

Pension Benefit Guaranty Corporation

80-9

June 9, 1980

REFERENCE:

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, this Office concludes that the Plan is not excluded from Title IV coverage by § 4021(b)(13).

Section 4021(b)(13) of the Act excludes from coverage any plan:

established and maintained by a professional 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. (emphasis added).

A professional service employer is any entity owned or controlled by professional individuals, as defined in § 4021(c)(2)(B) of the Act, where both the entity and the professional individuals owning and controlling it are engaged in the performance of the same professional service. We understand that \* [\*2] \* \* is wholly owned by opticians licensed to practice as such by the State of Alaska.

Section 4021(c)(2)(B) lists some but not all of those individuals who are considered to be "professional individuals." Opticians, however, are not included in the list. Consequently, our determination of whether such individuals, and others not listed, are "professional individuals" depends on an analysis of the services performed and the expertise required to perform them.

As stated in PBGC Opinion Manual letter 76-106, a professional individual generally is one who provides services which require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship or from training in the performance of routine mental, manual or physical processes. The rendering of professional services generally requires the consistent exercise of discretion and judgment in its performance and usually would be predominantly intellectual in character.

Opticians are engaged primarily in the business of dispensing eyeglasses and contact lenses. [\*3] Opticians also grind lenses to prescription and fit them for customers. Although this work requires a high degree of skill, it does not require a prolonged course of specialized intellectual instruction, and is not predominantly intellectual in character. Therefore, opticians would not appear to fit within the foregoing description of "professional individual." Because opticians are not "professional individuals" within Act § 4021(c)(2)(B), \* \* \* cannot be a "professional service employer" within Act § 4021(c)(2)(A). Therefore, the Plan is not excluded from Title IV coverage by Act § 4021(b)(13).

This letter constitutes an initial determination of the PBGC which is subject to reconsideration under 29 CFR Part 2618. A copy of that regulation is enclosed for your information.

If you have any questions please contact \* \* \* of this Office at the above address or at (202) 254-3010.

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General Counsel