

Pension Benefit Guaranty Corporation

77-159

August 15, 1977

REFERENCE:

[*1] 4044 Allocation of Assets

OPINION:

This is in response to your letter to the Pension Benefit Guaranty Corporation (the "PBGC") on behalf of the subject plan (the "Plan"). In your letter, you indicated that * * * is considering a proposal whereby the trust established to fund Plan benefits would purchase a group annuity contract (the "Contract") from the * * * which would provide immediate annuities to certain Plan participants. You also indicated that it is * * * intention that the trust would retain an interest in the annuities provided under the Contract such that should the Plan terminate, the then present value of the annuities would become available to pay the benefits of all Plan participants. Consequently, you stated that * * * has proposed that the following language be included in the Contract and requested a determination by the PBGC as to whether, in the event of the termination of the Plan, the assets held by * * * under the terms of the Contract would be considered Plan assets for purposes of Section 4044 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1344 (Supp. V, 1975).

It is hereby agreed that the Contract-Holder at all times retains a legal [*2] and equitable interest in this contract and that this contract shall constitute an asset of the Plan. It is further agreed that (1) upon the happening of any event which requires application of the assets of the Plan pursuant to Article XIII thereof, as from time to time in effect, including, to the extent applicable, any predecessor provisions thereto, (herein referred to as "Termination"), * * * commitment under this contract to each Annuitant and each person claiming through an Annuitant to future payments under this Contract shall terminate and the rights of each such person shall be subject to the terms of the Plan and applicable law, as from time to time in effect, with respect to the rights of all Participants, Contingent Annuitants and beneficiaries; (2) every certificate issued under this contract will contain a suitable legend describing the foregoing limitation on the rights of persons referred to in clause (1); and (3) upon Termination an amount equal to the then present value, determined by using the schedule of annuity purchase rates included in this contract, of the future payments due under this contract, shall be applied in accordance with the provisions of [*3] the Plan or as required by applicable law to the payment of benefits then payable to all remaining Annuitants and persons claiming through an Annuitant under this contract and to all other Participants, Contingent Annuitants and beneficiaries under the Plan using the same schedule of annuity purchase rates as was used to determine such value, but increased to reflect * * * expenses arising from the adjustments of future payments on Annuities theretofore purchased hereunder, the purchase of additional annuities and the payment of any other benefits. In lieu of such application, if the Contract-Holder so requests, all or any portion of such present value may be transferred in one sum from * * * will, within sixty days following the later of receipt of such request and of data sufficient to determine the portion to be transferred, offer a basis for making such transfer. Such offer will represent * * * judgment as to the then current one sum value corresponding to such present value. (Emphasis added.)

The PBGC has issued proposed amendments to its regulations on the valuation and allocation of plan assets (the "Proposal"), which indicate how the PBGC expects to treat insurance contracts [*4] owned by a covered pension plan at the time of its termination (See, 42 FR 20156, April 15, 1977, enclosed). You will note that under the Proposal, the Contract, rather than the assets held by * * * under the Contract, would be considered the asset of the Plan for purposes of Title IV (See, 29 CFR, proposed § 2611.11). Consequently, under the Proposal, the Contract would be valued to determine the maximum amount of guaranteed benefits that it can provide (See, 29 CFR, proposed § 2611.12).

The underscored portion of the quoted Contract language makes * * * obligation to pay annuities to specific Plan participants revocable at plan termination. Accordingly, under the Proposal, all amounts held by * * * under the Contract (except the amount needed to satisfy administrative and related expenses) would be included in the value of the Contract and would be available to pay, in accordance with Section 4044, the benefits of any Plan participant (See, 29 CFR, proposed § § 2611.13, 2608.3(a)).

Henry Rose
General Counsel