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September 29, 1999

Catherine T. Dixon, Esq.
Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Open Market Stock Purchase Plans Under Rule 16b-3

Dear Ms. Dixon:

On behalf of the Subcommittee on Employee Benefits and Section 16 of the American Bar Association Section of Business Law's Federal Regulation of Securities Committee, we are writing to request the staff's views on a question of general applicability relating to the rules under Section 16 of the Securities Exchange Act of 1934 ("1934 Act"). Rule 16b-3(a) states that the rule is available to exempt any "transaction between the issuer (including an employee benefit plan sponsored by the issuer) and an officer or director of the issuer" if the transaction satisfies the applicable conditions of the rule. We understand that the staff has reservations whether certain open market stock purchase plans qualify as employee benefit plans "sponsored by the issuer" under the rule. A determination by the staff that such plans are not sponsored by the issuer within the meaning of Rule 16b-3 would mean that acquisitions of stock by officers and directors under such plans would not be eligible for exemption under the rule.

The types of plans at issue are discussed by the Commission in various releases under the Securities Act of 1933 ("1933 Act"), including Release Nos. 33-4790 (1965), 33-5515 (1974), and 33-6281, § I.E. (1981). These plans generally involve purchases of the employer-issuer's stock in the open market by a broker on behalf of employees of the issuer or its subsidiaries. In Release No. 33-4790 ("Release 4790"), as supplemented by Release No. 33-5515, the Commission indicated that registration

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under the 1933 Act by the issuer of the stock acquired by participants in these plans would not be required where:

- All communications of a soliciting character are furnished by and in the name of a broker or other agent of the employees;
- The securities are acquired in ordinary brokerage transactions and the rights and obligations of the employee and the broker are consistent with the ordinary broker-client relationship, which might include leaving the securities in the custody of the broker or other person performing the custodial function; and
- The issuer or an affiliate performs no more than the following functions:
 - (1) Announces the existence of the plan;
 - (2) Makes payroll deductions at the request of employees for the purpose of participating in the plan;
 - (3) Makes available to the broker or other agent the names and addresses of employees for direct communications by it to such employees regarding the plan (as, for example, through addressing the communications to be sent by the broker or other agent, enclosing the broker's communications to employees with announcements by the issuer, or holding an initial meeting of employees at the issuer's premises);
 - (4) 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; and
 - (5) Performs bookkeeping and similar administrative functions relating to the operation of the plan.

In connection with your consideration of the application of Rule 16b-3 to the above plans, you have asked us for certain information regarding the method of operation of such plans.

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First, you asked what is generally considered a "same day" transaction by a participant with a broker under a Release 4790 plan. Our understanding is that relatively few plans permit participants to execute orders directly with a broker. Instead, most plans involve regular payroll deductions that are applied to the purchase of stock through a broker at prescribed intervals, which vary from issuer to issuer. For those plans that allow participants to execute an order directly through a broker, there does not appear to be any universal practice for determining whether an order will be executed on the same day it is given to the broker, as each such determination is based on the particular broker's procedures.

Second, you asked how long a plan trustee typically holds payroll deductions before using them to buy issuer stock. Generally, there is no trustee for these types of plans. Instead, as noted above, the issuer will apply the accumulated payroll deductions to the purchase of stock by entering a purchase order with a broker at a prescribed interval. The interval is at the election of the issuer, but typically is not excessive in length. Our understanding is that it would be uncommon for an issuer to apply the accumulated payroll deductions to the purchase of stock less often than quarterly, and that in most instances the interval is much shorter, and sometimes is within a day of the close of the payroll period in which such deductions have been made.

Third, you asked what is the typical treatment by a plan of sales or transfers to third parties of stock acquired under a plan by participants. Our understanding is that these plans simply place the stock in an individual account for the participant, at which point the participant is free to deal with the stock as he or she wishes. Thus, subsequent sales or transfers by the participant are outside the purview of the plan.

Fourth, you asked whether it is possible for a participant to change his or her election to purchase stock during a period in which payroll deductions are being made. Our understanding is that most payroll deduction plans involving periodic stock purchases, including those qualified under Section 423 of the Internal Revenue Code, permit a participant to withdraw his or her funds that have accumulated in a payroll deduction account at any time prior to the date designated as the end of the purchase period except for a few days at the end for administrative purposes. After the purchase period has ended, a participant typically is precluded from withdrawing the funds.

Fifth, you asked whether it is possible for participants in employee stock purchase plans to make large contributions immediately prior to purchases by the plan in the open market. Our understanding is that many plans permit non-payroll deduction

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contributions. However, because these plans typically contain contribution limits, large contributions are uncommon in our experience.

Finally, you asked whether it is customary for employee stock purchase plans to state that they are sponsored and administered by the issuer. Our belief is that most such plans do indeed contain a statement to that effect, although we do not think the availability of Rule 16b-3 should turn on the presence or absence of such a statement in a plan. Instead, we believe the rule's availability should depend solely on whether the issuer in fact actually functions as the sponsor and administrator.

The Commission's no-action position regarding the registration of the above types of plans under the 1933 Act is based generally on the theory that the issuer's participation in such plans is limited to the performance of functions that do not constitute a solicitation of an offer to buy the issuer's securities under Section 2(3) of the Act. Preliminarily, you have expressed concern that the involvement by the issuer in such plans may not be sufficient to warrant a position by the staff that the plans are "sponsored by the issuer," as required for the application of Rule 16b-3.

We do not believe it would be appropriate for the staff to take the position that all plans covered by Release 4790 are outside the purview of Rule 16b-3. The standard for the availability of the rule is whether a plan is "sponsored by the issuer." According to Webster's New World Dictionary, a sponsor is "any person or agency that undertakes certain responsibilities in connection with some . . . activity, as in being a proponent, endorser, advisor, underwriter, surety, etc." We think it is undeniable that the types of responsibilities that may be assumed by an issuer in connection with a Release 4790 plan are entirely consistent with those of a "sponsor." Announcing the existence of a plan, permitting on-site meetings relating to it, making payroll deductions for periodic stock purchases, performing bookkeeping functions, and paying brokerage commissions, are activities traditionally associated with sponsorship of a plan. These activities generally are critical to the operation of the plan and create the unmistakable impression in the minds of participants and others that the issuer is endorsing the plan in the manner of a sponsor.

The fact that the activities outlined in Release 4790 do not involve a solicitation of an offer to buy the issuer's securities under the 1933 Act does not mean that the activities are insufficient to constitute those of a sponsor under Rule 16b-3. Release 4790 draws no judgment on the sponsorship issue, and instead confines its commentary

solely to whether the activities described therein involve a solicitation of an offer to buy. In light of the narrow focus of Release 4790, the conclusion in that release regarding the application of the 1933 Act should have no bearing on the question whether a particular stock purchase plan is sponsored by the issuer for purposes of Rule 16b-3.

Although we firmly believe that the staff should not automatically conclude that all plans encompassed by Release 4790 are outside the purview of Rule 16b-3, we recognize that the staff may be reluctant for policy reasons to permit the use of Rule 16b-3 for Release 4790 plans that allow participants to make open market purchases in substantially the same manner as buying directly through a broker. For example, if an employee need only call a participating broker to make a purchase in the typical manner of buying stock through a broker, the staff understandably may not wish to say that the purchase is exempted under Rule 16b-3 simply because the purchase occurs under the auspices of a plan created by the issuer.

To deal with legitimate staff concerns of the type mentioned above without unduly restricting the availability of Rule 16b-3 for other Release 4790 plans that do not raise such concerns, we believe it would be appropriate for the staff to draw a distinction between those types of stock purchase plans under Release 4790 that permit same-day direct purchases through a broker, and those that allow only periodic purchases to be made following an accumulation of payroll deductions by the issuer. Direct purchase plans generally are characterized by minimal issuer involvement and permit purchases of the type that traditionally have not been exempted by the Commission because they provide significant opportunities for speculative abuse. Periodic purchase plans, on the other hand, generally are characterized by significant issuer involvement (in the form of payroll deductions, record-keeping and other administrative functions), and permit purchases that traditionally have been exempted in the past because they occur at pre-set intervals that are not influenced by issuer developments. Accordingly, we recommend that the staff take the position that a plan meeting the standards of Release 4790 will be deemed a plan "sponsored by the issuer" within the meaning of Rule 16b-3 if the plan restricts purchases to those made on a periodic basis through payroll deductions and restricts participation to employees of the issuer and other persons who would be eligible to purchase securities of the issuer under a registration statement on Form S-8.

In addition to conforming to the purposes of Section 16, adoption of the above recommendation would preclude discriminatory treatment under Rule 16b-3 of stock

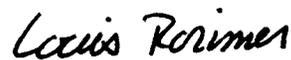
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purchase plans on the basis of their registration status under the 1933 Act. For example, if the staff were to take the position that Rule 16b-3 is not available for periodic purchase plans under Release 4790, other plans which essentially are identical to such plans, except for an issuer subsidy in the form of a matching contribution or price discount, would receive favored treatment under the rule. These other plans would be outside the bounds of Release 4790 because of the subsidy, and thereby would qualify for Rule 16b-3, while the plans without a subsidy would not so qualify. This would be an anomalous result, inasmuch as full-price plans meeting the standards of Release 4790 are likely to present less incentive to engage in speculative abuse than reduced-price, subsidized plans that provide greater opportunities for profit and are required to be registered under the 1933 Act. A policy that would encourage such a result would be unwise, in our view.

We note that this request is limited to plans meeting the standards of Release 4790 and the restrictions noted above. We do not intend to preclude the possibility that periodic sales to employees under other open market stock purchase plans might also qualify for exemption under Rule 16b-3. However, in view of the wide variety of features found in plans of this general type, we are not addressing them at this time.

In accordance with Release No. 33-6269, we are including seven copies of this request with the original letter. Members of the Subcommittee are available to discuss any aspect of this letter at the staffs convenience, and we would appreciate the opportunity to do so before you issue any response.

Sincerely,



Louis Rorimer
Chairman

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