

Pension Benefit Guaranty Corporation

76-2

January 16, 1976

REFERENCE:

[\*1] 4041(f). Termination by Plan Administrator. Application of Termination Procedures Upon Amendment to Individual Account Plan  
4044(d)(2) Allocation of Assets. Distribution of Residual Assets Attributable to Employee Contributions

OPINION:

This is in response to your inquiry of November 12, 1975. This will also serve to confirm your telephone conversation on December 17, 1975, with \* \* \* of our staff. Your letter raises the following questions:

(1) What is the position of the Pension Benefit Guaranty Corporation (the "PBGC") with respect to the amendment of a covered plan (the "Plan") to change it to an ESOT (Profit Sharing type)?

(2) If such change were considered a termination, would PBGC have any legal objection if after fully vesting all benefits as of the date of termination and after providing those benefits by purchasing and distributing Single Premium Immediate Annuities for those employees who are already retired and Single Premium Deferred Annuities for those people who are currently employed, the residual assets remained in the ESOT pursuant to the amended terms of the Plan and were allocated to the Plan participants?

When a covered plan is amended so as to be changed to a [\*2] defined contribution plan, such as an ESOT (Profit Sharing type), that amendment is treated as a plan termination, pursuant to Section 4041(f) of the Employee Retirement Income Security Act of 1974 (the "Act"). Accordingly, the statutory provisions relating to a plan termination set forth in Section 4041 of the Act apply. Section 4041(a) of the Act provides that the plan administrator shall file a notice of intent to terminate with the PBGC not later than 10 days before the proposed date of termination, and that a plan administrator who has filed such notice shall pay no amount pursuant to the termination procedure of the plan for a period of 90 days after the proposed termination date, unless he receives a notice of sufficiency from the PBGC. Such a notice will be issued after the PBGC finds that plan assets, when allocated in accordance with Section 4044 of the Act, are sufficient to pay basic benefits. Section 4044(d) (2) regarding the distribution of residual assets attributable to employee contributions is inapplicable inasmuch as you have advised us that there have been no employee contributions to the Plan.

With respect to your second question, assuming the Plan has terminated [\*3] and has received a notice of sufficiency from the PBGC we would have no legal objection to the retention of the excess assets in the ESOT and to the allocation of those assets among Plan participants. However, we do not express any opinion as to the tax implications of this transaction.

I trust this answers your inquiry.

George B. Driesen  
Deputy General Counsel