

U.S. Department of Labor

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



NOV 15 1985

85-39A

Yeshwant G. Kanitkar, A.S.A.
Senior Actuary
Smith, Everett & Associates, Inc.
144 Exchange Boulevard
Rochester, New York 14614

Dear Mr. Kanitkar:

This is in response to your letter concerning the application of the annual reporting requirements under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you have requested an advisory opinion as to whether the Rochester Button Pension Plan for Salaried Employees (the Plan) is required to engage an independent qualified public accountant for purposes of conducting an examination of the financial statements of the Plan for the plan year ending September 30, 1985.

Pursuant to your letter and a telephone conversation between Ms. Ida Spencer of your staff and Ronald D. Allen of my staff on June 7, 1985, the following facts and representations were submitted. The plan year begins October 1 and ends September 30. On October 1, 1983, there were over 100 participants in the Plan, consequently, an independent audit was deemed necessary for the 1983 plan year. However, because the Plan was terminated, effective April 30, 1984, the audit was deferred for one year, to be filed with the final Form 5500 filing pursuant to Department of Labor regulation 29 C.F.R. §2520.104-50. During August of 1984, the trustees contracted with an insurance carrier to purchase annuities for the retired and deferred vested lives. The certificates were not issued until March 21, 1985, after receipt of the Notice of Sufficiency from the Pension Benefit Guaranty Corporation. On April 26, 1985, all of the Plan's assets were distributed and the participant count fell below 100.

Section 103(a)(3)(A) of ERISA provides, in relevant part, that:

Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage ... 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 ... are presented fairly in conformity with generally accepted accounting principles Such examination shall be conducted in accordance with generally accepted auditing

standards and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant.

Regulation 29 C.F.R. §2520.103-1(b)(5) provides that, except as provided in paragraph (d) and in §2520.104-44,¹ the annual report of an employee benefit plan covering 100 or more participants at the beginning of the plan year (emphasis supplied) must attach a report of an independent qualified public accountant to the Form 5500. However, pursuant to §2520.104-50, the plan administrator may defer the audit requirement contained in section 103(a)(3)(A) of ERISA for the first of two consecutive plan years, one of which is a short plan year of seven or fewer months, and file an audited statement for that plan year with the annual report for the immediately following plan year, provided that certain conditions are satisfied (copies of regulations enclosed).

Since there were more than 100 participants in the plan on October 1, 1984 (the beginning of the plan year) and the plan assets had not been distributed at such time, it is the opinion of the Department of Labor that the Rochester Button Pension Plan for Salaried Employees is required to engage an independent qualified public accountant to render an opinion for the plan year October 1, 1984, through April 26, 1985 (1984 plan year), pursuant to section 103(a)(3)(A) of ERISA and 29 C.F.R. §2520.103-1. A return/report, including schedules and a report of an independent qualified accountant for the 1984 plan year is due by the last day of the seventh month following the end of the plan year, i.e., November 30, 1985. Since the Plan deferred the 1983 plan year audit requirement, pursuant to §2520.104-50, a report of an independent qualified accountant for the 1983 plan year is required to be included with the annual report for the 1984 plan year.

¹ §2520.103-1(d) provides that if a plan has between 80 and 120 participants (inclusive) as of the beginning of the plan year, the plan may elect to file the same category of form (i.e., either Form 5500 and attachments or Forms 5500-C or R) that it filed the previous year.

§2520.104-44 provides a limited exemption and alternative method of compliance for annual reporting by unfunded and by certain insured plans. An accountant's examination and report and certain financial statements and schedules in the annual report are waived for plans meeting the requirements of this regulation. Insured pension plans are entitled to this exemption only if the insurance contracts or policies funding the plan are allocated contracts or policies whose terms specifically and fully guarantee benefit payments and if certain other requirements are met (see paragraph (b)(2) of this regulation).

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,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations

Enclosures