance protection for participants, and to make the related allocation and employer liability provisions effective immediately as well.

In conclusion, we note that your persion program is "now substantially funded." Since the contingent liability about which you have expressed concern applies only to unfunded liabilities for non-forfeitable, basic benefits, and since the rules governing the allocation of assets upon termination [*4] gives non-forfeitable, basic benefits high priority, it may well be that if you were to terminate your plan you would escape the contingent liability to which you refer. You may wish to consult an attorney or actuary about this possibility. But since one of the purposes of the Act is "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants" (Section 4002(a)(1)), it would be unfortunate indeed if you or other employers determined to terminate existing plans because of a concern over the contingent liability. We certainly hope that few employers will take that tack since termination would, in fact, bring that contingent liability closer to reality. In your case, where the plan is "largely funded," it would seem that the employer liability provisions should not be a matter of serious concern, and we hope that you would see

fit to continue your plan in operation. As we have indicated, however, the statute is immediately applicable to your plan and to others which were established prior to the effective date of the Act.

Steven E. Schanes
Acting Executive Director