



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

March 23, 2017

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: Appeal No. 2016-0313; Case No. 226695; [REDACTED] Company Defined Benefit Pension Plan (the "[REDACTED] Company Plan" or the "Plan")

Dear Ms. [REDACTED]:

The Appeals Board is responding to [REDACTED] Company's appeal of PBGC's determination of May 10, 2016. PBGC determined that the benefits under the [REDACTED] Company Plan are not insured by PBGC because the Plan is excluded from coverage under section 4021(b)(13) of Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").¹ [REDACTED] Company claims that the Plan is not excluded from PBGC's insurance coverage because [REDACTED] Owner is not a "professional individual" within the meaning of section 4021(c)(2) of ERISA and the principal business of [REDACTED] Company is not the performance of professional services.

Summary of Decision

The primary issue presented by the appeal is whether the [REDACTED] Company Plan is covered by PBGC's pension insurance program. A pension plan maintained by a professional service employer that has not had more than 25 active participants since September 2, 1974, is excluded from PBGC coverage. Under Section 4021(c)(2), an entity is a professional service employer if it is owned or controlled by a professional individual, as defined by ERISA, and its principal business is the performance of professional services. Because the appeal does not dispute that the Plan has always had fewer than 25 active participants and that [REDACTED] Owner is the sole owner of [REDACTED] Company, our decision focuses mainly on whether [REDACTED] Owner is a professional individual under Section 4021(c)(2) and whether the principal business of [REDACTED] Company is the performance of professional services.

We find that [REDACTED] Owner is a professional individual and that the principal business of [REDACTED] Company is the performance of professional services. We thus conclude that [REDACTED] Company is a professional service employer within the meaning of Section 4021(b)(13). Because a pension plan maintained by a professional service employer is not covered under Title

¹ Title IV of ERISA is codified at 29 U.S.C. §§ 1301 *et seq.* The Board uses only the ERISA citations in this decision.

IV, the **Company** Plan is not a PBGC-insured pension plan. Hence, as explained below, we must uphold PBGC's determination and deny **Company's** appeal.

Statutory Background

PBGC is the United States government agency that insures private sector defined benefit pension plans in accordance with Title IV of ERISA. If a plan sponsor becomes unable to support its defined benefit pension plan, PBGC becomes the statutory trustee of the plan and pays guaranteed pension benefits according to the plan's provisions, subject to legal limitations set by Congress under ERISA.

Section 4021(a) sets forth the criteria for PBGC's coverage of pension plans under Title IV of ERISA. PBGC does not, however, insure all pension plans. Section 4021(b) enumerates plans that are excluded from PBGC coverage.

Under Section 4021(b)(13), PBGC's insurance coverage does not apply to any plan "established and maintained by a professional service employer which does not at any time after September 2, 1974, have more than 25 active participants in the plan."

ERISA defines the term "professional service employer," generally, as a business rendering professional services that is owned or controlled by a "professional individual," which ERISA defines by reference to a non-exclusive list of professional individuals. Section 4021(c)(2) of ERISA provides:

(A) the term "professional service employer" means any proprietorship, partnership, corporation, or other association or organization (i) owned or controlled by professional individuals or by executors or administrators of professional individuals, (ii) the principal business of which is the performance of professional services, and

(B) the term "professional individuals" includes *but is not limited to*, physicians, dentists, chiropractors, osteopaths, optometrists, other licensed practitioners of the healing arts, attorneys at law, public accountants, public engineers, architects, draftsmen, actuaries, psychologists, social or physical scientists, and performing artists.

(Emphasis added.)

PBGC has issued a number of opinion letters interpreting the professional service employer exclusion from PBGC coverage.² Implicit in the occupations listed in Section 4021(c)(2)(B) and in PBGC's interpretations thereof is the element of public trust placed in the persons performing the services. In many of the occupations listed, government bodies or professional associations

² PBGC's opinion letters are available at <http://www.pbgc.gov/prac/other-guidance/opinion-letters.html>.

impose licensing or other requirements designed to protect the consumers of the professional services provided by these professional individuals.

In determining whether the statutory exclusion applies, PBGC has interpreted Section 4021(b)(13) to mean that both the business and the professional individual owning or controlling the business must be engaged in the performance of the same professional service.³

Summary of Facts

1. Company

Company is a sole proprietorship owned by Owner and located in , .⁴ Company offers “financial planning advisory services” to individuals and business owners.⁵ According to its website, Company has five employees, including Owner, and three administrative support personnel.⁶

The Company sponsors the Company Plan, which was established in 2010. The Plan covers Owner and two non-owner employees of Company. According to PBGC’s determination of May 10, 2016, the Plan has never had more than three participants. The Company Plan is a single-employer plan within the meaning of section 4001(a)(15) of ERISA.⁸ We assume for purposes of this decision that the plan meets the requirements for tax qualification under section 401(a) of the Internal Revenue Code.⁹

Company’s website gives the following description of the services that Company and its staff provide:

³ PBGC Opinion Letter (“OL”) 75-49 (Nov. 10, 1975); OL 76-106 (Sept. 3, 1976); OL 97-2 (Dec. 29, 1997).

⁴ Letter dated July 8, 2016, from to PBGC Appeals Division, including PBGC Form 724 (Appeal of a PBGC Benefit Determination), and “Request for Reconsideration,” with Exhibits A through F (hereinafter “Appeal”) at 1, provided as **Enclosure 1**; see also [Company’s Website] (last visited March 21, 2017).

⁵ Company’s Securities and Exchange Commission (“SEC”) Forms ADV Part 2A Brochure (separately “SEC Brochure”) and ADV Part 2B Brochure Supplements 1 and 2 (separately, “SEC Brochure Supplements”), dated 2013, at 4, provided as **Enclosure 2**.

⁶ [Company’s Website] (last visited March 21, 2017).

⁷ See PBGC’s determination letter dated May 10, 2016 (summarizing information provided to PBGC by the Plan’s third-party administrator,), provided as **Enclosure 3**.

⁸ See Section 4001(a)(15) (defining “single-employer plan” as “any defined benefit plan (as defined in §3(35) [of ERISA]) which is not a multiemployer plan”); see also 2015 Form 5500-SF (Short Form Annual Return/Report of Small Employee Benefit Plan) (showing that the Plan is a single-employer plan and not a multiemployer plan), provided as **Enclosure 4**.

⁹ The Appeals Board has obtained a copy of an IRS opinion letter with respect to the Plan dated March 31, 2010, which states that the form of the Plan is acceptable, but which is not a ruling or determination that the Plan is tax-qualified under section 401(a) of the Code, provided as **Enclosure 5**.

Our goal is to assist our clients in every aspect of their financial lives, through sound, independent advice and superior service . . .

Our staff consists of experienced professionals with a “hands on” method to financial guidance. As we guide our clients in formulating personal, comprehensive financial plans, we always take time to educate them as well. We conduct annual audits of our clients’ plans with them and monitor all aspects of their progress.¹⁰

Company offers financial plans that include one or more of the following areas:

ESTATE PLANNING – This includes recommendations with respect to property titling, distribution strategies, estate tax reduction, and tax payment techniques. It involves a discussion of gifts, trusts, wills, etc., and the disposition of business interests. . . .

RETIREMENT PLANNING – This involves advice with respect to alternatives and techniques for accumulating wealth for retirement income or advice relative to appropriate allocation and distribution of assets following retirement. . . .

INVESTMENT PLANNING – This includes advice with respect to asset allocation, investment income and accumulation techniques. Evaluations are made of existing investments in terms of their economic and tax characteristics as well as their suitability for meeting client objectives. . . .

BUSINESS SUCCESSION PLANNING – This includes advice with respect to alternatives and strategies that deal with the continuity or disposition of the business upon the business owner’s retirement, death, disability, or decision to sell. . . .¹¹

In each area of its financial planning services, **Company** identifies tax consequences and their implications. **Company** further specifies that “[p]lanning is based upon each client’s individual financial situation and personal objectives, and is focused on specific areas. The degree of detail and sophistication of the financial planning services provided varies according to the individual client’s circumstances.”¹²

¹⁰ **[Company’s Website]** (last visited March 21, 2017), provided as **Enclosure 6**.

¹¹ See **Enclosure 2** at 4.

¹² *Id.*

Company self-identifies as an “investment adviser” under the Investment Advisers Act of 1940 (“Investment Advisers Act”).¹³ The Investment Advisers Act defines an investment adviser, generally, as any person who, for compensation, engages in the business of providing investment advice related to securities.¹⁴ As an investment adviser with “assets under management” of less than \$25 million, Company is required to register with the state of (the “State”).¹⁵ Thus, Company is a *registered* investment adviser (an “RIA”).¹⁶

As an RIA, Company must file the SEC Form ADV, the SEC Brochure, and the SEC Brochure Supplements with the State.¹⁷ On the SEC Form ADV, Company provides details about various aspects of its business, including the type and number of its clients.¹⁸ In the SEC Brochure, Company must provide more specific details about the financial services it provides and must disclose sources of potential conflict related to its advisory services.¹⁹ Company must file an SEC Brochure Supplement for each “supervised person” whom the Company authorizes to provide investment advice on its behalf.²⁰ Company has two SEC Brochure Supplements on file with the State—one for Owner and the other for .²¹

Company charges each client a flat fee for its financial planning services.²² In conjunction with its financial planning services, the Company also offers “implementation services,” whereby authorized employees act as brokers, distributors, and advisers of investment products to help clients implement the investment recommendations in their financial plans.²³ Company does not directly charge a fee for implementation services; however, as discussed in more detail below, clients may purchase securities and insurance products or open advisory accounts with LPL Financial LLC (“LPL Financial”) through Owner and , for which normal and customary commissions are paid.²⁴

¹³ See *id.* (describing the nature of the services Company provides “in its capacity as a Registered Investment Advisor”). The Investment Advisers Act is codified at 15 U.S.C. § 80b-1 *et seq.*

¹⁴ 15 U.S.C. § 80b-2(a)(11).

¹⁵ 15 U.S.C. §§ 80b-3, 80b-3a.

¹⁶ See Enclosure 2 at 1.

¹⁷ 17 C.F.R. § 275.203-1.

¹⁸ See, generally, Company's SEC Form ADV, Uniform Application for Investment Adviser Registration and Report by Exempt Reporting Advisers, amended as of , 2016 (“SEC Form ADV”), provided as Enclosure 7.

¹⁹ See, generally, Instructions for Part 2 of the SEC Form ADV, provided as Enclosure 8.

²⁰ See Enclosure 8 at 1.

²¹ See Enclosure 2 at 12-21.

²² See Enclosure 2 at 5.

²³ *Id.*

²⁴ *Id.* LPL Financial and Company are separate entities.

More than 76 percent of [redacted] Company's clients are "high net worth individuals."²⁵ The remainder of [redacted] Company's clients are a mixture of other individuals, pension and profit-sharing plans, charitable organizations, and businesses.²⁶ In 2015, [redacted] Company's clients made investments of approximately \$192 million, based upon the Company's financial planning advisory services.²⁷

2. [redacted] Owner

a. Education and Training

[redacted] Owner is not a college graduate.²⁸ After high school, he obtained his Certified Financial Planning credential and became a Certified Financial Planner ("CFP") through the College of Financial Planning in Denver, Colorado.²⁹ When he obtained CFP certification, the requirements were not the same as they are now.³⁰ In 1986, he began working for CIGNA Financial Advisers ("CIGNA") as a Financial Adviser.³¹ In 1993, [redacted] Owner left CIGNA, founded [redacted] Company and became affiliated with LPL Financial.³² [redacted] Owner currently holds Series 6, 7, 22, 24, and 63 securities licenses from the Financial Industry Regulatory Authority ("FINRA").³³

An individual must be registered with and licensed by FINRA to conduct securities transactions and business with the investing public, and securities professionals must pass qualification exams to demonstrate competence in particular activities.³⁴ For example, [redacted]

²⁵ See Enclosure 7, Item 5.D.(1) (reporting that 76 to 99 percent of [redacted] Company's clients are "high net worth individuals"); Items 5.C.(1) and 5.H., at 4, 6 (reporting that [redacted] Company provided investment advice for 26 to 100 clients and financial planning for 51 to 100 clients); see also SEC Form ADV: Glossary, No. 18 (defining "high net worth individual" as "an individual who is a 'qualified client' under rule 205-3 of the Investment Advisers Act"), provided as Enclosure 9; 17 C.F.R. § 275.205-3 (defining a "qualified client," in part, as one whose net worth exceeds \$2.0 million).

²⁶ See Enclosure 7, Item 5.D.(1) at 4-5.

²⁷ See Enclosure 7, Item 1B – Business Information H. at 15.

²⁸ See Appeal at 7.

²⁹ See Enclosure 2 at 14.

³⁰ See Appeal at 7. The Appeal states that the number of classes were fewer by one when [redacted] Owner obtained his certification. The Board notes that the education requirement now includes a bachelor's degree or higher from a regionally accredited college or university. See Exhibit C to the Appeal, Enclosure 1. Nevertheless, as a CFP, [redacted] Owner is subject to the same Code of Ethics and Professional Responsibility, Rules of Conduct, and Practice Standards as all other CFPs.

³¹ See Enclosure 2 at 14.

³² See Enclosure 2 at 14.

³³ See Enclosure 2 at 11. FINRA is the largest independent regulator for securities firms and professionals doing business in the United States. FINRA is a private, non-profit organization authorized by Congress to regulate securities broker-dealers and to provide education and resources for investors. FINRA, *About FINRA*, <http://www.finra.org/about>.

³⁴ See generally *Member Regulation*, <http://www.finra.org/industry/member-regulation> (last visited March 21, 2017).

Owner's Series 6 license allows him to sell certain investments such as mutual funds, while his Series 7 license is more general and authorizes him to sell practically any security, other than commodities, real estate, and life insurance. The Series 63 license, awarded for passing the Uniform Securities Agent State Law exam, is required by each state and authorizes licensees to do business in a state. The Series 24 license authorizes an individual to perform as a general securities principal, supervising all areas of a member's securities business and overall compliance.³⁵

b. Affiliation with LPL Financial

Owner has been affiliated with LPL Financial since 1993. Like Company LPL Financial is an RIA under the Investment Advisers Act; however, because the total assets under LPL's Financial's management exceed \$100 million, LPL is registered with the SEC and not with the State.³⁶ LPL Financial is also registered as a broker-dealer of securities with the SEC and is a member of FINRA. These designations permit LPL Financial—and its authorized representatives—to buy and sell securities on behalf of others.³⁷ An individual can be affiliated with LPL Financial in one or more capacities, including as a Registered Representative (an "LPL Financial RR") or as an Investment Adviser Representative (an "LPL Financial IAR").³⁸

Owner is both an LPL Financial RR and an LPL Financial IAR.³⁹

As an LPL Financial IAR, Owner assists clients with opening advisory accounts with LPL Financial, in which each client's funds are allocated among various types of investments.⁴⁰ As an LPL Financial IAR, Owner advises his clients on the asset-mix that would best suit each client's objectives and circumstances.⁴¹ As an LPL Financial IAR, Owner is responsible for monitoring his clients' accounts and recommending "rebalancing" or other modification as may be needed to respond to changing circumstances.⁴² As an LPL Financial IAR, Owner is compensated by fees that his clients' advisory accounts

³⁵ See generally FINRA, *Qualification Exams*, <http://www.finra.org/industry/qualification-exams> (last visited March 20, 2017). The Series 22 exam "measures the degree to which each candidate possesses the knowledge needed to perform the critical functions of a direct participation programs representative, including the solicitation, purchase and sale of limited partnerships, among other products." See FINRA, Series 22: Direct Participation Programs Limited Representative Examination (DR), <http://www.finra.org/industry/series22> (last visited March 20, 2017).

³⁶ See 15 U.S.C. §§ 80b-3, 80b-3a.

³⁷ See 15 U.S.C. §§ 78c(a)(4) and (a)(5).

³⁸ LPL Financial Holdings Inc. Annual Report, SEC Form 10-K ("LPL Financial Holding 10-K") at 6, provided as Enclosure 10. LPL Financial is a subsidiary of LPL Financial Holdings Inc.

³⁹ See Enclosure 2 at 15.

⁴⁰ *Id.* at 5.

⁴¹ LPL Financial, *Working with an LPL Financial Adviser: The Choice between Advisory Services and Brokerage Services*, <https://lplfinancial.lpl.com/content/dam/lpl-www/documents/working-with-an-lpl-financial-adviser.pdf>, provided as Enclosure 11.

⁴² *Id.* at 2.

generate.⁴³ These fees typically account for more than 60% of [redacted] Company's business activity and more than 50% of [redacted] Company's revenue.⁴⁴

PBGC's Determination

On March 23, 2015, [redacted] contacted PBGC on behalf of [redacted] Company and requested a determination as to whether the [redacted] Company Plan is covered under Title IV of ERISA. On May 10, 2016, PBGC issued its determination that the [redacted] Company Plan is not covered by PBGC's insurance program.

PBGC's determination applied the professional service employer exclusion under Section 4021(b)(13). PBGC determined that [redacted] Company the Plan's sponsor, is a sole proprietorship owned by [redacted] Owner a CFP. PBGC determined that [redacted] Owner is a professional individual and that [redacted] Company and he are engaged in the same professional service of financial planning. Based on these findings and the fact that the Plan has had fewer than 25 active participants since it became effective in 2010, PBGC concluded that the Plan is excluded from coverage under Title IV of ERISA.

[redacted] Company's Appeal of PBGC's Determination

On July 8, 2016, [redacted] Company filed a timely appeal with the Appeals Board.⁴⁵ The appeal concedes that [redacted] Owner is the sole owner of the Plan's sponsor, [redacted] Company and that at all relevant times, the Plan did not have more than 25 active participants; however, the appeal contests PBGC's determination concerning [redacted] Owner's status as a professional individual and [redacted] Company's status as a professional service employer.

The appeal claims that [redacted] Owner does not meet the criteria of a professional individual under ERISA and PBGC guidance, arguing that his CFP certification is insufficient to merit the status of a professional individual:

To equate this [CFP] course and multiple-choice exam to true professional service employers, such as doctors who attend medical school and must pass the Medical Boards or to lawyers who attend law school and must pass the Bar Exam, is wholly inappropriate. It is more analogous to many in the service sector

⁴³ Enclosure 2 at 5.

⁴⁴ *Id.* As an LPL Financial RR, [redacted] Owner uses LPL Financial's brokerage platform to execute the purchase and sale of securities at the direction and on behalf of his clients. Enclosure 2 at 8; Enclosure 10 at 6. In this capacity, [redacted] Owner's compensation consists of commissions on the securities transactions he brokers. Enclosure 2 at 5; Enclosure 10 at 2. These commissions typically account for less than 1% of [redacted] Company's overall business activity. Enclosure 2 at 5.

⁴⁵ *See* Enclosure 1. By letter dated June 21, 2016, the Board granted [redacted] Company an extension in which to file its appeal until July 11, 2016. The Appeal contains several references to "requests for reconsideration." Under PBGC's regulations, determinations that a pension plan is not covered under Section 4021 are reviewed as administrative appeals by the Appeals Board. *See* 29 C.F.R. § 4003.1(b)(6). [redacted] Company's request for review of PBGC's determination of May 10, 2016, is properly before the Appeals Board.

who are not professionals, such as general contractors, automotive service providers, massage therapists, court reporters, computer network specialists, and the like. If one compares Owner's training and study to the types of business owners who have been found by the PBGC to be professional in nature and those that have been determined not to be professionals (e.g., opticians, food brokers, artist-designers, real estate brokers, and advertising and public relations firms, funeral directors and embalmers; see PBGC Opinion Letters 80-9, 80-10, 80-11, 80-12, 80-13, 80-14, 80-15, and 78-21) and to the listed professions and the PBGC's finding that a person engaged in professional planning who is required to have a degree in planning engineering or architecture, plus two years of experience; see PBGC Opinion Letter 79-12, the CFP program more closely compares to the latter than the former [*sic*].

* * *

Although Owner admits that the state of requires him to maintain the CFP certification to practice as a financial advisor and an insurance license to sell life insurance, as demonstrated above, the requirements to obtain such license in no way required him to 'acquire knowledge under a prolonged course of specialized intellectual instruction and study.'

The appeal also contends, essentially, that PBGC's determination represents a change of position regarding the coverage exclusion under Section 4021(b)(13), to the detriment of Company. The appeal argues that PBGC's determination is "contrary to the belief and understanding of those in the benefits industry." In support of this argument, the appeal asserts:

This type of finding, so contrary to earlier decisions by the PBGC and so different than the expectations of the industry, should not occur at the misfortune of one employer. This type of realignment of the PBGC's opinions as to coverage should be the subject of widely dispersed and broadly applicable guidance, subject to public commentary and PBGC leadership consideration.

The appeal cites no PBGC Opinion Letters nor other PBGC guidance to support its assertion that PBGC's determination is contrary to "earlier decisions," nor does it provide any evidence of the "expectations of the industry."

By letter dated November 30, 2016, the Appeals Board asked Company to clarify the source of its revenue so that the Board could better understand the principal business of Company. Noting that it may consider the SEC Form ADV and SEC Brochure in deciding the appeal, the Board provided Company the opportunity to comment on these documents.

Company by counsel, responded by letter dated December 27, 2016, drawing the Board's attention to several sections of the SEC Brochure.⁴⁶

Issues Presented by Company's Appeal

As discussed above, the issue presented by the appeal is whether the Company Plan is covered by PBGC's pension insurance program. To resolve this issue, we must decide whether Owner is a professional individual and whether the principal business of Company is the performance of professional services; we must also decide whether Owner and Company are engaged in the performance of the same professional service.

The appeal also raises issues that relate to the expectations of similarly situated employers. We address these concerns near the end of our decision.⁴⁷

Discussion

1. Company is a professional service employer

Section 4021(c) sets forth conditions for determining whether a plan sponsor qualifies as a "professional service employer." First, the entity must be "owned or controlled by professional individuals or by executors or administrators of professional individuals."⁴⁸ Second, the "principal business" of the entity must be "the performance of professional services."⁴⁹ As stated above, PBGC has interpreted the statute to mean that the professional service employer and the professional individual who owns or controls the employer must be engaged in the same professional service.⁵⁰ Company satisfies these conditions for exclusion of the Company Plan from coverage under Title IV.⁵¹

⁴⁶ The letters of November 30, 2016, and December 27, 2016, are provided as Enclosures 12 and 13, respectively.

⁴⁷ The appeal expresses concern about "income tax deduction ramifications" for Company as a result of PBGC's coverage determination. But a plan sponsor's eligibility for deductions from income tax under the Internal Revenue Code is a matter within the jurisdiction of the Internal Revenue Service. Although pension plans must generally be tax-qualified under section 401(a) of the Code to be insured under Title IV of ERISA, the availability or the amount of income tax deductions associated with the sponsorship of pension plans is not relevant to PBGC or the Appeals Board in resolving coverage issues under Section 4021(b).

⁴⁸ ERISA § 4021(c)(2)(A)(i).

⁴⁹ ERISA § 4021(c)(2)(A)(ii).

⁵⁰ OL 75-49; OL 76-106; OL 97-2.

⁵¹ The Appeals Board notes that pension plan sponsors who meet the conditions under Section 4021(b)(13) and whose pension plans are therefore excluded from PBGC coverage may not elect to be insured under Title IV.

a. **Owner is a professional individual**

Owner is the sole owner of **Company**, a sole proprietorship.⁵² Therefore, the first condition of Section 4021(c)(2)(A) is satisfied if he is a “professional individual.” For the reasons discussed below, we find that he is.

ERISA does not specifically define the term “professional individual.” Rather, Section 4021(c)(2)(B) provides a non-exclusive list of professional individuals covered by the term. Financial planner is not among those listed. As an initial matter, however, we note that **Owner** and his associates employed by **Company** provide services beyond those generally performed by an ordinary financial planner. For example, **Owner** is a licensed insurance agent in the state of [redacted] and an Investment Advisor Representative (or IAR) with LPL Financial.

As discussed above, more than 50% of **Company's** revenue is derived from Investment Advisor fee compensation. In addition to financial planning and investment advice, **Company** also derives revenue from the sale of insurance products and some form of pension plan consulting.⁵³ As such, **Company** is better described as a provider of “integrated advisory services.”⁵⁴ This description is consistent with the Company’s description of itself on Form 5500-SF under Business Code 523900: “Other Financial Investment Activities (including portfolio management and investment advice).”⁵⁵

PBGC Opinion Letter (OL) 76-106 provides guidance in determining whether one whose occupation is not listed at Section 4021(c)(2)(B) qualifies as a professional individual. Since then, PBGC has consistently opined that the determination of whether one is a professional individual “depends upon an analysis of the services performed and the expertise required to perform them.”⁵⁶

OL 76-106 further discusses the manner in which the expertise to perform professional services may be acquired and the characteristics inherent in the performance of professional services:

⁵² A “sole proprietorship is not a legal entity separate from its individual owner.” See *Ball v. Steadfast-BLK*, 196 Cal. App.4th 694, 701, 126 Cal. Rptr.3d 743, 747 (Cal. Ct. App. 2011).

⁵³ See Enclosure 13 at 2 (describing **Company's** services for tax-qualified pension plans).

⁵⁴ See Securities and Exchange Commission Release No. IA-1092 at 4–5 (Oct. 8, 1987) (hereinafter “SEC Release No. IA-1092”) (describing the services of persons who provide a mix of financial planning, pension consulting, tax planning, and investment advice as “integrated advisory services”), provided as **Enclosure 14**.

⁵⁵ See Enclosure 4 at 1, 16.

⁵⁶ See OL 76-106 (Sept. 6, 1976); OL 78-21 (Sept. 19, 1978); OL 80-9 (June 9, 1980); OL 80-10 (June 9, 1980); OL 80-11 (June 9, 1980); OL 80-12 (June 9, 1980); OL 80-13 (June 20, 1980); OL 80-14 (June 20, 1980); OL 96-1 (June 27, 1996); see also *Compass Capital Partners, Ltd. Defined Benefit Retirement Plan*, Appeal 214700 (decided Aug. 3, 2010), provided as **Enclosure 15**. PBGC Appeals Board decisions are available at <http://www.pbgc.gov/prac/appeals-board/appeals-decisions.html>.

In our view, 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 would be predominantly intellectual in character.

To determine whether **Owner** is a professional individual, the Appeals Board must analyze the integrated advisory services that he and **Company** perform and the expertise required to perform them. The Board must then determine whether its analysis shows that **Owner** should be deemed a “professional individual” under Section 4021(c)(2)(B).

i. **Owner's expertise in financial planning services**

As part of its **Company's** integrated advisory services, **Owner** provides financial planning services. In general, individuals do not need specialized training or licensing to hold themselves out as financial planners.⁵⁷ But **Owner** is a Certified Financial Planner, or CFP. As advertised on the website of the CFP Board of Standards (“CFP Board”), the licensing body for CFPs: “CFP professionals have completed extensive training and experience requirements and are held to rigorous ethical standards.”⁵⁸ According to the CFP Board, the objective of these training requirements is to “enhance the knowledge, skills and abilities” of those seeking to become financial planners in order to enable them “to deliver professional and competent financial planning services to the public.”⁵⁹

A CFP must conduct his practice under a CFP Board-prescribed Code of Ethics, Rules of Conduct, and Standards of Professional Conduct for CFP professionals.⁶⁰ The CFP Board’s Rules of Conduct require CFP professionals to put clients’ “interests ahead of their own at all

⁵⁷ See CFP Board, *Are financial planners regulated?*, <http://www.cfp.net/public-policy/public-policy-issues/regulation-of-financial-planners> (last visited March 14, 2017).

⁵⁸ See CFP Board, *CFP Certification: The Standard of Excellence*, <http://www.cfp.net/about-cfp-board/cfp-certification-the-standard-of-excellence> (last visited February 22, 2017), provided as **Enclosure 16** (together with additional CFP Board materials). To become a CFP, a candidate must complete educational requirements in the following areas: General principles of financial planning; insurance planning; investment planning; income tax planning; retirement planning; estate planning; interpersonal communication; professional conduct and fiduciary responsibility; and financial plan development. *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ See (1) CFP Board, *Standards of Professional Conduct*, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct> (last visited March 20, 2017); (2) CFP Board, *Rules of Conduct*, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct> (last visited March 20, 2017); and (3) CFP Board, *Disciplinary Rules & Procedures*, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/disciplinary-rules-procedures> (last visited March 20, 2017).

times and to provide their financial planning services as a ‘fiduciary.’⁶¹ CFP professionals are subject to CFP Board sanctions under its Disciplinary Rules if they violate these standards.⁶²

As a CFP professional, **Owner** provides financial planning services that include the areas of estate planning, retirement planning, investment planning, and business succession planning. In addition to providing advice and recommendations in these areas, **Owner** or **Company** identifies and evaluates the tax consequences associated with a client’s financial plan. According to **Company’s** SEC Brochure, the detail and sophistication of its financial planning services will vary based on its clients’ circumstances.

According to the SEC Form ADV, **Company** identifies between 76–99% of its clients as “high net worth individuals.”⁶³ **Owner** generally requires that prospective financial planning clients have at least \$1 million of “investable assets” before entering a financial planning contract.⁶⁴ Investments made based on **Company’s** financial planning services totaled \$192 million at the end of its 2015 fiscal year.⁶⁵ Based on the evidence available, the Board concludes that a substantial majority of **Company’s** financial planning services are provided to affluent individuals who expect a high degree of professionalism.

Given **Owner’s** apparent success in providing financial planning services to his clients since 1993 as a CFP professional, the Board finds that he possesses considerable expertise in financial planning.⁶⁶ After acquiring the CFP certification, he gained experience as a financial advisor from 1986 to 1993 with CIGNA. He is a licensed insurance agent in **Owner** and sells insurance through numerous insurance companies. He also has undoubtedly benefited greatly from the annual continuing education requirements and rigorous practice standards imposed by the CFP Board. **Owner** has developed his financial planning skills and knowledge for over two decades.

ii. **Owner’s expertise in investment advisory services**

As part of **Company’s** integrated advisory services, **Owner** offers investment advisory services. By incorporating these services into **Company’s** business model, **Owner** is able to offer his financial planning clients the means to implement the investment recommendations under their financial plans. For example, in his capacity as an LPL Financial IAR, **Owner** is able to open LPL Financial advisory accounts on behalf of his clients.

⁶¹ See Enclosure 16 at 10.

⁶² See CFP Board, *About: Ethics and Enforcement*, <http://www.cfp.net/about-cfp-board/ethics-enforcement> (last visited March 20, 2017).

⁶³ See Enclosure 7 at 5 and *supra* note 26.

⁶⁴ See Enclosure 2 at 5.

⁶⁵ See Enclosure 7 at 15.

⁶⁶ **Company’s** website states that “we have earned a reputation for excellence in our industry, and rank in the top 1% of LPL Financial’s approximately 12,800 advisors nationwide, based on annual production.” See Enclosure 6.

As an LPL Financial IAR, [Owner] is subject to the Investment Advisers Act of 1940. Section 202(a)(11) of the Investment Advisers Act defines the term “investment adviser” to mean:

... any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities ...

An investment adviser is generally regarded as owing fiduciary duties to his clients: “An investment adviser is a fiduciary who owes his clients an affirmative duty of utmost good faith, and full and fair disclosure of all material facts.”⁶⁷ The investment adviser’s duty includes the “obligation to disclose material facts to his clients whenever the failure to do so would defraud or operate as a fraud or deceit upon any client or prospective client” and “the duty to disclose the various capacities in which he might act when dealing with any particular client”⁶⁸ Recognizing this duty, [Company] discloses in the SEC Brochure the potential conflicts of interest in having [Owner] offering fee-generating LPL Financial advisory accounts to [Company’s] financial planning clients as well as the various capacities in which [Owner] provides investment advisory services as an LPL Financial RR or LPL Financial IAR.⁶⁹

[Owner] may also provide brokerage services for securities transactions in his capacity as an LPL Financial RR or as an LPL Financial IAR.⁷⁰ As discussed earlier, [Owner] acquired various securities licenses from the FINRA, including the Series 7 license, which authorizes him to sell practically any security.

iii. Analysis of [Company’s] arguments on [Owner’s] status as a professional individual

[Company’s] appeal emphasizes [Owner’s] lack of a college degree and the coursework required for becoming a CFP when he obtained his certification. Because the current CFP certification is about 18 college semester hours and awarded for passing a multiple choice examination, the appeal asserts that it is “wholly inappropriate” to equate the CFP course with law school, medical school, and, presumably, other professional schools. The appeal relies on OL 76-106’s view that the services provided by a professional individual require knowledge that is “customarily acquired by a prolonged course of specialized intellectual instruction and study”

Though we acknowledge that previous opinion letters applying the exclusion have included traditional educational degrees as a factor in their overall analysis, Section 4021(c)(2)(B) does

⁶⁷ See SEC Release No. IA-1092 (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963) (quoting Prosser, *Law of Torts*, at 534-535 (1955)) (internal quotation marks omitted), Enclosure 14 at 15.

⁶⁸ See *id.* at 15-16.

⁶⁹ See Enclosure 2 at 8.

⁷⁰ See *id.* (“Brokerage Practices”).

not include such a requirement.⁷¹ Indeed, the use of the word “customarily” in OL 76-106 implies that the status of “professional individual” may be obtained through specialized education, training, and experience, rather than exclusively through a traditional degree. So, for example, Section 4021(c)(2)(B) includes “attorneys at law” as professional individuals, even though some states, *i.e.*, California, Virginia, Vermont, and Washington, continue to allow individuals without a law degree to become lawyers through study and experience. And, in OL 97-2, in which PBGC determined that licensed surveyors were professional individuals, the qualification to sit for the licensing examination was met if an individual graduated from a four-year program *or* had 10 years of specific experience.

The appeal focuses exclusively on [Owner's] CFP certification to distinguish him from the professional individuals listed in the statute. But [Owner's] services are not limited solely to the knowledge he acquired to become a CFP. As discussed above, [Owner] provides, individually, and as [Company] integrated advisory services that include insurance sales and investment advice. To provide these services in his various capacities, *e.g.*, RIA, IAR, RR, [Owner] acquired knowledge from, *inter alia*, the preparation and study for numerous examinations leading to FINRA series licenses. His years of experience as a CIGNA Financial Advisor undoubtedly contributes to his professional knowledge and expertise. And, as a CFP and licensed insurance agent in [Owner] [Owner] must meet prescribed continuing education requirements. Thus, we reject the appeal's overly narrow appraisal of [Owner's] education and training.

We also disagree with the appeal's argument that [Owner's] services are akin to those performed by general contractors, automotive service providers, massage therapists, court reporters, computer network specialists, and others whom PBGC has previously determined not to be professional individuals. The services that these individuals perform typically involve routine mental, manual or physical processes. They are fundamentally different from providing, as a fiduciary, a financial plan, along with an analysis of the associated tax consequences and ongoing investment advice and monitoring of investments needed to carry out the plan. [Owner's] services “consistently require the exercise of discretion and judgment and are predominantly intellectual in character.”⁷² The services performed by the workers referenced in the appeal, *e.g.*, massage therapists, etc., cannot be characterized as fiduciary in nature.

iv. Summary of analysis; findings as to professional individual

Based on an analysis of [Owner's] services, the Appeals Board concludes that his services are analogous to the services provided by the professional individuals set forth in Section 4021(c)(2)(B). Like the services of many of the statutory professional individuals, [Owner's] services are licensed and regulated to protect consumers. Based on the evidence, the Board finds [Owner] provides services that require knowledge and expertise of an advanced type in a field of learning that he acquired through “a prolonged course of specialized intellectual instruction.”⁷³ The Board further finds that [Owner's] education

⁷¹ See OL 79-12, OL 96-1, and OL 97-2.

⁷² OL 76-106.

⁷³ OL 76-106.

and training can be “distinguished from a general academic education and from an apprenticeship or from training in the performance of routine, mental, manual or physical processes.”⁷⁴ The Board therefore finds that [redacted] Owner is a professional individual under Section 4021(c)(2).

b. [redacted] Company's principal business is the performance of professional services

Section 4021 does not define the term “professional services.” As explained above, the statute defines “professional individuals” through a non-exclusive list in Section 4021(c)(2)(B). The Appeals Board has previously concluded that “professional services” are the type of services customarily “performed by individuals who are employed either in one of the occupations identified in Section 4021(c)(2)(B) or in an occupation with similar characteristics.”⁷⁵ As previously discussed, PBGC’s Opinion Letters have described professional services as “requiring the consistent exercise of discretion and judgment in [the] performance” and as being “predominantly intellectual in character.”⁷⁶

PBGC’s opinion letters include several cases in which the services are performed by individuals who are not included in Section 4021(c)(2)(B) but who nevertheless perform professional services. For example, in OL 97-2, surveying consulting services were professional services because the services provided required the firm’s principals to use their discretion and judgment to evaluate conflicting data and render advice based on their analysis of the data. In OL 96-1, economic consulting services were professional services because the firm presented professional opinions in the areas of macroeconomics, mathematical economics, econometrics, and accounting in the form of reports to clients. And, in OL 79-12, urban planning services were professional services because the professional planners advised municipal planning boards in preparing comprehensive development plans, land use studies, and housing surveys. The Appeals Board finds that these services are analogous to the integrated advisory services provided by [redacted] Company

Based on the evidence, the Appeals Board finds that [redacted] Company's integrated advisory services require “the consistent exercise of discretion and judgment in [their] performance” and are “predominantly intellectual in character.” As discussed above, [redacted] Company is a Registered Investment Adviser under the Investment Advisers Act and, accordingly, is a fiduciary to its clients. [redacted] Owner acts as a fiduciary both as a CFP and as an LPL Financial IAR. In these capacities, he is required to act in the best interests of his clients. The CFP Board’s Disciplinary and Ethics Commission reviews and takes actions for violations of the Code of Ethics and Rules of Conduct. [redacted] Owner's breach of fiduciary duties could jeopardize his position as an LPL Financial RR and IAR, result in the imposition of sanctions by the CFP Board, and subject him to civil or criminal liability under the Investment Adviser’s Act. The Appeals Board concludes that [redacted] Company provides professional services.

⁷⁴ *Id.*

⁷⁵ See Enclosure 15 at 6.

⁷⁶ See OL 79-12, 76-106.

Because Section 4021(c)(2)(A) defines “professional service employer” as an entity “the principal business of which is the performance of professional services,” we must determine whether professional services are the principal business of [redacted] Company. As stated above, the Board finds that [redacted] Company’s integrated advisory services are professional services. Consistent with the plain meaning of “principal,” we conclude that this standard has been met where more than 50% (*i.e.*, a simple majority) of the entity’s business revenue is derived from the performance of professional services.⁷⁷ Based on a preponderance of the evidence, we find that these integrated advisory services constitute the principal business of [redacted] Company within the meaning of Section 4021(c)(2)(A).

The Board must also determine whether [redacted] Company and [redacted] Owner perform the same professional service. Based on our review, we find that [redacted] Company and [redacted] Owner provide the same professional service—integrated advisory services.

The appeal emphasizes that “[redacted] Company’s revenue is not solely derived from financial planning services.” We agree. According to the SEC Brochure, more than 50% of [redacted] Company’s revenue is derived from “Investment Advisor Representative fee compensation,” which apparently includes revenue derived from financial planning services.⁷⁸ Although the appeal asserts that as much as 15% of [redacted] Company’s business over the past three years is not derived from financial planning, the appeal does not offer any evidence to suggest that [redacted] Company’s principal business is anything other than the performance of integrated advisory services that include financial planning services and investment advice. Therefore, we uphold PBGC’s determination that [redacted] Company’s principal business is the performance of professional services.

Because [redacted] Owner the sole owner of [redacted] Company is a professional individual and [redacted] Company’s principal business is the performance of professional services, we find that [redacted] Company is a professional service employer. Because [redacted] Company is a professional service employer and the Plan has always had fewer than 25 active participants, we find that the [redacted] Company Plan is excluded from PBGC’s coverage under Title IV of ERISA.

2. PBGC’s determination is consistent with longstanding guidance

The appeal claims that PBGC’s coverage determination of May 10, 2016, marks a “realignment” of PBGC’s coverage opinions and is “so contrary to earlier decisions by the PBGC and so different than the expectations of the industry.” The appeal does not, however, cite any opinion letters or other determinations in which PBGC has found that plan sponsors offering the type of integrated advisory services provided by [redacted] Company are not professional service employers within the meaning of Section 4021(b)(13). As discussed above,

⁷⁷ See *Black’s Law Dictionary* (10th ed. 2014) (defining “principal” as “chief; primary; most important.”). See also OL 82-18 (June 9, 1982) (The “principal business” of a pharmaceutical entity was the performance of professional service because over 50% of gross sales were derived from the sale of prescription drugs.).

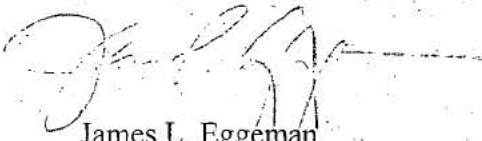
⁷⁸ Enclosure 2 at 5. Financial planning revenue is not accounted for in the SEC Brochure, but the appeal combines [redacted] Company’s IAR fee compensation revenue with its financial planning revenue, so [redacted] Company likely combined them in the SEC Brochure as well. See Enclosure 1, Exhibit F, at 26-28.

our decision is consistent with section 4021 of ERISA, PBGC's existing opinion letters, and the prior Appeals Board decision.

Decision

For the reasons discussed above, we deny [redacted] Company's appeal and affirm PBGC's determination that the Plan is not eligible for insurance coverage under Title IV of ERISA. This is PBGC's final decision on this matter. [redacted] Company may seek review of this decision in an appropriate United States District Court.

Sincerely,



James L. Eggeman
Member, Appeals Board

16 Enclosures:

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