U.S. Department of Labor

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

OPINION NO. 84-45A
Sec. 103(a)(3)(A)

NOV 16 1984

Mr. Stanley A. Hansen
Den Hartog & Hogan
Certified Public Accountants
3128 Brockway Road
P.O. Box 240
Waterloo, Iowa 50704-0240

Dear Mr. Hansen:

This is in response to your letter concerning the application of the audit requirements under section 103(a)(3)(A) of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you have posed several questions relating to the requirement under section 103(a)(3)(A) of ERISA that an opinion of an independent qualified public accountant be included as part of the annual report (Form 5500) of an employee benefit plan.

First, you indicate that several plans which you will be auditing prepare their financial statements on a basis of accounting other than that of generally accepted accounting principles (GAAP). For example, you indicate that certain plans' financial statements may be prepared using the modified cash basis of accounting or that the financial statements may not show certain items, such as investments in mortgages, at fair market value. Since both are departures from GAAP, you are required to indicate in your opinion that the financial statements are not prepared in accordance with GAAP. In this regard, you inquire whether an opinion which indicates that the financial statements are not prepared in accordance with GAAP is acceptable to the Department.

Section 103(a)(3)(A) of ERISA provides, with respect to the examination by an independent qualified public accountant, that the accountant "shall conduct such 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 . . . are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year." The Department does not require plans to maintain their statements, books and records in accordance with GAAP and, for purposes of items 13 and 14 of the Form 5500, allows the reporting of assets, liabilities, receipts and disbursements using either the cash, modified accrual or accrual basis. However, for purposes of compliance with the annual reporting requirements, as described in 29 C.F.R. §2520.103-1(a)(2), the notes to the financial statements accompanying the annual report must describe, among other things, the accounting principles and practices reflected in the financial statements, and, if applicable, variances from generally accepted accounting principles (see: §2520.103-1(b)(3)). Accordingly, an accountant's opinion which notes variances from GAAP would not for that reason alone be unacceptable to the Department. With regard to the valuation of investments, it should be noted that for annual reporting purposes section 103(b)(3)(A) of ERISA requires that the statement of assets and liabilities of a plan be valued at their current value.

Second, you state that the administrative boards of several multiemployer plans have indicated that, due to the costs associated with auditing participant data, they would like to limit the scope of the accountant's examination by excluding the audit of participant data. You indicate that, in accordance with the American Institute of Certified Public Accountants' guidelines, you would be required to state that you did not audit the participant data and, therefore, cannot express an opinion on the plan's financial statements. In this regard, you inquire whether an opinion which indicates that no audit work had been done on the participant data would be acceptable to the Department.

Section 103(a)(3)(A) provides that the accountant shall conduct the examination of the plan "in accordance with generally accepted auditing standards [GAAS], and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant." Accordingly, if in the performance of an audit in accordance with GAAS the accountant determines that it is necessary to audit participant data, such an audit must be undertaken for purposes of satisfying the audit requirements of section 103(a)(3)(A) of ERISA. Therefore, the annual report of a plan which includes an opinion of an independent qualified public accountant which is qualified because auditing procedures determined necessary by the accountant in accordance with GAAS were omitted from the audit would not, except as provided in 29 C.F.R. §2520.103-8, be considered in compliance with the annual reporting requirements under section 103 of ERISA and §2520.103-1.[1]

You further inquire whether the Department would view a "no opinion" audit as the equivalent of no audit since the independent qualified public accountant could not or did not perform enough audit procedures to render an opinion, and you ask what the consequences to the plan are where the Department does not find the opinion of the plan's financial statements to be acceptable.

It is the view of the Department that where an accountant's opinion is not in accordance with the requirements of section 103 and the regulations issued thereunder or is otherwise qualified, except as provided in 29 C.F.R. §2520.103-1(b)(5), the plan for which the opinion was rendered would not have satisfied the requirements of section 103(a)(3)(A).

With regard to the consequences of a plan's failure to comply with the annual reporting requirements of section 103 of ERISA and §2520.103-1 et seq., the Department may, pursuant to section 104(a)(4), reject the plan's annual report filing. In accordance with section 104(a)(5), if a revised filing satisfactory to the Department is not submitted within 45 days of the rejection, the Department may take any one or more of the following actions: "(A) retain an independent

[1] 29 C.F.R. §2520.103-1(b)(5)(ii), concerning an accountant's representations as to the audit, provides, in relevant part, that " ... The accountant's report --

(A) Shall state whether the audit was made in accordance with generally accepted auditing standards; and
(B) Shall designate any auditing procedures deemed necessary by the accountant under the circumstances of the particular case which have been omitted, and the reasons for their omission. Authority for the omission of certain procedures which independent accountants might ordinarily employ in the course of an audit made for the purpose of expressing the opinions required by paragraph (b)(5)(iii) of this section is contained in §2520.103-8."

It should be noted that, because the accounting profession establishes the requirements pertaining to the generally accepted accounting principles and the generally accepted auditing standards referred to in section 103(a)(3)(A) of ERISA, the Department generally will not rule as to the acceptability of methods of accounting or auditing for purposes of that section.

qualified public accountant (as defined in section 103(a)(3)(D)) on behalf of the participants to perform an audit, … (C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part [part l], or (D) take any other action authorized by this title."

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (copy enclosed). 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

Enclosure