

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-33A
408(e)

MAR 23 1981

Mr. Hal N. Swenson
Fabian and Clendenin
Eighth Floor
Continental Bank Building
Salt Lake City, Utah 84101

Re: Heritage Corporation and Heritage Corporation Amended Profit Sharing Plan
Identification Number: F-1563A

Dear Mr. Swenson:

This is in response to your request for an advisory opinion under section 408(e) of the Employee Retirement Income Security Act of 1974 (ERISA) concerning the acquisition by the Heritage Corporation Amended Profit Sharing Plan (the Plan) of preferred shares of Heritage Corporation stock. You request an opinion that the Plan may acquire some of the preferred stock in payment of a debt owed by Heritage to the Plan and in exchange for Heritage common stock owned by the Plan.

You relate the following facts with respect to the first transaction. The Plan, prior to ERISA's effective date, made a loan of \$101,000 to Heritage, documented with a promissory note, which by reason of section 414(c) of ERISA, may not be held by the Plan beyond June 30, 1984. Heritage and the Plan wish to exchange the note for \$101,000 worth of \$10 par value shares of Heritage preferred stock. The Plan, as an eligible individual account plan, is not subject to the restrictions of section 407(a) and is authorized to invest 100 percent of Plan assets in qualifying employer securities.

The second transaction would involve the exchange of some or all of the Heritage common stock held by the Plan for Heritage preferred stock. The Plan now holds 3,108 of the 9,408 outstanding shares of common stock and wishes to reduce its holdings of Heritage common stock while acquiring some Heritage preferred stock.

The Heritage preferred stock has the following attributes. Dividends will be cumulative, equal to the average New York "prime" lending rate of the year of determination, but with a maximum of 12 percent and a minimum of 6 percent. The stock may be redeemed at the option of the Board

of Directors at any time, with a redemption premium for the first eleven years. The holders of the preferred stock will receive the redemption price or par value, plus all accumulated and unpaid dividends in the event of a liquidation, dissolution, or winding up of the corporation, before the holders of common stock receive any payment. The holders of preferred stock will be entitled to voting rights only in the event dividends are in arrears for at least 1 1/2 years.

Section 408(e) exempts from the prohibitions of sections 406 and 407 the acquisition or sale by a plan of qualifying employer securities if: (1) the acquisition is for adequate consideration, (2) no commission is charged with respect thereto, and (3) the plan is an eligible individual account plan.

You represent that no commissions will be charged with respect to either of the proposed transactions and that the Plan is an "eligible individual account plan" under section 407(d)(3). You recognize that the Department of Labor will not ordinarily opine as to whether an acquisition is for "adequate consideration." The issue you ask the Department to decide is whether the transactions involve "the acquisition of qualifying employer securities," as contemplated by section 408(e).

Department of Labor Reg. Sec. 2550.408(e) defines the term "acquisition" for purposes of section 408(e) to include, among other things, an acquisition by the exchange of plan assets. It is thus the opinion of the Department that the acquisition by the Plan of Heritage preferred stock in payment of a debt owed by Heritage to the Plan and the acquisition of Heritage preferred stock in exchange for Heritage common stock owned by the Plan constitute "acquisitions" within the meaning of section 408(e).

Section 407(d)(5) defines "qualifying employer security" as a security issued by the employer or an affiliate which is stock or a marketable obligation. Section 407(e) defines "marketable obligation," in relevant part, as a bond, debenture, note certificate or other evidence of indebtedness if: (1) it is acquired directly from the issuer at a price not less favorable to the plan than the price currently paid for a substantial portion of the same issue by persons independent of the issuer, and (2) immediately following the acquisition not more than 25% of the aggregate amount of obligations issued in the issue and outstanding at the time of acquisition is held by the plan, at least 50% of the issue is held by persons independent of the issuer, and not more than 25% of the plan's assets are invested in employer obligations.

To date, the Department has taken no position on the question of what securities constitute "stock" for purposes of section 407(d)(5). We are thus unable to opine as to whether the preferred stock issued by Heritage is "stock" under section 407(d)(5). We do note, however, that certain aspects of the proposed transactions and certain attributes of the preferred stock create an impression that the preferred stock is intended to serve Heritage in a manner similar to instruments of indebtedness. In this regard, we must emphasize that, notwithstanding the label applied to a security, the Department expects any security which is in the nature of debt to

comply with the definition of "marketable obligation" set forth in section 407(e) in order to be considered a "qualifying employer security."

The preceding 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,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs