

Pension Benefit Guaranty Corporation

96-1

June 27, 1996

REFERENCE:

[\*1] § 4021(b)(13)

OPINION:

This is a final decision by the Pension Benefit Guaranty Corporation (the "PBGC") regarding the \* \* \* Defined Benefit Pension Plan (the "Plan"). On July 21, 1995, the PBGC issued an initial determination that the Plan is covered under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301-1461. By letter dated August 18, 1995, you requested reconsideration of PBGC's initial determination on behalf of \* \* \*

Based on our review, and for the reasons set forth below, the PBGC has determined that the Plan is exempt from coverage under Title IV of ERISA. Consequently, the request for reconsideration is granted.

**Request for Determination**

By letter dated August 5, 1994, the Company asked whether the Plan was exempt from coverage under ERISA § 4021(b)(13), 29 U.S.C. § 1321(b)(13), as a plan maintained by a professional service employer with fewer than 25 active participants. The Company represented that it qualified for that exemption as "an economic consulting firm."

**Initial Determination**

In its letter of July 21, 1995, the PBGC indicated, in part, [\*2] that based on its review of the services performed by the Company and the expertise required to perform them, and "since there are no state licensing requirements for economists, we determine that [the] section 4021(b) exclusion does not apply to the Plan."

**Request for Reconsideration**

The Company requested reconsideration in August 1995. In that request, the Company stressed that three of the owners have Doctor of Philosophy Degrees in economics, and the fourth is a certified public accountant. In addition, the Company expanded the description of its business to clarify that its expertise involved international economics and accounting issues with respect to transfer pricing, tax issues, and international trade and sector analysis and that its clients included multinational corporations, trade associations and the Internal Revenue Service.

Subsequently, the Company provided additional information that indicated that all of the Company's work is economic analysis, which involves applying "the entire range of analytical tools from microeconomic analysis, mathematical economics and econometrics to their solution." While the Company's clients potentially can appear in [\*3] an administrative hearing or trial over issues on which the Company provides its services, only about 5% of their matters go to hearing or trial, and, in those matters less than 2% of the Company's billable work is actual testimony.

**Discussion**

Section 4021(b)(13) of ERISA 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 participants in the plan.

A "professional service employer" is an entity whose principal business is the performance of professional services, and is owned or controlled by professional individuals or their executors or administrators. ERISA § 4021(c)(2)(A).

A representative, but non-exclusive, list of professional individuals is listed in ERISA § 4021(c)(2)(B). The list includes social scientists and public accountants, but does not specify economists.

Where an occupation is not listed, the PBGC will analyze the services performed and the expertise required to perform them. PBGC Opinion Letters 80-14, 80-13, 80-12, 79-12. In such cases, a professional generally is one who provides services which require knowledge of [\*4] an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship or from training in the performance of routine mental, manual or physical processes. The rendering of professional services generally requires the consistent exercise of discretion and judgment in its performance and would be predominantly intellectual in character. PBGC Opinion Letter 79-12.

In this case, the Company's owners meet the PBGC's criteria for professionals. They have advanced degrees in economics and accounting, have extensive work and teaching experience in those fields, and have published articles in those fields. They currently do analyses in the areas of macroeconomics, mathematical economics, econometrics and accounting. They provide intellectual services which require knowledge of an advanced type and which require the consistent exercise of discretion and judgment in its performance. They present their professional opinions in the form of reports to clients. Since such services comprise essentially all of the Company's business, the [\*5] Company's "principal business . . . is the performance of professional services" within the meaning of ERISA § 4021(c)(2)(A)(ii).

### **Conclusion**

The Plan is exempt from coverage under Title IV of ERISA, pursuant to ERISA § 4021(b)(13), 29 U.S.C. § 1321(b)(13).

In accordance with 29 C.F.R. § 2606.36, this constitutes a final decision and exhausts any further administrative remedies.

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