Pension Benefit Guaranty Corporation

79-15

November 15, 1979

REFERENCE:
[*1] 4021. Plans Covered
4021(a) Plans Covered. Requirements of Coverage
4022(b)(8). Benefits Guaranteed. Five Year Phase-in of Guarantee.

OPINION:

This is in answer to your requests that the Pension Benefit Guaranty Corporation ("PBGC") guarantee pension benefits for 20 former employees of * * * (the "Company") and that the benefits of three individuals who are currently receiving payments from the PBGC which were decreased because of a phase-in, be increased. (Although your letter indicates four individuals are receiving benefits from PBGC, our records show only three are receiving benefits; * * *.)

The pertinent facts of the case as we understand them are as follows:

1. Beginning in 1946, predecessors of the Company began a policy of paying retired employees benefits under an unwritten pension plan directly from the general assets of the Company. There was no separate funding for these benefits.

2. On January 16, 1974, the Company adopted a tax-qualified pension plan funded through an * * * Group annuity policy (the "* * * Plan"), effective August 1, 1973.

3. The 20 individuals you represent, who were already receiving benefits under the unwritten plan, were not eligible for the * [*2] * * Plan.

4. The remaining 3 individuals you represent were eligible for participation in the * * * Plan, and on retirement began receiving benefits from the * * * Plan.

5. The Company was placed into receivership by the Division of Insurance on September 12, 1975.

6. The 20 individuals' payments ceased at that time.

7. On March 18, 1976, the PBGC became trustee of the * * * Plan and commenced paying the three individuals their guaranteed benefits. Their benefits were reduced because the benefits were subject to only a 20% phase-in of PBGC's guarantee.

You have asked that the PBGC guarantee the benefits of the retirees under the unwritten plan and increase the benefits of the retirees under the * * * Plan. This is based on your assertation that the unwritten plan is a predecessor plan and on your interpretation of § 4021 of the Employee Retirement Income Security Act ("ERISA") which would allow a predecessor plan to be covered by Title IV of ERISA even if it were not tax-qualified, in practice or in fact, if its successor plan had been determined by the IRS to be tax qualified.

In order to be covered by Title IV, a plan, whether a predecessor plan or not, must meet one [*3] of the tax qualification tests set forth in § 4021(a). Since the unwritten plan does not meet any of these tests, it is not a covered plan and the PBGC is precluded from paying any benefits with respect to it.

Section 4021(a) describes the plans which are covered by Title IV. Section § 4021(a)(1) describes plans which are engaged in commerce and which have in practice met Internal Revenue Code ("IRC") requirements for qualification for 5 years (i.e. "qualified in practice"). Section 4021(a)(2) describes plans which have been determined by the Secretary of Treasury to be qualified under applicable IRC sections, or which are plans described in those IRC sections but which have never requested an IRS determination (i.e. "tax-qualified"). Section 4021(a) then provides that "a successor plan is considered to be a continuation of a predecessor plan" (emphasis added).

In the context of § 4021(a), it seems clear that for the purpose of this case, the successor plan concept is a counting rule which allows a successor plan to tack on the time of its predecessor plan in order to meet the 5-year "qualified-in-practice" period necessary under § 4021(a)(1). It only makes sense to tack [*4] on the time during which the predecessor plan existed if that plan met the "qualified-in-practice" test.

This conclusion that the predecessor/successor plan concept is merely a counting rule and not a rule which permits the tax-qualified status of one plan to be attributed to another, non-qualified plan is further supported by the phase-in rule of § 4022 and the legislative history thereof.

"The phase-in rule applies to all benefits provided by qualified plans from the date the benefit was provided. In the case of non-qualified plans that affect commerce, the phase-in rule applies only to benefit increases since the original plan benefits must have been in existence for five years when the plan is first covered (after at least five years of meeting all the standards applicable to qualified plans).

In the case of a plan not covered the date after enactment, the five-year phase-in rule is to commence only when the plan is covered."

(Conference Report on H.R.2, H.R. Rep. No. 1280, 93d Cong., 2d. Sess. 369 (1974))

It is apparent from this history that a plan that has not been determined by the IRS to be qualified must meet applicable Code standards for qualification for 5 years [*5] before it is covered.

It is also clear that phase-in begins only when the plan is covered. In this case, the phase-in percentage was computed according to § 4022(b)(2) from January 16, 1974, the date the * * * Plan, a covered plan, was adopted. Guaranteed benefits paid by the PBGC are limited by § 4022(b)(8) to the greater of 20% of the amount would have been guaranteed had the plan been in effect for 60 months or $20 per month.

We share your concern about the individuals involved. Unfortunately, ERISA does not extend coverage to the 20 individuals under the unwritten plan and limits the three retirees now being paid by PBGC at their current benefit level.

Henry Rose
General Counsel