

Pension Benefit Guaranty Corporation

85-19

July 29, 1985

REFERENCE:

[\*1] 4021(a)(1) Plans Covered. Tax Qualification in Practice  
4021(a)(2) Plans Covered. Tax Qualification by IRS Determination  
4021(b)(7) Plans Covered. Foreign Plans

OPINION:

This is in response to your question as to whether PBGC guarantees extend to a plan established by a Guam corporation or proprietorship for employees who are residents of Guam. As we understand it, all requirements for U.S. tax-qualification are met, except that the plan's trust is located in Guam.

Guam is an unincorporated territory of the United States. 48 U.S.C. § 1421(a). Practically all inhabitants of Guam residing there or born there after April 11, 1899 are citizens of the United States. 8 U.S.C. § 1407. Therefore, the exemption from PBGC coverage in ERISA section 4021(b)(7) for plans established and maintained outside of the United States primarily for the benefit of nonresident aliens does not apply.

In PBGC Opinion Letter 76-109, September 14, 1976, the PBGC stated that "a defined benefit plan of a Guamian employer which maintains a trust organized and established in Guam or otherwise outside of the United States would not be a tax-qualified plan under the [Internal Revenue] Code and would be excluded from [\*2] the termination insurance provisions of Title IV of the Act." The rationale for the conclusion in this letter was that section 4021(a)(2) of ERISA provides that only plans meeting the requirements of Internal Revenue Code section 401(a) are covered, and that one of the requirements of section 401(a) is that a trust under a plan must be "created or organized in the United States." The Opinion noted that section 7701(a)(9) of the Internal Revenue Code defines "United States" as "only the States and the District of Columbia," and concluded that a trust with a situs in Guam does not meet the requirements for coverage because it is not a United States trust. This letter did not consider the question of whether a Guamian plan is covered pursuant to section 4021(a)(1) of ERISA.

In a later letter, No. 77-172, December 23, 1977, the PBGC stated that, with regard to a plan established in Puerto Rico, "the PBGC does not consider the requirement of [Internal Revenue] Code § 401(a) that the trust under the plan be 'created or organized in the United States' to be a bar to Title IV coverage under § 4021(a)(1) of [ERISA] provided that the plan has otherwise met in practice the tax qualification [\*3] requirements of the [Internal Revenue] Code."

Similarly, where a plan established in Guam with a non-United States trust otherwise has in practice met the tax qualification requirements of the Internal Revenue Code for the period required by section 4021(a)(1) of ERISA, and is not a plan described in section 4021(b) of ERISA, the plan is subject to Title IV coverage.

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