

Pension Benefit Guaranty Corporation

85-28

December 2, 1985

REFERENCE:

[\*1] Joint Implementation Guidelines

OPINION:

This responds to your request for the PBGC's opinion concerning the use of a "participating" annuity contract issued by an insurance carrier (the "Annuity Contract") to satisfy all accrued benefits in connection with the proposed termination of the

\*\*\* Plan (the "Plan") and the reestablishment by Company (the "Company") of a new defined benefit plan. You propose that the trust established under the Plan will be used as the trust under the new plan and will hold both the Annuity Contract and all assets of the new plan.

The facts, as we understand them, are essentially as follows: The plan administrator has proposed to terminate the Plan, which has assets substantially in excess of the present value of accrued benefits. The date of termination is December 31, 1984. The Company has established a new defined benefit plan covering active participants in the Plan and Providing substantially the same benefits as did the Plan. All benefits under the Plan to the date of termination will be vested and annuitized, as provided by the Implementation Guidelines on asset reversions issued jointly on May 23, 1984, by the PBGC, the Department of Labor, and the [\*2] Treasury Department ("the Guidelines"). Residual assets will revert to the Company as provided in PBGC's Allocation of Assets Regulation, 29 C.F.R. § 2618.30, except for residual assets attributable to employee contributions, if any, which will be determined and allocated among the pool of eligible participants and beneficiaries in accordance with Section 4044(d)(2) of ERISA and 29 C.F.R. §§ 2618.31 and 2618.32.

The plan administrator proposes to annuitize benefits by the purchase of the Annuity Contract in consideration for the payment of a one-time premium. You have represented that the Annuity Contract is nearly identical to that used in the spinoff/termination transaction of \*\*\* which was given PBGC approval in the enclosed letter to you dated \*\*\* letter"). n1 See also Opinion Letter 85-9, approving use of a participating annuity contract in a termination/reestablishment case.

n1 Unlike the \*\*\* contract, the annuity holder will only be permitted to withdraw assets so that the asset value in the separate account drops to the level at which a surplus strain charge might otherwise be imposed, but not below it. For this reason, there is never a surplus strain charge. The annuity holder gives up its right to withdraw assets below the level at which a surplus strain charge might otherwise be imposed, and in return the insurance company assumes the risk of incurring surplus strain if the assets fall below that level because of poor experience under the contract. Also, the fee charged by the insurance company in the \*\*\* case may be higher than that charged in the \*\*\* case. [\*3]

All accrued benefits as of the termination date will be guaranteed under the Annuity Contract as the unconditional, irrevocable and non-cancellable obligation of the insurance company. In no event, including favorable or unfavorable investment or actuarial experience, can the amounts payable to participants under the Annuity Contract increase or decrease. The Annuity Contract will provide for all optional forms of benefit payments available under the Plan. If there is a failure by the insurance company to make benefit payments at the time or in the manner set forth in the Plan and the Annuity Contract, you represent that affected former Plan participants would have a cause of action against the insurance company to enforce the guaranteed benefits.

When the Notice of Sufficiency is issued by the PBGC, the Annuity Contract will be purchased by the trustee of the Plan. Lump sums will then be paid out to those receiving lump sum settlements of their benefits at that time. Then the trustee will deliver the surplus assets in the trust to the Company as its reversion. Rather than terminate the trust, the Company plans to continue it in existence, holding both the Annuity Contract [\*4] and the contributions to fund benefits under the new plan. Thus any returns to the contractholder by reason of the participation feature under the Annuity Contract will revert to the plan trustee rather than the Company.

For the reasons set forth in the \* \* \* letter and Opinion Letter 85-9 it is the PBGC's opinion that the purchase of the Annuity Contract in satisfaction of all accrued benefits in connection with the above-described termination/reestablishment transaction is permissible under Title IV of ERISA. Further, under the circumstances of this case, formal termination of the Plan's trust is not required to effect a termination of the Plan. Thus, we have no objection to the holding of the Annuity Contract by the trust created under the Plan.

Finally, the conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions as to the acceptability of this type of arrangement under Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

I hope this is of assistance. If you have further questions concerning this matter, please contact \* \* \* of my staff at the above address [\*5] or at (202) 254-4895.

Edward R. Mackiewicz  
General Counsel