

Pension Benefit Guaranty Corporation

82-1

January 19, 1982

REFERENCE:

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

OPINION:

This is in response to your inquiry whether the above-referenced pension plan (the "Plan") is exempt from the termination insurance provisions of the Employee Retirement Income Security Act of 1974 (the "Act") under § 4021(b)(13) as a professional service employer. For the reasons stated herein, this Office concludes that the Plan is excluded from Title IV coverage by § 4021(b)(13).

As we understand the facts, A Company * * * and B Company * * * are both Wisconsin corporations. All of A's stock is owned by a licensed pharmacist, and all of B's stock is owned by another corporation, all of whose stock is in turn owned by a licensed pharmacist. More than 50 percent of the gross sales of B and of A are derived from the preparation and sale of prescription drugs. The Plan covers employees of B and A. You have informed us that the Plan is a single plan, funded through a single trust, to which both B and A contribute. There have been less than 25 active participants in the Plan at all times.

Section 4021(b)(13) of the Act excludes from coverage a plan "established and maintained by a professional service employer which [*2] 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 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, as stated in PBGC Opinion Manual Letter 75-107, - it is consistent with the language and intent of the Act to consider pharmacists professional individuals for the purposes of § 4021(b)(13). Nevertheless, as stated in that letter 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 over 50 percent of the gross sales of each corporation whose employees are covered by the Plan are derived from the sale of prescription drugs, the principal business of each corporation is the performance of professional services. [*3] Finally, since the stock of each corporation that is the employer maintaining the Plan is owned by pharmacists (or by another corporation that is owned by pharmacists), the employer is owned and controlled by professional individuals.

Accordingly, it is our view that the Multi-Business Pension Plan of A Company and B Company is excluded from coverage under Title IV of the Act pursuant to § 4021(b)(13). If you have any questions concerning this matter, please do not hesitate to contact us.

Henry Rose
General Counsel