

Pension Benefit Guaranty Corporation

96-3

July 8, 1996

REFERENCE:

[\*1] § 4021(b)(2)

OPINION:

I write in response to your letters regarding coverage of the above-referenced Plan under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1301-1461 (1994) ("ERISA"). On January 2, 1996, PBGC issued the enclosed determination that the Plan is covered under Title IV to the extent that it provides fixed benefits to participants for past service. n1 You have asked us to also rule on whether the Plan is a governmental plan excluded from coverage by section 4021(b)(2) of ERISA. n2 We have determined that the Plan is not excluded from Title IV coverage as a governmental plan.

n1 PBGC's January 2, 1996 determination addressed the Plan sponsor's request for a refund of premiums mistakenly paid to PBGC during the years 1989 through 1991 on account of individual account plan assets transferred into the Plan. PBGC ruled that plan participants whose benefits were based solely on the transferred individual account balances should not have been counted in calculating the amount of premiums owed for the years in question. Accordingly, PBGC is currently determining the amount of any refund owed to the Plan sponsor. [\*2]

n2 By letter dated February 14, 1994 (copy enclosed), another representative of the Plan sponsor also requested a ruling regarding whether the Plan is a governmental plan. Our opinion expressed below addresses both requests.

Our discussion of the issues you have raised assumes that the facts and representations made in your submission are accurate and complete. The Plan sponsor is the \* \* \* which is tax-exempt under section 501(c)(6) of the Internal Revenue Code (the "Code"), was organized under California State law as a non-profit mutual benefit corporation. \* \* \* is a membership \* \* \* organization, and its members are horse trainers. \* \* \* primary objective is to be a "trainers' organization" under California State law, and it promotes the interests of thoroughbred horse trainers in California.

\* \* \* provides services to associations that conduct horse racing meetings. California law requires these associations to deduct a percentage of the purses paid to horse owners to pay for a pension plan for backstretch personnel. In the case of thoroughbred horse racing, these sums are then paid to \* \* \* as a "trainers' organization" under California law. As a "trainers' organization," [\*3] \* \* \* must be incorporated in California, and it must represent a majority of thoroughbred horse trainers in the State.

The Plan was adopted by \* \* \* effective December 31, 1979, to provide benefits to backstretch employees who work either at a racetrack in California that contracts with \* \* \* or at an off-site training center that is approved under California law as a facility from which horses can be raced at racetracks having contracts with \* \* \*. Benefits are funded by contributions made by \* \* \*. The Internal Revenue Service has determined that the Plan is a tax-qualified, defined benefit pension plan.

Except as provided in section 4021(b) of ERISA, Title IV generally applies to defined benefit pension plans that are determined by the Secretary of Treasury to be plans described in section 401(a) of the Code. ERISA § 4021(a)(2). Section 4021(b)(2) excludes from Title IV coverage any plan "established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing...."

There is no definitive statutory or regulatory definition of a governmental [\*4] plan, but PBGC has considered a number of relevant factors, including (i) whether the plan or the plan sponsor is controlled by a governmental entity, (ii) whether the officers or members of the plan sponsor represent, or are selected by, a governmental entity, (iii) whether the plan or the plan sponsor is funded by a governmental entity, (iv) whether the plan's participants are considered to be government employees, (v) whether the plan sponsor is treated under state or federal law as a governmental entity, (vi) whether there are any private interests involved, and (vii) whether a governmental entity has the powers and interests of

an owner. See e.g., PBGC Opinion Letter 83-16 (July 12, 1983), PBGC Opinion Letter 81-40 (December 9, 1981), PBGC Opinion Letter 81-37 (November 16, 1981), PBGC Opinion Letter 81-31 (September 22, 1981), PBGC Opinion Letter 81-30 (September 22, 1981), PBGC Opinion Letter 81-13 (May 13, 1981), PBGC Opinion Letter 79-6 (April 10, 1979), PBGC Opinion Letter 78-25 (October 31, 1978), PBGC Opinion Letter 77-152 (July 13, 1977) and PBGC Opinion Letter 76-95 (August 2, 1976).

The Department of Labor ("DOL") and the Internal Revenue Service ("IRS") have considered [\*5] similar factors in interpreting ERISA § 3(32) and Code § 414(d), respectively. See ERISA Opinion Letter 90-09 (April 25, 1990), ERISA Opinion Letter 89-16 (August 4, 1989), Rev. Rul. 89-49, 1989-1 C.B. 117, and Rev. Rul. 57-128, 1957-1 C.B. 311.

As the IRS has indicated, the mere satisfaction of one or all of these factors is not necessarily determinative. See Rev. Rul. 89-49, 1989-1 C.B. 117. We have examined the relevant factors, and believe that the Plan is not excluded from Title IV coverage as a governmental plan. Neither the State of California nor any of its agencies or instrumentalities appears to manage or control the Plan sponsor - \* \* \* -- or the Plan. Instead, \* \* \*'s business affairs are managed by its Board of Directors, and the Board is chosen by \* \* \* members. \* \* \* Amended and Restated Bylaws (the "Bylaws") at Sections 6.01 and 6.02. Likewise, the Plan is administered by a committee composed of individuals selected by Plan at Section 5.1. Although \* \* \* receives funding pursuant to California State law, that funding comes directly [\*6] from the private entities sponsoring the horse races. Cal. Bus. & Prof. Code §§ 19610-19619.8 (Deering 1992 & Supp. 1995). Moreover, the amount of funding that \* \* \* receives is set by statute, and \* \* \* has no apparent authority to increase or decrease that amount. Compare PBGC Opinion Letter 76-95 (August 2, 1976) (Pension plan held not to be covered where its sponsor was authorized to offset any funding deficiency in the plan by assessing a tax against county residents). And as you have stated, Plan participants are not considered government employees; rather, they are employees of the horse trainers and owners.

The business of horse racing in California is regulated by State law, see Cal. Bus. & Prof. Code §§ 19400-19705 (Deering 1992 & Supp. 1995), but there is no evidence that the State of California considers \* \* \*'s services to be governmental services, or that \* \* \* provides services on behalf of a governmental entity. Nor does a governmental entity appear to have any ownership powers or interests in \* \* \*. Instead, \* \* \*'s members -- the horse trainers -- are private interests. See \* \* \* Bylaws at Sections 3.01-3.07. California law does not create \* \* \* or require [\*7] that \* \* \* be a "trainers' organization." Although the funding that receives pursuant to California law could be withheld if it did not qualify as a "trainers' organization," California law does not require \* \* \* to remain a "trainers' organization."

In summary, we believe that the Plan is not excluded from coverage as a governmental plan under section 4021(b)(2) of ERISA. Please note, however, that our opinion does not purport to interpret any provision of Title I or Title II of ERISA. See, e.g., ERISA Opinion Letter 95-01A (February 13, 1995). For an interpretation of those Titles, we suggest that you contact DOL or IRS.

The PBGC's decision expressed herein is an initial determination pursuant to 29 C.F.R. § 2606.1(b)(1)(1994). You may request reconsideration of this determination pursuant to Subpart C of 29 C.F.R. Part 2606 (1994). This initial determination will become effective on the 31st day after the date of this letter unless an aggrieved person requests reconsideration within 30 days of the date of this letter. Any request for reconsideration should be addressed to:

Ms. Anna Gilreath, Manager, Standard Termination Compliance Division, Insurance Operations Department, [\*8] Pension Benefit Guaranty Corporation, 1200 K Street, N.W., Washington, D.C. 20005

We hope this response is helpful. If you have any questions or need additional information, please contact me at (202) 326-4000.

David Smith, Chief  
Administrative Review and Technical Assistance Branch