Exchange Act Rules

Last Update: March 31, 2020

These Compliance and Disclosure Interpretations ("C&DIs") principally comprise the Division's interpretations of the rules promulgated under the registration and reporting provisions of Sections 12, 13 and 15 of the Exchange Act. Some of these C&DIs were first published in prior Division publications and have been revised in some cases. The bracketed date following each C&DI is the latest date of publication or revision.

N.B. C&DIs for Exchange Act Section 16 rules have been separately published and can be found at Exchange Act Section 16 and Related Rules and Forms.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Sections 101 to 107. Rules of General Application: Rules 0-1 to 0-10

None

Section 108. Rule 0-11

Question 108.01

Question: What fee rates apply to repurchases of securities and to proxy solicitations and statements in corporate control transactions?

Answer: The fee rates (as adjusted annually) under Exchange Act Section 13(e) and Section 14(g) apply to repurchases of securities and to proxy solicitations and statements in corporate control transactions, respectively. The fee rates set forth in Exchange Act Rule 0-11 do not apply. The Commission publishes orders and related press releases concerning current fee rates on the Commission's web site at www.sec.gov. [June 4, 2010]

Question 108.02

Question: If Company A files proxy materials for the transfer of substantially all of its assets to its wholly-owned subsidiary, Company B, in exchange for shares of Company B stock, will Company A have to pay the filing fee contemplated by Rule 0-11 or Exchange Act Section 14(g)?

Answer: No, because this transaction is an internal recapitalization and is not deemed to be a "sale or other disposition" for filing fee purposes. [June 4, 2010]

Section 109. Rule 0-12

None

Sections 110 to 119. Definitions: Rules 3a11-1 to 3b-19

Question 110.01

Question: A foreign issuer qualifies as a foreign private issuer on the last business day of its most recently completed second fiscal quarter, which is the "determination date" for foreign private issuer status under Exchange Act Rule 3b-4(c). Shortly thereafter, the foreign issuer reincorporates in Delaware. May it continue to use the foreign private issuer forms and rules until it retests its foreign private issuer status on the next determination date?

Answer: No. Under Exchange Act Rule 3b-4(e), a foreign issuer generally may use the foreign private issuer forms and rules until the first day of the fiscal year following the determination date on which it no longer qualifies as a former private issuer. That provision, however, does not apply to domestic issuers. A U.S.-domiciled company can never be a foreign issuer or foreign private issuer, no matter how few U.S. shareholders it may have or where its assets, business, officers or directors are located. Therefore, as a successor to the foreign issuer's reporting obligations, the Delaware corporation must immediately begin filing Exchange Act reports on domestic issuer forms. [Aug. 11, 2010]

Question 110.02

Question: In applying the foreign private issuer definition in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), how can an issuer that has multiple classes of voting stock with different voting rights determine whether more than 50 percent of its outstanding voting securities are directly or indirectly owned of record by residents in the United States?

Answer: An issuer may choose one of two methods. The issuer may look to whether more than 50 percent of the voting power of those classes on a combined basis is directly or indirectly owned of record by residents of the United States. Alternatively, an issuer may make the determination based on the number of voting securities. Issuers must apply a determination methodology on a consistent basis. [December 8, 2016]

Question 110.03

Question: In applying the foreign private issuer definition in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), what factors should be applied to determine the status of an individual as a "U.S. resident" for purposes of determining whether 50 percent of the company's outstanding voting securities are held of record by U.S. residents?

Answer: A person who has permanent resident status in the U.S. — a so-called Green Card holder — is presumed to be a U.S. resident. Other individuals without permanent resident status may also be residents of the U.S. for purposes of these provisions. In these circumstances, an issuer must decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result. Examples of factors an issuer may apply include tax residency, nationality, mailing address, physical presence, the location of a significant portion of their financial and legal relationships, or immigration status. [December 8, 2016]

Question 110.04

Question: In determining whether a majority of the executive officers or directors are United States citizens or residents under the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), must the calculation be made separately for each group or are executive officers and directors to be treated as a single group when making the assessment?

Answer: The determination must be made separately for each group. In effect, there are four determinations: the citizenship status of executive officers, the residency status of executive officers, the citizenship status of directors, and the residency status of directors. [December 8, 2016]

Question 110.05

Question: In determining whether the majority of the directors are United States citizens or residents under the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), how should the determination be made when the issuer has two boards of directors?

Answer: The issuer must make the determination with respect to the board that performs the functions most closely to those undertaken by a U.S.-style board of directors. If those functions are divided between both boards, the issuer may aggregate the members of both boards for purposes of calculating the majority. [December 8, 2016]

Question 110.06

Question: In determining whether more than 50 percent of the assets of an issuer are located outside the United States under the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), can an issuer use the geographic segment information determined in the preparation of its financial statements?

Answer: Yes. Alternatively, an issuer may apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets for purposes of this determination. [December 8, 2016]

Question 110.07

Question: For purposes of the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), how does an issuer determine whether its business is administered principally in the United States?

Answer: There is no single factor or group of factors that are determinative under this clause. The issuer must assess on a consolidated basis the location from which its officers, partners, or managers primarily direct, control and coordinate the issuer's activities. [December 8, 2016]

Question 110.08

Question: For purposes of the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), would holding an annual or special meeting of shareholders or occasional meetings of the issuer's board of directors in the United States result in a determination that the issuer's business is administered principally in the United States?

Answer: No. Absent other factors indicating the location from which an issuer's officers, partners, or managers primarily direct, control and coordinate the issuer's activities on a consolidated basis, as described in Securities Act Rules CDI 203.22 / Exchange Act Rules CDI 110.07, there is no single factor or group of factors that is determinative of whether an issuer's business is principally administered in the United States. [December 8, 2016]

Section 120. Manipulative and Deceptive Devices and Contrivances: Rule 10b5-1

Question 120.01

Question: On January 1, a person adopts a written plan for selling securities that satisfies the affirmative defense conditions of Rule 10b5-1(c). The first sale of securities under the plan will take place on March 1 in reliance on Rule 144. The person will need to file a Form 144. Does adoption of the Rule 10b5-1 plan change the due date for the Form 144?

Answer: No. The Form 144 must be transmitted for filing concurrently with either the placement of a sell order for a brokerage transaction, or the execution of such sale directly with a market maker, as provided in Rule 144(h). The adoption of the plan itself may not be the same as placement of a sell order. The notice on Form 144 is effective for a maximum of three months, so that sales over longer periods will involve multiple requirements of notice under Rule 144(h). [Mar. 25, 2009]

Question 120.02

Question: A person who has adopted a written trading plan or given trading instructions to satisfy Rule 10b5-1(c) plans to sell the securities in reliance on Rule 144. Can the person modify the Form 144 to state that the representation regarding the seller’s knowledge of material information regarding the issuer is as of the date the Rule 10b5-1 plan was adopted or instructions given, rather than the date the person signs the Form 144?

Answer: The form already includes the representation, so modification is unnecessary. [Apr. 24, 2009]

Question 120.03

Question: At a time when she is not aware of material nonpublic information, a person establishes a trust. In establishing the trust, she specifies that the trust shall sell 1,000 shares of issuer stock each quarter. Apart from this specification, she does not have or share any control over the trust's assets. Is a defense available under Rule 10b5-1(c)(1)(i)(B)(3) for the quarterly sales by the trust?

Answer: Yes. Rule 10b5-1(c)(1)(i)(B)(3) contemplates that a person, while not aware of material nonpublic information, may delegate to a third party under a contract, instruction or written trading plan, all subsequent influence over how, when or whether to effect purchases or sales. Reliance on this affirmative defense does not prevent the person from setting some of the terms of the purchases or sales at the creation of the contract, instruction or plan so that no one has subsequent discretion as to those terms.

For example, this defense would be available if, in creating the contract, instruction or plan, the person specifies one or two of the amount, price or date of transactions. Whether or not any terms are set at creation, for a Rule 10b5-1(c)(1)(i)(B)(3) defense to be available, the person is not permitted to exercise any subsequent influence over how, when, or whether a transaction occurs. The third party who has been granted discretion must not be aware of material nonpublic information when exercising that discretion. [Mar. 25, 2009]

Question 120.04

Question: At a time when he is not aware of material nonpublic information, a person will establish a blind trust to which he will contribute some, but not all, of the issuer securities that he owns. The person intends to delegate investment control over trust assets to the trustee so as to establish a defense under Rule 10b5-1(c)(1)(i)(B)(3) for trust transactions. Within the meaning of Rule 144(a)(2), the person and the trust will be a single person.

During any three-month period, sales of issuer securities by the trust will share the Rule 144(e) volume limitation with the person's sales of other issuer securities he owns. Does the manner of allocating the Rule 144(e) volume limitation between sales by the trust and the person's other sales of issuer securities affect whether the person is permitted to exercise any subsequent influence over how, when, or whether to effect purchases or sales under the trust within the meaning of Rule 10b5-1(c)(1)(i)(B)(3)?

Answer: Yes. If during the term of the trust the person can control what portion of the Rule 144(e) volume limitation is available for trust sales, the person would be permitted to exercise subsequent influence over trust sales within the meaning of Rule 10b5-1(c)(1)(i)(B)(3). As a result, the Rule 10b5-1(c)(1)(i)(B)(3) defense would be unavailable.

However, the person would not be permitted to exercise subsequent influence over trust sales if the instrument creating the trust specified either (1) the percentage of the volume limit to be allocated to sales by the trust and other sales by the person, or (2) that the trustee would determine that allocation for each applicable three-month period without consulting the person. [Mar. 25, 2009]

Question 120.05

Question: At a time when he is not aware of material nonpublic information, a person buys a put option, giving him the right at any time during the 12-month term of the option to sell 10,000 shares at a fixed exercise price. Two months later, he wishes to exercise the option. If he is aware of material nonpublic information at the time of exercise, can he rely on a Rule 10b5-1(c) defense in exercising the option?

Answer: No. The exercise of the option is a separate investment decision from the purchase of the option. *See* Securities Act Release No. 7881 (Aug. 15, 2000) at fn. 115. For a defense to be available under Rule 10b5-1(c), each of the amount, price and date of the transaction must be specified or determined by formula, or all subsequent discretion over purchases and sales must be delegated to a third party who must not be aware of material nonpublic information when exercising that discretion. The person must make this specification or delegation in good faith before becoming aware of material nonpublic information.

In this example, the person has retained discretion over the timing of the option exercise. Consequently, if he is aware of material nonpublic information at the time of exercise, no defense will be available under Rule 10b5-1(c). The same analysis applies whether the option is a put or a call. [Mar. 25, 2009]

Question 120.06

Question: At a time when he is not aware of material nonpublic information, a person purchases a put option. At the same time, the person instructs his broker to exercise the option on its expiration date, June 30, 2001, if the option is in-the-money on that date. Is the exercise of the option covered by a Rule 10b5-1(c)(1)(i)(B)(1) defense despite the fact that the amount, price and date are not specified by the same method?

Answer: Yes. The terms of the option, which is a binding contract within the meaning of Rule 10b5-1(c)(1)(i)(A)(1), specify the amount of shares to be sold and the price at which they will be sold under the option. The instruction to the broker, which is an instruction to another person within the meaning of Rule 10b5-1(c)(1)(i)(A)(2), specifies the date of the transaction and imposes a limit on the price, within the meaning of Rule 10b5-1(c)(1)(iii)(B). Viewed together, the option and the instruction specify the amount of securities, the price and the date of the transaction for purposes of Rule 10b5-1(c)(1)(i)(B)(1). The same analysis applies whether the option is a put or a call. [Mar. 25, 2009]

Question 120.07

Question: At a time when she is not aware of material nonpublic information, a person writes a call option, giving the option purchaser the right at any time during the life of the option to buy 10,000 shares from her at a fixed exercise price. Two months later, the option writer receives an exercise notice, requiring her to sell the shares to the counterparty at the exercise price. Is the sale pursuant to the option exercise covered by an affirmative defense under Rule 10b5-1(c)?

Answer: Yes. As long as the terms of the option contract do not permit the person to exercise any subsequent influence over how, when or whether she sells the shares covered by the option, and she does not in fact influence the timing of the option exercise, a defense would be available under Rule 10b5-1(c)(1)(i)(B)(3). [Mar. 25, 2009]

Question 120.08

Question: At a time when she is not aware of material nonpublic information, a person obtains a bank loan to invest in real estate, and pledges securities as collateral. She fails to pay the loan as due. The bank proceeds against the stock that was posted as collateral and sells it in the open market. Is the Rule 10b5-1(c)(1)(i)(B)(3) defense available to the person when the bank sells the stock?

Answer: No. The sale was not pursuant to a contract, instruction or plan that did not permit the person to exercise any subsequent discretion over how, when, or whether to effect purchases or sales. First, the person could have exercised discretion not to pay the loan, resulting in default and the transfer of the securities. Also, she may have had the discretion to substitute collateral or provide additional collateral or cash to prevent foreclosure and sale of the stock. [Mar. 25, 2009]

Question 120.09

Question: At a time when he is not aware of material nonpublic information, a person obtains a $1 million loan from a brokerage firm and places $2 million of stock in a margin account with the broker. The stock price falls and the broker issues a margin call. The person does not deposit additional securities in the margin account (although he could have), so the broker sells sufficient margined securities to satisfy the margin call. Is the Rule 10b5-1(c)(1)(i)(B)(3) defense available to the person for the broker's sales?

Answer: No. Where the person retains any discretion to substitute or provide additional collateral, or to repay the loan before the pledged securities may be sold, Rule 10b5-1(c)(1)(i)(B)(3) does not provide a defense. This is because the terms of the margin account contract would permit him to exercise subsequent influence over how, when, or whether to effect purchases or sales.

If the margin account contract did not permit the insider to exercise any subsequent influence over how, when, or whether to effect purchases or sales, and the broker did not in fact give the person the opportunity to substitute or provide additional collateral or cash, a defense would be available under Rule 10b5-1(c)(1)(i)(B)(3) if the broker is not aware of material nonpublic information in selling the margined securities. [Mar. 25, 2009]

Question 120.10

Question: At a time when she is not aware of material nonpublic information, a person establishes a written trading plan to sell 5,000 shares each month, on a date to be selected by her broker during the second or third week of each month, at or above $20 per share. The person does not communicate any information to the broker that could influence when sales would occur. Does Rule 10b5-1(c)(1)(i)(B)(3) provide a defense for sales under this plan?

Answer: Yes, assuming two additional facts are present: (1) the terms of the plan do not permit her to exercise any subsequent influence over the timing of sales under the plan; and (2) the broker is not aware of material nonpublic information when selling securities under the plan. [Mar. 25, 2009]

Question 120.11

Question: At a time when she is not aware of material nonpublic information, a person establishes a written trading plan to sell 10,000 shares each month, at or above $20 per share. To implement the sales, the plan provides that on the last day of each month the person will place a limit order with a broker, valid until the last day of the next month, to sell 10,000 shares at or above $20 per share. The person may be aware of material nonpublic information when she places the limit order. Do Rules 10b5-1(c)(1)(i)(A)(3) and (B)(1) provide a defense for sales under this plan if the limit order is non-discretionary (requiring the broker to execute a sale as soon as a buyer is available at or above $20 per share)?

Answer: Rules 10b5-1(c)(1)(i)(A)(3) and (B)(1) could provide a defense if the limit order is non-discretionary. The written trading plan would need to specify the amount, price and dates of the sales. As defined in Rule 10b5-1(c)(1)(iii)(C), in the case of a limit order, "date" means a day of the year on which the limit order is in force. For Rules 10b5-1(c)(1)(i)(A)(3) and (B)(1) to provide a defense, the terms of the plan must specify the dates on which the monthly non-discretionary limit orders will be in force. [Mar. 25, 2009]

Question 120.12

Question: How does the analysis in Question 120.11 change if the written trading plan doesn't specify when the non-discretionary limit order will be in force?

Answer: If the written trading plan by its terms doesn't specify these dates, the analysis would focus on each transaction, and depend on whether the person is aware of material nonpublic information at each time she places a non-discretionary limit order. A defense would be available under Rule 10b5-1(c)(1)(i)(A)(2) and (B)(1) if: (1) she acts in good faith and is not aware of material nonpublic information at the time she instructs the broker; and (2) in placing a non-discretionary limit order, she specifies the dates on which that limit order will be in force. [Mar. 25, 2009]

Question 120.13

Question: Do Rules 10b5-1(c)(1)(i)(A)(3) and (B)(1) provide a defense for sales under the written trading plan described in Question 120.11 when the limit order is discretionary (where the broker is granted discretion such that the broker is not required to execute a sale as soon as a buyer is available at or above $20 per share)?

Answer: If a limit order is discretionary, the discretion granted to the broker over the timing of a sale would require the conditions of Rule 10b5-1(c)(1)(i)(B)(3) to be satisfied for a defense to be available. Rule 10b5-1(c)(1)(i)(B)(1) would not be available. [Mar. 25, 2009]

Question 120.14

Question: Assume that the written trading plan described in Question 120.11 also includes a provision requiring the number of securities to be sold during each month to be reduced, if necessary, to comply with applicable volume limitation under Rule 144(e). What effect does this have on the availability of a Rule 10b5-1(c) defense?

Answer: The analysis depends on the manner in which the adjustment is effected:

(a) First, the written plan could provide for adjustment of the amount of securities to be sold each month based on a written formula specified in the plan within the meaning of Rule 10b5-1(c)(1)(i)(B)(2). Where a written formula specifies one or more of the price, amount and dates of transactions that are all specified in a contract, instruction or written plan, the Rule 10b5-1(c)(1)(i)(B)(2) defense would apply.

(b) Alternatively, the written plan could provide for adjustment of the amount of securities to be sold each month based on a delegation of discretion to the broker. In this case, where one or more of the price, amount and dates of transactions under a contract, instruction or written plan are to be determined based on a delegation of discretion to another person, the availability of a defense depends upon satisfaction of the conditions of Rule 10b5-1(c)(1)(i)(B)(3). [Mar. 25, 2009]

Question 120.15

Question: During a month when the written trading plan described in Question 120.11 is in effect, the person calls the broker to place an order to sell an additional 15,000 shares at the market. How is this transaction analyzed for purposes of Rule 10b5-1(c)?

Answer: (a) The written trading plan defense is not available for the market order to sell the 15,000 additional shares. Instead, the analysis would focus on whether the person was aware of material nonpublic information at the time she places the market order.

(b) The market order transaction would not affect the availability of the written trading plan defense for the limit order sales under the written trading plan. The market order does not effect an alteration or deviation of a plan transaction within the meaning of Rule 10b5-1(c)(1)(i)(C) because the 10,000 share limit order under the plan will continue to be executed when the price limit is met. The market order is not a corresponding or hedging transaction within the meaning of Rule 10b5-1(c)(1)(i)(C) because it does not reduce or eliminate the economic consequences of the limit order sales under the written trading plan. [Mar. 25, 2009]

Question 120.16

Question: During a month when the written trading plan described in Question 120.11 is in effect, the person calls the broker to increase the non-discretionary limit order currently in force from 10,000 shares to 15,000 shares. How is this analyzed for purposes of Rule 10b5-1(c)?

Answer: Changing the amount to be sold under a written limit order trading plan currently in force effects an alteration or deviation within the meaning of Rule 10b5-1(c)(1)(i)(C). Consequently, sales pursuant to the altered limit order would not be pursuant to the existing plan. Securities Act Release No. 7881 (Aug. 15, 2000) at fn. 111 provides that "a person acting in good faith may modify a prior contract, instruction, or plan before becoming aware of material nonpublic information. In that case, a purchase or sale that complies with the modified contract, instruction, or plan will be considered pursuant to a new contract, instruction, or plan." [Mar. 25, 2009]

Question 120.17

Question: After the written trading plan described in Question 120.11 has been in effect for several months, the person terminates the selling plan by calling the broker and canceling the limit order. Standing alone, does the act of terminating a plan while aware of material nonpublic information, and thereby not engaging in the planned securities transaction, result in liability under Section 10(b) and Rule 10b-5?

Answer: No. Section 10(b) and Rule 10b-5 apply to any fraudulent conduct "in connection with the purchase or sale of any security." The “in connection with” requirement is satisfied when a fraud “coincides” with a securities

transaction. *See, e.g., SEC v. Zandford,* 535 U.S. 813 (2002) and *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Dabit,* 547 U.S. 71 (2006). [Mar. 25, 2009]

Question 120.18

Question: Does termination of a plan affect the availability of the Rule 10b5-1(c) defense for prior plan transactions? Does canceling one or more plan transactions affect the availability of the Rule 10b5-1(c) defense for prior plan transactions?

Answer: Termination of a plan, or the cancellation of one or more plan transactions, could affect the availability of the Rule 10b5-1(c) defense for prior plan transactions if it calls into question whether the plan was "entered into in good faith and not as part of a plan or scheme to evade" the insider trading rules within the meaning of Rule 10b5-1(c)(1)(ii). The absence of good faith or presence of a scheme to evade would eliminate the Rule 10b5-1(c) defense for prior transactions under the plan. [Mar. 25, 2009]

Question 120.19

Question: Does canceling one or more plan transactions affect the availability of the Rule 10b5-1(c) defense for future plan transactions?

Answer: The cancellation of one or more plan transactions would be an alteration or deviation from the plan, which would terminate that plan. The Rule 10b5-1(c) defense would be available for transactions following the alteration only if the transactions were pursuant to a new contract, instruction or plan that satisfies the requirements of Rule 10b5-1(c). *See* Securities Act Release No. 7881 (Aug. 15, 2000), at fn. 111 and Question 120.16. Moreover, if a person established a new contract, instruction or plan after terminating a prior plan, then all the surrounding facts and circumstances, including the period of time between the cancellation of the old plan and the creation of the new plan, would be relevant to a determination whether the person had established the contract, instruction or plan “in good faith and not as part of a plan or scheme to evade” the prohibitions of Rule 10b5-1(c). [Mar. 25, 2009]

Question 120.20

Question: Is the Rule 10b5-1(c) affirmative defense available where a person establishes a Rule 10b5-1 written trading plan while aware of material nonpublic information if the plan is structured so that plan transactions will not begin until after the material nonpublic information is made public?

Answer: No. [Mar. 25, 2009]

Question 120.21

Question: A person purchases employer stock through her participation in the employer's 401(k) plan. These purchases are made pursuant to bi-weekly payroll deductions. The 401(k) plan also allows employees to transfer the assets in their accounts among funds within the plan (including the employer stock fund) through fund-switching transactions. Is a Rule 10b5-1(c) defense available for payroll deduction purchases under the 401(k) plan?

Answer: If an employee acts in good faith and is not aware of material nonpublic information at the time she provides written or oral instructions as to payroll deduction purchases, a defense would be available for those purchases under Rule 10b5-1(c). *See* Securities Act Release No. 7881 (Aug. 15, 2000), text at fn. 117-121. [Mar. 25, 2009]

Question 120.22

Question: Under the 401(k) plan described in Question 120.21, is a Rule 10b5-1(c) defense available for fund-switching transactions that result in purchases or sales of employer stock?

Answer: If an employee acts in good faith and is not aware of material nonpublic information at the time she provides written or oral instructions as to a fund-switching transaction under the 401(k) plan, a defense would be

available for that transaction under Rule 10b5-1(c). *See* Securities Act Release No. 7881 (Aug. 15, 2000), text at fn. 117-121. [Mar. 25, 2009]

Question 120.23

Question: Could fund-switching transactions under the 401(k) plan described in Question 120.21 be considered "corresponding or hedging transactions" within the meaning of Rule 10b5-1(c)(1)(i)(C) with respect to payroll deduction purchases under the 401(k) plan?

Answer: Possibly, depending upon the facts and circumstances. Rule 10b5-1(c)(1)(i)(C) requires, as a condition to the exemption, that the purchase or sale be pursuant to the contract, instruction, or plan. The rule provides that a purchase or sale is not "pursuant to a contract, instruction, or plan" if, among other things, the person entered into or altered a corresponding or hedging transaction or position with respect to those securities.

As a general matter, a fund-switching transaction that effects a sale could be a corresponding or hedging transaction under Rule 10b5-1(c)(1)(i)(C) with respect to a payroll deduction purchase under the 401(k) plan. If, however, the person is acting in good faith and provides instructions for the fund-switching transaction at a time when she is not aware of material nonpublic information, the fund-switching transaction would not disturb the Rule 10b5-1(c) defense for a payroll deduction purchase under the 401(k) plan. [Mar. 25, 2009]

Question 120.24

Question: Under applicable state law, an oral agreement would be considered a binding contract. Does the contract nevertheless need to be written to establish a defense under Rule 10b5-1(c)?

Answer: No. The rule specifies when a writing is necessary to establish a defense. The rule does not require a binding contract (Rule 10b5-1(c)(1)(i)(A)(1)) or an instruction to another person (Rule 10b5-1(c)(1)(i)(A)(2)) to be written. In contrast, the rule requires a plan for trading securities (Rule 10b5-1(c)(1)(i)(A)(3)) and a formula, algorithm or computer program for determining amounts, prices and dates of transactions (Rule 10b5-1(c)(1)(i)(B)(2)) to be written. [Mar. 25, 2009]

Question 120.25

Question: Is the institutional defense provided by Rule 10b5-1(c)(2) available to the issuer of the securities for a repurchase plan?

Answer: Yes, assuming the conditions of that rule are satisfied. [Mar. 25, 2009]

Section 121. Rule 12a-5

Question 121.01

Question: Does Rule 12a-5 provide an exemption from registration for “poison pill” rights under stockholder rights plans?

Answer: No. “Poison pill” rights issuable under stockholder rights plans are not the type of rights contemplated by Rule 12a-5, which provides a temporary exemption from registration for substituted or additional securities to allow when-issued trading. [September 30, 2008]

Sections 122 to 129. [Reserved]

Sections 130 to 139. Regulation 12B: Rules 12b-1 to 12b-37

Section 130. Rule 12b-2

Question 130.01

Question: A condition for meeting the definitions of “accelerated filer” and “large accelerated filer” in Rule 12b-2 is that the issuer must have been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a

period of at least “twelve calendar months” as of the end of its fiscal year. What is a “calendar month” for purposes of the definitions of “accelerated filer” and “large accelerated filer”?

Answer: The term “calendar month” under Rule 12b-2 is interpreted in a manner consistent with the term “calendar month” in determining Form S-3 eligibility. In both cases, a “calendar month” begins on the first day of the month and ends on the last day of that month. For example, if an issuer became subject to the requirements of Section 13(a) on January 15 and remains subject to Section 13(a) through the end of the year, it will have been subject to the requirements of Section 13(a) for eleven “calendar months” as of December 31. [September 30, 2008]

Question 130.02

Question: Can an issuer that submits Exchange Act reports on a voluntary basis satisfy the definitions of “accelerated filer” or “large accelerated filer” in Rule 12b-2?

Answer: No. Rule 12b-2 requires that an accelerated filer or large accelerated filer be “subject to” the reporting requirements of Section 13(a) or 15(d) of the Exchange Act. A voluntary filer is not “subject to” Section 13(a) or 15(d) of the Exchange Act because it is not obligated to file Exchange Act reports pursuant to either of those provisions. [September 30, 2008]

Question 130.03

Question: For purposes of determining “accelerated filer” and “large accelerated filer” status, may an issuer take into account its reporting history as a voluntary filer?

Answer: No. The reporting history of an issuer while it was a voluntary filer is not considered part of the “twelve calendar months” during which the issuer must have been subject to the reporting provisions of the Exchange Act. As discussed in Question 130.02, voluntary filers submit Exchange Act reports without being obligated to do so pursuant to Section 13(a) or 15(d) of the Exchange Act. As such, these filers do not meet the requirement that they be “subject to” Section 13(a) or 15(d) of the Exchange Act, which is among the criteria for meeting Rule 12b-2’s definitions of “accelerated filer” and “large accelerated filer.” [September 30, 2008]

Question 130.04

[Withdrawn, November 7, 2018]

Sections 131 to 132. [Reserved]

Section 133. Rule 12b-15

Question 133.01

Question: When a registrant is amending multiple Exchange Act reports at the same time, may it do so in a single filing?

Answer: No. Where several Exchange Act reports are being amended at the same time, the amendments should not be made in a single filing. Amendments should be filed separately for each Exchange Act report to be amended. [September 30, 2008]

Question 133.02

Question: Is it necessary for a majority of the board of directors of the registrant to sign an amendment to a Form 10-K?

Answer: No. An amendment to Form 10-K does not require signatures of the majority of the board of directors. Rule 12b-15 provides that amendments may be signed by a duly authorized representative of the registrant. [September 30, 2008]

Section 134. Rule 12b-23

Question 134.01

Question: May an issuer incorporate by reference into its own Exchange Act documents information contained in the filed documents of another issuer?

Answer: Yes. Within the guidelines specified by Rule 12b-23, an issuer may incorporate by reference into its own Exchange Act documents any information contained in the filed documents of another issuer. [September 30, 2008]

Section 135. Rule 12b-25

Question 135.01

Question: Is Rule 12b-25(b) available to a parent with respect to a subsidiary whose financial statements are to be filed by amendment to the parent's Form 10-K under Rule 3-09 of Regulation S-X?

Answer: Paragraph (f) of Rule 12b-25 excludes from the operation of the rule a company with a subsidiary whose financial statements are to be filed by amendment to the company's Form 10-K, as provided in Rule 3-09 of Regulation S-X. However, in cases in which the subsidiary under Rule 3-09: (1) is less than 50% owned, (2) is itself a reporting company, and (3) will be filing its financial statements late and is itself eligible to use Rule 12b-25 for an extension, the Division staff will construe Rule 12b-25(b) to be available to the parent with respect to the subsidiary's filing. [September 30, 2008]

Question 135.02

Question: Is a company required to file a Form 12b-25 even when it anticipates filing a periodic report after the Rule 12b-25 extension period?

Answer: Yes. Under Rule 12b-25(a), a company must file a Form 12b-25 for a periodic report that is filed after the due date regardless of whether it anticipates filing the periodic report within the extension period. *See* Exchange Act Release No. 16718 (Apr. 2, 1980). If the company does not anticipate filing the periodic report within the extension period, it should not check the box in Part II of Form 12b-25. [September 30, 2008]

Question 135.03

Question: What is the due date of a Form 12b-25 when the due date of the periodic report falls on a Saturday, Sunday or federal holiday?

Answer: Rule 12b-25 provides that an annual or quarterly report shall be deemed timely filed if a Form 12b-25 making certain specified representations is filed no later than one business day after the due date of the annual or quarterly report, and the report itself is filed no later than fifteen or five calendar days, respectively, after the due date. Rule 0-3 under the Exchange Act provides that when the due date of a report falls on a Saturday, Sunday or holiday, the report will be considered timely filed if it is filed on the first business day following the due date. If a report is due on a Saturday, Sunday or holiday, the issuer can timely file a Form 12b-25 on the second business day following the due date and timely file the report fifteen calendar days (annual report) or five calendar days (quarterly report) after the first business day following the due date. For example, where the due date for a Form 10-K is Sunday, March 31, the Form 10-K would be due on Monday, April 1 and the Form 12b-25 would be timely if filed on Tuesday, April 2. The Form 10-K would then be due for filing on Tuesday, April 16 (15 days after April 1, not 15 days after April 2). [September 30, 2008]

Question 135.04

Question: If the Rule 12b-25 extension period ends on a Saturday, Sunday or federal holiday, may the periodic report be filed on the next business day and still be deemed to have been timely filed?

Answer: Yes. If a registrant properly files a Form 12b-25 with respect to a periodic report, and the Rule 12b-25 extension period for the filing of the periodic report ends on a Saturday, Sunday or federal holiday, the periodic report will be deemed to have been filed within the Rule 12b-25 extension period if the registrant files the periodic report by the next business day, consistent with Exchange Act Rule 0-3. [September 30, 2008]

Question 135.05

Question: Are there any additional extensions for the timely filing of periodic reports beyond those provided in Rule 12b-25?

Answer: No. Pursuant to Rule 12b-25, there are no additional extensions of time beyond the 15 calendar days for annual reports and the 5 calendar days for quarterly reports. [September 30, 2008]

Question 135.06

Question: May a company continue to use a registration statement that is predicated on timely filed reports (such as Form S-3) *during* the Rule 12b-25 extension period for a periodic report?

Answer: Rule 12b-25(d) provides that, during the extension period, a company "will not be eligible to use any registration statement form under the Securities Act the use of which is predicated on timely filed reports until the subject report is actually filed." The staff interprets the term "use" contained in the rule to mean that a company would not be eligible to file a new registration statement on Form S-3 until the subject report is filed within the extension period. The staff does not interpret the term to mean that the company cannot continue to use an already effective Form S-3 to make offers and sales during the extension period. Rather, the company's ability to continue to make such offers or sales will depend on whether it determines that the prospectus included in the Form S-3 is a valid Section 10(a) prospectus and there are no Section 12(a)(2) or anti-fraud concerns with the prospectus. If the company determines that it does not have a valid Section 10(a) prospectus, it should cease making any offers or sales under the registration statement that includes that prospectus. [September 30, 2008]

Question 135.07

Question: A registrant has failed to file its Form 10-K. May the registrant continue to use an effective Form S-3, which is predicated on timely filed reports, *after* expiration of the Rule 12b-25 extension period relating to the Form 10-K, but *before* the date on which the registrant is required to update the registration statement under Section 10(a)(3) of the Securities Act?

Answer: If the registrant has not filed a Form 10-K after the Rule 12b-25 extension period has run, and the registrant is not yet required to update the registration statement under Section 10(a)(3) of the Securities Act, the registrant's ability to make offers and sales will depend on whether the company determines that the prospectus included in the Form S-3 is a valid Section 10(a) prospectus and there are no Section 12(a)(2) or anti-fraud concerns with the prospectus.

After the registrant files the Form 10-K, however, all offers and sales under the registration statement must cease. This is because the Form 10-K serves as the Section 10(a)(3) update to the Form S-3, as provided in the undertakings in Item 512 of Regulation S-K. Further, for purposes of Rule 401(b) under the Securities Act, the filing of the Form 10-K constitutes a post-effective amendment to the Form S-3. Therefore, the registrant would not satisfy General Instruction I.A.3 to Form S-3 at the time of its Section 10(a)(3) update because, while the company may be "current" in its Exchange Act reporting at that time, it would not be "timely" in that reporting for the twelve calendar months preceding the filing of the Section 10(a)(3) update. Therefore, in order to resume making sales under the effective registration statement, the company would have to file (and have declared effective) a post-effective amendment on whatever form the company is eligible to use for that offering at that time. [September 30, 2008]

Question 135.08

Question: When the conditions of Rule 144(c)(1) must be satisfied in selling securities under the Rule 144 safe harbor, may sales continue during the Rule 12b-25 extension period?

Answer: There is a risk in selling under Rule 144 during the 5-day or 15-day period following the filing of the Form 12b-25 because, if the missing report or portion thereof is not filed during that period, the issuer may be deemed not current until it is filed. [September 30, 2008]

Question 135.09

Question: May an issuer rely on Rule 12b-25 for an extension to file a special financial report under Rule 15d-2?

Answer: Yes. Rule 12b-25 is available to registrants filing special financial reports under Rule 15d-2. [September 30, 2008]

Question 135.10

Question: Can Rule 12b-25 be used to extend the due date for timely filing of information incorporated by reference from definitive proxy materials into Item III of Form 10-K?

Answer: No. General Instruction G.(3) to Form 10-K permits a reporting issuer subject to the proxy rules to omit Part III information concerning management and its compensation from the Form 10-K, if the information omitted from Part III is disclosed in the issuer's proxy statement and if the proxy statement is filed with the Commission no later than 120 days from the end of the fiscal year. In other words, the instruction permits forward incorporation by reference of the proxy statement into the already filed Form 10-K.

The effect of the instruction is to deem the Part III information to have been timely filed on the due date applicable to the Form 10-K. The effect is not to constitute the 120th day as a second due date for the Part III information.

As a result, Rule 12b-25 cannot be used to extend the time available for satisfying Part III's line-items by incorporating the proxy statement. The Form 10-K must be amended by the 120th day to disclose the Part III information if the definitive proxy statement has not been filed, as stated in the general instruction. The proxy statement still must be filed independently to comply with Rule 14a-6.

If a filer does not file its proxy statement or amend its Form 10-K within 120 days, it would be considered an untimely filer. Thus, the company would be eligible to use Form S-3 only after it subsequently filed its Exchange Act reports on a timely basis for 12 calendar months after the original Form 10-K due date. [September 30, 2008]

Question 135.11

Question: Can a filer rely on Exchange Act Rule 12b-25 to extend the due date of an Interactive Data File?

Answer: No. Rule 12b-25 has been amended to state that its provisions do not apply to Interactive Data Files. Filers that are unable to submit or post Interactive Data Files when required must comply with the hardship exemption requirements of either Rule 201 (temporary hardship exemption) or Rule 202 (continuing hardship exemption) of Regulation S-T. However, filers that are unable to file their traditional format financial statements by the prescribed due date — but qualify for the additional time permitted under Rule 12b-25 and file their traditional format financial statements within that time — would not be required to submit and post their interactive data until the traditional format financial statements are filed. [May 29, 2009]

Question 135.12

Question: A registrant expects that due to COVID-19 it will be unable to file a report of the type covered by Rule 12b-25 on a timely basis without incurring an unreasonable effort or expense. It is uncertain as to its ability to file the required report within the applicable Rule 12b-25(b)(2)(ii) period. Should the registrant instead furnish a report on Form 8-K or 6-K, as applicable, relying on the COVID-19 Order (Release No. 34-88465 (March 25, 2020))?

Answer: Yes. As a condition to its use, the COVID-19 Order requires, among other things, that the registrant furnish certain specified statements by the later of March 16, 2020 or the original due date of the required report. If

the registrant only files a Form 12b-25 by the original due date of the required report, it will have not met the condition of the COVID-19 Order to provide the statements called for by the original filing deadline on a furnished Form 8-K or Form 6-K. Unless this condition is met, the 45 day relief period provided in COVID-19 Order will not be available. Registrants unable to rely on the COVID-19 Order are encouraged to contact the staff to discuss collateral consequences of late filings. [March 31, 2020]

Question 135.13

Question: Can a registrant that filed a Form 12b-25 subsequently rely on the COVID-19 Order (Release No. 34-88465 (March 25, 2020)), to extend the filing deadline for the subject report?

Answer: The COVID-19 Order is conditioned on a registrant having furnished a Form 8-K or Form 6-K by the later of March 16, 2020 or the original due date of the report. A Form 12b-25 filing does not extend the original due date of a report. Therefore, unless a registrant that filed a Form 12b-25 also furnished a Form 8-K or Form 6-K by March 16, 2020 or the original due date of the report, it would not be able to rely on the COVID-19 Order.

On the other hand, a registrant that relies on the COVID Order for a report will be considered to have a due date 45 days after the original filing deadline for the report. As such, the registrant would be permitted to subsequently rely on Rule 12b-25 if it is unable to file the report on or before the extended due date. Registrants unable to rely on the COVID-19 Order are encouraged to contact the staff to discuss collateral consequences of late filings. [March 31, 2020]

Sections 136 to 139. [Reserved]

Sections 140 to 149. Regulation 12d1; Regulation 12d2

Sections 140 to 143. [Reserved]

Section 144. Rule 12d2-2

Question 144.01

Question: For a class of securities that is being delisted from a national securities exchange, may a Form 15 be filed with respect to that class of securities *before* the effective date of the delisting pursuant to a Form 25?

Answer: No. The effective date of a Form 25 for the delisting of an issuer's securities may not be earlier than 10 days following the date on which such form is filed with the Commission. A Form 15 with respect to the class of securities being delisted may not be filed prior to the effective date of the Form 25 for the delisting since the reporting obligations pursuant to Sections 12(g) and 15(d) remain suspended until that date. [September 30, 2008]

Question 144.02

Question: After its Form 25 is effective for the delisting of a class of securities from a national securities exchange (and assuming that the same class of securities is not listed on any other national securities exchange), a registrant files a Form 15 with respect to the Section 12(g) registration and/or Section 15(d) reporting obligation relating to the same class of securities. What Exchange Act filings must the registrant make after it files the Form 15?

Answer: In this case, a registrant would not have to file Section 13(a) reports during the period after the filing of the Form 15 through the effectiveness of the termination of the Section 12(g) registration and/or Section 15(d) reporting obligation, notwithstanding Rules 12d2-2(d)(6) and (7), if the company would not otherwise be required to file Exchange Act reports under Sections 13(a) or 15(d) of the Exchange Act. [September 30, 2008]

Question 144.03

Question: An issuer files a Form 25 to delist a class of securities from a national securities exchange and to terminate the Section 12(b) registration of that class. After filing the Form 25, the issuer files a Form 12b-25 with

respect to a periodic report that is due between the date it filed the Form 25 and the effective date for the delisting under Rule 12d2-2(d)(1). The date by which the periodic report must be filed pursuant to Rule 12b-25(b)(3) falls after the effective date of the delisting. The issuer is not otherwise required to file Exchange Act reports under Sections 13(a) or 15(d) of the Exchange Act after the effective date of the delisting. Must the issuer file the periodic report?

Answer: Yes. Rule 12d2-2(d)(5) specifies that the issuer's duty to file any reports under Section 13(a) solely because of registration pursuant to Section 12(b) is suspended only when the Form 25 is effective for the delisting. Therefore, an issuer may not look to Rule 12b-25 to avoid filing a periodic report that becomes due after the filing of the Form 25 but before the effectiveness of the delisting. [September 30, 2008]

Question 144.04

Question: An issuer files a Form 25 to delist a class of securities from a national securities exchange and to terminate the Section 12(b) registration of that class. The issuer is not otherwise required to file Exchange Act reports under Section 13(a) or 15(d) of the Exchange Act after the effective date of the delisting. Between the date of filing the Form 25 and the effective date of the delisting under Rule 12d2-2(d)(1), a periodic report becomes due. Assume that the due date of the periodic report is a Saturday, Sunday or federal holiday, and the effective date of the delisting occurs on the first business day following that due date. Must the issuer file the periodic report?

Answer: Yes. Rule 12d2-2(d)(5) specifies that the issuer's duty to file any reports under Section 13(a) solely because of registration pursuant to Section 12(b) will be suspended upon the effective date of the delisting. An issuer may not look to Exchange Act Rule 0-3(a) to avoid filing the periodic report in the event that the due date of the periodic report falls on a Saturday, Sunday or federal holiday and the effective date of the delisting occurs on the first business day following that due date. [September 30, 2008]

Sections 145 to 149. [Reserved]

Sections 150 to 159. Extensions and Temporary Exemptions; Definitions: Rules 12g-1 to 12h-6

Section 150. Rule 12g-3

Question 150.01

Question: Under Exchange Act Rule 12g-3, must a Form 8-A, or any other form, be filed in order for the securities of a successor issuer to be deemed registered under Section 12?

Answer: No. Rule 12g-3 provides for the registration of the securities of successor issuers under the Exchange Act. The securities of a successor issuer described in Rule 12g-3 are deemed to be registered under Section 12 by operation of law, and no Exchange Act registration statement on Form 8-A or any other form therefore need be filed. Under Rule 12g-3(f), the successor must file a Form 8-K with respect to the succession transaction, using the predecessor's file number. After the Form 8-K is filed, a new file number will be generated for the successor company. When two reporting companies consolidate, each of the predecessor companies should file a Form 15 in connection with the succession. [September 30, 2008]

Question 150.02

Question: What filings should a non-reporting foreign private issuer make when it succeeds to the reporting obligation of an issuer under Exchange Act Rule 12g-3? For example, if a non-reporting foreign private issuer acquires a reporting foreign private issuer using shares as consideration in a transaction exempt from registration under the Securities Act (such as under Section 3(a)(10)), how should the non-reporting foreign private issuer begin filing on EDGAR?

Answer: The foreign private issuer's initial filing to evidence the succession should be a Form 6-K announcing the succession, filed on EDGAR using the 8-K submission type that is appropriate to the specific transaction.

Thereafter, the issuer should make all other Exchange Act filings as appropriate. [December 8, 2016]

Section 151. Rule 12g-4

Question 151.01

Question: An issuer files a Form 12b-25 in connection with a periodic report, and then files a Form 15 under Rule 12g-4 during the Rule 12b-25 extension period. Is an issuer nonetheless required to file the periodic report in this situation?

Answer: Yes. An issuer which files a Form 12b-25 for an extension of the period for filing a periodic report, and subsequently files a Form 15 under Rule 12g-4 prior to the expiration of the extension, would still be required to file the periodic report. Rule 12g-4 does not suspend an obligation to file a Form 10-K or Form 10-Q when either form was due before the Form 15 was filed. [September 30, 2008]

Question 151.02

Question: When does Rule 12g-4 suspend an issuer's Section 13(a) and Section 14(a) reporting obligations?

Answer: The filing of a certification on Form 15 pursuant to Rule 12g-4 immediately suspends an issuer's obligation to file periodic reports pursuant to Section 13(a), but the issuer's obligations under Section 14(a) continue until the effective date of the issuer's Section 12(g) deregistration. Rule 12g-4 affects only Section 13(a) reporting requirements that arise from Section 12(g) registration and does not affect any reporting requirement under Section 15(d) of the Exchange Act that may become operative in connection with the termination of Section 12(g) registration. [September 30, 2008]

Question 151.03

Question: A registrant with a calendar year end has less than 300 holders of record as of February 15 and files a Form 15 to terminate its Section 12(g) obligations under Rule 12g-4 before the due date of the Form 10-K for the most recently completed fiscal year. Assuming the registrant had more than 300 holders of record as of January 1, the registrant then has a Section 15(d) obligation that revives because it had an effective Form S-3 and Form S-8 that were updated during the registrant's last fiscal year by virtue of the filing and incorporation by reference of a Form 10-K into the Form S-3 and Form S-8. How can the registrant suspend its Section 15(d) obligation on a going forward basis?

Answer: The registrant can suspend the Section 15(d) obligation on a going forward basis provided: (1) the registrant first files post-effective amendments to the Form S-3 and Form S-8 to terminate those offerings; (2) those post-effective amendments become effective before the registrant files a Form 10-K for the last fiscal year; and (3) all of the applicable conditions in Rule 12h-3 are met. The registrant would still need to file a Form 10-K for the last fiscal year because the Form S-3 and Form S-8 were updated that year. [September 30, 2008]

Question 151.04

Question: A company has filed a Form 25 which will become automatically effective on a Sunday. Once the Form 25 is effective the company may file a Form 15 which will immediately suspend its Exchange Act reporting obligations. The company's next Form 10-Q is due on the same Sunday the Form 25 will become effective. If the company files the Form 15 on the next business day, is it required to file the Form 10-Q?

Answer: No. [Apr. 24, 2009]

Section 152. Rule 12g5-1

Question 152.01

Question: How is the number of record holders determined under Rule 12g5-1?

Answer: Rule 12g5-1 defines "held of record" for purposes of Exchange Act Section 12(g) and 15(d). It is the counting rule for determining whether an issuer has sufficient security holders to become or remain subject to Section 12(g) and to remain subject to Section 15(d). Rule 12g5-1(a)(3) provides a special counting method for securities held in a custodial capacity for a single trust, estate or account. In such a case, each trust, estate or account is a distinct holder of record for purposes of Sections 12(g) and 15(d). Institutional custodians, such as Cede & Co. and other commercial depositories, are not single holders of record for purposes of the Exchange Act's registration and periodic reporting provisions. Instead, each of the depository's accounts for which the securities are held is a single record holder.

In contrast, securities held in street name by a broker-dealer are held of record under the rule only by the broker-dealer. The Commission originally proposed a version of the rule that would have looked through to the beneficial owners of the street-name securities, but adopted the rule in a form that does not produce this result. [September 30, 2008]

Section 153. Rule 12h-3

Question 153.01

Question: Section 15(d) of the Exchange Act provides an automatic suspension of the periodic reporting obligation as to any fiscal year (except for the fiscal year in which the registration statement became effective) if an issuer has fewer than 300 security holders of record *at the beginning* of such fiscal year. In contrast, Rule 12h-3 permits a company to suspend its reporting obligation under Section 15(d) if the requirements of the rule are met *at any time* during the fiscal year. Is a Form 15 required to be filed under Rule 12h-3 as a condition of the suspension?

Answer: Because situations exempted by Rule 12h-3 (*e.g.*, there are fewer than 300 security holders of record in the middle of a fiscal year) do not meet the literal test of Section 15(d), Rule 12h-3 requires the filing of Form 15 as a condition of the suspension. By contrast, under Rule 15d-6, if an issuer has fewer than 300 security holders of record at the beginning of the fiscal year, a Form 15 should be filed to notify the Commission of such suspension, but the suspension is granted by statute and is not contingent on filing the Form 15. [September 30, 2008]

Question 153.02

Question: A company's obligation to file periodic reports was automatically suspended under Section 15(d) for fiscal year 2007 because the class of securities at issue was held by less than 300 record holders on the first day of the company's fiscal year. Subsequently, on the first day of fiscal year 2010, the number of record holders exceeded 300, and as a result, the company's obligation to file periodic reports under section 15(d) "revived." What is the first report due for this company?

Answer: The first report due will be a Form 10-K for the previous fiscal year (fiscal year 2009). This position is consistent with the "look back" provision of Rule 12h-3(e), which provides that a company that suspends its reporting obligation under Rule 12h-3, but subsequently has that reporting obligation "revived," must begin reporting again under Section 15(d) by filing a Form 10-K for its previous fiscal year. Similarly, a company that must file a registration statement on Form 10 to register a class of securities under Section 12(g) must include financial statements for its previous fiscal year. [September 30, 2008]

Question 153.03

Question: Can a company suspend its reporting obligations under Section 15(d) with respect to "the fiscal year within which such registration statement became effective"?

Answer: No. A company must always file the Form 10-K for the fiscal year in which the registration statement is declared effective. The Form 10- K is required regardless of whether the company suspends its reporting obligation under Section 15(d) or Rule 12h-3. [September 30, 2008]

Section 154. Rule 12h-5

Question 154.01

Question: When must a parent company's full and unconditional guarantee be in effect in order for the parent's subsidiary to be exempt from the requirements of Section 13(a) or 15(d) pursuant to Exchange Act Rule 12h-5?

Answer: In order for the subsidiary to be exempt from filing a periodic report pursuant to Rule 12h-5, the full and unconditional parent guarantee of the subsidiary's debt securities must be in effect before the end of the period that would have been covered by the periodic report, assuming that all other applicable conditions of Rule 3-10 of Regulation S-X are met. [September 30, 2008]

Section 155. Rule 12h-6

Question 155.01

Question: For purposes of applying the primary trading market definition under Rule 12h-6(f)(5), may an issuer consider all securities trading markets in countries that are part of the European Union as a single foreign jurisdiction?

Answer: Yes, because the capital markets within the European Union have become more integrated as a result of application of EU-wide laws and regulations relating to prospectuses, transparency, trading and other matters. [December 8, 2016]

Sections 156 to 159. [Reserved]

Sections 160 to 164. Regulation 13A: Rules 13a-1 to 13a-20

Section 160. Rule 13a-1

Question 160.01

Question: If a registrant with a December 31 fiscal year-end files a Form 10 in November 2007 which goes effective in January 2008, what is the first Form 10-K that the registrant is required to file?

Answer: The registrant's first Form 10-K should be filed with respect to its fiscal year ended December 31, 2007. [September 30, 2008]

Section 161. Rule 13a-14

Question 161.01

Question: May the principal executive officer and principal financial officer of an issuer omit certain paragraphs from the certifications required by Rules 13a-14(a) and 15d-14(a) when the issuer is filing an amendment to a periodic report?

Answer: If there are no financial statements or other financial information in the amendment, then paragraph 3 may be omitted from the certifications that are filed with the amendment. If the amendment does not contain or amend disclosure pursuant to Item 307 or 308 of Regulation S-K (or the equivalent disclosure requirement in Form 20-F or 40-F), and such disclosure is not otherwise required to be amended given the nature of the reasons for the amendment, paragraphs 4 and 5 may be omitted from the certifications that are filed with the amendment. Paragraphs 1 and 2 may not be omitted under any circumstances. [September 30, 2008]

Question 161.02

Question: If an officer signs the certification without altering the wording to indicate he or she is providing the certification as principal financial officer, how will readers know whether the signatory is the principal executive officer or the principal financial officer?

Answer: The officer should include his or her title under the signature. [September 30, 2008]

Question 161.03

Question: If the same individual is both the principal executive officer and principal financial officer, must he or she sign two certifications?

Answer: The individual may provide one certification and provide both titles underneath the signature. [September 30, 2008]

Question 161.04

Question: A CEO resigned after the end of the quarter but before the filing of the upcoming Form 10-Q. The company appointed a new CEO prior to the filing. Who signs the certification?

Answer: The new CEO, provided that he or she is the principal executive officer at the time of the filing. [September 30, 2008]

Question 161.05

Question: A company's CEO is resigning at the end of the year and is no longer performing the functions of a principal executive officer even though she remains employed with the company and has the title of the CEO. At the time of the filing of the periodic report, another officer is performing the functions of a principal executive officer. Should this other officer sign the certification despite the fact that there is a titular CEO?

Answer: The individual performing the functions of a principal executive officer at the time of the filing must provide the certification. If it is not the titular CEO, the company should disclose in the filing that the certifying individual is performing the functions of a principal executive officer. [September 30, 2008]

Question 161.06

Question: An issuer does not have a principal executive officer or a principal financial officer. Who must execute the certifications required by Rules 13a-14(a) and 15d-14(a)?

Answer: As set forth in paragraph (a) of Rules 13a-14 and 15d-14, where an issuer does not have a principal executive officer or a principal financial officer, the person or persons performing similar functions at the time of filing of the report must execute the required certification. [September 30, 2008]

Question 161.07

Question: Must co-principal executive officers (or co-principal financial officers) execute separate certifications or may both execute the same certification?

Answer: Co-principal executive officers (or co-principal financial officers) should each execute separate certifications. [September 30, 2008]

Question 161.08

Question: If the certifications required by Rules 13a-14(a) and 15d-14(a) are not included as exhibits to a Form 10-K or 10-Q, and an amendment will be filed to include the certifications as exhibits, must the entire periodic report be re-filed or can the amendment include only the signature page?

Answer: Because the certification relates to the entire Form 10-K or 10-Q, the amendment should include the entire report, not just the signature page. [September 30, 2008]

Question 161.09

Question: Using the same facts in Question 161.08 above, if the amendment is not filed within the time period required for the periodic report, is the report deemed to be untimely?

Answer: Yes. The periodic report will not be deemed timely for purposes of form eligibility, and the issuer will not be deemed current until the amended periodic report containing the certification is filed. [September 30, 2008]

Question 161.10

Question: Where the registrant is a limited partnership that does not have an audit committee, who should be considered the persons performing the equivalent function as referenced in paragraph 5 of the certifications required by Rules 13a-14(a) and 15d-14(a)?

Answer: This is a question of fact. Relevant considerations may include: who is responsible for engaging the external auditor and for pre-approving audit and non-audit services? To whom is the registered public accounting firm reporting critical accounting policies and practices? To whom are the principal executive and financial officers disclosing significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting, or fraud involving management or other employees who have a significant role in the registrant's internal control over financial reporting? Oftentimes, if there is ultimately a corporation serving as the general partner of a limited partner in the chain of ownership, the corporation's audit committee or full board is likely performing the equivalent functions of an audit committee for the registrant. Or, if there is ultimately an individual serving as the general partner of a limited partner in the chain of ownership, then that individual is likely performing the equivalent functions of an audit committee for the registrant. [September 30, 2008]

Section 162. Rule 13a-15

Question 162.01

Question: The interactive data adopting release provides that controls and procedures with respect to interactive data fall within the scope of "disclosure controls and procedures." *See* Securities Act Release No. 9002 (Jan. 30, 2009). Exchange Act Rules 13a-15 and 15d-15 require certain officers to evaluate the effectiveness of the filer's disclosure controls and procedures, and Item 307 of Regulation S-K requires the filer to disclose the officers' conclusions regarding the effectiveness of those disclosure controls and procedures. However, the adopting release also adopts amendments to Exchange Act Rules 13a-14 and 15d-14 that exclude interactive data from officer certifications, which, among other things, describe the officers' responsibility for establishing and maintaining disclosure controls and procedures and require statements regarding their design and evaluation. Is a filer that submits interactive data in an exhibit to a Form 10-K or 10-Q required to consider controls and procedures with respect to interactive data in complying with Exchange Act Rules 13a-15 and 15d-15 and Item 307?

Answer: Yes. Controls and procedures with respect to interactive data fall within the scope of "disclosure controls and procedures." That the principal executive and financial officers do not need to consider such controls in making their individual certifications about their responsibility for establishing and maintaining the filer's disclosure controls and procedures does not mean that the filer can exclude such controls in complying with Rules 13a-15 and 15d-15 and Item 307 of Regulation S-K. [May 29, 2009]

Sections 163 to 164. [Reserved]

Sections 165 to 169. Regulation 14A: Rules 14a-1 to 14b-2

Sections 165 to 168 [Reserved]

Section 169. Rule 14a-21

Question 169.01

[Withdrawn, November 7, 2018]

Question 169.02

[Withdrawn, November 7, 2018]

Question 169.03

[Withdrawn, November 7, 2018]

Question 169.04

Question: Must the vote on say-on-frequency, as required by Rule 14a-21(b), be in the form of a "resolution"?

Answer: No. [Feb. 11, 2011]

Question 169.05

Question: Is it permissible for the say-on-pay vote to omit the words, "pursuant to Item 402 of Regulation S-K," and to replace such words with a plain English equivalent, such as "pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this proxy statement"?

Answer: Yes, it is permissible to use a plain English equivalent in lieu of the words, "pursuant to Item 402 of Regulation S-K." [Feb. 11, 2011]

Question 169.06

Question: Is it permissible for the say-on-frequency vote to include the words "every year, every other year, or every three years, or abstain" in lieu of "every 1, 2, or 3 years, or abstain"?

Answer: Yes. [Feb. 11, 2011]

Question 169.07

Question: On its proxy card and voting instruction form, how should a company describe the advisory vote to approve executive compensation that is required by Exchange Act Rule 14a-21?

Answer: The following are examples of advisory vote descriptions that would be consistent with Rule 14a-21's requirement for shareholders to be given an advisory vote to approve the compensation paid to a company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K.

- To approve the company's executive compensation
- Advisory approval of the company's executive compensation
- Advisory resolution to approve executive compensation
- Advisory vote to approve named executive officer compensation

The following is an example of an advisory vote description that would not be consistent with Rule 14a-21 because it is not clear from the description as to what shareholders are being asked to vote on. Shareholders could interpret this example as asking them to vote on whether or not the company should hold an advisory vote on executive compensation, rather than asking shareholders to actually approve, on an advisory basis, the compensation paid to the company's named executive officers.

- To hold an advisory vote on executive compensation

[Feb. 13, 2012]

Sections 170 to 179. Reports of Registrants Under the Securities Act of 1933: Rules 15d-1 to 15d-6

Section 170. Rule 15d-2

None

Section 171. Rule 15d-6

Question 171.01

Question: Section 15(d) of the Exchange Act provides an automatic suspension of the periodic reporting obligation as to any fiscal year (except for the fiscal year in which the registration statement became effective) if an issuer has fewer than 300 security holders of record *at the beginning* of such fiscal year. Is a Form 15 required to be filed under Rule 15d-6 as a condition of the suspension?

Answer: No. Under Rule 15d-6, if an issuer has fewer than 300 security holders of record at the beginning of the fiscal year, a Form 15 should be filed to notify the Commission of such suspension, but the suspension is granted by statute and is not contingent on filing the Form 15. [September 30, 2008]

Sections 172 to 179. [Reserved]

Sections 180 to 189. Other Reports: Rules 15d-10 to 15g-100

Section 180. Rule 15d-10

None

Section 181. Rule 15d-14

Question 181.01

Question: Must an issuer that is filing or submitting reports exclusively under Section 15(d) of the Exchange Act on a “voluntary” basis (for example, pursuant to a covenant in an indenture or similar document), due to a statutory suspension of the Section 15(d) filing obligation, comply with Rules 15d-14 and 15d-15 and the disclosures required by Item 307 and Item 308 of Regulation S-K?

Answer: Yes. All issuers filing or submitting reports under Section 15(d) on a voluntary basis must comply with those provisions whether or not a Form 15 has been filed pursuant to Rule 15d-6. [September 30, 2008]

Section 182. Rule 15d-15

Question 182.01

Question: Must an issuer that is filing or submitting reports exclusively under Section 15(d) of the Exchange Act on a “voluntary” basis (for example, pursuant to a covenant in an indenture or similar document), due to a statutory suspension of the Section 15(d) filing obligation, comply with Rules 15d-14 and 15d-15 and the disclosures required by Item 307 and Item 308 of Regulation S-K?

Answer: Yes. All issuers filing or submitting reports under Section 15(d) on a voluntary basis must comply with those provisions whether or not a Form 15 has been filed pursuant to Rule 15d-6. [September 30, 2008]

Question 182.02

Question: The interactive data adopting release provides that controls and procedures with respect to interactive data fall within the scope of "disclosure controls and procedures." *See* Securities Act Release No. 9002 (Jan. 30, 2009). Exchange Act Rules 13a-15 and 15d-15 require certain officers to evaluate the effectiveness of the filer's disclosure controls and procedures, and Item 307 of Regulation S-K requires the filer to disclose the officers' conclusions regarding the effectiveness of those disclosure controls and procedures. However, the adopting release also adopts amendments to Exchange Act Rules 13a-14 and 15d-14 that exclude interactive data from officer certifications, which, among other things, describe the officers' responsibility for establishing and

maintaining disclosure controls and procedures and require statements regarding their design and evaluation. Is a filer that submits interactive data in an exhibit to a Form 10-K or 10-Q required to consider controls and procedures with respect to interactive data in complying with Exchange Act Rules 13a-15 and 15d-15 and Item 307?

Answer: Yes. Controls and procedures with respect to interactive data fall within the scope of "disclosure controls and procedures." That the principal executive and financial officers do not need to consider such controls in making their individual certifications about their responsibility for establishing and maintaining the filer's disclosure controls and procedures does not mean that the filer can exclude such controls in complying with Rules 13a-15 and 15d-15 and Item 307 of Regulation S-K. [May 29, 2009]

Section 183. Rule 15d-21

Question 183.01

Question: Is an employee benefit plan with a Section 15(d) reporting obligation that files Forms 11-K, or that has its filing obligation satisfied by compliance with Exchange Act Rule 15d-21, required to file any other current or periodic reports under the Exchange Act?

Answer: No. An employee benefit plan with a Section 15(d) reporting obligation that files Forms 11-K, or that has its filing obligation satisfied by compliance with Exchange Act Rule 15d-21, is not required to file any other periodic reports or any current reports. In the *Citizens and Southern Corp.* no-action letter (Feb. 8, 1988) issued by the Division, we state that, for a plan filing annual reports on Form 11-K, “no other reports required by Section 13 of the 1934 Act would be required.” [September 30, 2008]

Section 184. Rule 15g-9

None

Sections 185 to 189. [Reserved]

INTERPRETIVE RESPONSES REGARDING PARTICULAR SITUATIONS

Sections 201 to 209. Rules of General Application: Rules 0-1 to 0-12

None

Sections 210 to 219. Definitions: Rules 3a11-1 to 3b-19

None

Section 220. Manipulative and Deceptive Devices and Contrivances: Rule 10b5-1

220.01 After the written trading plan described in Q&A 120.11 has been in effect for several months, the broker that has been executing plan sales goes out of business at a time when the person is aware of material nonpublic information. The person wishes to continue sales under the plan pursuant to its original terms. The person may transfer plan transactions to a different broker without being deemed to have cancelled the original plan and adopted a new plan if the transfer to the new broker is timed so that there is no cancellation of any transaction scheduled in the original plan, and the new broker effects sales in accordance with the original plan’s terms in compliance with Rule 10b5-1(c). [Mar. 25, 2009]

220.02 A company sought to establish a stock repurchase plan that would comply with Rules 10b5-1(c)(1) and 10b-18. Most shares would be repurchased through open market transactions, but the company intended to negotiate repurchase of at least one large block of stock through a privately negotiated transaction. The company proposed that the plan provide for an automatic reduction in the aggregate number of shares authorized for repurchase under the plan equal to the number of shares, if any, that the company discloses in Form 10-Q, Part II, Item 2 that it has repurchased in privately negotiated transactions. The broker executing plan repurchases would

review company filings to determine the amount of any such repurchases that had been disclosed. Because this would give the issuer the potential to effectively modify the plan by doing the block trades while aware of material nonpublic information, the Division staff took the view that the Rule 10b5-1(c) affirmative defense would not be available. Question 120.14, which provides that delegation of discretion to a broker to reduce the number of shares to be sold under a trading plan to comply with the Rule 144(e) volume limitations, was distinguished because the reductions in Question 120.14 reflect limitations imposed by law rather than an exercise of discretion by the seller. [Mar. 25, 2009]

Section 221. Rule 12a-5

None

Sections 222 to 229. [Reserved]

Sections 230 to 239. Regulation 12B: Rules 12b-1 to 12b-37

Section 230. Rule 12b-2

230.01 If two accelerated filers or large accelerated filers merge and become subsidiaries of a newly formed holding company, that newly formed holding company will be deemed an accelerated or large accelerated filer, respectively. [September 30, 2008]

230.02 If a newly formed public company uses Form S-3 on the basis of another entity's (*e.g.*, its parent's) reporting history and that other entity is an "accelerated filer," then the newly formed public company is also deemed an accelerated filer. In such a case, the newly formed public company would not wait until the end of its fiscal year to determine its accelerated filer status. It must comply with the accelerated filer deadlines for its Forms 10-Q filed after its formation but prior to the filing of its first Form 10-K, and the company must check the box on the cover pages of these Forms 10-Q indicating that it is an accelerated filer. [September 30, 2008]

Sections 231 to 232. [Reserved]

Section 233. Rule 12b-15

None

Section 234. Rule 12b-23

234.01 Where a company is being acquired, the acquiring company may incorporate by reference the acquired company's Form 10-K financial statements into the acquiring company's Form 8-K, so long as copies of the pertinent pages of the Form 10-K are filed as an exhibit to the Form 8-K. The consent(s) of the accountant(s) for the acquired company should be filed with the Form 8-K. [September 30, 2008]

234.02 An issuer with a pending Securities Act registration statement files its Form 10-K and seeks to incorporate by reference into the Form 10-K information from the pending registration statement. This is permissible, provided two conditions are met: (1) the portion of the registration statement to be incorporated does not include any incorporation by reference to another document (*see* Item 10(d) of Regulation S-K), and (2) a copy of the incorporated portion of the registration statement is filed as an exhibit to the Form 10-K, as required by Rule 12b-23(a)(3) under the Exchange Act. [September 30, 2008]

Section 235. Rule 12b-25

None

Sections 236 to 239. [Reserved]

Sections 240 to 249. Regulation 12d1; Regulation 12d2

Sections 240 to 243. [Reserved]

Section 244. Rule 12d2-2

None

Sections 245 to 249. [Reserved]

Sections 250 to 259. Extensions and Temporary Exemptions; Definitions: Rules 12g-1 to 12h-6

Section 250. Rule 12g-3

250.01 Under Rule 12g-3, the securities issued by a holding company that acquires a company with a class of securities registered under Section 12(g) of the Exchange Act are automatically deemed to be registered under Section 12(g), whether or not a Form 8-K or 8-A has been filed with respect to such securities. The rule serves to eliminate any possible gap in the application of Exchange Act protection to the security holders of the predecessor. [September 30, 2008]

250.02 The successor to a Section 12(g) registrant that underwent a re-incorporation merger to change its state of incorporation reported the merger in the next Form 10-Q that would have been required of the Section 12(g) registrant, and thereafter continued to file Exchange Act reports in reliance upon Rule 12g-3. The successor later learned that at the time of the merger, the predecessor had fewer than 300 record shareholders. Although Rule 12g-3 does not provide for the succession to the predecessor's Section 12(g) registration if at the time of the succession the securities of the class are held by fewer than 300 record holders, the Division staff has taken the position that Section 12(g) registration could be voluntarily continued by the successor pursuant to Rule 12g-3 in these circumstances without the filing of a new Exchange Act registration statement. [September 30, 2008]

250.03 Where the Rule 12g-3 succession involves the formation of a one-bank holding company, the subsidiary bank does not have an Exchange Act file number. In such situations, the Commission assigns an Exchange Act file number for the successor holding company when the Form 8-K is filed. [September 30, 2008]

250.04 Following emergence from bankruptcy, the same issuer issues a new class of common stock that has substantially the same terms as its old common stock, except for a different par value. Under the bankruptcy plan, all shares of the old common stock are canceled simultaneously with the issuance of the new common stock to new holders. Although Rule 12g-3 technically does not apply because only one issuer is involved, the Division is of the view that the new common stock would succeed to the registered status of the old common stock, so that continuous Exchange Act reporting would be required. [September 30, 2008]

250.05 Rule 12g-3(a) would be available to effect Section 12 registration of securities of a successor issuer formed as part of the predecessor's emergence from bankruptcy, even though the class of securities so registered will be issued to persons other than the holders of the registered class of the predecessor. [September 30, 2008]

Section 251. Rule 12g-4

251.01 Following a tender offer, a company has sufficiently few shareholders to be eligible to file a Form 15 pursuant to Rules 12g-4 and 12h-3. Subsequently, the company will have a back-end merger. The Division staff ordinarily will not accelerate termination of Section 12(g) registration under Rule 12g-4 where an Exchange Act event is anticipated. Accordingly, the company will be required to file a Schedule 14A proxy statement or a Schedule 14C information statement relating to the back-end merger during the 90-day period between filing the Form 15 and termination of registration pursuant to Rule 12g-4. [September 30, 2008]

Section 252. Rule 12g5-1

252.01 Rule 12g5-1 does not require an issuer to look through record ownership to the beneficial holders in determining whether it has 500 security holders for purposes of registration under Section 12(g) of the Exchange

Act. [September 30, 2008]

252.02 An ESOP is a "trust," and counts as one holder of record for purposes of Rule 12g5-1(a)(2). An ESOP is not a "voting trust" under Rule 12g5-1(b). [September 30, 2008]

Section 253. Rule 12h-3

253.01 A registrant formed two limited partnerships, the A partnership and the B partnership, both having between 300 and 500 shareholders. The registrant has been filing a combined Form 10-K report for those partnerships using the 33- file number from the Securities Act registration statement. The B partnership is now eligible to suspend filing pursuant to Rule 12h-3 because it has had less than $10 million in assets for its last three fiscal years. The registrant can file a Form 15 relating to the B partnership indicating the suspension of reporting with respect to that partnership, and continue filing reports under the 33- number for the remaining partnership. [September 30, 2008]

253.02 Rule 12h-3(c)-(d) operates to relieve a holding company of the Section 15(d) reporting obligation which would normally arise from the registration statement filed for the reorganization of a non-reporting company into a one-subsidiary holding company where the equity holders receive the same proportional interests in the holding company and the holding company emerges from the reorganization with more than 300 shareholders. [September 30, 2008]

Section 254. Rule 12h-5

254.01 If an issuer of a guaranteed security has a different class of securities that is registered under Section 12 of the Exchange Act, the issuer cannot rely on Rule 12h-5 for reporting relief until it deregisters the other class of securities. [September 30, 2008]

Sections 255 to 259. [Reserved]

Sections 260 to 264. Regulation 13A: Rules 13a-1 to 13a-20

Section 260. Rule 13a-1

260.01 An issuer goes effective with a Securities Act registration statement after its fiscal year end without including audited financial statements as of such year end in such registration statement. Concurrently, the issuer registers under the Exchange Act using a Form 8-A that also does not contain the final year end audited financial statements. The issuer is not permitted to file a special financial statement report containing such audited financial statements pursuant to Rule 15d-2 (as opposed to an annual report in accordance with Rule 13a-1). The Rule 13a-1 annual report would be due at the same time as any other such annual report. [September 30, 2008]

Section 261. Rule 13a-14

261.01 An issuer filing a special financial report on Form 10-K under Rule 15d-2 must file the certification required by Item 601(b)(31) of Regulation S-K, but may omit paragraphs 4 and 5 of the certification because the report will contain only audited financial statements and not Item 307 or 308 of Regulation S-K disclosures. [September 30, 2008]

Section 262. Rule 13a-15

None.

Sections 263 to 264. [Reserved]

Sections 265 to 269. Regulation 14A: Rules 14a-1 to 14b-2

Sections 265 to 268 [Reserved]

Section 269. Rule 14a-21

None

Sections 270 to 279. Reports of Registrants Under the Securities Act of 1933: Rules 15d-1 to 15d-6

Section 270. Rule 15d-2

270.01 An issuer goes effective with a Securities Act registration statement after its fiscal year end without including audited financial statements as of such year end in the registration statement. Concurrently, the issuer registers under the Exchange Act using a Form 8-A that also does not contain the final year end audited financial statements. The issuer is not permitted to file a special financial statement report containing such audited financial statements pursuant to Rule 15d-2 (as opposed to an annual report in accordance with Rule 13a-1). The Rule 13a-1 annual report would be due at the same time as any other such annual report. [September 30, 2008]

Section 271. Rule 15d-6

None

Sections 272 to 279. [Reserved]

Sections 280 to 289. Other Reports: Rules 15d-10 to 15g-100

Section 280. Rule 15d-10

280.01 Exchange Act Release No. 26589, which significantly amended Rule 15d-10, states that "[a] change from a fiscal year ending as of the last day of the month to a 52-53 week fiscal year commencing within seven days of the month end (or from a 52-53 week to a month end) is not deemed a change in fiscal year for purposes of reporting subject to Rule 13a-10 or 15d-10 if the new fiscal year commences with the end of the old fiscal year. In such cases, a transition report would not be required. Either the old or new fiscal year could, therefore, be as short as 359 days, or as long as 371 days (372 in a leap year)." While a transition report would not be required, a Form 8-K (Item 5.03) may have to be filed to report the change in fiscal year-end. [September 30, 2008]

280.02 A company planned to file a Form 11-K for a 6-month year period for an ERISA plan. Form 11-K provides that the due date for an ERISA plan's Form 11-K is 180 days after fiscal year end. Notwithstanding the due dates prescribed by Rule 15d-10(j)(1) for transition reports to be filed on the form appropriate for annual reports of the issuer, the Division staff took the position that the short-year Form 11-K could be filed 180 days after the plan's fiscal year end. [September 30, 2008]

Section 281. Rule 15d-14

None

Section 282. Rule 15d-15

None

Section 283. Rule 15d-21

None

Section 284. Rule 15g-9

284.01 A registration statement under the Securities Act relates to the initial public offering of common stock. After the offering, the issuer's net tangible assets will be less than $2 million and the common stock will not be an NMS Stock, as defined in Section 242.600(b)(47) of Regulation NMS. The public offering price is $5 a share.

The question is whether the prospectus forming part of the registration statement should disclose the applicability of Rule 15g-9, the penny stock cold-calling rule, in the event of a price decline in the aftermarket. With the advice of the Division of Trading and Markets, the Division staff recommended disclosure concerning the rule in the prospectus. The purpose of the disclosure in these circumstances is to alert dealers required to deliver a prospectus in the 90 days after the effective date of their additional responsibilities under Rule 15g-9 if the trading price falls below $5. [September 30, 2008]

Sections 285 to 289. [Reserved]

Modified: Nov. 7, 2018