

Pension Benefit Guaranty Corporation

86-16

July 31, 1986

REFERENCE:

[*1] 4042 Termination by PBGC.
4049 SEPPAA Nonguaranteed Benefits Trust.
4062 Liability of Employer in Single Employer Plans

OPINION:

This responds to your request for an opinion concerning the effect of certain provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), with respect to the transaction described below.

As you have represented the facts, on * * *, A sold all of the outstanding stock of its subsidiary * * * B Corporation * * * to C Inc. C Inc. and members of its controlled group (hereinafter the "Buyer") are unrelated to A and members of its controlled group (hereinafter the "Seller"). The sale represented an arm's-length transaction for fair market value. B maintains two defined benefit pension plans * * * for the benefit of B salaried and hourly employees. The B Plans are subject to Title IV of ERISA. After the sale, the Buyer will continue to maintain the B Plans. As of the closing date of the sale, the B Plans' assets were insufficient to pay all benefit commitments provided under the B Plans. n1

n1 Benefit commitments are defined in section 4001(a)(16) and are generally those benefits which: (1) are guaranteed by the PBGC under section 4022; (2) would be guaranteed but for the limitations in section 4022(b); or (3) constitute early retirement supplements or subsidies, plant closing benefits, or death benefits, providing the participant or beneficiary has, prior to the plan termination date, satisfied all of the conditions under the plan to establish entitlement to the benefit. [*2]

However, after the closing date of the sale, 30 percent of the net worth of the Buyer is greater than the sum of the asset insufficiencies of all the single-employer plans maintained by the Buyer. n2

n2 In addition to the B Plans, you have represented that the Buyer maintains other single-employer plans, all of which have assets in excess of the accrued liabilities of such plans.

You requested our opinion with regard to the above transaction as to whether the Seller will incur liability to the PBGC under sections 4062, 4063, 4064, or 4069 of ERISA if the B Plans are terminated following the sale of B to the Buyer.

In Opinion Letter 82-30, PBGC addressed the question of the potential employer liability of a controlled group seller where the stock of a subsidiary corporation of the seller was sold to a buyer and the defined benefit plan of the seller's former subsidiary continued to be maintained by the former subsidiary after the sale. In Opinion Letter 82-30 we determined that:

PBGC will not, as a general rule, seek from the seller and other members of a controlled group of corporations with the seller employer liability under Section 4062 of ERISA, with respect to a termination [*3] of a pension plan by a successor employer after the sale of stock of a subsidiary corporation, if:

(1) as of the closing date of the sale the plan had sufficient assets to satisfy all benefits which are guaranteed by the PBGC under Title IV, or

(2) [where] the plan's assets are not sufficient to satisfy guaranteed benefits on such date, 30% of the statutory net worth of the employer maintaining the plan immediately after the closing is greater than the sum of the plan asset insufficiencies of all the single-employer plans maintained by such employer.

Based on the financial information you submitted with respect to the Buyer, it is PBGC's view that 30% of the net worth of the Buyer immediately after the closing substantially exceeds the amount of the unfunded benefit commitments in all single-employer plans maintained by the Buyer.

Accordingly, if the information you have submitted is accurate, there would be no liability of the Seller to PBGC for guaranteed benefits under sections 4062, 4063, or 4064 of ERISA if the B Plans are terminated by the Buyer. We note that in any case in which a plan is terminated under sections 4041 (c) or 4042(a) of ERISA, in addition to the liability [*4] to PBGC imposed under section 4062(b) for benefits guaranteed by PBGC, section 4062(c) imposes liability to a section 4049 trust for the lesser of: (1) 75 percent of the total outstanding amount of benefit commitments under the plan; or (2) 15 percent of the actuarial present value of all benefit commitments under the plan. Moreover, section 4062(d) imposes liability to a section 4042 trustee for certain funding deficiencies which become due and payable to such trustee as of the termination date. The financial condition of the Buyer after the closing is such that it could satisfy benefit commitments and funding deficiencies, so that it does not appear to us that the Seller would be liable to a 4049 trust under section 4062(c) or a 4042 trustee under section 4062(d). n3

n3 Of course, PBGC cannot speak for a 4049 trustee or a 4042 trustee other than PBGC.

You have also requested our opinion as to whether the Seller would be liable to PBGC under section 4069 of ERISA. Section 4069 provides that if the principal purpose of a transaction that takes place within 5 years before termination of a plan is to evade liability, the parties to the transaction and members of their controlled [*5] groups shall be subject to liability under Title IV. Such a determination is of course dependent on all of the facts and circumstances of a particular case. However, the information now available to us does not suggest that this transaction is of the type to which section 4069 would apply.

I hope this response is helpful. If you have further questions, please contact Angela J. Arnett of my staff at the address given above or 956-5023.

Edward R. Mackiewicz
General Counsel