

Pension Benefit Guaranty Corporation

75-107

November 21, 1975

REFERENCE:

[\*1] 4021(b)(13) Plans Covered. Professional Service Employer Plans  
4021(c)(2)(A) Plans Covered. Definition of Professional Service Employer

OPINION:

This is in reference to your plan termination notice dated December 9, 1974, for the \* \* \* which was received by the Pension Benefit Guaranty Corporation on December 11, 1974. You have indicated in your correspondence with this Corporation that \* \* \* Pharmacy, Inc. is an entity owned and controlled by pharmacists, and that 68 percent of its gross sales are derived from the sale of prescription drugs. You have also indicated that no more than two employees were covered by the \* \* \* Plan at any time subsequent to September 2, 1974.

Section 4021(b)(13) of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as the "Act") excludes from coverage a 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)(A) of the Act provides that a professional service employer is an entity whose principal business is the performance of professional services, and is owned or controlled by professional [\*2] individuals or their executors or administrators. A representative, but not exclusive sample of professional individuals is listed in § 4021(c)(2)(B).

Pharmacists are not specifically listed in § 4021(c)(2)(B). However, in common with a majority of the enumerated professional individuals, pharmacists must receive formal, specificized schooling and are subject to licensing requirements. In view of these factors, and the nature of the work performed, it is consistent with the language and intent of the Act to consider pharmacists professional individuals for the purposes of § 4021(b)(13). A pharmaceutical entity is performing a professional service only when preparing and vending prescription drugs; when a pharmacy sells other items it is acting as does any retail store. Since 68 percent of the \* \* \* gross sales are derived from the sale of prescription drugs, its principal business is the performance of professional services.

Accordingly, it is our view that the \* \* \* Retirement Plan is excluded from coverage under § 4021(b)(13). Plans which are excluded from Title IV coverage need not file a notice of termination with the Pension Benefit Guaranty Corporation, or obtain its [\*3] approval to terminate such a plan.

If you have any questions concerning this matter please do not hesitate to contact us.

Henry Rose  
General Counsel