The letter was 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, Hazel, NJ 08799
Re: Dividend Reinvestment and Stock Purchase Plans,

To clarify issues raised under Rule 10b-6 ("Rule") under the Securities Exchange Act of 1934 ("Exchange Act") 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, and the agents of the Issuers ("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 Act 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-6 and to non-traditional DRSPPs, which are the subject of the exemption from Rule 10b-6 discussed below.

I. Background

A DRSPP 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 cases, by making optional cash payments. Individual investors may be attracted to DRSPPs 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 DRSPP.

The earliest DRSPPs 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 DRSPPs, 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 DRSPPs to shareholders or employees. Rather, various issuers have extended DRSPP 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 DRSPPs following an initial cash payment, rather than requiring prior share purchases. Further, as noted above, many DRSPPs 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...
paragraph (c)(4) of the Rule. 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.  

When an issuer expands its DRSPP 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 DRSPP Agent related to the Issuer's DRSPP are prohibited. Consequently, many issuers offering non-traditional DRSPPs 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 DRSPPs. These exemptions permit bids and purchases by issuers, their affiliated purchasers, and DRSPP Agents during distributions pursuant to the Issuer's DRSPPs. The exemptions focused not only on the relationship between the issuer and the individual participating in the DRSPP, but also upon the magnitude of sales pursuant to the DRSPP and the use of special selling efforts to promote methods to promote participation in such programs. Additionally, the exemption letters were used to notify issuers of other issues raised by DRSPPs, including activities by issuers that may raise concern 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 DRSPPs. Because of the numerous requests received by the Commission for exemptions for Rule 10b-6 on behalf of individual issuers offering DRSPPs, 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 DRSPPs, including the activities of issuers in connection with DRSPPs 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 DRSPP Agent to bid for or purchase the Issuer's common stock during a distribution of such security pursuant to the Issuer's DRSPP, and to permit the DRSPP Agent to bid for or purchase the Issuer's common stock pursuant to the DRSPP 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. DRSPP Agent  
   The Issuer shall appoint an independent agent (i.e., the DRSPP Agent) to execute transactions on behalf of the DRSPP and its participants. For purposes of this exemption, the DRSPP 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 DRSPP Agent may not be an affiliate of the Issuer, and neither the Issuer nor any affiliate of the Issuer may exercise 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 DRSPP, 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 DRSPP or its participants shall be made by the DRSPP 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 DRSPP Agent to execute such transactions. The DRSPP Agent may perform only purely clerical and ministerial functions, including forwarding cash and securities to an independent broker-dealer or bank, in connection with the DRSPP. 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 DRSPP Agent by maintaining records of each participant's activities, issuing statements of account, and performing other functions of a transfer agent.  

B. Purchases of Securities on Behalf of the DRSPP  
   Consistent with the DRSPP Agent's independent role, neither the Issuer, nor any person in a control relationship with the Issuer, through the provisions of the DRSPP or otherwise, may place any restrictions upon the time, price, amount, or manner of purchases made on behalf of the DRSPP. The Issuer cannot change its determination that shares purchased for the DRSPP 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 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 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 DRSPP.  

   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 DRSPP, 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 DRSPP 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 DRSPP, however, sales efforts relating to the DRSPP must be consistent with the distribution activities permitted in Section IV.A., infra.

IV. 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 DRSPPs 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 DRSPPs 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 Division. The Notice must identify the Issuer and represent that the DRSPP will be operated consistently with the conditions of this Letter. The Notice may be provided by the Issuer the DRSPP Agent, the Issuer's transfer agent, or the legal representative of any of the foregoing. Unless otherwise extended by the
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 made promptly to the Division upon its request:

1. the dates and substance of any materials distributed in connection with the DRSP;
2. the number of persons participating in the DRSP, on a monthly basis;
3. the value of securities purchased for the DRSP by the DRSP 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 DRSPP Agents engage in connection with DRSPP raise issues under Section 15(a). 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 DRSPPs.

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 DRSPP participants, it may be required to register as a broker-dealer under Section 15 of the Exchange Act. Broker-dealer registration minimizes the DRSPP participant’s exposure to the risks 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 some protection to investor 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 DRSPPs 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 DRSPP. 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 DRSPP 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., "prospectus" 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 DRSPP (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 DRSPP has not yet been filed under the Securities Act, the information contained in any communication, pursuant to Rule 15 under the Securities Act, 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.15 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 DRSPP, (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 15 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 DRSPP 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 DRSPP 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 DRSPP 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 promptly all funds to be used to purchase shares of its common stock to a segregated escrow account at a bank or to the DRSPP Agent. Funds must be returned to the DRSPP participant if securities have not been purchased: (a) within 35 days of receipt of optional cash payments;18 or (b) within 30

12 Issuers that only sell their own securities (i.e., treasury stock), but do not purchase and arrange for the sales of such securities, do not owe any disclosure 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, persons of Issuers would not be required to register as broker-dealers provided that they meet the requirements of Rule 240.3a4-1 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 DRSPP, 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 disqualified, 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)(ii)(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)(ii)(D).

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

19 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.

20 The escrow account must be held for the benefit of the participants, and cannot be subject to any lien, 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.

21 The Division of Investment Management would not object if a DRSPP holds participants’ optional

Continued
days of the dividend date for dividend reinvestments. Additionally, any participant must be permitted to withdraw from the DRSPP at any time by giving written notice to the Issuer or DRSPP 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 DRSPP.

V. Transfer Agents

In connection with their DRSPPs, 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. Thus, any person, including an issuer of securities, who engages in such activities in connection with a DRSPP must register with the Commission pursuant to Section 17A(c) of the Exchange Act.

The Commission recently issued releases 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.

23 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 U.S.C. § 78q-1(c).


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. 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 DRSPP Agent. The Division expresses no view with respect to other questions that the DRSPP-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.

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