

Pension Benefit Guaranty Corporation

95-1

July 28, 1995

REFERENCE:

[*1] >4050>

29 CFR 2617 Determination of Plan Sufficiency & Termination of Sufficient Plans

OPINION:

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation (the "PBGC") as to whether assets held in trust by * * * Bank (the "Bank") for unidentified participants in a terminated pension plan should be forwarded to the PBGC. Specifically, you inquire whether the assets should be forwarded to the PBGC pursuant to the Retirement Protection Act of 1994, or whether the assets instead should be forwarded to the State of California pursuant to California's escheat laws.

In your correspondence, as augmented by subsequent telephone conversations with the staff attorney assigned to this matter, you state that the Bank holds approximately \$ 412 in trust for certain individuals who were participants in a defined benefit pension plan (the "Plan") sponsored by a company that went out of business some years ago. The Plan was terminated in 1975, and all assets other than those which the Bank now holds in trust were distributed to participants. The Bank incurred its trust obligation with regard to the undistributed assets when the Bank acquired the assets of a former [*2] trustee of the Plan. Despite repeated efforts, the Bank has been unable to identify the participants to whom the remaining assets should be distributed. The Bank had no involvement with the Plan while it was ongoing, the sponsor of the Plan is no longer in existence, and no records exist that would enable the Bank to identify the participants.

Section 776 of the Retirement Protection Act Of 1994 ("RPA") provides rules for the distribution of benefits under a defined benefit pension plan terminating in a standard termination, with regard to participants whom a plan administrator cannot locate after a diligent search. See Retirement Protection Act, Subtitle F, Title VII, § 776(a), Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). Pursuant to these rules, the administrator of such a plan will be required to (1) transfer a missing participant's designated benefit to the PBGC or purchase an annuity from an insurer to satisfy the plan's liability to the missing participant, and (2) provide the PBGC with such information and certifications regarding the benefit or annuity as the PBGC may require. Id. Amounts transferred to the PBGC under these rules will [*3] be treated as assets under a pension plan trustee by the PBGC, which will take steps to locate missing participants and serve as an information clearinghouse for missing participants for whom plan administrators have purchased annuities. Id. The RPA's missing participant provisions will be effective with respect to distributions that occur in plan years beginning after the PBGC promulgates final regulations implementing the provisions' terms. RPA § 776(e). The PBGC has not yet promulgated final regulations implementing the rules the RPA sets forth. Because the distributions with respect to the Plan occurred some twenty years ago, the RPA's missing participant rules are inapplicable to this case.

Consequently, the pre-RPA rules governing distribution of assets to missing participants apply to the Plan. The PBGC has opined that a plan administrator hoping to complete a final distribution of assets in connection with the termination of a plan that has sufficient assets to pay for benefits under the plan generally must purchase an annuity for missing participants. The only exception is for participants whose benefits are valued at \$ 3500 or less and who would otherwise receive a [*4] lump sum distribution; a plan administrator may open individual interest-bearing accounts for such participants at federally-insured institutions. If an administrator cannot locate an institution willing to offer such accounts, PBGC will permit the use of a pooled account, provided that the accounts are maintained by fiduciaries who keep current records and fulfill other duties. Preamble to the PBGC Regulations on Standard Terminations, 57 Fed. Reg. 59,206, 59,214-15 (Dec. 14, 1992); PBGC Opinion Letter 91-8 (concerning missing participants in connection with termination of a multiemployer pension plan).

Because pre-RPA rules do not provide for the transfer to the PBGC of missing participants' benefits under the Plan, the PBGC cannot assert control over the assets in question and the Bank should not transfer these assets to the PBGC.

PBGC cannot opine as to how California law may apply to this situation; we note that Title I of the Employee Retirement Income Security Act ("ERISA") provides that state laws are preempted insofar as they "relate to" covered employee benefit plans. 29 U.S.C. § 1144. As you may know, the United States Department of Labor is responsible for interpreting [*5] and enforcing ERISA's preemption provisions.

You indicate that it would be helpful if the PBGC regulations implementing the RPA's missing participant provisions were to provide guidance with respect to terminated plans as to which banks hold assets for unidentifiable participants in trust, inasmuch as such assets may be acquired by banks through acquisition of other trust companies. Although we appreciate your suggestion, as previously noted, Congress limited applicability of the RPA's missing participant provisions to defined benefit pension plans that terminate in standard terminations after the effective date of regulations promulgated by the PBGC.

If you have any questions, please contact the staff attorney assigned to this matter, Amanda Jaffe, at (202) 326-4028.

James J. Keightley

General Counsel