

Pension Benefit Guaranty Corporation

91-6

August 19, 1991

REFERENCE:

[*1] >4214>

>4214(b)>

4219(c)(7) Notice & Collection of Withdrawal Liability - Alternate Payment

4224 Alternate Method for Payment

OPINION:

I write in response to your letter requesting an opinion concerning the adoption of plan rules providing for terms and conditions for the satisfaction of an employer's withdrawal liability in accordance with Sections 4219(c)(7) and 4224 of Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § § 1399(c)(7) and 1404. Specifically, you seek the PBGC's opinion as to whether the trustees of a multiemployer pension plan can adopt plan rules modifying an employer's withdrawal liability payment schedule to take into account the financial condition of a withdrawing employer. You also request the PBGC's opinion as to what conditions or limitations should be imposed on withdrawing employers seeking to have their payment schedules modified.

As we understand the facts, the * * * Pension Plan * * * is a multiemployer pension plan that has been terminated by amendment pursuant to Section 4041A(a)(1) of ERISA, 29 U.S.C. § 1341A(a)(1). Several employers have requested to have their withdrawal liability payment schedule modified because payment [*2] in accordance with Section 4219(c) of ERISA, 29 U.S.C. § 1399(c), results in the employer being unable to continue in business. In such cases, the Trustees of the Plan believe that it may be prudent to modify a financially troubled employer's withdrawal liability payment schedule in order to allow the employer to continue in business and make additional withdrawal liability payments to the Plan. Accordingly, the Trustees of the Plan seek to adopt plan rules in accordance with Sections 4219(c)(7) and 4224 of ERISA, 29 U.S.C. § 1399(c)(7) and 1404, which will allow them to modify a financially troubled employer's withdrawal liability payment schedule in order to maximize the net amount of withdrawal liability payments received.

Sections 4219(c)(7) and 4224 of ERISA, which are virtually identical, permit plans certain latitude regarding the satisfaction of an employer's withdrawal liability. Section 4224 of ERISA provides:

A multiemployer pension plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with [ERISA] and with such regulations as may be prescribed by the [PBGC].

29 U.S.C. § 1404. [*3] The PBGC has not promulgated regulations under this section.

The legislative history indicates that the purpose of the provision is to enable trustees to weigh the cost of collecting withdrawal liability payments against the expected return in order to maximize recovery.

[Section 4224] authorizes plans . . . to provide an alternative method for payment of withdrawal liability. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of a responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. Thus, for example, where it is prudent and in the participants' interest, plan trustees may decide to settle a withdrawal liability dispute for less than the full amount claimed, to cooperate with an employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment of further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount of liability likely to be recovered.

126 Cong. Rec. H7889 (daily ed., August 26, 1980) (statement [*4] of Rep. Thompson) (emphasis added).

The trustees' proposal to adopt plan rules which allow modification of a financially troubled employer's withdrawal liability payments is unlike the examples cited in the legislative history. The proposal does not involve compromising

a disputed claim, cooperating with other creditors in a contractual or court supervised renegotiation of an employer's indebtedness, or foregoing collection of withdrawal liability. Rather, the trustees seek a mechanism to deal with financially troubled employers before informal or court supervised insolvency proceedings become necessary.

We conclude that rules which allow the trustees of a multiemployer pension plan to modify and lower a financially troubled employer's withdrawal liability payment schedule are consistent with ERISA and permissible under Sections 4219(c)(7) and 4224. In situations where payments in accordance with Section 4219(c) of ERISA will cause an employer to liquidate, plan rules which authorize trustees to modify withdrawal liability payment schedules enable the trustees to collect a greater portion of the employer's total withdrawal liability. The employer can pay a lesser amount over a [*5] longer period of time. Such rules are consistent with Sections 4219(c)(7) and 4224 of ERISA because they recognize the discretion reserved for plan fiduciaries to facilitate the collection of withdrawal liability on behalf of the plan and its participants. Plan rules which provide alternative terms or conditions for satisfaction of withdrawal liability are allowable under Sections 4219(c)(7) and 4224 of ERISA if they are reasonable and maximize the net amount of withdrawal liability for the plan at supportable costs. We note that the proposed modification is structured to yield the total payment of withdrawal liability, albeit over a longer period of time.

The decision to modify and lower an employer's withdrawal liability schedule pursuant to plan rules adopted in accordance with Section 4219(c)(7) and 4224 of ERISA is subject to the fiduciary standards prescribed by Title I of ERISA. The trustees must look to what is best for the plan and its participants in adopting rules allowing modification of withdrawal liability payment schedules and in determining what terms and conditions should be imposed on a specific employer seeking to have its payment schedule modified. n1 See [*6] 29 U.S.C. § 1104. The United States Department of Labor is responsible for enforcing the fiduciary standards prescribed by Title I of ERISA. Any questions concerning the application of the fiduciary standards in a specific case should be referred to them.

n1 The trustees' decision to modify an employer's withdrawal liability payment schedule pursuant to rules adopted in accordance with Sections 4219(c)(7) and 4224 of ERISA possibly could be viewed as an extension of credit between the plan and a party in interest which is prohibited by Section 406(a)(1)(C) of ERISA, 29 U.S.C. § 1106(a)(1)(C). However, Section 4219(d) of ERISA provides that the prohibited transactions described by Section 406(a) of ERISA do not apply to actions permitted under MPPAA. See also 29 U.S.C. § 1108(b)(10).

We note that under Section 4214(b) of ERISA, 29 U.S.C. § 1394(b), plan rules authorized under Title IV of ERISA must operate and apply uniformly to all employers, although they may take into the employer's creditworthiness. Rules which take into account the creditworthiness of an employer should state with particularity the categories of creditworthiness the plan will use, the specific differences [*7] in treatment accorded employers in different categories, and the standards and procedures for assigning an employer to a category.

I hope this letter is of assistance. If you have any additional questions, please contact D. Bruce Campbell of my staff at the above address or at (202) 778-1918.

Carol Connor Flowe
General Counsel