

Pension Benefit Guaranty Corporation

85-11

May 14, 1985

REFERENCE:

[*1] 4044 Allocation of Assets
4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer

OPINION:

The PBGC has reviewed your presentation of the facts and circumstances surrounding the proposed termination of the Retirement Plan for Salaried Employees of * * * Plan) n1 and the reestablishment of a defined benefit plan for the same group of employees providing the same benefits as provided in the Salaried Plan with an offset for amounts paid under the Salaried Plan. The Salaried Plan was created as a result of the split-up of The Retirement Plan for Employees of * * * Company (Annuity Plan) as of * * *, into the Salaried Plan and the Retirement Plan for Certain Hourly Employees of The * * * (Hourly Plan). As part of the split-up, excess assets of the Annuity Plan were allocated between the Salaried Plan and Hourly Plan in proportion to the accrued benefits under those plans.

n1 A Notice of Intent to Terminate the Salaried Plan was filed with the PBGC on October * * *, 1984.

This will advise you that PBGC has concluded, on the basis of its review of the facts and circumstances of this case, that the split-up of the Annuity Plan followed by the termination of the Salaried [*2] Plan is not subject to the requirements of paragraph #4 of the Implementation Guidelines (Guidelines) issued May 24, 1984, by the PBGC, the Treasury Department and the Department of Labor (the agencies). Paragraph 4 of the Guidelines applies to "spin-off/termination" cases, and in pertinent part provides that a termination of one part of a split-up plan will not be recognized unless benefits under the ongoing part of the split-up plan are fully vested and nonforfeitable as of the date of termination and all benefits accrued as of the date of termination in the ongoing plan are provided for by the purchase of annuity contracts that represent irrevocable commitments for the benefit of each individual participant.

Your presentation of the facts is as follows. For about forty years * * * Company (the Company) had maintained the Annuity Plan that covered salaried and non-union hourly personnel. While the Annuity Plan was initially intended to cover only salaried employees, non-union hourly employees were routinely included until about * * *. Thereafter, the Company believed it desirable to maintain separate plans for salaried and non-union hourly employees. Thus, when two new plants [*3] were opened in the * * *, non-union hourly employees in those Plants were provided separate pension plans. No action was taken with respect to the Annuity Plan, however, until the Company undertook a review of the Annuity Plan in * * *. In * * *, representatives of the Company and of the insurance company that issued a group annuity contract under the Annuity Plan met to discuss a split-up of the Annuity Plan into separate plans for salaried employees and non-union hourly employees with an expected target date of * * *. In early * * *, senior management of the Company approved the split-up, and in * * *, * * *, the split-up and other employee benefit changes that the Company had been working on were announced to employees. Form 5310, advance notification to Internal Revenue Service (IRS) of the split-up was filed with IRS on * * *.

In * * *, the Company was informed by outside advisors of the potential for the recovery of excess assets if a pension plan were terminated and then reestablished. Among other things, consideration was given to withdrawing the notice of the split-up given to IRS and terminating the entire Annuity Plan, which at that time had not been split up. The [*4] Company decided to proceed with the split-up, and the transfer of assets and liabilities to the separate Salaried and Hourly Plans was effected on * * *, * * *. On * * *, the Company's Pension Committee recommended termination of the Salaried Plan following the "termination/reestablishment" approach discussed below. On October * * * 1984, a Notice of Intent to Terminate the Salaried Plan was filed with PBGC.

Section 4044 of Title IV of ERISA sets forth rules for the allocation of assets where there is a termination of a single employer defined benefit plan. Under Section 4044(d)(1), after all liabilities to participants and beneficiaries have been satisfied, residual assets may be distributed to the employer maintaining the plan if the plan provides for such a distribution. Further, there is no prohibition in Title IV against an employer's effecting a termination of a plan, recovering excess assets from that plan and then establishing a new defined plan for the same group of employees

covered by the terminated plan with the same benefits as in the terminated plan. Such an arrangement is a so-called "termination/reestablishment." See Guidelines paragraph #3.

As a general proposition, [*5] nothing in Title IV speaks to responsibilities and limitations in ongoing plans. It follows that nothing in Section 4044 permits the extraction of residual assets from a plan that is ongoing. It is the agencies' interpretation that an employer cannot invoke Title IV provisions that permit asset distribution merely by taking steps that, in form, appear to bring about a termination of a plan, when in substance the arrangement viewed as a whole does not constitute a full termination. A classic example that in substance fails to constitute a termination is a sequence of transactions that purportedly split a plan with excess assets into two parts, one part of active participants that continues under the same terms and conditions as prior to the split-up and the other part for retirees and deferred vested participants (inactives' part), and then terminate the inactives' part with a reversion of excess assets to the employer. Where part of the plan remains ongoing, the effect of the transactions would be the recovery of excess assets from a plan without satisfying the basic elements of a plan termination, the vesting and annuitization of the benefits of all participants. Accordingly, [*6] the agencies determined that certain transactions, including, but not limited to, the example, set forth above, would violate the law's requirements unless, among other things set forth in the Guidelines, benefits in the ongoing part of the plan were fully vested and annuitized.

PBGC has carefully reviewed the documentation of the abovedescribed facts, including internal corporate memoranda and an affidavit from * * *, Vice President - Finance and Treasurer of the Company, that you submitted to us. Based on these facts, PBGC has concluded that the split-up of the Annuity Plan into the Salaried Plan and the Hourly Plan followed by the proposed termination of the Salaried Plan with a reversion of excess assets to the Company is not a transaction to which the spino ff/termination requirements of the Guidelines apply. Accordingly, PBGC will recognize the termination and reestablishment of the Salaried Plan without the necessity of the vesting and annuitization of benefits under the Hourly Plan.

The conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions of the consequences under Title I of ERISA and the Internal Revenue Code must be obtained from the [*7] Department of Labor and the Internal Revenue Service, respectively.

Mitchell L. Strickler
Deputy Director