

2001-1            §302(a) (I.R.C. §412(a))  
                      §302(c)(10) (I.R.C. §412(c)(10))  
                      §302(e) (I.R.C. §412(m))  
                      §302(f) (I.R.C. §412(n))  
                      §4062(c)

[PBGC Letterhead]

February 6, 2001

Your letter dated December 8, 2000, accompanying the PBGC Form 200 for the ("Plan"), has been referred to this office for response. In that letter, you question whether a lien under Section 412(n) of the Internal Revenue Code ("Code") and Section 302(f) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")<sup>1</sup> can arise where a pension plan's accumulated funding deficiency, as defined in Code §412(a), is less than one million dollars. Specifically, you dispute that a lien under Code §412(n) arose in favor of the Plan after the sum of missed contributions exceeded \$1 million, because the accumulated funding deficiency of the Plan at the end of the prior plan year was approximately [\$630,000].

As more fully explained below, the Pension Benefit Guaranty Corporation ("PBGC") has historically followed the plain meaning of the statutory language under the Code and ERISA, determining (a) whether a lien has arisen and (b) the amount of the lien on the basis of the sum of missed contributions, not on the basis of the accumulated funding deficiency of the plan.

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<sup>1</sup> Because the language of the cited statutes is identical, this letter hereinafter will only make reference to Code §412(n) for convenience.

## Statutory Background

Code §412(n) was enacted as part of the Pension Protection Act of 1987 (Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, December 22, 1987). The provision was amended by the Retirement Protection Act of 1994 (included in the Uruguay Round Agreements Act, Pub. L. No. 103-465, December 8, 1994) to alter, *inter alia*, the time when the statutory lien would arise and the amount of the statutory lien.

Code §412(n) protects a pension plan whose contributing sponsor fails to make required contributions. A statutory lien is imposed on all property of the contributing sponsor and that of all members of its controlled group to secure the amount of the missed contributions. The lienholder is the pension plan, but the lien can only be perfected and enforced by the PBGC (or, at the PBGC's direction, by the contributing sponsor or a controlled group member). Code §412(n)(1) & (5). Not all missed contributions trigger a statutory lien.

Code §412(n)(1) provides that a lien arises on all property of a plan sponsor (and each member of its controlled group) when the sum of all missed required installments and other payments to a plan (including interest) exceeds one million dollars as of a due date for such an installment or payment. Code §412(n)(1)(A) makes specific reference to a "required installment under subsection (m)" (Code §412(m)). The only other required payment under Code §412 is the payment required as of the end of a plan year to assure that the plan's funding standard account will not end with a deficit (the "catch-up payment"); that payment is "due" as late as 8-1/2 months after the close of a plan year. Code §412(a), (c)(10)(A). Thus, when the sum of missed §412(m) installments and catch-up payments, plus interest, exceeds one million dollars, a lien arises under §412(n). Similarly, Code §412(n)(3) provides that the amount of the lien is equal to the sum of the missed installments and catch-up payments, including interest.

Nothing in Code §412(n) states explicitly or suggests that the determination of the lien threshold amount or the amount of the lien itself should be based on the accumulated funding deficiency of the pension plan.

## Factual Background

As we understand the facts, the contributing sponsor of the Plan failed to make all or a part of a required contribution for the third quarterly installment due on October 15, 1998. Thereafter, eight additional quarterly installments were missed, and the catch-up payments for the 1998 and 1999 plan years were also missed. The table below reflects PBGC's understanding of the amounts required as of each due date with interest to September 15, 2000:

DueDate	PY98	PY99	PY2000	Missed Contributions with Interest to 9/15/2000
10/15/98	[\$28,176]			[\$32,956]
1/15/99	[\$62,569]			[\$71,692]
4/15/99		[\$80,294]		[\$90,170]
7/15/99		[\$80,294]		[\$88,355]
9/15/99	[\$76,780]			[\$83,325]
10/15/99		[\$80,294]		[\$86,557]
1/15/2000		[\$80,294]		[\$84,795]
4/15/2000			[\$160,294]	[\$165,870]
7/15/2000			[\$160,294]	[\$162,530]
9/15/2000		[\$319,995]		[\$319,995]
<b>Total:</b>				[\$1,186,245]

Once the catch-up payment for the 1999 plan year was missed on September 15, 2000, the sum of all missed installments and other required payments, plus interest, exceeded one million dollars.

In your letter, you suggest that because the Plan's accumulated funding deficiency as of the end of the 1999 plan year was slightly less than [\$630,000], no lien could arise on September 15, 2000.

#### Discussion

Your letter includes an attached statement from the Plan's actuaries asserting that the one million dollar lien triggering threshold in Code §412(n) is based on the accumulated funding deficiency of the Plan, not on the sum of missed contributions. Your actuaries point out that because a prior year's funding deficiency is included in the current year's minimum funding requirements, the PBGC should, in essence, ignore the prior year's missed contributions. Under their view, once it is clear that the prior year will end with a funding deficiency (which will generally not be known until 8-1/2 months after the close of the prior plan year), PBGC should not include any of the prior year's quarterly installments or the catch-up payment in determining whether a statutory lien arose. Such an approach would produce the following result: after the Plan's sponsor had failed to make the 1998 plan year catch-up payment (due by September 15, 1999), the PBGC would ignore the missed quarterlies that were due on October 15, 1998 and

January 15, 1999, as well as the catch-up payment, itself, in determining whether a lien had arisen.

As noted above, the language of Code §412(n) requires a summing of the missed contribution amounts, not a calculation of a plan's accumulated funding deficiency at any given point during a plan year. The statutory provision makes specific reference to quarterly installments and other required payments (catch-up payments). There is no specific reference to the plan's accumulated funding deficiency nor a requirement that the sponsor calculate that deficiency as of each contribution due date to determine whether the deficiency exceeds one million dollars. Congress knew how to make an explicit reference to a plan's accumulated funding deficiency as of a specific date, but it did not do it here. See ERISA §4062(c).

As the table above shows, when the Plan did not receive the catch-up payment due by September 15, 2000, the sum of all missed installments and other required payments, plus interest, exceeded one million dollars, and a lien arose under Code §412(n). We also note that when contributions to the Plan were missed on October 15, 2000, an additional lien arose.

Generally, the amount of the lien determined by adding all prior missed contribution amounts, plus interest, may exceed a pension plan's accumulated funding deficiency. Notwithstanding the lien amount determined and included in the filings made to perfect the lien by PBGC, generally the most that the agency will recover for the plan, in the event enforcement of the lien is necessary, is the amount of the accumulated funding deficiency.

On the date of this letter, the agency is filing notices in the appropriate state recording offices for the lien under Code §412(n) that arose against the property of the Plan's sponsor and of all members of its controlled group as of October 15, 2000. If you have any questions concerning any of the foregoing, please feel free to contact Frank McCulloch, Senior Counsel in the Office of the General Counsel (202-326-4020 [x3033]).

Yours very truly,

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James J. Keightley  
General Counsel