Pension Benefit Guaranty Corporation

89-10

December 8, 1989

REFERENCE:
[*1] 3(2) Definitions. Pension Plan Definitions. Pension Plan
3(7) Definitions. Participant Definitions. Participant
3(35) Definitions. Defined Benefit Plan Definitions. Defined Benefit Plan
>4001(a)(15)>
4001(b) Definitions. Employer and Controlled Group Definitions. Employer and Controlled Group
4021 Plans Covered Plans Covered
4021(a) Plans Covered. Requirements of Coverage Plans Covered. Requirements of Coverage
4021(a)(1) Plans Covered. Tax Qualification in Practice Plans Covered. Tax Qualification in Practice
4021(a)(2) Plans Covered. Tax Qualification by IRS Determination Plans Covered. Tax Qualification by IRS Determination
4021(b)(9) Plans Covered. Substantial Owner Plans Plans Covered. Substantial Owner Plans
4021(b)(13) Plans Covered. Professional Service Employer Plans Plans Covered. Professional Service Employer Plans
>4022(b)(5)>
>4041(a)(1)>
>29 CFR 2610.2>

OPINION:

We write in response to your request for an opinion of the Pension Benefit Guaranty Corporation ("PBGC") that a defined benefit pension plan your firm has established (the "Plan") will not be subject to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") (1) because [*2] a plan covering only self-employed persons is not covered under Title IV; and/or (2) because a plan that never covers more than 25 active participants who are "employees" as defined by Department of Labor regulation 29 C.F.R. § 2510.3-3(c) is excluded from Title IV coverage by ERISA § 4021(b)(13). We have concluded that the Plan would not be excluded from Title IV coverage on either basis.

Your firm is a partnership engaged in the practice of law. The firm has approximately 90 partners, 82 of whom are individuals and 8 of whom are professional corporations, each employing a single individual who is the sole shareholder and employee of the corporation. Previously, the firm maintained approximately 34 separate defined benefit pension plans (the "prior plans") each covering a single partner. None of the prior plans ever had a participant other than the partner and they apparently had been excluded from coverage under Title IV pursuant to ERISA § 4021(b)(13), referenced above.

You merged at least 50 prior and new plans into the Plan, which is a single defined benefit pension plan covering 50 or more partners of the firm. Benefits are funded through a single trust which will be qualified [*3] under IRC § 401(a).

The Plan Is Covered Under Title IV Pursuant to ERISA § 4021(a)

ERISA § 4021(a) provides:

Except as provided in subsection (b), this section applies to any plan . . . which, for a plan year --

(1) is an employee pension benefit plan (as defined in paragraph (2) of section 3 of [ERISA]) established or maintained --

(A) by an employer engaged in commerce or in any industry or activity affecting commerce, or

(B) by any employee organization, or organization representing employees, engaged in commerce or in any industry or activity affecting commerce, or

(C) by both,

which has, in practice, met the requirements of part I of subchapter D of chapter 1 of the Internal Revenue Code of 1954 . . .; or

(2) is, or has been determined by the Secretary of the Treasury to be, a plan described in section 401(a) of the Internal Revenue Code of 1954 . . . .

You urge initially (1) that Title IV of ERISA covers only "employee pension benefit plans" as that term is defined in ERISA § 3(2) (i.e., in Title I), (2) that the Department of Labor has in 29 C.F.R. § 2510.3-3(b), (c) defined "employee pension benefit plan" to include only plans containing at [*4] least one participant who is not a partner in the enterprise maintaining the plan (hereinafter a "common law employee"), (3) that the Department of Labor's definition of "employee pension benefit plan" is controlling for Title IV purposes, and (4) that because the Plan does not include any common law employees it is not covered by the Department of Labor's definition and, therefore, is not described in ERISA § 4021(a). We do not agree with your initial premise.

ERISA § 4021(a)(1) extends Title IV coverage to a plan which is an employee pension benefit plan as defined in ERISA § 3(2) which meets, in practice, the applicable Internal Revenue Code ("IRC" or "Code") requirements specified in § 4021(a)(1). However, ERISA § 4021(a)(2) also extends Title IV coverage to any plan which "is, or has been determined by the Secretary of the Treasury to be, a plan described in [IRC § 401(a)] . . .," regardless of whether such plan is an "employee benefit pension plan" within the meaning of ERISA § 3(2). You urge that "the grammatical structure of ERISA § 4021 is susceptible to more than one interpretation." We disagree. The requirements for coverage under ERISA § 4021(a)(1) and ERISA § [*5] 4021(a)(2) are clearly alternative tests for coverage under Title IV.

Because the statute is clear on its face, resort to legislative history is unnecessary. However, the history of ERISA § 4021(a) strongly supports our interpretation. The version of the statute adopted by the Senate contained only the tax qualification requirement set forth in ERISA § 4021(a)(2). H.R. 2, 93d Cong., 2d Sess. Sec. 421 (1974), with amendments as passed by Senate, Legislative History of the Employee Retirement Income Security Act of 1974 ("Leg. Hist."), at 3700 (1976). The version adopted by the House included requirements comparable to those set forth in ERISA § 4021(a)(1), with the exception of the "in practice" tax qualification requirement inserted by the Conference Committee. H.R. 2, 93d Cong., 2d Sess. Sec. 301 and 409 (1974), as passed by House, Leg. Hist. at 3995-96, 4022-23. Rather than make the attempt at integrating the two provisions that your analysis assumes, the Conference Committee simply incorporated both definitions into the final version of ERISA. (As noted above, the Conference Committee added the "in practice" tax qualification requirement to the House coverage criteria.) [*6] Thus, to the extent that any analysis of legislative history is necessary, we conclude that the Committee intended that any plan covered under either definition should benefit from the PBGC's guarantee.

In support of your interpretation you cite the statement in H.R. Conference Report No. 93-1280 that "[Title IV] requires mandatory coverage of employee pension benefit plans that either meet [the other requirements of § 4021(a)(1)] or . . . are qualified under the Internal Revenue Code." H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), Leg. Hist. at 4634 (emphasis yours). Aside from the fact that such a statement cannot displace the specific statutory language contained in ERISA § 4021(a)(2), a separate sentence from the legislative history strongly suggests that Congress intended all tax-qualified pension plans to be covered under § 4021(a). "A plan once determined to be a qualified plan by the Internal Revenue Service is a covered plan even if the determination is subsequently deemed erroneous." Leg. Hist. at 4634.

You further argue that the purposes of Title IV are fully served if only plans including "common law employees" are deemed to be covered. The statute [*7] suggests otherwise. ERISA § 4021(b)(9) sets forth an exclusion of plans which are "established and maintained exclusively for 'substantial owners' as defined in section 4022(b)(6) [now 4022(b)(5)]." However, ERISA § 4022(b)(5) defines a substantial owner as

an individual who --

. . .

(ii) in the case of a partnership, is a partner who owns, directly or indirectly, more than 10 percent of either the capital interest or the profits interests in such partnership, or

(iii) in the case of a corporation, owns, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation.

To interpret ERISA § 4021(a) as excluding all plans which consist entirely of partners would be to expand this exclusion beyond Congress' chosen requirement of a minimum 10 percent ownership.

You also urge that PBGC should not cover plans containing only partners because the Department of Labor's exclusion of these plans from Title I coverage, and thereby from the funding and fiduciary standards set out in that Title, creates an additional financial risk for PBGC. However, the scope of the insurance program established under Title [*8] IV is set forth in ERISA § 4021, which also delineates the exceptions to that coverage. That a plan may be excluded from coverage under Title I, and may thereby present a possible financial risk to PBGC based on the inapplicability of the funding and fiduciary standards set forth in that Title, does not, standing alone, provide a statutory basis for excluding the plan from coverage under Title IV. Moreover, as you note in your submission, proper funding of a plan is also required by the Internal Revenue Code. The IRS may impose a 10% excise tax on any unpaid accumulated funding deficiency if a plan sponsor fails to make a yearly plan contribution. IRC § 4971(a). A 100% excise tax may be imposed on the accumulated funding deficiency if the deficiency is not eliminated after notice from IRS. IRC § 4971(b). Although these requirements are not specifically enforceable by PBGC, they do provide a genuine incentive for plan sponsors to fund their plans soundly and therefore provide significant protection for PBGC.

You similarly urge that the PBGC has, by the language of earlier Opinion Letters, impliedly incorporated the interpretation you advocate. You cite PBGC letters describing [*9] the insurance program as extending to "employee pension benefit plans that are tax-qualified." We have examined the letters you describe and in none of them does the letter's conclusion depend on the interpretation of ERISA § 4021(a) that you advance. Instead, they are simply an acknowledgment of the fact that the great majority of plans covered by the PBGC meet the conditions imposed by both ERISA § 4021(a)(1) and ERISA § 4021(a)(2).

Based on the foregoing, it is our opinion that the Plan meets the coverage requirements of ERISA § 4021(a)(2). It is therefore unnecessary for us to address your arguments that the opinion of the Department of Labor concerning the definition of an "employee benefit pension plan" for Title I purposes is controlling in the interpretation of Title IV and that the Plan is in any event not covered under Title IV as a result of the application of ERISA § 4021(a)(1). n1

n1 We also discussed with you the argument that if the Plan is not an "employee pension benefit plan" within the meaning of Title I, it is not subject to the termination requirements of ERISA § 4041(a)(1) because that it will not be a "single-employer plan". ERISA § 4001(a)(15), enacted with the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), defines a "single-employer plan" as a "defined benefit plan (as defined in Section 3(35)) which is not a multiemployer plan." ERISA § 3(35), in turn, defines a defined benefit plan as a "pension plan other than an individual account plan." Arguably, the Department of Labor definition of "employee pension benefit plan" would exclude the Plan on the basis that it will include no common law employees.

However, we do not believe that Title IV coverage is so limited. As discussed above, ERISA, as originally enacted, extended Title IV coverage to plans meeting the requirements of IRC § 401(a), regardless of whether they met the criteria of ERISA § 4021(a)(1). Congress gave no indication with the enactment of MPPAA that it wished to alter the basic coverage of Title IV. Rather, we think, Congress intended to draw on Title I only for the definition of the term "defined benefit", not to modify the definition of "plan" under Title IV. [*10]

Partners Are Counted As Participants for the Purpose Of the 25 Active Participant Ceiling Under ERISA § 4021(b)(13)

As discussed above, the Plan is subject to Title IV of ERISA pursuant to ERISA § 4021(a)(2). You assert, however, that even assuming coverage on this basis, the Plan should be exempted from coverage under ERISA § 4021(b)(13) as a plan "established and maintained by a professional service employer which does not at any time after the date of enactment of [ERISA] have more than 25 active participants in the plan."

You urge that because the partner participants in the Plan are not employees within the meaning of Title I, they are not "participants" within the meaning of ERISA § 3(7). You then conclude that they are not "participants" within the meaning of ERISA § 4021(b)(13). We cannot agree.

As you admit in your submission, PBGC itself has defined "active participant" as (1) any individual who is currently in employment covered by the plan and who is earning or retaining credited service under the plan or (2) any non-vested individual who is not currently in employment covered by the plan but who is earning or retaining credited service under the plan. 29 C.F.R. [*11] § 2610.2. This definition does not rely on the Title I definition of "employee," nor, for that matter, does it rely on the Title IV definition of "employee."

If, however, the Title IV term "active participant" referenced "employee," we would use the Title IV definition contained in ERISA § 4001(b) which states, in relevant part, "a partnership is treated as the employer of each partner who is an employee within the meaning of Section 401(c)(1) of the [Code]." We note that ERISA § 4001(b) is not meant merely to define employers under Title IV. Were that the case, that section would refer to IRC § 401(c)(4), which defines "employer." Rather, it refers to IRC § 401(c)(1), which defines "employee." Reference to that section of the Code discloses the following: "the term 'employee' includes, for any taxable year, an individual who is a self-employed individual for such taxable year." IRC § 401(c)(1)(A). That section further provides that "[a] partnership shall be treated as the employer of each partner who is an employee within the meaning of paragraph (1) [of this section]." IRC § 401(c)(4). In addition, IRC § 404, which covers deductibility of contributions to plans, speaks specifically [*12] to the status of self-employed individuals and, echoing § 4001(b) of ERISA, defines such individuals as employees pursuant to IRC § 401(c)(1). Therefore, partners are plainly "employees" under Title IV.

Since the Plan has more than 50 partners who are active participants, the Plan is ineligible for exclusion under ERISA § 4021(b)(13).

You urge, however, that the PBGC should act to correct Congress' purportedly unintentional expansion of termination insurance coverage, effected by its amendment to the Internal Revenue Code in section 401(a)(26). You suggest that this unintentional expansion of coverage is likely to encourage many professional service employer plans to terminate rather than to merge and be subject to the requirements of Title IV of ERISA. What you request is not within PBGC's discretion to grant. We note, moreover, that since the enactment of the Tax Reform Act of 1986, which added Section 401(a)(26), Congress has twice amended the Internal Revenue Code without addressing the concern you raise. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 stat. 1329 (Dec 22, 1987) and Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Internal Revenue [*13] Amendments, Pub. L. No. 100-647 (H.R. 4333) (October 22, 1988). We therefore suggest that if Congress indeed acted unintentionally, its having done so would have to be demonstrated more clearly than you have done here.

Conclusion

Based upon the foregoing, we conclude that the Plan is subject to Title IV of ERISA pursuant to ERISA § 4021(a)(2), and that it is not eligible for the professional service employer exclusion under ERISA § 4021(b)(13) because it fails to meet the mandatory ceiling of 25 active participants.

If you have any questions pertaining to this matter, please contact Peter Gould of my staff at the above address or at (202) 778-8823.

Carol Connor Flowe
General Counsel