

For RELEASE Tuesday, July 13, 1965

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.
20549

SECURITIES ACT OF 1933
Release No. 4790

EMPLOYEE STOCK PURCHASE PLANS

Questions frequently arise with respect to the necessity for the registration under the Securities Act of 1933 of securities of the employer company or an affiliate^{1/} purchased through an employee stock purchase plan which is in substance the equivalent of a customer's account with a broker for the purchase of shares on the open market. A similar problem may exist with respect to plans for the purchase of securities by persons who are not technically employees of the issuer or an affiliate. Of course, where the employer or an affiliate directly or indirectly supplies the securities for purchase by employees under the plan, the registration provisions of Section 5 of the Act would clearly be applicable absent an appropriate exemption.

The question presented is whether there is an "attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value," as referred to in the definition of "offer for sale" in Section 2(3) of the Securities Act of 1933, by the issuer of such security or underwriter for such issuer or an affiliate. In accordance with long-established interpretation by the Commission, a solicitation of an offer to buy a security by or on behalf of an issuer or an affiliate of the issuer of that security is deemed to be subject to the registration provisions of the Act notwithstanding that the securities are not owned by the issuer or an affiliate but are purchased on the exchange or the over-the-counter market by the designated agent for the account of participating employees.

Solicitation of an Offer to Buy

Some participation by the employer company or an affiliate will exist in almost every such plan, but the nature and extent of such

^{1/} The term "affiliate" is used herein as defined in Rule 405, as follows: "An 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by or is under common control with, the person specified.

participation varies substantially in different plans. In some cases, there is sufficient participation by the employer company or an affiliate to constitute a solicitation of an offer to buy, so that registration is required under the Act. A determination whether registration is required, therefore, will turn upon the degree and type of participation by such persons in the particular program.

Participation by the employer or an affiliate will be considered to be sufficiently limited, and will not require registration, where all communications of a soliciting character are furnished by and in the name of a broker or other agent of the employees, and if the employer company or an affiliate performs no more than the following functions:

1. The employer company or an affiliate announces the existence of the plan.
2. The employer company makes payroll deductions at the request of employees for the purpose of participating in the plan.
3. The names and addresses of employees are made available to the broker or other agent for direct communications by it to such employees regarding the plan. This may take the form of addressing the communication to be sent by the broker or other agent, the inclusion of the broker's communication with the announcement by the employer company, or the holding of an initial meeting of employees at the company's premises.
4. The employer company or an affiliate pays no more than its expense of payroll deductions and the reasonable fees and charges of the broker or other agent for brokerage commissions and bookkeeping and custodial expenses.

Any deviation from these standards may require registration.

The Commission will from time to time re-assess the above standards to determine whether under these conditions employees are in fact being solicited by employer companies or affiliates to purchase any of their securities.

The Plan Participations as a Separate Security

The above discussion presupposes that the plan involves minimal differences from the manner in which securities are acquired in ordinary brokerage transactions and that the rights and obligations of the employee

and the broker will be consistent with the ordinary broker-client relationship, which might include the leaving of the securities in the custody of the broker or other person performing the same custodial function. Where substantial variations exist, however, such as limitations on the right of the employee to withdraw from the plan or to withdraw securities held in custody, the granting of management discretion to someone other than the employee, the accumulation of sums for material periods of time before investment, the payment of special fees or charges such as a front-end load, or the diminution of his rights or privileges as a shareholder, a separate security may be created which will be required to be registered under the Securities Act of 1933 and the issuer of which may be an investment company required to register under the Investment Company Act of 1940.^{2/}

Furthermore, such plans commonly involve such participation by the employer or an affiliate as to amount to a solicitation of an offer to buy the securities of the employer company or an affiliate within the meaning of the Securities Act of 1933 and thus require registration of such securities as well.

Finally, reference is made to the provisions for civil liability and criminal sanction for fraud in the sale of securities in Sections 12(2) and 17 of the Securities Act of 1933 and Section 10(b), and Rule 10b-5 thereunder, of the Securities Exchange Act of 1934, which are applicable to transactions in securities notwithstanding the availability of exemption from registration. Consequently, it is anticipated that employee stock purchase plans not subject to registration will be limited to the securities of companies about which information is generally available.

^{2/} Provision in the plan for reinvestment of dividends on a voluntary basis, such as is commonly provided in the Monthly Investment Plans of the New York Stock Exchange, will not of itself create a separate security.