

Westlaw

1983 WL 28259

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(Cite as: 1983 WL 28259 (S.E.C. No - Action Letter))

(SEC No-Action Letter)

*1 American Council of Life Insurance
Publicly Available May 10, 1983

SEC LETTER

1933 Act / s 2(11)

May 10, 1983

Publicly Available May 10, 1983

Mr. Robert S. McConnaughey

Associate General Counsel

American Council of Life Insurance

1850 K Street, N.W.

Washington, D.C. 20006

Re: Section 2(11) of the Securities Act of 1933

Dear Mr. McConnaughey:

In your letter dated April 27, 1983, you inquire about the operation of Section 2(11) of the Securities Act of 1933 with respect to the purchase by insurance companies and similar institutional investors of significant percentages of registered offerings. In this regard, you raise a question as to whether, under the current law and existing judicial and administrative interpretations, such institutional investors purchasing substantial amounts of securities directly from an issuer, may be considered underwriters under Section 2(11).

You assert that the nature of the business of these institutional investors differs significantly from that of an underwriter as contemplated by Section 2(11). In particular, you note that underwriters act as conduits of securities from an issuer to investors, while the business of an insurance company and similar institutional investors is to invest funds entrusted to them. The question is whether the purchase is made as an investor or as a conduit for further distribution. Thus, underwriters acquire securities as participants in distributions of securities, while insurance companies and similar institutional

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investors act as purchasers of securities. Moreover, unlike underwriters, which seek to reduce market risk in the performance of their function as a conduit, such institutional investors assume the market risk associated with an investment. In light of these distinctions, you express the view that ordinarily it is inappropriate to treat insurance companies and similar institutional investors as underwriters when they purchase all or a significant percentage of registered offerings of securities.

Inquiries regarding the application of Section 2(11) require an examination of all the facts and circumstances surrounding a particular transaction. Generally, the Division does not provide advice on particular transactions because the parties are in possession of all the details concerning the transaction, and thus are in a better position to make the judgment about whether Section 2(11) applies. Nonetheless, the Division agrees with your view that insurance companies and similar institutional investors generally should not be deemed underwriters under Section 2(11) with regard to the purchase of large amounts of registered securities provided such securities are acquired in the ordinary course of their business from the issuer or underwriter of those securities and such purchasers have no arrangement with any person to participate in the distribution of such securities.

Sincerely,

Lee B. Spencer, Jr.

*2 Director

LETTER TO SEC

April 27, 1983

Mr. Lee Spencer

Director

Division of Corporation Finance

Securities and Exchange Commission

450 Fifth Street, NW

Washington, D.C. 20549

Re: Securities Act of 1933

Section 2(11)--"Underwriter"

Dear Mr. Spencer:

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The purpose of this letter is to determine whether the Commission staff agrees with our opinion that a life insurance company, a pension or employee benefit plan managed by a life insurance company, or a similar institutional investor is not an "underwriter" as that term is used in the Securities Act of 1933 (the "Securities Act") with regard to registered securities acquired in the ordinary course of the business of such investor from the issuer of or an underwriter of those securities so long as such investor has no arrangement with any person to underwrite or participate in the underwriting of such securities.

For a period beginning sometime in the mid-1960s and extending to the mid-1970s, the Commission staff employed, in one form or another, a "rule of thumb" pursuant to which any person purchasing a significant amount of the securities issued in any registered offering was subject to a presumption that such person was an underwriter with regard to those securities. [FN1] The method of determining the amount of securities necessary to bring one within this "presumptive underwriter" doctrine apparently varied. [FN2]

FN1 See, Nathan, Presumptive Underwriters The Review of Securities Regulation, Vol. 8, No. 13, 881 (July 24, 1975).

FN2 Nathan, supra note 1.

End of Footnote(s).

While the "presumptive underwriter" doctrine was never formally set forth as Commission policy, the doctrine became well entrenched in the lore of the securities bar and the financial community and has survived to influence the business practices of life insurance companies, pension and employee benefit plans managed by life insurance companies, and similar institutional investors. Of course, status as an underwriter carries with it significant burdens, liabilities, and responsibilities. To avoid even the possibility of incurring these problems as a result of the presumptive underwriter doctrine, life insurance companies, pension and employee benefit plans managed by life insurance companies, and similar institutional investors have significantly limited their purchases of registered securities in public offerings. We believe that continuing this practice of arbitrarily limiting purchases in public offerings is neither necessary nor in the public interest.

The nature of the business of many institutional investors such as insurance companies and pension and employee benefit plans differs significantly from that of an "underwriter," even under the broad interpretation that term is given under the Securities Act. Whereas an underwriter functions as a conduit of securities from the issuer of those securities to investors, the business of such institutional investors is to invest, directly, through a general account, or through a separate managed account, funds entrusted to them in order to meet contractual obligations which normally will arise upon the occurrence of future events. For example, pursuant to a conventional life insurance policy, the insurer guarantees to pay to the beneficiary a specified amount upon the death of

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the insured. In the case of annuity policies and most retirement or employee benefit plans, the insurance company or plan guarantees to pay certain amounts to the beneficiaries on the occurrence of specified events, such as, for example, retirement, the passage of a specified number of years, or disability. Unlike underwriters, which seek to minimize market risk in performing their conduit function and cannot be said to truly invest in the securities they underwrite, this type of institutional investor invests in securities and accepts the market risk involved in such investments.

*3 Although insurance companies and pension and employee benefit plans managed by insurance companies purchase securities as investments, it is imperative that such investments be sufficiently liquid to meet foreseeable obligations and also unforeseen demands. This need for portfolio liquidity requires that such institutional investor be reasonably certain when purchasing securities whether, and under what circumstances, it will be able to resell such securities. Such reasonable certainty cannot be achieved so long as Commission policy remains unclear concerning the underwriter status of such financial institutions should they purchase significant quantities of registered securities from issuers or underwriters in registered offerings.

We do not believe that it will ordinarily be appropriate to impose underwriter's obligations and liabilities upon institutional investors of the type discussed even when they purchase all or a significant percentage of a registered offering of securities. Such institutions are, in the ordinary course of their business, investors. To impose underwriter status on investors because they purchase large amounts of securities is not consistent with the purposes of the Securities Act and also has the effect of inhibiting the participation of such investors in registered securities offerings, thereby limiting the access of issuers to large amounts of capital.

We are of the opinion that a life insurance company, a pension or employee benefit plan managed by a life insurance company, or a similar institutional investor is not an underwriter with regard to registered securities acquired in the ordinary course of the business of such investor from the issuer of or an underwriter of those securities so long as such investor has no arrangement with any person to underwrite or participate in the underwriting of such securities. We would very much appreciate your letting us know that you concur with our opinion.

Sincerely,
Robert S. McConnaughey

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