



OPINION NO. 84-46A
Sec. 3(1), 3(2)(A)

NOV 19 1984

Mr. John R. Thomas
Merline, Thomas & Stuart
Post Office Box 10796
665 North Academy Street
Greenville, South Carolina 29603

Dear Mr. Thomas:

This is in reply to your correspondence of March 13 and April 19, 1984 requesting an advisory opinion concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the First Federal Savings and Loan Association (First Federal) Stock Purchase Plan and Trust Agreement (the Plan). Specifically, your inquiry concerns whether the Plan is an employee benefit plan within the meaning of section 3(1) of ERISA or an employee pension benefit plan within the meaning of section 3(2) of ERISA.

Your correspondence contains the following facts and representations. The Plan is designed to encourage employees of First Federal to purchase First Federal common stock and thereby acquire an ownership interest in their employer. Participation in the Plan is voluntary and is open to full-time salaried and permanent part-time employees of legal age employed by First Federal or any subsidiary, affiliated company, or other company authorized by First Federal's or another adopting company's board of directors to adopt and participate in the Plan. Individuals who are First Federal corporate or regional board members may also become Plan participants.

Participants contribute to the Plan by payroll deduction and may make lump sum payments to purchase additional shares of stock. The Plan trustees use the amounts contributed to purchase First Federal common stock in the market at prevailing market prices. First Federal pays most purchase costs and fees associated with stock purchase and pays the cost of the Plan administration. Stock purchases are made monthly by Plan trustees.

In the event there is no stock available for purchase on a given date, stock will be purchased on the following day and each day thereafter until all funds in the participant's cash account on the 15th of the month prior to the date of regular monthly purchase have been used to purchase stock. No interest is paid on a participant's cash or stock account. Cash dividends are reinvested in additional common stock of First Federal. Plan trustees hold title to the common stock for the benefit of the Plan participant.

Each January 2 and July 1 a participant may withdraw all common stock purchased and credited to the participant's stock account. A participant does not automatically terminate participation in the Plan by withdrawing all stock purchased prior to the designated withdrawal date. Participation through payroll deduction may continue until termination of employment or until a participant voluntarily terminates payroll deductions. It appears that retirement of a participant is treated similarly to any other termination of employment under the terms of the Plan. On termination of

employment or termination of payroll deduction, a participant is issued all common stock purchased on his behalf by the Plan trustees. Following a termination of payroll deductions, the participant is ineligible to participate in the Plan for 6 months but may begin participating in the Plan again on the next earliest entry date (January 2, April 1, July 1, or October 1) after the 6 month penalty period. In the event of a participant's death, the balance of the participant's cash account and stock account shall be paid to executor/administrator of the participant's estate. There are apparently no restrictions on sale of stock by Plan participants or by the participant's representative after the stock is withdrawn or issued from the Plan.

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 to purchase shares of stock in First Federal. Purchase of stock 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 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 represent.

By its express terms, the Plan does not appear to provide retirement income or result in a deferral of income to termination of employment or beyond. Therefore, it is the Department's opinion that the Plan, by its express terms, is not a pension plan within the meaning of section 3(2)(A) of ERISA. You should be aware that the plan could be viewed by the Department as a pension plan as a result of surrounding circumstances. Based on the facts provided, the Plan might be regarded as a pension plan as a result of surrounding circumstances if it is administered in a manner that has the effect of providing retirement income to employees, results in a deferral of income by employees extending to termination of covered employment or beyond or if communications to plan participants suggest that the plan is established or maintained for the purpose of providing retirement income or to defer income to the termination of covered employment or beyond. For example, if an employer or any person acting directly or indirectly in the interest of an employer prevents or discourages participants' requesting or receiving a distribution of their property or

reselling stock acquired under the arrangement, the Department may view the arrangement as a pension plan within the meaning of section 3(2)(A) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations