

Pension Benefit Guaranty Corporation

90-6

October 31, 1990

REFERENCE:

[\*1] 4021(b)(2) Plans Covered. Government Plans.  
4021(b)(9) Plans Covered. Substantial Owner Plans.  
>4022(b)(5)>

OPINION:

I write in response to your request for a determination regarding whether the above-captioned pension plan (the "Plan") is covered by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301-1461 (1988).

You state that, from its inception, the Plan covered three employees, one of whom was the 100% owner of the Plan sponsor. However, the two other Plan participants who held no ownership in the Plan sponsor retired during 1988. Each of these participants was paid the benefit that he accrued under the Plan. Thus, the Plan now covers only the 100% owner of the Plan sponsor.

Section 4021(b)(9) of ERISA, 29 U.S.C. § 1321(b)(9), excludes from coverage any plan "which is established and maintained exclusively for substantial owners . . ." A substantial owner is defined as an individual who "in the case of a corporation, owns, directly or indirectly, more than 10% in value of either the voting stock of that corporation or all the stock of that corporation." ERISA section 4022(b)(5)(A)(iii), [\*2] 29 U.S.C. § 1322(b)(5)(A)(iii). Therefore, while the plan was not "established" exclusively for substantial owners, it is presently so "maintained."

The PBGC has declined to interpret the conjunction of the terms "established and maintained" strictly in the context of the exemption from Title IV coverage for governmental plans, ERISA section 4021(b)(2), 29 U.S.C. § 1321(b)(2), because doing so would frustrate the intent of Congress in providing the exemption. See PBGC Op. Ltr. 75-44. In that context, the court in *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2nd Cir. 1987), sanctioned the PBGC's "sensible" approach, recognizing that "the status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions than does the status of the entity which established the plan."

The same principle applies to plans maintained exclusively for substantial owners. Substantial owners have greater control over the level of, and funding for, plan benefits than do other plan participants, and are thus less in need of the protections of Title IV. Consequently, in the present case, where the Plan [\*3] is maintained exclusively for a substantial owner, and there are no longer any other participants in the Plan, the PBGC has determined that the Plan is exempt from Title IV coverage under Section 4021(b)(9) of ERISA. The PBGC notes, however, that if the current status of the Plan should change at any time, this determination may no longer apply.

This letter constitutes an initial determination subject to appeal under 29 C.F.R. Part 2606, Rules for Administrative Review of Agency Determinations (a copy of which is enclosed). Anyone who is an "aggrieved person" (as defined in § 2606.2 of the regulation) may file an appeal addressed to: Appeals Board, Pension Benefit Guaranty Corporation, 2020 K Street N.W., Suite 2500, Washington, D.C. 20006-1806.

Appeals must be filed within 45 days after the date of this letter. 29 C.F.R. § 2606.53. Any such appeal must: (a) be in writing; (b) be clearly designated as an appeal; (c) contain a statement of the grounds for appeal and the relief sought; (d) reference all pertinent information already in the possession of the PBGC and include any additional information believed to be relevant; (e) state whether the appellant desires to appear in person [\*4] or through a representative before the Appeals Board; and (f) state whether the appellant desires to present witnesses to the Appeals Board, and how such witnesses will further the decision making process.

If you should have any questions regarding this matter, feel free to contact Sara B. Eagle at (202) 778-8824.

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Deputy General Counsel