

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-81A  
Sec. 103(a)(3)(A)

23 NOV 1981

Mr. Myron A. Methvin  
Hunt Oil Company  
2900 First National Bank Building  
Dallas, Texas 75202

Dear Mr. Methvin:

This is in reply to your letter of July 6, 1981, requesting an advisory opinion concerning whether the Fidelity Thrift Plan (the Plan) established by the Hunt Oil Company must engage an independent qualified public accountant to conduct an examination of the financial statements and schedules of the Plan pursuant to the Employee Retirement Income Security Act of 1974 (ERISA).

You enclosed with your request a copy of the Plan's 1979 Annual Return/Report (Form 5500 series). The following is a summary of the representations contained in your letter.

The Plan was established as a contributory thrift-savings plan to provide deferred compensation and savings incentive benefits to participants supplementary to the non-contributory Fidelity Pension Plan. All funds of the Plan, with the exception of a small imprest fund retained by the Plan Administration Committee to meet minor contingencies, have been invested with the Equitable Life Assurance Society of the United States (the Equitable) in unallocated funds (contract number AC 3945). The Equitable provides an annual certification of the beginning fund balance, total contributions made by employer and participants, interest earned, distributions to participants and the ending fund balance. This information is reported in item 6 of Schedule A (Form 5500). Finally, the Plan is insured by a fidelity bond with American Home Assurance Company.

You specifically question whether it is mandatory for the Plan to have an accountant's opinion since the funds are under contract with an insurance carrier which annually furnishes its certification.

The requirement that a plan's annual report be audited by an accountant is set forth in section 103(a)(3)(A) of ERISA. More specifically, that section provides, in relevant part, that the administrator of an employee benefit plan must engage an independent qualified public

accountant to conduct an examination of any financial statements, books, and records of the plan necessary to enable the accountant to form an opinion as to whether the financial statements and schedules, required to be included in the annual report, are presented fairly and in conformity with generally accepted accounting principles.

As you point out in your letter, the Conference Report accompanying ERISA H. Rep. No. 93-1280, 93d Cong., 2d. Sess. (1974), at page 257, notes that "[a]n accountant's opinion is not to be required for statements prepared by banks or similar institutions or an insurance carrier if the statements of the bank or insurance carrier are certified by the bank and made part of an annual report." This sentence summarizes section 103(a)(3)(C) of ERISA. The regulatory provision implementing section 103(a)(3)(C) is 29 CFR §2520.103-8 (copy enclosed), which provides, in relevant part, that the examination and report of an independent qualified public accountant need not extend to any statements or information relating to assets held by an insurance carrier which is regulated and supervised and subject to periodic examination by a State agency, provided that the statements or information are prepared and certified by the insurance carrier in accordance with 29 CFR §2520.103-5.<sup>1</sup>

Section 103(a)(3)(C) and §2520.103-8 limit the scope of the accountant's audit required under section 103(a)(3)(A). They do not, however, provide an exemption from that requirement. Accordingly, despite the fact that this limitation may apply with respect to assets of an employee benefit plan, the plan would remain subject to the audit requirement (assuming, of course, that the plan is not exempt from the requirement under any other provision).

In your submission you also express the view that the limited exemption provided in 29 CFR §2520.104-44 for certain insured plans and unfunded plans should apply to the Plan. Section 2520.104-44 contains a limited exemption and alternative method of compliance for annual reporting by unfunded plans and by certain insured plans. Specifically, this regulation exempts a pension plan from various provisions requiring the inclusion of financial information in the plan's annual report, as well as from the audit requirement of section 103(a)(3)(C) if, among other conditions, benefits under the pension plan are provided exclusively through allocated insurance contracts issued by an insurance company which fully guarantees the benefit payments.

With regard to the question whether the exemption provided in §2520.104-44 is available with respect to the Plan, the Plan's 1979 Form 5500, item 13, shows that as of the end of the Plan year, the Plan's assets totaled \$2,796,487 which consisted of \$47,576 of cash on hand, \$343 of receivables and \$2,748,568 of unallocated contracts. Since Plan funds do not appear to be held

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<sup>1</sup> Section 103(a)(2)(A) and 29 CFR §2520.103-5, in pertinent part, require an insurance carrier which provides some or all of the benefits under a plan or holds plan assets to transmit and certify the accuracy and completeness of such information as is needed by the plan administrator to comply with the requirements of Title I of ERISA.

exclusively in allocated insurance contracts which fully guarantee benefit payments, it is the Department's view that the limited exemption provided by §2520.104-44 is not available with respect to the Plan.

In this connection, you inquired why a distinction is drawn in §2520.104-44 between allocated and unallocated funds. In the preamble to the Federal Register notice adopting §2520.104-44 (43 FR 10130, March 10, 1978), the Department explained why the exemption does not apply to a contract with an insurance company that provides for the accumulation of unallocated funds. The preamble states that to the extent that funds accumulated under an insurance contract are allocated and the insurance carrier fully guarantees benefit payments, the participants and beneficiaries look to the insurance carrier, not to plan, for their benefits. Thus, the financial information that is not required to be included in the annual report under §2520.104-44 (and the accountant's audit of that information) is not necessary to provide accurate and reliable reporting on the funds available to the plan for the payment of benefits. However, to the extent that funds accumulated under an insurance contract are unallocated and benefit payments are not guaranteed, plan participants and beneficiaries look to the plan for their benefits and the financial information provided in the annual report is necessary to provide accurate and reliable reporting.<sup>2</sup>

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff  
Administrator of Pension and Welfare Benefit Programs

Enclosure

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<sup>2</sup> Your discussion of §2520.104-44 appears to be based on the misapprehension that the exemption provided in that section was issued under section 103(a)(3)(C) of ERISA. In fact, the regulatory provision issued under section 103(a)(3)(C) is §2520.103-8, not §2520.104-44. Thus, while you are correct in asserting that the limitation on the scope of the accountant's examination and report provided in section 103(a)(3)(C) applies regardless whether funds held by the insurance carrier are allocated or unallocated, the exemption provided in §2520.104-44 only applies if the funds in question are allocated and the insurer fully guarantees benefit payments.