U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-22A
3(2)

FEB 18 1981

Mr. Mark S. Dray
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212

Dear Mr. Dray:

This is in response to your letter of December 13, 1978, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether certain payments by United Virginia Bankshares Incorporated (the Company) would constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA.

You advise that the Company is currently considering terminating the services of several long-time employees. Although the Company maintains two deferred compensation plans qualified under section 401(a) of the Internal Revenue Code of 1954, as amended, you further advise that the Company desires to make additional post-termination payments to these employees. You also suggest that, with respect to the proposed payments, the Company is prepared to comply with some of the criteria included in 29 C.F.R. §2510.3-2(e) (issued August 15, 1975) for certain types of arrangements excluded from the definition of an employee pension benefit plan.

Regulation section 2510.3-2(e) provides that:

> (e) Gratuitous payments to pre-Act retirees. For purposes of Title I of the Act and this chapter, the terms "employee benefit plan" and "pension plan" shall not include voluntary, gratuitous payments by an employer to former employees who separated from the service of the employer if:
> (1) payments are made out of the general assets of the employer,
> (2) former employees separated from the service of the employer prior to September 2, 1974,
> (3) payments made to such employees commenced prior to September 2, 1974, and
> (4) each former employee receiving such payments is notified annually that the payments are gratuitous and do not constitute a pension plan.

Since, as of the date of your letter, the employment of the intended recipients had not been terminated, the proposed payments would not satisfy the second and third conditions of this regulation. As a result, the payments would not be excluded from coverage under ERISA by reason of regulation section 2510.3-2(e).

As you have noted in your letter, subsequent to the issuance of regulation section 2510.3-2(e), the Department of Labor has taken the position in several advisory opinions that supplemental payments to retirees which do not fully conform with this regulation may nevertheless not be part of an employee pension benefit plan. See also news release USDL 76-707. In one of those advisory opinions, the Department specifically stated that supplemental payments which fail to meet all of the criteria of the regulation will not be deemed pension plans solely because the payments had not commenced by December 31, 1976. The Department, however, has not altered its position that such payments do not constitute a pension plan only if the recipients separated from the service of the employer on or before December 31, 1976.

Therefore, the Department of Labor will not assure you that the proposed payments by the Company are excluded from the definition of an employee pension benefit plan.

As you may be aware, section 409 of the Multiemployer Pension Plan Amendments Act of 1980 (P.L. 96-364) generally authorizes the Secretary of Labor to issue regulations treating supplemental payment arrangements which take into account some or all of the increases in the cost of living since retirement as welfare plans rather than pension plans. The Department has proposed a regulation exercising this authority. See 46 Federal Register 8571 (January 27, 1981). If the regulation is adopted as proposed, it generally will be effective as of September 26, 1980. While the proposed regulation contains a temporary "safe harbor" from treatment as a pension plan for certain supplemental payments made before January 1, 1982, you should note that this treatment will only be available for supplemental payments to persons who separated from the service of the employer before January 1, 1977.

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