

Multiemployer

B U L L E T I N

Pension Benefit Guaranty Corporation

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Waiver of Seller's Bond

Introduction

The Pension Benefit Guaranty Corporation ("PBGC") has received numerous requests for advice concerning the bonding and escrow requirements imposed on employers that sell their assets pursuant to transactions covered under section 4204 of the Employee Retirement Income Security Act of 1974.

This Bulletin discusses a number of circumstances under which sponsors of multiemployer plans might waive the seller's bond or escrow requirement. This Bulletin provides guidance to employers that sell their assets, and to plan sponsors of multiemployer plans.

Background

The Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 (the "Multiemployer Act")

became law on September 26, 1980 and amended the Employee Retirement Income Security Act of 1974 ("ERISA"). As a result of the Multiemployer Act, an employer that withdraws, or partially withdraws, from a multiemployer pension plan covered under Title IV of ERISA may be liable to the plan for a portion of the plan's unfunded vested benefits. The withdrawal liability rules generally apply to withdrawals occurring after April 28, 1980.

Section 4204 of ERISA provides that a cessation of contributions or covered operations resulting from the bona fide, arm's-length sale of assets of a contributing employer to an unrelated party will not be considered a withdrawal if three conditions are met. These conditions are enumerated in section 4204(a)(1)(A)-(C).

Section 4204(a)(3)(A) provides that if the seller is liquidated (or if all, or substantially all, of the seller's assets are distributed) within the 5-year period described in section 4204(a)(1)(C) (the first 5 plan years commencing after the sale), then the seller must post a bond, or place an amount in escrow, to the plan. The bond or escrow must equal the present value of the withdrawal liability the seller would have had if the sale of assets had constituted a partial or complete withdrawal. The bond or escrow is payable to the plan if the purchaser withdraws from the plan within the first five plan years commencing after the sale

and does not pay its withdrawal liability at any time thereafter.

Section 4224 of ERISA authorizes multiemployer plans to adopt plan rules providing for terms and conditions for the satisfaction of an employer's withdrawal liability other than those specified in Part 1 of Subtitle E of Title IV of ERISA. Such rules must be consistent with the provisions of ERISA and regulations prescribed by the PBGC.

Permissible Waivers

PBGC has determined that it would be consistent with the Multiemployer Act for a plan to adopt a rule allowing for modification of the seller's bond or escrow requirement under some circumstances. For example, waiver or reduction of the seller's bond or escrow may be appropriate if the bonding requirement would frustrate a transaction under which an ongoing, solvent purchaser would purchase the assets and assume the contribution requirements of a seller that is a Debtor in a case under the Bankruptcy Code. Under these circumstances, the waiver may be in the best interest of the plan. The plan's contribution base might be more secure if a purchaser that might not otherwise have entered the plan would assume an obligation to contribute to the plan for substantially the same number of base units as the seller. Furthermore, in the situation described, as

a practical matter, the seller might be unable to post the bond or escrow.

Plan rules might also permit waiver when the purchaser's financial condition indicates that the seller's bond is not necessary to protect the plan. For example, if a plan had such a rule and if the plan sponsor were to determine that a purchaser's financial resources would be sufficient to pay its withdrawal liability should it withdraw, the plan sponsor might determine that it would be appropriate to waive, reduce or cancel the seller's bond before the end of the five plan years beginning after the sale. Factors that the plan sponsor should consider in making these determinations include (but are not limited to) the purchaser's creditworthiness, general financial condition, stability and past financial history, anticipated future financial prospects in light of industry conditions, and past contribution history.

The purchaser's financial condition may also indicate that the seller's bond is not necessary to protect the plan in other situations. For example, a purchaser might agree to assume the full amount of the unfunded vested benefits allocable (as of the date of sale) to the transferred operations of a seller, even though the purchaser's share under section 4204(b)(1) might be a lesser amount. In addition, the plan sponsor might be able to obtain security

arrangements different from and possibly more advantageous to the plan than those specified by the Act. Under these circumstances, the plan sponsor may decide that the seller's bond is unnecessary to protect the plan. Further, because the purchaser's additional undertakings constitute an alternative method of satisfying the seller's contingent liability, the plan sponsor may also decide to release its right to collect the contingent liability from the seller. Thus, assume employer S sells its covered operations to employer P in a transaction described in section 4204. The amount of the unfunded vested benefits allocable to S under section 4211 is \$1 million, while P's allocable share under section 4204(b)(1) would be \$500,000. The plan sponsor may decide to waive the seller's bond and also release its right to collect the underlying liability from S where the following conditions are met: (1) P agrees to assume the full amount of S's allocable share; (2) P provides such additional security as the plan sponsor may require; and (3) the plan sponsor determines that P is financially able to meet its obligations to the plan.

The decision to waive the bond or escrow or to release the plan's right to collect the contingent liability from the seller in a particular case is generally the responsibility of the plan sponsor. Of course, any decision to waive or modify the bond or escrow requirement must be made in a

manner consistent with the plan sponsor's fiduciary duties under ERISA and its powers and duties under the plan or trust. Accordingly, all such decisions shall be made solely in the interests of plan participants and beneficiaries and with the care, skill, prudence and diligence required by section 404(a)(1) of ERISA. Also, plan sponsors should note that section 4214 of ERISA provides that all plan rules relating to withdrawal liability must operate uniformly and be applied in an impartial manner.

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