89-2

February 14, 1989

REFERENCE:

[*1] 4201 Withdrawal Liability Established
4203 Complete Withdrawal
4205 Partial Withdrawals
4208(d) Reduction of Partial Withdrawal Liability. Building & Construction Industry Exemption
4212(a) Obligation to Contribute - Definitions
4231 Mergers & Transfers Between Multiemployer Plans
4234(c) Written reciprocity agreements

OPINION:

We write in response to your request for opinions of the Pension Benefit Guaranty Corporation ("PBGC") regarding the application of certain provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") to the adoption of a reciprocity agreement by a multiemployer defined benefit pension plan.

The reciprocity agreement in question is an agreement among several multiemployer pension plans maintained pursuant to collective bargaining agreements involving locals of a single construction industry union. Under the agreement, upon the request of an employee covered by one of the participating plans (the employee's "home fund") who is working temporarily in the jurisdiction of another participating plan (the "temporary fund"), the temporary fund must transfer to the employee's home fund contributions "made on his behalf" to the temporary fund by the temporary employer. The home [*2] fund must treat the transferred amounts "as the equivalent of Contributions" and grant the employee vesting and benefit accrual credit for the hours worked for the temporary employer. The agreement also contains the following provisions:

For purposes of the Pension Benefit Guaranty Corporation (PBGC), the Temporary Employee shall not be considered a participant in the [Temporary] Fund if [contributions on the employee's behalf] are transferred to the Temporary Employee's Home Fund.

No Participating Fund shall be liable to any other Participating Fund for any sum whatsoever except to the extent Contributions made on Temporary Employees are in fact collected.

No employer shall be considered a contributing employer in any Participating Fund or Funds other than the Fund or Funds to which he is bound to contribute pursuant to the terms of a collective bargaining agreement which he has signed or assented to.

One of your questions is whether the requirements of section 4231 of ERISA apply to transfers under the reciprocity agreement. Section 4231 prescribes rules governing the transfer of assets and liabilities generally between defined benefit multiemployer plans. However, section [*3] 4234(c) of ERISA provides that --

[t]his part [part 2 of subtitle E of Title IV of ERISA, including section 4231] shall not apply to transfers of assets pursuant to written reciprocity agreements, except to the extent provided in regulations prescribed by the corporation.

The PBGC has prescribed no regulations on this subject, and thus section 4231 is inapplicable to transfers of assets (and any accompanying liabilities) under any reciprocity agreement.

Your other question is whether the adoption of the reciprocity agreement by a defined benefit multiemployer plan makes that plan's contributing employers potentially liable for withdrawal liability to other defined benefit multiemployer plans participating in the agreement. When an employer under the adopting plan hires a temporary employee from another plan's jurisdiction, its contributions for that employee may be transferred to the employee's home fund under the reciprocity agreement. As you suggest, the employer might be considered to have an obligation to contribute to the home fund (notwithstanding the language to the contrary in the reciprocity agreement) and thus might be subject to potential withdrawal liability to the [*4] home fund if such a contribution obligation ceased. You ask for assurance that employers contributing to one plan would not, because of the reciprocity agreement, be exposed to possible withdrawal liability to

other participating plans.

Under ERISA, the initial responsibility for determining whether a particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. ERISA further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Thus it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to a particular transaction. However, the PBGC will continue its practice of answering general interpretive questions regarding Title IV of ERISA.

The reciprocity agreement in issue here purports to provide, in the sections quoted above, that when an employer's contributions for a temporary employee are transferred to a home fund, the employee is not a participant in the temporary fund and the employer is not a contributing [*5] employer in the home fund. However, ERISA contains provisions defining the terms "participant," "employer," and "obligation to contribute" that cannot be varied by agreement. Thus, while the provisions of the reciprocity agreement -- and of the collective bargaining agreement, plan, and other documents -- may have a bearing on questions regarding status as a participant or as an employer having an obligation to contribute, they are not of themselves dispositive of those questions.

Section 4201 of ERISA imposes withdrawal liability on employers that withdraw from a multiemployer plan in a complete or partial withdrawal. Under section 4203(a) of ERISA, a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. ERISA section 4203(b) provides a special rule for employers and plans in the building and construction industry (as therein defined) under which a complete withdrawal occurs only if the employer ceases to have an obligation to contribute under the plan, and either continues to perform work in the jurisdiction of the collective bargaining agreement of the type [*6] for which contributions were previously required, or resumes such work within five years after the obligation to contribute under the plan ceased, without renewing the obligation to contribute.

Under section 4205 of ERISA, a partial withdrawal occurs when an employer has a 70 percent contribution decline in each of three consecutive plan years; or, the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work; or, the employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities, while continuing to perform work at the facility of the type for which the obligation to contribute ceased. For employers and plans in the building and construction industry (as defined in section 4203(b)), ERISA section 4208(d)(1) makes an employer liable for a partial withdrawal only if the employer's obligation to contribute is continued for no more than an insubstantial [*7] portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.

Whether an employer has an obligation to contribute to a plan is thus central to any discussion of whether a withdrawal can occur. An employer cannot withdraw from a plan to which it has no obligation to contribute. Section 4212(a) of ERISA defines "obligation to contribute" broadly as an obligation to contribute arising under one or more collective bargaining (or related) agreements, or as a result of a duty under applicable labor-management relations law. The committees that considered the Multiemployer Pension Plan Amendments Act of 1980, which added sections 4201 - 4225 to ERISA, intended this definition to -- apply to any situation in which an employer has directly or indirectly agreed to make contributions to a plan . . . includ[ing] cases in which the employer signs a collective bargaining agreement or a related agreement such as a participation agreement or memorandum of understanding, and cases in which the employer agreed to be bound by an association agreement.

126 Cong. Rec. 23,287 (1980) (remarks of Sen. Williams) (emphasis [*8] supplied).

There is, however, other legislative history that may be read as limiting the breadth of this language where reciprocity agreements are concerned. In discussing the provision that became section 4234(c) of ERISA (quoted above), the House Committee on Education and Labor said:

The committee has exempted written reciprocity agreements from asset transfer rules, except to the extent the corporation determines application of the rules is necessary. The committee believes that it is important to encourage expansion of reciprocals to enhance pension portability.

H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. I, at 70 (1980). The PBGC believes that this comment evidences a Congressional intent that ERISA not be applied to reciprocity agreements in a manner that would discourage their use

as aids to pension portability. Clearly, the use of reciprocity agreements might be discouraged if, simply by contributing pursuant to a collective bargaining agreement for employees who elect to have contributions transferred to their home plans under a plan that adopted such a reciprocity agreement, an employer were exposed to potential withdrawal liability to other defined benefit plans [*9] to which contributions might be transferred under the agreement. Accordingly, it is the PBGC's opinion that an appropriately structured reciprocity agreement does not in and of itself create in any employer an obligation to contribute, within the meaning of section 4212(a), to any transferee plan.

On the other hand, the PBGC believes that circumstances could be created in which a reciprocity agreement -- either alone or in combination with other agreements -- could reflect an undertaking by contributing employers under one plan of an obligation to contribute to one or more other plans. Because it is impossible to predict the kinds of fact situations that might arise in this area, the PBGC considers it unwise to speculate about the nature of the circumstances in which such an undertaking might be found. However, the PBGC believes that the recurrent transfer of relatively large amounts under a reciprocity agreement could suggest the existence of an obligation to contribute; conversely, to the extent that transfers are relatively small and irregular, it would appear less likely that an obligation to contribute exists.

If you have any further questions about this matter, you may [*10] call Deborah C. Murphy of my office at 202-778-8820.

John H. Falsey
Acting General Counsel