

U.S. Department of Labor

Labor-Management Services Administration

Washington, D.C. 20216



OPINION 80-65A

3(1)

3(2)

November 13, 1980

Mr. Ronald s. Rizzo Kindel & Anderson
Twenty-sixth Floor
555 South Flower Street
Los Angeles, California 90071

Dear Mr. Rizzo:

This is in reply to your letters of October 19, 1979, and November 30, 1979, requesting an advisory opinion concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the proposed Employee Stock Purchase Plan (the Plan) of Applied Magnetics Corporation (the Company). Specifically, your inquiry concerns whether the Plan is an employee benefit plan covered by ERISA title I. We regret the delay in responding to your inquiry.

The following is a summary of the information contained in the materials you submitted. According to the Plan provisions, the Company Board of Directors will appoint both a stock purchase committee to administer the Plan and a Plan custodian. The stock purchase committee may interpret the Plan and make and enforce rules for Plan administration, thereby supplying any omissions in, and correcting any defects of, the Plan.

Employees eligible to participate in the Plan will include full-time employees over 18 years old with at least 6 months of service, unless (1) they are covered by a collective bargaining agreement which does not expressly provide for employee participation in the Plan, or (2) they are employed outside the United States and are not designated as eligible by the stock purchase committee. Participation by eligible employees will be voluntary and, if terminated by the participant, may be resumed after an interim of 6 full fiscal months, providing that service with the Company is not interrupted during the waiting period.

Participants who terminate employment must reestablish eligibility under the Plan as though they had never previously been employees of the Company.

Under the Plan, the number of years a participant has been employed by the Company will affect the percentage of income which the participant may contribute through the Plan's payroll deduction scheme. For example, while participants with less than 3 years of employment may contribute only 2 percent of compensation, participants with 6 or more years of service may contribute within a range from 2 percent of compensation to a maximum of 6 percent of compensation. On a monthly basis, the Company will contribute up to the equivalent aggregate of one-third of common stock purchased by the

participant through payroll deductions for that month. The Company's contribution will take the form of shares of Company common stock, par value \$.10 per share, or of cash to be used by the Plan customer to purchase shares on the open market.

Two individual accounts for each participant are to be maintained in connection with the Plan. The "A" account will consist of the following: cash from payroll deductions; shares of stock purchased with cash from a participant's payroll deduction; stock dividends, stock splits, and other distributions with respect to common stock in a participant's "A" account; and all cash dividends from stock in the participant's "A" and "B" accounts. A participant will always be vested in, and the legal owner of, the "A" account. Common stock, with respect to which an individual participant is the legal owner, may be registered in a nominee account for the Plan until a distribution of shares takes place.

The "B" account will consist of shares of stock and cash contributed by the Company to a participant's account; shares of common stock purchased with such cash; and stock dividends, stock splits, and other non-cash distributions with respect to the participant's "B" account. A participant's "B" account will become 100 percent vested at the earliest of

- (1) termination of the Plan,
- (2) participant's termination of employment at or on attainment of age 65,
- (3) death of participant, (4) participant's termination due to total disability, or (5) the February 1st after the second plan year following that for which the contribution was made. When a participant's interest in the "B" account becomes vested, it will be transferred to a participant's "A" account. Assets allocated to a participant's "B" account will be forfeited if not vested at the time a participant terminates participation, including at termination of employment for all reasons other than those enumerated above.

With respect to distributions and custody of stock in the "A" account, the Plan provides, in relevant part, that:

A. While a Participant is employed by the Company, the Custodian shall retain custody of all shares of Common Stock, cash and other property allocated to a Participant's "A" Account unless written instructions have been received from the Participant or his legal representative that request the ...delivery of such shares...

B. A Participant shall be entitled to receive distributions of Common Stock, cash, or other property held for such a Participant by the Custodian and allocated to the Participant's "A" Account only to the extent, at the times and in the manner set forth in Paragraph A [of this section], or upon termination of his employment with the Company, as provided in Paragraph C below.

C. When an employee ceases to be a Participant hereunder because of his termination of employment, the Common Stock, cash and other property allocated to Participants' "A" account shall be

distributed to the Participant or his legal representative in accordance with instructions from the Participant or legal representative.

Participants have the right to instruct the Plan custodian how to vote stock allocated to their "A" and "B" accounts.

The Plan's "C" account will consist of all cash, stock, or other property otherwise held by the Plan custodian in connection with the Plan, including assets forfeited when a participant terminates participation. The Company will be the legal owner of the "C" account, and the assets therein may be used to reduce required Company contributions to the Plan. "C" account assets will be returned to the Company if the Plan terminates. The Plan custodian will vote the stock in the "C" account.

You also represent that the Plan is not intended to qualify under any provisions of the Internal Revenue Code and that the Company's contributions to the Plan will be included in the participant's gross income not later than the time a participant fully vests in the Plan's "B" account.

The term "employee benefit plan" is defined in section 3(3) of ERISA as "... an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA as ".... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or.

(B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." The Plan is for the purpose of providing a means for eligible employees of the Company to purchase shares of stock in the Company, which is not among the benefits enumerated in ERISA section 3(1). Thus, the Plan is not an employee welfare benefit plan within the meaning of ERISA section 3(1).

The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA as "...any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -- (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment

or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan."

By its terms, the Plan allows the distribution of property in the participant's "A" account at any time upon request. In addition, the distribution of property in the participant's "B" account will be possible after a maximum of 2 years, since the property must be transferred to the "A" account at that time.'. Nor are there any restrictions on the subsequent transfer of property that is distributed. Thus, the Plan does not, by its express terms, appear to provide retirement income or result in a deferral of income to the termination of covered employment. In our opinion, therefore, the Plan is not, by its express terms, a pension plan within the meaning of section 3(2)(A) of ERISA. Our conclusion in this regard, however, is based solely on the terms of the Plan. You should be aware that if the Plan is communicated to participants or administered in a manner that would prevent or discourage participants from requesting a distribution of their property prior to the termination of covered employment, or make it unlikely that participants would request such a distribution, the Plan might be a pension plan under section 3(2)(A) of ERISA as a result of surrounding circumstances.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare
Benefit Programs