

U.S. DEPARTMENT OF LABOR

Pension and Welfare Benefit Programs

Washington, D.C. 20216



MAR 13 1978

OPINION 78-6 A

Mr. David M. Helfeld
Arbitrator
DX-2, Faculty Residences
University of Puerto Rico
Rio Piedras, Puerto Rico 00923

3(10)

4(a)

Dear Mr. Helfeld:

This is in response to your request for an opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Plan de Pensiones de los Trabajadores de la Puerto Rican Cement Company, Inc., Division de San Juan (the Plan) is covered by ERISA.

You advise that the Plan was established in 1953 by the Puerto Rican Cement Company (the Company). On February 11, 1976, the Company notified La Union de Trabajadores de la Industria del Cemento "Puerto Rico", Local 956 that it was ceasing operations. In the subsequent process of liquidating the Plan, the Board of Trustees became deadlocked whereupon you were appointed Arbitrator to resolve all issues involved in liquidating the Plan. Among the issues to settle is the applicability of ERISA to the Plan in allocating assets among participants.

Section 4(a) of ERISA provides that generally title I will apply to any employee benefit plan established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce or by any employee organization representing employees engaged in commerce or in any industry or activity affecting commerce, or by both. Exceptions to this general provision are provided in sections 4(b), 201, 301, and 401 of ERISA. None of these exceptions applies to Puerto Rican plans as a class. In addition, section 3(10) defines the term "State" for the purposes of title I to include Puerto Rico.

Thus, title I of ERISA, including part 4 of that title, covers Puerto Rican plans. Therefore, it is the position of the Department of Labor that the Plan de Pensiones de los Trabajadores de la Puerto Rican Cement Company, Inc., Division de San Juan is not excluded from coverage under title I solely by virtue of being established or maintained in Puerto Rico.

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The provisions of title I regarding allocation of the assets of a terminated pension plan are set forth in ERISA section 403(d) (1), which provides as follows:

(d) (1) Upon termination of a pension plan to which section 4021 does not apply at the time of termination and to which [part 4 of title I] applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 4044 of this Act, except as otherwise provided in regulations of the Secretary [of Labor].

In effect, section 403(d) (1) authorizes the Secretary to adopt regulations to permit certain plans (plans covered by part 4 of title I, but not covered by the insurance coverage provisions of section 4021) to allocate assets upon termination in a manner other than that prescribed by section 4044 of ERISA. To date no regulations have been adopted under section 403(d) (1). Therefore, in general, the provisions of section 4044 govern the allocation of plan assets upon termination of a pension plan, regardless of whether section 4021 applies to such plan.

It should be noted that title IV of ERISA, including section 4021, is administered by the Pension Benefit Guaranty Corporation (PBGC). The PBGC is, therefore, the appropriate agency to make a determination as to whether section 4021 applies to the Plan, and no opinion is expressed herein on that question.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (copy enclosed). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions

Enclosure