SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 231
(Release No. 33-6188)

Employee Benefit Plans;
Interpretations of Statute

AGENCY: Securities and Exchange Commission.

ACTION: Interpretations of statute.

SUMMARY: The Commission has authorized the issuance of a release setting forth the views of its staff on the application of the Securities Act of 1933 to employee benefit plans. The purpose of the release is to provide guidance to the public and thereby assist employers and plan participants in complying with the Act.


SUPPLEMENTARY INFORMATION: On January 16, 1979, the Supreme Court issued a decision in which it addressed for the first time in its history the application of the Securities Act of 1933 ("1933 Act") [15 U.S.C. 77a et seq.] to participation interests in a private pension plan. The decision, which was rendered in the case of International Brotherhood of Teamsters v. Daniel ("Daniel").1 has generated considerable controversy and comment. Moreover, it has raised questions about the application of the Act to many types of employee benefit plans2 not covered by the decision. In an effort to resolve the uncertainty which has developed and thereby assist employers and plan participants in complying with the 1933 Act, the Commission has authorized the issuance of this release setting forth the views of its Division of Corporation Finance (hereinafter, the "staff")3 on the application of the Act to such plans.

The release initially discusses the circumstances under which interests in plans and related entities may be subject to the requirements of the 1933 Act. In this connection, an analysis is provided of the criteria to be used in determining when an offer or sale of a security will occur. There is also a discussion of the various exemptions from the Act's registration provisions that may be available for such offers or sales. This is followed by a brief discourse on the application of the Act both to the various types of securities transactions in which plans may engage 198 S. Ct. 790. — U.S. (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.] apply to a compulsory, noncontributory pension plan.


3As used in this release, the term "employee benefit plan" means a pension, profit-sharing, or similar plan. It does not include welfare and similar plans which provide for hospitalization or disability benefits, funeral expenses, or social or cultural activities. These latter plans historically have not been considered subject to the securities laws because they do not involve any expectation of financial return on the employee's part.

4While this release was prepared by the Division of Corporation Finance, in some instances the views described were originally expressed by the Commission's Division of Investment Management. All such instances are duly noted in the release.
3. Exemptions from Registration.—

Registration of securities offered or sold pursuant to employee benefit plans is necessary unless an exemption is available. In most instances, an exemption is available and registration therefore is not required. Some of the exemptions that are frequently relied upon are those provided by the 1933 Act for nonpublic offerings, intrastate offerings, and certain small offerings. The only exemption, however, which is specifically designed for interests issued in connection with employee benefit plans is the one provided by section 3(a)(2) of the Act. The section 3(a)(2) exemption applies both to the interests of plans in certain investment vehicles maintained by banks and insurance companies and to the interests of participants in the plans themselves. Interests issued in connection with Keogh plans, however, are specifically excluded from the exemption, although the Commission can exempt such interests from registration under certain conditions. Although the language of section 3(a)(2) can be read to suggest otherwise, the staff does not believe that a single trust fund for a plan must be maintained by a bank in order for the exemption to be available. However, if the trust fund involves a single employer and invests employee monies in securities of the employer, the exemption cannot be utilized. For purposes of section 3(a)(2), the term “single employer” is deemed to include the employer and any entity controlling, controlled by, or under common control with, the employer. Thus, a parent and its subsidiaries are considered a single employer under this interpretation. While the section 3(a)(2) exemption is not available by its terms for so-called “guaranteed investment contracts” issued to plans by insurance companies, the staff has taken a no-action position with respect to the offer and sale of such contracts if certain specified conditions are met. A similar position, again subject to certain conditions, also has been taken with respect to the offer and sale of interests in multiple-employer trusts established by insurance companies for the offering of various forms of annuity contracts to unrelated employers.

4. Securities Transactions by Plans. In addition to issuing participation interests to employees or fostering the purchase of employer stock by such persons, a plan may engage in various other transactions involving the purchase, sale or distribution of securities. It may, for instance, acquire stock of the employer from various sources, including the company. For a
variety of reasons, however, registration usually would not be necessary with respect to the acquisition transaction. A plan also may offer or sell securities of the employer or other entities held in its portfolio. If the plan is considered to be an affiliate of the employer, sales by it of the employer’s securities would be subject to the registration provisions of the 1933 Act in the same manner as if the employer were engaging in the transaction. Sales by the plan of non-employer securities, however, usually would not have to be registered because of the availability of the exemption provided by section 4(1) of the Act for transactions not involving issuers, underwriters or dealers.

The distribution, or actual delivery, of employer stock by a plan to individual participants would not be subject to registration, although any offers or sales of such stock to participants prior to actual delivery would have to be registered, unless an exemption were available. 

5. Resales by Plan Participants.— Employees who receive securities under a plan may freely resell such securities without restriction if the securities have been registered and they are not affiliates of the issuer. If the securities have not been registered, they generally must either be registered or sold in reliance upon some exemption, such as that provided by section 4(1) of the 1933 Act. An exception to this general rule occurs when non-affiliates receive unregistered securities under a plan which satisfies certain conditions.

6. Methods of Registration.—If the securities to be issued under a plan must be registered, Form S-8 [17 CFR 239.10b] would be the appropriate form for this purpose if the employer were able to satisfy the requirements for its use. If Form S-8 cannot be used, the issuer would then consider other forms, such as S-1 [17 CFR 239.11] or S-18 [17 CFR 239.28]. Affiliates who receive securities under a plan and wish to have them registered for resale may utilize a Form S-16 [17 CFR 239.27] reoffer prospectus for this purpose if the securities were originally issued pursuant to a Form S-8 filing. If the securities were not so issued, Form S-1 may be utilized, assuming the issuer is agreeable to a filing on that form, or the securities may be resold pursuant to Rule 144 [17 CFR 240.144] under the 1933 Act.

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I. General Structure of the Act

According to its preamble, the 1933 Act is intended “to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof.” * * *:

Sections 5 and 17 of the Act are the principal provisions used to implement the Act’s disclosure and antifraud purposes. Section 5 provides that every offer or sale of a security made through the use of the mails or interstate commerce must be accomplished through the use of a registration statement meeting the Act’s disclosure requirements, unless one of the several exemptions from registration set out in sections 3 and 4 of the Act is available. Section 17 of the Act prohibits the use of fraud or misrepresentation in the offer or sale of a security.

To promote compliance with the registration and antifraud requirements, the Act provides for both civil liabilities and potential criminal penalties in the event violations occur. The civil liabilities are specified in sections 11 and 12 and basically give the buyer the right to rescind the sale and recover the net cost of the security. The criminal penalties are prescribed in section 24 and consist of a fine of up to $10,000 or imprisonment for up to five years, or both, if the Act is willfully violated. In addition, section 20(b) of the Act authorizes the Commission to bring injunctive actions whenever it appears a person is engaged, or is about to engage, in violations of the Act.

II. The Term “Security”

In order for the registration and antifraud provisions of the 1933 Act to be applicable, there must be an offer or sale of a security. The term “security” is defined in section 2(1) of the Act and includes, among other things, stocks, bonds and investment contracts. The Commission believes that two types of securities, generally in the form of investment contracts, may be issued in connection with employee benefit plans: (1) interests of participants in their respective plans, and (2) interests of investors before a sale becomes final and a separate section containing information which is on file with the Commission but which is not required to be furnished to investors. Sales of securities cannot be made until the registration statement becomes effective.

The types of information required to be included in registration statements are specified in Schedules A and B of the 1933 Act and in the various registration forms under the Act adopted by the Commission.

IV. Methods of Registration

A. Form S-8

B. Other forms

C. Form S-16 reoffer prospectus

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plans in collective investment media, such as bank collective trust funds and insurance company separate accounts, in which such plans invest their assets. Each of these interests will be discussed in detail in the sections which follow.

A. Interests of Participants in Plans

An investment contract involves "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." The Commission has traditionally applied this test, which is often called the "Howey test" because it was first articulated in the case of S.E.C. v. W. J. Howey Co., to the interests of employees in pension, profit-sharing and similar plans. In this regard, it has in the past determined that such interests are investment contracts because the plans are investment vehicles designed to produce profits in the form of retirement or other benefits for the employees through the efforts of plan managers.

Although the Commission has believed that employee interests in pension and profit-sharing plans generally are securities, it has required such interests to be registered only where a plan is both voluntary and invests in securities of the employer an amount greater than that paid into the plan by the employer. The basis for this administrative practice, which was codified by Congress in 1970 in Section 3(a)(2) of the 1934 Act, is as follows: (1) Registration serves no purpose where a plan is involuntary, since a participant is not permitted to make an investment decision in such a circumstance; and (2) The costs of registration are a significant burden to an employer and should be imposed only where the employer has a direct financial interest in soliciting voluntary employee contributions, as in the case where such contributions will be used to purchase the employer's securities.

The Commission's belief that the registration provisions of the 1933 Act should be applicable to voluntary, contributory plans which involve the purchase by employees of employer stock is supported by the legislative history of the Act. In 1934 Congress considered and rejected a proposed amendment to the Act that would have exempted employee stock investment and stock option plans from the Act's registration provisions. The amendment, which had been passed by the Senate but was eliminated in conference, was not adopted "on the ground that the participants in employees' stock investment plans may be in great need of the protections afforded by the availability of information concerning the issuer for which they work as are most members of the public." 16

The decision by the Supreme Court in the Daniel case, in which the Court held that the interests of employees in involuntary, noncontributory pension plans are not securities, has raised questions concerning the applicability of the 1933 Act to other types of employee benefit plans not covered by the decision. In the interest of providing guidance to the public and because of uncertainty with respect to the implications of the Daniel decision, the Commission believes it is appropriate at this time to set forth its own views regarding the applicability of the 1933 Act to employee benefit plans. Those views are expressed according to the major categories into which pension and profit-sharing plans may fall (i.e., defined benefit and defined contribution, corporate, Keogh, IRA, and miscellaneous plans).

1. Defined Benefit and Defined Contribution Plans—Employee benefit plans are of an infinite variety. All such plans, however, can be reduced to two broad categories: defined benefit plans and defined contribution plans.

A defined benefit plan pays fixed or determinable benefits. The benefits ordinarily are described in a formula which specifies the amount payable in monthly or annual installments to participants who retire at a certain age. As long as the plan and the employer(s) contributing to the plan remain solvent, and the plan continues to be operated, vested participants will receive the benefits specified. In the event the investment results of the plan do not meet expectations, the employer(s) usually will be required, on the basis of actuarial computations, to make additional contributions to fund the promised benefits. Conversely, if plan earnings are better than anticipated, the employer(s) may be permitted to make contributions that are less than the projected amounts.

A defined contribution plan does not pay any fixed or determinable benefits. Instead, benefits will vary, depending on the amount of plan contributions, the investment success of the plan, and allocations made of benefits forfeited by nonvested participants who terminate employment. Thus, the amount of benefits is based, in part, on the earnings generated by the plan.

Both defined benefit and defined contribution plans can provide for employee contributions. In addition, defined contribution plans maintain individual accounts for all participating employees. These accounts reflect each participant's share in the underlying trust assets and are adjusted annually to take into account plan contributions, earnings and forfeitures. In contrast, defined benefit plans ordinarily do not maintain individual accounts, except to the extent necessary under the Internal Revenue Code to record benefits attributable to voluntary contributions by employees.

The Daniel decision dealt with an involuntary, noncontributory plan which...
was also a defined benefit plan. The Supreme Court's opinion in that case, however, did not rest on the fact that the plan was a defined benefit plan. Instead, the Court based its decision on the involuntary nature of the plan (unlike all prior cases of the Court involving securities, the employees did not have a choice whether to participate) and the fact that the plan did not provide for direct, identifiable contributions by employees (the employees' labor could be considered a contribution "only in the most abstract sense"). This view is supported both by the Court's statement of the issue presented by the case ("whether a noncontributory, compulsory pension plan constitutes a 'security'") and by its later statement that "We hold the Securities Acts do not apply to a noncontributory, compulsory pension plan." In neither instance did the Court refer to the defined benefit characteristic of a security.

The foregoing suggests that some of the key factors to be considered in connection with the "security" question are whether a plan is voluntary or involuntary, and whether it is contributory or noncontributory. There are at least three pertinent elements in determining whether a plan is defined benefit or defined contribution.

a. Involuntary, Noncontributory Plans. The Court in Daniel held that the Securities Acts do not apply to a noncontributory, compulsory pension plan. This holding clearly precludes the finding that interests in such plans are securities. Accordingly, the 1933 Act is not applicable to such interests.

b. Involuntary, Contributory Plans. Where a plan requires direct contributions by employees, it would be possible to take the position that there is an "investment" (in the form of employee contributions) "in a common enterprise" (the plan) "with an expectation of profits" (the excess of benefits over contributions) "from the efforts of others" (the plan managers). In the Daniel decision, however, the Supreme Court based its decision that no investment contract was present at least in part on the involuntary nature of the plan involved in that case. The Court noted in that regard that in its other decisions involving investment contracts the person found to have been an investor "chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security." After consideration of the foregoing, the staff believes it is appropriate from an administrative standpoint for it to take the position that the interests of employees in involuntary, contributory plans are not securities and that the registration and anti-fraud provisions of the 1933 Act do not apply to them.

C. Voluntary, Noncontributory Plans

Plans in which employees may voluntarily participate without making any personal contributions generally arise in rather limited circumstances. The staff has not taken a position on whether such plans are securities. It has noted, however, that in general the mere presence of a voluntary feature in a plan would not, by itself, necessarily indicate the presence of a security, since the other elements of an investment contract also must be present. In most instances, the fact that a plan is noncontributory would mean that the

The Court of Appeals for the Ninth Circuit agreed, noting that even though the plan was contributory, participation therein did not involve a reasonable expectation of profit nor is the plan's status as a plan of the "contractual" type sufficient to bring the transaction within the scope of the securities laws. Pointing to the Supreme Court's discussion of the impact of the Employee Retirement Income Security Act of 1974 ("ERISA") in its view, no practical connection with the "security" question depends to some extent on whether a plan is voluntary. But the mere presence of a voluntary feature in a plan would not, by itself, necessarily indicate the presence of a security, since the other elements of an investment contract also must be present. In most instances, the fact that a plan is noncontributory would mean that the
An employee who is given a choice in a common enterprise. The Court in Daniel seemed to dismiss the earnings generated by the plan managers as being too insignificant in relation to employer contributions to qualify as “profits” in the investment contract sense. Moreover, the Court seemed to believe that any participation by employees in the earnings of the plan at issue in that case depended primarily on the personal efforts of the employees to meet the vesting requirements, rather than on the plan actually generating such earnings.

Although a commentator has suggested that a security may be present in some voluntary, noncontributory plans, the staff, as a matter of administrative practice, will assume that such plans do not involve securities. Accordingly, the registration and anti-manipulation provisions of the 1933 Act are not considered by the staff to be applicable to such plans.

d. Voluntary, Contributory Plans. Since 1941, the Commission and its staff have adhered to the position that interests in voluntary, contributory pension and profit-sharing plans are securities. The articulated basis for this view is that such interests constitute investment contracts, although it also has been suggested that they may be “certificates of interest or participation in a profit-sharing agreement” as well.

The Commission recently confirmed its view in the testimony of its Chairman before the Senate Committee on Human Resources on the antifraud provisions of the proposed ERISA Improvements Act of 1979 (S. 209), wherein it was noted that:

- An employee who is given a choice whether to pay a non-contributory pension plan, and decides to contribute a portion of his earnings or savings to such plan, has clearly made an investment decision, particularly when his contribution is invested in securities issued by his employer.

Employees making such decisions should continue to be afforded the protections of the antifraud provisions of the federal securities laws.

The Commission’s view that the interests of employees in voluntary, contributory plans are investment contracts appears to be supported by the reasoning used in the Daniel decision. Certainly, where a plan is voluntary, the requirement that employees be able to choose whether or not to invest has been met. And the other elements of an investment contract would also appear to be present where a plan is contributory, regardless of whether the plan is defined contribution or defined benefit in nature, as the following analysis indicates.

(1) Investment of money. The payment of cash or its equivalent by an employee to a contributory plan clearly satisfies the “investment” requirement in that the consideration paid is “specific, tangible and definable.”

(2) In a common enterprise. The opinion in Daniel suggests that a plan will satisfy the common enterprise requirement where the interests of employees therein are “separable” and possess “substantially the characteristics of a security.”

With regard to the separability aspect, it appears the Court believed that where there is an investment contract, it is possible to segregate the non-investment (or employment) portion of a person’s total compensation package from the investment (or pension) portion. In contributory plans, the amount set aside for defined benefit plans because such plans maintain individual accounts for participants. And it also should be present in defined benefit plans, by virtue of the requirement that, in order to qualify for favorable tax treatment, such plans must return to nonemployed employees who cease being participants accrued benefits based upon the employee’s contributions. Thus, in both defined contribution and defined benefit plans, there is, in effect, a separate account maintained for each participant to the extent of such person’s contributions to the plan.

Accordingly, the investment aspects of an employee’s compensation package are segregated under both types of plans.

(3) With an expectation of profits. An employee who voluntarily contributes his own funds to a pension or profit-sharing plan can expect that in return for his contributions the plan will generate earnings through the efforts of the plan managers that will result in his receiving a pension or similar benefits that will exceed his total contributions.

In terms of economic realities, the excess of benefits over contributions, to the extent they are dependent on earnings by the plan, may be deemed a profit which the employee fully expects to receive as a result of his payments to the plan. By deciding to participate in the plan voluntarily, the employee implicitly has made an investment decision to the effect that his contributions will achieve investment results that will be equal to or superior to those he could obtain from investing his funds elsewhere. Accordingly, from the employee’s standpoint, there would appear to be an “expectation of profits” in the investment contract sense.

The foregoing analysis clearly appears to be valid when applied to a defined contribution plan, for the level of benefits under such a plan is directly related to the plan’s investment success. Further analysis, however, is necessary for defined benefit plans.

In Daniel, the Court indicated there was no “expectation of profits” with respect to the defined benefit plan at issue in that case because (1) the plan did not depend substantially on earnings
to meet its benefit obligations, since it could rely on increased employer contributions to cover any shortfalls in earnings, and (2) the vesting requirements for the plan were so substantial that an employee's participation in the plan's earnings depended more on his own efforts to meet the vesting requirements than it did on the plan actually generating the earnings. 65 The Court's statements can be interpreted to suggest that unless a defined benefit plan has a substantial dependency on earnings, as well as vesting requirements that are not excessively difficult to satisfy, there may be no expectation of profits in the investment contract sense.

Several points should be kept in mind with respect to the Court's statements. First, they were made in the context of an involuntary, noncontributory defined benefit plan, in which employees neither invested any funds of their own nor had any investment choice to make. The situation is materially different in voluntary, contributory plans, where employees can make investment decisions by deciding to invest their funds in such plans rather than in other investment media. An employee who participates in such a plan implicitly does so because he expects the plan to generate earnings that will be sufficient to provide him with a return on his investment, in the form of certain promised benefits, that will be equal to or superior to other investment alternatives available to him.

Second, many, if not most, defined benefit plans substantially depend on earnings to pay the benefits promised by them. 67 Quite often, in the case of multiemployer plans, a shortfall in earnings (and thus a shortfall in assets to pay benefits) results not in increased employer contributions, as the Court suggested is usually the case, 68 but in a revision downward of the level of benefits to be paid. 69 Or, in some instances, the plan itself may be terminated and benefits may be paid only to the extent that the Pension Benefit Guaranty Corporation 70 is able
to do so within its prescribed limitations. The fact that a plan may reduce its level of benefits or terminate altogether in the event earnings are insufficient to pay benefits underscores the dependency which many plans have on such earnings.

Third, vesting requirements under ERISA (which was not applicable to Daniel) are much less strict than the requirement of 20 years of continuous service with which Daniel had to comply. 71 Because the ERISA requirements are substantially less difficult to satisfy than the vesting provision in Daniel, the staff takes the position that the ERISA requirements would not be a barrier to finding an investment contract present.

On the basis of all of the foregoing, the staff is of the view that where a plan is both voluntary and contributory, regardless of whether it is a defined contribution or defined benefit in nature, a participant generally would have an expectation of profits from it in the investment contract sense. (4) From the efforts of others. Any earnings generated by a plan would, of course, result from the efforts of the plan managers. Thus, the requirement of an investment contract that there be reliance on the efforts of others to produce profits would seem to be satisfied in the context of a voluntary, contributory plan.

As a result of the foregoing analysis, the staff believes that the interests of employees in voluntary, contributory, corporate pension and profit-sharing plans are securities within the meaning of section 2(1) of the 1933 Act. Moreover, as indicated in Part III of this release, such securities are deemed to be offered and sold to employees within the meaning of section 2(9) of the Act. Accordingly, they are subject to both the registration and antifraud requirements of the Act. But, as indicated in the discussion of section 3(a)(2) in Part IV of the release, such securities generally would be required to be registered only where the plan invests in employer securities an amount greater than that contributed to the plan by the employer.

3. Keogh Plans

Keogh plans (also known as "H.R. 10 plans") are tax-deferred retirement plans established by self-employed individuals 72 for the benefit of themselves and their employees. They were authorized by Congress in 1962 73 to permit such individuals to share some of the favorable tax benefits 74 which prior thereto were available only in connection with certain corporate plans.

There are two types of securities that may be issued in connection with Keogh plans: (1) interests in collective funding vehicles arising from investments made by the plans, and (2) interests of employee-participants in the plan themselves.

With respect to the interests of Keogh plans in collective funding vehicles, these clearly are securities, often in the form of investment contracts. There is an investment of money by the plan in a common enterprise (the funding vehicle) with the expectation that the managers of the funding vehicle will generate earnings on that investment.

Congress gave implicit recognition to the fact that interests in collective funding vehicles maintained for Keogh plans are securities when it amended section 3(a)(2) of the 1933 Act in 1970. In both the Senate and House reports relating to the 1970 Amendments, it was indicated that such interests were not being exempted under section 3(a)(2) "because of their fairly complex nature as an equity investment and because of the likelihood that they could be sold to self-employed persons, unsophisticated in the securities field." 75 Clearly, the reference to such interests in the reports (and in section 3(a)(2) as well) was based on the belief that they are securities. As explained in Part IV of this release, however, the Commission possesses authority under section 3(a)(2) to exempt interests or participations.

65 An individual who is an "employee" within the meaning of Section 401(c)(1) of the Internal Revenue Code of 1954 may establish a Keogh plan.
67 The tax advantages to a self-employed person in establishing a Keogh Plan are essentially twofold: A deduction can be taken for at least a part of his contributions to the plan and the income earned on his contributions is not taxed until it is distributed.
68 Senate Report No. 91–194 (1969), at 27–28, and House Report No. 91–1382 (1970), at 44. Although Section 3(a)(2) may not be available, the intrastate offering exemption [see Part IV] often can be relied upon for the offer and sale of interests in collective funding vehicles maintained for Keogh plans. However, if the funds in that vehicle are commingled with those from exempt qualified plans sold to non-residents, the two offerings would be integrated, and the intrastate exemption would not be available.

69 S. Ct. 797–798.
70 The Supreme Court appeared to believe otherwise, as indicated by its statement that "a plan usually can count on increased employer contributions to which the plan itself has no control to cover shortfalls in earnings." 99 S. Ct. 798.
71 "If, of course, benefits accrued by participants up to the date the level of benefits is revised would be payable on the basis of the schedule of benefits in effect until then.
72 The Pension Benefit Guaranty Corporation ("PBGC") was created by ERISA to provide some assurance that the benefits promised to vested participants in employee benefit plans would, in fact, be paid. Pursuant to ERISA, every single-employer defined benefit plan must meet certain minimum funding standards and pay annual premiums to the insurance fund maintained by the PBGC. The PBGC guarantees a portion of the defined benefit in the event the employer terminates the plan. The extent of PBGC coverage is set forth in 29 U.S.C. 1301–1303.
73 Daniel was denied his pension because, although he had over 22 years of service as a teamster, he had suffered an involuntary break-in-service of approximately four months midway through his career. Thus, the years prior to the break-in-service could not be used to satisfy the requirement of 20 years of "continuous service."
issued in connection with Keogh plans from the registration requirements of the 1933 Act.

The interests of covered employees in Keogh plans also appear to be securities. Although many such plans involve only one individual, a significant number cover more than one person (as would occur, for example, where a law partnership institutes a plan in which all employees can participate). Using the analysis already described with respect to corporate plans, the staff is of the view that voluntary contributions by participants to such plans would create securities in the form of investment contracts.

Although the interests of participants in voluntary, contributory Keogh plans are deemed to be securities, the staff has not required the separate registration of such interests. Most plans can rely on an exemption from registration for the offer and sale of employee interests.65 For those relatively few plans that do not have a readily available exemption, the staff, as a matter of administrative discretion, will not require such interests to be registered. The antifraud provisions of the 1933 Act, however, would continue to apply to the offer and sale of such interests to employees.

4. IRAs and Simplified Employee Pension Plans

IRAs (or "Individual Retirement Accounts") are a relatively new form of tax deductible retirement savings created by ERISA in 1974. They are intended to allow employees who are not covered under a corporate or Keogh plan to obtain tax benefits similar to those provided under such plans.66

Although IRAs commonly are established by individuals, they also may be sponsored by employers and unions for their employees and members, respectively. In an effort to encourage the establishment of employer-sponsored IRAs, the Revenue Act of 197867 introduced the concept of "Simplified Employee Pensions"68.

Simplified pensions have been characterized as plans with a minimum of paper work and red tape,69 and, in this context, the Revenue Act provides for simplified employer reports to the IRS and to employees.70 For the purposes of this discussion, IRAs and Simplified Employee Pensions will be considered the same.

The applicability of the federal securities laws to IRAs was specifically considered by Congress at the time ERISA was pending congressional approval. In that regard, the conference report on ERISA stated:

The conference intend that this legislation with respect to individual retirement accounts not to limit in any way the application of the federal securities laws to individual retirement accounts or the application to them of the laws relating to common trusts or investment funds maintained as such accounts. As a result, the Securities and Exchange Commission will have the authority to act on the issues arising with respect to individual retirement accounts independently of this legislation.71

The status of IRAs under the Securities Act was further commented upon by the Senate Subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs in a study conducted in 1975. The Subcommittee expressed the belief that "IRAs and collective investment funds for IRAs clearly are not exempt from registration under . . . the Securities Act of 1933."72 While the question of whether or not an exemption would be available would depend on the facts and circumstances of each case, it is clear that IRAs which involve the placement of an individual's funds in the hands of another person with reliance on that person to produce profits are securities which are subject to the registration and antifraud requirements of the 1933 Act.

Many IRAs involve a direct investment by an individual in an exempt security (such as one issued by a bank)73 or in a medium that is not considered to be a security (such as a traditional fixed annuity). In neither instance would registration be necessary, and only in the former would the antifraud provisions be applicable.

Beyond the foregoing are two other situations in which the registration of IRAs is considered unnecessary. The first of these involves retirement plans funded solely by specific mutual fund shares that are registered under the 1933 Act. The staff has stated that, so long as these shares are offered pursuant to current prospectuses which contain appropriate disclosure of the IRAs to which they may be offered, no separate registration of the IRAs is necessary.74

The second situation involves so-called master trusts or prototype plan arrangements75 which are used to market IRAs and Keogh plans. Where these types of trusts or arrangements exist, the sponsoring organization usually limits its own involvement to establishing the plan and/or setting up a separate account for each individual participant. The commingling of account assets is generally prohibited and, for those, the most complete, investment discretion is vested in each account holder. Participants usually are afforded several investment alternatives, such as savings accounts or other bank instruments, insurance products or the like. The sponsor generally limits its role to that of a custodian and does not render any investment advice.

An argument often made is that interests in these types of plans do not constitute securities within the meaning of Section 2(1). The theory underlying

64 See Part IV of this release for a discussion of some exemptions available to plans.
65 For example, an employee can claim a tax deduction for contributions to an IRA of the lesser of 25% of earned income or $1,500, and he will have the authority to act on the issues arising with respect to individual retirement accounts independently of this legislation.71
66 See Part IV of this release for a discussion of some exemptions available to plans.
67 See Part IV of this release for a discussion of some exemptions available to plans.
68 See Part IV of this release for a discussion of some exemptions available to plans.
69 See Part IV of this release for a discussion of some exemptions available to plans.
70 See Part IV of this release for a discussion of some exemptions available to plans.
71 See Part IV of this release for a discussion of some exemptions available to plans.
72 See Part IV of this release for a discussion of some exemptions available to plans.
73 See Part IV of this release for a discussion of some exemptions available to plans.
74 See Part IV of this release for a discussion of some exemptions available to plans.
75 See Part IV of this release for a discussion of some exemptions available to plans.
this view is that each individual relies on his own efforts to earn a profit in his account, rather than on the efforts of others, and therefore one of the key elements of an investment contract is missing. Although in practice this theory does not apply where an IRA or Keogh plan is funded through the use of a pooled investment medium, it has more validity where the sponsor acts as a mere custodian for a participant's separate account (the assets of which are not commingled) and the participant retains complete investment power or control over his account. Recognizing that the existence of an investment contract in such circumstances may be open to question, the staff generally has taken a no-action position regarding the registration of such interests.

5. Miscellaneous Plans

In addition to the plans already mentioned, there are four types of employee benefit plans that merit a separate discussion, either because they involve issues of special interest or because they are somewhat unique. a. Stock purchase plans. Stock purchase plans permit employees to purchase stock of their employer through payroll deductions or otherwise. The stock may be acquired either directly from the employer or in open market purchases effected by the plan. Clearly, the stock is a security, and where it is supplied by the employer or an affiliate for purchase by employees under the plan registration is necessary absent an exemption. Where the stock is obtained through open market purchases, registration may not be required, as indicated in Part III of this release.

The only significant question presented by stock purchase plans under section 2(1) of the 1933 Act is whether the interests of participants therein are securities. In Release No. 33-4790 (July 13, 1965) [30 FR 6059], the Commission indicated that employee interests in stock purchase plans which acquire the employer's stock in the open market might be securities where there are substantial differences between the manner of acquiring stock under the plan and the manner of acquiring it in ordinary brokerage transactions. Some of the variations which might be considered substantial, according to the release, are (1) limitations on the rights of employees to withdraw from the plan or to drawdown securities held in custody, (2) the granting of management discretion to someone other than the individual participants, (3) the accumulation of sums by the plan manager for material periods of time before investment, (4) the payment of special fees or charges, such as a front-end load, and (5) the diminution of the employee's rights or privileges as a shareholder.

The staff continues to believe that the presence of some or all of the foregoing factors in a stock purchase plan may create a separate security in the form of a participation interest. The reason is that such factors tend to place the employee in a position where he is relying on the plan managers to maintain or protect his investment. Accordingly, where such participation interests are deemed to be securities, they would be subject to the registration and antifraud provisions of the 1933 Act upon their offer or sale.

b. Bond purchase plans. Bond purchase plans are authorized under section 405 of the Internal Revenue Code. They permit employers to purchase a special series of United States bonds for the benefit of employees or their beneficiaries. Although the bonds are securities, they are exempt from the registration requirements of the 1933 Act by virtue of section 5(a)(2) thereof. Similarly, the interests of employees in such plans are not required by the staff to be registered, because of the nature of the bonds underlying them and the congressional policy to encourage the establishment of these plans.

c. Annuity Plans. Section 403(b) of the Internal Revenue Code permits public school systems and charitable organizations to enter into deferred compensation arrangements with their employees that are funded through the purchase of annuity contracts or mutual fund shares for the covered employees. Variable annuity contracts are securities as are mutual fund shares, and both are therefore subject to the registration and antifraud provisions of the 1933 Act. Whether the interests of employees in these plans also are securities in all instances is problematical.

Participation interests in section 403(b) plans that are both voluntary and contributory on the part of participating employees would appear to be securities, for the reasons already discussed under the section entitled "Voluntary, Contributory Plans." As a matter of administrative practice, however, the staff does not require such interests to be registered. The antifraud provisions, however, would be applicable to the offer and sale of such interests.

d. Stock bonus plans. Stock bonus plans are plans under which an employer awards shares of its stock to covered employees at no direct cost to the employees. These plans can take various forms, such as Employee Stock Ownership Plans ("ESOPs"), Tax Reduction Act Stock Ownership Plans ("TRASOPs"), stock appreciation right plans ("SARs"), and other variations as well.

While the stock awarded to employees under the above types of plans is a security, the staff generally has not required it to be registered. The basic for this position generally has been that there is no "sale" in the 1933 Act sense to employees, since such persons do not individually bargain to contribute cash or other tangible or definable consideration to such plans. It also is justified by the fact that registration would serve little purpose in the context of a bonus plan, since employees in almost all instances would decide to participate if given the opportunity. Similarly, the interests of employees in bonus plans have not been subjected to registration.

B. Interests of Plans in Collective Investment Media

The contributions made to employee benefit plans frequently are invested in pools of assets managed by other entities. These pools of assets may take the form, for example, of bank collective

**Footnotes:**

7 The staff's no-action position involving master trust or prototype plan arrangements extends to both IRA and Keogh plans having substantially the same characteristics as those described in the text. See, e.g., letters re A. G. Edwards & Sons, Inc. dated June 15, 1973 and The National Bank of Georgia dated November 4, 1976.

8 Plans which possess the essential characteristics of a stock purchase plan will be treated as subject to the 1933 Act, even though they may not be labeled as "stock purchase plans." The substance of a plan, rather than the name assigned to it, is the determining factor with respect to the application of the 1933 Act.

9 An annuity contract is one which provides an income for a specified period of time, such as a number of years or for life.

10 Many TRASOPs permit employees to purchase stock of the employer at a price equal to half its market value. See Part III of this release for a discussion of the application of the 1933 Act to such purchases.

11 The staff's position generally is applicable only in the context of bonus plans which are made available to a relatively broad class of employees. With respect to stock awarded to, or acquired by, employees pursuant to individual employment arrangements, the staff generally has concluded that such arrangements involve separately bargained consideration, and that a sale of the stock has occurred.
trust funds or insurance company separate accounts. In the staff's view, the participation interests in plans in these collective investment vehicles are securities, essentially in the form of investment contracts.68 That is, they involve an investment of money (the assets of the investing plan) in a common enterprise (the fund) with an expectation of profits (the earnings generated by the fund) from the efforts of others (the fund managers). In effect, plans which invest in such funds choose "to give up a specific consideration in return for a separable financial interest with the characteristics of a security."69 Support for the fact that these interests are securities can be found in section 3(a)(2) of the 1933 Act, which provides a specific exemption from registration for them if certain specified conditions are met. Clearly, there would be no need to provide such an exemption unless the interests were securities.

The real issue, then, with respect to interests in collective investment media is whether they are securities, but whether they are exempt from registration by virtue of section 3(a)(2) or some other exemption. The general exemptions that might be available are discussed separately in Part IV of this release.

III. The Term "Sale" and Other Factors Affecting Registration

It already has been stated that the application of the registration and antifraud provisions of the 1933 Act depends on there being a "sale" or an "offer" of a security. Section 2(9) of the 1933 Act defines these terms as follows:

The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell," "offer for sale," or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value ** * **

The key elements in the foregoing definition from the standpoint of employee benefit plans are the words "value" and "solicitation of an offer to buy." For without one or both the 1933 Act is inapplicable. Each of these terms is discussed in the following sections.

A. What Constitutes "Value"

While the term "value" is not defined in the 1933 Act, the staff generally has taken the position that it includes all ordinary forms of consideration, such as cash, property, services, or the surrender of a legal right. There are two specific situations involving the term "value" that warrant separate discussion. These are dealt with in the sections which follow.

1. Conversions of Existing Plans.—For various reasons, a company may decide to convert its pension or profit-sharing plan into an ESOP or other type of plan. When such a conversion occurs, all of the assets of the old plan are transferred to a trust established under the new plan.67 In terms of the application of the 1933 Act, the question arises whether the exchange of interests in the former plan for interests in the new plan constitutes "value" within the meaning of section 2(9).

The staff's response to this question is that although "value" in the traditional sense may be present in the exchange, no useful purpose is served by applying the Act's registration provisions where employees have no investment decision to make with respect to the proposed conversion.68 Accordingly, the staff has indicated that it will not recommend any enforcement action concerning registration if the conversion will occur without giving employees any choice in the matter.69 It has declined to issue a no-action letter where the situation is otherwise.70 Because the staff's position on the conversion of existing plans is clear-cut, it will decline to respond to any future requests on the subject.

2. Investment Elections Under Noncontributory Plans.—The application of Section 2(9) also becomes an issue in the context of noncontributory plans which provide employees with the opportunity to make various investment elections. For example, a plan may permit an employee to invest his share of the employer's contribution in various investment media (including company stock),71 or to accept cash and defer a portion of the employer's award in the form of company stock,72 or to elect cash or stock upon a distribution,73 or to elect stock to the extent of a specific consideration. The nature of these elections, which appear to involve investment decisions, the staff for some time declined to take a no-action position with respect to them.74

As a result of the Daniel decision, which dealt with a noncontributory plan, the staff has reconsidered its position. It now is of the view that registration should not be required with respect to investment elections in noncontributory plans.

3. The Bifurcated Sale Concept.—In its brief in the Daniel case, the Commission took the position that it was possible for some employee benefit plan transactions to involve a "sale" for purposes of the antifraud, but not the registration, provisions of the 1933 Act. The basis for this view was the belief that the phrase "unless the context otherwise requires," which precedes the definitional portion of the Act, allows in some cases a different construction of the term "sale" in the context of the Act's registration provisions than it does in the context of the antifraud provisions.75

The Supreme Court in Daniel did not specifically address the merits of the Commission's "bifurcated sale" concept.76 The staff, however, has revisited this issue and concluded that, for purposes of analyzing the impact of the 1933 Act on various employee benefit plans, it serves no practical purpose to apply the term "sale" in a bifurcated manner. Accordingly, the term "sale," when applied to employee benefit plans in the future, will be considered to have the same meaning for purposes of both the registration and antifraud provisions of the Act.77

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68 Collective investment vehicles also are generally considered to be "investment companies" subject to the requirements of the 1940 Act.
69 S. Ct. 796.
70 96 S. Ct. 796.
71 For example, a plan may permit an employee to invest his share of the employer's contribution in various investment media (including company stock), or to accept cash and defer a portion of the employer's award in the form of company stock, or to elect cash or stock upon a distribution, or to elect stock to the extent of a specific consideration.
72 As a result of the Daniel decision, which dealt with a noncontributory plan, the staff has reconsidered its position. It now is of the view that registration should not be required with respect to investment elections in noncontributory plans.
73 The basis for this view was the belief that the phrase "unless the context otherwise requires," which precedes the definitional portion of the Act, allows in some cases a different construction of the term "sale" in the context of the Act's registration provisions than it does in the context of the antifraud provisions.
74 The Supreme Court in Daniel did not specifically address the merits of the Commission's "bifurcated sale" concept.
75 The staff, however, has revisited this issue and concluded that, for purposes of analyzing the impact of the 1933 Act on various employee benefit plans, it serves no practical purpose to apply the term "sale" in a bifurcated manner. Accordingly, the term "sale," when applied to employee benefit plans in the future, will be considered to have the same meaning for purposes of both the registration and antifraud provisions of the Act.
76 96 S. Ct. 796.
B. Solicitations of Offers To Buy

The registration and antifraud provisions of the 1933 Act apply not only where there has been a disposition of a security for value, but also where there has been an offer to sell a security or a solicitation of an offer to buy the same for value. Insofar as employee benefit plans are concerned, the issue of whether the employer has made a solicitation or offer to buy its securities arises most frequently in connection with employee stock purchase plans.

1. Stock Purchase Plans.—As previously noted in Part II, a stock purchase plan allows an employee to purchase stock of the employer through payroll deductions or otherwise. The stock may be acquired directly from the employer, in which case registration would be necessary unless an exemption were available. Alternatively, the stock may be acquired in the open market through various types of arrangements involving payroll deductions.

The Commission's view as to whether registration by the employer will be necessary with respect to open market purchases depends on the employer’s degree of participation in the plan. If the employer’s involvement is fairly substantial, it may be deemed to be soliciting its employees to buy its securities, and registration generally would be necessary in such circumstances. On the other hand, if the employer’s participation is limited to ministerial-type functions so that purchases of stock under the plan are not significantly different than purchases outside the plan in ordinary brokerage transactions, registration would not be required.

In Release No. 33–4790, the commission specified the circumstances under which an employer’s involvement in a stock purchase plan would be considered sufficiently limited so as not to raise a registration question. According to the release, the employer must not solicit employees to participate in the plan (only the broker or other agent of the employees may do so). It may, however, perform the following functions:

1. Announce the existence of the plan;
2. Make payroll deductions for the plan at the request of employees;
3. Make available to the broker or other agent the names and addresses of employees in order to facilitate communications regarding the plan;
4. Address communications to be sent to employees by the broker or other agent;
5. Include the broker's communications with other announcements by the employer;
6. Permit an initial meeting of employees regarding the plan to be held at the employer's premises; and
7. Limit its expenditures to those involved in making payroll deductions and paying the reasonable fees and charges of the broker or other agent for commissions and bookkeeping and custodial expenses.

In addition to the general caveat in Release No. 33–4790 that any deviation from the foregoing standards could necessitate registration, the staff has stated that the following requirements should be complied with in order to avoid any registration difficulties:

(1) The plan should be limited solely to employees or to persons, such as franchisees and independent sales representatives, who have essentially the same degree of access to information about the company as its employees; and
(2) The employer must not make contributions to the plan to defray the cost of the stock or lend money to employees for the purpose of facilitating its purchase.

This requirement, however, is not violated where an employee elects to supplement his personal contributions to the plan with his portion of profits distributable from the employer's profit-sharing plan.

2. TRASOPs.—TRASOPs are a special form of Employee Stock Ownership Plan created by the Tax Reduction Act of 1975. From the employee's standpoint, they are a combined stock bonus and stock purchase plan. That is, employees can receive shares of the employer at no cost to them under such a plan, and they may also be given the opportunity to purchase additional shares of the employer at half the prevailing market price.

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.

Generally, as pointed out in Release 33–4790, it has been the Commission’s position that where an employer’s involvement in a stock purchase plan (which a TRASOP partially can be) extends beyond the ministerial functions outlined in the preceding section, it is deemed to be soliciting an offer to buy the securities offered through the plan. In a contributory TRASOP, this customary analysis yields the result that the shares purchased by employees under such a plan must be registered. This is based on the theory that the employer’s payment of half the price of stock purchased by the employees amounts to a subsidy that provides such a strong incentive to acquire the employer's stock that it is deemed to be a “solicitation of an offer to buy” within the meaning of section 2(3).

There are, however, persuasive reasons for taking the position that the registration of shares acquired in the open market under TRASOPs is neither necessary nor appropriate. First, no practical purpose appears to be served by requiring registration solely because the employer is paying half the purchase price. To hold otherwise creates the anomalous situation whereby a company is not required to provide a prospectus to employees who pay the full market price for stock under a plan which complies with the requirements of Release 33–4790, but must furnish a prospectus to employees who pay only half the market price under a TRASOP that is essentially identical to the 4790 plan.

Second, the party ultimately subsidizing half of the purchase price of shares acquired under a TRASOP is not the employer but the federal government. Through the device of an investment tax credit conditioned upon the employer’s participation in a TRASOP, the employer’s payment of half the cost of stock purchased by employees is in effect reimbursed by the U.S. Treasury. The congressional policy underlying this tax credit to encourage
the purchase of the employer’s stock at half the market price is a further reason for not requiring registration.

On the basis of the foregoing reasons, the staff hereby will take the position that shares acquired in the open market by employees under a TRASOP which otherwise satisfies the requirements of Release 33-4790 need not be registered. The purchase of such shares would, of course, continue to be subject to the antifraud provisions of the 1933 and 1934 Acts.

IV. Exemptions From Registration

If an issuer determines that an offer or sale of securities will occur in connection with an employee benefit plan, it must either register the securities or rely upon one of the several exemptions from registration contained in the 1933 Act.

A. Generally Available Exemptions

Sections 3 and 4 of the Act set forth the various exemptions from registration. Those most likely to be available for securities transactions involving employee benefit plans are set forth below.

(1) Section 3(a)(2). This is the only exemption in the 1933 Act which specifically refers to employee benefit plans. Because of its significance, it will be discussed in detail later in this section.

(2) Section 4(2). This provision exempts transactions by an issuer not involving any public offering. Known as the “private offering” exemption, it generally is available if an offering is made to a limited number of persons who are sophisticated in business matters and have access to the types of information that could be obtained through the registration process. In connection with the exemption provided by section 4(2), the Commission has adopted Rule 146 [17 CFR 230.146], which provides certainty, in the form of a safe harbor, that the exemption is available if all of the conditions of the rule are met.

(3) Section 3(a)(11). This section, which is commonly referred to as the “intrastate offering” exemption, exempts offerings that are confined to residents of the state in which the issuer is organized and conducts the bulk of its business. Rule 147 [17 CFR 230.147].

The exemptions in Sections 3 and 4 do not apply to the antifraud provisions of the Act. See in this regard the introductory phrase to Section 4, as well as Section 17(c) of the Act.

The intrastate offering exemption requires that all plan participants and the plan trustee reside in the same state as the employer. See letters re Queens County Medical Society dated January 7, 1972 [plan participants], and Continental Investors under the Act provides a safe harbor for reliance upon the intrastate offering exemption if all of its conditions are satisfied.

(4) Section 3(b). Under this provision, the Commission has the authority to exempt certain offerings of securities if it finds that neither the public interest nor the protection of investors warrants registration “by reason of the small amount involved or the limited character of the public offering. Pursuant to the authority provided by section 3(b), the Commission has adopted Regulation A [17 CFR 230.251 to 230.264], Rule 240 [17 CFR 230.240], and Rule 242 [17 CFR 230.242], all of which may be utilized in connection with securities offered pursuant to employee benefit plans. Regulation A can be relied upon for offerings of up to $1.5 million during a 12 month period. Rule 240 is available for offerings of up to $100,000 during a similar period. Rule 242 may be used for offerings of up to $2 million of securities in a single issue if certain conditions are met.

B. Section 3(a)(2)

Congress amended section 3(a)(2) in 1970 to exempt securities issued in connection with certain employee benefit plans. The relevant provisions of Section 3(a)(2) read as follows:

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 any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian; * * * or any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension or profit-sharing plan maintained by a bank; or (B) 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

Life Insurance Company dated March 4, 1971 [plan trustee]. Also, the exemption may not be relied upon if the securities of the employer held by the trustee are not eligible for the exemption. Letter re Rochester Telephone Corp. dated June 2, 1970.

Note 22, supra. The amendments made to Section 3(a)(2) in 1970 hereinafter are cited as the “1970 Amendments.”

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 by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code. The Commission, by rule, has adopted Regulation A, which exempts 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 or 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. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank and the term “bank” means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official except that in the case of a common trust fund, or a collective trust fund, the term “bank” has the same meaning as in the Investment Company Act of 1940.

1. Definitions—The lengthy and complex provisions of section 3(a)(2) quoted above can best be analyzed by first defining the major terms used therein. The meaning of those terms is described below:

(a) Interest or Participation. The beneficial right or share which a participant has in a plan, or which a plan has in a single trust fund, collective trust fund, or separate account.

(b) Common Trust Fund. A trust fund maintained by a bank as an investment vehicle solely for trusts, estates or similar entities for which the bank acts in a bona fide fiduciary capacity, such as that of trustee, executor, administrator or guardian. Such a fund may not be used as a vehicle for direct investment by members of the public.

The staff takes the position that the exemption in section 3(a)(2) of the 1933 Act (as well as its counterpart in section 3(c)(3) of the 1940 Act) for interests or participations in bank-maintained common trust funds was not meant to exempt investments by a bank as trustee for employee benefit plans.

including Keogh plans.\textsuperscript{111} Such investments were meant to be exempted by the latter by the exception in section 3(a)(2) dealing with collective trust funds for employee benefit plans, provided the conditions of that clause are satisfied. (c) Collective Trust Fund. A trust fund maintained by a bank as an investment vehicle solely for corporate stock bonus, pension, or profit-sharing plans (other than Keogh plans) which meet the requirements for qualification under section 401(a) of the Internal Revenue Code.\textsuperscript{112} Like a common trust fund, a collective trust fund may not be used for direct investment by members of the public.\textsuperscript{113} It should be noted that the section 3(a)(2) exemption for interests or participations in collective trust funds will not be available to a collective fund which commingles the assets of section 401 qualified plans with those of Keogh plans.\textsuperscript{114}

(d) Single Trust Fund. A non-collective trust fund (i.e., a fund which is not established at the instance of, or by, a financial intermediary for the use of separate employers).\textsuperscript{115} Under this definition, each of the following would be considered a single trust fund: (1) a trust fund for employees of a single employer;\textsuperscript{116} (2) a trust fund for employees of employers so closely related as to be regarded as a single employer (e.g., a parent and its subsidiaries);\textsuperscript{117} and (3) a trust fund established and controlled by employers and/or a union representing the employees of such employers. (e) Bank. This term includes the following entities only: (1) a banking institution organized under the laws of the United States, (2) a member bank of the Federal Reserve System, (3) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under

\textsuperscript{111}See letter re National Boulevard Bank of Chicago dated February 28, 1972 and September 18, 1974 (reconsideration request) issued by the Division of Investment Management. 

\textsuperscript{112}House Report at 43, and Senate Report at 27. See also letter re Communications Workers of America dated December 28, 1979 issued by the Division of Investment Management.

\textsuperscript{113}House Report at 43, and Senate Report at 27. See also letter re Communications Workers of America cited in Note 112, supra.

\textsuperscript{114}See the definition in this section of the term "single employer." 

\textsuperscript{115}Letter re Gibson, Dunn & Crutcher dated March 18, 1974 issued by the Division of Investment Management.

\textsuperscript{116}The definition used for the term "bank" is the one found in Section 2(a)(6) of the 1940 Act. The 1940 Act definition is applicable because of the language used in the last clause of Section 3(a)(2), which states that "... in the case of a common trust fund or similar fund, or a collective trust fund, the term 'bank' has the same meaning as in the Investment Company Act of 1940." 

\textsuperscript{117}IRC Reg. § 1.401-1(b)(1)(ii).

\textsuperscript{118}IRC Reg. § 1.401-1(b)(1)(i).

\textsuperscript{119}IRC Reg. § 1.401-1(b)(1)(iii).

\textsuperscript{110}IRC Reg. § 1.401-1(b)(1)(ii).

\textsuperscript{111}IRC Reg. § 1.401-1(a)(1).

\textsuperscript{112}IRC Reg. § 1.401-1(a)(2).

\textsuperscript{113}IRC Reg. § 1.401-1(a)(3).

\textsuperscript{114}IRC Reg. § 1.401-1(a)(4).

\textsuperscript{115}Opinion of the Assistant General Counsel, Note 18 supra.
with employee benefit plans need not be registered unless employee funds are used to purchase employer securities. In the Daniel decision, however, the Supreme Court implied, in dictum, that the section 3(a)(2) exemption extends only to the interests or participations of plans in certain funding vehicles, rather than the interests of employees in the plans themselves.130

The legislative history of the 1970 Amendments indicates that their original purpose was to alleviate a concern expressed by banks and insurance companies that there was no clear exemption from registration in the 1933 Act for interests in the collective funding vehicles maintained by those entities for employee benefit plans.131

While the amendments were under consideration, however, language was added that reflected the Commission's consistent administrative practice of not requiring interests in plans to be registered except where employee money is used to buy securities of the employer.132

The inclusion of the language referred to above, as well as a recent decision by a U.S. District Court,133 would seem to support the staff's view that the implicit purpose of the 1970 Amendments was to exempt not only the interests of plans in certain investment vehicles, but also the interests of participants in the plans themselves.134 This position is reasonable when one considers that, from the employee's standpoint, his interest in the plan is inseparable from his aliquot share of the plan's interest in the funding vehicle. Moreover, there is the practical consideration that if section 3(a)(2) were not broadly construed to cover employee interests in plans as well as plan interests in funding vehicles, many plans would have no exemption from registration upon which to rely for the offer and sale of interests to employees.135

Accordingly, the staff believes it is appropriate to link both the plan's interest in a funding vehicle and the interests of participants in the plan itself for purposes of the exemption provided by section 3(a)(2).

The staff recognizes that the Supreme Court, in the Daniel decision, did not endorse the broad interpretation of the 3(a)(2) exemption described above.136 While the statements by the Court are entitled to serious consideration, they are dicta and therefore do not resolve the issue conclusively. This fact is reflected in Chief Justice Burger's concurring opinion, in which he stated that "There is no need to deal, in this case, with the scope of this exemption; since it is not an issue presented for decision."137 The Chief Justice further noted that "the construction of the 1970 Amendment may be problematical" and "of real importance to someone in some future case" and that, as a result, he was "reserving any expression of views" on the scope of the exemption.138 In light of all of the foregoing, particularly the negative effects on many plans which might flow from a narrow construction of Section 3(a)(2), the staff will continue to view the exemption as being applicable to both interests in funding vehicles and interests in plans.

3. Significant Interpretive Issues.

There are several significant interpretive issues under section 3(a)(2) that have arisen over the years. These are discussed in detail in the sections which follow.

a. "Maintained by a Bank" Requirement. Section 3(a)(2) states in part that it shall be available for interests or participations in any "common trust fund maintained by a bank" or any "single or collective trust fund maintained by a bank," provided certain conditions are met. The word "maintained" has been interpreted by the staff to mean that the bank must exercise "substantial investment responsibility" over the trust fund administered by it.139 Thus, a bank which functions in a mere custodial or similar capacity will not satisfy the "maintained" requirement.140 In exercising its investment authority over a trust fund, however, a bank may hire an investment adviser to assist it, although the final decision whether or not to invest must be made by the bank.141

The principal question concerning the "maintained" requirement is whether it applies to single trust funds. The language of the statute, which is the starting point in statutory construction,142 suggests that such funds must be so maintained. The staff, however, has taken the position that the "maintained" requirement applies only to common and collective trust funds.143 Thus, interests or participations in a single trust fund would not be exempt unless a bank as trustee will be deemed exempt under Section 3(a)(2) if all of the other requirements of the provision are satisfied.

The staff's view that single trust funds need not be maintained by a bank is based on its perception of the intent of Congress at the time the reference to such funds was inserted in section 3(a)(2). The reference was included in 1970 at the request of Sperry-Rand Corporation,144 with the Commission's full support.145 Sperry-Rand had expressed concern that a failure to refer specifically to single trust funds in the then-pending amendments to section 3(a)(2) would create a negative inference.

130 The Court stated in this regard that the 1970 Amendments to Section 3(a)(2) "recognized only that a pension plan has 'an interest or participation' in the plan's assets. . . . 'maintained' was held not to prospectively beneficiaries of a plan had any interest in either the plan's bank-maintained assets or the plan itself." 99 S. Ct. 795. See also, n. 19 at 99 S. Ct. 795.

131 In the case of banks, the concern arose because the exemption for bank securities previously included in Section 3(a)(2) and thought to apply to both interests in funding vehicles maintained by banks and collective trust funds was determined not to be available for such interests. This position was codified to some extent in the 1970 Amendments to Section 3(a)(2), which added a provision to that section stating that a "security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank." Subsequently, insurance companies also became concerned that the separate accounts maintained by them for investments by section 401 corporate plans might involve the issuance of securities for which there was no available exemption from registration.

132 See the portion of Section 3(a)(2) which states that the exemption does not extend to plans for a single-employer "under which an amount in excess of the employer's contribution is allocable to the purchase of securities . . . issued by the employer or [an affiliate thereof] . . . ."


134 The exemption, however, certainly does not extend to stock or other securities that may be held by a plan. Such securities must find their own exemption from registration. See letter re AMF, Inc. dated September 29, 1976.

135 This, of course, presumes that such interests are securities. A presumption that, as previously stated, may be applicable only to voluntary, contributory plans. Note 130, supra. 99 S. Ct. 822.

136 'Pub. L. No. 91-547 (December 14, 1970)."
that interests in such funds were required to be registered. Such an inference, as previously indicated, would have been contrary to the Commission's consistent position over the years that interests in such funds were subject to registration only where employee funds were invested in securities of the employer. To eliminate the problem raised by Sperry-Rand, it was decided to insert the words "single or" in section 3(a)(2) immediately in front of the words "collective trust fund maintained by a bank." In retrospect, this method of resolving the issue was somewhat inartful, since it created the erroneous impression that single trust funds had to be maintained by a bank in order for interests therein to be exempt under section 3(a)(2). Certainly, there was no intent by Congress to change the Commission's prior interpretive position that such funds did not have to be maintained by a bank in order to avoid registration. This is evident from the Conference Report on the subject, which stated that the amendment "codified a long established administrative practice of the Commission by making it clear that [the section 3(a)(2)] exemption applied not only to collective trust funds, but also to single trust funds." Further support for the validity of the staff's interpretation can be found in section 3(c)(11) of the 1940 Act. That section, together with its predecessor, was the model upon which the provisions in section 3(a)(2) under discussion were based. It excludes from the operation of the 1940 Act "any employees' stock bonus, pension or profit-sharing trust which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954," as well as "any collective trust fund maintained by a bank consisting solely of the assets of such trusts." Clearly, single trust funds are not required to be maintained by a bank under section 3(c)(11). A different view of such funds under section 3(a)(2) would result in an anomaly whereby virtually all single trust funds for section 401 plans would have to be maintained by a bank under the 1933 Act but not under the 1940 Act. Such a result would, in the staff's view, be contradictory and counter to the apparent intent of Congress.

b. What Constitutes a "Single Employer". The general exemption provided by section 3(a)(2) for interests or participations issued in connection with certain employee benefit plans contains two exclusions. One relates to interests in Keogh plans and will be discussed in the next section. The other relates to interests in plans whose contributions are held in a single trust fund or separate account for a "single employer" and which permit amounts in excess of the employer's contribution to be used to purchase securities of the employer or its affiliates. The purpose of the second exclusion described above is to deny the section 3(a)(2) exemption to interests in plans which invest employee contributions in securities of the employer or related entities. It appears, however, that this purpose has been frustrated somewhat by the staff's prior interpretation of the term "single employer." Until now, the staff has viewed the term in a literal sense and stated that a parent and its subsidiaries are not a single employer for purposes of section 3(a)(2). The effect of this has been to permit some plans covering a parent and its subsidiaries to invest employee funds in securities of the parent (or one of the subsidiaries) without abrogating the 3(a)(2) exemption. This has occurred because the exclusion referred to above applies only where a plan both covers a single employer and invests employee money in employer securities. The staff announced some time ago that it was reconsidering its position concerning the single employer question. It has now concluded that its past interpretation of the term was incorrect and contrary to the purpose of the exclusion. A parent and its subsidiaries are in fact under common control and to consider them as separate or unrelated employers ignores reality. Accordingly, in the future, a parent and its subsidiaries will be deemed a single employer for purposes of the 3(a)(2) exclusion being discussed, as will all entities which share a control relationship. It should be noted, however, that the staff's revised view of the single employer question will be applied on a prospective basis only. Therefore, it will not be cited with respect to past activities of employers made in reliance upon the staff's former interpretation.

c. Keogh Plans. As indicated in part II of this release, interests or participations issued in connection with Keogh plans generally are deemed to be securities which are subject to the registration and antifraud provisions of the 1933 Act. Although the intrastate exemption frequently is relied upon for the offer and sale of such interests, registration has been necessary in some instances. Section 3(a)(2) specifically excludes Keogh plan interests from the general exemption provided by the section but does provide the Commission with the authority to exempt such interests from registration where it is "necessary or appropriate in the public interest and consistent with the protection of investors and the purposes [of the 1933 Act]" to do so. This power was granted to the Commission in 1970 but was not used until November 1976, when an exemptive order under section

148 Opinion of Assistant General Counsel, note 18, supra.
150 The predecessor of section 3(c)(11) was section 3(c)(13), which had been in existence since the inception of the Act in 1936.
151 See Hearing on Amendment No. 498 to S. 1599 (1967), 1338-1347.
153 The full text of the two exclusions states that the section 3(a)(2) exemption does not apply to any plan described in clause (A) or (B) 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 by a company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of Section 401(c)(1) of such Code.
154 The reference in the second exclusion to amounts in excess of the employer's contributions simply means that employee funds may not be utilized to purchase securities of the employer or affiliated entities. No tracing of the employer's contributions is the same or less than the amount contributed by the employer to the plan. Moreover, the staff has indicated in a letter concerning Eastern Kodak Company dated January 22, 1976 that an employer may allocate part or all of his share of the employer's plan contributions to the purchase of employer securities without destroying the 3(a)(2) exemption.
155 The second exclusion originally applied to both single and collective trust funds maintained by banks for such plans. Pub. L. 91-547 (December 22, 1970). Shortly after its enactment, however, it was amended to delete the reference to collective trust funds. Pub. L. 91-547 (December 22, 1970). This was done to recognize the fact that such funds might unwittingly lose the 3(a)(2) exemption simply because they invested some of the fund's assets in securities of one of the covered employers.
157 The 1970 Amendments to Section 3(a)(2) granted such authority to the Commission, See Note 22, supra.
provide for guaranteed interest and annuity purchase rates, both of which may be subject to change after a specified period, commonly three to five years. Some contracts provide for the payment of interest (or dividends in the case of mutual companies) in excess of the guaranteed amount based upon an investment year method of interest allocation. The contracts also provide for or permit the optional purchase of annuities generally at the time a retiree’s annuity is desired.

Certain guaranteed investment contracts appear to be securities. They are not exempt from registration under Section 3(a)(2) of the 1933 Act because they are funded by insurance company general accounts, which are not referred to in that section. (Only separate accounts are mentioned.) They also are not exempt under Section 3(a)(8) of the Act in those instances where the issuing insurance company either fails to assume a meaningful mortality risk under the contract or allows the purchaser to bear a significant investment risk. 164

Notwithstanding the above, the Division of Investment Management has indicated that it will not recommend any enforcement action if the offer and sale of guaranteed investment contracts to pension and profit-sharing plans is not registered, provided certain specified conditions are met. 165 The conditions are:

(1) Each contract must be issued in connection with a pension or profit-sharing plan which (a) covers not less than 15 persons, or (b) involves annual contributions in excess of $10,000, or (c) is established by a corporate employer with a net worth of at least $100,000 on the last day of its fiscal year preceding the day the contract becomes effective; (2) Each prospective contractholder must be provided with an offer by the issuer (which also should be contained in any printed sales literature used) to provide upon request financial statements and other material information; and (3) Advertising describing or offering such contracts must be directed solely to employers who may establish tax-qualified corporate plans or to trustees of such plans.

In addition to the foregoing, a more recent development has been the formation of multiple-employer trusts by insurance companies that are funded, respectively, by fixed or variable annuity contracts, or combination contracts providing both fixed and variable annuity alternatives. The formation of a trust for the offering of such contracts to unrelated employers appears to be necessary to satisfy state insurance requirements. Moreover, because of the economies of scale involved, it has the advantages of permitting reduced group annuity rates and limiting the expenditures for complying with ERISA recordkeeping and reporting requirements.

The Division of Investment Management has indicated that it will not recommend enforcement action to the Commission if multiple-employer trust arrangements of the type described above are marketed without registration of participations in the trusts under the Securities Act of 1933 or registration of the trusts under the Investment Company Act of 1940. A number of facts and representations were important in reaching the no-action position.

Specifically:

(1) Participants in the group annuity contract would tender consideration directly to the insurance company, and would receive annuity payments directly from the insurance company; (2) The insurance company would perform all marketing, administrative and investment functions involved in funding the group annuity contracts, and any financial claim which the participants would have under the contracts would be against the insurance company itself; (3) The insurance company would name the trustees of each trust, and reserve the right to remove them and name successor trustees; (4) The sole responsibility of the trustee would be to serve as group annuity contract holder, and the trust would not have any financial interest in the group annuity contract.

In such circumstances, where the multiple-employer trust is passive, compliance with the federal securities laws would be unnecessary.

V. Securities Transactions by Plans

In addition to issuing participation interests and fostering stock purchases by employees, either of which may be subject to the registration and antifraud provisions of the 1933 Act depending on the circumstances, a plan may engage in various other transactions involving the purchase, sale or distribution of shares.
securities. These are briefly discussed in the sections which follow.

A. Acquisitions of Employer Stock

Many plans invest part or all of their assets in stock or other securities of the employer. There are three primary sources that a plan can draw upon to acquire employer securities: the employer, affiliates of the employer, and persons selling their securities in the open market. Generally, no matter from whom the securities are obtained, registration will not be necessary with respect to the acquisition transaction by the plan. The reasons for this result will vary, depending on the manner of acquisition. For instance, there may be no sale involved (as in the case of a contribution of stock or cash to the plan by the employer), or one of the several exemptions from registration provided by section 4 of the Act may be available.

Although the transaction in which a plan acquires employer securities need not be registered, the same would not necessarily be true with respect to the offer, sale or distribution of those securities to plan participants. These latter transactions are separate and distinct from the acquisition transaction and therefore must either be registered or exempt from registration. Further, the plan trustee should take into consideration, when purchasing stock of the employer in the open market, the application of the antifraud provisions of the 1934 Act to such purchases.

B. Sales of Employer Stock

A plan may from time-to-time offer or sell the securities of the employer held by it. If the plan is considered an affiliate of the employer, any such offers or sales, whether to plan participants or to persons not associated with the company, would be subject to the registration and antifraud provisions of the 1933 Act in the same manner as if the employer were engaging in the transaction. Thus, even if the securities to be sold were acquired on the open market, registration would be necessary under such circumstances, absent an available exemption.

C. Distributions of Employer Stock to Plan Participants

The distribution, or actual delivery, of employer stock by a plan to individual participants is not deemed to be a registrable event. Of course, if the plan were to offer or sell such stock to participants prior to actual delivery, registration would be necessary unless an exemption were available.

D. Transactions in Non-Employer Securities

In conducting its operations, a plan may buy or sell securities of issuers other than the employer. Purchases of such securities by the plan ordinarily would not create any 1933 Act consequences, if the compliance provisions of the Act are directed at sellers of securities, not at buyers. Sales of such securities would, of course, have to be made in reliance upon an exemption unless they were registered.

The most common exemption relied upon for sales is that provided by section 4(1) of the Act for persons who are not issuers, underwriters or dealers. Rule 144 (17 CFR 240.144) under the 1933 Act provides a safe harbor from registration for persons who wish to rely upon the section 4(1) exemption for resales of restricted securities, provided all of its conditions are met.

Plan trustees who intend to acquire significant amounts of the equity securities of an issuer (including the employer) should bear in mind the potential applicability of sections 13(d), 16(a), and 16(b) of the 1934 Act. Section 16(d) requires beneficial owners of more than five percent of a class of equity securities registered under section 12 of the 1934 Act to report their ownership, as well as any further acquisitions, to the issuer, to any stock exchange on which the securities are listed, and to the Commission. Sections 16(a) and 16(b) apply to beneficial owners of more than 10% of a class of equity securities registered under section 12. Section 16(a) requires an initial report of a person’s holdings and subsequent reports of any changes in such holdings. Section 16(b) permits an issuer to recover any profits realized by persons subject to that section on purchases and sales of the issuer’s securities that occur within a period of less than six months.

VI. Resales by Plan Participants

A matter of major concern to participants in a pension or profit-sharing plan is the tradeability of securities received by them under the plan. That is, can the securities be freely resold without restrictions or not? The next two sections will attempt to resolve the uncertainty that may exist regarding this issue.

A. Registered Plans

Many plans register the securities offered and sold by them on Form S-8 or some other appropriate registration form under the 1933 Act. Generally, such securities are freely tradeable upon distribution to participants, unless the person acquiring the securities is an affiliate of the issuer. Thus, participants in a registered plan who do not have a control relationship with the issuer may resell the shares or other securities acquired by them under the plan without any restrictions.

Affiliates are in a somewhat different position because their control relationship with the issuer subjects them to the same disabilities regarding registration that would attach to the issuer if it tried to sell the securities. Such persons may resell their shares publicly either pursuant to an effective registration statement or pursuant to Rule 144 under the 1933 Act. Affiliates also may resell the securities registered under section 12 of the 1934 Act to report their ownership, as well as any further acquisitions, to the issuer, to any stock exchange on which the securities are listed, and to the Commission. Sections 16(a) and 16(b) apply to beneficial owners of more than 10% of a class of equity securities registered under section 12. Section 16(a) requires an initial report of a person’s holdings and subsequent reports of any changes in such holdings. Section 16(b) permits an issuer to recover any profits realized by persons subject to that section on purchases and sales of the issuer’s securities that occur within a period of less than six months.
in a private transaction, provided it is understood that the purchaser is acquiring restricted securities which are subject to the same limitations on resale as the seller. In making such private sales, the affiliates presumably would rely on the so-called "Section 4(1)-2” exemption. This is a hybrid exemption not specifically provided for in the 1933 Act but clearly within its intended purpose. The exemption basically would permit affiliates to make private sales of securities held by them so long as some of the established criteria for sales under both Section 4(1) and Section 4(2) of the Act are satisfied. For a detailed discussion of the “Section 4(1)-2” exemption, see The Section "4(1)-2” Phenomenon: Private Resales of "Restricted Securities”, a Report to the Committee on Federal Regulation of Securities of the ABA from the Study Group on Section "4(1)-2” of the Subcommittee on 1933 Act—General, dated April 30, 1979. The report is reproduced in The Business Lawyer (July 1979), at 3.

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these proposals would permit new filings on Form S-8 to become effective automatically on the twentieth day after receipt, without review or other action by the Commission or its staff. In addition, the proposals would allow amendments to previously filed Form S-8 registration statements to become effective automatically on the date of filing, without any waiting period. It is believed that this proposal, if adopted, would permit issuers to make offerings on Form S-8 on a more timely basis than in the past and would allow the staff to reallocate the resources which it formerly devoted to reviewing filings on the form.

Another proposal of a more far-reaching nature would amend Form S-8 to resemble Form S-16 in both its disclosure and operational aspects. Form S-16 is an abbreviated registration form which provides a limited amount of information about the issuer and the offering. It does, however, incorporate by reference certain past and future reports required to be filed by the issuer under Section 13 or 15(d) under the 1934 Act. The assumption underlying Form S-16 is that the information in the 1934 Act reports is widely available and sufficiently detailed to satisfy the disclosure requirements of the 1933 Act.

The use of a Form S-16 registration format for employee benefit plans could result in significant cost savings to issuers. For instance, the expense of preparing such a filing would be minimized because of the limited disclosures involved. And, like all S-16 registration statements, there would be no need to amend the prospectus annually to update it, provided the accountant for the issuer filed an appropriate consent-in the issuer's annual report on form 10-K. Thus, in almost all cases, the initial filing on the revised Form S-8 would be the only one required for the plan, thereby eliminating the expense now involved in preparing and filing annual post-effective amendments to such forms.

It should be noted that final action on the foregoing proposals has yet to be taken by the Commission. It is anticipated, however, that they will be reviewed by the Commission during 1980 and that a decision as to their final status will be made at that time.

Footnotes continued from last page
(3) the adoption of one or more new forms that would be less difficult to comply with than Form S-8.

The consent would permit the 10-K financial statements and the accountant's opinion concerning them to be used in connection with filings (such as those on Form S-8) under the 1933 Act.

B. Other Forms

For those issuers who are unable to satisfy the requirements for the use of Form S-8, there are several other forms that may be available to register securities offered under a plan:

(1) Form S-7. This is the Commission's general registration form which is available to all issuers for which no other form is authorized or prescribed. It contains detailed disclosure requirements regarding the organization and business of the issuer, as well as extensive financial statement requirements.

(2) Form S-18. This form can be used for an offering of up to $5 million in securities for cash. Its availability is limited, however, to U.S. or Canadian corporations who are not subject to the periodic reporting requirements of the 1934 Act and who meet certain other standards. The disclosure requirements of Form S-18 are considerably less difficult to comply with than those of Form S-1.

(3) Form S-16. The availability of this form is restricted to established companies who satisfy certain specified criteria. The disclosure requirements of the form are somewhat abbreviated in comparison to those of Form S-1.

(4) Form S-16. This form is available only to issuers which qualify for the use of Form S-7 and meet certain other requirements for its use in connection with primary offerings. As previously noted, the disclosure requirements of this form are minimal, with heavy reliance placed on the issuer's continuing disclosures under the 1934 Act.

Although any of the above forms are available to issuers who qualify for their use, the staff takes the position that when they are used in connection with primary offerings by employee benefit plans, they must contain all of the information regarding 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.

C. Form S-16 Reoffer Prospectus

Affiliates who acquire securities under a plan may not, as previously indicated, freely resell such securities because of their control relationship to the issuer. As a practical matter, these persons must either register the securities for resale or rely upon Rule 144 if they wish to sell the securities in a public transaction.

Affiliates who wish to register their securities for resale may do so on Form S-16, provided the issuer meets the qualifications for the use of the form and the affiliates have a present intention to sell their securities within the next 16 months. S-16, as stated earlier, is a simplified registration form which consists of little more than the names of the selling security holders, the amount of securities being sold, and the terms of their distribution.

If the securities held by the affiliate are covered by a Form S-8 registration statement, the use of Form S-16 for resale is a relatively simple matter. A reoffer prospectus on that form can be filed as part of S-8, and no separate registration fee is required in such circumstances. The amount of securities that can be included in the S-16 reoffer prospectus is limited to the quantities that can be sold under Rule 144, unless the issuer independently meets the qualifications for the use of the form. In the latter circumstance, there is no limitation on the amount of securities that can be included in the S-16 for resale.

Rule 144 is not the exclusive means for resales without registration, as indicated in paragraph (l) of the rule. It appears, however, that insofar as affiliates are concerned, brokerage firms ordinarily would decline to execute an unregistered resale transaction of a public nature by such persons outside the rule.

If Form S-16 cannot be used, Form S-1 would then become the proper form for resale purposes.

See in this regard, General Instruction E to Form S-8. The staff has indicated that a limited number of securities issued by a plan prior to registration may be included in the S-8 filing solely for resale on the Form S-16 reoffer prospectus. Letter re Colonial Bancorp, Inc. dated October 17, 1977. The amount that can be so included is limited to 10 percent of the total number of shares issuable under all plans registered by the employer on Form S-8. Letter re Midtryline Corp. dated July 3, 1978.