

Pension Benefit Guaranty Corporation

82-18

June 9, 1982

REFERENCE:

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

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, we conclude that the Plan is excluded from Title IV coverage by § 4021(b)(13).

As you have represented the facts the Plan is maintained by * * *. Fifty-one percent of * * * stock is held by a licensed pharmacist * * *. The balance of 49 percent is held by * * *, a nonprofessional. * * * makes all of the business decisions for the Company and more than 50 percent of the gross sales of * * * are derived from the sale of prescription drugs. You have further stated that there are only three participants in the Plan, including * * *. The Plan has had less than 25 participants at all times.

Section 4021(b)(13) of the Act excludes from coverage a plan "established and maintained by a professional [*2] 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 individuals or their executors or administrators. A representative, but not exclusive, list 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, pharmacists must receive formal, specialized 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). Nevertheless, that opinion letter goes on to state that 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 * * * gross sales [*3] are derived from the sale of prescription drugs, its principal business is the performance of professional services. Finally, 51 percent of the stock is owned by * * * a licensed pharmacist. Thus, the business is also owned and controlled by a professional individual.

Accordingly, the Plan is excluded from coverage under Title IV of the Act pursuant to § 4021(b)(13). If you have any question concerning this matter, please call * * * of this Office at (202) 254-4895.

Henry Rose
General Counsel