

Pension Benefit Guaranty Corporation

85-23

September 12, 1985

REFERENCE:

[\*1] 4219 Notice & Collection of Withdrawal Liability  
4219(b) Notice and Collection of Withdrawal Liability - Assessment and Review  
4219(c) Notice and Collection of Withdrawal Liability - Payment  
4219(c)(5) Notice & Collection of Withdrawal Liability - Default

OPINION:

This responds to your request for the PBGC's interpretation of its regulation governing default for non-payment of withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980.

ERISA Section 4219 establishes the rules for notice and collection of withdrawal liability due to a multiemployer plan, including the assessment of interest for overdue and defaulted liability payments. Under Section 4219(b), a plan sponsor assesses withdrawal liability by notifying the employer of the amount of the liability and schedule of payments and demanding payment in accordance with the schedule. The first payment is payable no later than 60 days after the date of the demand, even if the employer requests a review of or appeals the amount of the liability or the schedule of payments (Section 4219(c)(2)). In the event of a default, a plan sponsor may, [\*2] pursuant to Section 4219(c)(5), require immediate payment of the outstanding balance of the employer's withdrawal liability plus accrued interest on the total outstanding liability from the due date of the first missed payment. Under Section 4219(c)(5)(A), a default occurs if the employer fails to make a withdrawal liability payment within 60 days after notice from the plan sponsor that the payment is overdue. (Section 4219(c)(5)(B) provides that plan rules may define "default" to include additional events that indicate a "substantial likelihood that an employer will be unable to pay its withdrawal liability.")

The PBGC's regulation, at 29 C.F.R. § 2644.2(a) and (b), restates the statutory rules on when a withdrawal liability payment is overdue and when a default occurs. Section 2644.2(c) establishes rules that "shall apply with respect to the obligation to make withdrawal liability payments during the period for plan review and arbitration and with respect to the failure to make such payments" (emphasis supplied). These rules provide, in part, that no default for non-payment may be declared until the 61st day after the last of: (1) the expiration of the period for requesting [\*3] plan review; (2) if an employer requests plan review, expiration of the period for requesting arbitration; or (3) when arbitration is timely initiated either by the plan or the employer or both, issuance of the arbitrator's final decision. (This limitation does not apply to a default for a reason other than non-payment.) Your question is whether this regulatory limitation on default declarations, which applies "during the period for plan review and arbitration" under the explicit terms of the regulation, also applies during the 90-day period within which the employer may request plan review pursuant to Section 4219(b)(2)(A).

The regulatory phrase at 29 C.F.R. § 2644.2(c), "during the period for plan review and arbitration," necessarily encompasses the 90-day period for requesting plan review. A contrary interpretation would render inoperative in all cases the first time limitation set forth in the regulation, i.e., the 61st day after the expiration of the period for requesting plan review. Moreover, as was noted by the PBGC in its preamble to the final version of the regulation at issue, "declaring a default, and thus requiring immediate payment of withdrawal liability plus [\*4] interest, is a very serious remedy which ought not to be invoked while an employer is exercising its statutory right to contest the plan's determination." 49 Fed. Reg. 22644 (1984). It follows that this "very serious remedy" may not be invoked before an employer even has a full opportunity to request plan review and thereby initiate "its statutory right to contest the plan's determination." Finally, the proposed version of the regulatory limitation on default declarations was described by the PBGC as "reflect[ing] the Congressional intent that withdrawal liability should not be accelerated for non-payment of installments before the arbitrator has issued a final decision." 48 Fed. Reg. 6559 (1983) (citations omitted). Any interpretation of the PBGC's regulation that would permit default declarations during the 90-day period for requesting plan review would frustrate that intent.

I hope this has been of assistance to you. If you have further questions concerning this matter, please contact of my staff at the above address or (202) 254-4889.

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General Counsel