Pension Benefit Guaranty Corporation

85-3

January 30, 1985

REFERENCE:
[*1] 4211 Withdrawal Liability

OPINION:

This responds to your request for the PBGC's opinion concerning section 4211 of ERISA as it relates to the allocation of unfunded vested benefits in multiemployer pension plans to which employee contributions are made by employees of some but not all of the contributing employers. You state that your plan is such a plan, but that employees of your employer do not make contributions. The level of benefits is set in accordance with the negotiated level of contributions from each source. You wish to know whether such a pension plan may include employee contributions in the allocation fractions determined pursuant to Section 4211 in determining an employer's withdrawal liability. Alternatively, you wish to know whether a portion of an employer's contributions may be deemed to be employee contributions and therefore excluded from the numerator of the employer's allocation fractions upon its withdrawal.

As you note, vested benefits under a plan to which both employers and employees contribute will be supported by both sources of income and, as in your case, may be based directly on these contribution levels. In such cases if only employer contributions are [*2] counted in the allocation fractions, an employer whose employees make no contributions may, upon withdrawal, be allocated a share of unfunded vested benefits which is greater than the share of an employer whose employees earn identical benefits based on the same level of contributions part of which, however, is paid by its employees. You suggest that an equitable allocation can be achieved only if the statute is interpreted to allow appropriate adjustments to the fractions.

Section 4211 (b)(2)(E)(ii) defines the allocation fraction under the presumptive rule as a fraction --

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

Substantially the same fraction is found [*3] in Sections 4211(b)(3)(B), (C)(2)(B)(ii), (C)(2)(C)(ii), (C)(3)(B), and (C)(4)(D)(ii).

Each of the above fractions is based on a ratio of employer contributions. The PBGC has previously addressed the question of what constitutes an employer contribution for purposes of the denominators of the statutory allocation fractions in its Interim Regulation on Allocating Unfunded Vested Benefits, 29 C.F.R. 2642. In 29 C.F.R. § 2642.6(a) "contributions made" and "total amount contributed" are described as "amounts considered contributed to the plan for purposes of section 412(b)(2)(A) of the Internal Revenue Code." The regulation further states that "[e]mployee contributions, if any, should be excluded from the totals."

In our view "contributions required to be made by the employer" for purposes of the numerator of the allocation fractions are also exclusive of employee contributions. However, whether amounts contributed by an employer may be deemed employee contributions and thus excluded would depend on the facts and circumstances of each case. This determination must be made in the first instance by the Plan sponsor and is subject to the statute's dispute resolution procedures. Thus, [*4] it would be inappropriate for the PBGC to interject itself in this process by issuing an opinion on the facts of your withdrawal. The PBGC by this letter takes no position on whether amounts contributed by an employer are ever excludable as employee contributions.

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

Edward Thomas Veal
Acting Director, Legal Department