

Pension Benefit Guaranty Corporation

85-17

June 10, 1985

REFERENCE:

[*1] 4204 Sale of Assets

OPINION:

This responds to your request for the PBGC's opinion concerning Section 4204 of ERISA. Specifically you wish to know whether a seller and a purchaser can retroactively bring a sale of assets within the coverage of Section 4204 by posting an appropriate bond and by amending the sales contract.

Under Section 4204 a complete or partial withdrawal does not occur as a result of a bona fide, arm's length sale of assets to an unrelated party if (1) the purchaser has an obligation to contribute for substantially the same number of contribution base units for which the seller had an obligation to contribute; (2) the purchaser provides a bond for 5 plan years following the sale; and (3) the contract for the sale provides that the seller is secondarily liable to the plan if the purchaser withdraws during those 5 plan years and fails to pay its liability.

If an employer ceases to contribute to a plan as a result of a sale of assets that fails to meet the conditions described above, then a withdrawal may occur. Further, if the conditions are initially met, but there is a subsequent failure of condition, then the plan find that a withdrawal has occurred as of the date of the [*2] seller's cessation of contributions. An example of when this may occur is when the purchaser fails to maintain a bond or escrow. See PBGC Opinion Letter 83-8 (March 25, 1983).

Thus, it is a plan's responsibility to determine whether a withdrawal has occurred, including whether the conditions of Section 4204 are met. Further, it is the PBGC's view that the plan has discretion in determining whether a condition has been met in a timely fashion. Of course any dispute concerning a plan's determination of the applicability of Section 4204 is subject to the dispute resolution procedures contained in Sections 4219 and 4221 of ERISA.

I hope this has been of assistance. If you have further questions concerning this matter please contact * * * of my office at the above address or at (202) 254-4873.

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General Counsel