

ERISA OPINION

320

SEP 21 1977

AO 77-74

Mr. Garland F. Smith
Chairman of the Board
Mid Valley State Bank
Weslaco, Texas 78596

Dear Mr. Smith:

This is in response to your inquiry of February 17, 1976, regarding whether the Mid Valley State Bank Fund (the Fund) is a pension plan subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). We regret the delay in responding to your inquiry.

You state that the Mid Valley State Bank (the Bank) normally has about 20 employees with more than one year of service and who are thereby qualified to participate in the Fund. Contributions to the Fund are at the maximum rate of five per cent (5%) of the employee's salary and a matching amount is made by the Bank. These monies are then invested by the Board of Trustees (the Trustees) which is comprised of two members of the Board of Directors of the Bank, two members of the Officers of the Bank, and two employee members of the Bank. The resultant profits (and losses) from investments are proportionately distributed.

If termination of employment occurs prior to the attainment of five years membership, the participant is entitled to his contributions, interest or profits less any losses. However, matching Bank contributions remain in the Fund and are credited to the Bank against future contributions for remaining Fund members. After five years membership, the participant is fully vested and entitled to the matching Bank monies together with the applicable investment earnings (and losses).

With the attainment of twenty (20) years of continuous membership or \$20,000 vested value in the participant's account, such member may cease his contributions and elect either to have the Bank contributions continue to his Fund account or be paid directly to him. In addition, interest and profits (and losses) will be accounted for annually until the member's termination of employment when final settlement of his account is made. The plan provides: "As long as a member of the Fund is a Director, Officer or Employee in the service of Mid Valley State Bank, he or she shall have no right to withdraw any of the amounts standing to his or her credit, or any part thereof, except in case of certain emergencies as provided in Article XIVc hereafter."

Although the Bank may have intended the plan to encourage savings and provide education and experience in investments, section 3(2) of the ERISA defines the term "pension plan," in part, to mean any plan, fund, or program established or maintained by an employer which by its express terms or surrounding circumstances results in a deferral of income by employees extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. The fund by its terms defers income until the termination of covered employment and is therefore a pension plan within the meaning of section 3(2) of ERISA.

Your concern, as expressed in your letter, is with the reporting and disclosure requirements of ERISA. The Department is aware of these burdens on small plans and has attempted in its regulations to reduce them to the extent possible. For example, section 2520.104-41 of the Department's regulations on annual reporting (41 FR 32525, August 3, 1976) provides for simplified annual reporting for plans having fewer than 100 participants.

I hope this information is helpful to you.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory
Standards and Exceptions