

Pension Benefit Guaranty Corporation

94-8

September 30, 1994

REFERENCE:

[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
>4211(>
>4211(4)(B)>
4219 Notice & Collection of Withdrawal Liability
4221 Resolution of Disputes
>29 USC 1461 note>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC"). Your first request concerns a particular application of the principles set forth in the PBGC's Notice entitled "Multiemployer Pension Plans; Withdrawal Liability in Plans without Unfunded Vested Benefits," 56 Fed. Reg. 12288 (March 1991) (the "March 1991 Notice"), copy enclosed. Your second request concerns the determination of reallocated unfunded vested benefits with respect to certain plans covering employers in the building and construction industry.

With regard to your first request, PBGC believes that the application of the principles set forth in the March 1991 Notice to particular fact patterns and allocation methods is best left to plan sponsor review and arbitration under sections 4219 and 4221 of ERISA, subject to judicial review.

In your second request, you ask about an employer subject to the special "construction industry" withdrawal rule in section 4203(b) of [*2] ERISA who no longer participates in a plan but has not withdrawn under that rule. More specifically, you ask whether the unfunded vested benefits otherwise allocable to such an employer must be included in reallocated unfunded vested benefits when determining the withdrawal liability of withdrawing employers under the "presumptive rule" in section 4211(b) of ERISA.

Section 4211(b)(4)(B) of ERISA provides that "[e]xcept as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of --

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under title 11, United States Code, or similar proceedings[.],

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 4209, 4219(c)(1)(B), or 4225 against an employer to whom a notice described in section 4219 has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation. [*3]

As you know, PBGC has not issued regulations under this provision. However, section 405(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, 1303, permits plan sponsors to act in advance of PBGC's promulgation of regulations, so long as their actions are reasonable.

With regard to your particular question, section 4211(b)(4)(B)(iii) of ERISA does not explicitly require that an employer have withdrawn under section 4203 for the plan sponsor to determine that amounts with respect to that employer should be treated as reallocated unfunded vested benefits when calculating the withdrawal liability of another employer. Accordingly, it would be reasonable for a plan sponsor to determine that amounts are unassessable against an employer, within the meaning of section 4211(b)(4)(B)(iii) of ERISA, even though the employer has not withdrawn under section 4203(b) of ERISA. This approach would be consistent with the principle that, under any method of calculating withdrawal liability, the full amount of unfunded vested benefits under the plan should be allocated among the employers with respect to whom withdrawal liability may be assessed and collected. [*4] See ERISA §

4211(c)(5)(B) (requiring that alternative allocation methods prescribed by regulation provide for the allocation of substantially all of the plan's unfunded vested benefits among employers who have an obligation to contribute under the plan).

If you have further question about these matters, you may call James Beller of my office at 202-326-4076.

Carol Connor Flowe
General Counsel