

to obtain their first shares of an issuer's securities directly from the issuer. The STA Letter has been issued in the context of a continuing review of Rule 10b-6, and is published to provide notice of the exemption's availability.

For further information, contact the Office of Trading Practices (for matters regarding Rule 10b-6), at (202) 942-0772, and the Office of Chief Counsel (for matters regarding broker-dealer registration), at (202) 942-0073, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

Margaret H. McFarland,

Deputy Secretary

December 1, 1994.

Mr. Michael J. Foley, President,

The Securities Transfer Association, Inc.,

P.O. Box 5067, Hazlet, NJ 07730-5067

Re: Dividend Reinvestment and Stock Purchase Plans.

Dear Mr. Foley: To clarify issues raised under Rule 10b-6 ("Rule 10b-6" or "Rule")¹ under the Securities Exchange Act of 1934 ("Exchange Act")² by dividend reinvestment and stock purchase plans ("DRSPPs"), the Commission has determined to grant an exemption from the Rule to certain issuers ("Issuers"), their affiliated purchasers ("Affiliated Purchasers"), as defined in paragraph (c)(6) of the Rule,³ and the agents of the Issuers' DRSPPs ("DRSPPs Agents") during distributions of the Issuers' shares of common stock pursuant to the Issuers' DRSPPs. This letter also addresses the application of Sections 15(a) and 17A of the Exchange Act⁴ to DRSPPs. The discussion of Sections 15(a) and 17A pertains to all DRSPPs. It applies both to "plans," as defined in paragraph (c)(4) of Rule 10b-6⁵ and to non-traditional DRSPPs, which are the subject of the exemption from Rule 10b-6 discussed below.

I. Background

A DRSP is a program offered by a corporation or closed-end fund that allows participants to accumulate shares of an issuer's common stock directly from the issuer by reinvesting dividends and, in many

¹ 17 CFR 240.10b-6.

² 15 U.S.C. §§ 78a et seq.

³ 17 CFR 240.10b-6(c)(6). Generally, an affiliated purchaser includes any person acting in concert with the issuer or other person making the distribution; an affiliate who directly or indirectly controls purchases by the issuer or other person, or whose purchases are controlled by or under common control with the issuer or other person; a broker-dealer affiliate; and a non-broker-dealer affiliate that regularly purchases securities for its own account or for another's account or recommends or exercises investment discretion with respect to the purchase or sale of securities.

⁴ 15 U.S.C. §§ 78o and 78q-1, respectively.

⁵ 17 CFR 240.10b-6(c)(4). A plan includes "any bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, stock ownership, stock appreciation, stock option, dividend reinvestment or similar plan for employees or shareholders of an issuer or its subsidiaries."

cases, by making optional cash payments. Individual investors may be attracted to DRSPs because they often provide a relatively convenient and inexpensive mechanism to accumulate shares of particular issuers through the automatic, regular reinvestment of dividends and, in many cases, through optional cash payments. These programs also are favored by issuers because, among other things, they can provide a relatively economical mechanism for raising capital, while simultaneously improving shareholder relations and broadening and stabilizing the issuer's shareholder base. Approximately 1,000 issuers currently offer some form of DRSP.

The earliest DRSPs were dividend reinvestment plans ("DRPs"), in which participation was limited to the issuer's shareholders, and through which additional shares could be purchased only with reinvested dividends. Since the first DRP was introduced in the late-1960s, there has been considerable evolution in these programs. The greatest changes have been in the categories of persons that are permitted to participate in DRSPs, and in the ability of participants to accumulate issuers' shares by making optional cash purchases as well as through dividend reinvestment.

Today, many issuers no longer limit participation in their DRSPs to shareholders or employees. Rather, various issuers have extended DRSP participation to, among others, retirees, outside directors, consultants, suppliers, franchisees, independent contractors, family members of the above, as well as credit card holders and other customers. Moreover, some issuers permit participation in their DRSPs following an initial cash payment, rather than requiring prior share ownership. Further, as noted above, many DRSPs allow shares to be purchased with optional cash payments as well as reinvested dividends.

II. Rule 10b-6

Rule 10b-6 is an anti-manipulation rule that, subject to certain exceptions, prohibits persons who are engaged in a distribution of securities from bidding for or purchasing, or inducing others to purchase, such securities, any security of the same class and series as the distributed securities, or any security that is immediately convertible into or exchangeable for or any right to acquire such distributed securities (collectively "related securities"), until they have completed their participation in the distribution. The Rule is intended to prevent those persons participating in a distribution of securities from artificially conditioning the market for the offered securities in order to facilitate the distribution, and to protect the integrity of the securities trading market as an independent pricing mechanism.

Paragraph (e) of Rule 10b-6 provides that the Rule does not apply to any distribution of securities by an issuer or a subsidiary of the issuer to employees or shareholders of the issuer or its subsidiaries, or to a trustee or other person acquiring such securities for the account of such employees or shareholders pursuant to a plan as defined in

[Releases Nos. 33-7114; 34-35041]

59 FR 63393 12/08/94

Exemption From Rule 10b-6 for Certain Dividend Reinvestment and Stock Purchase Plans

December 1, 1994.

Pursuant to delegated authority, on December 1, 1994, the Division of Market Regulation issued the attached letter to The Securities Transfer Association ("STA Letter") granting a class exemption from rule 10b-6 under the Securities Exchange Act of 1934, subject to certain conditions, to facilitate the availability of certain dividend reinvestment and stock purchase plans ("DRSPPs") to investors. The STA Letter is significant because many issuers no longer will need to seek individual exemptions from Rule 10b-6 before implementing their DRSPPs. The letter also addresses issues concerning broker-dealer registration under Section 15(a) of the Exchange Act.

The STA Letter is consistent with prior Rule 10b-6 exemptions granted to issuers, and facilitates investors' access to DRSPPs insofar as it permits investors

paragraph (c)(4) of the Rule.⁶ Paragraph (g) of Rule 10b-6 further provides that a bid for or purchase of any security made or effected by or for a plan shall be deemed to be a purchase by the issuer unless the bid is made, or the purchase is effected, by an "agent independent of the issuer," as that term is defined in paragraph (a)(6) of Rule 10b-18.⁷

When an issuer expands its DRSP to allow participation by persons other than its employees or shareholders or those of its subsidiaries, the exception in paragraph (e) of the Rule is no longer available. Without this exception, bids for or purchases of an issuer's common stock made or effected by or for a DRSP are attributed to the issuer. Consequently, many issuers offering non-traditional DRSPs have sought, and have been granted, exemptions pursuant to paragraph (j) of the Rule of permit transactions that otherwise would be prohibited by Rule 10b-6 during distributions pursuant to DRSPs. These exemptions permit bids and purchases by issuers, their affiliated purchasers, and DRSP Agents during distributions pursuant to a plan, subject to specified conditions. The exemptions focused not only on the relationship between the issuer and the individuals participating in the DRSP, but also upon the magnitude of sales pursuant to the DRSP and the use of special selling efforts and selling methods to promote participation in such programs. Additionally, the exemption letters were used to notify issuers of other issues raised by DRSPs, including activities by issuers that may raise concerns under Section 15(a) of the Exchange Act relating to broker-dealer registration.

The Commission recently published a concept release ("Concept Release") regarding the anti-manipulation regulation of securities distributions, which sought comment on, among other things, the application of Rule 10b-6 to DRSPs.⁸ Because of the numerous requests received by the Commission for exemptions for Rule 10b-6 on behalf of individual issuers offering DRSPs, an exemption from Rule 10b-6 appears to be appropriate pending consideration of responses to the Concept Release. Moreover, the staff of the Division is setting forth its views on other matters involving DRSPs, including the activities of issuers in connection with DRSPs that raise issues under Sections 15(a) and 17A of the Exchange Act.

III. Exemption

The Commission, by the Division of Market Regulation pursuant to delegated authority, hereby grants an exemption from Rule 10b-6 pursuant to paragraph (j) of the Rule to permit any Issuer, its Affiliated Purchasers, and the DRSP Agent to bid for or purchase the Issuer's common stock during a distribution of such security pursuant to the Issuer's DRSP, and to permit the DRSP Agent to bid for or purchase the Issuer's common stock pursuant to the DRSP during

a distribution of common stock or related securities, by the Issuer or any Affiliated Purchaser of the Issuer, subject to the following terms and conditions:

A. Plan Administration

1. DRSP Agent

The Issuer shall appoint an independent agent (*i.e.*, the DRSP Agent) to execute transactions on behalf of the DRSP and its participants. For purposes of this exemption, the DRSP Agent must be a registered broker-dealer or bank as defined in Section 3(a)(6) under the Exchange Act. To be deemed independent, the DRSP Agent may not be an affiliate of the Issuer, and neither the Issuer nor any affiliate of the Issuer may exercise any direct or indirect control or influence over the times when or the prices at which, the independent agency may purchase the Issuer's common stock for the DRSP, the amounts of the security to be purchased, the manner in which the security is to be purchased, or the selection of a broker or dealer (other than the independent agent itself) through which purchases may be executed.

2. Clerical and Ministerial Functions

All bids and purchases, and offers and sales, of the Issuer's common stock on behalf of the DRSP or its participants shall be made by the DRSP agent, or by a registered broker-dealer or bank, as defined in Section 3(a)(6) of the Exchange Act, that is independent of the Issuer and that is selected by the DRSP Agent to execute such transactions. The Issuer may perform only purely clerical and ministerial functions, including forwarding cash and securities to an independent broker-dealer or bank, in connection with the DRSP. The Issuer also must comply with this condition in order to avoid broker-dealer registration under Section 15(a) of the Exchange Act. See Section IV, *infra*.

Where the Issuer is a registered transfer agent, see Section V, *infra*, the Issuer also may assist the DRSP Agent by maintaining records of each participant's activities, issuing statements of account, and performing other functions of a transfer agent.¹⁰

B. Purchases of Securities on Behalf of the DRSP

Consistent with the DRSP Agent's independent role, neither the Issuer, nor any person in a control relationship with the Issuer, through the provisions of the DRSP or otherwise, may place any restrictions upon the time, price, amount, or manner of purchases made on behalf of the DRSP. The Issuer cannot change its determination that shares purchased for the DRSP will be purchased from the Issuer or in the open market more than once in any 12 month period. The Issuer cannot exercise such right

⁶ *E.g.*, there can be no requirement that purchases for the DRSP be made within a specified number of days after the dividend date or after any deadline for submitting payment toward optional cash purchases, except as consistent with Letter regarding Lucky Stores Incorporated (pub. avail. July 6, 1974) ("Lucky Stores") as modified *infra*.

¹⁰ See U.S.C. § 78c(a)(25).

absent a documented determination by its board of directors or chief financial officer that the Issuer's need to raise additional capital has changed, or that there is another valid reason for such change, such as action by a state or federal regulatory agency recommending or requiring a change in the capital structure of the Issuer or of one of its major operating subsidiaries.

If securities are purchased directly from the Issuer, the Issuer and its Affiliated Purchasers cannot purchase the common stock on any day on which the market price of the common stock will be a factor in determining the purchase price of the common stock to be delivered under the DRSP.

Unless otherwise excepted by or exempted from Rule 10b-6, the Issuer and its Affiliated Purchasers shall not purchase the common stock: (1) During the period commencing two business days prior to the initial dissemination of announcements regarding the DRSP, and ending 30 calendar days after such initial dissemination, and (2) during the period commencing two business days before any subsequent general dissemination of announcements regarding the DRSP and ending 15 calendar days after such subsequent dissemination.

C. Selling Efforts

An Issuer may permit persons with whom the Issuer has a preexisting, continuing relationship, as well as members of the general public to participate in its DRSP, however, sales efforts relating to the DRSP must be consistent with the solicitation activities permitted in Section IV.A., *infra*.

D. General Conditions of the Exemption

No bids or purchases shall be made for the purpose of creating actual, or apparent, active trading in or raising the price of the Issuer's common stock. Additionally, this exemption does not apply to sales of the Issuer's securities by participants in DRSPs that otherwise may involve a distribution for purposes of Rule 10b-6.

This exemption is subject to modification or revocation if at any time the Commission or Division determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. As noted above, the Commission recently published the Concept Release seeking comments on a broad range of issues relating to the anti-manipulation regulation of securities offerings, and specifically requested comments on the treatment of DRSPs under Rule 10b-6. Following review of comments received in response to that release, the Commission may determine to undertake rulemaking or other action that may supersede this exemption.

E. Notice Requirement

Any Issuer that relies on the exemption granted herein shall provide a written notice ("Notice") to the Director of the Division. The Notice must identify the Issuer and represent that the DRSP will be operated consistently with the conditions of this letter. The Notice may be provided by the Issuer, the DRSP Agent, the Issuer's transfer agent, or the legal representative of any of the foregoing. Unless otherwise extended by the

⁶ 17 CFR 240.10b-6(e).

⁷ 17 CFR 240.10b-18(a)(6).

⁸ Securities Exchange Act Release No. 33924 (April 19, 1994), 59 FR 21061.

Division, this notice requirement will expire on December 31, 1995.

F. Record Maintenance and Production

The Issuer shall maintain the following information for a period of at least two years from the date of the event, which must be provided promptly to the Division upon its request:

1. the dates and substance of any materials distributed in connection with the DRSP;P;
2. the number of persons participating in the DRSP;P, on a monthly basis;
3. the volume of securities purchased for the DRSP;P by the DRSP;P Agent, on a weekly basis, or, if shares are purchased less frequently, the number of shares purchased on a monthly basis; and
4. a notation of any period that the Issuer is engaged in any other distribution of common stock for purposes of Rule 10b-6.

Unless otherwise extended by the Division, this record maintenance and production requirement will expire on December 31, 1995.

IV. Interpretation of Section 15(a)

The staff of the Division is of the view that certain activities in which Issuers, their Affiliated Purchasers, and DRSP;P Agents engage in connection with DRSP;Ps raise issues under Section 15(a).¹¹ Therefore, in addition to granting the foregoing class exemption from Rule 10b-6, this letter also clarifies the application of those provisions of the Exchange Act to both traditional and non-traditional DRSP;Ps.

When an issuer induces or attempts to induce the purchase or sale of its securities, receives compensation based on securities transactions, or holds and maintains the funds, securities, and accounts of DRSP;P participants, it may be required to register as a broker-dealer under Section 15 of the Exchange Act. Broker-dealer registration minimizes the DRSP;P participant's exposure to the risks typically associated with the execution of orders, and the handling and placement of funds and securities with others. For example, the Commission's financial responsibility rules are designed to provide safeguards with respect to customer funds and securities held by registered broker-dealers, by providing accountability for those funds and securities, and requiring

the maintenance of accurate books and records, and sufficient liquid assets.

To avoid both the potential for sales practice abuse or loss of investors' funds and securities, Issuers operating DRSP;Ps either must limit their activities as described below or register as a broker-dealer.¹²

A. Solicitation

Under the conditions set forth below, the Issuer may inform the general public through announcements, newspaper advertisements, circulars, notices, and investor fairs about its securities or the securities of the Issuer's subsidiary available through the DRSP;P. In addition, an Issuer may inform those prospective participants with whom the Issuer has a pre-existing, continuing relationship that encompasses the receipt of written communications by existing means of communication (e.g., including the solicitation with a bill, annual report, or payroll stub).¹³ The Issuer, however, may not use an agent other than a registered broker-dealer or bank to solicit participation in the DRSP;P on its behalf.

The information contained in any solicitation material may include no more than that allowed, nor less than that required under Rule 134 under the Securities Act of 1933 ("Securities Act") (i.e., tombstone advertisements).¹⁴ Thus, typically, materials may include: (1) The Issuer's name; (2) the Issuer's type of business; (3) the type of security being offered in the DRSP;P (i.e., common or preferred stock); (4) the price of the security or the method of price determination; and (5) information on how and where a prospectus may be obtained.

If a registration statement for the securities to be offered under the DRSP;P has not yet been filed under the Securities Act, the information contained in any communication, pursuant to Rule 135 under

¹² Issuers that only sell their own securities (i.e., treasury stock), but do not purchase and arrange for the sales of such securities, and do not otherwise effect transactions in securities for investors, would continue to be excluded from the broker-dealer registration requirements of Section 15(a) of the Exchange Act. Furthermore, associated persons of Issuers would not be required to register as broker-dealers provided that they meet the requirements of Rule 3a4-1 under the Exchange Act, 17 CFR 240.3a4-1. Associated persons (e.g., partners, officers, directors, or employees) who are participating in the sale of securities through a DRSP;P, may qualify for the safe harbor if they meet the requirements of subparagraphs (a) (1)-(3) of Rule 3a4-1 (the associated person must not be subject to a statutory disqualification, cannot receive transaction-based compensation, and must not be an associated person of a broker-dealer at the time of participation) and either: (a) restrict their participation to offers and sales of securities involving employee dividend reinvestment or stock purchase plans, pursuant to Rule 3a4-1 (a)(4)(i)(D); or (b) restrict their activities to delivering and preparing written materials, giving limited responses to inquiries initiated by prospective participants, or perform ministerial and clerical work, pursuant to Rule 3a4-1(a)(4)(iii).

¹³ Such prospective participants would include shareholders, employees, customers, and other persons with a pre-existing relationship with the issuer, such as independent contractors, franchisees, and suppliers.

¹⁴ 17 CFR 230.134.

the Securities Act,¹⁵ must state that the Issuer proposes to make a public offering of securities to be registered under the Securities Act and that the offering will be made only by means of a prospectus and may include no more information than that which is allowed under the rule.¹⁶ Thus, typically, such a communication would include, in addition to the mandatory information described: (1) The title, amount, and basic terms of the securities proposed to be offered in the DRSP;P; (2) the anticipated time of the offering; (3) the manner and purpose of the offering; and (4) any statement or legend required by state or foreign law or administrative authority.

As required by Rules 134 and 135 under the Securities Act, recommendations, predictions, and, unless accompanied by a prospectus, applications or enrollment forms, may not be included in any materials. Furthermore, the Issuer and its associated persons may not engage in oral solicitation of potential DRSP;P participants. Associated persons (e.g., partners, officers, directors, or employees) of the Issuer, however, may respond orally to inquiries initiated by potential participants, provided that the content of the response is limited to information provided in the registration statement, prospectus, or other offering document.¹⁷

B. Fees and Expenses

The Issuer may not receive or collect for itself transaction-based compensation, but may charge DRSP;P participants fees that are reasonably related to actual administrative costs (e.g., the cost to print and mail brochures or authorization forms). In addition, all costs to be paid by DRSP;P participants must be disclosed prior to enrollment.

C. Participants' Funds and Securities

As discussed in Section III.A.2., the Issuer must limit its activities to clerical and ministerial functions.

The Issuer may receive optional cash investments from participants, provided that the Issuer transmits promptly¹⁸ all funds to be used to purchase shares of its common stock to a segregated escrow account¹⁹ at a bank or to the DRSP;P Agent.

Funds must be returned to the DRSP;P participant if securities have not been purchased: (a) within 35 days of receipt of optional cash payments;²⁰ or (b) within 30

¹⁵ 17 CFR 230.135.

¹⁶ 17 CFR 230.135.

¹⁷ See Rule 3a4-1(a)(4)(iii), discussed *supra* at note 12.

¹⁸ For purposes of this letter, "transmit promptly" shall mean by the opening of business on the next business day if the funds are received before noon, and by noon of the next business day if the funds are received after noon.

¹⁹ The escrow account must be held for the benefit of the participants, and cannot be subject to any liens, any creditor claims, or any other claims against the Issuer. Furthermore, the escrow account cannot be subject to bankruptcy proceedings if the Issuer files for bankruptcy under federal or state law.

²⁰ The Division of Investment Management would not object if a DRSP;P holds participants' optional

Continued

days of the dividend date for dividend reinvestments. Additionally, any participant must be permitted to withdraw from the DRSP at any time by giving written notice to the Issuer or DRSP Agent. Within 30 days of receipt of such notice, the participant must be sent certificates for shares of common stock held for the participant, or cash payments for any shares that the participant wishes to sell pursuant to the DRSP.

V. Transfer Agents

In connection with their DRSPs, many Issuers engage in activities that cause them to satisfy the definition of "transfer agent" contained in Section 3(a)(25) of the Exchange Act.²¹ Thus, any person, including an issuer of securities, who engages in such activities in connection with a DRSP must register with the Commission pursuant to Section 17A(c) of the Exchange Act.²²

The Commission recently issued releases²³

cash payments for no more than 35 days and, accordingly, is modifying the position taken in Lucky Stores, in which the staff advised plans to hold optional cash payments for no more than 30 days.

²¹ 15 U.S.C. § 78c(a)(25). A "transfer agent" is defined as any person who, on behalf of an issuer of securities or on its own behalf as an issuer of securities, engages in the countersigning of such securities, monitoring of the issuance of such securities with a view to preventing unauthorized issuance, registering the transfer of such securities, exchanging or converting such securities, or transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates.

²² 15 U.S.C. § 78q-1(c).

²³ Securities Exchange Act Release Nos. 35038 and 35040 (December 1, 1994).

soliciting comment on, among other things, developments affecting the regulation of transfer agent activities. You should be aware that following the review of comments received in response to these releases, the Commission may determine to undertake rulemaking or other action pertaining to transfer agent regulation.

VI. Conclusion

Your attention also is directed to the anti-fraud and anti-manipulation provisions of the Securities Act, particularly Section 17(a), and the Exchange Act, particularly Sections 9(a)(2) and 10(b), and Rule 10b-5 thereunder.²⁴ Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the Issuer, its Affiliated Purchasers, and the DRSP Agent. The Division expresses no view with respect to other questions that the DRSP-related transactions may raise, including, but not limited to, the adequacy of disclosure concerning, and the applicability of any other federal or state laws to, the proposed transactions.

Sincerely,

Brandon Becker

Director.

[FR Doc. 94-30127 Filed 12-7-94; 8:45 am]

BILLING CODE 8010-01-M

²⁴ 15 U.S.C. §§ 78i(a)(2) and 78j(b), and 17 CFR 240.10b-5, respectively.