

sec docket

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SIGNIFICANT ITEMS ANNOUNCEMENT

33-6281 Interpretive release supplementing an earlier release which expressed the views of its staff on the application of the 1933 Act to employee benefit plans.

RULES

The following releases relate to self-regulatory rule proposals and/or adoptions.

34-17452	34-17465	34-17472
34-17454	34-17466	34-17473
34-17461	34-17467	34-17478
34-17462	34-17471	

33-6280 Revision of fee schedule for records services to provide the continuance of services to disseminate filings made with the Commission to interested members of the public.

33-6281 Extension of comment period on revisions of investment company current report forms. [S7-864; Comment Period Expires February 27, 1981.]

34-17460 Extension of comment period on net capital requirements for brokers and dealers. [S7-855 and S7-856; Comment Period Expires March 16, 1981.]

supplemental release is to provide further guidance and assistance to employers and plan participants in complying with that Act. To accomplish this purpose, the release: (1) clarifies certain positions expressed in the prior release, (2) discusses issues not previously addressed, and (3) describes recent developments under the 1933 Act relevant to employee benefit plans.

FOR FURTHER INFORMATION CONTACT: Peter J. Romeo, Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, Washington, D. C. 20549, (202) 272-2573.

SUPPLEMENTARY INFORMATION: On February 1, 1980, the Commission issued Release No. 33-6188 ("Release 6188") [45 CFR 8960], setting forth the views of its Division of Corporation Finance (the "staff") concerning the application of the Securities Act of 1933 ("1933 Act") [15 U.S.C. 77a et seq.] to employee benefit plans.¹ The release was intended to resolve much of the uncertainty concerning the application of the 1933 Act which had developed as a result of the Supreme Court's decision in *International Brotherhood of Teamsters v. Daniel* ("Daniel").²

In Release 6188, the staff invited interested members of the public to express their views on the positions set forth in the release. Further, it indicated a willingness to reconsider those positions if it received persuasive comments from the public that revisions were appropriate.

The staff received 12 letters commenting on the release. Almost all of the letters expressed general

¹As used in this release, the term "employee benefit plan" means a pension, profit-sharing, bonus, thrift, savings or similar plan. Thus, it generally would include plans described in Section 3(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. 1001 et seq.]. The term does not include welfare and similar plans, such as those described in Section 3(1) of ERISA, which do not involve any expectation of financial return or profit on the part of participating employees.

²439 U.S. 551, 99 S. Ct. 790 (1979). In *Daniel*, the Supreme Court held that neither the 1933 Act nor the Securities Exchange Act of 1934 ("1934 Act") [15 U.S.C. 78a et seq.] applies to a compulsory noncontributory pension plan.

SECURITIES ACT OF 1933
Release No. 628/Jan. 15, 1981

EMPLOYEE BENEFIT PLANS

ACTION: Interpretive release.

SUMMARY: The Commission has authorized the issuance of an interpretive release supplementing an earlier release which expressed the views of its staff on the application of the Securities Act of 1933 to employee benefit plans. The purpose of the

agreement with the views of the staff. Several, however, either indicated reservations about the staff's position on certain issues or sought clarification of some matters not specifically addressed in the release. In addition to the written commentary, many persons have sought the views of the staff on numerous other issues relating to employee benefit plans not discussed in the release.

The various comments received indicate that there is considerable interest on the part of the public in receiving further guidance concerning the application of the 1933 Act to employee benefit plans. As a result, the Commission has authorized the issuance of this release for the purpose of providing additional advice by the staff on this subject. Among other things, the release will discuss issues not covered in the prior release, describe important developments in the employee benefit plan area that have occurred since that release was issued, and address concerns expressed by the persons who commented on the earlier release.

The release is divided into four topical areas, which are as follows: I. Plans Subject to the Act; II. The Section 3(a)(2) Exemption; III. Sales and Resales of Employer Stock; IV. Form S-8.

The statements set forth in this release represent the current views of the staff. Accordingly, they supersede any prior letters or other documents issued by the staff on the subjects covered. Again, as with the earlier release, the staff welcomes any comments from the public on the positions expressed herein.³

I. PLANS SUBJECT TO THE ACT

In Release 6188 the staff expressed the view that the only types of employee benefit plans which are subject to the 1933 Act are those which are both voluntary and contributory on the part of participating employees. Some questions were raised in this regard about the types of plans that are considered "voluntary and contributory." Further, some commentators asked for clarification or reconsideration of the staff's views concerning specific types of voluntary contributory plans. These matters are discussed under appropriate captions in the sections which follow.

A. Voluntary Contributory Plans

The staff indicated in Release 6188 that a "volun-

tary" plan is "one in which employees may elect whether or not to participate."⁴ A "contributory" plan was defined as "one in which employees make direct payments, usually in the form of cash or payroll deductions, to the plan."⁵

In retrospect, the foregoing definitions were somewhat incomplete in that they did not encompass all types of voluntary contributory plans. Generally, it is the staff's view that the determination of whether a plan is a voluntary contributory one rests solely on whether the participating employees can decide at some point whether or not to contribute their own funds to the plan.⁶ Thus, for example, each of the following types of plans would be considered voluntary and contributory because each permits employees to make a determination, either at the time they join the plan or later, whether they will invest their own money: (1) a plan which is voluntary as to participation and then mandatory as to the amount of contributions, (2) a plan which is voluntary as to participation and which permits employees to make contributions at their option, and (3) a plan which is mandatory as to participation but provides employees with a choice whether or not to invest their own funds.

Although the staff continues to hold the view that all voluntary contributory plans are subject to the 1933 Act, it should be noted that there exists litigation⁷ which raises the issue whether this view is

³Any such comments should be addressed to Peter J. Romeo, Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, Washington, D. C. 20549.

⁴See fn. 19 of Release 6188.

⁵See fn. 20 of Release 6188.

⁶As noted in Release 6188 (see the text at fn. 84), a plan may also be deemed to be voluntary and contributory and therefore to involve a sale of a security in those instances where participating employees individually bargain to contribute their services in exchange for interests in the plan.

⁷*Newkirk v. General Electric Company*, [1979-1980 Transfer Binder] CCH Fed. Sec. L. Rep. 97,216 (N.D. Cal., 1979), appeal pending (9th Cir.), docket No. 80-402.

appropriate with respect to a defined benefit plan⁸ which is voluntary and contributory. The Commission has filed an *amicus curiae* brief in the subject litigation taking the position that employee interests in the plan at issue are securities within the meaning of the 1933 Act.

B. Section 401(k) Plans

In connection with the foregoing, several persons have inquired whether cash or deferred arrangements qualifying under Section 401(k) of the Internal Revenue Code of 1954 as amended ("Code") [26 U.S.C. 401(k)] are deemed to be voluntary contributory plans. Section 401(k) exempts from taxation certain nondiscriminatory profit-sharing or stock bonus plans which allow employees to elect annually either (1) to receive immediate payment of the employer's plan contribution or a portion thereof, or (2) to defer receipt of, and not be subject to income tax on, the contribution or a portion thereof and have it invested in a trust where it will accumulate for later payment. The fact that employees can elect either to receive their shares of the employer's contribution immediately or to defer receipt raises a question whether the deferred amounts are tantamount to voluntary contributions by the employees.

The staff's view on the above question is that Section 401(k) plans are not contributory on the part of employees⁹ because they do not involve out-of-pocket investments by employees of their own funds. Such plans are funded entirely by employer contributions. Accordingly, in the staff's view, interests in Section 401(k) plans are not subject to the 1933 Act.

C. Participant-Directed Plans

One of the commentators on Release 6188 questioned whether voluntary contributory plans which permit participants to direct the investment of their funds involve separate employee interests that are subject to the 1933 Act. Examples of such plans are Individual Retirement Account ("IRA") plans and certain Keogh and corporate plans which provide a variety of investment alternatives to participants.

The commentator's doubt is based in part on the belief that there is no investment contract relationship between the participant and the plan because the participant arguably does not rely on the plan to determine how his funds will be invested.

Moreover, the commentator believes that there is no sale of an interest by the plan to the participant, on the theory that the participant makes no investment decision regarding such an interest.

Whether a separate security in the form of a plan interest exists in participant-directed plans depends on the circumstances.¹⁰ Certainly, as noted in Release 6188,¹¹ there is considerable doubt in this regard with respect to many master trust or prototype plan arrangements which are used to makret IRAs and Keogh plans. Where the sponsor under such a trust or arrangement acts as a mere custodian of the participant's account without rendering investment advice or commingling the assets of the account with those of other accounts, and the participant retains complete investment discretion and control over the account, the staff generally has taken a no-action position regarding the registration of interests in the plan or arrangement.

A different situation exists where the sponsor or trustee of a participant-directed plan actively manages the funds provided to him by plan participants. Thus, for example, corporate thrift, savings or similar plans which allow participants to direct their investments into any of several investment funds managed by the plan trustees or administrators would be deemed to involve securities in the form of employee interests. In such

⁸A defined benefit plan pays fixed or determinable benefits and in this respect differs from defined contribution plans, which pay benefits that vary, depending on the amount of plan contributions, the investment success of the plan, and allocations made of benefits forfeited by non-vested participants who terminate employment. See in this regard Section 3(34) of ERISA.

⁹The Internal Revenue Service has taken a similar position under the Code. See Rev. Rul. 80-16, C.B. (January 7, 1980), Internal Revenue Bulletin No. 1980-3, January 21, 1980.

¹⁰Although the plan interests may not always be deemed securities, the stocks, bonds or investment fund shares in which the participant directs that his assets be invested would be securities in almost all instances.

¹¹See the text beginning at fn. 76 of Release 6188.

cases, it is clear that the employees are relying on the plan managers to maintain the various funds in a manner that will produce profits and thereby enhance their investment. Although the interests of employees in such plans are securities, they usually are exempt from registration under Section 3(a)(2) of the 1933 Act, except in those instances, as noted later in this release,¹² where employee monies are used to purchase employer stock.

D. TRASOPs

TRASOPs are a special form of Employee Stock Ownership Plan created by the Tax Reduction Act of 1975.¹³ From the employee's standpoint, they are a combined stock bonus and stock purchase plan. That is, employees are awarded shares of the employer's stock at no cost to them under such a plan, and they also may be given the opportunity to purchase additional shares at half the prevailing market price.

In Release 6188, the staff revised its prior position concerning TRASOPs and indicated that shares acquired in the open market by employees pursuant to such a plan henceforth need not be registered under the 1933 Act, provided the plan satisfied certain conditions described in Release No. 33-4790 ("Release 4790") (July 13, 1965) [30 FR 9959].¹⁴ One of the conditions in Release 4790 is that the plan must not contain any significant limitations on the right of employees to withdraw which might give rise to separate employee interests.

Several persons, noting that all TRASOPs contain a mandated provision which generally prohibits withdrawals for a period of seven years, inquired whether the above condition means that interests in an open market TRASOP must be registered. The staff's view is that the mandated seven-year withdrawal provision will not, by itself, necessitate the registration of employee interests in a TRASOP. To hold otherwise would subject all open market TRASOPs to registration, thereby nullifying the perceived benefits of the staff's position in Release 6188. In effect, the conditions in Release 4790 relating to withdrawal rights and employer contributions¹⁵ are not considered applicable to open market TRASOPs.

Accordingly, if a TRASOP is in compliance with the other conditions outlined in Release 4790, neither the stock acquired by employees nor any plan interests that might be deemed to exist would have to be registered under the 1933 Act.

Finally, a number of persons asked whether an issuer which decides to discontinue registration of its TRASOP under the 1933 Act because of the staff's revised position in Release 6188 must formally notify the Commission or its staff regarding that fact. The staff encourages an issuer in such a situation to furnish formal notification by filing a post-effective amendment to its registration statement formally deregistering the remaining unsold shares.¹⁶ The principal advantage of deregistration is that it makes clear on the record that the plan is relieved from any obligation to file future periodic reports that otherwise might be required under Section 15(d) of the 1934 Act. However, a failure to formally notify the Commission will not mean that a TRASOP continues to be subject to registration or that it cannot avail itself of the staff's position concerning the nonregistration of open market TRASOPs. In effect, therefore,

¹²See Part II, Subsection B. 1.

¹³Pub. L. 94-12 (March 29, 1975). Employers derive certain tax benefits by sponsoring TRASOPs. They can, for instance, receive up to an additional one percent investment tax credit for amounts contributed in cash or shares to the plan. In addition, they can become entitled to an extra one-half percent investment tax credit to the extent they match employee contributions for the purchase of company stock under the plan.

¹⁴The conditions in Release 4790 are designed to provide some assurance that the purchase of stock pursuant to the plan will be essentially the same as a purchase by the employee in an open-market transaction. Among the conditions are requirements that the employer limit its participation in the plan basically to performing ministerial functions and that it not pay any portion of the purchase price of stock acquired by employees under the plan. When such conditions are satisfied, the employer is not considered to be soliciting offers to buy its securities within the meaning of Section 2(3) of the 1933 Act.

¹⁵See Release 6188 (subsection B.2) and the next section of this release for discussions of employer contributions to TRASOPs.

¹⁶Even in the absence of formal notification, the registration statement automatically could no longer be used after a period of time because it would fail to satisfy the current prospectus requirements of Section 10(a)(3) of the 1933 Act.

formal deregistration is encouraged but is not absolutely necessary.¹⁷

E. Open Market Stock Purchase Plans

As a result of the staff's position in Release 6188 that certain open market TRASOPs no longer need be registered, a number of persons have asked the staff to take a similar position with respect to all other open market stock purchase plans which currently must be registered because the employer pays part of the purchase price of the stock acquired by employees. Traditionally, the payment by the employer of part of the purchase price has been considered a solicitation of an offer to buy its securities within the meaning of Section 2(3) of the 1933 Act and has therefore triggered the registration provisions of the Act.

In Release 6188,¹⁸ the staff stated with respect to open market TRASOPs that "no practical purpose appears to be served by requiring registration solely because the employer is paying half the purchase price." In part, this position reflected the general policy of the Congress to encourage the adoption of TRASOPs by employers. This policy is evidenced by the fact that the federal government, through the device of an additional investment tax credit, in effect reimburses employers for their contributions to the cost of stock acquired by employees under such plans.

In the case of a non-TRASOP open market stock purchase plan which provides for contributions by the employer that match or exceed employee contributions, the employer's contributions are not reimbursed by the federal government. Notwithstanding this fact, it seems reasonable to not require registration where such a plan otherwise satisfies the requirements of Release 4790. From the employee's standpoint, the plan is similar to an open-market TRASOP. The source of half or more of the funds used to purchase stock is the employer, and the employee has a strong incentive (though is not actually required) to participate because his risk of loss is substantially reduced due to the matching contribution feature. Under the circumstances, particularly the limited investment required of participating employees, the staff henceforth will take a no-action position regarding the registration of all open market stock purchase plans which provide for employer contributions that match or exceed employee contributions and which otherwise satisfy the conditions of Release 4790.

The foregoing position is being taken for policy reasons. Accordingly, it should not be construed as a change in the view expressed in Release 4790 that contributions by employers under stock purchase plans to the purchase price of their stock generally constitute solicitations of offers to buy under Section 2(3). As a result, the staff's no-action position described above does not extend to other open market stock purchase plans under which employers make contributions which fail to match or exceed the contributions of participating employees.

On another matter relating to open market stock purchase plans, some persons inquired whether the staff continues to apply Release 33-5515 ("Release 5515") (August 8, 1974) [39 FR 28520] to such plans. The inquiry stems from the fact that Release 6188 omitted any reference to Release 5515 when discussing open market plans.

Release 5515 states in part that an issuer may perform certain bookkeeping and similar administrative functions in operating a dividend reinvestment or similar plan without such activities being deemed solicitations of offers to buy its securities. The staff traditionally has applied the position stated in that release to open market employee stock purchase plans and continues to do so. Accordingly, the fact that Release 6188 did not specifically state that Release 5515 is applicable to such plans should not be construed as a change in the staff's prior position.

F. Conversions of Noncontributory Plans

In Release 6188¹⁹ the staff indicated that a conversion of an existing plan to another plan would involve a sale of a security if a choice were given to plan participants regarding the matter. A commentator asked the staff to reconsider that position with respect to conversions of noncontributory plans. First, he questioned whether a security is involved when an existing noncontributory plan is being converted to another plan, in view of the fact that interests in noncontributory plans are not

¹⁷See in this regard the staff's no-action letter concerning *The Limited Stores, Inc.* dated August 8, 1980.

¹⁸See Part III, Subsection B. 1 of Release 6188.

¹⁹See Part III, Section A. 1 of Release 6188.