

## SECURITIES ACT INTERPRETIVE STATEMENT-06

RE: RCW 21.20.310(10) - EMPLOYEE BENEFIT PLANS - PERMITTED BENEFICIARIES - ACCELERATION OF EFFECTIVENESS - LATE FILING - SUBSEQUENT DISTRIBUTIONS OF SECURITIES

The following are commonly asked questions and the Division's discussion and conclusions regarding the employee benefit plan exemption:

### **Statute:**

**RCW 21.20.310(10)** exempts "any security issued in connection with an employee's stock purchase, savings, pension, profit-sharing, or similar benefit plan if: (a) The plan meets the requirements for qualification as a pension, profit sharing, or stock bonus plan under section 401 of the internal revenue code, as an incentive stock option plan under section 422 of the internal revenue code, or as an employee stock purchase plan under section 423 of the internal revenue code; or (b) the director is notified in writing with a copy of the plan thirty days before offering the plan to employees in this state. In the event of late filing of notification the director may upon application, for good cause excuse such late filing if he or she finds it in the public interest to grant such relief."

### **Question No. 1:**

To what extent does RCW 21.20.310(10) exempt the issuance of securities in connection with an employee benefit plan to non-employees?

### **Discussion:**

The Administrator frequently receives inquiries regarding employee benefit plans that include non-employees such as consultants, independent contractors, agents, or customers. The Division follows Rule 405 of the federal Securities Act of 1933 which defines employee benefit plan as follows:

The term "employee benefit plan" means any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan, or written compensation contract, solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors, provided that bona fide services shall be rendered by consultants or advisors and such services must not be in connection with the offer or sale of securities in a capital-raising transaction. (emphasis added).

Securities issued to other persons pursuant to an employee benefit plan are not exempt under RCW 21.20.310(10).

### **Question No. 2:**

Under what circumstances will the Administrator accelerate the 30 day waiting period for employee benefit plans that must file with the Division in order to utilize the exemption provided by RCW 21.20.310(10)?

**Discussion:**

It is the policy of the Securities Division to accelerate the 30 day waiting period to the date of the letter from the Division acknowledging the effectiveness of the exemption. Exemption filings are typically processed and a letter issued several days after the filing is received.

**Question No. 3:**

What are the consequences of a late filing?

**Discussion:**

Pursuant to the 1995 revisions to RCW 21.20.310(10), certain internal revenue code qualified plans are not required to file to claim the exemption. Other plans must file thirty days before offering the plan to beneficiaries in this state. In the event of late filing, "the director may upon application, for good cause excuse such late filing if he or she finds it in the public interest to grant such relief." As discussed above, the Administrator routinely accelerates the thirty day waiting period. Where securities have been issued prior to filing, the Administrator will typically acknowledge the exemption as to issuances on or after the date of the letter from the Administrator acknowledging effectiveness. With regard to the prior issuances, the Administrator will typically take no action to assert any violation of the registration sections of the state Securities Act. The Division will not, however, express an opinion regarding any potential civil liability of the issuer for those transactions.

**Question No. 4:**

Does the scope of the exemption include the issuance of securities, such as stock, pursuant to such a plan?

**Discussion:**

Yes. Prior to the 1995 revisions to the exemption, only the investment contract evidencing an employee's interest in the plan was exempted by RCW 21.20.310(10). Subsequent distributions of securities pursuant to a plan, such as in a stock purchase plan, had to be registered or utilize another exemption. The exemption now covers all securities "issued in connection with" an employee benefit plan. Practitioners should disregard WAC 460-42A-010 which is contrary to the statute and will be repealed by the end of 1996.

**Conclusions:**

The employee benefit plan exemption is available for securities issued in connection with plans issued to employees, directors, general partners, trustees (where the registrant is a business trust),

officers or, in certain circumstances, consultants or advisors. The Division will accelerate the thirty day waiting period to the date of the letter from the Administrator acknowledging the effectiveness of the exemption. Plans which are filed after offers and/or sales have already occurred may still be eligible to use the exemption.

Adopted: January 1, 1991; As amended January 1, 1996

Replaces: Statements of Policy 81-3, 83-44 and 87-69

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