

Pension Benefit Guaranty Corporation

76-109

September 14, 1976

REFERENCE:

[\*1] 4021(a) Plans Covered. Requirements of Coverage

OPINION:

This is in response to your letter to Mr. Donald C. Alexander, Commissioner of Internal Revenue, which has been referred to this Corporation for reply. You have asked whether a defined benefit plan established and organized in the Territory of Guam ("Guam") would be a plan covered by Title IV of the Employee Retirement Income Security Act of 1974 (the "Act"). You have indicated that at present there are no defined benefit plans established or maintained in Guam.

Section 4021(a) of the Act provides for mandatory plan termination insurance coverage for defined benefit pension plans which are, or have been determined by the Internal Revenue Service to be, qualified plans, i.e. those plans meeting the requirements of section 401(a) or section 404(a)(2) of the Internal Revenue Code of 1954 (the "Code"). One of the requirements of section 401(a) of the Code is that a trust under a plan must be "created or organized" in the "United States" and further, pursuant to section 1.401-1(a)(3)(i) of the Income Tax Regulations, "maintained at all times as a domestic trust in the United States." For this purpose, section 7701(a)(9) of the Code [\*2] defines "United States" to include "only the States and the District of Columbia." A trust with a situs in Guam or otherwise outside of the \* \* \* "United States" clearly does not meet the above requirement. Accordingly, a defined benefit plan of a Guamanian employer which maintains a trust organized and established in Guam or otherwise outside of the "United States" would not be a tax-qualified plan under the Code and would be excluded from the termination insurance provisions of Title IV of the Act.

Please note, however, that when a Guamanian employer's plan maintains a trust created or organized in the "United States" as defined by section 7701(a)(9) of the Code and which is "maintained at all times as a domestic trust in the United States" as provided by section 1.401-1(a)(3)(i) of the Income Tax Regulations, and the plan otherwise meets the requirements of section 401(a) of the Code, such a plan would be subject to Title IV of the Act. Whether a trust is a resident trust of the "United States" depends on the facts and circumstances in a particular case. Facts and \* \* \* circumstances relevant to such a determination have been held to include operation of the business and affairs [\*3] of the trust within the "United States" subject to the continuous jurisdiction of the courts of the United States and an intention of the plan administrator, the participants and beneficiaries of the trust that the trust management, assets and distributions therefrom be kept within the "United States." See Rev. Rul. 70-242, 1970-1 C.B. 89 See also Rev. Rul. 57-199, 1957-1 C.B. 155. In such a case, if such a plan were not otherwise excluded by the provisions of \* \* \* section 4021(b) of the Act, the plan would be a plan subject to the insurance provisions of Title IV.

With respect to annuity plans described in section 404(a)(2) of the Code, section 401(f) of the Code and section 1.401-8 of proposed Income Tax Regulations provide that an annuity contract shall be treated as a qualified trust under section 401 of the Code if the annuity contract would, except for the fact that it is not a trust, constitute a qualified trust. Accordingly, the foregoing analysis is generally applicable in the instance of a plan which maintains an annuity contract. Thus, the situs of the seller of an annuity contract is not dispositive of a determination of whether an annuity contract will [\*4] be deemed a trust qualified under section 401(a) of the Code. Rather such a determination is subject to an assessment of all the relevant facts and circumstances in a particular case.

We hope this is of assistance.

Henry Rose  
General Counsel