

Pension Benefit Guaranty Corporation

75-49

November 10, 1975

REFERENCE:

[*1] 4021(b)(13) Plans Covered. Professional Service Employer Plans

OPINION:

This is in response to your letter of October 1, 1975 requesting a confirmation of your opinion that:

". . . a pension plan with less than 25 active participants, established and maintained by a proprietorship controlled by an actuary and consultant, the principal business of which is the rendering of professional services, is not subject to the plan termination insurance provisions of Title IV of the Employee Retirement Income Security Act of 1974 (the "Act")."

As you know, Section 4021(B)(13) excludes from coverage any plan "established and maintained by a professional service employer which does not at any time after the date of enactment of this Act have more than 25 active participants in the plan."

Section 4021(c)(2) defines "professional service employer" for the purposes of Section 4021(b)(13) as follows:

"(A) . . . the term 'professional service employer' means any proprietorship, partnership, corporation or other association or organization (i) owned or controlled by professional individuals or by executors or administrators or professional individuals, (ii) the principal business of which is the performance [*2] of professional services, and * * * (B) the term 'professional individuals' includes but is not limited to, . . . actuaries"

You state in your letter that the principal business of the proprietorship in question is the rendering of professional services. It should be noted that it is the position of the Pension Benefit Guaranty Corporation that to fall within the exclusion of Section 4021(b)(13) the professional services rendered by such a proprietorship must fall within the field of expertise of the professional individual owning or controlling the proprietorship.

As you stated in your letter, the term "active participant" is not defined in the Act; nor has PBGC issued regulations defining this term for purposes of Section 4021(b)(13). The term "active participant," however, has been defined in the Notice of Intent to Terminate regulation to mean:

". . . those participants who are currently employed, or on furlough, leave of absence, or lay-off, if the plan provides that such individuals continue to retain or accrue pension credits. A participant ceases to be an 'active participant' upon incurring a break-in-service as provided by the plan [which are not inconsistent [*3] with section 202 of the Act and section 410 of the Internal Revenue Code], upon terminating employment with a right to a deferred vested benefit, or upon retiring under the terms of the plan."

Thus, it is the opinion of the PBGC that a pension plan maintained by a proprietorship owned or controlled by an actuary, the principal business of which is the performance of actuarial services, which at no time since September 2, 1974 has had more than 25 participants exclusive of those employees who have terminated employment with a right to a deferred vested benefit or who have retired under the terms of the plan, is not subject to the plan termination insurance provisions of Title IV of the Act.

I hope this information will prove useful to you.

Henry Rose
General Counsel