

Pension Benefit Guaranty Corporation

85-10

April 24, 1985

REFERENCE:

[*1] 4044 Allocation of Assets
29 CFR 2618 Allocation of Plan Assets

OPINION:

This is in response to your request for an opinion regarding the distribution of assets in excess of those necessary to satisfy all accrued benefits upon termination of the defined benefit pension plan ("Plan") of your client (the "Company").

Our opinion is based on our understanding of the following facts. The Plan is a non-contributory plan except that participants may make voluntary contributions which are held in individual accounts. The Plan currently provides that, upon termination and payment of all accrued benefits (for which annuity contracts will be purchased from an insurance company), any assets remaining in the Plan may be returned to the employer. The Company proposes to terminate the Plan and replace it with a profit sharing plan. The Company will, prior to termination, amend the Plan to provide that only a specified amount of assets may revert to the employer. The amount of the reversion is related to benefits earned by a principal shareholder of the Company. The Plan amendment will also provide that all other assets in excess of those necessary to satisfy all accrued benefits will be transferred [*2] to the new profit sharing plan and allocated among participants in accordance with a formula set forth in the amendment.

The formula is based on the accrued benefits n1 of the active participants, subject to the limitation that a participant's share in the amount transferred shall be limited to an amount necessary to provide his projected benefit to normal retirement age as though the Plan continued in operation. n2 Future contributions to the profit sharing plan may be reduced by the participant's share of assets transferred from the Plan to the profit sharing plan.

n1 Although the Plan formula for calculating normal retirement benefits is integrated with social security, the formula for calculating a participant's accrued benefit for purposes of allocating transferred assets will not be integrated.

n2 A participant's share of excess assets that exceeds the limitation will be reallocated among other participants on the basis of their accrued benefits.

You have requested our opinion regarding two specific questions involving the above-described proposal. The first question is whether the proposed method of allocating assets in excess of those necessary to satisfy all accrued [*3] benefits complies with the Employee Retirement Income Security Act of 1974 ("ERISA"), since, under the proposal, no assets will be allocated according to the formula prescribed in PBGC regulations, 29 C.F.R. § 2618.32(a).

Section 2618.32(a) applies to the allocation of any assets which remain in a plan after assets have been allocated to benefits in categories 1-6 in Section 4044 of ERISA. Since, under the Company's proposal, all assets (including assets in excess of those necessary to satisfy all accrued benefits) will be allocated to benefits in categories 1-6 in Section 4044 under the terms of the Plan, there will be no assets remaining to which the allocation described in regulation 2618.32(a) applies.

Your second question is whether, with respect to the amounts proposed to be transferred the profit sharing plan, participants must be given the election to receive an annuity or a lump sum distribution. Because the proposed distribution to the profit sharing plan is not part of a participant's accrued benefit payable as an annuity, the distribution is not required to be offered as an annuity. See 29 C.F.R. § 2617.4. Nor must a participant be offered a lump sum. PBGC Opinion [*4] Letter 82-19 is distinguishable. There the PBGC ruled that a plan administrator could not automatically transfer to an individual account plan the value of participants' * * * nonforfeitable annuity benefits that were less than \$1,750 but must offer participants a lump sum.

I hope this letter fully answers your questions. However if you have additional questions please contact * * * of my staff at (202) 254-4895.

Edward R. Mackiewicz
General Counsel