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EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

SECURITIES DIVISION
Office: (602) 542-4242
FAX: (602) 542-3583

April 5, 1993

Mr. J. Scott Pusey
Morgan, Lewis & Bockius
101 Park Avenue
New York, New York 10178

RE: Dean Witter Financial Services Group Inc. Capital Accumulation Plan
No Action Request
A.R.S. § 44-1801(22)

Dear Mr. Pusey:

On the basis of the facts set forth in your letter of March 12, 1993, the original letters to the SEC dated November 14, 1984 and December 19, 1984 respectively, the SEC no enforcement recommendation dated February 4, 1985, the Illinois Securities Department no enforcement recommendation dated December 2, 1992 and in reliance upon your opinion as counsel, the Securities Division is of the opinion that the interests in the above-mentioned plan are "securities" under A.R.S. § 44-1801(22). Therefore, as such they are required to be registered pursuant to A.R.S. § 44-1841, unless they qualify for an exemption.

As was discussed with you on the telephone on March 5, 1993, there are several exemptions which your clients may wish to consider. The Division suggested that you consider R14-4-101, R14-4-102, A.R.S. § 44-1844(1) and R14-4-126. As was stated to you at that time, these exemptions are merely a suggestion. It is up to you and your client to determine the specific applicability of any of these exemptions.

Should you and your client feel that one of these exemptions is applicable, please note that the exemption would apply only to the registration requirements of the Act; the anti-fraud provisions of the Act continue to be applicable.

As this position is premised upon the facts set forth in your letter, it should not be relied on for any other set of facts or by any other person.

We have attached photocopies of your letter. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

DEE RIDDELL HARRIS
Director of Securities

DRH:ph

Enclosure

MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
101 PARK AVENUE
NEW YORK, NEW YORK 10178
TELEPHONE (212) 309-6000
FAX (212) 309-6273

PHILADELPHIA
LOS ANGELES
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FRANKFURT

WASHINGTON
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SAN DIEGO
BRUSSELS
TOKYO

J. SCOTT PUSEY
DIAL DIRECT (212) 309-6073

March 12, 1993

VIA COURIER

State of Arizona
Corporation Commission,
Securities Division
1200 West Washington Street,
Suite 201
Phoenix, AZ 85007
Attn: No Action Request

Re: Request for No Action Letter

Dear Sirs:

We reference the enclosed Disclosure Memorandum that describes the interests (the "Interests") available to certain employees, directors and persons affiliated with Dean Witter, Discover & Co. (f/k/a Dean Witter Financial Services Group Inc.), a Delaware corporation ("DWDC") or its subsidiaries under the Dean Witter Financial Services Group Inc. Capital Accumulation Plan, as amended.

Dean Witter Reynolds Inc. ("DWR") requests your written statement as to whether the Department would commence any enforcement action against DWR with respect to the Interests. The relevant sections of the Arizona Blue Sky Law are Sections 44-1801.22 and 44-1841.

We refer you to the Disclosure Memorandum for a detailed factual explanation of the Plan and the Interests. We also refer you to the Dean Witter Reynolds Inc., SEC No-Action Letter (March 4, 1985) (the "Letter"), a copy of which is enclosed herewith, for a discussion of current statutes, rules and legal principles relevant to the facts set forth in the Disclosure Memorandum. Also enclosed is the letter dated December 3, 1992 of the Securities Department of the Office of the Secretary of State of Illinois (the "Illinois Letter").

The Letter sets forth the legal arguments under the federal securities laws and relevant case law as to whether instruments such as the Interests are deemed to be "securities" within the meaning of federal securities laws. Because we are not lawyers admitted to practice in Arizona, we are unable to

express any opinion as to the applicability of the tests and rules set forth in the Letter to or under the Arizona Blue Sky Law or Regulations.

The Illinois Letter sets forth the no action position of the Securities Department of Illinois with regard to the Interests. The Illinois Letter is based on the position that the Interests do not constitute "securities" as defined in the Illinois Blue Sky Laws.

DWR represents that there are no actions, suits or proceedings pending or to the knowledge of DWR, threatened in any court or before any regulatory commission, board or other administrative entity of the United States or of any state (except for other pending requests for interpretive statements or no action positions or requests for exemption from State Blue Sky laws) which relate directly or indirectly to the Plan, the Interests or to the facts set forth in the Disclosure Memorandum.

DWR represents that eligible employees in Arizona are currently not enrolled in the Plan and as of the date hereof are only eligible to enroll in the Plan.

Only DWDC and its subsidiaries and their respective directors, officers and employees will rely on your response to this request. Such parties understand that they may only rely on your response to the extent possible under the Blue Sky Laws of Arizona and under specific terms of such response.

Please be advised that there is approximately one eligible employee who resides in Arizona out of a total of 106 eligible employees under the Plan. Approximately 91 eligible employees reside in Illinois.

We have enclosed a check for $200 payable to the Securities Division State of Arizona Corporate Commission in connection with this request.

Your prompt response to this request is greatly appreciated.

Very truly yours,

J. Scott Pusey

JSP
Enclosure
cc: David M. Stolow
Robert C. Mendelson

1985 SEC No-Act. LEXIS 1778

Securities Act of 1933 -- Section 2(3)

Mar 4, 1985

[*1] Dean Witter Financial Services Inc.

TOTAL NUMBER OF LETTERS: 3

SEC-REPLY-1: SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
February 4, 1985
RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE

Re: Dean Witter Reynolds, Inc. (the "Company")
Incoming letters dated November 14 and December 13, 1984

On the basis of the facts presented and policy considerations, but without necessarily agreeing with your legal analysis, this Division will not recommend any enforcement action to the Commission if the Company implements its voluntary unfunded deferred compensation plan as proposed without registration under the 1933 Act.

Because the above position is based upon the representations made to the Division in your letters, it should be noted that any different facts or circumstances might require a different conclusion. Further, this response only expresses the Division's position on enforcement action and does not purport to express any legal conclusion on the questions presented.

Sincerely,
Jan Aalbregtse
Special Counsel

INQUIRY-1: WILLKIE FARR & GALLAGHER
ONE CITICORP CENTER
153 EAST 53RD STREET
NEW YORK, N.Y. 10022
(212) 935-8000
December 13, 1984

Mr. John C. Bryce
Room 3083
Division of Corporation [*2] Finance
Securities and Exchange Commission
Washington, D.C. 20549

Re: Dean Witter Financial Services Inc.
Deferred Compensation Plan

Dear Mr. Bryce:

Pursuant to our telephone conversation yesterday, I am enclosing herewith a revised marked copy of the Dean Witter Financial Services Inc. Deferred

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Services of Mead Data Central, Inc.

Compensation Plan (the "Plan"). Except as noted below, the markings indicate changes made at the request of the New York Stock Exchange, the Chicago Board of Trade or the Chicago Mercantile Exchange in connection with their review of the subordination feature of the Plan. The insert on the last line on page 5 of the words "or decrease" and the changes noted on page 9 were made to correct inadevertent omissions in the prior draft.

Please note that the change on page 9 clarifies the point you raised as to when a participant would be paid any amounts during his employment period. A participant is entitled to elect to have all of a portion of his deferred compensation account (determines as of the last day of the calendar year) paid out in one or two months (excluding January) of the following year or in January of the second calendar year following the date of his election. Thus, a [*3] participant may continuously defer the receipt of any payment credited to his deferred compensation account by electing at the end of each year to have the entire amount deferred until January of the second following calendar year. To illustrate, if a participant had $10,000 credited to his account as of December 31, 19184 and elected to have such amount paid out in January 1986, in December 1985, prior to any payment, he could again elect to have that $10,000 paid out in January 1987, thus revoking his earlier election and deferring payment for another year. This process could be repeated indefinitely during the employment period, thus causing all credited amounts to be deferred.

This will also confirm that Dean Witter Reynolds Inc. has distributed to each participant under the Plan a memorandum describing the proposed subordination feature of the Plan and the effect thereof upon the right of a participant to receive amounts credited to his account under the Plan.

Finally, please be advised that the income eligibility threshold for the Plan for 1985 has been fixed at $150,000 per annum.

Please feel free to call me if I may be of any further assistance. As I mentioned to [*4] you, we would be most appreciative if your response to our no-action request is forthcoming prior to January 1, 1985, the targeted commencement date of the Plan as revised.

Sincerely,
Daniel Schloendorn

INQUIRY-2: WILLKIE FARR & GALLAGHER
ONE CITICORP CENTER
153 EAST 53RD STREET
NEW YORK, N.Y. 10022
(212) 935-8000
1933 Act § 2(1)
November 14, 1984

Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549

Re: Dean Witter Financial Services Inc.
Deferred Compensation Plan

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Dear Sirs:

On behalf of Dean Witter Reynolds Inc. (the "Company"), we are writing to request your advice that the Dean Witter Financial Services Inc. Deferred Compensation Plan in its proposed amended form (hereinafter referred to as the "Plan") as described below does not involve the offer and sale of securities under the Securities Act of 1933, as amended (the "Securities Act"), and we request assurance that, as a consequence, you will not recommend any enforcement action to the Commission if the Plan is operated without registration under the Securities Act. For your convenience, we have enclosed four copies of the Plan for your review, along with [*5] three additional copies of this letter.

1. Facts.

The Company is a registered broker-dealer under the Securities Exchange Act of 1934 (the "Exchange Act") and a wholly owned subsidiary of Dean Witter Financial Services Inc. ("DWFS"), which is in turn a wholly-owned subsidiary of Sears, Roebuck and Co. At September 30, 1984, the stockholder's equity of the company was approximately $614 million, and its net capital in excess of the minimum capital required by the Exchange Act was approximately $161 million.

The Plan is an unfunded, voluntary deferred compensation plan originally established in 1978. The Company now proposed that the Plan be amended, effective as of December 31, 1984, so that amounts credited thereunder will be treated as part of the Company's net capital for purposes of Rule 15c3-1 under the Exchange Act, and the following description is of the Plan as so proposed to be amended.

Participation in the Plan is limited to (i) those employees of the company, DWFS or certain affiliated companies who are exempt from overtime requirements and have been designated as key, highly compensated or management employees by the chief executive officer of the Companay or [*6] his delegate, and (ii) individuals who have made a rollover election under DWFS" Management Profit Participation Plan (participation in which was limited to the same group of employees as are eligible to participate in the Plan). Each eligible employee may elect to defer up to 50% of his or her total compensation in each year or portion thereof as of the first day of the calendar quarter subsequent to the election. By filing a prescribed form before the first day of any calendar quarter, the percentage of compensation so deferred may be changed effective as of the first day of the following calendar quarter, or the election canceled with respect to further compensation.

The deferred portion of each employee's compensation is to be credited to a separate account on the books of the employer company. Interest will be credited quarterly to each such account, at a rate equal to the time-weighted average interest rate paid by the Company for such quarter to institutions from which it borrows funds. (For the quarter ended September 30, 1984, this formula would have resulted in an interest rate of 11.73%.)

Provided that the amount of deferred compensation for which payment is requested [*7] has been in the participant's account for at least a full calendar year following the year in which such amount was initially credited to the participant's account, prior to termination of employment a participant may elect to have his or her entire deferred compensation account, or a specified

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dollar amount thereof, paid in any month excluding January, or any two months excluding January, of the calendar year following the end of the year in which the payout election is made. If no election is made, the entire balance of a participant's account as of the end of a calendar year will be paid in a single cash payment to the participant in January of the following year to the extent such balance was initially credited to the participant's account prior to the beginning of such calendar year. Any portion of the balance which was initially credited to the participant's account during such calendar year will be paid to the participant in cash in January of the second year subsequent to such crediting. An advance payment from a deferred compensation account is permitted only upon a showing of financial hardship, and then only as to amaounts credited to the participant's account prior [*8] to the beginning of the year preceding the year in which the advance payment is requested, or, if credited thereafter, only if the consent of the New York Stock Exchange, Inc. ("NYSE") is obtained.

Subsequent to termination of employment, amounts credited to a participant's deferred compensation account at the time of termination are generally paid out in quarterly installments over a ten-year period, commencing in the first full calendar quarter of the year following the termination of employment. The Company reserves the right under certain circumstances, including termination of employment for misconduct, to make a lump sum distribution as soon as practicable following termination, without interest in cases involving employee misconduct. Certain alternative payment methods are also available to the participant at his or her election.

Any employee's claim upon his or her deferred compensation account is to be no greater than that of an unsecured creditor, and each participant must deliver to the Company and the NYSE a subordination agreement stating in effect that all right, title and interest of the participant to all amounts credited to his or her deferred compensation account [*9] will be subordinated to all claims of present and future creditors of the Company whose claims are to be senior thereto, so that such amounts will count as capital of the Company for purposes of calculating its net capital. * A participating employee's interest in the Plan is not assignable or transferable in any way.

* As a condition to continued participation in the Plan after December 31, 1984, each current participant will be required to deliver such a subordination agreement both as to amounts to be deferred in the future and amaounts currently credited to that participant's account. At September 30, 1984, the aggregate amaount credited to all participants' accounts under the Plan was approximately $58 million.

As of September 30, 1984, the companies eligible to participate in the Plan had approximately 16,500 employees, of whom approximately 750 were participants in the Plan. Over 90% of the participants are officers of their employer company. The income eligibility threshold for the Plan for 1985 has not yet been finally determined, but in any event will not be less than $100,000 per annum. At that level, 869 employees would be eligible to join the Plan.

2. Discussion [*10]

The definition of a security under the Securities Act is set forth in Section 2(1) of the Securities Act, which provides that, "unless the context otherwise requires," a security is:

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"[A]ny note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities . . . or any put, call, straddle, option or privilege entered into on a national securities exchange relating to a foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

The definition of the term "security" under Section 2(a)(36) of the Investment Company Act is basically identical to that of Section 2(1) of the Securities [*11] Act...

Of the instruments included in this defintion of a security, only the term "investment contract" could be said to cover interests in the Plan. Several court decisions have dealt with the issue of whether interests in employee benefit plans are securities and have based their analysis on whether the particular plan fits within the definition of an "investment contract." See e.g., International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979); Tanuggi v. Grolier Inc., 471 F. Supp. 1209 (S.D.N.Y. 1979); Newkirk v. General Electric Company, CCH Fed. Sec. L. Rep. (1979-80 Transfer Binder) P97,216 (N.D. Cal. 1979). If interests in the Plan are to be considered securities, it would have to be because they are "investment contracts," as the meaning of that term has been judicially developed.

In S.E.C. v. W. J. Howey, 328 U.S. 293 (1946), the Supreme Court defined an investment contract as "an investment of money in a common enterprise with profits to come solely from the efforts of others." Howey, supra, 328 U.S. 293, 301. The test has been traditionally applied by the federal courts as well as by the Commission in determining if an instrument is an [*12] investment contract. See Release No. 30-6188, fn. 17, 45 CFT 8960 (Feb. 1, 1980). The Supreme Court has stated that "[t]his test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security." Upon applying the Howey definition to the Plan, it is apparent that interests in the Plan do not constitute investment contracts within the meaning of the Securities Act because the Plan, and interests in it, do not satisfy any of the elements of that definition.

The first element in the Howey definition of an investment contract is the element of investment. The primary reason why employees of the Company would elect to participate in the Plan is not the result of an investment decision but rather is to gain a deferral of tax on compensation for present services. Amounts credited to an employee's account under the Plan are not intended to be taxable as income until the taxable year in which they are actually distributed to the employee, when he or she can be expected to have less taxable income and therefore a lower marginal income tax rate. Similarly, it is expected that the interest accruing in each account will not [*13] be taxed to the employee until distribution. Thus, the election to participate in the Plan is merely an incident and benefit of his employment with the Company, and should not be viewed as an opportunity to make a capital investment in the Company.

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The second element of the Howey test -- the expectation of profits from the efforts of others - is also lacking here. The only "profits" that participants in the Plan expect to receive is the interest paid on the employees' accounts. There is no separate fund in which the deferred amounts under the Plan are placed in order to be invested to earn the amounts paid out as interest, and the rate of interest is not related to the success or failure of the company but is rather tied to the Company's cost of institutional funds. The Supreme Court has defined "profits" to mean "either capital appreciation resulting from the development of the initial investment, . . . or a participation in earnings resulting from the use of investors' funds." United Housing Foundation Inc. v. Forman, 421 U.S. 837, 852 (1975). Participants in the Plan will not participate in capital appreciation of any kind and the earnings of the Company will not [*14] be related to the participants' benefits, except to the extent that the Company's insolvency or failure to satisfy the net capital requirements of the SEC may cause the deferred amounts to go unpaid.

Finally, it should be noted that under the Howey test the profits must "come solely from the efforts of others." The employee benefit plan cases cited above typically involve funded plans which were managed by a committee or other third persons and the issue under the part of the Howey test was whether the investment success of the fund managers had some direct bearing on the level of benefits paid out under the plan. The amounts deferred or accrued under the Plan are not segregated or put into any separate fund by the Company but simply remain a part of the general assets of the Company. As a result there is no relationship between the benefits payable under the Plan and the success of the Company, except in the case of the Company's insolvency or net capital deficiency. Even under the strained reasoning that the solvency of the Company determines the level of "profits" under the Plan, it would not be correct to say that the solvency of the Company depends solely on the efforts [*15] of others, in light of the fact that the only persons eligible to participate in the Plan are highly paid key employees who in all likelihood could have an effect on the solvency of the Company.

In summary, interests in the Plan do not meet any of the three elements for investment contracts set forth in Howey. As a result, the operation of the Plan as described herein should not constitute an offer or sale of a security and therefore may be conducted without registration under the Securities Act. Furthermore, the purposes of the Securities Act will not be served by requiring registration of interests in the Plan. Because the interests are not transferable, the only persons to be protected by registration would be the participants in the Plan, i.e., the employees. Since these employees are highly paid key employees, they may not need the protection of the Securities Act as much as others who would be less able to assess the risks of participation or who are less knowledgeable about the financial structure of the Company. These key employees would already be familiar with much of the information that would be provided by registration under the Securities Act.

We would also [*16] like to refer you to two no-action letters of the Staff concerning registration of deferred compensation plans very similar to the Plan. See, The Milwaukee Company (May 10, 1982); and Shearson Hayden Stone, Inc. (January 12, 1979). In both letters, the Staff stated that it would not recommend any enforcement action to the Commission if the deferred compensation plans were implemented as proposed without compliance with the registration requirements of the Securities Act.

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For all reasons stated above, we request that you concur with our opinion that interests in the Plan are not securities for purposes of the Securities Act. If you need any additional information, please feel free to contact the undersigned.

Very truly yours,
Daniel Schloendorn

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