

September 29, 1976

Dear :

This is in response to your letter of May 7, 1975. You ask in your letter, to summarize, whether the Department is working on regulations which will establish procedures and standards for qualifying unlicensed accountants as qualified public accountants for purposes of ERISA, and whether certain suggested standards would be acceptable in our view. We regret the extreme delay in answering but the question is a difficult one and the demands of issuing necessary regulations have precluded an earlier response. Also, I thought it desirable to await an ERISA Advisory Council recommendation on the question. A copy of the Council's recommendation is attached.

The Secretary's authority in this area is contained in section 103(a)(3)(D) of ERISA. Section 103(a)(3)(D) prescribes three categories of individuals as qualified public accountants: (1) certified public accountants, certified by a regulatory authority of a State; (2) licensed public accountants, licensed by a regulatory authority of a State; or (3) accountants certified by the Secretary of Labor as qualified public accountants. The Secretary, however, may certify individuals as qualified public accountants only in States "...where there is no certification or licensing procedure for accountants." See also H. R. Rep. No. 93-1280 (the conference report), 93d Cong., 2d Sess. 257-8. Thus, the Secretary's authority to establish procedures and standards for qualifying accountants is limited solely to those situations where a State has neither a certification nor a licensing procedure. This interpretation comports with the legislative history. H. R. 4200, the Senate passed bill, did not provide for a certification procedure to be administered by the Secretary of Labor (see section 502(p)). H. R. 2, the House passed bill provided at section 104(a)(3)(C) for three categories of qualified public accountants, the third of which included individuals in any State certified by the Secretary irrespective of any State certification or licensing procedures. ERISA section 103(a)(3)(D)(iii), which came out of the Conference Committee, must be viewed as a restriction of the H. R. 2 provisions.

Our research indicates that every State in the United States has a licensing procedure. In every State, any certified public accountant is licensed to practice as a qualified public accountant. In addition, fifteen states provide a procedure whereby an accountant who is not a certified public accountant may qualify for a restricted license. Consequently, §103(a)(3)(D)(iii) has no application to any State at present.

Some of the concern regarding licensing of public accountants by the Secretary emanated from a concern over the cost to small plans for an accountant to perform an audit and render an opinion on such plans for purposes of the annual report to the Department of Labor. The Department has issued regulations which provide that plans with fewer than 100 participants during a plan year will not be required to have an audit performed and an accountant's opinion submitted with their annual report (§2520.104-46, 41 FR 32522, Aug. 3, 1976).

Because of our analysis that section 103(a)(3)(b)(iii) is not operative since all states provide some form of licensing or certification procedures for accountants, and also since small plans will not be required to be audited, the Department does not contemplate the issuance of regulations on the qualification of accountants.

Sincerely,