

Pension Benefit Guaranty Corporation

82-7

March 9, 1982

REFERENCE:

[*1] 208 Mergers, Consolidations and other Transfers of Plan Assets
414(l). (IRC) Definitions and Special Rules. Mergers, Consolidations and other Transfers of Plan Assets
4044 Allocation of Assets

OPINION:

This is in response to your request for an opinion with respect to the liability of X Inc. * * * and/or the purchaser of X stock under Title IV of the Employee Retirement Income Security Act ("ERISA") after the occurrence of the following transaction.

You have advised that financial difficulties and the depressed state of the * * * industry have led Y to determine that it would be in Y's best interests to sell 100% of the outstanding shares of X a wholly-owned subsidiary of Y to a corporation which is independent from Y. Y has represented that the outstanding shares of X will be sold for their fair market value and that, accordingly, Y will be in receipt of consideration equivalent to the value of the X shares which are sold.

X employees presently participate in the Y Corporation Salaried Employees' Retirement Plan; the Y Corporation Pension Plan; the Pension Agreement between Y Corporation and the "A" Union, * * * and, the Pension Agreement between Y Corporation and the "B" Union, * * * [*2] ("the Plans"). The Plans are defined benefit pension plans subject to the termination insurance provisions of Title IV of ERISA.

As of January 1, 1981, X participants constituted less than nine percent of the total number of participants in the Plans. (The number of X employees participating in each of the Plans has always been less than 20 percent of the total number of participants in each such Plan.)

Each of the Plans is structured so that, in the event one of the Plans terminates, only the assets of that terminated plan would be available to provide benefits for participants in that plan.

You have represented that, on or prior to the date of the sale ("the closing date"), a proportionate share of assets and liabilities of each Plan applicable to X employees (for service credited up to the date of the sale) will be transferred, in conformity with Sections 208 and 4044 of ERISA and Section 414(1) of the Internal Revenue Code, to new plans to be established by X, on or prior to the closing date, solely for its active and former employees. You have further represented that assets and liabilities will, initially, be allocated and transferred from the Plans to the newly established [*3] X plans on the basis of estimated calculations by the Plans' actuaries, who have stated that their "best estimates" will not differ materially or substantially from the amounts required to be allocated and transferred under Sections 208 and 4044 of ERISA and Section 414(1) of the Internal Revenue Code. You have indicated that less than six percent of the assets of the Plans will be apportioned to corresponding X plans. Within 90 days of the closing date, March 11, 1982, the Plans' actuaries will complete the final calculation of the assets and liabilities which, under the law, must be allocated and transferred to the X plans. You have stated that an adjustment (either through an additional transfer from one or more of the Plans to one or more of the X plans or through a refund from one or more of the X plans to one or more of the Plans) will be made within 90 days of the closing date if it is determined that the amounts allocated and transferred on the basis of the estimated calculations differ from the amounts required by law to be allocated and transferred. In sum, it is our understanding that on the closing date three events will occur: X shares will be sold by Y to a corporation [*4] which is independent from Y; separate X pension plans will be established; and, assets and liabilities will be transferred from the Plans to the new X plans. Within 90 days of the closing date the transfer of the Plans' assets and liabilities will be perfected.

Based upon the foregoing representations, neither X nor the proposed purchaser of X stock would have any liability under Title IV of ERISA to the PBGC in the event that one or more of the Plans were to terminate subsequent to the closing date. Of course, X would have potential Title IV liability in connection with the new plans it establishes for its

own active and former employees. You have represented that Y and the purchaser of X stock will agree by contract to adjust the initial allocation and transfer of the Plans' assets and liabilities within 90 days of the closing date. Assuming that the obligations of Y and the purchaser of X stock, with respect to the post-closing adjustments, are legally enforceable, nothing in Title IV of ERISA would preclude the Plans from discharging such obligations, notwithstanding the post-closing termination of one or more of the Plans.

The PBGC's determinations are based upon the representations [*5] in your letters concerning this transaction *
* *.

Henry Rose
General Counsel