

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



September 8, 1995

95-24A  
ERISA SECTION 403(c)(1)

Mr. Harold H. Brown  
Height, Brown & Bonesteel  
1620 26th Street  
Suite 4000 North  
Santa Monica, CA 90404

Dear Mr. Brown:

This responds to your request on behalf of the Board of Trustees (the Board) of the Western Growers Pension Plan A (the Plan) for an opinion of the Department of Labor (the Department) regarding the circumstances under which the fiduciary provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) permit a plan administrator to refund overpayments of withdrawal liability assessed pursuant to sections 4201 *et seq.* of Title IV of ERISA in connection with the termination of the plan under section 4041A(a)(2) thereof.<sup>1</sup> Specifically, you inquire whether a plan administrator may refund, without violating the anti-inurement rule contained in ERISA section 403(c)(1), amounts that the plan administrator has determined were wrongly assessed due to computer programming errors of the plan administrator's actuary, regardless of whether the refund has been determined to be required as a result of the review and arbitration processes provided under ERISA sections 4219(b)(2) and 4221.

According to your representations, the Plan is a multiemployer plan as defined by section 3(37) of ERISA that has been terminated as a result of the mass withdrawal of the participating employers. The Plan is administered by the Board, which is responsible for assessing the withdrawal liabilities of the withdrawing employers. You represent that the Plan's actuary, in reviewing the previously made assessments of the withdrawal liabilities, determined that certain of the actuarial assumptions, methods, and interest rates stated in the actuarial valuations were not reflected in the computer-derived output that should have used those assumptions. Specifically, the actuary determined that the intended retirement decrements for anticipated retirements between the ages of 65 and 70, as well as the indicated decrements for active female participants for potential future mortality and disability, were not correctly reflected in the computer-generated calculations. You further represent that these errors occurred because the computer program that generated the valuation output was incorrectly coded. As a result of the incorrect coding, the actual valuation figures did not reflect the stated actuarial assumptions for the Plan.

The actuary also determined that a recalculation for the appropriate years, using the correct coding in the computer program, would result in a material reduction of the previously derived unfunded benefit liability figure and a corresponding reduction in most of the assessments of withdrawal liabilities.<sup>2</sup> The Board wishes to make corrections to the withdrawal liability assessments previously made and to make the appropriate refund or adjustment to the payment schedules to take into account the corrected actuarial calculations. The Board desires to make these

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<sup>1</sup> Interpretation of the provisions of Title IV of ERISA is within the jurisdiction of the Pension Benefit Guaranty Corporation.

<sup>2</sup> Your representations include a statement that the errors in coding also caused underassessments of withdrawal liabilities in a small number of cases.

corrections for all employers that received an overassessment,<sup>3</sup> whether or not the employer has initiated a review of the assessment under ERISA section 4219(b)(2)(A), the assessment is or was subject to arbitration pursuant to ERISA section 4221, or the employer has not contested the assessment at all.

Under these facts, you ask whether the Board may refund the withdrawal liability overpayments under ERISA section 403(c)(2)(A)(ii) or 403(c)(3).

Section 403(c)(1) of ERISA generally provides that the assets of a plan shall never inure to the benefit of any employer, but shall be held for the exclusive purpose of providing benefits to the participants and their beneficiaries of the plan. Similarly, section 404(a)(1)(A) provides, in relevant part, that a fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries. Section 404(a)(1)(D) provides that a fiduciary must act in accordance with the documents and instruments governing the plan insofar as they are consistent with the provisions of Parts I and IV of ERISA.

Section 403(c) contains limited exceptions from the general prohibition against the inurement of plan assets to the benefit of an employer. Section 403(c)(2)(A)(ii) permits the return of contributions or payments made by a mistake of fact or law to an employer from a multiemployer plan within 6 months after the date the plan administrator<sup>4</sup> determines that such a mistake has occurred. Section 403(c)(3) permits the return of withdrawal liability payments determined to be overpayments within 6 months after the date of such determination.

Section 403(c)(2)(A)(ii), as originally enacted, permitted refunds only of employers' payments made because of a mistake of fact. The requirements concerning employers' payment of withdrawal liability, which are contained in sections 4201 through 4219 of Title IV of ERISA, were added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.), a comprehensive modification of ERISA that was intended to improve retirement income security under ERISA for participants and beneficiaries of multiemployer plans. MPPAA also enlarged the scope of section 403(c)(2)(A)(ii) to permit multiemployer plans (though not single employer plans) to refund payments made because of a mistake of law, other than mistakes of law relating to the plan's tax-qualified status. See Pub. L. 96-364, § 410. As a separate matter, MPPAA added subsection 403(c)(3), permitting the return of a withdrawal liability payment "determined to be an overpayment" within 6 months after the date of such determination. See id., § 310.

It is the Department's view that the MPPAA amendment of section 403(c)(2)(A)(ii) was not intended to restrict a plan administrator's discretion to determine whether a contribution or payment has been made because of a mistake, but rather to expand upon the types of mistakes that may be recognized. We find no reason to conclude that, under section 403(c)(2)(A)(ii), the plan administrator is permitted to make such determinations, and therefore to refund payments or contributions, only when required to do so pursuant to a review or arbitration initiated under ERISA sections 4219 or 4221. Thus, it is the view of the Department that, if the Board, acting in its capacity as "plan

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<sup>3</sup> You represent that the Board does not intend to pursue the underassessed employers.

<sup>4</sup> Section 3(16) of ERISA defines the term "administrator" to include the person specifically so designated by the terms of the instrument under which the plan is operated, or if an administrator is not so designated, the plan sponsor. Section 3(16) also defines the term "plan sponsor." A plan sponsor, in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, is the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

administrator," determines that payments of withdrawal liability have been made by a mistake of fact or law, section 403(c)(2)(A)(ii) permits the return of such mistaken payments within 6 months of the Board's determination.<sup>5</sup> Finally, it should be noted that, in determining whether or not a payment may be returned to an overassessed employer or whether or not to pursue underpayments from an underassessed employer, the Board is acting in its fiduciary capacity and is subject to the requirements and standards of ERISA and, to the extent not inconsistent therewith, the Plan documents.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations

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<sup>5</sup> We note that section 403(c)(3) also permits the refund of a withdrawal liability payment that is determined to be an overpayment, provided that the refund is made within 6 months after the date of such determination. This opinion does not address the scope of section 403(c)(3) because, based on your representations, the Department concludes that section 403(c)(2)(A)(ii) would permit the Board acting in its capacity as plan administrator to make a determination that withdrawal liability payments were made by a mistake of fact or law and to refund the erroneous payments, provided the refunds were made within 6 months of the determination.