

Pension Benefit Guaranty Corporation

90-1

March 20, 1990

REFERENCE:

[*1] >4069(b)>

4204 Sale of Assets Sale of Assets

>4204(a)(1)(A)>

4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security Sale of Assets. Withdrawal - Posting of Security

4204(a)(1)(C) Sale of Assets. Secondary Liability of Seller Sale of Assets. Secondary Liability of Seller

>4204(b)(1)>

4218 Withdrawal - No occurrence Withdrawal - No occurrence

OPINION:

We write in response to your request for an opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the application of section 4204 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), in a case where the buyer in a sale qualifying under that section re-sells the purchased operations before the expiration of the five-plan-year period commencing with the first plan year beginning after the first sale.

Your request involves the anticipated sale by your client, a corporation, of an unincorporated division (the "Division"). You state that the Division "employs [union]-represented employees for whom it contributes to an underfunded [multiemployer] pension plan." Your client acquired the Division and other assets in 1987 in a transaction ("first sale") that is assumed for purposes of your request [*2] and this opinion to have met the requirements of section 4204. Your client is now negotiating a sale of the Division to another corporation, and prefers to structure this sale ("second sale") as a sale of assets meeting the requirements of section 4204.

Section 4204(a)(1) of ERISA provides that:

A complete or partial withdrawal of an employer (hereinafter in this section referred to as the "seller") under this section does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party (hereinafter in this section referred to as the "purchaser"), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if --

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of this Act, or an amount held [*3] in escrow by a bank or similar financial institution, satisfactory to the plan, in an amount equal to the greater of [the amount calculated under clause (i) or the amount calculated under clause (ii)]; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

A second sale that meets the requirements of section 4204 will not result in the withdrawal of the second seller. You ask, however, whether a second sale will result in the disqualification under section 4204 of the first sale, and trigger the withdrawal of the original seller. In this regard, you point out that a second sale will relieve the second seller of the obligation that it assumed as the purchaser in the first sale "to contribute to the . . . Plan for 'substantially the same number' of contribution base units" as the original seller, as section 4204(a)(1)(A) requires.

The circumstances [*4] of the first sale, about which we have no information, may be relevant to your inquiry since the legislative history of section 4204 indicates that the requirement of section 4204(a)(1)(A) was intended to "be applied

for a period of time after the transaction that is reasonable in light of the circumstances of the transaction." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Report on S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 16-17 (Comm. Print 1980). In addition, the circumstances of the second sale must be considered in light of the purposes of section 4204(a)(1)(A). That section was meant to "be read with a view to protecting the plan against significant harm as a result of a particular transaction." Id. at 16. It was intended to provide for uninterrupted contributions to the plan and "to protect the plan . . . against a significant diminution of its contribution base without compensation through withdrawal liability." Id.

The plan's contribution base is protected in the context of a second sale meeting the requirements of section 4204 by the new purchaser's assumption, pursuant to [*5] section 4204(a)(1)(A), of the "obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan." Moreover, in the event of a withdrawal by the new purchaser, that purchaser will be liable for withdrawal liability in an amount determined under section 4204(b)(1). The plan will also be protected by the secondary liability of the second seller under section 4204(a)(1)(C) and, under section 4204(a)(1)(B), by the bond or escrow provided by the new purchaser. Finally, the plan will be protected (for the remainder of the period of five plan years commencing with the first plan year beginning after the first sale) by the bond or escrow provided by the second seller when it purchased the assets in the first instance. However, to ensure that this protection will be adequate in the event of the new purchaser's withdrawal, it is necessary to consider how the amount of the new purchaser's bond or escrow, and the amount of the new purchaser's potential withdrawal liability, are to be determined.

Under section 4204(a)(1)(B), the amount of the bond or escrow that the [*6] purchaser in the second sale must provide is equal to the greater of --

- (i) The average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or
- (ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs

Under these provisions, the amount of the bond or escrow provided by the purchaser in the first sale is based on the contributions required to be made by the original seller. In turn, the amount of the bond or escrow provided by the purchaser in the second sale will be based on the "average annual" or "annual" contribution required to be made by the second seller, who was the purchaser in the first sale, during the periods described in section 4204(a)(1)(B)(i) and (ii). In the circumstances you describe, however, the seller in the second sale has been required to contribute to the plan for fewer than two years. In such circumstances, it is our opinion that the amount of the bond or escrow to be [*7] provided by the purchaser in the second sale must be calculated with reference not only to the second seller's required contributions, but also to any contributions required to be made by the original seller during the 3-plan-year period described in section 4204(a)(1)(B)(i) (or the plan-year period described in section 4204(a)(1)(B)(ii), if relevant in the circumstances). In other words, the original seller's required contributions must be attributed to the seller in the second sale for purposes of calculating the amount of the bond or escrow provided by the purchaser in the second sale.

We believe that the same principles must apply with respect to determining the amount of the withdrawal liability of the purchaser in the second sale if that purchaser withdraws during the first five plan years commencing with the first plan year beginning after the second sale. In this regard, section 4204(b)(1) requires that --

the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years. [*8]

As with the amount of the bond or escrow determined under section 4204(a)(1)(B), the liability of the first purchaser in the event of a withdrawal within 5 plan years after the first sale is based on the contributions required to be made by the original seller in the year of the first sale and the 4 plan years preceding that sale. Similarly, the liability of the purchaser in the second sale, if the purchaser withdraws in the relevant period under section 4204(a)(1)(C), will be based on the second seller's required contributions in the year of the second sale and the four plan years preceding the second sale. However, if the second seller has not contributed to the plan for the relevant period by the time of the second sale, the liability of the purchaser in the second sale must reflect, to the extent relevant, the original seller's contribution history.

We believe that these results are consistent with the purpose of section 4204: "to assure the protection of the plan

with the least practical intrusion into business transactions." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., supra, at 16. Attribution of the original seller's contribution history to [*9] the second seller assures that the plan will be protected in the event of an early withdrawal by the purchaser in the second sale. See id. The plan will be protected by a meaningful bond (or escrow) provided by the purchaser in the second sale, and will be adequately compensated by withdrawal liability calculated just as it would have been if the first purchaser had withdrawn during the period described in section 4204(a)(1)(C).

Thus, it is our opinion that a second sale of assets will not trigger the withdrawal of the original seller if the second sale meets all the requirements of section 4204, as set forth above.

You have asked, in the alternative, whether the incorporation of the Division and the sale of the new subsidiary's stock, in a transaction that meets the requirements of section 4218 of ERISA, would result in the withdrawal of the original seller. Section 4218 provides that:

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because --

(1) an employer ceases to exist by reason of --

(A) a change in corporate structure described in section 4069(b) . . .

if the change causes no interruption [*10] in employer contributions or obligations to contribute under the plan .

. . .

* * *

[A] successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

Among the changes described in section 4069(b) are "a mere change in identity, form, or place of organization" and "a merger, consolidation or division." In Opinion Letters 83-11 (May 16, 1983), 84-7 (December 20, 1984), and 82-4 (February 10, 1982), the PBGC expressed its opinion that neither the incorporation of a division nor the sale of the resulting subsidiary's stock brings about the withdrawal of the original (parent) corporation if the change causes no interruption in employer contributions or obligations to contribute under the plan. Nor, in our opinion, would such a sale result in the withdrawal of the original seller in this instance.

The incorporation of a division and sale of the resulting subsidiary's stock will result in the formation of a controlled group including at least the purchaser of the stock and the purchased subsidiary. That controlled group will become the "employer" for purposes of Title IV. See ERISA section 4001(b). Under the last sentence [*11] of section 4218 (quoted above), this new controlled group is considered to be the same as the previous contributing employer -- the original purchaser under section 4204. Thus, the contribution history used to determine the withdrawal liability of the controlled group in the event of withdrawal will be the same contribution history that would have formed the basis for withdrawal liability if the incorporation and stock sale had not occurred. And, as discussed above, that history includes the contribution history of the original seller under section 4204.

It is also the PBGC's opinion that under the last sentence of section 4218, a withdrawal and failure to pay withdrawal liability by the successor employer (the new controlled group) would be treated as if it were the act of the predecessor employer -- the purchaser in the first sale (under section 4204). Therefore, in the event of such a withdrawal and non-payment, the plan would be entitled to payment of the bond or escrow provided under section 4204(a)(1)(B) and the original seller's secondary liability. (The terms of the bond or escrow should provide for payment to the plan upon withdrawal and non-payment of withdrawal liability [*12] by the successor employer, and failure of the bond or escrow so to provide -- either explicitly or as a matter of interpretation -- would be equivalent to discontinuance of the bond upon the second sale, which would disqualify the first sale under section 4204, unless an appropriate replacement bond or escrow were in place.)

With the understandings set forth in this letter, it is our opinion that transactions like those you describe would not ordinarily result in the disqualification of the first sale of assets under section 4204.

Of course, the opinions in this letter are subject to the special rule in section 4212(c), which states that --

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and

liability shall be determined and collected) without regard to such transaction.

If you have any further questions about this matter, please call Deborah C. Murphy of my staff at (202) 778-8820.

Carol Connor Flowe
General Counsel