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REGISTRATION OF STOCK OPTION PLANS
UNDER THE SECURITIES ACT OF 1933

JOSEPH J. ZIINO*

INTRODUCTION

Many executives believe that the ownership of a corporation's common stock by its employees encourages employee initiative and effort and provides a spirit of cooperation between top management and subordinates because those responsible for implementing a corporation's policy have a financial interest in it. Management may believe that a stake in the company's stock market performance, which to a large extent is dependent on earnings performance, will generate employee enthusiasm and discourage unionization and burdensome employee demands. In some corporations, participation in employee stock option plans may be limited to a group of senior executives. In others, participation is often extended to a relatively broader category of employees with lower level job classifications.

Such an option plan may be either "qualified" within the meaning of section 421 of the Internal Revenue Code of 1954 or non-qualified. The federal and state income tax consequences of various types of benefit plans, including option plans, to both employer and employee, influence the type of plan which is adopted and special attention is often focused on tax considerations. However, there is also a growing body of rules and policies by which the federal securities laws are applied to stock option plans. These developments have largely resulted from no-action letters¹ and informal

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1. "No-action letters" are issued by the staff of the Securities and Exchange Commission in response to specific requests by persons contemplating specific actions. The requesting party sets forth the facts surrounding this proposed activity, includes an opinion of counsel to the effect that such action will have or not have certain consequences under the federal securities acts and requests the staff to state that it will take no enforcement action at the present time under specific statutory provisions against such action if it is so undertaken. The staff generally does not state that it concurs in the opinion of counsel or otherwise commit itself to future action or inaction. These letters are generally made available to the public, although relatively few are published in various private research services such as Commerce Clearing House. For a further description of no-action letters, see 17 C.F.R. § 200.80-81 and Securities Act Release No. 5098 (October 29, 1970), CCH Fed. Sec. L. Rep. [1970-1971 Transfer Binder] ¶77,921.
advice given by the staff of the Securities and Exchange Commission in recent years.

Reference will be made throughout this article to such no-action positions and advice of the Commission. The authorities cited herein have been published in one of the securities law services and the author has not relied upon no-action letters or letters of advice which have not been published. Moreover, it should be realized that the conclusions of the Commission may not always be consistent because of differences of policy or interpretation of the law within and between its divisions. In addition, it is often difficult to determine from such no-action letters and letters of advice the underlying reasons, either in fact or in law, for the conclusions expressed. Therefore, such letters should be regarded only as guidelines for advice by attorneys and, except in factual and legal contexts unusually similar to those in published letters, it would be advisable to submit to the Commission a specific no-action request or request for advice.

The stock option plan presents the corporate attorney with a number of state and federal securities law questions, but the basic and initial question concerns the need for registration under the Securities Act of 1933\(^2\) of the option plan itself as well as the underlying shares to be offered. Unless an exemption from the Act is available, optionees must be furnished with statutory prospectuses which provide them with certain information concerning the employer-issuer and the option plan itself.\(^3\)

The basic form of registration statement under the Act is that on Form S-1. This form applies to all offerings of securities subject to the Act which do not qualify for use of the other special registration forms. However, the S-1 registration statement is a very inclusive document which is costly and time consuming in preparation. To comply with the registration requirements of the Act and further the purposes underlying it the Securities and Exchange Commission promulgated a "Form S-8" in 1953 on which participation by employees in stock option and other specified employee benefit plans and the issuance of securities thereunder could be registered.\(^4\)

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2. The Securities Act of 1933 is hereinafter referred to as the "Act".
3. Throughout this article it will be generally assumed that the employer is also the issuer and such terms will be used interchangeably, although such may not be the case; e.g., a subsidiary may be the employer and the parent the issuer.
Form S-8 furnishes information not only by means of a prospectus, but also through stockholder reports required to be distributed in connection therewith. It is less expensive and time consuming in preparation than a Form S-1, but nevertheless is well-tailored to the disclosure needs of potential purchasers. Furthermore, the registration of the option plan and the underlying shares provides the optionee, with some significant exceptions to be discussed hereinafter, with an opportunity to resell such shares without further registration under the Act. Nevertheless, the shares acquired pursuant to an S-8 may be resold only under certain conditions, which differ depending upon the identities of the seller and issuer. These resale rules presumably further several regulatory policies, but clear implementation of those policies remains unresolved, particularly in light of Rule 144 under the Act, promulgated in 1972.

This article will attempt to set forth the present state of the law with respect to these issues. Moreover, the author will suggest improvements in the requirements for resale which would more effectively accomplish the objectives of the Act.

Of course, the central purpose of the S-8 registration statement and prospectus is to provide the purchaser of securities with all material information necessary to enable him to make an investment decision. There are varying levels of knowledge and investment sophistication among employee-optionees and the registration statement is designed to equalize this investment information. In most instances, options are granted to junior and senior level corporate executives who are most familiar with the issuer and are cognizant of the mechanics and opportunities under the stock option plan as well as the restrictions applicable thereto. Other employee-optionees, however, are less likely to have access to information about the issuer or familiarity with the workings of the option plan. The broader the employee group included under the

The Securities and Exchange Commission has indicated that under certain circumstances, employee stock purchase plans in which employees may authorize payroll deductions for investment by a broker in common stock of the issuer-employer and in which the issuer-employer merely announces the plan and pays reasonable administrative costs and brokerage commissions on behalf of employees is not subject to the registration requirements of the 1933 Act. See Securities Act Release No. 4790 (July 13, 1965), 1 CCH Fed. Sec. L. Rep. ¶1131. However, this exemption is very limited and any employer involvement beyond that permitted by the release may require registration of the plan.

plan, the greater is the need for assuring disclosure of material information to optionees.

Policies Underlying Registration of Employee Benefit Plans

Section 4(2) of the Act exempts from registration transactions by an issuer which do not involve a "public" offering. These "private" offerings are not defined in precise terms, except for a limited class of transactions described in recently effective Rule 146 which is not generally useful in connection with broad employee stock option plans. A determination of whether an offering is "private" rests upon the number of employees participating in the plan, their access to information concerning their employer, and their general investment sophistication.

In order to assure that a "private" offering is not merely a step toward an eventual offering of securities to the public, Rule 144 imposes a number of restrictions, including a two-year holding period, with respect to securities acquired in transactions not involving a public offering which, therefore, are exempt from registration. In order to assure compliance with such restrictions, the Commission has indicated that issuers of such "restricted" securities must impose a legend on certificates indicating the limits of transferability for such securities. Moreover, a purchaser of such securities must clearly be informed of such limitations on resale in order to comply with the anti-fraud provisions of the Securities Exchange Act of 1934.5

Without discussing the definitional problems of the "private" offering, which is beyond the scope of this article, a general statement of the problem in the context of sales of securities of an employer to an employee is set forth in S.E.C. v. Ralston Purina.6 In that well-known case shares of the employer were sold to "key" employees in reliance upon a private offering exemption and without registration under the Act. Offers in one year were made to 500 employees, with 165 applications to purchase shares submitted. In each of two prior years more than 400 employees had purchased shares. The employees resided in several states and held


positions ranging from copywriter to production trainee.

The Supreme Court noted that the safeguards of the Act applied to employees as well as to non-related investors. Absent a showing that because of their position the employees "have access to the same kind of information that the Act would make available in the form of a registration statement," there is no reason to apply the registration requirements of the Act in a less rigorous manner to sales to employees than to sales to the general public.

The burden of establishing an exemption from registration is on the issuer who asserts it and the access and availability of information to the employee-offerees, not the motives of the issuer, must determine the availability of an exemption. The focus of inquiry, said the Court, is on "the need of the offerees for the protections afforded by registration." The Court noted that the availability of an exemption, as a matter of statutory interpretation, does not turn solely on the number of offerees or purchasers. Nevertheless, the number of offerees, determined in accordance with the doctrine that different offerings may be "integrated" for purposes of an exemption determination, is obviously a significant though not conclusive factor.

The present rules governing use of the S-8 further three principal policies underlying the requirement of registration: (1) to disclose material information to purchasers; (2) to prevent an issuer from selling its securities without registration to the public indirectly through an intermediate distribution to its employees; (3) to limit the sale of the issuer's securities by persons who control it. These considerations influence not only whether registration is required in particular instances, but also the conditions under which shares acquired thereby may be subsequently sold.

Because an issuer may indirectly engage in a public distribution through the intermediate process of the grant and exercise of options, the Commission has taken steps to alert issuers to this problem and to require disclosure of the status of stock option plans when public offerings of securities are filed with it. The Commission's guide for the preparation and filing of registration statements provides that a registrant which has in effect an employee stock option plan not registered under the Act should inform the Division of Corporation Finance if the issuer intends to register optioned shares and, if not, of facts supporting a claimed exemp-

7. Id. at 125-126.
8. Id. at 127.
Counsel for the issuer bears the primary responsibility for determining the status of the plan and advising the Commission of the issuer's legal position. The Division's practice apparently has been to accept a representation from the issuer or its counsel that a registration statement covering the option plan will be filed prior to exercise of the options.

In the event that a private offering or other exemption is unavailable to an issuer, the issuer and its counsel must consider a number of questions involving registration, which are the subject of the remainder of this article.

FORM AND CONTENT OF THE S-8 REGISTRATION STATEMENT

Form S-8 is available only if the issuer is subject to the filing requirements of section 13 or 15(d) of the 1934 Act. Under these sections, the issuer is required to file certain regular reports with the Commission, including reports on Forms 8-K, 10-Q and 10-K. Securities of an issuer need not necessarily be registered under section 12(g) of the 1934 Act to be subject to such requirements. Issuers who have sold securities pursuant to an S-1 registration statement must undertake as part of the registration process to comply with such reporting requirements. Form S-8 is available for the registration of shares acquired pursuant to stock options which are "qualified" within the meaning of section 422 of the Internal Revenue Code or "restricted" within the meaning of section 424(b) of the Code irrespective of when such restricted option was granted.

10. See Instruction A(c) to Form S-8. Section 424(b) of the Internal Revenue Code establishes certain requirements concerning the option price and other terms of issuance of restricted stock options, but such options could only be granted before January 1, 1964. Nevertheless, for purposes of Form S-8, options granted after such date which are "non-qualified"; i.e., which do not meet the requirements of section 422(b), but which otherwise meet the requirements of section 424(b) may be registered on Form S-8.

In Securities Act Release No. 5530 (October 3, 1974) the Securities and Exchange Commission proposed an amendment to Form S-8 whereby use of the Form would be expanded, upon certain conditions. The proposed amendment would permit registration of (1) employee security option plans, without limiting reference to the Internal Revenue Code, (2) bonus, appreciation or similar plans, (3) plans involving securities other than "stock", and (4) plans involving offers or sales to employees of a parent of the issuer.

These plans may be registered only if the issuer is a reporting company under sections 13 or 15(d) of the 1934 Act. In addition, these plans must (1) be in writing, (2) specify the class of eligible employees, (3) the maximum amount of securities offerable thereunder, the price at which the securities may be offered, the method of determining such price and, (4) be approved by stockholders within the time period provided in Release 5530. Furthermore, any option or similar right must not be transferable other than by will or laws of descent.
The following are the principal types of information set forth in the S-8 prospectus:

1. The general nature and purpose of the plan. This is often a rather standard, brief reference to the incentives which the employer seeks to create by means of stock ownership.

2. The tax consequences of the plan to optionees and the employer. This description is more lengthy in the case of certain restricted stock option plans. Issuers should disclose changes in the tax law which are in proposed form by legislative or regulatory bodies which would materially affect the taxability of options, even though such proposals may require further legislative or regulatory action before they become effective.

3. The number of shares which may be issued pursuant to the plan and the eligibility and extent of participation therein by employees or classes of employees.

4. The terms and conditions upon which options may be exercised, including the time period during which and price at which options must be exercised.

5. The effect of termination of employment on options and the transferability of options.

6. Information concerning the number of outstanding options and the number of options granted or exercised by certain officers, directors and beneficial owners of the issuer.

7. A brief description of the terms of the class of stock to be registered.

The employees are also advised of the market price for the shares during the last five years. A summary of earnings of the issuer for the last five fiscal years, with certified earnings statements for at least the last three fiscal years, is included in the prospectus. In developing the format of the S-8, the Commission realized that these items of information concerning the issuer are

and distribution and must be exercisable during the employee’s lifetime only by the employee.

The Release indicated that these amendments served to substantially codify present informal policy, although the imposition of conditions for registration of these securities was new. The Commission further indicated that it was reviewing the disclosure and resale provisions of the Form and conditions as to the use of Form S-8 for profit-sharing, pension and thrift plans and that further amendments covering these matters might be published soon.

This article has been written on the basis of the law prior to Release 5530. To the extent that this article does not reflect Release 5530 or any subsequent amendments to Form S-8, the reader should consider the impact thereof.
most relevant to an employee's evaluation of the investment value of the issuer.

On the other hand, there is little reference to the registrant's business, except for specified "significant developments" during the prior five years. Because employees are generally familiar with their employers and are given stockholder reports, the omission of the types of information set forth, for example, in the "Company" and "Business" sections of an S-1 prospectus appears justified.

There are three important undertakings included in the registration statement which are not included in the prospectus:

(A) The issuer must file reports required pursuant to section 15(d) of the 1934 Act.

(B) The issuer must deliver or cause to be delivered to each employee to whom and at the time the prospectus is sent a copy of its annual report to stockholders for its last fiscal year. Furthermore, the issuer undertakes to transmit to all employees participating in the plan, who did not otherwise receive such material as stockholders, copies of all reports, proxy statements and other communications distributed to stockholders in the same manner and at the same time as they are sent to its stockholders. Such stockholder communications, unless otherwise filed with the Commission, are also to be delivered to the Commission; they are not deemed to be "filed" as part of the registration statement for purposes of the Act.12

(C) The subsequent sale of shares registered pursuant to the S-8 must be effected in accordance with the following Undertaking, reproduced in full:

*Undertaking in the Case of Restricted Stock Options*

The undersigned issuer undertakes (if any of the securities...
registered hereunder are to be offered by it pursuant to restricted stock options) —

(a) That for the purpose of any public offering of any of such securities (otherwise than on a national securities exchange) by any person who may be deemed an underwriter of such securities, the issuer will, prior to such public offering, file a prospectus containing, in addition to the information required by this form, the information which would be required by Items, 1, 2, 7, 8, 9, 10, 11, 12, 16, 17 and 20 of Form S-1 if the securities to be so offered were registered on that form.

(b) That every such prospectus and every prospectus which purports to meet the requirements of Section 10(a)(3) of the Act will be filed as a part of an amendment to the registration statement and will not be used until such amendment has become effective, and the effective date of each such amendment shall be deemed the effective date of the registration statement with respect to securities sold after such amendment has become effective.13

This undertaking and other more complex rules regarding resale will be the subject of further discussion in this article.

Two technical problems common to shelf registrations in general, but more often to S-8 registrations, arise when the number of shares to be included in the registration statement is increased while the registration statement is effective. When a stock option plan is amended to increase the number of shares available thereunder, otherwise than by an adjustment for a stock split or stock dividend, a new registration statement must be filed covering the additional shares, with a new filing fee to be paid.

If options remain outstanding or if some options remain to be granted under the plan prior to its amendment, the previously filed registration statement remains in existence. However, the same prospectus may be used for both registration statements, as permitted by Rule 429 under the Act. Upon increase of issuable shares, the cover page of the new registration statement should include a statement to the effect that the prospectus included therein is to be used as the prospectus for the first registration statement. It is not necessary to file post-effective amendments for the first registration statement, because it is updated by the filing of the new registration statement and the post-effective amendments thereto. The same procedure may be adopted if a second

option plan is adopted and the two plans are included in one prospectus.

**TREATMENT OF EMPLOYEE PARTICIPATION AS A “SALE”**

There may be some question whether registration is required and whether an S-8 prospectus must be delivered upon grant or some other time prior to actual exercise of an option. This determination turns on whether a “sale” of a “security” has occurred within the meaning of the Act. An “option” is a “security” as defined in section 2(1) of the Act, since it constitutes a right to purchase stock. A “sale” defined by section 2(3) of the Act includes an “offer to sell” a security.

Obviously, a sale of the shares themselves has occurred upon actual exercise of an option. A determination of whether a sale of an option or an offer to sell the underlying shares occurs earlier reflects an evaluation of the needs of optionees for disclosure of information, because their participation in the plan is the subject of registration. The public which may later purchase these optioned shares is not the direct focus of protection at this early stage.

The term “sale” is not specifically defined in the Act. However, there appears to be no reason why the concept of “sale” for purposes of the Act should not correspond to its general legal definition as occurring when the purchaser exchanges something of value in return for something else of value. The Act is designed to protect persons who part with something of tangible or intangible value in exchange for securities. Upon exercise of an option, cash is exchanged for the shares. However, upon grant of an option, there usually is nothing of tangible value which is even indirectly given by the employee in return for the right to purchase shares. Moreover, often no intangible right is transferred or obligation undertaken by the employee. For example, usually no requirement that the employee remain in the employ of the issuer, or that he forego other rights or possible future benefits is imposed in return for the option granted.

The Commission’s present policy is reflected in a number of recent no-action letters. The letters discussed are intended merely to serve as guidelines to the present ruling policy of the staff of the Commission and are not intended to serve as an exhaustive summary of the staff’s position.
In *Solid State Scientific Devices Corp.*, an issuer reduced salaries of certain employees and they had no enforceable rights against their employer by reason of such decrease. In order to "reward" its employees, the issuer's management proposed to make gifts to them of 23,955 shares of its common stock within a few months after such salary reduction. None of the employees were "controlling" persons as that term is defined for purposes of the Act. The staff of the Commission responded that the proposed "gift" could not be made without registration in light of the contemporaneous reduction of salary. The staff reasoned that there was a causal connection between these two events from which a "sale" could be inferred. The employees had relinquished a portion of their salaries and remained in the issuer's employment in return for shares distributed to them.

In *Oklahoma Natural Gas Company* certain executives were to be awarded deferred compensation which they could elect to receive in the form of either cash or shares of the employer's stock. The amount of the awards would be determined on the basis of the employer's earnings and the shares of common stock would be purchased on the open market by the employer shortly before their actual distribution to the employees. The only undertaking furnished by the executives would be to remain in the employment of the issuer for the five-year duration of the plan, or until an executive's earlier retirement or death.

The staff of the Commission concluded that shares could not be distributed to the employees without compliance with the registration requirements of the Act. The staff believed that "value" was received by the employer to the extent that participants would be induced to continue their employment, and, therefore, that a "sale" had occurred.

In other rulings the staff has concluded that where, in the past, the employer had awarded cash as a prize or bonus to employees who had performed valuable services and where the employer subsequently decided to distribute its securities instead of cash as a prize, such a distribution could not be made without prior registration under the Act. Moreover, in *Keene Corporation*, the distri-
bution of shares of an issuer as an incentive to its distributors and sales representatives required registration, even where there apparently was no substitution for a prior or present alternative cash payment.

These staff positions reveal an interesting analysis of the constituent elements of a "sale." In *Solid State Scientific Devices*, the issuer, without legal liability, presumably could have reduced employees' salaries. However, the staff must have believed that such an action would have caused a reaction from employees, presumably in the form of resignations from the issuer's employment. Apparently, in an attempt to forestall or prevent this reaction, the issuer transferred shares to these employees without direct payment. In this manner, the employees were induced to forsake action and relinquish employment opportunities which might have otherwise been available to them. However, in *Oklahoma Natural Gas*, the employees were more directly led to make employment decisions because they entered into employment contracts partly in reliance upon a deferred compensation plan.

In *Keene* the distributions were made only as bonuses and not in lieu of commissions or salaries. However, there the staff may have reasoned that bonus arrangements are common and, therefore, anticipated in sales programs. A distribution in one form or another would be a factor which a sales representative would consider usual, rather than unusual, and would be evaluated in determining whether and to what extent the representative would become associated with the issuer. Thus, the distributed securities would indirectly represent a substitution for anticipated cash compensation.

It is no great leap from this conclusion to an even broader one. Option plans are often generally intended as substitutes for increased cash compensation and such plans are widely accepted by companies, particularly "growth" companies, as a means of attracting or retaining talented executives who might otherwise seek employment from other concerns. It follows that in determining whether a "sale" has occurred, it is often more relevant to determine whether the employee has made an employment decision rather than an investment decision. Realistically, options are quite

19. See note 14, supra.
20. See note 16, supra. Because the employee could choose between cash and securities, the net effect of such a choice would be substantially the same as if cash had been received and then used to acquire securities.
21. See note 18, supra.
significant to employees in evaluating employment opportunities, and employees often act in reliance upon the anticipated value of options. In effect, a decision by an employee to commence or maintain employment, based upon consideration of an option plan, constitutes the transfer of "value" to an employer requisite to a "sale." On this assumption, most employee benefit plans would require registration upon the commencement of participation by a substantial number of employees in order to provide employees with adequate information concerning the plan and the issuer. However, the Commission has not apparently yet adopted such a broad rule.

In *Dayton Steel Foundry Company*, the employer proposed to issue non-qualified stock options to seventy-five key employees whose annual salaries generally exceeded $15,000. No options could be exercised until a registration statement with respect to the shares became effective. The staff did not object to the proposed grant without registration under the Act. It should be noted that the issuer did not have securities registered under the 1934 Act, nor had it ever filed a registration statement under the 1933 Act. Therefore, there was little likelihood of public distribution of the optioned shares; moreover, Form S-8 would have been unavailable and presumably a complete S-1 registration would have been necessary. The benefits of registration were apparently outweighed by the burdens which registration would have imposed on the issuer.

In other circumstances the Commission has concluded that registration of benefit plans was not necessary and it is not easy to reconcile these determinations with those described above. In *Howmedica, Inc.*, the issuer-employer prepared to award on a regular basis shares of its common stock to employees earning between $10,000 and $20,000 per year on the basis of merit and service to the employer as determined by management. There would be no option to receive cash in lieu of stock. The staff concluded that the award itself was not subject to registration.

In *Republic Gear Industries, Inc.* the employer proposed to issue five shares of stock to each of approximately 200 employees in order to give them a proprietary interest in the company. These shares would be issued as a one-time bonus and would not constitute a continuing bonus plan. The staff concluded that the award

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of shares was not subject to registration. In *Spencer Foods, Inc.*\(^25\) the implementation of a qualified profit-sharing plan was delayed and in lieu of a contribution, the employer issued 2,612 shares of its common stock to 120 employees and three officers. Future distribution was not contemplated and employees had no right to elect to receive cash in lieu of shares. The staff concluded that such a distribution was not subject to the registration requirements of the Act.

**CONCLUSIONS REGARDING REGISTRATION**

It can be concluded from these releases and no-action letters that the following factors would most likely determine whether registration of benefit plans under the Act is required upon commencement of employee participation: (1) the extent to which employees are induced to take or forego action, particularly concerning their employment; (2) the extent to which employees compete among themselves for benefits; (3) whether shares are in effect issued in lieu of cash by reason of substitution of shares for cash and whether the employee may elect cash or shares; (4) the number of shares to be distributed and the scope and effect of possible subsequent sales; (5) the access of employees to information concerning the issuer; (6) the extent to which distributions are regularly made or are required to be made without discretion on the part of the issuer; (7) whether the issuer is subject to the reporting requirements of the 1934 Act at the time of distribution.

In evaluating the need for registration at grant counsel should consider the potential liabilities arising out of a failure to timely register. The mere failure to register a plan pursuant to section 5 of the Act results only in a right of the optionee to rescind the transaction under section 12 of the Act. However, a failure to register may also result in violation of the anti-fraud prohibitions of section 10 of the 1934 Act because of the failure to disclose to optionees material facts about the plan and the issuer. Because of the employee's reliance upon the option plan in evaluating his employment opportunities the scope of potential damages arising out of such reliance may be substantially broader under the 1934 Act than under the 1933 Act.\(^26\)

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26. Although still unclear, one recent case has indicated that under Rule 10b-5 a purchaser of securities is entitled to recover damages resulting from and caused by fraudulent conduct in addition to the "actual damages" under section 28(a) of the 1934 Act. *See* Zeller
should not be dismissed as a mere technical violation; instead it may be the tip of an iceberg of liability in favor of employees.

With respect to the registration of an option grant, it would appear that generally a “sale” of the option has occurred at the time of grant in light of the fact that the employee has relied upon the value of the option and the underlying securities in making an employment decision.

Even though the option plan or agreement might not require that the optionee remain in the employ of the issuer for a specified period of time as a condition to exercise, it can be reasonably concluded that an option right has been sold and an “offer” to sell the underlying shares has been made to the employee. In the usual instance, where more substantial conditions to exercise might be imposed, the option which is “sold” or offer which is made may be of less value, but the need for disclosure to the optionee is greater in light of the more substantial burdens imposed on the optionee to obtain the right of exercisability.

It is the writer’s belief that counsel should advise an issuer that the plan and underlying shares be registered prior to grant of options or as soon thereafter as practicable in the absence of a clear exemption from registration. It is possible that by reason of the number and identity of initial optionees under a plan, the initial grant can be considered to be a private or intrastate offering exempt from registration. Registration could then be withheld until such time as additional grants are made which would terminate the previously claimed offering exemption. However, the ever-present doctrine of “integration” of offerings could be used in support of the contention that a public or interstate offering was contemplated upon adoption of the plan and that no private or intrastate offering ever existed.

It might be argued that instead of registration of an option plan

v. Bogue Electric Manufacturing Corp., 476 F.2d 795 (2nd Cir., 1973), cert. denied, 414 U.S. 908. But see Madigan, Inc. v. Goodman, 4 CCH Fed. Sec. L. Rep. ¶94,586 (7th Cir., June 6, 1974). Collins v. Rukin, 342 F.Supp. 1282 (D.C. Mass., 1972) is one of the few reported cases on the question of whether granting an option constitutes a “sale” for purposes of the anti-fraud provisions of section 10 of the 1934 Act. In that case, the court found that although no cash consideration was paid by the employee upon grant and no cash consideration was required until exercise of the option, the option was granted to induce the employee to enter into the employment of the issuer, and, therefore, there was a “sale” and transfer of value to the employer.

“Actual damages” have been generally defined to include only “out-of-pocket” losses. The Second Circuit noted that a plaintiff seeking to establish consequential damages must establish causation between the fraudulent practice and the injury “with a good deal of certainty.”
at grant, registration is only necessary prior to the time when an optionee acquires an unconditional right to exercise his options. This position ignores the significance of the option grant itself to an employee and the importance which he assigns to it. In any event, the date on which options become exercisable is certainly the latest date at which registration should be effected and prospectuses should be delivered.

SALE OF SHARES ACQUIRED UPON EXERCISE

The sale of shares acquired upon exercise is governed by Undertaking C to the S-8 registration statement. By its terms, the Undertaking applies only if any of the securities registered thereunder "are offered pursuant to restricted stock options." Instruction A(c) to Form S-8 defines "restricted" stock options to be those described in section 424(b) of the Internal Revenue Code of 1954, irrespective of the date of their issuance.

However, according to instruction A(c), issuance of shares pursuant to any of the following three types of stock options may be registered on Form S-8: (1) "qualified" options defined in section 422(b) of the Code; (2) "employee stock purchase plan" options defined in section 423(b); (3) "restricted" options defined in section 424(b) which could be granted prior to January 1, 1964. "Restricted" options within the meaning of section 424(b) could not be granted after January 1, 1964, but options granted after such date which meet the terms of such section are characterized as "restricted" and can be registered on Form S-8.

Section 424(b) describes a "restricted" option as: (1) one whose price is at least 85% of the fair market value of the stock subject to option at the date of grant (except for certain variable price options); (2) one which is not transferable except by will or the laws of descent and distribution and is exercisable during the optionee's lifetime only by him; (3) one which, with certain exceptions, is granted to a person who at the time of grant does not own more than 10% of the voting power of all classes of stock of the employer; (4) one which is not exercisable after ten years from the date of grant.

Unlike qualified options restricted stock options were not required to be issued pursuant to plans approved by stockholders. In fact qualified options, defined in section 422(b) of the Code, and options under employee stock purchase plans under section 423(b)

27. See text accompanying note 13, supra.
of the Code are necessarily included within the above definition of "restricted" options since the requirements of qualified and employee stock purchase plan options are similar but more restrictive than those for "restricted" options. Therefore, the Undertaking's use of the term "restricted" options is somewhat misleading to the reader who is accustomed to distinguishing qualified from restricted options for federal tax purposes.

Undertaking C aside, a general principle established in the securities laws is that persons acquiring shares from an issuer in a registered offering are entitled to resell such shares without further registration and without limitation unless such person is in a position to "control" the issuer, as that term has been developed by regulatory and judicial interpretation, or is an "underwriter" as defined by section 2 (11) of the Act. The statutory basis for this principle and the special rules applicable to "control" persons and underwriters lies in section 4(1) of the Act which provides that the registration requirement does not apply to "transactions by any person other than an issuer, underwriter or dealer." [Emphasis added]

The "control" person is assumed to be the "issuer" for purposes of section 4(1) in order to prevent the indirect public distribution of shares through the circumvention of formal sale by the issuer. Another policy indirectly served by this construction of the Act is to limit the possibility that the control person may use his special relationship to the issuer for his own benefit and to the detriment of the purchaser. This special treatment of control persons is demonstrated by paragraph (e)(1) of Rule 144, which subjects all securities of an issuer held by a control person to the rule, whereas only "restricted" securities held by other persons are subject to the Rule.

An "underwriter" is defined by the Act to include any person who acquires securities from an issuer "with a view to" sale or sells for an issuer "in connection with" the "distribution" of securities. Once again, the Act is designed to prevent circumvention of the registration provision through the device of a purchase of securities from the issuer and resale thereafter as part of a plan of distribution.

Employees acquiring shares pursuant to an S-8 registration statement are free to resell such shares without limitation, as any other person acquiring shares in a registered offering, unless they are control persons or underwriters. However, control persons and underwriters should be subject to special rules consistent with the
general purposes and functions of the S-8 form to prevent circum-
vention of registration policies.

**Sales By Underwriters**

The manner of sale of shares acquired through exercise of op-
tions is dependent upon whether shares are sold in the over-the-
counter market or on a national securities exchange. According to
Undertaking C (a), any sale effected by an underwriter other than
on a national securities exchange must be made by means of a
prospectus including certain stated types of information required
by Form S-1. This amended prospectus is delivered to the purchas-
ers by the underwriter. In other words, the sale by an underwriter
in the over-the-counter market involves delivery of two prospec-
tuses: an S-8 prospectus to the underwriter prior to exercise and a
combined S-8/S-1 prospectus to the public upon resale. Underwri-
ters may sell shares on an exchange without such an amendment
to the S-8 prospectus.

Nevertheless, the staff has advised issuers that in the event
shares are sold by underwriters on a national securities exchange
the S-8 prospectus must contain a statement to the effect that the
prospectus may be used for such purpose. This writer does not
believe that such a statement serves any useful purpose except to
notify the Commission and optionees that a substantial number of
optioned shares may be acquired by one person. Those persons
purchasing shares from the underwriter on an exchange do not
receive a prospectus and would be unaware of the sale by the
underwriter. The disclosure is of no substantial benefit to the other
optionees because the disclosed possibility of sale will not affect
their resale of shares.

In *Digital Information Devices, Inc.* and *Data Packaging
Corporation,* the staff has defined a "statutory underwriter" to
include one who acquires "10% or more of the offering." The staff
has applied this definition in at least one published no-action letter.
In *Spectra-Physics, Inc.* the issuer granted options to purchase
57,882 shares of its common shares to four employees, who did not
control it, which was the maximum number of options to be
granted pursuant to the plan. Three of the persons obtained more
than 10% of the options, with one of the three obtaining options

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for 35,080 shares. The fourth person obtained options for 5,262 shares, less than 10% of the maximum offering. The staff refused to conclude that the optionees would not be deemed to be “underwriters.”

Apparently the rule of “10% of the offering” is applied in less than a literal manner because in Spectra-Physics even the person who received less than 10% of the offering was considered to be an underwriter. The staff probably attributed ownership of all options to each individual in much the same way as, with respect to Rule 144, the sale of shares by persons “acting in concert” are attributed to one another. This rule of interpretation appears justified where, for instance, the persons are united by a common plan of sale. However, in the absence of evidence of concerted action or common control of sale of shares, a rule of attribution should not be applied.

There remains some ambiguity concerning the definition of “offering” as to whether the term refers to the number of options already granted, options which may be granted, or options which have been exercised or may be exercised. The practical differences between these possible definitions is not likely to be significant, but a clarification would provide a guide for issuers in granting options. Moreover, it is unclear whether the 10% standard is applied separately to one of several option plans, or to all option plans as a group.

The staff’s refusal to recognize that any of the optionees in Spectra-Physics were not underwriters would indicate that it is interpreting the term “underwriter” very broadly in light of the fact that one of the optionees would have held less than 2% of shares under all option plans and two others would have owned less than 3%. Although not free from doubt, it would appear that in light of Spectra-Physics, the definitional standard of “10% of the offering” in determining underwriter status is not fixed or exclusive, but merely serves as a means of identifying one instance of “underwriter” status.

**SALES BY CONTROL PERSONS**

Probably the most confusing resale restriction applies to “control” persons. Presumably a person is deemed to be in “control” of an issuer for S-8 purposes in the same manner and to the same extent as for other purposes in the securities law. As provided by Rule 405 under the Act, a person who by reason of “his employment or ownership relationship to the employer possesses, directly
or indirectly, the power to direct or cause the direction of the management and policies of the employer is deemed to be in 'control' of the employer." Undoubtedly, officers and directors and probably beneficial holders of 10% or more of the voting stock of the issuer are "control" persons.\textsuperscript{32}

With regard to sales on an \textit{exchange}, the staff has indicated that shares acquired by such persons pursuant to an S-8 registration are registered securities. Therefore, if there is a "current" prospectus available with respect to such shares, they may not be sold pursuant to Rule 144, but may be sold only pursuant to the S-8 prospectus.\textsuperscript{33} If the Form S-8 is not available for resale purposes because it is not current, Rule 144 would be available for resale, assuming its conditions are met.\textsuperscript{34} In order to be "current," a prospectus must comply with section 10(a)(3) of the Act.

The requirement that the prospectus be "current" was accorded further significance in \textit{Digital Information Services} where the staff stated that "options must not be granted, nor shares issued, under the [option] plan at a time when the prospectus does not meet the requirements of section 10(a)(3) of the 1933 Act." The requirement that a prospectus be "current" for delivery to optionees upon grant or exercise of an option or issuance of shares merely assures that minimal, reasonably recent financial information is furnished optionees who make employment or investment decisions. However, the requirement that a prospectus be current at the time of \textit{resale} by a control person serves little purpose because the control person does not deliver a prospectus to his purchaser.\textsuperscript{35} Thus, there is no reliance by the purchaser upon such current financial information. Perhaps the rationale for the requirement of currency is that at the time of resale it is important that there be available for dissemination to investors generally

\textsuperscript{32} It appears that for purposes of Undertaking C of Form S-8 officers and directors are not deemed merely by reason of their position to be underwriters and the term "underwriter" means persons who own or acquire a certain percentage of ownership of securities as discussed in the text infra. See Tracor, Inc. at note 38, infra.


\textsuperscript{34} See American Standard at note 28, \textit{supra}.

\textsuperscript{35} In a sale of shares effected on a national securities exchange, the seller need only deliver copies of the prospectus relating thereto to the exchange in accordance with Rule 153 under the Act. No such rule applies to sales effected in the over-the-counter market, which is consistent with, or perhaps, is the reason for, the rule that sales effected by a control person in the over-the-counter market may not be sold "pursuant to" the current S-8 prospectus.
(including the purchaser from the control person) relatively recent financial statements. However, as a practical matter, the information disseminated is not furnished directly to the purchaser, who must search elsewhere for such current financial information; such disclosure is hardly adequate.

The fallacy of the "currency" requirement for resale rests upon the theory that a sale is actually being effected "pursuant to" a registration statement. Without delivery of a prospectus to a purchaser, however, resale "pursuant to" a registration statement is a mere fiction which only generates confusion and frustration of the policy objectives which should be furthered upon resale.

To comply with section 10(a)(3) of the Act, the following condition must be met: if the prospectus is more than nine months old, the financial statements contained therein may be no more than sixteen months old. In shelf registrations, such as an S-8, the prospectus may be kept current for use by promptly filing post-effective amendments containing updated financials after the certified financial statements are available. Thus, for example, if the fiscal year of the issuer ends December 31, and financial statements for such year are available on the following March 15, the post-effective amendment containing such financials should be filed and become effective by May 1. In this way, the prospectus will remain current for delivery purposes until the following May 1. This filing schedule may be repeated each year thereafter.

To illustrate the difficulties created by filing post-effective amendments under another time schedule, assume the above December 31 and March 15 dates. If a post-effective amendment containing end-of-the-year financials is instead effective on July 1 of each year, the prospectus will not be current for the period of May 1 - June 30.

With regard to sales by control persons in the over-the-counter market, the staff has taken a somewhat different position. Initially, it had declared that control persons could not resell shares unless they either (1) complied with Undertaking C, or (2) held such shares for two years and sold them pursuant to Rule 154, the predecessor of Rule 144 then in effect. Subsequently, the staff stated that Rule 144 would be available to control persons for sales of shares acquired in connection with an option plan registered on Form S-8. The staff has further stated that with respect to such

36. See note 30, supra.
sales pursuant to Rule 144 the control person need not satisfy the
two-year holding period requirement applicable to shares acquired
without registration.\textsuperscript{38} Resale pursuant to a current S-8 prospectus
is not available to a control person effecting sales in the over-the-
counter market.

However, in \textit{Community Psychiatric Centers},\textsuperscript{39} the president
of an issuer-employer acquired some of its shares in 1970 pursuant
to exercise of options. The staff of the Commission indicated that
resale of shares which had been acquired pursuant to a stock option
plan not covered by a registration statement was subject to all of
the requirements of Rule 144, including the two-year holding re-
quirement. Such shares were "restricted" securities and subject to
the holding period requirement. The shares of the issuer were listed
on a national securities exchange, but the reasoning of the letter
should apply equally to over-the-counter companies.

The following is a summary of the various resale rules, with
citation to published staff positions. All of these positions assume
that the delivery requirements of the S-8 prospectus have been met
with regard to the acquisition of shares by the employee:

A. Sales on a National Securities Exchange:

1. Sales by employees (other than control persons and under-
writers) may be made without further registration and are not
subject to Rule 144.\textsuperscript{40}

2. Sales by control persons must be made pursuant to a cur-
rent S-8 prospectus if available,\textsuperscript{41} or, if unavailable, pursuant to
Rule 144.\textsuperscript{42}

3. Sales by statutory underwriters must be made pursuant to

\textsuperscript{39} [1972-1973 Transfer Binder] ¶78,825 (May 31, 1972). The staff has indicated that if
shares are acquired pursuant to a stock bonus plan which has not been registered under the
Act, such shares may be resold on Form S-16. \textit{See} Nabisco, Inc. [1972-1973 Transfer
Binder] ¶79,008 (October 26, 1972). The staff has also indicated that bonus shares acquired
without registration are "restricted" securities for purposes of Rule 144. \textit{See} Securities Act
Release No. 5243 at note 4, supra. Presumably, the same treatment should be accorded
shares acquired pursuant to options whose grant and exercise have not been subject to
registration under the Act.

\textsuperscript{40} Capitol Industries [1971-1972 Transfer Binder] ¶78,438 (October 7, 1972).
\textsuperscript{41} \textit{See} Delta Airlines, Inc. at note 33, supra and Northrup Stock Option Plans [1972-

\textsuperscript{42} \textit{See} note 24, supra. Presumably, sales by control persons of a listed company would
not be subject to the two-year holding period by analogy to the staff’s position in Tracor,
Inc., at note 38, supra, although the author has not found any published authority discussing
this question directly.
a current S-8 prospectus, which must set forth the use of the prospectus for such purpose.\textsuperscript{43} It is unclear whether Undertaking C would require sales pursuant to the S-8/S-1 prospectus if sales were not made on an exchange.\textsuperscript{44}

B. Sales in the Over-the-Counter Market:

1. Sales by employees may be made without registration and are not subject to Rule 144.\textsuperscript{45}

2. Sales by control persons may be made pursuant to Rule 144,\textsuperscript{46} without compliance with the two-year holding period requirement.\textsuperscript{47} Sales pursuant to the S-8 prospectus are not permitted.

3. Sales by statutory underwriters may be made only by complying with Undertaking C of the S-8 registration statement.\textsuperscript{48}

**SUGGESTED CHANGES OF RESALE RULES**

Undertaking C regarding sales by underwriters and the informal staff policy regarding sales by control persons distinguish sales executed on a national securities exchange from sales in the over-the-counter market. Such a policy may have served substantial purposes years ago when Form S-8 was adopted. At that time, the New York and American stock exchanges, the two largest of the national exchanges, had substantially fewer listed companies than they have today. The exchanges are no longer the exclusive clubs of a decade ago.

\textsuperscript{43} Id.

\textsuperscript{44} By negative inference, Undertaking C seems to state that if the shares are not sold on an exchange an amended S-8/S-1 prospectus would be required and Rule 144 would not be available. However, in American Standard, at note 28, supra, the staff stated in discussing sales by underwriters and control persons: "If the Form S-8 prospectus is not available for such resales, for instance because it is not current or because the resales are to be made otherwise than on a national securities exchange and the prospectus has not been amended to include the additional information required by Undertaking C of Form S-8, Rule 144 would be available for such resales assuming all its conditions are met." On the other hand, in Delta Airlines, Inc. at note 33, supra, the staff stated with respect to sales by control persons: "The securities acquired by the optionees are registered securities and Rule 144 is not available for them. Persons who might be deemed underwriters of such securities would have to furnish an amended registration prospectus which meets the requirements of section 10(a)(3) of the Act." It is difficult to reconcile these two positions and this difficulty demonstrates the problems created by the absence of a sound theoretical basis for the resale rules.

\textsuperscript{45} See note 30, supra.

\textsuperscript{46} See note 37, supra.

\textsuperscript{47} See note 38, supra.

\textsuperscript{48} See notes 31 and 38, supra.
The amendments in 1964 to section 12(g) of the 1934 Act extended the reporting requirements of section 13 to a much broader class of companies than had previously been subject to such requirements. In addition, the over-the-counter market has been dramatically changed by the introduction of the NASDAQ system which enables a broker-dealer to obtain quotations from several sources and which has substantially lessened the differences in bid and asked prices between various market makers.

Today there is extensive discussion of a central market system composed of both listed and unlisted companies, and a recent policy statement of the Commission has approved such a system in principle. Although there remain substantial uncertainties as to the structure of the system, its acceptance recognizes that the gap between sales of shares of listed and unlisted companies will continue to be significantly reduced.

In light of these developments there is serious doubt whether a distinction regarding resale based on the market in which such sale is effected remains relevant. A distinction should no longer be drawn between the markets in which shares are sold; rather the focus of policy and rulemaking should be on preventing or alleviating potential abuses which might arise out of resales, irrespective of where they are executed. Obviously, the interest of controlling persons in keeping the market price of shares at a high price could serve as a temptation to such persons to use their position for their own benefit. Moreover, there is a possibility that increased selling effort will be exerted to sell shares held by a control person. The "growth" or "hot issue" company may spawn option programs resulting in substantial profits for the control person who resells shares. On the other hand, more established companies are likely to be more attentive to the potential effect of option plans on the market price of shares and the need to control potential abuses.

In place of the maze of rules and their exceptions relating to resale by control persons summarized above, the writer would suggest the following procedures applicable to control persons and underwriters of issuers irrespective of whether or not they are listed on an exchange. If an issuer meets the various present requirements for use of an S-7 registration statement (or a similar and perhaps less stringent set of requirements)—a history of reporting

under the 1934 Act, financial and management stability, and history of requisite earnings—its control person or underwriter could sell shares acquired upon exercise of options by compliance with the provisions of Rule 144, except for the two-year holding period.

With respect to a control person or underwriter of an issuer which does not qualify for use of the S-7 prospectus (or similar requirement), such persons, in addition, should be required to hold the shares acquired upon exercise for a period of time of perhaps six months or one year after exercise. This holding period would not apply if the control person or underwriter sold shares by delivering to the purchaser a combined S-8/S-1 prospectus meeting the requirements of Undertaking C which is presently in effect for underwriters who are not selling on an exchange.

This holding period can serve to curtail significant potential abuse created when a control person or underwriter exercises options and promptly thereafter, when the price of his shares has risen, sells the optioned shares at a substantial profit. Because of the special relationship to the issuer-employer of an employee who is a control person or underwriter, it appears to be desirable to require such an employee to hold optioned shares and assume an investment risk for a six or twelve month period. The prevention of this type of manipulation is of greater benefit to the investor who, in the open market and without knowledge of the identity of the seller, purchases shares sold by a control person, than the disclosures of an S-8 prospectus delivered to such investor. Because of the possibilities of abuse or unfairness in the grant, exercise and resale of optioned shares, whether or not intentional, on the part of the control person or underwriter, the optioned shares acquired by him should not be sold in the open market as freely as shares of issuers with more stable histories.

Rule 144 would serve as a more effective means of preventing potential abuses than would a fictional sale “pursuant to” an S-8 or other prospectus (which is limited in its disclosures and not even delivered to purchasers) or, for that matter, even than an S-8 pros-

50. The holding period requirements of Rule 144 per se should not apply to resales by control persons, because the shares were acquired in a public registered offering on Form S-8 and therefore, are not “restricted” securities. However, the Rule’s specific procedures for determining the length of time during which shares have actually been held; e.g., tacking of holding periods or commencement of the holding period from the date of payment, could be adopted in determining how long shares have actually been held. The rules for determining whether Form S-7 may be used by an issuer are compiled in the instructions to the Form, I CCH FED. SEC. L. REP. ¶7190.
pectus which is delivered to purchasers. Rule 144 imposes limitations on the number of shares which may be sold (which presently differ for listed and unlisted companies); the issuer must have publicly made available current information about itself; and sales must be effected in broker's transactions, which limit potential unusual selling efforts on behalf of sellers.

Sales of all shares of the issuer by control persons, irrespective of how acquired, are subject to the limitations of Rule 144 on the number of shares which may be sold by an affiliate in a six-month period, according to paragraph (e)(1) of the Rule. Therefore, to require resales of optioned shares by control persons to comply with the Rule, with necessary modifications for the requisite holding period, would not be grossly contrary to the present policy of the Commission. Generally, the Commission has indicated a preference for sales pursuant to registration statements, with the accompanying delivery of a prospectus, over sales pursuant to Rule 144. This preference reflects the desire of the Commission to assure, to the maximum extent possible, that information concerning a sale and the issuer is disclosed directly by means of a prospectus delivered to a purchaser rather than indirectly under the Rule by reason of publicly available information. Under present rules, this preference is not satisfied because an S-8 prospectus is not delivered to a purchaser by a control person upon resale. Because the S-8 prospectus is designed to avoid the complexities of lengthy disclosures, the policy of extensive disclosure presently and properly yields to the benefits of convenience. Rule 144 would furnish greater protection against market manipulation than the present fictional sale pursuant to the S-8 registration statement for issuers listed on an exchange and, therefore, is preferable.

51. See note 28, supra.
52. In reviewing the requirements of registration of such sales other remedies should not be overlooked which may be applied to prevent sales by "insiders" of a corporation or provide a means for rescinding or recovering profits arising from such sales. Of course, Rule 10b-5 under the Securities Exchange Act of 1934 prohibits fraudulent transaction and provides the public and private remedies for fraudulent sales. In addition with respect to those issuers which are subject to section 16 of that Act, "insiders" (generally officers, directors, and holders of 10% and more of the outstanding shares of equity securities) are required to file with the Securities and Exchange Commission forms indicating acquisitions and dispositions of the issuer's securities. Issuers may also be required to disgorge profits made on sales of securities within six months of purchase. See 2 Loss, SECURITIES REGULATION, 1037-1132 (and supplementary material in 5 Loss 2999-3107), Note, Insider Liability for Short-Swing Profits: The Substance and Function of the Pragmatic Approach, 72 Mich L. Rev. 592 (1974), and Painter, Federal Regulation of Insider Trading (and supplement) (1968).
With respect to resales by underwriters, the present definition of "underwriter" for purposes of Form S-8 does not reflect the effect of such resales on the public market in which the issuer's shares are traded. The policies promoted by the restrictions on sales by underwriters would be better served by modifying the presently unclear definition which relates to the acquisition of "10% or more of the offering." The present test does not relate to the effect on the investing public of the underwriter's sale and whether the requirement of registration of a public offering is circumvented by use of an underwriter as an intermediary between the issuer and the public.

The inappropriateness of the present definition of "underwriter" is illustrated by the following example, which is not atypical. Assume that an issuer has 2,000,000 shares outstanding and has an option plan covering 50,000 shares and all outstanding options for 20,000 shares are exercised by four senior executives. The shares subject to granted options and even the shares which might be issued if all options were granted represent only 1% and 2.5% respectively, of outstanding shares of the issuer. Under present definitions, each of the executives apparently would be an "underwriter" whether such characterization is based on the number of options granted or which might be granted. Yet the number of shares which may be sold to the public is minimal in relation to the total number of shares outstanding. Under the present rules, an option plan covering only a few employees and a small number of shares may be put at a disadvantage relative to a plan covering a larger number of employees and a substantial number of shares. Such a result is incongruous and unnecessary in light of the purposes of the Act.

A more appropriate test for defining an "underwriter" would be based upon the proportion which the shares obtained by the optionee pursuant to all options bears to either an average trading volume figure for a given period of time; e.g., the average weekly volume for the last four weeks, if such statistics are available, or if unavailable, the total number of outstanding shares. In this way, the effects of sales of a substantial number of shares could be gauged. If the holder of optioned shares is entitled to purchase a number of shares in excess of such a minimum number, he would be deemed to be an "underwriter." Of course, if a number of persons obtained total optioned shares exceeding the "underwriter" threshold and if it were established that the group of optionees were acting in concert, the general doctrine of "integration" of
offerings could be asserted by the Commission to determine underwriter status, even though individual optionees might not be "underwriters."

CONCLUSION

The S-8 registration statement serves to accomplish the purposes of the Act in a manner which does not burden the issuer with unnecessary registration effort. The content of the registration statement itself as it relates to option plans and the use of supplementary stockholder reports appear to adequately protect optionees and provide them with timely disclosure. However, after several years of development, the rules concerning resale of shares acquired upon option should be modified along the lines suggested in this article.

Registration of option plans should be effected upon their commencement and prior to grant of options in order to avoid a possible contention by optionees that they were led to rely upon the anticipated value of options without the benefit of adequate disclosure. Prompt registration and disclosure can only advance employer-employee relations and prevent possible violations of the registration and anti-fraud provisions of the securities laws as presently interpreted by the staff of the Commission.

53. The S-8 prospectus might be revised to become useful for resale purposes by expressly incorporating by reference all filings by the issuer under the 1934 Act. This incorporation by reference is required for S-16 prospectus and, in effect, imposes liability under the 1933 Act for material misstatements or omissions which are made in filings under the 1934 Act.