U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 10, 2006 **FLSA2006-8**

Dear **Name***:

This is in response to your request for an opinion regarding the applicability of the Fair Labor Standards Act (FLSA) to the proposed employee stock purchase plan (ESPP) under consideration by your client (the "Employer"). It is our opinion that the contributions under the ESPP do not have to be included in the employee's regular rate.

The Employer you describe has an international work force with a substantial number of employees in the United States. You seek assurance that when the Employer's nonexempt employees in the U.S. participate in the proposed ESPP, the Employer contribution may be properly excluded from the "regular rate" of pay under the provisions of section 7(e) of the FLSA. As you know, section 7(e) of the FLSA, 29 U.S.C. § 207(e) (copy enclosed), excludes certain employer-provided payments and benefits from the regular rate of compensation for calculating overtime pay. You state that if the provisions of the ESPP do not fall within section 7(e), you alternatively request the Wage and Hour Administrator to approve the plan under the authority provided in 29 C.F.R. Part 547.

As you describe the Employer's plan, participating employees may make monthly contributions of up to 7.5% of their gross base pay for the month (with an annual maximum of $5,000) toward the purchase of shares of the Employer's publicly traded American depositary receipts. These employee purchases are referred to in the plan as Contribution Shares. Employees may withdraw Contribution Shares from their ESPP account at any time and may stop future contributions at any time by notifying the Employer. The ESPP is scheduled to be in place for five years initially, though it may be renewed periodically. Employees will be allowed to purchase Contribution Shares for the first two years of the plan. After three years, the Employer will provide a "Matching Share" to employees whose Contribution Shares have been held for the three years following their purchase. Thus, in the fourth year of the plan, the Employer would match Contribution Shares purchased in the first year of the plan. Shares would be matched on a one-for-one basis.

Section 7(e)(3)
FLSA section 7(e)(3)(b) excludes "sums paid in recognition of services performed if … the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor (Administrator)…." The regulations issued under this section are found in 29 C.F.R. Part 547 (copy enclosed). The essential requirements for the qualification of a bona fide thrift or savings plan are detailed in 29 C.F.R. § 547.1(b)-(f). When these requirements are met and none of the "disqualifying" provisions of 29 C.F.R. § 547.2 are present, the Employer's Matching Share contributions may properly be excluded from the regular rate. 29 C.F.R. § 547.1(b)-(f) states that:

> (b) The thrift or savings plan must constitute a definite program, in writing, adopted by the employer or by contract as a result of collective bargaining. The plan must be communicated or made available to the employees. It must be established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.
>
> (c) The plan specifically shall set forth the category of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as an employee's hours of work, production, or efficiency, although hours of work may be used to determine the eligibility of part-time or casual employees.
>
> (d) The amount an employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.
>
> (e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year: Provided,

however, That a plan permitting a greater contribution may be submitted to the Administrator and approved by him as a "bona fide thrift or savings plan" within the meaning of section 7(e)(3)(b) of the Act if:

(1) The plan meets all the other standards of this section;
(2) The plan contains none of the disqualifying factors enumerated in [29 C.F.R.] § 547.2;
(3) The employer's contribution is based to a substantial degree upon retention of savings; and
(4) The amount of the employer's contribution bears a reasonable relationship to the amount of savings retained and the period of retention.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: Provided, That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

Following are the three "disqualifying provisions" as listed in 29 C.F.R. § 547.2:

(a) No employee's participation in the plan shall be on other than a voluntary basis.
(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.
(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

The proposed ESPP meets the standard contained in section 547.1(b). You state that it will be a formal, company-wide plan whose details will be available on the Employer's Intranet site. It is intended to encourage voluntary saving by matching employee stock purchases beginning in the fourth year of the plan. Additionally, the proposed ESPP meets the section 547.1(c) standard. Participation is open to all active, full-time employees. The Employer defines a full-time employee as one who is regularly scheduled to work more than 30 hours a week. The number of hours worked is used only to distinguish full-time and part-time employees and restrict eligibility to full-time employees, as is permissible under the regulation. Eligibility is not based on employee production or efficiency. The proposed ESPP also fulfills the requirements of section 547.1(d). The plan specifies the amount an employee may contribute (up to 7.5% of gross monthly base pay per month, up to a cap of $5000 per year).

However, as you pointed out, the Employer's plan may not meet the requirements of section 547.1(e). Because of the three-year delay between the date an employee purchases shares and the date the Employer matches those shares, it is possible that the amount of the Employer's "match" in a particular year may exceed the total amount saved by employees in the same year, and thus may fail to meet the requirement of 29 C.F.R. § 547.1(e). You provide the following example of this possibility: "if the right to purchase Contribution Shares is suspended, or if employee participation rates decline, the Employer's contributions for purchase of Matching Shares in Year 4 of the ESPP (which will be based on employee contributions toward purchase of Contribution Shares in Year 1) may exceed the total of employee contributions in Year 4. Moreover, because the Employer's matching contribution is on a per-share rather than per-dollar basis, the value of the Employer's contribution will fluctuate over time as the market price of its shares changes."

It is obviously impossible to ascertain in advance the value and relative amounts of the Shares in Year 4 of the plan. However, as you know, section 547.1(e) (1)-(4) contains a possible option in certain cases where the amount of the Employer's contribution exceeds the allowable 15% of employees' earnings or exceeds the amount of employee contributions. These alternative standards have been met. Specifically, as already discussed and as further discussed below with regard to the remaining requirements, the plan otherwise meets all the requirements of section 547.1 and none of the disqualifying factors in section 547.2 are present. The Employer's contribution requires a three-year retention of the employees' Contribution Shares. Finally, the employee shares are matched on a one-for-one basis, if retained for three years. Therefore, the plan is a "bona fide thrift or savings plan" pursuant to section 547.1 (e) (1)-(4).

The proposed plan meets the requirements of section 547.1(f) also. Pursuant to the ESPP, the employee's contributions are matched on a one-for-one basis after the employee retains them for three years. Your letter does not mention any basis for diminishing an employee's share.

The proposed ESPP also complies with the requirements of 29 C.F.R. § 547.2. You stated that employee contributions are voluntary. Your letter confirmed that neither the decision to participate nor the amount of the matching contributions would influence employees' wages or salaries. Additionally, the amounts an employee may save under the plan and the amounts the employer will pay under the plan are preset and are not dependent on any of the variables in section 547.2(c).

Based on the above discussion, we find that, so long as the contribution requirement of section 547.1(e) is met, or the ESPP meets the alternative standards requiring approval by the Administrator, the proposed ESPP meets the requirements of a bona fide thrift or saving plan under section 7(e)(3)(b) of the FLSA. Details of the preconditions for such approval are described above and have been met. Therefore, in the event that the requirement of section 547.1(e) regarding the relative amounts of employee and Employer contributions is not met, we agree with your conclusion that "… a mismatch between employee and employer contributions, due solely to the timing of such contributions, is not inconsistent with the purpose of section 547.1(e) of the regulations." Thus, because all other requirements for the exemption are met, should such a "mismatch" occur, the Employer's request for discretionary approval of the ESPP by the Administrator under section 547.1(e) is granted. See WH Opinion Letters February 14, 2001 and April 8, 1999 (copies enclosed). Because approval is granted, there is no need to address section 7(e)(8).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; Hultgren v. County of Lancaster, 913 F.2d 498, 507 (8th Cir. 1990).

We trust the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures:
FLSA § 7(e)
29 C.F.R. Part 547
WH Opinion Letters February 14, 2001 and April 8, 1999

Note: * The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7)