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Securities Act Interpretive Statement - 06

RE: RCW 21.20.310(10) – Securities Exemption for Employee Benefit Plans

This Interpretive Statement addresses commonly asked questions regarding the employee benefit plan exemption at RCW 21.20.310(10).

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

Question No. 1: Permitted Beneficiaries

To what extent does RCW 21.20.310(10) exempt securities issued in connection with an employee benefit plan to persons who are not employees?

Discussion:

The Securities Administrator frequently receives inquiries regarding employee benefit plans that include non-employees such as consultants, independent contractors, agents, or customers. With respect to whom the securities may be issued under RCW 21.20.310(10), the Securities Division interprets the exemption consistent with the provisions in Rule 701(c) under the Securities Act of 1933. Rule 701(c) exempts securities issued pursuant to written compensatory benefit plans to "employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders."

Pursuant to Rule 701(c)(1), the issuer may use the exemption for securities issued to consultants and advisors only if:

- i. The consultants or advisors are natural persons;
- ii. The consultants or advisors provide *bona fide* services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and
- iii. The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.

In addition, we interpret RCW 21.20.310(10) consistent with the provisions in Rule 701(c) that pertain to *former* employees, directors, general partners, trustees, officers, consultants and advisors. Under Rule 701(c), the issuer may use the exemption for securities issued to these persons only if they were employed by or providing services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent at the time the securities were offered.

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

Question 2: Applicable Entity

Does the Securities Division interpret RCW 21.20.310(10) consistent with Rule 701 under the Securities Act of 1933 with respect to the entity for which a person must be an employee, director, general partner, trustee, officer, consultant, or advisor?

Discussion:

Yes. The Division interprets RCW 21.20.310(10) consistent with Rule 701(c) under the Securities Act of 1933, which exempts certain securities issued under a written compensatory benefit plan to certain persons. Under Rule 701(c), a written compensatory benefit plan is any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan established by:

The issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders.

If the securities qualify for the federal exemption under Rule 701, the securities will qualify for the exemption under RCW 21.20.310(10). However, please be aware that the issuer may need to make a notice filing in Washington.

Question No. 3: Acceleration of Effectiveness

Under what circumstances will the Administrator accelerate the 30-day waiting period for employee benefit plans that must make a notice filing with the Division to utilize the exemption under RCW 21.20.310(10)?

Discussion:

It is the policy of the Securities Division to waive the remainder of the 30-day waiting period as of the date the Division issues the letter acknowledging the effectiveness of the exemption. We typically process an exemption filing and issue the acknowledgment several days after we receive the filing.

Question No. 4: Consequences of Late Notice Filing

What are the consequences of a late notice filing?

Discussion:

Pursuant to RCW 21.20.310(10), certain qualified plans are not required to notice file to claim the exemption. Other plans must file 30 days before offering the plan to beneficiaries in Washington. In the event of a late notice filing, "the director may upon application, for good cause excuse such late filing if he or she finds it in the public interest to grant such relief." As discussed in Question 3 above, the Administrator routinely accelerates the 30-day waiting period. Where securities have been issued prior to notice filing, the Administrator will typically acknowledge the exemption as to issuances on or after the date the Administrator issues the acknowledgment. With regard to the prior issuances, the Administrator will typically take no action to assert any violation of the registration sections of the state Securities Act of Washington. The Division will not, however, express an opinion regarding any potential civil liability in connection with those transactions.

Question No. 5: Omnibus Plans

- a. Is the exemption at RCW 21.20.310(10) available for an omnibus employee benefit plan that provides for the issuance of qualified incentive stock options and non-qualified restricted stock units (RSUs), performance share units (PSUs), restricted stock, or other forms of securities?

Short Answer: Yes.

- b. Is the issuer required to make a notice filing for this plan?

Short Answer: Yes.

Discussion:

The exemption at RCW 21.20.310(10) applies to “any security issued in connection with” an employee’s stock purchase, savings, pension, profit, or similar benefit plan. This includes securities of all types issued in connection with both qualified and non-qualified employee benefit plans. Therefore, the issuer may utilize the exemption for an omnibus plan.

Generally, an issuer must make a notice filing to claim the exemption, unless an exception is available. RCW 21.20.310(10) excepts the following plans from the notice filing requirement:

1. A pension, profit sharing, or stock bonus plan that meets the requirements for qualification under Section 401 of the Internal Revenue Code;
2. An incentive stock option plan under Section 422 of the Internal Revenue Code;
3. A non-qualified incentive stock option plan adopted with or as a supplement to an incentive stock option plan under Section 422 of the Internal Revenue Code; and
4. An employee stock purchase plan under Section 423 of the Internal Revenue Code.

For the purpose of the question presented, we assume that an omnibus plan does not comply with Section 401 or Section 423 of the Internal Revenue Code. Washington does not require a notice filing for a non-qualified incentive stock option plan adopted with or as a supplement to an incentive stock option plan under Section 422 of the Internal Revenue Code. However, the omnibus plan described in the question presented is not limited to qualified incentive stock options and non-qualified incentive stock options; it includes additional types of securities. Therefore, the omnibus plan does not fit into an exception, and the issuer must make a notice filing to claim the exemption.

Question 6: Amended Plans

We previously made a filing to claim the exemption at RCW 21.20.310(10), and have now amended our employee benefit plan. Do we need to make a new notice filing in Washington?

Discussion:

An issuer that previously made a notice filing pursuant to RCW 21.20.310(10) should file an updated copy of the employee benefit plan if the issuer has made any material changes to the plan. The issuer should submit the amended plan to the Securities Division with a cover letter that identifies the existing file number.

However, if the issuer has adopted a new plan, the issuer should make a new notice filing.

Adopted: January 1, 1991; As amended January 1, 1996 and February 11, 2022.

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

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