

Pension Benefit Guaranty Corporation

98-2

May 20, 1998

REFERENCE:

[*1] 4021(b)(2) Plans Covered. Government Plans

OPINION:

This is in response to the request that you filed (the "Request") n1 for a determination by the Pension Benefit Guaranty Corporation ("PBGC") that the above-referenced plan (the "Plan") is exempt from coverage under Title IV of ERISA, 29 U.S.C. § 1301, et seq. You assert that the Plan is a governmental plan that is exempt under ERISA § 4021(b)(2). For the reasons discussed below, on the basis of the information that you provided, we conclude that the Plan is not a governmental plan.

n1 Our references to the "Request" include your letters dated September 8, 1995 ("Sept. Ltr."); January 5, 1996 ("Jan. Letter"); April 26, 1996 ("Apr. Ltr."); and July 21, 1997 ("July Ltr."), and attachments thereto. In addition, you have provided PBGC counsel in telephone conversations with certain background information.

The Request

The Plan sponsor is * * * (the "Corporation"), a * * * corporation that, under a contract with the city of * * * (the "City"), operates the * * * (the "Transit System"). The Request argues that the Corporation is a government instrumentality, and thus the Plan is a governmental plan [*2] exempt from Title IV coverage. Apr. Ltr. at 1.

In support, the Request asserts that the governmental exemption applies because: (1) the Corporation "operates the City's transit system" (Sept. Ltr.); (2) the City "owns" the Transit System, which is a "public enterprise" within the meaning of N.C. Gen. Stat. § 160A-311 (Apr. Ltr. at 1-2); (3) the City is the "source" of contributions to the Plan, and, under its contract with the Corporation, is responsible for paying "all past, present, and future pension or profit-sharing plan liability, including, without limitation . . . liability for vested, but under funded or unfunded benefits" (id. at 2-3, 4); (4) in-house counsel for * * * , the ultimate parent of the Corporation, wrote a letter to the Corporation opining that the Corporation "and similar subsidiaries of * * * " are government instrumentalities (id. at 3); (5) the City pays all expenses of the Transit System, and all revenues therefrom are property of the City (id. at 4); (6) the City has the power to approve in advance the appointment and removal of the "resident management team" of the Corporation's parent, * * * (id.); (7) the Corporation's activities are [*3] greatly restricted by the policies, standards and procedures established by the City (id.); (8) the Plan is a governmental plan within the meaning of Title I of ERISA, § 3(32) (id. at 5); and (9) the Plan is a governmental plan within the meaning of the Internal Revenue Code, § 414(d) (id. at 5-7). n2

n2 The Request included the following documents: (1) selected sections of the City's Charter and * * * General Statutes; (2) the Corporation's Articles of * * * Incorporation; (3) various reports and internal draft and final memos of the City pertaining to standards applicable or desirable for the Transit system; (4) the "opinion letter" dated March 26, 1996, of * * * , Assistant Division Counsel, * * * ; (5) the management contract dated September 1, 1994, among the Corporation, * * * , and the City; (6) Form 5303 Application for plan qualification to the IRS dated March 31, 1995, (7) IRS Determination Letters dated August 15, 1988, December 7, 1995, and undated but mailed in February 1996; (8) Plan counsel's letter to the IRS dated January 5, 1996; and (9) the Plan.

Background

The City is a political subdivision of the State of * * * . Apr. Letter at 1-2. Pursuant [*4] to state statute, the City is authorized to contract for the operation of a "public enterprise" such as the Transit System. N.C. Gen. Stat. §§ 160A-311, 312(a).

As we understand the facts, from 1955 to 1977, the Transit System was managed by * * * was a private, for-profit corporation that was owned, directly or indirectly, by a private company based in * * * . See Plan at § 1.6. * * * managed the Transit System under contract with the City. In 1955, * * * established a pension plan for employees of the Transit

System (the " * * * Plan"). The Request does not assert that the * * * Plan was or is a governmental plan or otherwise exempt from Title IV.

In 1977, the City did not extend the management contract with * * * and instead selected the Corporation and * * * Company to manage the Transit System. The Corporation, organized under the laws of * * *, is a subsidiary of * * * Company (the "Parent"), a wholly owned, for-profit subsidiary of * * *. , a wholly owned subsidiary of * * *. , which is a wholly owned subsidiary of * * *. The Parent is in the business of providing management services for the operation of transit systems.

Certain employees who work in the Transit System [*5] are represented by the * * * (the "Union"). When * * * was replaced by the Corporation, the City and Union agreed that the pension benefits of Transit System employees should not be affected by the replacement of the management company. They attempted to obtain the agreement of * * * to transfer assets allocable to those employees from the * * * Plan to a successor plan to be established. However, * * * refused their request.

Instead, the City and the Corporation established the Plan as a type of mirror, offset benefit plan that, in combination with the * * * Plan, essentially provided the benefits that would have been paid had the participants continued to be covered by the * * * Plan. From 1980 to 1995, without reservation, the Plan paid Title IV premiums. n3

n3 Under ERISA § § 4006 and 4007, only plans covered by Title IV are required to pay premiums. Governmental plans are not required to pay premiums to PBGC. See ERISA § § 4006(a)(1) and 4021(b)(2).

The Plan is not part of any pension plan offered by the City to public employees. Apr. Letter at 2; Plan § 12.2. The Plan provides that the Corporation (and not the City) is the sponsor of the Plan. See Plan § § 1.8, 2-5, [*6] 8, 10-12. Under Plan § 3.1, the Corporation is required to make such contributions "as are deemed necessary to maintain the Plan on a sound actuarial basis . . . taking into account . . . the requirements of the [Internal Revenue] Code." n4

n4 Minimum funding requirements prescribed by Title I of ERISA and section 412 of the Code do not apply to "governmental plans" within the meaning of those statutes respectively. ERISA § 4(b)(1); Code § 412(h)(3). Thus, if the Plan were * * * governmental, no contributions would be required under ERISA or section 412 of the Code.

Participation in the Plan is limited to Corporation employees. Plan § § 1.5, 2.1. Although the Plan grants past service credit for employment with private companies such as * * *, it does not grant past service credit for employment with the City. Plan § § 1.17, 1.31.

The Corporation administers the Plan. Plan § 8.1. The Corporation is empowered to appoint and remove the Trustee, who manages the assets of the Plan. Plan § 9.7.

The Corporation has the exclusive powers, unrestricted by the Plan, to amend and terminate the Plan. Plan § § 10.1, 10.2. Upon termination of the Plan, any excess assets revert to the Corporation. [*7] Plan § § 3.2, 10.2(c). The Plan also provides that "no participant or other individual shall have recourse toward the satisfaction of any accrued benefit other than from the trust fund or the Pension Benefit Guaranty Corporation." n5 Plan * * * § 10.2(b).

n5 Under ERISA § 4021(b)(2), PBGC does not guarantee benefits of governmental plans.

The contract dated September 1, 1994, among the Corporation, the Parent; and the City (the "Contract"), § I.A., provides that the City "engages [the Parent and the Corporation] as independent contractors to advise the City and manage the operation of its transit system . . . now or hereinafter owned by the City." (Emphasis added.) "The Parent and the Corporation are * * * independent contractors and are not employees or agents of the City and each retains the right to exercise full and exclusive control and supervision over its employees and their compensation and discharge except as herein provided." Contract § I.A.1. The Contract further provides it shall not "be construed as creating a partnership, agency, joint venture or other similar relationship between the City and [the Parent] or [the Corporation]." Contract § I.A.1.

The Parent [*8] is to be compensated by the City for its management services in the amount of at least \$ * * * per annum, plus incentives and other charges not to exceed \$ * * * over three years, not including "Special Projects." Contract § I.B.4.

The Corporation is "responsible for operating the [Transit System] under the supervision of [the Parent] and subject to the policy direction of the City. . . ." Contract § I.A.1. Subject to the consent of the City, the Parent appoints and removes certain senior management personnel. Contract § II.A.1. The Parent and Corporation together "have primary

responsibility to manage all primary and support functions necessary to transit operations." Contract § II. In particular, management responsibilities of the Parent and the Corporation include:

. . . carrying out the functions of short range transit planning, equipment and building utilization and maintenance, security, routes, schedules, fare analysis, equal service standards, purchasing, budgeting, safety, employee selection and training, employee relations, labor negotiations, public relations, equipment selection, development of all specifications, capital equipment and capital improvements, unless the [*9] City desires to make other arrangements, and all other normal managerial functions reasonably required in the day-to-day operation of [the Transit System] . . . [Contract § I.B.1.]

The City has "primary responsibility for policy direction, funding, marketing, finance, and grant application/administration and long range planning for Transit System operations." Contract § II. The City owns all or virtually all of the hard assets of the Transit System, as well as the operating revenue. Contract § § III.C, V.B. In addition, the City is responsible for paying "all operating expenses" of the Transit System, which includes "[c]ontributions to a pension plan that meets Federal requirements pursuant to [the] Employee Retirement [sic] Security Act of 1974" and "all past, present, and future pension or profit sharing liability, including, without limitation to [sic] liability for vested, but under funded or unfunded benefits." Contract § I.A.2.b. Upon termination or expiration of the Contract, "the City or its designee shall . . . immediately assume responsibility for the payment and performance of all outstanding obligations arising out of the [Corporation] employment relationship, including, [*10] but not limited to, . . . pension or profit sharing plans, including, without limitation, liability for vested but unfunded or underfunded benefits." Contract § III.A.2.

The Request does not assert, and the Contract does not provide, that the City is directly liable to the Plan or Plan participants for unfunded benefits. The Contract contains no provision allowing Plan participants to enforce a claim against either the Corporation or the City with respect to any Plan benefit or liability. Although Plan counsel suggested that participants may have a third-party beneficiary claim against the City, the Contract explicitly provides that it "is not intended to be a third party beneficiary contract and confers no rights upon anyone other than the City or [the Parent]/[the Corporation]." Contract § III. I. Nor is there any statute that requires the City to contribute to the Pension Plan in the event of underfunding. Apr. Letter at 3. In substance, the Contract merely provides for indemnification of the Corporation by the City, rather than unconditionally obligating the City to pay for unfunded benefits.

In addition, Section 11.2 of the Plan provides that the Corporation is not liable thereunder [*11] for any Plan benefits. Thus, even if the City were, under the Contract, vicariously liable to the participants for the Corporation's Plan benefit liabilities, the Corporation has no such liabilities under the Plan. The City's buffer against liability for Plan benefits is further reinforced by Plan Section 11.2, which provides that no benefits are payable except in accordance with the Plan, and, as previously noted, the Plan makes no provision whatsoever for payment of any benefits or liabilities by the City. n6 In sum, if the Plan were governmental, the Corporation would not be liable for unfunded benefits upon termination of the Plan, and, thus, the City would not even have indemnification liability with respect to unfunded benefits.

n6 Further, under Plan § 11.7, only the Corporation and the Trustee are necessary parties to litigation involving the Plan, and participants, who are purportedly bound by such litigation under the terms of the Plan, are not entitled to any notice of such litigation.

The Request does not assert that the Corporation is treated as a governmental entity under any state or other federal law. Nor does the Request assert that employees of the Corporation [*12] are treated as government employees. To the contrary, as previously noted, the Contract provides that the Corporation, and not the City, controls the compensation, discipline and day-to-day functions of employees who operate the Transit System. Contract § § I.A.1, I.A.2.a.

The Request suggests that the IRS's favorable qualification letter of * * *, may support the Request because the IRS's letter refers to the Plan as a governmental plan. n7 However, as the Request concedes, the IRS expressly disclaimed having considered whether the Plan met the requirements for governmental plan status. Further, by letter dated January 5, 1996, Plan counsel requested the IRS to issue a "corrected determination letter" without the disclaimer of consideration of the Plan's governmental status. However, on * * *, the IRS instead issued a revised determination that eliminated the reference to the Plan as a governmental plan.

n7 In a telephone conversation, Plan counsel told PBGC counsel that the IRS had determined the Plan to be a governmental plan. However, after PBGC counsel requested a copy of the IRS's determination, Plan counsel reviewed

the matter and, in his * * * cover letter to PBGC counsel, receded from the position that the IRS had determined that the Plan was governmental. [*13]

The Request also relies upon the "opinion letter" dated March 26, 1996, of * * *, Assistant Division Counsel of * * * (the " * * * Opinion"). It states that "has always taken the position" that the Plan is governmental based upon various private letter rulings of the IRS and the opinion of outside counsel. The * * * Opinion asserts that the IRS has taken the position in private letter rulings that employees of transit operations like those of the Transit System are "actually governmental employees" and therefore the benefit plans covering them are governmental plans. However, the * * * Opinion does not include or specifically reference such private letter rulings. Moreover, neither the * * * Opinion nor the Request asserts that a private letter ruling as to whether the Plan is governmental has ever been requested of the IRS. Similarly, neither the * * * Opinion nor the Request includes the "opinion of outside legal counsel" upon which the * * * Opinion relies.

Discussion

ERISA § 4021(b)(2), 29 U.S.C. § 1321(b)(2), excludes from Title IV coverage any plan "established and maintained for its employees by the Government of the United States, [*14] by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing . . ." The legislative history of ERISA § 4021(b)(2) indicates that * * * governmental plans were excluded from Title IV coverage because, in part, Congress believed that "the ability of governmental bodies to fulfill their obligations to employees through their taxing powers is an adequate substitute for termination * * * insurance." S. Rep. No. 93-383, 93rd Cong., 1st Sess., 81 (1973); H.R. Rep. No. 93-807, 93rd Cong., 2d Sess., 164-5 (1974). See *Rose v. Long Island R.R.*, 828 F.2d 910 (2d Cir. 1987); PBGC Op. Ltr. 75-44.

There is no definitive statutory or regulatory definition of the term "governmental instrumentality." PBGC has considered a number of factors in determining whether a plan is or is not the plan of a governmental instrumentality. These include (i) whether the plan or the plan sponsor is controlled by a governmental entity, (ii) whether the officers or members of the plan sponsor represent, or are selected by, a governmental entity, (iii) whether the plan or the plan sponsor is funded by a governmental entity, (iv) [*15] whether the plan's participants are treated as governmental employees, (v) whether the plan sponsor is treated under state or federal law as a governmental entity, (vi) whether there are any private interests involved, and (vii) whether a governmental entity has the powers and interests of an owner. See, e.g., PBGC Opinion Letters No. 83-16 (July 12, 1983), No. 81-40 (December 9, 1981), No. 81-37 (November 16, 1981), No. 81-31 (September 22, 1981), No. 81-30 (September 22, 1981), No. 81-13 (May 13, 1981), No. 79-6, (April 10, 1979), No. 78-25 (October 31, 1978), No. 77-152 (July 13, 1977), and No. 76-95 (August 2, 1976).

Based upon the statute, its legislative history, and the criteria discussed in these Opinion Letters, we do not agree that the facts presented by the Request show that the relationship between the Corporation and the City is such that the Corporation should be deemed a governmental instrumentality for purposes of section 4021(b)(2) of ERISA.

(i) Control. First, the Request does not demonstrate that the City exercises control over the Plan. To the contrary, the Plan is sponsored and administered solely by the Corporation and the Corporation's appointee, the [*16] Trustee. Second, the * * * Corporation itself is owned and controlled by the Parent, a private, for-profit corporation, rather than the City. Indeed, the Corporation's Charter makes no mention whatever of the City. Third, by contract, the Corporation is "an independent contractor" rather than any form of "agent" of the City. Of course, like virtually any client, the City establishes the overall goals of its contractor, the Corporation, with respect to the subject of the contract. However, the Corporation and the Parent are substantially responsible for how they perform their contractual tasks. Thus, the Parent and the Corporation are contractually authorized and directed "to manage all primary and support functions necessary to transit operations." Fourth, the Request does not demonstrate that, in practice, the City actually manages those functions while the Corporation and the Parent perform merely ministerial functions. In sum, the evidence provided by the Request indicates that the Plan is controlled by the Corporation, which in turn is owned and substantially controlled by private interests, the * * *, rather than by the City. See PBGC Op. Ltrs. 81-2 and 81-13.

(ii) Officers [*17] and Directors. The Parent, under the Contract and by its control over the Corporation, has "primary" responsibility for managing the Transit system. The Request does not demonstrate that the City has the power of appointment of the officers or directors of the Parent. n8 Moreover, the Parent, and not the City, appoints the officers and directors of the Corporation. See *Rose v. LIRR*, 828 F.2d 910, 916-917 (2d Cir. 1987); PBGC Op. Ltrs. 81-23, 81-30, and 81-40.

n8 Under Contract § II.A.1., the Parent is responsible for furnishing a "resident management team" that must be

approved by the City. However, at least absent a demonstration that the City's veto power, in practice, amounted to a power of appointment, this provision cannot be equated with a power of appointment. Rather, it appears simply to be a typical provision in service contracts intended to assure that, for key positions, the managing company selects from its staff those employees who have appropriate expertise and experience.

(iii) Funding. Under the Plan, the Corporation, which does not have taxing power, is solely responsible for Plan contributions. Although the City is contractually [*18] liable to the Corporation for reimbursement of those contributions, the Request does not demonstrate that the City would be liable to the Plan or the participants for delinquent contributions. Moreover, the Request does not demonstrate that the City would necessarily be liable for underfunding if the Plan were terminated. See PBGC Op. Ltr. 81-13 (plan was not governmental where contractor/plan sponsor's contract with the government provided that wages and pension contributions attributable to work performed for the governmental project were an "allowable expense," but "[n]either the Plan nor the contract provides for any direct payment by [the governmental entity] of Plan participant benefits in the event they become unavailable from other funding media)." See also PBGC Op. Ltr. 76-95. Compare PBGC Op. Ltr. 77-126 (plan is governmental where governmental entity "is contractually required to pay all benefit entitlements under the Plan, including, in the event of a termination, benefits that would be insured under Title IV . . .").

(iv) Employee Status. The Request makes no showing that Transit System employees are government employees of the City, rather than private [*19] employees of the Corporation. And, under the Contract, the Corporation "retains the right to exercise full and exclusive control and supervision over its employees and their compensation and discharge . . ." See *Alley v. Resolution Trust Corp.*, 984 F.2d 1201, 1205-6 (D.C. Cir. 1993) (court found no indication that Congress meant the ERISA exemption to reach an entity whose employees are not subject to laws governing public employees generally, since "the core concern for ERISA purposes is the nature of an entity's relationship to and governance of its employees"); PBGC Op. Ltr. 81-40.

(v) Other Laws. The Request does not assert or demonstrate that the Corporation is treated as a governmental entity under any other federal or state law. See PBGC Op. Ltrs. 81-23, 81-30, and 81-37.

(vi) Private Interests. The Corporation is a wholly owned subsidiary of the Parent, which in turn is a wholly owned affiliate of the privately owned * * *. Thus, the Corporation is owned and controlled by private, commercial interests. See *Rose v. LIRR*, 828 F.2d at 915; PBGC Op. Ltr. 81-13.

(vii) Governmental Interests. The City [*20] owns the assets and revenues of the Transit System and is responsible for most Transit System expenses. Moreover, the Transit System serves a public purpose. However, as noted above, the Plan is sponsored by the Corporation, which is owned and controlled by the * * *, not the City. The Corporation's employees are not covered by any of the City's plans. See *Alley v. RTC*, 984 F.2d at 1206 (Congress assumed that public employees exempt from ERISA protection would be "covered by some distinctively 'public' employee benefit scheme.")

In sum, we conclude that the various factors used to assess whether the Corporation is a governmental instrumentality weigh heavily towards the conclusion that it is not, and thus that the Plan is not a governmental plan exempted from Title IV protection and coverage. Further, we do not think that the arguments raised by the Request support a different conclusion.

First, the Request asserts that the governmental exemption applies because the Corporation "operates the City's transit system," which is a "public enterprise" within the meaning of N.C. Gen. Stat. § 160A-311. (Apr. Ltr. at 1-2; Sept. Ltr.) The fact that a private [*21] entity's operations serve a public purpose does not convert the entity into a governmental instrumentality. See *Alley v. RTC*, 984 F.2d at 1205. Indeed, many clearly private companies provide public transportation, support national defense efforts, or otherwise serve public purposes. See PBGC Op. Ltr. 81-13. Thus, the fact that the operations of the Corporation serve a public purpose does not establish that the Corporation is a government instrumentality.

Second, the Request asserts that the governmental exemption applies because the City "owns" the Transit System. (Apr. Ltr. at 1-2.) However, although the City owns the hard assets, the Corporation, and not the City, employs the Transit System employees and sponsors the Plan.

Third, the Request asserts that the Plan is exempt because the City is the "source" of contributions to the Plan, and, under its contract with the Corporation, the City is responsible for paying "all past, present, and future pension or profit-sharing plan liability, including, without limitation . . . liability for vested, but under funded or unfunded benefits." (Apr. Ltr. at 2-3, 4.) However, as previously discussed, the Request [*22] does not demonstrate that the taxing power of the

City necessarily backs the obligations of the Plan.

Fourth, the Request relies upon the * * * Opinion that the Corporation "and similar subsidiaries of * * * " are government instrumentalities. (Apr. Ltr. at 3.) However, the * * * Opinion is merely conclusory. Rather than presenting substantive support for the position that the Corporation is a governmental instrumentality, the * * * Opinion relies upon unspecified private letter rulings by the IRS and an undisclosed opinion by * * * 's "outside legal counsel." Plainly, the weight of the evidence that the Corporation is not a governmental instrumentality is not affected by conclusory, unspecified, or undisclosed rulings or opinions. Moreover, the * * * Opinion is expressly based upon the proposition that "the employees of [the Corporation] . . . are government employees and the corresponding benefit plans are government plans." However, as previously discussed, the evidence submitted with the Request does not support the conclusion that the Corporation's employees are government employees. While this may not necessitate a finding that the Plan is private in all circumstances, it negates [*23] the * * * Opinion's only stated basis for its position that the Plan is governmental.

Fifth, the Request suggests that the Corporation is a mere conduit controlled by the City because the City pays all expenses of the Transit System and all revenues thereof are property of the City (id. at 4); the City has the power to approve the appointment and removal of the "resident management team" of the Corporation's parent, * * * (id.); and the Corporation's activities are greatly restricted by the policies, standards and procedures established by the City (id.). However, Request does not demonstrate that the Corporation is a mere conduit or agent of the City.

To the contrary, the Contract between the Corporation and the City provides that the Corporation is independent from the City with regard to performance of its duties thereunder, namely, the operation of the Transit System. For example, the Contract specifies that the Corporation is an independent contractor rather than any kind of agent of the City. Moreover, under the Contract, the Corporation "retains the right to exercise full and exclusive control and supervision over its employees and their compensation and discharge [*24]" And while the City is primarily responsible for basic policy choices and funding, the Corporation and the Parent are responsible for operating the Transit System.

Finally, the Corporation is a wholly owned affiliate of a large, well established, privately controlled group of corporations, * * *, that is in the business, inter alia, of operating transit systems. This kind of independent ownership is further evidence that the Corporation is not a mere conduit that is controlled by the City.

Sixth, the Request asserts that the Plan is a governmental plan within the meaning of Title I of ERISA, § 3(32). (Apr. Ltr. at 5). However, this is far from clear. The Department of Labor considers much the same factors as PBGC in determining coverage under ERISA § 3(32). See DOL Opinion Letter 90-09 (April 25, 1990). As previously discussed, those factors indicate that the Plan is not a governmental plan. Indeed, the Request does not assert that an opinion of DOL concerning the Plan or any other plan of the Corporation was ever requested or issued.

Moreover, the DOL opinion letters cited by the Request do not support the conclusion that the Plan is a governmental plan. DOL Opinion [*25] Letter 93-28A involved a city transportation authority (the "Authority") that was established as a "public body" by state statute. This public body was empowered to levy and collect taxes, to issue municipal bonds, and exercise the right of eminent domain. Its employees were treated as public employees for purposes of workers' compensation statutes. The board of directors of the Authority was appointed by public officials. The plan at issue was sponsored and administered by the Authority. Thus, the DOL's conclusion that the Authority's plan was a governmental plan provides no support for the Request's position that the Plan at issue here is governmental. To the contrary, DOL carefully distinguished the Authority's governmental plan from a different plan, evidently non-governmental, maintained by a private company engaged by the Authority to provide drivers and maintenance personnel for the bus system. n9

n9 Similarly, DOL Op. Ltr. 95-21A does not support the Request. That letter involved a plan sponsored and administered by a county-owned hospital. The hospital was operated pursuant to state statute by the county. The hospital's powers included the power to levy taxes, to issue tax-exempt bonds, and to exercise the right of eminent domain. The county was responsible for the financial obligations of the hospital. The hospital's board was appointed by public officials. DOL specifically cited these governmental powers and control in concluding that the hospital was a governmental entity. In contrast, the Corporation does not have such powers, nor is it publicly owned or controlled as was the hospital. Thus, if anything, DOL Op. Ltr. 95-21A supports the conclusion that the Plan is not governmental. [*26]

Finally, even if the Plan were governmental under Title I, that would not be conclusive here. Although DOL is entitled to deference in its interpretations of Title I of ERISA, those interpretations do not necessarily control in the Title

IV context.

Seventh, the Request asserts that the Plan is a governmental plan within the meaning of the Internal Revenue Code, § 414(d). (Apr. Ltr. at 5-7). As previously noted, however, the Request does not assert that a ruling to that effect was requested or issued by the IRS. To the contrary, in response to Plan counsel's January 5, 1996 letter, the IRS refused to certify that the Plan was governmental.

The Request also cites certain IRS Revenue Rulings and private letter rulings as to other plans, but these rulings are not persuasive that the Plan is a governmental plan within the meaning of ERISA § 4021(b)(2). Revenue Ruling 57-128, 1957-1 C.B. 311, was a pre-ERISA, non-pension ruling involving an association operated by the heads of the insurance departments of several states, all members of which were public officials. Moreover, in that case, the IRS opinion that the association was governmental was [*27] based upon the fact that "no proprietary interest in the association exists other than those of the states themselves, which through the membership of their officers have the powers and interests of an owner." Here, in contrast, the Parent and the Corporation are owned by the * * * . n10

n10 Similarly, Rev. Rul. 65-196, 1965-2 C.B. 388, was a pre-ERISA, non-pension ruling involving a government-owned and controlled sports commission created to provide recreational facilities for the public.

More to the point is Rev. Rul. 89-49, 1989-1 C.B. 117, n11 in which the IRS ruled that a plan sponsored by a non-profit company that contracted to provide volunteer fire-fighting services to several municipalities was not a governmental plan. The IRS stated that "one of the most important factors . . . is the degree of control that the . . . government has over the organization's everyday operations." Further, the IRS stated that "the mere satisfaction of one or all of the factors is not necessarily determinative." In particular, the IRS found that:

[t]he degree of control which the municipalities exert [*28] over the fire company in its everyday operations is * * * minimal. . . . [T]here was no specific legislation which affiliated the company with the state. Further, the company's expenses are, in part, paid by the community donations. In addition, the board of trustees which controls the company's basic operation is elected by the volunteer fire-fighters. Finally, State X has not treated the company's employees as employees of the state or political subdivision thereof.

Similarly, in the instant case, the Request has not established that the City substantially controls the day-to-day operation of the Transit System, or that it treats the Corporation's employees as City employees. Moreover, the evidence here as to the other factors noted by the IRS is comparable to the evidence in that case. n12

n11 Unlike Rev. Rules 57-128 and 65-196, supra, Rev. Rul. 89-148 was issued under section 414(d) of the Code and is the published position of the IRS with respect to this ERISA-correlated section of the Code.

n12 In PLR 7935040 (May 29, 1979) and PLR 9541040 (June 30, 1995), on facts similar to the instant case in certain respects, it was determined that plans of certain corporations that manage transit systems under contract with a city or a city instrumentality were governmental plans. However, unlike the instant case, in those cases there was no finding that the cities were not directly liable for pension liabilities. Moreover, unlike the instant case, the IRS found that the cities exercised substantial control over the everyday operations of the managing corporation. Here, in contrast, the facts show that the Corporation's functions are not merely ministerial. Moreover, a private letter ruling applies only to the taxpayer(s) to whom the private letter ruling is issued. And, in any event, even if the two IRS cases were factually identical to the instant case, PBGC might well reach a different conclusion under Title IV than those two private letter rulings reach under the Code. [*29]

In sum, the IRS rulings cited by the Request do not persuade us that the Plan is a governmental plan under Title IV.

Conclusion

For the reasons discussed above, we conclude that the Plan is not excluded from coverage under Title IV of ERISA as a governmental plan. PBGC's Collections and Compliance Division will contact you regarding due and owing premiums and associated interest and penalties.

This letter constitutes an initial determination of which reconsideration may be requested pursuant to 29 C.F.R. Part 4003. Absent such a request for reconsideration, your client's administrative remedies would not be exhausted. If you decide to request reconsideration, the request should be sent, within 30 days of the date of this letter, to:

Anna Gilreath

Manager

Standard Termination and Compliance Division

Insurance Operations Department

1200 K St., N.W.

Washington, D.C. 20005-4026

This letter is not a determination as to the applicability to the Plan of either Title I or Title II of ERISA. Any inquiry relating to such a determination should be directed to the Department of Labor or the Internal Revenue Service, respectively.

Charles Korb

Manager

Processing and

Technical Assistance [*30] Branch