

Pension Benefit Guaranty Corporation

85-20

August 2, 1985

REFERENCE:

[*1] 4204 Sale of Assets
4204(a)(1) Sale of Assets. Conditions for Exemption from Withdrawal
4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security
4204(a)(1)(C) Sale of Assets. Secondary Liability of Seller
4204(a)(2) Sale of Assets. Subsequent Withdrawal by Purchaser
4204(a)(3) Sale of Assets. Bond Requirement on Liquidation of Seller
4204(a)(3)(A) Sale of Assets. Complete Liquidation of Seller
4204(c) Sale of Assets. PBGC Grant of Variances or Exemptions from Bond Requirements
29 CFR 2643 Variances and Exemptions

OPINION:

This is in response to your letter in which you asked the opinion of the Pension Benefit Guaranty Corporation ("PBGC") concerning Section 4204 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1384. More specifically, your question concerned the requirements for avoiding withdrawal liability under that section.

The facts, as you present them, are that an employer (the "Seller") obligated to contribute to a multiemployer pension plan (the "Plan"), as defined by Section 4001(a)(3) of ERISA, 29 U.S.C. § 1301(a)(3), sold its assets to an unrelated entity (the "Buyer") in an arm's-length transaction. You state [*2] that under the terms of the sales agreement (the "Agreement"):

"(1) The [Buyer] agreed to assume the Seller's obligation to contribute to the Plan.

"(2) The [Buyer] agreed, unless otherwise exempted, to provide to the Plan for a period of five plan years starting with the first plan year after the sale of assets, a bond or escrow in an amount equal to the greater of (i) the average annual contribution required to be made by the Seller to the Plan for the three plan years preceding the plan year in which the sale of assets occurred, or (ii) the annual contribution that the Seller was required to make to the Plan for the last plan year before the plan year in which the sale of assets occurs.

"(3) The Seller agreed that if the [Buyer] completely or partially withdraws from the Plan during the five years beginning after the sale, the Seller will be secondarily liable to the Plan if the [Buyer] fails to pay its withdrawal liability to the Plan.

"(4) Since the Seller was liquidated immediately after the sale, the [Buyer] agreed to provide to the Plan on behalf of the Seller, at the [Buyer's] sole cost and expense, a bond or escrow in an amount equal to the present value of the withdrawal [*3] liability the Seller would have had but for the special asset sale exemption in Section 4204 of ERISA."

You state that these provisions were drafted into the Agreement in order to satisfy Section 4204(a)(1) of ERISA, thereby avoiding the imposition on the Seller of withdrawal liability resulting from the sale of the Seller's assets.

You further indicate that the Buyer qualifies under 29 C.F.R. §§ 2643.11 and 2643.14 for the exemption from the requirements set out in subparagraphs 4204(a)(1)(B) and (C) that the Buyer post a bond and that the sales agreement impose secondary withdrawal liability on the Seller. Specifically, you state that the Buyer satisfies the "net tangible asset test" set out in 29 C.F.R. § 2643.14. You ask whether the satisfaction of that test also exempts the now-liquidated Seller from the requirement of posting a bond under Section 4204(a)(3)(A) of ERISA.

Section 4203 of ERISA provides, among other things, that complete withdrawal from a multiemployer pension plan occurs when a contributing employer ceases to have an obligation to contribute to the plan. Section 4201(a) of ERISA provides that upon complete withdrawal from such a plan, ordinarily an employer [*4] is liable to the plan for

withdrawal liability. Section 4204 of ERISA provides an exception to the general rule imposing withdrawal liability, in the case of a "bona fide, arm's-length sale of assets to an unrelated party . . ." where certain conditions are met. Section 4204(a)(1) provides three separate requirements which, briefly stated, are that:

1. The buyer has an obligation to contribute substantially similar to that of the seller;
2. The buyer posts a bond or escrow; and
3. The sales contract provides for secondary liability of the seller to the plan if the buyer withdraws from the plan within five years from the sale of assets.

In addition, Section 4204(a)(2) of ERISA provides that, in any event, if the buyer withdraws from the Plan within five plan years, the seller will be liable to the plan for the withdrawal liability the seller would have owed but for Section 4204 if the buyer fails to pay the withdrawal liability when due. Section 4204(a)(3)(A) provides that, upon liquidation or distribution of the seller or the seller's assets within five years of the sale, the seller must post a bond equal to the present value of the withdrawal liability that would have been [*5] imposed on the seller but for Section 4204.

Section 4204(c) authorizes the PBGC by regulation to vary the requirements of Section 4204(a)(1)(B) [the buyer's bond requirement] and (C) [the requirement of a contract provision imposing secondary liability on the seller]. The PBGC has done so at 29 C.F.R. Part 2643. One of the tests which has been set out for variance from the requirement of Section 4204(a)(1)(B) and (C) is the net tangible asset test, 29 C.F.R. § 2643.14, which you state has been met in the present case.

Thus, as you present the situation, the Buyer has met the requirements for waiver of the requirement of obtaining a buyer's bond and of inserting a seller's secondary liability provision in the sales contract. You ask whether this waiver also exempts the Seller from posting the liquidation bond required by Section 4204(a)(3).

The PBGC has been granted specific statutory authority to waive the two requirements of a buyer's bond and of the seller's contractual secondary liability. ERISA Section 4204(c). The PBGC has done so by regulation. 29 C.F.R. Part 2643. However, no such explicit statutory authority exists for the PBGC to waive either the seller's liability [*6] under Section 4204(a)(2) or the required seller's liquidation bond under Section 4204(a)(3). We note that the seller's liability under Section 4204(a)(2) is independent, although potentially overlapping, of the seller's contractual secondary liability under Section 4204(a)(1)(C), only the latter of which is explicitly waivable by the PBGC. Moreover, as the regulation and the preamble to both the proposed and final versions of the regulation make clear, the exemptions provided in 29 C.F.R. Part 2643 apply only to Section 4204(a)(1)(B) and (C), and not to any other portion of the statute. 48 Fed. Reg. 6555 (February 14, 1983) and 49 Fed. Reg. 22635 (May 31, 1984).

We, therefore, conclude that the exemptions established by satisfaction of one of the tests set out in 29 C.F.R. Part 2643, Subpart B do not exempt the Seller from the obligation of posting a liquidation bond under Section 4204(a)(3). The decision whether to waive the obligation of the Seller to post a liquidation bond is one that must be made by the Plan. As you are aware, Multiemployer Bulletin Number 2, published by the PBGC, provides guidance on the waiver of the seller's liquidation bond by a plan.

In reaching [*7] this conclusion, we make no determination as to the correctness of your factual statements or conclusions. The determination as to whether a withdrawal has occurred is to be made in the first instance by the plan sponsor, subject to the statutory dispute resolution procedures. By this letter, the PBGC only seeks to provide general guidance on the interpretation of Title IV of ERISA based on your statements, representations, and conclusions.

In your letter, you further request that, if the PBGC determines that the requirements of Section 4204(a)(3) are not waived by satisfaction of one of the tests set out in 29 C.F.R. Part 2643, Subpart B, the PBGC approve a proposed Plan rule. We point out that the adoption of a Plan rule is not a matter subject to approval by the PBGC. Consequently, we express no opinion with respect to your proposed rule.

I hope this has been of assistance to you. If you have any further questions on this matter, please contact * * * of my staff at the above address or at (202) 254-3010.

Edward R. Mackiewicz
General Counsel