

sec docket

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SIGNIFICANT ITEMS ANNOUNCEMENT

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| 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. |
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RULES

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

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| 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 market 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.

deemed to be securities. Second, the commentator believes it is inconsistent for the staff to state, as it did in Release 6188, that registration is not required with respect to investment elections under noncontributory plans,²⁰ but may be necessary if employees are given a choice regarding the conversion of a noncontributory plan to another plan. In the commentator's opinion, the two situations should be treated the same because they both involve a choice by employees with respect to monies not contributed by them. Finally, he stated that the staff's position appears to have the undesirable effect of discouraging plan sponsors from providing employees with a choice regarding conversions, because to do so might subject the conversions to registration.

The staff has given serious consideration to the views described above. Nevertheless, it continues to believe that a conversion of a noncontributory plan involves a sale of a security where employees are given a choice as to whether they will receive funds or benefits from the original plan or whether they will have such funds invested on their behalf in another plan. In such a situation, although the funds from the original plan were derived from the employer, the second plan operates essentially as a voluntary contributory one insofar as the contributions from the prior plan are concerned.

The staff believes that a conversion in which employees have the option to receive funds or to invest them in another plan can be distinguished from an election granted to employees under a continuing noncontributory plan. In a conversion where a choice is given, the employee's interest in the prior plan is terminated, and the funds or other benefits representing his accumulated rights under that plan in effect become the property of the employee, and can at his election be contributed to the new plan. As a result, it is appropriate to regard the funds contributed to the new plan as coming from the employee, and to consider the new plan as contributory to that extent. In the situation involving an election among investment media under an ongoing noncontributory plan, however, the funds contributed by the employer are not made available to the employee, but instead are retained by the plan itself and therefore cannot be regarded as employee monies. Similarly, under Section 401(k) plans, discussed in Section I.B. above, although the employee has an initial right to elect to receive plan contributions directly, amounts which are contributed come solely from the employer, become

assets of a continuing plan, and can properly be regarded as not involving out-of-pocket investments by employees of their own funds.

In summary, it is the staff's view that conversions in which employees are offered a choice between a new plan and receipt of the funds or other benefits from the old plan involve a sale of a security subject to the 1933 Act. Many such conversions, however, would be exempt from registration under Section 3(a)(2) of the 1933 Act, provided none of the funds transferred are to be invested in employer stock and other applicable conditions are met.²¹

II. THE SECTION 3(a)(2) EXEMPTION

Section 3(a)(2) of the 1933 Act provides an exemption from registration for the issuance of securities in connection with employee benefit plans. The exemption was discussed at length in Release 6188. Subsequent to that release, Congress amended Section 3(a)(2) in certain significant respects and the Commission proposed the adoption of a rule that would exempt certain Keogh plans under that section. These developments, as well as certain significant interpretive issues that were not addressed in Release 6188, are discussed in the sections which follow.

A. Important Developments

Title VII of the Small Business Investment Incentive Act of 1980 (the "1980 amendments")²² amended Section 3(a)(2) and certain other provisions of the federal securities laws relating to employee benefit plans.²³ The amendments to Section 3(a)(2) are set

²⁰See Part III, Section A. 2 of Release 6188.

²¹There are, of course, situations where the Section 3(a)(2) exemption would not be available. For example, the exemption could not be relied upon if a defined benefit plan were converted to, and employees were given a choice as to investment in, a defined contribution profit sharing or stock bonus plan (including an employee stock ownership plan) under which the funds transferred on conversion were invested in employee stock.

²²Pub. L. 96-477 October 21, 1980).

²³The other provisions amended were Section 3(a)(12) of the 1934 Act and Section 3(c)(11) of the Investment Company Act of 1940 ("1940 Act") [15 U.S.C. 81a et seq.].

forth below. Italics and brackets have been used to signify, respectively, additions to and deletions from the former language of the section.

Section 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

* * * * *

(2) ...any interest or participation in a single [or collective] trust fund, *or in a collective trust fund maintained by a bank, [or in a separate account maintained by an insurance company] or any security arising out of a contract issued by an insurance company, which interest, [or] participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, (B) an annuity plan which meets the requirements for deduction of the employer's contributions under section 404(a)(2) of such Code, or (C) a governmental plan as defined in section 414(d) of such Code which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for a part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, other than any plan described in clause (A), [or] (B), or (C) of this paragraph (i) the contributions under which are held in a single trust fund [maintained by a bank] or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code, or (iii) which is a plan funded by an annuity contract described in section 403(b) of such Code.* The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit-

sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of Section 401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

The 1980 amendments broadened the scope of the Section 3(a)(2) exemption by including certain insurance contracts and governmental plans within its coverage. In addition, the amendments make clear that any security arising out of a contract issued by an insurance company will be exempt under Section 3(a)(2) if it is issued in connection with a plan specified in that section and the other conditions of the exemption are met. As revised, the exemption is now broad enough to include within its coverage guaranteed investment contracts²⁴ and other arrangements sold to tax qualified plans that are funded by an insurance company's general account rather than by separate accounts. Formerly, Section 3(a)(2) exempted only securities funded by separate accounts, with the result that new insurance contracts funded by general accounts arguably were beyond its coverage.²⁵

The 1980 amendments also added governmental plans, as defined in Section 414(d) of the Internal Revenue Code, to the category of plans to which securities of the type specified in Section 3(a)(2) may be offered and sold without registration under the 1933 Act. Section 414(d) was added to the Code in 1978 and provides special tax treatment for plans covering state and local governmental employees. In

²⁴See Release No. 33-6051 (April 5, 1979) [44 FR 21626].

²⁵Notwithstanding the former language of the Section 3(a)(2) exemption, the staff had taken a no-action position regarding the registration of guaranteed investment contracts issued to plans under certain specified conditions. Letter to *American Council of Life Insurance* dated March 18, 1977. The no-action position was based in part on a recognition that guaranteed investment contracts are relatively new forms of contracts that generally were not in existence in 1970 when Congress created the exemption for interests in separate accounts.

order to fall within the amended exemption, a Section 414(d) plan must be established for the exclusive purpose of providing retirement benefits to employees or their beneficiaries, and the funds of the plan must be segregated and not subject to diversion to other purposes.

Finally, the 1980 amendments codified two prior staff interpretations regarding the Section 3(a)(2) exemption. First, the amendments specifically exclude from the exemption contracts issued in connection with tax deferred annuity plans described in Section 403(b) of the Internal Revenue Code. Such plans are adopted primarily by public school systems and departments of education, and it has been the staff's position that annuity contracts issued to them must be registered under the 1933 Act unless some exemption other than that provided by Section 3(a)(2) is available. Second, the amendments make it clear that a single trust fund need not be maintained by a bank in order for the Section 3(a)(2) exemption to be available. The former language of Section 3(a)(2) was ambiguous in this respect, but it is now clear that only collective trust funds for qualified plans must be maintained by a bank under the exemption.

The 1980 amendments are silent on the issue of whether Section 3(a)(2) exempts the interests of participants in plans covered by the exemption. The staff took the position in Release 6188 that, on the basis of the Commission's past administrative practice and practical considerations, Section 3(a)(2) generally exempts such interests to the same extent that it exempts the interests of plans in certain specified funding vehicles. The staff's position, which was contrary to dicta in the *Daniel* case,²⁶ recognized that the interests of participants in a plan are identical to their interests in the funding vehicles invested in by the plan and therefore generally should be accorded the same treatment as these latter interests.²⁷ Thus, for purposes of the Section 3(a)(2) exemption, the two types of interests generally are the same for all practical purposes. Nothing in the legislative history of the 1980 amendments suggests that the staff's interpretation is incorrect. Accordingly, the staff continues to adhere to the position outlined in Release 6188.

In addition to the enactment of the 1980 amendments, a further development of significance pertaining to Section 3(a)(2) was the issuance for public comment of proposed Rule 180 under the 1933 Act.²⁸ Pursuant to its authority in Section

3(a)(2) to exempt securities issued in connection with Keogh plans from registration, the Commission proposed the rule for the purpose of exempting plans which meet the criteria specified therein. The rule, if adopted, should largely eliminate the need for the Commission to issue exemptive orders for Keogh plans in the future.

B. Significant Interpretive Issues

There are several important issues relating to Section 3(a)(2) that various commentators have asked the staff to address. These are discussed below under appropriate captions.

1. Plans With Multiple Investment Choices

Many persons have asked the staff to discuss the availability of the Section 3(a)(2) exemption for interests in thrift, savings or similar plans which provide employees with several investment alternatives, one of which consists of securities of the employer. It is the staff's view that the exemption is available for such interests only if amounts invested in securities of the employer can be attributed to contributions made by the employer. The staff bases its position on the provision in Section 3(a)(2) which states that the exemption does not apply to a plan whose contributions are held in a single trust fund or in a separate account maintained by an insurance company and under which an amount in excess of the employer's contribution is allocated to the purchase of securities of

²⁶See the discussion in Release 6188 (Part IV, Section B. 2.) on this point.

²⁷There are limited situations, however, where the interests of participants in a plan would be treated differently under Section 3(a)(2) than the interests of the plan in certain funding vehicles. For example, a plan may invest part or all of its assets in a mutual fund. The interest of the plan in the mutual fund would not be exempt under Section 3(a)(2) because such funds are not referred to in the section. However, the interests of employees in the plan would be exempt under Section 3(a)(2) so long as no employee funds were invested in employer securities and the plan otherwise satisfied the requirements of the exemption.

²⁸Release No. 33-6247 (October 4, 1980) [45 FR 69476].

the employer or its affiliates. As previously noted in Release 6188,²⁹ this provision was included in Section 3(a)(2) in 1970 in order to reflect the staff's consistent administrative practice of not requiring interests in plans to be registered unless employee monies were used to buy securities of the employer.

The application of the staff's position to thrift and similar plans can best be illustrated by the following example. XYZ Company has established a thrift plan whose assets are held in a single trust fund. The plan's assets are segregated under the trust into three separate funds, one of which consists exclusively of XYZ securities. Employees may choose to have their plan contributions invested in any or all of the funds, and XYZ will match all such contributions on a dollar-for-dollar basis. Aggregate contributions under the plan are as follows:

| Three Funds | Employee Contributions | XYZ Contributions | Total |
|-------------------------|------------------------|-------------------|-------|
| XYZ Securities Fund | 10% | 10% | 20% |
| Guaranteed Income Fund | 20% | 20% | 40% |
| Diversified Equity Fund | 20% | 20% | 40% |
| Totals | 50% | 50% | 100% |

It is the staff's view that although XYZ's contributions to the plan in the aggregate exceed the amount invested in its securities, the Section 3(a)(2) exemption is not available. This is because the plan clearly allows, insofar as the XYZ securities fund is concerned, funds in excess of the employer's contribution to be allocated to the purchase of securities of the employer. Thus, interests in the plan are not exempt under Section 3(a)(2). If, however, the plan were changed so that it became possible to attribute all employee contributions to non-XYZ securities, the Section 3(a)(2) exemption would then be available. In the above example, this could be done in either of two ways. First, employees might be prohibited in the future from investing their own money in the XYZ securities fund, but they would be permitted to designate that matching contributions by the employer be invested on their behalf in that fund. Second, the XYZ securities fund might either be enlarged to include securities of

other entities or merged into the diversified equity fund, with the understanding that in no instance would the amounts invested in XYZ securities under any such fund exceed the amount of XYZ's contributions to that fund. In both of these situations, it would be possible to attribute all investments in XYZ securities to contributions by the employer, with the result that the Section 3(a)(2) exemption would then be available, assuming all of its other conditions were satisfied.

2. *Commingling of Assets in a Fund or Account*

In Release 6188,³⁰ the staff expressed the opinion that the Section 3(a)(2) exemption for interests or participations in a bank collective trust fund or an insurance company separate account is not available if the fund or account commingles the assets of tax qualified corporate plans with those of Keogh plans. The staff based its view on the belief that Section 3(a)(2) exempts only interests or participations in collective funds or separate accounts which consist exclusively of assets of tax qualified corporate plans.

Representatives of insurance companies and other persons have asked the staff to reconsider the opinion noted above. Their request is based partly on the language and legislative history of Section 3(a)(2) and partly on practical considerations. With respect to the language of Section 3(a)(2), these persons noted that it exempts *any* interest or participation in a collective fund or separate account so long as it is issued in connection with a plan (other than a Keogh plan) qualified under Section 401 of the Internal Revenue Code. Read literally, this language does not preclude commingling of Keogh plan assets with corporate plan assets. Further, the legislative history of Section 3(a)(2) suggests that a literal interpretation is not inappropriate in this regard.³¹

²⁹See the text at fn. 132 of Release 6188.

³⁰See the text at fn. 114 of Release 6188.

³¹*Compare* Amendment No. 438 to S. 1659, 90th Cong., 1st Sess., Section 102(b) (1967), which would have required a bank collective fund under Section 3(a)(2) to consist *solely* of assets of tax qualified plans other than Keogh plans, and a subsequent bill, S. 3724, 90th Cong., 2nd Sess., Section 27(b) (1968), which did not include the word "solely."

From a practical standpoint, the persons requesting reconsideration point out that there does not appear to be any substantial reason why commingling of the assets of corporate and Keogh plans should be prohibited. Moreover, they indicate that a number of insurance companies commingled assets in separate accounts in such a manner for many years prior to the enactment of Section 3(a)(2) and have continued to do so after its enactment. Such companies traditionally have registered only the interests in such accounts that are sold to Keogh plans, believing that the Section 3(a)(2) exemption applied to the interests sold to tax qualified corporate plans.

After consideration of the reasons outlined above, the staff has determined to change the interpretation in Release 6188 discussed above. Accordingly, the availability of the Section 3(a)(2) exemption no longer will be deemed by the staff to depend in part on whether the assets of Keogh plans are commingled with the assets of tax qualified corporate plans. Of course, where commingling of assets in the above manner does occur, interests or participations sold to plans not covered by the Section 3(a)(2) exemption would be subject to registration under the 1933 Act, absent some other exemption.

3. Plans Funded by Exempt Securities

The exemption from registration provided by Section 3(a)(2) for interests or participations in a plan is, by virtue of the language of the statute, not available in those instances where employee monies are used to purchase securities of the employer or its affiliates. Notwithstanding the language of Section 3(a)(2), the staff has taken a no-action position for policy reasons on several occasions where employee monies were used to purchase employer securities which were exempt from registration under one of the securities exemptions set out in Sections 3(a)(2) through 3(a)(8) of the 1933 Act.³² These no-action positions have been based on the view that it would be contrary to the purposes of Section 3(a)(2) to require interests in a plan to be registered solely because employees are investing in securities of the employer which, because of their nature, were never intended by Congress to be subject to registration.

On a somewhat related issue, a commentator on Release 6188 inquired whether the Section 3(a)(2) exemption would be jeopardized if the trustees for a plan whose assets are held in an insurance company

separate account decided to create an additional fund consisting of exempt U.S. Government securities which is not maintained by the insurance company. The staff's position is that the exemption would not be affected by such a decision. Apart from the policy consideration previously noted that investments by a plan in exempt securities should not necessitate registration, it would appear that in this instance the plan's investment in U.S. Government securities would be held in a single trust fund that would satisfy the literal requirements of Section 3(a)(2). Accordingly, the exemption would be available, in the staff's view.

III. SALES AND REALES OF EMPLOYER STOCK

Release 6188 discussed in considerable detail sales and resales of employer stock by plans and their participants. There still remain, however, several important matters that merit attention. These are discussed below.

A. Sales by Plans

In Release 6188,³³ the staff indicated that if a plan is considered an affiliate³⁴ of the employer, any sales by it of employer stock "would be subject to the regis-

³²See, e.g., letters re *Irwin Union Bank & Trust Co.* dated August 18, 1978 and *Roadway Express, Inc.* dated May 24, 1979. The Division's no-action positions in this area, however, do not extend to those situations in which the employer's securities are offered to employees in reliance upon a transactional exemption, such as those provided by Sections 3(a)(9) through 3(a)(11) of the 1933 Act. The reason is that, unlike a securities exemption, a transactional exemption does not rest on a Congressional determination that the securities themselves should be exempt from registration. See letter re *H. C. Prange Company* dated July 14, 1980.

³³See Part V, Section B of Release 6188.

³⁴An "affiliate" of an entity is defined in Rule 405 [17 CFR 230.405] under the 1933 Act as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the [entity]."

tration and antifraud provisions of the 1933 Act in the same manner as if the employer were engaging in the transaction." Some persons have asked whether this statement was meant to imply that plans which are affiliates cannot use Rule 144 [17 CFR 230.144]³⁵ under the Act to sell employer stock. The basis for this inquiry lies in the fact that issuers are barred from using Rule 144 to sell their own stock, and thus it could be inferred from the staff's statement that plans which are affiliates of such issuers likewise are so barred.

The statement quoted above was not intended to preclude plans from using Rule 144 to sell employer stock. Only issuers are prohibited from using the rule. Thus, an affiliate plan may rely on Rule 144 to sell stock of the employer, provided it complies with all applicable conditions of that rule.

B. Resales by Plan Participants

The staff stated in Release 6188 that non-affiliates who receive unregistered securities from a plan could resell such securities immediately without any restrictions (such as registration or compliance with Rule 144) if three conditions were satisfied.³⁶ The three conditions are: (1) the issuer of the securities is subject to the periodic reporting requirements of Section 13 or 15(d) of the 1934 Act, (2) the stock being distributed is actively traded in the open market, and (3) the number of shares being distributed is relatively small in relation to the number of shares of that class issued and outstanding. Several persons have asked that the staff provide some guidance as to what is considered to be a "relatively small amount" under the third condition noted above. In this regard, it is the staff's view that a relatively small amount will always be involved when the total amount of shares distributed by a plan to its participants during a fiscal year does not exceed one percent of the outstanding securities of the class. Distributions during a fiscal year which exceed the one-percent test may in some cases still be deemed to involve relatively small amounts if there is data (such as a large trading volume) indicating that resales of the distributed shares will not have a measurable impact on the trading market.

With respect to resales by affiliates, the staff indicated in Release 6188 that, even when the three conditions described above are satisfied, resales by such persons would continue to be subject to registration in the absence of an available

exemption, such as that provided by Rule 144. In this regard, the staff also has stated that if the three conditions are complied with the securities involved will not be considered "restricted securities" under Rule 144.³⁷ As a result, affiliates may disregard the two-year holding period requirement of Rule 144 in the event they choose to rely on that rule for the resale of their securities.

IV. FORM S-8

Form S-8 [17 CFR 239.16b] is the principal form used to register securities issued in connection with employee benefit plans.³⁸ In the last several months,

³⁵Rule 144 provides a safe harbor from the registration provisions of the 1933 Act for the resale of restricted securities (i.e., securities acquired in non-public transactions from the issuer or an affiliate) and securities held by affiliates. It contains various conditions, including requirements that there be current information about the issuer available to the public and that the securities have been held by the seller for at least two years.

³⁶An assumption underlying the staff's position is that the unregistered securities were distributed in a legal offering to plan participants. If the securities were issued in an illegal offering, non-affiliate participants not involved in the illegality could, pursuant to the policy underlying Section 4(3)(A) of the 1933 Act, freely resell such securities without regard to whether the three conditions were satisfied. For a discussion of Section 4(3)(A) of the Act, see 1 Loss, Securities Regulation (1961), p. 257, fn. 228.

³⁷Release 33-5750 (October 8, 1976) [41 FR 45632].

³⁸Form S-8 can be used for offerings which are limited to employees of the issuer and its parents and subsidiaries, provided the following conditions are met: (1) the issuer, at the time of filing, has been subject to the periodic reporting requirements of Section 13 or 15(d) of the 1934 Act for at least the prior 90 days and has filed all reports required during the preceding 12 months or such shorter period that it was subject to those requirements, and (2) the issuer has furnished or will furnish an annual report to security holders for its last fiscal year containing substantially the information required by Rule 14a-3 [17 CFR 240.14a-3] under the 1934 Act. Those issuers who are unable to satisfy the

the Commission and its staff have taken several steps designed to minimize the burdens imposed on issuers who use this form.

A. Revisions to the Form and to the Procedures for Making It Effective

The initial step taken by the Commission was to revise the procedures utilized by it for making filings on Form S-8 effective under the 1933 Act.³⁹ Formerly, registration statements on Form S-8 and post-effective amendments thereto generally were not made effective until the Commission's staff had reviewed the filings in question and was satisfied that they were in compliance with all applicable disclosure requirements. It became increasingly apparent to the Commission, however, that most filings on Form S-8 complied in all material respects with the disclosure requirements of the form and related rules, and that the review process resulted in only minimal disclosure improvement. Under the circumstances, the Commission believed that the public interest would generally best be served by prompt effectiveness of such filings without the delays necessitated by the low review priority given to them. Accordingly, the Commission adopted or amended several rules under the 1933 Act,⁴⁰ as well as Form S-8 itself, to provide for such prompt effectiveness. The net effect of these changes was to permit original filings on Form S-8 to become effective automatically 20 days following the date of filing and to allow post-effective amendments on Form S-8 to become effective automatically on the date of filing.

A second step of even greater significance taken by the Commission was the adoption of a completely revised Form S-8.⁴¹ The new form generally requires fewer disclosures than formerly were necessary, thereby reducing the time and expense involved in preparing such filings. Moreover, as explained in the next section, it provides for a method of updating which requires minimal effort and expense.

B. Changes in Methods of Updating

In order to satisfy the current prospectus requirements of Section 10(a)(3) of the 1933 Act, issuers in the past generally updated their Form S-8 registration statements on an annual basis through the filing of a post-effective amendment. The preparation of many such amendments was costly and time-consuming, due to the fact that a completely revised prospectus generally had to be

included in order to reflect all material changes from the preceding year.

In recognition of the considerable effort and expense involved in preparing annual post-effective amendments, the Commission adopted an updating procedure for the new Form S-8 that is similar to that utilized for many years under Form S-16. The new procedure allows the issuer to incorporate by reference periodic reports required to be filed under the 1934 Act in order to satisfy the majority of all updating requirements.⁴² Under this method, the issuer generally can continue to use the same prospectus (sometimes characterized as an "evergreen prospectus") year-after-year without any fundamental changes. Thus, preparation, printing and distribution costs are considerably reduced when this method is used.

Footnote 38 continued

requirements for the use of Form S-8 can use Form S-1 [17 CFR 239.11] or, if they qualify, Form S-7 [17 CFR 239.26], Form S-16 [17 CFR 239.27], or Form S-18 [17 CFR 239.38]. Issuers who utilize these other forms for registering primary offerings by employee benefit plans must include therein all of the information regarding the plans which Form S-8 would otherwise require. Thus, the disclosures regarding the plan would be the same, no matter which registration form was used.

³⁹Release 33-6190 (February 22, 1980) [FR 13438].

⁴⁰The rules involved in the changes were Rules 464 [17 CFR 230.464], 473 [17 CFR 230.473], 475a [17 CFR 230.475a], 477 [17 CFR 230.477], and 485 [17 CFR 230.485].

⁴¹Release 33-6202 (April 2, 1980) [45 FR 23653]. In that release, the Commission also substantially amended Form 11-K [17 CFR 249.31], the annual report under the 1934 Act required to be filed by plans which have registered interests therein pursuant to the 1933 Act.

⁴²It should be noted that in order to utilize the 1934 Act periodic reports for updating purposes, it is necessary that the accountant for the issuer file a consent with the Commission permitting the financial statements and related accountant's opinion in the issuer's Form 10-K [17 CFR 249.310] to be used in connection with the Form S-8 under the 1933 Act.

In those unusual situations where annual updating cannot be completely accomplished through the filing of 1934 Act periodic reports,⁴³ the staff has indicated that issuers may utilize an "appendix" to the evergreen prospectus for this purpose.⁴⁴ The appendix generally would consist of a page or two containing the additional information required to update the S-8 and would be distributed to existing plan participants in lieu of a completely revised prospectus. New participants, of course, would be furnished with both the evergreen prospectus and the appendix, and existing participants could also obtain copies of the evergreen prospectus, if they so desired. Again, this method of updating is advantageous because it allows printing and other costs to be reduced.

C. Other Efforts to Minimize Burdens

In addition to the foregoing, the staff has issued two no-action letters designed to further alleviate the burdens associated with Form S-8.

The first letter⁴⁵ permits issuers to take advantage of the new updating procedure described above without the necessity of making a complete filing on the new Form S-8. The staff's position is based on the fact that the former S-8 form generally required more information to be disclosed than the new form and therefore plan participants will not suffer if the old form continues to be used for a period of time. Thus, an issuer with an existing S-8 registration statement on file generally may avail itself of the new updating procedure immediately by filing a post-effective amendment (using the appendix approach, if desired) containing the information required by Item 12 ("Incorporation of Certain Documents by Reference") and Item 13 ("Additional Information") of the new S-8 form and the undertakings required by Part II of that form.⁴⁶

The second letter⁴⁷ permits issuers to use the summary plan description required by ERISA to satisfy certain of the disclosure requirements of Form S-8 regarding the plan. In effect, this position allows issuers to eliminate essentially duplicative disclosures that may have occurred under ERISA and the 1933 Act in the past. Pursuant to the letter, an issuer is allowed to file the summary plan description as an exhibit to the S-8. The issuer, however, need not attach the summary plan description to the prospectus delivered to employees, since such persons would independently be furnished with a copy of the summary plan

description pursuant to the requirements of ERISA.

The staff's position described above is subject to the following conditions: (1) the issuer must state in its Form S-8 prospectus that a current copy of the summary plan description will be provided to any plan participant upon request; (2) the issuer will continue to comply with the requirements of ERISA pertaining to the amendment and distribution of the summary plan description; and (3) the issuer will update, when necessary, the copy of the summary plan description on file with the Commission through the filing of exhibits to the S-8 and, where appropriate, the annual reports of the plan filed on Form 11-K.

Accordingly, 17 CFR Part 231 is amended by adding reference to this release thereto.
By the Commission.

George A. Fitzsmmons
Secretary

⁴³For example, updating by filing a post-effective amendment to the S-8 may still be necessary to disclose: (1) changes in the tax effects which may accrue to employees (and to the issuer) as result of participation in the plan, (2) changes in the approximate number of employees participating in the plan and the number eligible to participate, (3) changes in the names and addresses of the plan administrators and any material relationships between them and the plan participants, the issuer or its affiliates, and (4) changes in the data required for the purpose of evaluating alternative investment media.

⁴⁴Letter re *Crocker National Corporation* dated September 25, 1980.

⁴⁵*Ameron, Inc.* dated May 1, 1980.

⁴⁶Of course, consistent with the updating procedure utilized with respect to Form S-16 filings, the issuer should also file the consent of its independent public accountant, as noted in fn. 42. Further, any material amendments to the plan not previously described in the S-8 would have to be disclosed in the post-effective amendment.

⁴⁷*Shop & Go, Inc.* dated July 17, 1980.