

Pension Benefit Guaranty Corporation

91-8

December 9, 1991

REFERENCE:

[\*1] 4041A Multiemployer Termination  
4041A(c)(2) Multiemployer Termination. Annuity Requirement  
4041A(f)(1) Multiemployer Termination. Lump Sum Payments

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") on several issues arising from the post-termination distribution of assets of the \* \* \* Pension Plan (the "Plan"), a multiemployer defined benefit pension plan. In particular, your inquiry relates to the inability of the Plan to complete a final distribution of Plan assets under sections 4041A(c)(2) and (f)(1) of ERISA, because of its inability to locate certain Plan participants and beneficiaries.

You state that the Plan is terminating under section 4041A(a)(1) of ERISA pursuant to an amendment to the 1987 collective bargaining agreement between the \* \* \* and the \* \* \* District Council of North Central Texas. You indicate the Plan has assets sufficient to satisfy all outstanding benefit liabilities. The trustees of the Plan have attempted to notify all participants of the termination in order that Plan assets can be distributed. Not all participants can be located, and you request guidance on how to complete the distribution [\*2] under these circumstances.

1) You ask what actions are required of a plan in making a reasonable effort to locate all participants for the purpose of making a final distribution of assets following termination of a multiemployer plan.

In your correspondence, you indicate the Plan trustees have attempted to locate the missing participants through various means. They have sent several notices to the participants' last known mailing addresses, searched internal records and local union records, and hired a "private locator service", which utilized social security records in attempts to locate the missing participants. You wish to know if these efforts satisfy the "reasonable efforts" standard established by the PBGC. See PBGC Opinion Letters 83-24 and 89-4).

When a multiemployer plan terminates by plan amendment, the plan sponsor may distribute plan assets in full satisfaction of all nonforfeitable benefits under the plan. ERISA § 4041A. PBGC Opinion Ltr. 82-19. The PBGC previously has interpreted analogous distribution requirements imposed by Title IV in the instance of single employer plan terminations to require a plan administrator to take reasonable steps to locate all [\*3] participants for making a final distribution. See PBGC Opinion Letters 83-24 and 89-4. Plan administrators and other fiduciaries of terminating multiemployer plans have a similar obligation to take reasonable steps to locate participants and beneficiaries to whom assets should be distributed.

In addition, the Plan trustees should be aware that the Department of Labor has established additional guidelines regarding the satisfaction of Title I obligations in these circumstances. See, e.g. DOL Opinion Letter No. 11-86. Opinions relating to Title I of ERISA may be sought from the Department of Labor.

2) You ask whether the Plan, to satisfy final distribution requirements, must purchase annuities for missing participants or beneficiaries with accrued benefits in excess of \$3,500. For missing participants with accrued benefits \$3,500 or less, you ask whether the only option is to either purchase annuities or open individual interest-bearing bank accounts.

Under Section 4041A(c), (f), a plan sponsor distributing assets in full satisfaction of all nonforfeitable benefits must pay those benefits in the form of an annuity, unless the participant elects, with spousal consent, [\*4] another form of distribution provided by the plan. See, e.g., PBGC Opinion Ltr. 82-19. If another form of benefit has not been chosen, and attempts to purchase annuities for such participants prove futile, a final distribution may be accomplished through a lump-sum payment to those participants where the present value of each participant's nonforfeitable benefit does not exceed \$3,500. See ERISA § § 203(e), 4041A(f)(1), PBGC Opinion Letters 83-24 and 89-4.

When a participant cannot be located, the option of making the distribution through a lump-sum payment is not available. The PBGC and the Department of Labor have both opined that the only option available for completing the final distribution, when annuities cannot be purchased for missing participants, is through the opening of individual interest-bearing accounts for those persons at federally insured institutions. PBGC Opinion Letter 89-4; DOL Opinion Letter No. 11-86. For the reasons expressed in Opinion Letter 89-4, PBGC does not consider pooled interest-bearing accounts to be an optional form of distribution available at plan termination.

The PBGC, however, recognizes that plan trustees may confront difficulties [\*5] in locating financial institutions willing to open individual interest-bearing accounts for missing participants, particularly where the benefit amounts are small. In the limited case where a multiemployer plan has made every reasonable effort to locate missing participants and to locate institutions that are either willing to provide annuities for these "lost" participants or to open individual interest-bearing accounts for them, but is still unable to make a final distribution in this manner, then the use of a pooled interest-bearing account may be appropriate. If such an account is opened, it must be maintained by a fiduciary designated by the plan trustees of the terminating plan, who continue to have ongoing fiduciary obligations until all participants are distributed their appropriate benefits. See Rev. Rul. 89-87; ERISA § 4041A. This fiduciary will be responsible for keeping clear, up-to-date records of each participant's opening balance and earnings throughout the life of the account. Furthermore, this fiduciary, as well as the former trustees of the terminating plan, must remain available to make every reasonable effort to assist those participants who do come forward [\*6] and claim their benefits. In the instance of the \* \* \* Plan, where a successor plan is being established, thus continuing the existence of a fiduciary who will be able to fulfill the above obligations, the pooled interest-bearing account may be appropriate.

3) You ask whether undistributed missing participant assets may be temporarily rolled over into a successor defined contribution plan pending location of such participants.

Under appropriate circumstances, a multiemployer plan terminating by plan amendment may roll over the assets attributable to missing participants into a successor defined contribution plan pending the location of those participants. For such a transfer to satisfy the requirements for making a final distribution of plan assets, plan trustees and other plan fiduciaries must take measures to ensure that the benefits of missing participants, who have not consented to such a rollover, are properly protected. See ERISA § § 4041A(c), (f).

Pursuant to Section 4041A(f), the PBGC may authorize the payment of benefits to missing participants in the manner proposed if the plan sponsor of the terminating plan satisfactorily demonstrates that the proposed manner [\*7] of payment is "not adverse to the interest of the plan's participants and beneficiaries generally" and "does not unreasonably increase the PBGC's risk of loss with respect to the plan." ERISA § 4041A(f)(1). Should the trustees of the terminating plan elect to transfer the assets of missing participants to a successor defined contribution plan, they must segregate those assets from the assets of the participants of the successor plan. Furthermore, the trustees must provide adequate assurance that the transferred assets will be shielded from possible diminution in value and will earn a rate of return at least comparable to that which would be earned in a federally-insured individual interest-bearing account.

Should the missing participant assets be rolled-over into the successor defined contribution plan, the plan trustees and fiduciaries of the defined contribution plan will be under the same fiduciary obligation with regard to those assets as they are with the assets of the other participants of that plan. See ERISA § § 401-414. You should direct inquiries regarding fiduciary obligations under Title I to the Department of Labor.

Such a rollover may implicate section 402(a)(5) [\*8] of the Internal Revenue Code. Section 402(a)(5) permits an employee to roll over a qualified total distribution from one qualified trust or annuity to another qualified trust or annuity. However, under section 402, the employee must elect to make the rollover. You should direct inquiries involving the rollover requirements of section 402 of the Internal Revenue Code to the Internal Revenue Service.

4) You ask whether annuities purchased for missing participants must be in the form of a joint and survivor annuity. In addition, you ask whether the annuity must be in the form of a joint and survivor annuity in the absence of proof the missing participant is currently married.

Your question presupposes that the participant was married at the time of separation from service. Of course, participants who are not married at the time of separation from service, and who have remained unmarried at the time for commencement of benefit payments, are provided a straight life annuity, unless another form of benefit has been elected. Treas. Reg. § 1.401(a)-20, (Q-25). These individuals would not pose the problem suggested in your letter.

For participants who are married at the time of separation [\*9] from service, the Retirement Equity Act of 1984

("REA") has established that annuities purchased for participants in terminated plans must be in the form of a joint and survivor annuity, unless the benefit form was waived in the manner specified in the statute, which requires, inter alia, signed spousal consent to the waiver. ERISA § 205(c); IRC §§ 401(a)(11), 417(a)(2). Under certain circumstances, the spouse's consent to a waiver of the joint and survivor form of benefit is not required. For instance, if it is established to the satisfaction of a plan representative that there is no spouse or that the spouse cannot be located, spousal consent to waive the joint and survivor annuity is not required. Treas. Reg. § 1.401(a)-20, (Q-27).

You should direct inquiries relating to the requirements of REA and regulations promulgated thereunder to the IRS.

5) You have asked whether plan trustees can assume, in the absence of records indicating a deceased participant was married at the time of death, that the participant left no surviving spouse.

A participant who is married at the time of separation from service should be presumed to have remained married, at the date for commencement [\*10] of benefit payments, unless notice is provided to the plan trustees of a change in marital status. Thus, should the participant die prior to the commencement of benefit payments under the plan, the plan must provide the surviving spouse with a qualified pre-retirement survivor annuity. See ERISA § 205(a)(2); IRC § 401(a)(11). However, if the plan trustees are unable to locate the surviving spouse after having taken reasonable steps to do so, or are unable to determine whether the spouse predeceased the participant, the provisions set forth in question 2 above would apply, and the plan trustees would be required to purchase an annuity for the surviving spouse, open an individual interest-bearing account in the surviving spouse's name, or, if appropriate, place the surviving spouse's benefit entitlement in the special pooled account described above. In the instance where the participant and spouse have made a valid election to waive the qualified joint and survivor annuity, or qualified pre-retirement survivor annuity with spousal consent, ERISA § 205(c)(1), (c)(2), and the election designates a beneficiary or form of benefits which may not be changed without spousal consent, [\*11] ERISA § 205(c)(2), the plan trustees must take reasonable steps to locate that beneficiary to make a final distribution, and if unable to do so, must also follow the provisions set forth in question 2 above with regard to the beneficiary's benefits.

You should direct inquiries related to the requirements of REA and the regulations promulgated thereunder to the IRS.

6) You have asked whether there is an applicable time period in which a terminating plan must complete its final distribution of assets. Particularly, you ask whether a terminating multiemployer plan may take up to 18 months to complete the process of making a final distribution, if necessary, due to problems encountered in attempting to locate participants and beneficiaries, purchase annuities, and open individual (and in appropriate circumstances, pooled) interest-bearing accounts.

Under the multiemployer provisions of ERISA, a plan terminated by plan amendment continues indefinitely until plan assets have been distributed to participants and beneficiaries. See Rev. Rul. 89-87. There is no applicable time period under Title IV in which a multiemployer plan, terminated by plan amendment, must make a final distribution [\*12] of assets.

7) You ask whether plan trustees can presume a participant to be deceased if he is declared legally dead in an applicable state proceeding.

For purposes of Title IV, plan trustees must meet the "reasonable efforts" standard (see Q-1 above) when relying upon a state proceeding to determine that a missing participant is deceased. Whether or not the standard is met is determined on a case-by-case basis, and depends in part on the nature of the proceeding relied upon, its findings, and its standards of proof. We cannot give a specific opinion based upon the facts presented in your letter, and decline to establish a per se rule for the circumstances about which you inquire.

Plan trustees should be aware that the Department of Labor has established additional guidelines regarding the satisfaction of Title I obligations. See, e.g., DOL Opinion Letter No. 11-86. Opinions relating to Title I of ERISA may be sought from the Department of Labor.

If you have any further questions about this matter, you may call David W. Kemps at 202-778-8886.

Carol Connor Flowe

General Counsel