2001-2 §4001(a)(3)
§4001(a)(15)
§4005(a)
§4005(e)
§4005(f)
§4006(a)
§4022
§4022A
§4041
§4041A
§4042
§4048(b)
§4061
§4063
§4209(c)
§4219(c)
§4232
§4245(f)
§4261
§4281(d)
§4303
29 C.F.R. §4041A.21

[PBGC Letterhead]

March 16, 2001

Robert Rideout shared with me your February 6 letter to him and asked me to respond to it. You ask whether the
(the "Fund") continues to be a multiemployer plan — both in general and particularly with respect to PBGC premium payments — now that there is only one employer required to make contributions to the Fund. You note that a second employer participates in the Fund and makes contributions thereto, but is not required to do so by a relevant collective bargaining agreement.[1]

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[1] The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980), amended section 4001(a)(3) of ERISA to define "multiemployer plan" as a plan

In our view, a multiemployer plan retains its status as such even if the number of employers required to contribute to the plan decreases to a single employer. This is evident not only from the language of the statute and its implementing regulations, but also from differences in design between the multiemployer and single-employer statutory schemes.

Turning first to the language of ERISA, we note that there is no provision in MPPAA that allows for a change in plan status from multiemployer to single-employer, either before or after a plan terminates.[2] To the contrary, the text of MPPAA and its implementing regulations contemplate that under Title IV of ERISA, a multiemployer plan will retain its multiemployer status until the last employer incurs a complete withdrawal. This theme pervades the multiemployer rules on plan termination, withdrawal liability, fiduciary responsibility, and guaranteed benefits.

For example, under section 4041A, a multiemployer plan termination does not occur until the earlier of "the cessation of the obligation of all employers to contribute under the plan" or passage of a plan amendment which provides for

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> (A) to which more than one employer is required to contribute,
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> (B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
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> (C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation, except that, in applying this paragraph—
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> > (i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and
> >
> > (ii) for any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the term "multiemployer plan" means a plan described in section 414(f) of the Internal Revenue Code of 1954 as in effect immediately before such date. . . .

29 U.S.C. § 1301(a)(3). By contrast, a "single-employer plan" is defined as "any defined benefit plan . . . which is not a multiemployer plan." 29 U.S.C. § 1301(a)(15).

[2] ERISA expressly permits a multiemployer plan to become another type of plan under certain extremely narrow circumstances, none of which are raised by your inquiry. These are discussed below.

"no credit . . . for service *with any employer*." 29 U.S.C. § 1341A(a)(1), (2) (emphasis added). Similarly, MPPAA sets the date of a termination caused by employer withdrawal at the earlier of "the date *the last employer* withdraws" or the "first day of the first plan year for which *no employer contributions were required* under the plan." 29 U.S.C. § 1341A(b)(2) (emphasis added).

The withdrawal liability rules of MPPAA likewise contemplate that continuation of multiemployer plan status does not require participation by more than one employer. Section 4209(c), for example, ceases to apply in plan years after the year "in which substantially all employers" withdraw from a plan. 29 U.S.C. § 1389(c). See also section 4219(c), under which an employer's withdrawal liability payments are to be redetermined (without regard to the 20-year cap of section 4219(c)(1)(B)) if the employer withdrew in concert with "substantially all employers." 29 U.S.C. § 1399(c)(1)(D).

The provisions of MPPAA dealing with the responsibilities of the board of trustees and other fiduciaries similarly contemplate a retention of multiemployer status. The statute specifies that the duties of a plan administrator continue until "the plan assets are distributed in *full satisfaction of all nonforfeitable benefits* under the plan." 29 U.S.C. § 1341A(c)(2) (emphasis added). PBGC's regulation on the powers and duties of a plan sponsor following a mass withdrawal of "substantially all employers" further specifies that the plan sponsor shall continue to administer the plan pursuant to the multiemployer plan rules. 29 C.F.R. § 4041A.21. Neither the statutory or regulatory provisions would have meaning if the plan ceased to be a multiemployer plan solely because a single employer continued to have an obligation to contribute.

The guaranty provisions of ERISA also militate against a change in plan status. Section 4022 specifies that the single-employer guaranty rules apply to a single-employer plan "which terminates." By contrast, under section 4022A, PBGC's guaranty of benefits under a multiemployer plan applies to a multiemployer plan "which is insolvent" (regardless of whether it is terminated). Thus, for a plan to transform from a multiemployer plan into a single-employer plan would not only fundamentally alter the nature and timing of PBGC's guaranty with respect to the plan, it would also frustrate Congress's clearly expressed intention that the insurable events be different for the two types of plans. 29 U.S.C. § 1361. Furthermore, because a multiemployer plan remains ongoing after it terminates, a post termination devolution by a multiemployer plan into a single-employer plan creates the

anomalous possibility of a plan terminating twice, first as a multiemployer plan and then as a single-employer plan.[3]

Thus, under a textual analysis, it is plain that ERISA does not allow a multiemployer plan to devolve into a single-employer plan. This conclusion is buttressed by marked differences in the design and operation of the two regimes. A multiemployer plan terminates by occurrence of one of the events specified in ERISA § 4041A(a), whereas a single-employer plan can only terminate in accordance with sections 4041 and 4042. The date of plan termination for a single-employer plan is determined differently from that of a multiemployer plan (compare section 4048(b)(1) with section 4041A(b)), and just as a plan cannot terminate twice, it cannot have two termination dates. When a multiemployer plan terminates, it generally does not cease to exist but rather continues to collect contributions (and withdrawal liability) until the plan is sufficient. By contrast, when a single-employer plan terminates, it soon goes out of existence, and the employer obligation to contribute ceases.

The contrast between the multiemployer and single-employer programs does not stop there. The insurable event for a multiemployer plan is cash-flow insolvency, in which event the plan must seek financial assistance from PBGC. 29 U.S.C. §§ 1322A(a)(2), 1361, 1426(f), 1431, 1441(d). The insurable event for a single-employer plan is termination of the plan at a time when the plan's assets are insufficient to pay benefits at the guaranteed level. *See* 29 U.S.C. §§ 1322(a), 1341(b)(4), 1342(d)(1)(B)(iii), 1361; PBGC Op. Ltr. 91-1 (Jan. 14, 1991). When an employer withdraws from an underfunded multiemployer plan, it generally owes withdrawal liability, a concept unknown to the single-employer regime.[4] Premiums, too, are calculated differently for multiemployer and single-employer plans, and are allocated to separate funds, which may be used only for the respective guaranty program under which the premiums were paid. 29 U.S.C. §§ 1305(a), (e), (f), 1306(a), 1361. Finally, the nature and amount of PBGC's guaranty is also markedly different as between the two types of plans.

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[3] Section 4041's statement that it is the "exclusive" means of terminating a single-employer plan also strongly implies that a plan subject to its provisions has not yet been terminated.

[4] Section 4063 of ERISA describes a somewhat analogous form of liability in the single-employer context. *See generally* 29 U.S.C. § 1363(b).

It is also significant that Title IV of ERISA speaks directly to other possible changes in plan status. Conversion of a covered plan to an individual account plan constitutes a termination and thus subjects a plan to one or the other termination regime, depending on whether the plan is a single employer plan, *see* 29 U.S.C. § 1341(e), or multiemployer plan, *see* 29 U.S.C. § 1341A. Title IV also addresses mergers between multiemployer plans and single-employer plans. 29 U.S.C. § 1412. Title IV originally permitted certain plans that would become multiemployer plans under MPPAA's new definition irrevocably to elect single-employer plan treatment, so long as they did so within one year after MPPAA's enactment. 29 U.S.C. § 1453. These provisions describe specific circumstances under which a covered multiemployer plan could become another type of plan. That Congress attended to multiemployer plans changing status in certain limited situations strongly implies that a multiemployer plan cannot simply devolve into a single-employer plan in other situations, as when the number of employers is reduced to fewer than two. As the Senate Committee on Labor and Human Resources noted, MPPAA "clarifies that multiemployer status continues after termination even if, for instance, the termination is a result of all employers withdrawing from the plan." Senate Comm. on Labor and Human Resources, 96th Cong., *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 11 (Comm. Print 1980).

For the foregoing reasons, we conclude that a multiemployer plan does not devolve into a single-employer plan as a result of a reduction to less than two the number of employers required to contribute pursuant to a collective bargaining agreement. I hope this is helpful.

Very truly yours,

/s/

James J. Keightley
General Counsel