

RULE 144
OPINION



Office of Thrift Supervision
Department of the Treasury

94-CC-08

1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

May 19, 1994

[REDACTED]

Re: Request for Interpretive position under
12 C.F.R. Part 563g
Exemption from the Offering Circular
Requirements for Resales of Shares
Acquired through Employee Benefit Plans

Dear [REDACTED]:

This is in response to your letters dated September 15, and October 8, 1993, submitted on behalf of [REDACTED] (the "Savings Bank"). You asked for an opinion concluding that resales of savings association securities made in accordance with Rule 144¹ of the Securities and Exchange Commission ("SEC") are exempt from the offering circular requirements of the Office of Thrift Supervision's ("OTS") securities offering regulations ("Securities Offering Regulations").² You also asked that we concur in your opinion that shares issued under the Savings Bank's employee benefit plans are not "restricted securities" as defined in Rule 144.

For the reasons explained below, we conclude that resales of savings association securities made in accordance with all of the conditions of Rule 144, and which, therefore, would be exempt under section 4(1) of the Securities Act³, would be exempt from the offering circular requirement of § 563g.2 of the Securities Offering Regulations under § 563g.3(b) of the Securities Offering Regulations. We also concur in your opinion that shares issued under the plans are not "restricted securities."

¹ 17 C.F.R. § 230.144 (1993) ("Persons deemed not to be engaged in a distribution and therefore not underwriters.") ("Rule 144").

² 12 C.F.R. Part 563g (1993).

³ 15 U.S.C. § 77d(1) (Supp. IV 1992).

Background

The Savings Bank is a federally chartered stock savings bank. The Savings Bank's common stock is registered pursuant to 12(g) of the Securities Exchange Act of 1934⁴ and has been traded on a public exchange since July 1990.⁵ As of September 9, 1993, the Savings Bank had 11,273,316 shares of common stock issued and outstanding.

The Savings Bank has adopted, with shareholder approval, two Employee Stock Incentive Plans and a Non-Employee Directors' Stock Incentive Plan (collectively the "Plans"). The Plans issue shares to the Savings Bank's directors, officers and employees pursuant to an exemption from the offering circular requirements.⁶

Under the Employee Stock Incentive Plans, employees, including employee directors, may receive stock options, Stock Appreciation Rights, restricted stock, deferred stock or a combination of these awards. There are 900,000 shares or 8.2% of the Savings Bank's outstanding common stock reserved for issuance under the Employee Stock Incentive Plans.

The Non-Employee Directors' Stock Incentive Plan may grant each non-employee director options to purchase shares of the Savings Bank's common stock at an exercise price equal to 100% of the fair market value of the Savings Bank's common stock at the date of the grant. There are 250,000 shares, or 2.3%, of the Savings Bank's outstanding common stock reserved for issuance under the Non-Employee Directors' Stock Incentive Plan.

Participants in the Plans who desire to resell shares acquired through the Plans have concerns that they may be deemed to be "underwriters" under the Securities Offering Regulations and

⁴ 15 U.S.C. § 781(g) (Supp. IV 1992).

⁵ The Savings Bank's common stock was included for quotation on the NASDAQ from [REDACTED] it was traded on the NASDAQ Small-Cap Market; and [REDACTED] it has been traded on the Nasdaq National Market.

⁶ The offering circular requirements do not apply to an issuer's offer or sale of securities... "[t]o its officers, directors or employees pursuant to an employee benefit plan or a dividend or interest reinvestment plan, and provided that any such plan has been approved by the majority of shareholders present in person or by proxy at an annual or special meeting of the shareholders of the savings association." 12 C.F.R. § 563g.3(g) (1993).

that they would consequently be required to file offering circulars to resell their shares.

Discussion

1. The Securities Offering Regulations

Section 563g.2 of the Securities Offering Regulations prohibits all offers and sales of securities by savings associations unless (1) the offer or sale is accompanied or preceded by an offering circular filed with, and declared effective by the OTS, or (2) an exemption from the offering circular requirement is available.⁷ For purposes of § 563g.2, the term "savings association" includes any "underwriter" participating in the distribution of securities of a savings association.⁸ An "underwriter" generally is defined as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security or participates or has a participation in the direct or indirect underwriting of any such undertaking. . . ."⁹

The Securities Offering Regulations exclude from the definition of the term "underwriter" any person who has continuously held the securities being transferred for a period of two consecutive years, provided that the securities sold in any one transaction must be less than 10 percent of the issued and outstanding securities of the same class. *Id.* § 563g.1(a)(14) (1993) (the "Underwriter Exemption"). The Underwriter Exemption operates as a "safe harbor" because persons who meet this specific test are by definition not subject to the offering circular requirement.

The Underwriter Exemption is not the only exemption from the offering circular requirement.¹⁰ Section 563g.3(b) exempts from the offering circular requirement offers and sales of securities that would be exempt under section 3(1) or section 4 of the Securities Act, by reason of an exemption other than section 3(a)(5) (for regulated savings associations) and section 3(a)(11) (for intrastate offerings). Section 4(1) of the Securities Act¹¹ is pertinent to your inquiry because it exempts "transactions by any person other than an issuer, underwriter, or dealer." Whether

⁷ 12 C.F.R. § 563g.2(a) (1993).

⁸ *Id.* § 563g.1(a)(11) (1993).

⁹ *Id.* § 563g.1(a)(14) (1993).

¹⁰ OTS Op. Chief Counsel, July 10, 1992.

¹¹ 15 U.S.C. § 77d(1) (Supp. IV 1992).

a person falls within one of these exemptions depends on the facts and circumstances surrounding each transaction.¹² Because the determinations under these exemptions are fact-specific, OTS's policy has been to decline to opine on the availability of an exemption from underwriter status outside of the Underwriter Exemption.¹³

You assert that Plan participants wish to rely on section 4(1) of the Securities Act¹⁴ in selling shares acquired through the Plans, and that the most practical means for relying upon section 4(1) would be to resell the securities pursuant to Rule 144.

2. The Securities Act and Rule 144

Section 4(1) of the Securities Act exempts from the registration requirements of the Securities Act transactions "by any person other than an issuer, underwriter, or dealer."¹⁵ Section 4(1) exempts only trading transactions between individual investors with respect to securities already issued and does not exempt distributions by issuers or underwriters.¹⁶ The definition of "underwriter" in the Securities Act¹⁷ is substantially similar to the definition in the Securities Offering

¹² Federal Home Loan Bank Board Resolution No. 86-200, February 28, 1986, 51 Fed. Reg. 8184, 8185 (1986).

¹³ OTS Op. Chief Counsel, December 29, 1993 at 5; OTS Op. Chief Counsel, July 10, 1992 at 3.

¹⁴ 15 U.S.C. § 77d(1) (Supp. IV 1992).

¹⁵ Id. § 77d(1).

¹⁶ Notice of Adoption of Rule 144 Relating to the Definition of the Terms "Underwriter" in Sections 4(1) and 2(11) and "Brokers' Transactions" in Section 4(4) of the Securities Act of 1933, Adoption of Form 144, and Rescission of Rules 154 and 155 under that Act, Securities Act Release No. 5223, 17 C.F.R. § 231.6188, [1971-72 Transfer Binder] Fed. Sec. L. Rep. (CCH) Para. 78,487, p. 81,049, at 81,052 (Jan. 11, 1972).

¹⁷ 15 U.S.C. § 77b(11). "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission." Id.

Regulations.¹⁸ Individual investors are underwriters if they act as "links in a chain of transactions through which securities move from an issuer to the public."¹⁹

Prior to the adoption of Rule 144, in determining whether a seller of securities was an "underwriter" under the Securities Act, the staff of the SEC looked to subsequent acts and circumstances to determine whether the seller had acquired his or her shares "with a view to distribution" at the time of acquisition (much like the process the OTS uses to make that determination under the Securities Offering Regulations²⁰). The SEC staff examined factors such as the length of time the person had held the securities ("holding period") and whether there had been an unforeseeable change in the circumstances of the holder. The SEC concluded that reliance upon such factors did not assure adequate protection of investors through the maintenance of informed trading markets and led to uncertainty in the application of the registration provisions of the Securities Act.²¹

In 1972, the SEC adopted Rule 144 under Section 4(1) of the Securities Act, among other authorities. Rule 144 provides a "safe harbor" from the definition of "underwriter" under section 4(1) of the Securities Act for sales of securities by any "affiliate" (as defined in Rule 144) or any other person who sells "restricted securities" as defined in Rule 144.²² The rule

¹⁸ 12 C.F.R. § 563g.1(a)(14) (1993).

¹⁹ Securities Act Release No. 5223, supra note 16, at 81,053.

²⁰ See FHLBB Resolution No. 86-200, February 28, 1986, 51 Fed. Reg. 8184, 8185 (1986). ("Factors to be considered in making such a determination include, but are not limited to, the length of time the purchaser has held the securities prior to re-sale, whether there has been an unforeseeable change in the circumstances of the purchaser, and whether the purchaser has assumed the economic risks of the investment, and therefore, is not acting as a conduit for sales to the public of the securities, directly or indirectly, on behalf of the issuer.")

²¹ Securities Act Release No. 5223, supra note 16, at 81,053.

²² See 17 C.F.R. § 230.144(b); 17 C.F.R. § 230.144(a)(3) (1993). "Restricted securities" are defined as securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering, or securities acquired from the issuer that are subject to the resale limitations of Regulation D or Rule 701(c) under the Securities Act, or securities that are subject to the resale limitations of Regulation D and are acquired in a transaction or chain of transactions not (continued)

provides that a person shall not be deemed to be "engaged in a distribution," and thus shall not be deemed to be an "underwriter" for purposes of Section 4(1) of the Securities Act, if all of the provisions of the rule are satisfied in conducting resales of securities.²³ Generally, the rule requires a two-year holding period for restricted securities.²⁴ Even after the two-year holding period has been satisfied, Rule 144 limits the amount of securities which may be sold,²⁵ specifies the manner in which the securities must be sold,²⁶ and requires that there be adequate public information about the issuer available in the marketplace.²⁷

Through the provisions of 17 C.F.R. § 230.144(c), Rule 144 requires full and fair disclosure of the character of securities sold in trading transactions. Rule 144 also creates greater certainty and predictability in the application of the registration provisions of the Securities Act by replacing subjective standards with more objective ones.²⁸

In adopting the rule, the SEC noted that, while Rule 144 is not an exclusive means for reselling restricted securities and securities held by affiliates without registration, persons who offer or sell restricted securities without complying with Rule 144 were put on notice by the Commission that in view of the broad remedial purposes of the Act and of public policy which strongly supports registration, they will have a substantial burden of proof in establishing that an exemption from registration is available for such offers or sales and that such persons and the brokers and other persons who participate in the transactions do so at their risk.²⁹

involving any public offering or securities that are acquired in a transaction or chain of transactions not involving any public offering.

²³ Preliminary Note to Rule 144, "Persons Deemed Not to Be Engaged in a Distribution and Therefore Not Underwriters", *Id.*, § 230.144 (1993) and 17 C.F.R. § 230.144(b) (1993).

²⁴ 17 C.F.R. § 230.144(d)(1) (1993).

²⁵ 17 C.F.R. § 230.144(e) (1993).

²⁶ *Id.* § 230.144(f) (1993).

²⁷ *Id.* § 230.144(c) (1993).

²⁸ Securities Act Release No. 5223, *supra* note 16, at 81,053.

²⁹ *Id.* at 81,050.

3. Differences Between the Underwriter Exemption and Rule 144

The Underwriter Exemption differs from Rule 144 in several respects. First, the Underwriter Exemption does not distinguish between restricted and unrestricted securities. Second, the Underwriter Exemption treats affiliates and nonaffiliates of an issuer alike. Third, the aggregate amount of securities a person may sell in any one transaction under the Underwriter Exemption is greater than the amounts of securities a person may sell under Rule 144. Fourth, the Underwriter Exemption does not require information on the issuer to be publicly available. Fifth, the Underwriter Exemption has no exceptions to the two-year holding period. In contrast, Rule 144 does not apply the two-year holding period in all cases.³⁰ In this respect, the Underwriter Exemption can be more restrictive than Rule 144.

The Federal Home Loan Bank Board ("FHLBB"), OTS's predecessor agency, incorporated the Underwriter Exemption as a safe-harbor directly into the definition of "underwriter"³¹ in the Securities Offering Regulations instead of promulgating a separate regulation similar to Rule 144.³² Since the adoption of the Securities Offering Regulations, the FHLBB and the OTS have advised that resales of securities made pursuant to the requirements of Rule 144 do not qualify for an exception from the Underwriter Exemption.³³ We continue to believe that resales of securities made pursuant to Rule 144 do not qualify for exemption from the offering circular requirement of § 563g.2 under the Underwriter Exemption. However, the differences noted above, and particularly the strict two-year holding period in the Underwriter Exemption, have created a significant obstacle for persons seeking to sell savings association securities, vis-a-vis persons seeking to sell securities of a corporation subject to the Securities Act, who would not have to comply with the two-year holding period under Rule 144.

³⁰ The two-year holding period in Rule 144, 17 C.F.R. § 230.144(d) (1993), does not apply if the securities are not restricted. See also *infra* note 39 and accompanying text.

³¹ 12 C.F.R. § 563g.1(a)(14) (1993).

³² FHLBB Resolution No. 86-200, February 28, 1986, 51 Fed. Reg. 8184 - 8185 (1986) ("Instead of promulgating a separate regulation similar to the Commission's Rule 144, the Board has decided to incorporate a safe-harbor directly into its definition of 'underwriter.'").

³³ See, e.g., OTS Op. Chief Counsel, July 10, 1992 at 1.

4. Relationship Between Rule 144 and the OTS Securities Offering Regulations

Section 563g.3(b) of the Securities Offering Regulations exempts from the offering circular requirement offers and sales of securities that would be exempt under section 4 of the Securities Act. Section 4(1) of the Securities Act³⁴ exempts, among other things, transactions by any person other than an underwriter as defined in section 2(11) of the Securities Act.³⁵ After carefully reviewing OTS's experience under the Underwriter Exemption, the significant obstacle presented by the two-year holding period in the Underwriter Exemption, Rule 144 and the SEC's experience with Rule 144 since 1972, OTS now concludes that a person who offers or sells securities in compliance with the stringent requirements of Rule 144 qualifies for an exemption under section 4(1) of the Securities Act and, therefore, for an exemption under 12 C.F.R. § 563g.3(b) (1993). Accordingly, a person may sell those securities without complying with the offering circular requirement of 12 C.F.R. § 563g.2 (1993). OTS will follow SEC opinions, releases and "no-action" positions in determining whether a person has complied with Rule 144.

5. Restricted Securities

You also asked whether shares issued under the Plans would be considered "restricted securities" within the meaning of Rule 144.³⁶

The SEC does not treat securities received by non-affiliates under employee benefit plans (such as the Plans) as "restricted securities" for purposes of Rule 144 if (1) the issuer is a reporting company under the Securities Exchange Act of 1934; (2) the stock being distributed is actively traded in the open market, and (3) the number of shares being distributed is relatively small in relation to the number of outstanding shares of that class.³⁷

³⁴ 15 U.S.C. § 77d(1) (Supp. IV 1992).

³⁵ 15 U.S.C. § 77b(11) (Supp. IV 1992). The definition of the term "underwriter" in the Securities Offering Regulation, 12 C.F.R. § 563g.1(a)(14), is substantially similar to the definition in section 2(11) of the Securities Act.

³⁶ Supra, note 22.

³⁷ Employee Benefit Plans, Securities Act Release No. 6188, 17 C.F.R. § 231.6188, Fed. Sec. L. Rep. (CCH) Vol. I, Para. 1051 at p. 2073 (Feb. 1, 1980). But see Employee Benefit Plans, Securities Act Release No. 6867, 17 C.F.R. § 231.6867, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) Para. 84,605, p. 80,037 at 80,849, n. 128 (June 6, 1990) ("...effective as of June 20, 1989, with (continued)

You represent that all of the above conditions will be met in conducting the resales by Plan participants. If those conditions are met, we would concur in your position that the shares are not "restricted securities" for purposes of Rule 144.

Consistent with the SEC's position on this issue, resales of non-restricted shares by an "affiliate"³⁸ must be made either pursuant to a registration statement/offering circular or in compliance with all of the conditions of Rule 144 except for the two-year holding period requirement.³⁹

Conclusion

After careful consideration, we conclude that persons who resell savings association securities acquired through employee benefit plans in accordance with the conditions of Rule 144 are exempt from the offering circular requirement of § 563g.2 of the Securities Offering Regulation under § 563g.3(b) of the Securities Offering Regulation. Also, based upon the information and representations contained in your letter, we concur in your position that shares acquired through the Plans are not

respect to all future issuances of securities of 'top hat' stock option plans sold to executives pursuant to an exemption from registration under section 4(2) (15 U.S.C. § 77d(2)) of the Securities Act or Regulation D thereunder, it is the staff's position that such securities are 'restricted securities' as defined by rule 144 as are all securities issued in reliance upon an exemption from registration under section 4(2) or Regulations [sic] D."

³⁸ 17 C.F.R. § 230.144(a)(1) (1993). An "affiliate" of an issuer is "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, such issuer."


³⁹ See Securities Act Release No. 6099, 17 C.F.R. § 231.6099, Fed. Sec. L. Rep. (CCH) Vol. I, Para. 2705H, p. 2819-3 at 2819-7 (Aug. 8, 1979); Securities Act Release No. 6281, 17 C. F. R. § 231.6281, Fed. Sec. L. Rep. (CCH) Vol. I, Para. 1051, p. 2073-30 at 2073-39 (Jan. 15, 1981) ("With respect to resales by affiliates, the staff indicated in Release 6188 that, even when the three conditions described above are satisfied, resales by such persons would continue to be subject to registration in the absence of an available exemption, such as that provided by Rule 144. In this regard, the staff also has stated that if the three conditions are complied with the securities involved will not be considered 'restricted securities' under Rule 144. [Footnote omitted]. As a result, affiliates may disregard the two-year holding period requirement of Rule 144 in the event they choose to rely on that rule for the resale of their securities.")

"restricted securities" for purposes of Rule 144 if the resales are effected as represented in your letter.

In reaching the foregoing conclusions, we have relied on the factual representations contained in the materials submitted to us. Our positions depend on the accuracy and completeness of those representations. Any material change in facts or circumstances from those set forth in your letter could result in conclusions different from those expressed herein.

If you have any questions concerning the foregoing, please contact Jeffrey Mooney, Senior Attorney, at (202) 906-6549 or Deborah Silberman, Assistant Chief Counsel, at (202) 906-7013.

Sincerely,


Carolyn B. Lieberman
Acting Chief Counsel

cc: Regional Counsel
Regional Director
Southeast Regional Office

David Enzel

V. Gerard Comizio
CASD