

Pension Benefit Guaranty Corporation

85-29

December 5, 1985

REFERENCE:

[*1] 4062(d) Liability of Employer in Single Employer Plans. Corporate Reorganizations
4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4212(c) Obligation to Contribute - Liability
4218 Withdrawal - No occurrence

OPINION:

This letter is in response to your request for opinions on several issues arising under the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1301 et seq. (1976) (as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980)) ("ERISA").

The facts as we understand them are as follows. X, is a signatory to six collective bargaining contracts with various locals of the * * * Union * * * on behalf of its * * * Division * * * and * * * Division * * *. Under these agreements, X is obligated to contribute to the * * * Fund * * *, a multiemployer plan. Each agreement provides that X may not sell its covered business (i.e., * * * or * * *) unless the buyer agrees to be bound by the collective bargaining agreement and to assume all obligations with respect to the Fund required under the agreement.

X and the controlled group of corporations of which it is the parent corporation (Y) * [*2] * * are engaged in five different businesses in the consumer products area, two of which are the * * * and * * * businesses. You state that the Y Group desires to divest itself of its * * * and * * * businesses in order to facilitate the better allocation of financial and managerial resources. With respect to its holdings in the * * * business, the Y Group proposes to spin off such holdings through a series of transactions. A, a dormant second tier subsidiary of X, will acquire most of the Y group's holdings, other than X's divisions and stock of a first tier subsidiary in the * * * business. B Corp., A's parent corporation and a first level subsidiary of X, then will distribute all of A's stock to X, making A a first tier subsidiary of X. X next will transfer its own division, which include * * * and * * *, and the stock of its first tier * * * subsidiary to A. Finally, X will distribute all of the stock of A to X's share-holders. At the conclusion of this transaction, A will be a publicly held corporation which is independent of the Y Group. A also will become a successor employer to X under the provisions of the collective bargaining agreements between X and the union. [*3] A will undertake X contributions to the Fund on behalf of * * * and * * * and X will cease to make contributions.

Your first question concerns whether, when X transfers the business of * * * to A, there will be a withdrawal from the * * * Fund under Section 4203(a) of ERISA. Under Section 4203(a), 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. In our view, there will not be a complete withdrawal from the * * * Fund because of this transfer. Immediately prior to this transfer X and A will be among the controlled group of corporations that constituted the employer with respect to the * * * Fund pursuant to ERISA Section 4001(b). A will continue to have an obligation to contribute to the * * * Fund after the transfer. Thus, the employer will continue to have an obligation to contribute under the plan and will continue covered operations, so that there is not a withdrawal under ERISA Section 4203(a).

Your second question concerns whether a withdrawal will occur when X distributes the stock of A to X's stock-holders. After the distribution of the stock, [*4] A will not be a member of X's controlled group of corporations. Section 4218 of ERISA provides that a withdrawal shall not occur solely because an employer ceases to exist by reason of a change in corporate structure described in Section 4062(d) of ERISA as long as there is no interruption of employer contributions or obligations under the plan. The kinds of corporate restructuring referred to in Section 4062(d) include a corporate "division." In our view, the distribution of A's stock to X's shareholders is a "division" within the meaning of Section 4062(a). Under Section 4218, A is considered to be the original employer. Accordingly, there will not be a withdrawal solely as a result of the distribution of A's stock to X stock-holders.

Finally, you ask whether the above-described transactions may be disregarded under Section 4212(c) of ERISA. Section 4212(c) provides that if a principal purpose of any transaction is to evade or avoid withdrawal liability, liability

shall be determined and collected without regard to such transaction. The plan administrator, not the PBGC, must make this determination in the first instance. However, it should be noted that the mere fact that [*5] a transaction falls within Section 4218 does not, by itself, make Section 4212(c) inapplicable. Rather, the plan administrator must consider all of the facts and circumstances surrounding the transactions in order to determine whether Section 4212(c) applies.

I hope that this response is helpful to you. If you have any further questions, please do not hesitate to call Assistant General Counsel, at (202) 254-4895.

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