

Exemption From Bond/Escrow Requirement Relating to Sale of Assets by an Employer Who Contributes to a Multiemployer Plan; Tuscan Dairy Farms, Inc.

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of exemption.

SUMMARY: The Pension Benefit Guaranty Corporation has granted a request from Tuscan Dairy Farms, Inc. for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended, with respect to the Local 584 Pension Trust Fund. A notice of the request for exemption from the requirement was published on July 24, 1996 (61 FR 38481). The effect of this notice is to advise the public of the decision on the exemption request.

ADDRESSES: The nonconfidential portions of the request for an exemption and the PBGC response to the request are available for public inspection at the PBGC Communications and Public Affairs Department, Suite 240, 1200 K Street, N.W., Washington, DC 20005-4026, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Karen L. Morris, Attorney, Office of General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, N.W., Washington, D.C. 20005; telephone 202-326-4127 (202-326-4179 for TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

Section 4204 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, ("ERISA" or "the Act"), provides that a bona fide arm's-length sale of assets of a contributing employer to an unrelated party will not be considered to result in a withdrawal if three conditions are met. These conditions, enumerated in section 4204(a)(1)(A)-(C), are that—

(A) The purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller was obligated to contribute;

(B) The purchaser obtains a bond or places an amount in escrow, for a period of five plan years after the sale, in an amount equal to the greater of the seller's average required annual contribution to the plan for the three plan years preceding the year in which

the sale occurred or the seller's required annual contribution for the plan year preceding the year in which the sale occurred (the amount of the bond or escrow is doubled if the plan is in reorganization in the year in which the sale occurred); and

(C) The contract of sale provides that if the purchaser withdraws from the plan within the first five plan years beginning after the sale and fails to pay any of its liability to the plan, the seller shall be secondarily liable for the liability it (the seller) would have had but for section 4204.

The bond or escrow described above would be paid to the plan if the purchaser withdraws from the plan or fails to make any required contributions to the plan within the first five plan years beginning after the sale.

Additionally, section 4204(b)(1) provides that if a sale of assets is covered by section 4204, the purchaser assumes by operation of law the contribution record of the seller for the plan year in which the sale occurred and the preceding four plan years.

Section 4204(c) of ERISA authorizes the Pension Benefit Guaranty Corporation ("PBGC") to grant individual or class variances or exemptions from the purchaser's bond/escrow requirement of section 4204(a)(1)(B) when warranted. The legislative history of section 4204 indicates a Congressional intent that the sales rules be administered in a manner that assures protection of the plan with the least practicable intrusion into normal business transactions. Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations 16 (Comm. Print, April 1980); 128 Cong. Rec. S10117 (July 29, 1980). The granting of an exemption or variance from the bond/escrow requirement does not constitute a finding by the PBGC that a particular transaction satisfies the other requirements of section 4204(a)(1). Such questions are to be decided by the plan sponsor in the first instance, and any disputes are to be resolved in arbitration. 29 U.S.C. 1382, 1399, 1401.

Under the PBGC's regulation on variances for sales of assets (29 CFR Part 4204, available at 61 FR 34002, 34084 (July 1, 1996)), a request for a variance or waiver of the bond/escrow requirement under any of the tests established in the regulation (29 CFR 4204.12-4204.14) is to be made to the plan in question. The PBGC will consider waiver requests only when the request is not based on satisfaction of one of the four regulatory tests or when

the parties assert that the financial information necessary to show satisfaction of one of the regulatory tests is privileged or confidential financial information within the meaning of 5 U.S.C. 552(b)(4) (the Freedom of Information Act).

Under § 4204.22 of the regulation, the PBGC shall approve a request for a variance or exemption if it determines that approval of the request is warranted, in that it—

(1) Would more effectively or equitably carry out the purposes of Title IV of the Act; and

(2) Would not significantly increase the risk of financial loss to the plan.

Section 4204(c) of ERISA and section 4204.22(b) of the regulation require the PBGC to publish a notice of the pendency of a request for a variance or exemption in the Federal Register, and to provide interested parties with an opportunity to comment on the proposed variance or exemption.

The Decision

On July 24, 1996 (61 FR 38481), the PBGC published a request from Tuscan Dairy Farms, Inc. (the "Purchaser") for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) with respect to its August 18, 1995, purchase of certain assets of American Farms, Inc., Progressive Milk Co., Ltd., and 339 Milk, Inc. (the "Sellers"). No comments were received in response to the notice.

According to the request, on August 18, 1995, the Purchaser acquired certain assets of the Sellers. The Sellers were obligated to contribute to the Local 584 Pension Trust Fund (the "Plan") for certain employees at operations subject to the sale. The Purchaser is required to contribute to the Plan for substantially the same number of contribution base units with respect to employees of the Sellers who work at operations subject to the sale. The Sellers have agreed to be secondarily liable for any withdrawal liability they would have had with respect to the sold operations (if not for section 4204) should the Purchaser withdraw from the Plan within five years of the sale and fail to pay its withdrawal liability.

The estimated amount of the unfunded vested benefits allocable to the Sellers with respect to the operations subject to the sale is \$177,657. The Purchaser does not have an estimate of the unfunded vested benefits allocable to it for its other operations covered under the Plan. The amount of the bond/escrow that would be required under section 4204 (a)(1)(B) of ERISA is approximately \$123,905.

The Purchaser submitted a financial statement showing the amount of its net tangible assets. The Purchaser asserted that even though it does not have an estimate of the unfunded vested benefits allocable to its other operations, even if the total unfunded vested benefits of the Plan were allocated to those other operations, Purchaser's net tangible assets exceed the sum of the unfunded vested benefits allocable to the Sellers and the maximum amount that could be allocable to its other operations. The Purchaser has requested confidential treatment of its financial statements on the ground that they are confidential within the meaning of 5 U.S.C. 552.

Based on the facts of this case and the representations and statements made in connection with the request for an exemption, the PBGC has determined that an exemption from the bond/escrow requirement is warranted, in that it would more effectively carry out the purposes of Title IV of ERISA and would not significantly increase the risk of financial loss to the Plan. Moreover, the PBGC has determined that the Buyer satisfies the net tangible assets test contained in section 4204.13(a)(2) of the regulation, and would be entitled to a variance of the bond/escrow requirement from the Plan under section 4204.11 of the regulation. Therefore, the PBGC hereby grants the request for an exemption from the bond/escrow requirement. The granting of an exemption or variance from the bond/escrow requirement of section 4204(a)(1)(B) does not constitute a finding by the PBGC that the transaction satisfies the other requirements of section 4204(a)(1). The determination of whether the transaction satisfies such other requirements is a determination to be made by the Plan sponsor.

Issued at Washington, D.C., on this 7th day of October, 1996.

Martin Slate,

Executive Director.

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BILLING CODE 7708-01-P

Privacy Act of 1974; System of Records

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of a new routine use of records for PBGC-6, Plan Participant and Beneficiary Data—PBGC.

SUMMARY: The Pension Benefit Guaranty Corporation is proposing a new routine use of records for a system of records maintained pursuant to the Privacy Act of 1974, as amended, entitled PBGC-6, Plan Participant and Beneficiary Data—

PBGC. The new routine use will permit disclosure to the public of names and last known addresses of participants who are or may be entitled to benefits under terminated pension plans, and the names and last known addresses of their former employers, so that missing participants will know that they are being sought.

DATES: Comments on the new routine use must be received by November 12, 1996. The new routine use will become effective November 20, 1996, without further notice, unless comments result in a contrary determination and a notice is published to that effect.

ADDRESSES: Comments may be mailed to the Office of the General Counsel, Suite 340, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026, or delivered to that address between 9 a.m. and 4 p.m. on business days. Written comments will be available for public inspection at the PBGC's Communications and Public Affairs Department, Suite 240 at the same address, between 9 a.m. and 4 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: D. Bruce Campbell, Attorney, Office of the General Counsel, Suite 340, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026; 202-326-4123 (202-326-4179 for TTY and TDD).

SUPPLEMENTARY INFORMATION: The PBGC maintains certain information about participants and beneficiaries in terminating and terminated pension plans covered by title IV of the Employee Retirement Income Security Act of 1974, as amended, in a Privacy Act system of records entitled PBGC-6, Plan Participant and Beneficiary Data—PBGC.

To assist the PBGC in locating missing participants and beneficiaries, including missing participants under section 4050 of ERISA, the PBGC previously established routine uses of records for PBGC-6 that permit disclosure of certain information to the Internal Revenue Service, the Social Security Administration, certain labor organizations, private locator services, the United States Postal Service, and to certain other participants and beneficiaries. To provide an additional tool for locating missing participants, PBGC is establishing a new routine use of records for PBGC-6, routine use 11, that will permit disclosure of certain information so that missing participants will know that they are being sought. Routine use 11 will permit disclosure to the public of names and last known addresses of participants and

beneficiaries, and the names and addresses of participants' former employers. Such information will be disclosed only if the PBGC is unable to make benefit payments because the address it has does not appear to be current or correct.

For the convenience of the public, PBGC-6, as amended, is published in full below with new routine use 11 italicized.

Issued in Washington, DC, this 9th day of October 1996.

Martin Slate,

Executive Director, Pension Benefit Guaranty Corporation.

PBGC-6

SYSTEM NAME:

Plan Participant and Beneficiary Data—PBGC.

SECURITY CLASSIFICATION:

Not applicable.

SYSTEM LOCATION:

Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026 and/or field benefit administrator, plan administrator, and paying agent worksites.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Participants and beneficiaries in terminating and terminated pension plans covered by Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

CATEGORIES OF RECORDS IN THE SYSTEM:

Names, addresses, telephone numbers, sex, social security numbers and other Social Security Administration information, dates of birth, dates of hire, salary, marital status (including domestic relations orders), time of plan participation, eligibility status, pay status, benefit data, health-related information, insurance information where plan benefits are guaranteed by private insurers, and initial and final PBGC determinations (29 CFR 2606.22 and 2606.60). The records listed herein are included only as pertinent or applicable to the individual plan participant or beneficiary.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 1055, 1056(d)(3), 1302, 1321, 1322, 1322a, 1341, 1342 and 1350.

PURPOSE(S):

This system of records is maintained for use in determining eligibility for benefits under plans covered by Title IV of ERISA, including determinations as