

U.S. Department of Labor

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



OCT 25 1985

85-37A

Mr. Kevin J. Richter
Mathis, Marifian & Richter, Ltd.
Suite 15
7705 West Main
Belleville, Illinois 62223

Dear Mr. Richter:

This is in response to your letter concerning the applicability of certain provisions of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Ettelbrick Shoe Company pension plan established pursuant to the Board of Director Minutes of March 12, 1980 (the Plan). Specifically, you have inquired whether the Plan constitutes an unfunded plan maintained "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" within the meaning of sections 201(2), 301(a)(3), and 401(a)(1) of title I of ERISA.

According to the March 12, 1980 Board of Director Minutes accompanying your letter, the Board of Directors of the Ettelbrick Shoe Company (the Company) unanimously voted:

to pay each employee on the executive payroll as of May 4, 1980 and all employees on the executive payroll thereafter, who has completed ten consecutive years of employment with us, upon his reaching the age of sixty-five years, a pension of one percent (1%) of his average salary for the last five years of full employment before his retirement, times the number of each full year he has worked with the Company. The number of years worked need not be consecutive. This pension would be over and above any social security or other pension payment he might receive. In case of disability before reaching age of sixty-five, he would be paid his pension on certification by an accredited physician that he is totally disabled and not able to work. In no event would he be paid a disability pension before sixty-two.

In your letter, you have identified seven employees, and their positions and final salaries, who had been receiving benefits under the Plan. The salaries of the identified individuals ranged from \$11,905 to \$29,255 per year. The positions of those individuals include a cost accountant, a comptroller, three foremen, a scheduler (productions), and a time study position. You also indicated that the past president and Chairman of the Board of the Company had been receiving benefits under the Plan.

In addition, you have identified eleven other individuals and positions which you indicate would have been entitled to pensions under the Plan upon attaining age 65. The positions of these individuals include foremen, a superintendent, an assistant in the cost department, an order department clerk, an expediter, a stepmaster inventory control position and an insurance position, among others.

You indicate that the participants who have been receiving benefits under the Plan were notified by letter in September 1984 that the Plan was being discontinued. You further indicate that the Company is currently in liquidation proceedings. With regard to the status of the Plan, you believe that because of the broad range of employees covered as well as the responsibilities associated with their positions, the participants should not be considered a "select group of management" for purposes of the exclusions under sections 201(2), 301(a)(3), and 401(a)(1) from parts 2, 3, and 4 of title I, respectively.

In a July 18, 1985 letter submitted to the Department on behalf of the Company, the following additional information was provided. The Plan was also adopted by Greenup Mfg. Co. and Casey Mfg. Co., companies related by common stock ownership to Ettelbrick, and Robinson Mfg. Co., a subsidiary of Ettelbrick. At the time the Plan was adopted, the executive payroll covered approximately 50 of the total 750 employees employed by the four companies. The Executive payroll class of employees was created in 1974 and covered managerial personnel of the four corporations, including employees such as departmental foremen, factory superintendents and officers. According to the letter, this group represented the higher paid individuals. Using the 1983 fiscal year as an example, the letter indicates that the average compensation earned by employees of the executive group was \$20,979, as compared with the ten highest paid hourly employees of the four companies who had an average compensation of \$10,442.¹ The Plan was not funded. Monthly benefits payable for the life of an employee were calculated upon attainment of the employee's retirement age and were paid out of the employer's general assets.

The letter on behalf of the Company further indicates that Ettelbrick maintained two other defined benefit plans: The Ettelbrick Shoe Company Non-Union Pension Plan and The Ettelbrick Shoe Company Pension Plan for Certain Hourly Employees. According to the letter, employees on the executive payroll were never treated as participants in either of the two

¹ Based on the Company's letter of August 6, 1985, which lists the forty participants in the Executive Payroll Plan, we note that six of these participants are officers or directors of the Company; their annual salaries range from \$26,245 to \$55,000, with an average of \$37,917. In contrast, thirty-three participants in the Plan receive salaries ranging from \$12,124 to \$29,100, with one participant receiving \$45,000. The average salary of those thirty-three participants is \$18,584.

aforementioned plans. Termination documents with respect to these plans are presently being processed by the Pension Benefit Guaranty Corporation. The Company is of the view that the Plan is an unfunded plan of deferred compensation for a select group of employees and as such is not covered by the provisions of parts 2, 3, and 4 of title I of ERISA. The Department has considered all the facts and representations submitted on this matter and, while there may be additional facts which would influence our opinion, the Department has concluded on the basis of the facts and representations presented that, view of the broad range of salaries and positions of employees represented to be covered under the Plan, the Plan is not a plan maintained “primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees” within the meaning of sections 201(2), 301(a)(3), and 401(a)(1) of title I of ERISA.

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