

Pension Benefit Guaranty Corporation

76-43

March 25, 1976

REFERENCE:

[*1] 403(c)(1) Establishment of Trust. Restriction on Use of Plan Assets to Benefit Employer
4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer

OPINION:

This office has carefully reviewed your letter of December 29, 1975, in which you take the position that all assets of the * * * Pension Plan ("Plan") in excess of those necessary to purchase the full accrued benefits of participants therein may be returned to the employer. We have concluded that * * * the Employee Retirement Income Security Act of 1974 ("ERISA") does not authorize a return of the excess assets of this * * * particular Plan to the employer, and, therefore, all Plan assets must be used for the benefit of the plan participants and their beneficiaries.

Section 4041(d)(1) of ERISA allows excess plan assets to be distributed to the employer only if three conditions are met. One of those conditions is that "the plan provides for such a distribution in these circumstances." ERISA, § 4044(d)(1)(C) The subject plan here does not so provide.

Article VII, section 1 of the Plan provides that the Company shall have the right to amend that plan and further provides that:

". . . the Company shall have no power [*2] to . . . amend or terminate the Plan in such manner as will cause or permit any part of the funds to be diverted to purposes other than for the exclusive benefit of members, or their beneficiaries . . . or as will cause or permit any portion of the funds to revert to or become the property of the Company until all obligations of the Plan have been met."

This provision is a limitation on the Company's reserved power to amend the plan. It does not provide for a return of assets, but merely makes it possible for the Company to include such a provision in the Plan without violating the terms of the limitation. Article XII, Section 3 of the Plan does contain a formula providing for the distribution of Plan assets upon termination of the Plan but does not provide for a return to the Company of any assets remaining after such distribution. Therefore, § 4044(d)(1) does not authorize a return of the excess Plan assets to the employer since the Plan was not amended to provide for the return of such assets. Section 403(c)(1) of ERISA provides, inter alia, that:

"Except as provided . . . under Sections 4042 and 4044 (relating to termination of insured plans), the assets of a plan [*3] shall never inure to the benefit of any employer"

The only provision in Sections 4042 and 4044 of ERISA * * * authorizing a return of Plan assets to the employer in this case is contained in § 4044(d)(1). Since that section does not authorize a return of Plan assets in this case, under the rule of § 403(c)(1) the Plan assets may not be returned to the employer.

Because we have determined that the employer is not entitled to a return of any Plan assets, we do not here reach the question whether any other provision of Title IV of ERISA limits the employer's right to such a return.

Enclosed is a Notice of Sufficiency which will allow you to distribute to the beneficiaries of the Plan their benefits contained in the priority categories set forth in § 4044(a) of ERISA.

Excess Plan assets should be apportioned to each Plan participant and the beneficiaries of former Plan participants by multiplying the dollar amount of excess assets by fraction, * * * numerator of which is the value of the benefits under the plan of the participant or beneficiary, and the denominator of which is the value of all benefits under the plan.

Henry Rose
General Counsel