

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

81-18A

FEB 2 1981

Mr. G. Boone Smith, III
Jones, Cork, Miller & Benton
500 First National Bank Building
Macon, Georgia 31298

Dear Mr. Smith:

This is in reply to your letter received by the Department of Labor on September 25, 1980, concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Employee Stock Purchase Plan of the Bibb Company (the Plan). Specifically, you request an advisory opinion stating that the Plan is neither an employee welfare benefit plan within the meaning of ERISA section 3(1) nor an employee pension benefit plan within the meaning of ERISA section 3(2).

The Plan provides for voluntary payroll deductions for the purpose of purchasing stock of the Bibb Company (the Company). Employees whose customary employment exceeds 20 hours per week or 5 months in any calendar year are eligible to participate after 12 months of continuous service with the Company. Employees who terminate participation in the Plan may reestablish participation beginning in the third fiscal quarter after the quarter in which the election to terminate participation was made. The maximum amount a participant may contribute is 10 percent of gross base pay. Contributions are credited to a participant's individual account and used to buy whole shares of the Company's no par value common stock on the Friday preceding the last day of each fiscal quarter. Shares purchased under the Plan will cost a participant the greater of 85 percent of the fair market value of a share on the date of purchase or 90 percent of the lowest average market value per share on any day during the fiscal quarter. (The lowest average market value per share during the fiscal quarter under the Plan is the average of the closing bid and asked prices each day during the fiscal quarter.) Shares purchased under the Plan are either authorized but unissued shares or treasury shares of the Company. Amounts remaining in a participant's account which are not sufficient to buy a whole share of stock will be applied to the purchase of shares in the next fiscal quarter, and, in the same manner as all payroll deductions held in the participant's account, will not accrue interest, need not be segregated from the Company's general funds, and may be used for any purpose by the Company.

The Plan provides for refunds to the participant (or, as appropriate, payment to a deceased participant's beneficiary) of all uninvested cash balances in a participant's account in the event of

the participant's termination of employment, the Company's termination of the Plan, the participant's withdrawal from the Plan, or the death of the participant. The Plan also provides that each participant shall receive each quarter a statement of the shares owned by the participant and the current credit balance in the participant's account. The participant's rights in stock purchased include voting and dividend rights but may not in all cases entitle the participant to the stock certificates representing stock purchased under the Plan. No Plan provision sets forth the conditions, if any, under which stock purchased by a participant in the Plan may be resold to others or repurchased by the Company. However, no terms of the Plan expressly prevent a participant from taking any action except assigning, transferring, pledging, or otherwise disposing of the participant's right to purchase stock under the Plan. You also state in your request that sale of the stock by a participant is in no way dependent upon retirement of the participant from the Company or on termination of employment.

The term "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, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." The Plan is for the purpose of providing a means for eligible employees of the Company to purchase shares of stock in the Company, which is not among the benefits enumerated in ERISA section 3(1). Thus, the Plan is not an employee welfare benefit plan within the meaning of ERISA section 3(1).

The term "employee pension benefit plan" is defined in section 3(2)(A) 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 -- (i) provides retirement income to employees, or (ii) 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." ERISA section 3(2)(B) does not appear applicable to the factual situation you present.

Because the Plan does not restrict resale of stock purchased by the Plan participants, the Plan does not, by its express terms, appear to provide retirement income or result in a deferral of income to termination of employment or beyond. Therefore, it is our opinion that the Plan is not, by its express terms, a pension plan within the meaning of ERISA section 3(2)(A). Our conclusion in this regard, however, is based solely on your representations and the terms of the Plan. You should be aware that, if the Plan is communicated to participants or administered in a

manner that has the effect of providing retirement income to employees or resulting in a deferral of income by employees extending to the termination of covered employment or beyond -- for example, by preventing or discouraging participants from receiving a distribution of their property or from being able to resell stock acquired under the Plan or making it unlikely that participants would request a distribution or the opportunity to resell their property -- the Plan may be viewed by the Department as a pension plan within the meaning of ERISA section 3(2)(A) as a result of surrounding circumstances.

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,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs