

U.S. Department of Labor

Labor-Management Services Administration

Washington, D.C. 20216



Opinion 80-52A
103(a)(A)

September 3, 1980

Mr. Herbert J. McLaughlin
Thiokol Corporation
Newtown, Pennsylvania 18940

Dear Mr. McLaughlin:

This is in reply to your letter of February 28, 1979, requesting an advisory opinion concerning whether the Thiokol Corporation Retirement Income Plan (the Plan) qualifies for the limited exemption from the annual reporting requirements of the Employee Retirement Income Security Act of 1974 (ERISA) provided in 29 CFR 2520.104-44. Specifically, you ask whether the Plan is exempt pursuant to 2520.104-44 from the requirement in section 103(a)(3)(A) of ERISA to engage an independent qualified public accountant to conduct an examination of the financial statements and schedules of the Plan.

Your request contains the following facts and representations:

As of December 31, 1978, the Plan had assets of \$76,857,173, of which \$72,745,373 were held in the general account of the Connecticut General Life Insurance Company (the Insurance Company) and \$4,111,800 were held in "Separate Account A" of the Insurance Company. Until September 30, 1975, the Plan was funded primarily by a "Deferred Annuity Contract" which allocated individual premiums to each participant with retirement benefits "guaranteed" by the Insurance Company. As of October 1, 1975, the above "Group Annuity Contract" was amended to take the form of an "Immediate Participation Guarantee Contract" (IPG Contract).

Under the IPG contract, all previously retired participants continue to have their benefits "guaranteed" by the Insurance Company. Benefits purchased for active participants under the "Deferred Annuity Contract" also continue to be "guaranteed" by the Insurance Company. Each participant who retires after October 1, 1975, continues to have his retirement benefits "fully guaranteed" by the Insurance Company, and the only retirement benefits not "guaranteed" by the Insurance Company are increased payments to participants who retired prior to October 1, 1975.

The Plan also contains an employee savings facility for voluntary contributions by participants. Finally, the Insurance Company maintains employee records, performs actuarial services, and calculates and pays benefits based upon information supplied by Thiokol.

You submit with your request a number of enclosures, including the plan document of the Plan, Amendments GR-358-55, 56 and 57 to Group Annuity Contract GR-358, issued by the Insurance Company, containing a revision of the Plan's funding to an "immediate participation guarantee contract", and Group Annuity Contract GA-7070 which provides for a savings facility for voluntary employee contributions. The amendments to Group Annuity Contract GR-358 show that contributions paid by Thiokol Corporation to the Insurance Company are accumulated in an "Immediate Participation Guarantee Fund" (IPG Fund) from which withdrawals are made for payments of retirement annuities or other benefit payments, in accordance with the terms of the contract.

Under the terms of the group annuity contract, Thiokol Corporation, as policy holder, is required to specify which of two possible methods the Insurance Company will utilize in paying the retirement benefits under the contract. According to the amendments to Group Annuity Contract GR-358, as of October 1, 1975, Thiokol Corporation has specified that Method of Payment A will apply to retirement income benefits payable on and after October 1, 1975, and that Method of Payment B will govern the payment of retirement income benefits under section 4.4 of the plan.¹

Extracts from the group annuity contract furnished with your letter indicate that the contract explicitly provides that under Method of Payment B the Insurance Company does not guarantee a retirement annuity for each participant. With regard to Method A, pursuant to the contract, the Insurance Company will only credit a retirement annuity to a participant on his retirement date, provided that the amount of contributions in the IPG Fund on that date is not less than the "minimum fund liability". The term "minimum fund liability" is defined in the contract to mean the minimum amount in the IPG Fund which would be required to provide benefits guaranteed to be paid by the Insurance Company should the "date of discontinuance" occur.² Consequently, funds to purchase the retirement annuity will not be set aside by the Insurance Company until the retirement date for each particular employee. Thus, even under Method of Payment A, the Insurance Company guarantees to make retirement annuity payments only to those employees for whom a retirement annuity has been credited, and the crediting of a retirement annuity to a participant is contingent upon the sufficiency of the assets in the IPG Fund to purchase a retirement annuity on his retirement date.

Section 103(a)(3)(A) of ERISA provides, in relevant part, that the administrator of an employee benefit plan must engage an independent qualified public accountant to conduct an examination of any financial statements, books and records of the plan 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 and in conformity with generally accepted accounting principles.

29 CFR 2520.104-44 contains a limited exemption and alternative method of compliance for annual reporting by unfunded plans and certain insured plans. Specifically, this regulation exempts, in pertinent part, an employee pension benefit plan, which meets the requisite criteria of 2520.104-44(b)(2), from engaging an independent qualified public accountant to conduct such an examination of the plan's financial statements and schedules, provided that, among other conditions, benefits under such pension

plan are provided exclusively through allocated insurance contracts or policies which are issued by, and pursuant to the specific terms of which benefit payments are fully guaranteed by an insurance company or similar organization which is qualified to do business in a State.

Under Method of Payment A, it appears that no benefits are guaranteed by the Insurance Company until a participant retires, since until the date, payment of benefits to the participant by the Insurance Company pursuant to the Group Annuity Contract is contingent upon the amount of contributions accumulated in the IPG Fund being not less than the "minimum fund liability" at retirement. Under Method of Payment B, the contract explicitly provides that the payments are not guaranteed by the Insurance Company. Thus, although retirement benefits for retired participants may be "guaranteed", benefit payments for other participants in the Plan are not guaranteed by the Insurance Company. It is the Department's view, therefore, that the plan may not avail itself of the limited exemption provided by 2520.104-44.

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,

Ian D. Lanoff
Administrator
of Pension and Welfare Benefit Programs

¹ There appears to be no Section 4.4 of the Thiokol Corporation Retirement Plan submitted with the request for an advisory opinion.

²Although the portions of the group annuity contract furnished with your letter do not include a definition of the term "date of discontinuance", we assume that this term refers to the date on which the group annuity contract terminates.