

Pension Benefit Guaranty Corporation

83-10

May 12, 1983

REFERENCE:

[\*1] 4204 Sale of Assets  
4206 Adjustment for Partial Withdrawal  
4211 Withdrawal Liability

OPINION:

This is in response to your request for an opinion regarding the calculation of withdrawal liability for a partial withdrawal where there has occurred a sale of assets which meets the requirements of section 4204 of the Multiemployer Pension Plan Amendments Act of 1980.

Under the multiemployer provisions of ERISA, the initial responsibility for determining the amount of any such liability lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved by arbitration subject to review in the courts. Thus the PBGC does not interject itself in this process by issuing an opinion on the application of the law to a particular transaction. The PBGC will, of course, answer general interpretative questions regarding the Act.

Section 4204 of the Act provides that a complete or partial withdrawal under that section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party, the seller ceases covered operations or ceases to have an obligation to contribute for such operations [\*2] if certain conditions are met. Under this section, the seller remains contingently liable for "an amount equal to the payment that would have been due from the seller but for this section" if the purchaser withdraws from the plan before the last day of the fifth plan year beginning after the sale and fails to make any withdrawal liability payment when due. Under section 4204(b)(1), the liability of the purchaser is to be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the previous four years the amount the seller was required to contribute. Thus, this subsection attributes to the purchaser the contribution history of the seller for the year of the sale and the four plan years preceding the sale.

In the event that the sale of assets meeting the requirements of section 4204 constitutes the entire contribution obligation of the seller, the seller will not be liable for a withdrawal. Thus, the seller receives, in effect, a complete credit for any withdrawal liability that would otherwise have been due. However, if the sale under section 4204 is with respect to only a portion of the operations for which the employer has an obligation [\*3] to contribute, the question is raised whether future liability calculations should take into account all the operations, including those sold under section 4204, or whether there should be a credit for the sale in light of the purchaser's assumption of the contribution history for the sold operations.

After careful consideration, it is our view that credit should be given the seller for a section 4204 sale of a portion of its covered operations. Absent such a credit, calculation of an employer's liability for a partial or complete withdrawal where assets have been sold under section 4204 would not reflect the purpose of section 4204. That purpose is to avoid primary liability with respect to a sale of assets if the terms of section 4204 are met.

Thus, if there is a later complete withdrawal, the calculations under section 4211 for computing withdrawal liability should reflect the fact that there is a transfer of contribution history pursuant to section 4204(b)(1) to the purchaser of the sold operations and will be used to compute the purchaser's withdrawal liability if it should withdraw. Similarly, if an employer should have a partial withdrawal under section 4205 the liability [\*4] calculations for the partial withdrawal, which are set forth in section 4206, should reflect appropriate adjustments in the section 4206(a)(2) fraction with respect to a section 4204 sale. The calculations themselves, under section 4211 and section 4206, should reflect as nearly as possible Congress' intention that where liability may be assessed against a purchaser, it will not also be collected from the seller, giving the plan double recovery for the same contribution base upits.

However, we call to your attention section 4212(c) of the Act, which provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability should be determined and

collected without regard to such transaction."

I hope this letter has been of assistance. If you have any further questions, please do not hesitate to contact me or \* \* \*, of my staff, at 254-6476.

Henry Rose  
General Counsel