

Pension Benefit Guaranty Corporation

87-11

October 22, 1987

REFERENCE:

[\*1] 4044(a) Allocation of Assets. Requirement of Following Statutory Allocation Provisions  
4044(a)(6) All Other Benefits Under the Plan  
4044(d) Allocation of Assets. Distribution of Residual Assets  
4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer

OPINION:

This is in response to your request for an opinion concerning the benefits to which the plan administrator of a terminated single-employer defined benefit pension plan must allocate assets under Section 4044(a) of ERISA before any residual assets may be distributed to the employer pursuant to Section 4044(d). You specifically asked whether Section 4044(a)(6) requires the payment of any benefits that participants have not accrued by the date of plan termination, but to which they might have become entitled in the future if the plan had not terminated and they had continued working in covered service.

The facts, as we understand them from your request, are as follows. \* \* \* is terminating two defined benefit pension plans, the Retirement Benefit Plan for Salaried Employees of \* \* \* Incorporated and the \* \* \* Incorporated Retirement Income Plan for Hourly-Rated Employees (collectively, the "Plans"). The respective [\*2] dates of termination are April 30, 1987, and June 30, 1987. The plan administrator proposes to annuitize benefits under the Plans by purchasing group annuity contracts from an insurance company in consideration of the payment of a one-time premium for each contract. All benefits accrued under the Plans as of their respective dates of termination will be guaranteed under the annuity contracts as the unconditional, irrevocable and noncancellable obligation of the insurance company from which the contracts will be purchased. The annuity contracts will provide for all optional forms of benefit payments available under the Plans, as well as early retirement benefits, other benefits protected from cutback by Section 301(a) of the Retirement Equity Act of 1984, and preretirement survivor annuities. Early retirement benefits in amounts based on the participants' accrued benefits as of the date of plan termination will be provided under the annuity contracts to participants who then meet the age and service requirements for the subsidy or who will meet those requirements in the future. If the insurance company fails to pay benefits at the time or in the manner set forth in the Plans and [\*3] the annuity contracts, affected participants will have a cause of action against the insurance company to enforce the payment of benefits.

Section 4044(a) of ERISA governs the allocation of plan assets to plan benefits in the case of the termination of a single-employer pension plan. Plan assets must be allocated in succession to the benefits described in each of the six priority categories established in Sections 4044(a)(1) through (a)(6). Section 4044(d)(1) of ERISA provides that any residual assets remaining after satisfaction of all benefits in priority categories 1 through 6 of Section 4044(a) may be distributed to the employer if all liabilities of the plan to participants and their beneficiaries have been satisfied, the distribution does not contravene any provision of law, and the plan provides for such a distribution in these circumstances. Each of the Plans you submitted with your request satisfies the second and third of these conditions.

After assets have been allocated to the benefits assigned to priority categories 1 through 5 of Section 4044(a), Section 4044(a)(6) requires that the remaining assets be allocated to the payment of "all other benefits under the plan." [\*4] Under the PBGC's regulation on the Allocation of Assets to Benefit Categories (29 C.F.R. Part 2618, Subpart B), "the benefits assigned to priority category 6 with respect to each participant are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable." 29 C.F.R. § 2618.16. As the PBGC explained in the preamble to the proposed form of the regulation, "priority category 6 will contain the value of accrued forfeitable benefits of a participant." 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975). The PBGC accordingly construes Section 4044(a)(6) to include only accrued benefits, or, in the case of subsidies protected by the Retirement Equity Act, benefits to which participants may become entitled in the future. n1 See, e.g., Opinion Letters 86-1 (Jan. 15, 1986), 85-28 (Dec. 2, 1985), 85-9 (April 5, 1985).

n1 ERISA, as amended by the Retirement Equity Act, requires the payment of early retirement benefits and

retirement-type subsidies "with respect to benefits attributable to service before" plan termination. 29 U.S.C. § 1054(g); see 26 U.S.C. § 411(d)(6). In the case of a retirement-type subsidy, ERISA requires such payments of benefits accrued at the date of plan termination to any participant who meets, either before or after plan termination, the pretermination conditions for the subsidy. *Id.* Assets accordingly must be allocated under Section 4044(a) to the payment of these benefits. [\*5]

Section 4044(a) does not create benefit entitlements not otherwise provided for elsewhere in ERISA or under the plan. ERISA does not require benefit accruals per se based on service not actually completed under a plan. Moreover, the Plans that are the subject of your request for an opinion do not provide for the present award of benefit accrual credit based on hours of service not yet completed, nor for the payment, either before or after plan termination, of "unaccrued benefits" based on such unearned service. Section 4044(a)(6) accordingly does not require the allocation of assets to pay benefits that might have accrued in the future if the Plans had not terminated and the participants had continued performing covered service. Consequently, such "unaccrued benefits" cannot be considered "liabilities of the plan to participants and their beneficiaries" under Section 4044(d)(1).

You should be aware that panels of the United States Courts of Appeals for the Fourth and Eleventh Circuits, respectively, have decided otherwise in *Tilley v. Mead*, 815 F.2d 989 (4th Cir. 1987) and *Blessitt v. Dixie Engine Co.*, No. 86-8123 (11th Cir. June 1, 1987), although both cases are currently [\*6] pending on petitions for rehearing. In each of these cases, the PBGC has filed an amicus curiae brief in support of rehearing.

I hope this letter is of assistance. If you have further questions on this matter, please contact Jeanne Beck of my staff at the above address or at (202) 778-8824.

Gary M. Ford  
General Counsel