

Pension Benefit Guaranty Corporation

76-119

November 15, 1976

REFERENCE:

[\*1] 4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer

OPINION:

This is in response to your request that the Pension Benefit Guaranty Corporation (the "PBGC") reconsider its determination that the \* \* \* (the "Plan") does not provide for the return of residual Plan assets to the \* \* \* (the "Company"). In this regard, you indicated that a \* \* \* "fair" reading of Article IV, paragraphs 1, 4 and 5 of the Plan satisfies the requirements in section 4044(d)(1) of the Employee Retirement Income Security Act of 1974 (the "Act") and that, therefore, residual Plan assets should be returned to the Company.

Section 4044(d)(1)(C) of the Act provides that upon a plan's termination, the residual assets of a plan may be distributed to the employer maintaining the plan "if the plan provides for such a distribution in these circumstances." (Emphasis added.) Although Article IV, paragraphs 1, 4 and 5 may authorize the return of excess contributions to the Company while the Plan is ongoing, it appears that Article XI, \* \* \* paragraph 4 of the Plan supercedes those provisions in the event of the Plan's termination. As you are aware, that paragraph provides, inter Alia, that: [\*2]

"In the event of termination of this Agreement, . . . the Company may terminate the Plan . . . provided, however, that no such action shall operate to recapture for the Company any contributions or payments previously made to the Fund . . ." (Emphasis added.)

In light of the foregoing, it does not appear that there are grounds for the PBGC to alter its determination that the Plan does not provide for a return of residual Plan assets to the Company. Accordingly, all Plan assets must be distributed to Plan participants and their beneficiaries, pro rata, in relation to their accrued benefits.

Henry Rose  
General Counsel