

Pension Benefit Guaranty Corporation

86-28

December 31, 1986

REFERENCE:

[\*1] 3(34) Individual Account Plan  
3(35) Defined Benefit Plan  
4022(b)(3) Benefits Guaranteed  
General Limitation on Amount of Guarantee  
4044 Allocation of Assets General  
4045 Recapture of Certain Payments  
29 CFR 2618 Allocation of Plan Assets

OPINION:

This letter responds to your October 24, 1986 request that the Pension Benefit Guaranty Corporation ("PBGC") reconsider its position with respect to the benefit payable to your client, \* \* \*, under the Retirement Income Plan of \* \* \* Effective January 1, 1976 (the "Plan"). Neither this letter nor the PBGC's letter of September 26 constitutes an "initial determination" under 29 C.F.R. § 2606.1 (1986). Consequently, formal agency review through the reconsideration or appeals process set forth in the PBGC Rules for Administrative Review of Agency Decisions (29 C.F.R. Part 2606) is not available at this time. However, the PBGC agreed to reconsider informally its position regarding this matter in light of your stated objections to the PBGC's position. For the reasons stated in this letter, I have concluded that the PBGC's original decision regarding this matter should be affirmed.

The Plan has been terminated, and the date of Plan termination under Section [\*2] 4048 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1348, is no later than November 8, 1985. Because the Plan has insufficient assets to pay the benefits guaranteed under ERISA Title IV, the PBGC has been named statutory trustee of the Plan, pursuant to an agreement with the administrator of the Plan. As trustee of the Plan, the PBGC is responsible for paying Plan participants those benefits guaranteed by ERISA Title IV. 29 U.S.C. § § 1322, 1361.

Section 4022(a) of ERISA, 29 U.S.C. § 1322(a), provides that the PBGC shall guarantee payment of all nonforfeitable benefits under a covered single-employer plan which terminates, subject to the limitations set forth in Section 4022(b), 29 U.S.C. § 1322(b). Section 4022(b)(3) provides that the value of plan benefits guaranteed by the PBGC cannot exceed \$750 per month, adjusted for changes in the Social Security contribution and benefit base. The maximum guaranteeable monthly benefit for plans terminated in 1985 is \$1,687.50. (See Appendix A to 29 C.F.R. Part 2621.)

As of the date of termination, \* \* \* was receiving a total of \$ \* \* \* as \* \* \* regular retirement income under the Plan. Because this [\*3] amount exceeded the amount guaranteed by the PBGC under Section 4022 of ERISA, the PBGC concluded that benefit should be reduced pursuant to the PBGC's benefit reduction regulation, 29 C.F.R. Part 2623. You have requested that the PBGC reconsider its conclusion that the maximum guarantee established by ERISA Section 4022(b)(3), 29 U.S.C. § 1322(b)(3), should be applied to the total amount of \* \* \* regular retirement income under the Plan. You assert that the limitation should be applied only to that amount which is currently being paid by the Plan's trust fund.

Under the Plan, if a participant's projected regular retirement income at his Normal Retirement Date exceeded \$1,709 per month, the amount of the participant's regular retirement income in excess of \$1,700 per month (the "Insured Benefit") was to be funded through the purchase of an annuity contract. As we understand the pertinent facts, when \* \* \* retired on May \* \* \*, 1977, after thirty years of continuous service, \* \* \* was entitled to a monthly retirement benefit in an amount greater than \$1,700. Accordingly, the Acting Insurance Trustee of the Plan surrendered the proceeds of several life insurance policies and augmented [\*4] the proceeds as necessary from the Plan's Conversion Deposit Fund to purchase an annuity contract which provided the Insured Benefit to \* \* \* in the amount of \$1,830.74 per month. As of the date of Plan termination, \* \* \* was receiving an Insured Benefit of \$1,933.18 per month from the Connecticut Mutual Life Insurance Company. \* \* \* was also receiving \$1,881.66 per month directly from the Plan's trust fund.

You assert that \*\*\* accrued benefit, as of the date of Plan termination, is solely that portion of \*\*\* benefit currently being paid by the Plan's trust fund. This is incorrect. \*\*\* accrued benefit under the Plan is determined under Plan Section 4.3 and is based on his earnings and length of service. Plan Section 4.1 states that an eligible employee shall receive the "regular retirement income described in Section 4.3 of the Plan, a part of which may take the form of the insured benefit described in Section 4.4." Section 4.4 sets forth the means of funding that portion of the monthly regular retirement benefit determined under Plan Section 4.3 which exceeds \$1,700. That a portion of accrued benefit has already been purchased does not reduce the amount or change the [\*5] calculation of \*\*\* accrued benefit under Section 4.3 of the Plan.

You assert that the reduction in benefits constitutes an impermissible forfeiture of \*\*\* nonforfeitable Plan benefits. \*\*\* benefit under Plan Section 4.3 does constitute a nonforfeitable benefit as that term is defined under 29 U.S.C. § 1344(a). However, the PBGC's guarantee of that benefit is subject to the limitations set forth in 29 U.S.C. 1322(b), including the maximum guarantee limitation in 29 U.S.C. § 1322(b)(3).

You assert that the portion of \*\*\* regular retirement income paid through the annuity contract purchased for \*\*\* with Plan assets constitutes a separate individual account plan not covered by Title IV and that therefore only the portion of benefit paid directly from the Plan's trust fund is subject to the maximum guarantee limitation. Section (3)35 of ERISA, 29 U.S.C. § 1002(35), defines a defined benefit plan as one which is not an "individual account plan." Section 3(34) of ERISA, 29 U.S.C. § 1002(34), defines an individual account plan as one that provides benefits solely on the basis of the amount contributed to the participant's account. \*\*\* benefit under the Plan is not based [\*6] on the amount contributed on behalf during \*\*\* years of service but is based on the defined benefit formula set forth in Section 4.3 of the Plan. Consequently, that portion of \*\*\* regular retirement income under Plan Section 4.3 which is being paid by Connecticut Mutual does not constitute an "individual account plan" under ERISA Section 3(34), 29 U.S.C. § 1002(34).

Your letter correctly states that benefits which are funded by means of an "irrevocable commitment" as defined in Title 29 C.F.R. § 2618.2 are excluded from the allocation process of Section 4044 of ERISA. Title 29 C.F.R. § 2618.3(a) provides that an "irrevocable commitment from an insurer to pay a benefit, which commitment is in effect on the date of asset allocation, is not considered a plan asset, and a benefit payable under such a commitment is excluded from the allocation process." It does not follow, however, that Plan assets and benefits excluded for allocation purposes are excluded from all other provisions of Title IV.

Title 29 U.S.C. § 1344(a) provides that the assets of a plan "available to provide benefits" shall be allocated to benefits owed by a plan in the order specified by § 1344(a)(1) through (6). [\*7] Thus, the purpose of 29 U.S.C. § 1344 is to require the matching of outstanding plan liabilities, i.e., benefits owed by the plan, to plan assets available to pay those benefits. The assets used to purchase an annuity contract are no longer available to pay other benefits owed by the plan, nor is that benefit or portion of a benefit which has been purchased in the form of an annuity contract any longer an outstanding plan liability. The exclusion from the allocation process of funds irrevocably committed to provide benefits, and of benefits for which an annuity has been purchased, is appropriate because the excluded assets were already matched to the excluded benefits prior to the commencement of the allocation process.

The fact that the Plan assets used to purchase the annuity contract for \*\*\* are not available to pay other outstanding Plan liabilities upon Plan termination does not affect the application of 29 U.S.C. § 1322(b)(3) to benefit under the Plan. The irrevocable commitment exclusion pertains only to the allocation process; it does not change the amount of \*\*\* regular retirement benefit under Plan Section 4.3. It is that benefit which is subject to the maximum [\*8] guarantee of Section 4022(b)(3) of ERISA. I note that a conclusion that Title IV's maximum guarantee limitation does not apply to \*\*\* full accrued benefit under Plan Section 4.3 would ultimately result in the use of PBGC funds to ensure that a participant in an underfunded pension plan receive a benefit of more than \$3,000 per month. Such a result is inconsistent with both the statute's maximum guarantee limitation and with the PBGC's statutory mandate, set forth in Section 4002(a)(3) of ERISA, 29 U.S.C. § 1302(a)(3), to maintain premiums at the lowest level consistent with its obligations.

Finally, you assert that the reduction of \*\*\* benefits violates Section 4045(a) of ERISA, 29 U.S.C. § 1345(a). Your assertion in regard to Section 4045 is inapposite, because the reduction of \*\*\* benefits has been effectuated pursuant to 29 C.F.R. 2623, which pertains to payments in excess of the Title IV guarantee made on or after the date a plan \*\*\* terminates. Section 4045, on the other hand, pertains to the recapture of benefits paid in excess of specified levels during the three-year period prior to plan termination. The PBGC has made no determination whether any amounts paid [\*9] to \*\*\* during the three years prior to Plan termination are subject to recapture under Section 4045. You also

argue that the PBGC's conclusion that \* \* \* benefit under the Plan must be cut to the maximum guaranteeable amount constitutes an attempt to "end-run the three-year statute of limitations" contained in Section 4045. As indicated, the PBGC has made no attempt to apply Section 4045 in the instant case. However, you should be aware that the three-year provision in Section 4045 is not a statute of limitations. Rather, Section 4045 merely limits the temporal reach of the PBGC's authority to recapture overpayments to the three year period prior to the date of plan termination.

I hope I have been of assistance in this matter.

Edward R. Mackiewicz  
General Counsel