

U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICE ADMINISTRATION
Pension and Welfare Benefit Programs
Washington, D.C. 20216



November 28, 1977

Mr. Wm. Tracey Shaw
Edmunds, Williams, Robertson,
Sackett, Baldwin & Graves
P. O. Box 958
Lynchburg, Virginia 24505

OPINION 77-88 A

3(1)

3(3)

Dear Mr. Shaw:

This is in reply to your letter of July 19, 1977, regarding whether the nonqualified Employee Stock Purchase Plan of Fidelity American Bankshares, Inc. is an "employee benefit plan" within the meaning of section 3(3) of title I of the Employee Retirement Income Security Act of 1974 (ERISA) and is thereby covered under title I of ERISA.

According to your letter and the documents, the plan is a nonqualified stock purchase plan, of no fixed duration, participation in which is voluntary, which provides for purchases by full-time, regular employees of common stock of the company at market price through Wheat, First Securities, Inc. as agents. Purchases are funded by both employee and employer contributions and the common stock purchased is credited to an account in the name of the participating employee as are cash dividends (unless the participant requests that cash dividends be paid directly to the participant in cash). Participating employees may withdraw common stock and cash credited to their accounts at any time upon notice and are fully vested at all times. Withdrawing participants may rejoin the plan following a waiting period. Complete withdrawals may be made by a participant effective on any payroll deduction date next following January 1 of any year. Withdrawing participants are eligible to rejoin the plan the January 1 or July 1 which is more than 6 months following the effective date of withdrawal. Those participants who withdraw their accounts in whole or in part on the payroll deduction date next following January 1 of any year are not deemed to have withdrawn from the plan. A participant's account is closed upon termination of employment with the employer and distribution made as soon as is practicable.

An "employee benefit plan" is defined in section 3(3) as ". . . an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

An "employee welfare benefit plan" is defined in section 3(1) of ERISA as "any plan, fund or program, which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1974 (other than pensions on retirement or death, and insurance to provide such pensions)." Inasmuch as the plan was established to provide employees a means of purchasing shares of common stock of the company and the benefits of and provision of a means of stock ownership are not among the benefits listed in section 3(1), the plan is not an employee welfare benefit plan.

An "employee pension benefit plan" is defined in section 3(2) of ERISA as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods 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." Inasmuch as a participating employee is free to withdraw from the plan at any time and to receive a certificate for all full shares of common stock and the cash value of any fractional shares credited to his or her account, the plan is not an employee pension benefit plan within the meaning of section 3(2) of ERISA.

Because the plan is neither an employee welfare benefit plan nor an employee pension benefit plan, the plan does not constitute an employee benefit plan within the meaning of section 3(3) of ERISA.

This letter constitutes an advisory opinion as defined in ERISA Procedure 76-1, copy enclosed. Accordingly this letter is issued subject to the provisions of such procedure, including section 10 thereof relating to the effect of an advisory opinion.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions
Enclosure