Pension Benefit Guaranty Corporation

75-12

January 7, 1975

REFERENCE:
[*1] 4021. Plans Covered
4062(a) Liability of Employer in Single Employer Plans. Applicability
4062(b) Liability of Employer in Single Employer Plans. Amount of Employer Liability

OPINION:

Thank you for your letter, dated December 23, 1974, asking that we furnish you with a "general statement outlining the characteristics of plans that * * * require coverage by the Pension Benefit Guaranty Corporation." As you will recall, your inquiry was prompted by a letter from * * * dated December 5, 1974.

Section 4021(a) of the Employee Retirement Income Security Act of 1974 (hereinafter "the Act") establishes the scope of the Act's termination insurance provisions. In general, coverage extends to any employee pension benefit plan which has met the requirements of the Internal Revenue Code governing "qualified" plans, unless the plan is specifically exempted by one of the provisions of Section 4021(b). As I am sure you are aware, "qualified" plans, among other things, are incorporated in written instruments establishing pension trusts or providing for contributions to an insurance company to provide retirement income for employees of an employer. If a plan is qualified, the employer and the participants [*2] receive certain special tax benefits as set out in the Code. Such a plan is covered by the termination insurance provisions of the new Act, provided that it has met the requirements of the Internal Revenue Code during the plan's preceding five years.

After stating that all such "qualified" employee pension benefit plans are covered, the statute, enumerates in Section 4021(b) 13 exceptions to the coverage rule. The principal exception is for individual account plans, which the Act defines as a pension plan providing for an individual account for each participant, and for benefits based solely upon the amount contributed to the participant's account, adjusted for any experience gains and losses which may be allocated to that account. In general, an exempted "individual account plan" is to be distinguished from a covered "defined benefit" plan in which the amount of the retirement benefit is specified in the plan.

The other exceptions are narrower. Some relate to the identity of the employer establishing the plan. See, e.g., Section 4021(b)(2), exempting plans established by the United States, states, municipalities, and their agencies and instrumentalities; Section 4021(b)(3), [*3] optionally exempting plans established by churches and church related institutions; Section 4021(b)(4)(A), exempting plans established by fraternal societies, provided no contribution is made by employers of participants in the plan; Id., subsection (10), exempting plans established by international organizations which are exempt from taxation under the International Organization Immunities Act; and Id., subsection (13), exempting plans established and maintained by professional service employers with less than 25 participants. Other exceptions apply to plans which are unfunded and established for the purpose of providing deferred compensation for a select group of highly compensated or management employees (Id., subsection 6); plans to which employers do not contribute (Id., subsection 5) and plans maintained solely for the purpose of complying with workmens compensation, unemployment compensation, or disability insurance laws (Id., subsection 11). Also exempt are plans established and maintained outside of the United States primarily for the benefit of individuals "substantially all of whom" are non-resident aliens (subsection 7); so-called "excess benefit" [*4] plans (subsection 8) and, finally, defined benefit plans, to the extent that they are treated as individual account plans under Section 3(35)(B) of the Act. (subsection 12)

You can see from the above general statement of the scope of the termination insurance provisions of the Act that the plan referred to in letter may well not be covered by the statute. Apparently, the plan is an "individual account" plan, although that fact cannot be finally determined without examining the plan.

In general, however, it has been the Corporation's consistent position that where a plan otherwise fits within the statute, the fact that it is established and maintained by contracts with one or more insurance carriers does not in and of itself exempt the plan from the Act's coverage.

As we have indicated above, Congress has been very clear in specifying which kinds of plans are included and which excluded from the Act's coverage. It has not expressly excluded plans funded by insurance or annuity policies. Furthermore, elsewhere in Title IV, Congress has accorded special treatment to "insured" plans. Section 4062 of the Act, as you are no doubt aware, makes employers liable for the excess of [*5] the current value of a plan's benefits guaranteed under the statute over the current value of a plan's assets allocable to such benefits on termination. Act, Section 4062(b). However, Congress explicitly insulated employers from such liability "to the extent of any liability arising out the insolvency of an insurance company with respect to an insurance contract." Act, Section 4062(a)(2). This specific exception in the employer liability provision of the statute demonstrates bot that the Congress was fully aware of the existence of insured plans when it enacted the termination insurance provisions of the statute and that is assumed that ordinarily such plans would be covered. If plans funded by insurance contracts were not covered by Title IV, there would have been no need specifically to free employers from liability arising out of the insolvency of an insurance company.

We trust that this letter answers your inquiry. Should you wish any additional information, however, we should be most happy to provide it.

Steven E. Schanes
Acting Executive Director