

U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210



MAR 8 1985

85-12A
Sec. 103(a)(3)(A)

Mr. Thomas D. Wilcox
Executive Director and General Counsel
National Association of Stevedores
2011 Eye Street, N.W.
Suite 601
Washington, D.C. 20006

Dear Mr. Wilcox:

This is in response to your letter of November 27, 1984, to Mr. Raymond Maria, Deputy Inspector General, U. S. Department of Labor, regarding annual reporting requirements under the Employee Retirement Income Security Act of 1974 (ERISA). We regret that the volume of correspondence concerning ERISA has resulted in a delay in responding to you.

Specifically, you have requested a clarification or ruling on behalf of Mr. Thomas McCabe (a copy of whose correspondence was forwarded with your letter) with respect to the scope of the accountant's examination where plan assets are certified to by a qualified insurance carrier and information regarding plan liabilities is provided by an enrolled actuary. In his letter to you, Mr. McCabe represents that his company's pension plan (the Plan) is funded through an immediate participation guarantee contract with the Prudential Insurance Company. The Plan is audited by Peat, Marwick, Mitchell & Co., who prepares statements compiled from the certified information on assets provided by Prudential and on liabilities provided by the enrolled actuary. Relying on ERISA section 103(a)(3)(B) and the Department's regulation at 29 C.F.R. §2520.103-8, Mr. McCabe questions whether the Plan is incurring an unnecessary expense in retaining the services of an accountant to perform an audit where it appears that all of the requisite information is provided by the insurance company and the actuary.

Section 103(a)(3)(A) of ERISA provides, in relevant part, that the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem 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 by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Such examination shall be conducted in accordance with generally accepted auditing standards. Section 103(a)(3)(A) further provides that the opinion by the independent qualified public accountant shall be made a part of the annual report.¹

Section 103(a)(3)(C) of ERISA provides that the opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

Under regulation §2520.103-8, which interprets and implements ERISA section 103(a)(3)(C), the examination and report of an independent qualified public accountant need not extend to any statement or information prepared and certified to by a bank or similar institution if the bank or similar institution is regulated and supervised and subject to periodic examination by a State or Federal agency and the statements or information regarding the plan assets held by such bank or similar institution are prepared and certified to in accordance with regulation §2520.103-5.² The Department addressed the issue of whether a plan is required to engage an independent qualified public accountant when its assets are held and certified to by a bank or insurance company when these regulations were promulgated in 1978.³ At that time, the Department stated that,

¹ Section 103(a)(3)(B) of ERISA provides that an accountant offering his opinion under this section may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he states his reliance. In this regard, it should be noted that any such reliance by the accountant is discretionary and does not limit the requirement under section 103(a)(3)(A) that the accountant conduct an examination of the plan in accordance with generally accepted auditing standards.

Regulation §2520.103-1 provides, in relevant part, that separate financial statements, in addition to items 13 and 14 of the Form 5500, may be prepared in order for the independent qualified public accountant to form the opinion required by section 103(a)(3)(A).

² Regulation §2520.103-5 implements section 103(a)(2) of ERISA which requires an insurance carrier or other organization which provides some or all of the benefits under a plan or holds plan assets, a bank or similar institution which holds plan assets, or a plan sponsor to transmit and certify to the accuracy and completeness of such information as it is needed by the plan administrator to comply with the requirements of title I of ERISA.

³ See, 43 Fed. Reg. 10130, 10135 (March 10, 1978).

If a plan is required under §2520.103-1 to engage an accountant to render an opinion with respect to the financial statements of the plan, an exemption is not provided under §2520.103-8 and section 103(a)(3)(C) of the Act from such requirements solely because the plan's assets are held by a bank or insurance company and certification has been provided under §2520.103-5. However, the examination by the accountant and the scope of the accountant's opinion would, in such circumstances, be limited as a result of the applicability of this section.

Accordingly, the financial statements of the Plan as a whole remain subject to the audit requirements prescribed in section 103(a)(3)(A) of ERISA and regulation §2520.103-1.

While we recognize that the cost of an audit performed by an independent qualified public accountant may result in additional costs to a plan, it is the view of the Department that absent an independent certified audit participants would not be assured that amounts reported as being received and disbursed at the direction of the plan's administrator or other authorized parties have been properly determined in accordance with the terms of the plan and that information included in the financial statements and schedules has been presented in compliance with the Department's requirements for reporting and disclosure under ERISA. Since such assurances are fundamental to the security of plan participants, we are of the opinion that a plan's financial statements, books, and records should be examined and certified to by an independent qualified public accountant consistent with generally accepted auditing standards, as required by section 103(a)(3)(A) of ERISA.

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

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations