

Pension Benefit Guaranty Corporation

81-8

April 17, 1981

REFERENCE:

4021(b)(5) Plans Covered. Employee Contributed Plans
4041 Termination by Plan Administrator

OPINION:

You have requested, on behalf of your client, a ruling that the above-referenced plan (the "Plan") is not covered under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301 et seq. You have stated two reasons in support of your position that the Plan is not covered: 1) the Plan terminated in 1971, i.e., prior to the effective date of Title IV, and 2) ERISA, § 4021(b)(5) exempts the Plan from coverage. You have also requested that premiums paid to the Pension Benefit Guaranty Corporation be returned.

The information you have provided indicates that the Plan was amended in 1971 to preclude further vesting, participation, and accruals as of October 31, 1970. Plan participants were informed that the Plan sponsor had adopted a new Employee Stock Ownership Plan, effective January 1, 1970. The participants were not informed that the Plan was or would be terminated. There was neither a resolution of the Board of Directors of the Plan sponsor nor a Plan amendment which expressly [*2] terminated the Plan. The Plan was never amended to preclude future sponsor contributions. In fact, sponsor contributions to the Plan were made in 1972 and 1973.

While no contributions were made to the Plan after 1973, actuarial reports indicate that no contributions were actuarially necessary during that period. The Plan sponsor did not and has not ceased business operations. Plan assets have not been distributed or allocated to Plan participants.

In 1971, the opinion of the Internal Revenue Service ("IRS") was requested as to whether the Plan amendments effective October 31, 1970, would affect the tax qualification of the Plan. The IRS responded that the Plan continued to qualify.

While both the request and the IRS opinion referred to the "termination" of the Plan, the opinion only covered the issue of qualification. The 1978 IRS form "5500" filed for the Plan stated that the Plan had not terminated. Additionally, the Plan was amended by action of the Board of Directors of the Plan sponsor in 1977 to provide for an optional form of benefit for Plan participants, effective November 1, 1976.

On the basis of the information you have provided, we have concluded that the Plan [*3] did not terminate prior to July 1, 1974. In cases such as this, all facts and circumstances are considered in determining whether a plan has terminated. Here, the Plan sponsor continued to contribute to the Plan after the 1971 Plan amendments which, in effect, froze vesting and accruals. No contributions to the Plan were required after 1973 because of the Plan's favorable actuarial experience. Further, the Plan sponsor's statements to responsible federal agencies and the sponsor's actions, including the 1977 amendment of the Plan, are inconsistent with the view that the Plan terminated prior to July 1, 1974. Finally, Plan participants were not notified that the Plan had been or would be terminated.

Section 4021(b)(5) of ERISA excludes from Title IV coverage ". . . any plan which has not at any time after the date of enactment of the Act provided for employer contributions." This exclusion was intended to cover plans funded solely by employee contributions. See, H. Rep. No. 93-806, 93rd. Cong., 2d Sess. 91 (1974). Unquestionably, this Plan was funded in part by employer contributions. Additionally, we have carefully reviewed the Plan documents you have provided, and concluded [*4] that the Plan sponsor was required, under the Plan, to make all actuarially necessary contributions after September 2, 1974. Thus, Section 4021(b)(5) does not apply in this case.

We hope this has been of assistance.

Mitchell L. Strickler
Deputy General Counsel