U.S. Securities and Exchange Commission

Securities Act Rules

Last Update: September 20, 2017

These Compliance and Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of the rules adopted under the Securities Act. Some of these C&DIs were first published in prior Division publications and have been revised in some cases. In particular, the revisions on September 20, 2017 reflect updates for the amendments to Rules 147 and 504, the repeal of Rule 505, and non-substantive changes throughout the Rule 147 and Regulation D C&DIs based on the Commission's current rules (e.g., changes to correct outdated rule and statutory references). We have also removed Regulation D C&DIs that do not directly relate to the Commission's current rules.

The bracketed date following each C&DI is the latest date of publication or revision. We have not changed the date of the C&DIs that reflect only non-substantive changes; however, we have marked those C&DIs with an asterisk.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Sections 101 to 109. Rules 100 to 133 [Reserved]

Section 110. Rule 134 — Communications Not Deemed a Prospectus

Question 110.01

Question: A communication made in reliance on Rule 134 must contain the statement required by Rule 134(b)(1) and information required by Rule 134(b)(2), unless the conditions of Rule 134(c) are met. In addition, if the communication solicits from the recipient an offer to buy the security or requests the recipient to indicate whether he or she might be interested in the security, it must include the statement required by Rule 134(d).

Some electronic communication platforms, such as those made available through certain social media websites, limit the number of characters or amount of text that can be included in the communication, effectively precluding display of the required statements together with the other information. Under what circumstances would the use of a hyperlink to the required statements satisfy the Rule 134(b) or Rule 134(d) requirements?

Answer: Recognizing the growing interest in using technologies such as social media to communicate with security holders and potential investors, the staff will not object to the use of an active hyperlink to satisfy the requirements of Rule 134(b) or Rule 134(d) in the following limited circumstances:

- The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;

- Including the required statements in their entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and

- The communication contains an active hyperlink to the required statements and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

Where an electronic communication is capable of including the required statements, along with the other information, without exceeding the applicable limit on number of characters or amount of text, the use of a hyperlink to the required statements would be inappropriate. [April 21, 2014]

Question 110.02

Question: Some electronic communication platforms, such as those made available through certain social media websites, permit users to re-transmit a posting or message they receive from another party. When an issuer distributes an electronic communication in compliance with Rule 134 or Rule 433, must the issuer ensure compliance with Rule 134 or Rule 433 of a re-transmission of that communication by a third party that is not an offering participant?

Answer: If the third party is neither an offering participant nor acting on behalf of the issuer or an offering participant and the issuer has no involvement in the third party's re-transmission beyond having initially prepared and distributed the communication in compliance with either Rule 134 or Rule 433, the re-transmission would not be attributable to the issuer. As explained in Securities Act Release No. 33-8591 (July 19, 2005), "[W]hether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or other offering participant depends upon whether the issuer or other offering participant has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information." [April 21, 2014]

Sections 111 to 127. Rules 135 to 143 [Reserved]

Section 128. Rule 144 — Persons Deemed Not to be Engaged in a Distribution and Therefore Not Underwriters — General Guidance

Question 128.01

Question: Is Rule 144 available to the issuer of the securities?

Answer: No. Rule 144 is not available to the issuer of the securities. *See* Securities Act Release No. 5306 (Sept. 26, 1972). [Jan. 26, 2009]

Question 128.02

Question: How long must an underwriter wait before it resells the unsold portion of a "sticky" public offering as if it were compensation?

Answer: An underwriter may resell the unsold portion of a sticky public offering as if it were compensation — wait six months from the last sale under the registration statement and follow Rule 144 except for filing the form. [Jan. 26, 2009]

Question 128.03

Question: Are securities that are received pursuant to Section 1145(a) of the Bankruptcy Code deemed restricted securities?

Answer: No. Securities received pursuant to a Bankruptcy Code proceeding under the circumstances described in Section 1145(a) of the Bankruptcy Code would not be deemed restricted securities because they would have been received in a "public offering" under Section 1145(c) of the Code. [Jan. 26, 2009]

Question 128.04

Question: If an institutional purchaser buys a block of shelf-registered securities directly from the issuer, will the securities be deemed restricted securities?

Answer: When there is a sale of a block of shelf-registered securities directly by the issuer to an institutional purchaser, the securities will not be deemed to be restricted securities that are "acquired directly or indirectly from the issuer ... in a transaction ... not involving any public offering." However, the purchaser of the securities will still have to determine whether it may be deemed an underwriter in connection with resales of such securities; such a determination will depend upon the facts and circumstances of the particular case. [Jan. 26, 2009]

Question 128.05

Question: May restricted securities be tendered in connection with a tender offer without compliance with Rule 144?

Answer: Yes. Restricted securities may be tendered in connection with a tender offer without compliance with Rule 144. The rule is not the exclusive means for reselling restricted securities. [Jan. 26, 2009]

Section 129. Rule 144(a) — Definitions

Question 129.01

Question: What is a circumstance under which securities issued under stock option plans and excess compensation plans for directors will constitute restricted securities?

Answer: Securities often are issued under employee benefit plans where the basis for non-registration of the distribution is other than a "no-sale" theory under Securities Act Section 2(a)(3). Such plans include stock option plans and excess compensation plans for directors where the securities are issued pursuant to the Securities Act Section 4(2) private offering exemption or Regulation D. [Jan. 26, 2009]

Question 129.02

Question: Are shares acquired in a private transaction from the spouse of an affiliate deemed restricted securities?

Answer: Yes, if the spouse has the same home as the affiliate, as they would then be regarded as the same person under Rule 144(a)(2)(i). [Jan. 26, 2009]

Question 129.03

Question: An affiliate donor transfers, by bona fide gift, company stock acquired in the open market (i.e., the securities are not "restricted

securities" in the affiliate's hands) to a donee in a non-public transaction. What is the status of these securities in the donee's hands, and what requirements in Rule 144 are applicable to a donee who is a non-affiliate when he or she resells these securities?

Answer: In the donee's hands, these securities are "restricted securities" because they have been "acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering." As these securities were not subject to any holding period requirement in the affiliate donor's hands, however, the donee need not comply with the holding period requirement in Rule 144(d) for subsequent sales. If the donee is a non-affiliate and has not been an affiliate during the preceding three months, then the donee may resell the securities pursuant to Rule 144(b)(1) subject only to the current public information requirement in Rule 144(c)(1), as applicable. [May 16, 2013]

Section 130. Rule 144(b) — Conditions To Be Met

Question 130.01

Question: May the tacking provisions in Rule 144(d)(3) be applied in determining whether, under Rule 144(b)(1)(i), the Rule 144(c)(1) condition has been met for the one-year period?

Answer: Yes. [Jan. 26, 2009]

Section 131. Rule 144(c) — Current Public Information

Question 131.01

Question: If securities are sold pursuant to Rule 144 at various times over a three-month period, at which time(s) must the issuer satisfy the "current public information" requirement?

Answer: When the "current public information" requirement must be met in order for the security holder to sell securities under the Rule 144 safe harbor, the issuer must continue to satisfy this requirement at the time each sale is made. [Jan. 26, 2009]

Question 131.02

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. [Sept. 30, 2008]

Question 131.03

Question: When you have an effective Form S-1 registration statement followed by a registration statement pursuant to Exchange Act Section 12(g), when does the 90-day reporting period required by Rule 144(c)(1) begin?

Answer: The 90-day reporting period commences with the effective date of the Form S-1. [Jan. 26, 2009]

Question 131.04

Question: Do reports filed under Section 30(a) of the Investment Company Act satisfy the current public information requirement of Rule 144(c)(1)?

Answer: Yes. [Jan. 26, 2009]

Question 131.05

Question: Does the information standard of Exchange Act Rule 15c2-11 require that the information be current?

Answer: Yes. The public information standard of Rule 15c2-11 relating to issuers not subject to Section 13(a) or 15(d) is met only if the Rule 15c2-11 information is current. It is irrelevant that broker-dealers may publish quotes on the issuer's securities "piggy-backing" from their prior quotes based on Rule 15c2-11 information which was current at the time such quotations were initiated. [Jan. 26, 2009]

Question 131.06

Question: Do the financial statements of non-reporting issuers need to be audited or prepared in compliance with Regulation S-X in order to satisfy the "current public information" requirement of Rule 144(c)(2)?

Answer: No. The "current public information" requirement of Rule 144(c)(2) does not require the financial statements of non-reporting issuers to be either audited or prepared in compliance with Regulation S-X, as that is not required by clauses (xii) and (xiii) of Exchange Act Rule 15c2-11(a)(5), to which Rule 144(c)(2) refers. [Jan. 26, 2009]

Question 131.07

Question: Is the current public information requirement in Rule 144(c)(1) applicable to an issuer that submits Exchange Act reports on a voluntary basis?

Answer: No. Rule 144(c)(1) applies only to issuers that are, and have been for at least 90 days immediately before the sale, subject to the reporting requirements of Exchange Act Section 13 or 15(d). A voluntary filer is not "subject to" Exchange Act Section 13 or 15(d) because it is not obligated to file Exchange Act reports pursuant to either of those provisions. Accordingly, the current public information requirement in Rule 144(c)(2) is applicable to voluntary filers. [Jan. 26, 2009]

Section 132. Rule 144(d) — Holding Period for Restricted Securities

Question 132.01

Question: To whom does the phrase "without recourse" in Rule 144(d)(3)(iv) refer?

Answer: The phrase "without recourse" appearing in Rule 144(d)(3)(iv) refers to recourse against the pledgor personally in the usual situation in which the pledgor and borrower are the same person. This interpretation would not apply, however, if the pledgor and borrower were different persons, because Rule 144(d)(3)(iv) requires recourse only against the borrower under the note. [Jan. 26, 2009]

Question 132.02

Question: May closely-held entities make in-kind distributions of restricted securities of an affiliated issuer without disturbing the holding period of the

restricted securities?

Answer: The transfer of the restricted securities from the portfolio of the closely-held entity to its equity holders will not disturb the holding period if the distribution is made ratably and without the payment of consideration for the transfer. See Securities Act Release No. 6099 (Aug. 2, 1979), at Question 34, and the *Hale and Dorr* interpretive letter (June 12, 1991) issued by the Division. [Jan. 26, 2009]

Question 132.03

Question: After the Supreme Court's decision in *Rubin v. United States*, 449 U.S. 424 (1981), do the provisions of Rule 144(d) still permit the tacking of holding periods of a pledgor and pledgee?

Answer: Yes. Notwithstanding the Supreme Court's decision in *Rubin* that a pledge may be a sale for determining application of the anti-fraud provisions of the federal securities laws, it is the Division's view that the provisions of Rule 144(d) expressly permitting the tacking of holding periods of a pledgor and pledgee continue to apply. [Jan. 26, 2009]

Question 132.04

Question: Does Rule 144(d)(3)(vii) apply only to securities owned by the decedent?

Answer: Yes. Paragraph (d)(3)(vii) of Rule 144, which provides an exemption from the Rule 144(d) holding period requirement for sales of restricted securities by a non-affiliate estate, applies only to securities owned by the decedent. It does not exempt a non-affiliate estate from the holding period requirement in the case of securities acquired by the estate upon the exercise of stock options held by the decedent. [Jan. 26, 2009]

Question 132.05

Question: May a person transfer restricted securities into his or her individual retirement account without interrupting the Rule 144(d) holding period for the securities?

Answer: Yes. [Jan. 26, 2009]

Question 132.06

Question: An individual acquires shares pursuant to anti-dilution rights attaching to restricted securities. Are these newly acquired shares restricted securities?

Answer: For purposes of Rule 144, shares acquired pursuant to anti-dilution rights attaching to restricted securities are restricted securities themselves but their holding period dates back to the original placement of shares, not the exercise of the anti-dilution provisions. [Jan. 26, 2009]

Question 132.07

Question: When does the holding period begin for restricted securities acquired pursuant to a subscription agreement?

Answer: The holding period for restricted securities acquired pursuant to a subscription agreement begins at the time the agreement is accepted by the issuer, rather than the date it is signed by the purchaser or the date the

shares are issued, assuming that the full purchase price has been paid. [Jan. 26, 2009]

Question 132.08

Question: What is the restricted security and holding period status of securities exchanged for other securities of the issuer under Securities Act Section 3(a)(9)?

Answer: When securities are exchanged for other securities of the issuer under Section 3(a)(9), the securities received assume the character of the exchanged securities. Thus, for example, if restricted securities are exchanged, the new securities are deemed restricted and tacking of the holding period of the former securities is permitted. [Jan. 26, 2009]

Question 132.09

Question: Does the one-year holding period requirement in Rule 144(d)(1)(ii) apply to the restricted securities of an issuer that submits Exchange Act reports on a voluntary basis?

Answer: Yes. The six-month holding period requirement in Rule 144(d)(1)(i) is applicable only to the restricted securities of an issuer that is, and has been for at least 90 days immediately before the sale, "subject to" the reporting requirements of Exchange Act Section 13 or 15(d). A voluntary filer is not "subject to" Exchange Act Section 13 or 15(d) because it is not obligated to file Exchange Act reports pursuant to either of those provisions. Consequently, the one-year holding period requirement in Rule 144(d)(1)(ii) applies to the restricted securities of a voluntary filer. [Jan. 26, 2009]

Question 132.10

Question: How is the six-month holding period computed under Rule 144(d)(1)(i)?

Answer: Under Rule 144(d)(1)(i), a minimum of six months must elapse between the date of acquisition of the restricted securities from an issuer or from an affiliate of the issuer, whichever is later, and any resale of such securities under Rule 144. This period covers the six months immediately preceding the date of sale under the rule. For example, on May 15, X acquires restricted securities in a transaction not involving any public offering from an issuer. Assuming that the six-month holding period did not restart at any point since May 15 and that the other applicable conditions of Rule 144 would be met at the time of sale, X may sell the securities under Rule 144 on November 15, provided that the issuer is, and has been for at least the immediately preceding 90 days, subject to the reporting requirements of Exchange Act Section 13 or 15(d) at such time. [Jan. 26, 2009]

Question 132.11

Question: On what date does the holding period begin for restricted securities acquired under an employee stock option?

Answer: The holding period for restricted securities acquired under an employee stock option always begins on the exercise of the option and full payment to the issuer of the exercise price. The date of the option's grant may never be used for this purpose, even if the exercise involves no payment of cash or other consideration to the issuer. Because the option is

issued to the employee without any payment for the grant, the optionee holds no investment risk in the issuer before the exercise. [Jan. 26, 2009]

Question 132.12

Question: Does a change in the legal form of enterprise restart the holding period for restricted securities of the issuer?

Answer: A change in the legal form of an enterprise from a partnership or a limited liability company to a corporation normally will restart the holding period for restricted securities of the issuer. However, a holder may tack holding periods in this context if the following conditions are satisfied:

(1) the controlling agreement entered into at the time of the partnership or limited liability company's formation specifically contemplated the change of form;

(2) the partners or members seeking to tack had no veto or voting rights over the reorganization;

(3) the reorganization does not result in a change in the business or operations of the surviving entity;

(4) the proportionate equity interests in the successor are the same as the interests in the predecessor entity; and

(5) the equity holders provide no additional consideration for the securities they receive in exchange for their equity interests in the predecessor entity. [Jan. 26, 2009]

Question 132.13

Question: Does the payment of even a de minimis amount of cash upon a warrant exercise preclude the holder from tacking the holding period of the warrant to that of the common stock under Rule 144(d)(3)(x)?

Answer: Yes. The payment of even a de minimis amount of cash upon a warrant exercise would preclude the holder from tacking the holding period of the common stock to the warrant under Rule 144(d)(3)(x). The warrant exercise must be "cashless" (similar to the analysis under Section 3(a)(9)) in order to tack the holding period of the common stock to the warrant. [Jan. 26, 2009]

Question 132.14

Question: Is the applicable length of the Rule 144(d) holding period requirement for restricted securities (i.e., whether it is six months under Rule 144(d)(1)(i) or one year under Rule 144(d)(1)(ii)) determined as of (1) the date of the acquisition of the securities from the issuer or an affiliate of the issuer, or (2) the time of the proposed sale under Rule 144?

Answer: The applicable length of the Rule 144(d) holding period requirement is determined as of the time of the proposed Rule 144 sale.

For example, on March 5, 2008, a non-reporting issuer sold shares of its common stock to an investor pursuant to a private placement. Three weeks later, the issuer filed a registration statement on Form 10 to register its common stock under Exchange Act Section 12(g). On October 1, 2008, the investor wished to resell the shares he had acquired on March 5 from the issuer. The applicable holding period requirement for such shares as of October 1 would be the six-month holding period under Rule 144(d)(1)(i), since the issuer was, and had been for at least the immediately preceding

90 days, subject to the reporting requirements of Exchange Act Section 13 or 15(d) on such date.

Conversely, if the issuer had been an Exchange Act reporting issuer on March 5, 2008, but was not subject to the reporting requirements of Exchange Act Section 13 or 15(d) (or had not been for at least the immediately preceding 90 days) as of October 1, 2008, the one-year holding period under Rule 144(d)(1)(ii) would be applicable to such securities as of October 1. Hence, the investor would not have satisfied the Rule 144(d) holding period requirement as of that date. [Jan. 26, 2009]

Question 132.15

Question: A pledgor who is an affiliate defaults on a loan that had been secured, in a bona fide pledge situation, by restricted securities. What conditions of Rule 144 apply to a non-affiliate pledgee who is selling such restricted securities under Rule 144?

Answer: A non-affiliate pledgee (who has not been an affiliate during the preceding three months) may resell the restricted securities pursuant to the Rule 144 safe harbor by complying with the applicable conditions in Rule 144(b)(1). Depending on the circumstances, tacking pursuant to Rule 144(d)(3)(iv) may be permitted in determining whether the holding period requirement in Rule 144(d) has been satisfied. [Jan. 26, 2009]

Question 132.16

Question: After receiving a gift of restricted securities from an affiliate donor, what conditions of Rule 144 apply to a non-affiliate donee who is selling such restricted securities under Rule 144?

Answer: A non-affiliate donee (who has not been an affiliate during the preceding three months) may resell the restricted securities pursuant to the Rule 144 safe harbor by complying with the applicable conditions in Rule 144(b)(1). Tacking pursuant to Rule 144(d)(3)(v) may be permitted in determining whether the holding period requirement in Rule 144(d) has been satisfied. [Jan. 26, 2009]

Question 132.17

Question: Is tacking under Rule 144(d)(3)(ii) available when the securities to be sold were acquired in an exchange transaction that was exempt under Securities Act Section 4(2) instead of Section 3(a)(9)?

Answer: Yes, provided that the conditions in Rule 144(d)(3)(ii) are satisfied. [June 4, 2010]

Question 132.18

Question: Company A sells mandatorily exchangeable Notes to an investor in a private placement transaction. Under the terms of the Notes, the Notes can be exchanged for a fixed number of shares of Company B, an affiliate of Company A, either at Company A's option or upon the occurrence of certain events outside the investor's control. If such an exchange takes place, when does the holding period for the Company B Shares begin to run for purposes of Rule 144(d)(1)?

Answer: When Company A sells the Notes, there is deemed to be a concurrent private offering of the underlying Company B Shares, and the investor has no subsequent investment decision to make because the exchange is either at Company A's option or occurs automatically upon the

occurrence of certain events outside the investor's control. Accordingly, the investor's Rule 144(d) holding period for the Company B Shares would begin at the time the investor originally acquired the Notes from Company A, and not when the investor later receives the Company B Shares in exchange for the Notes.

If the Notes also include a provision allowing the exchange to occur at the investor's option and the investor decides to exchange the Notes for Company B Shares, then the holding period for the Company B Shares would begin on the date of the exchange. If the Notes also include this provision but the exchange occurs not because of the investor's decision but because of either Company A's decision or the occurrence of certain events outside the investor's control, then the holding period for the Company B Shares would begin at the time the investor originally acquired the Notes from Company A. [Mar. 4, 2011]

Section 133. Rule 144(e) — Limitation on Amount of Securities Sold

Question 133.01

Question: What exchanges are encompassed by the term "national securities exchanges" in Rule 144(e)?

Answer: The term "national securities exchanges," as used in Rule 144(e), encompasses only exchanges that are registered with the Commission pursuant to Section 6(a) of the Exchange Act. Because Canadian exchanges are not so registered, the volume of securities traded on such an exchange may not be taken into account when computing the volume limitation under Rule 144. [Jan. 26, 2009]

Question 133.02

Question: Is the OTC Bulletin Board an "automated quotation system" for purposes of Rule 144(e)?

Answer: No. Consequently, the market-based volume limitation that the rule allows for is unavailable for securities quoted only over the OTC Bulletin Board. [Jan. 26, 2009]

Question 133.03

Question: What effect(s) do stock splits and reverse stock splits have on available volume under Rule 144(e)?

Answer: Stock splits and reverse stock splits, which are not events of sale under the Securities Act, have no real effect on available volume under Rule 144(e) because the split or reverse split should not change the proportion of the issuer's securities that an affiliate is permitted to sell during the rule's three-month measuring period. To calculate available volume after a split or reverse split, an affiliate should give effect to the split or reverse split throughout the whole three-month period, as though it had occurred on the first day of the period, even though the record and effective dates were later. This method may be used for the rule's one-percent measurement or the market-based alternative for securities listed on an exchange. [Jan. 26, 2009]

Question 133.04

Question: In determining the amount of securities that an individual may sell pursuant to General Instruction C.2(b) of Form S-8, does the individual

need to aggregate the amount of securities that the individual has sold pursuant to Rule 144?

Answer: No. General Instruction C.2(b) to Form S-8 provides that if the registrant, at the time of filing, does not satisfy the registrant requirements for use of Form S-3 or Form F-3, the amount of both control and restricted securities to be reoffered by means of the reoffer prospectus by each person, and any other person with whom such person is acting in concert for the purpose of selling securities of the registrant, shall be limited during any three-month period to the amount specified in Rule 144(e). This limitation is strictly a limitation on the number of securities to be resold pursuant to the registration statement, and does not require aggregation of such securities with securities to be sold by the same person pursuant to Rule 144. The application of this instruction is reassessed each time the Form S-8 is updated pursuant to Securities Act Section 10(a)(3). [Jan. 26, 2009]

Question 133.05

Question: Is a public offering included in the volume computation when computing the average weekly trading volume of the issuer during the four-week period?

Answer: In computing average weekly trading volume where there is a public offering of shares by the issuer during the four-week period, the public offering is not included in the volume computation; however, increased volume in the aftermarket as a result of the offering can be included for purposes of the rule. [Jan. 26, 2009]

Question 133.06

Question: How is the four-week period for computing the average weekly trading volume computed?

Answer: For purposes of computing volume limitations under Rule 144(e)(l)(ii) and (iii), the "four calendar weeks preceding the filing of notice" on Form 144 are the four weeks preceding the week in which the form is transmitted for filing in accordance with Rule 144(h). *See* Securities Act Release No. 6099 (Aug. 2, 1979), at Question 38. [Jan. 26, 2009]

Question 133.07

Question: Are an affiliate's sales of securities back to the issuer in a non-public transaction excludable when calculating the amount of securities that may be sold by the affiliate under Rule 144?

Answer: Yes. Under Rule 144(e)(3)(vii)(C), securities sold in a transaction that is exempt pursuant to Securities Act Section 4 and does not involve any public offering need not be included in determining the amount of securities that may be sold under Rule 144. This would include an affiliate's non-public sales of securities back to the issuer. [May 16, 2013]

Section 134. Rule 144(f) — Manner of Sale

Question 134.01

Question: Can a principal of a brokerage firm use that firm to effect ordinary "brokers' transactions" for the principal's personal account under Rule 144(f)?

Answer: Yes. A principal of a brokerage firm may use that firm to effect ordinary "brokers' transactions" for the principal's personal account under Rule 144(f). [Jan. 26, 2009]

Question 134.02

Question: Does the publication of a customer limit order in accordance with Exchange Act Rule 11Ac1-4 constitute the solicitation or arrangement for the solicitation of orders to buy securities within the meaning of Rule 144(f)(2)?

Answer: No. The publication of a customer limit order in accordance with Exchange Act Rule 11Ac1-4 would not constitute the solicitation or arrangement for the solicitation of orders to buy securities within the meaning of Rule 144(f)(2). See the *Goldman, Sachs & Co.* no-action letter (Dec. 6, 1996) issued by the Division. [Jan. 26, 2009]

Section 135. Rule 144(g) [Reserved]

Section 136. Rule 144(h) — Notice of Proposed Sale

Question 136.01

Question: Does an amendment to Form 144 need to be filed in the event that a person does not sell the securities referred to in the Form?

Answer: No. If a person who has filed a Form 144 does not sell the securities referred to therein, no amendment reflecting this fact need be filed. [Jan. 26, 2009]

Question 136.02

Question: Does an amended Form 144 need to be filed to reflect a company's listing on a national securities exchange or a stock split?

Answer: No. A Form 144 need not be amended to reflect: (1) a company's listing on a national securities exchange; or (2) a stock split. [Jan. 26, 2009]

Question 136.03

Question: If a person intends to use two brokers, must the person allocate a specific number of shares to each broker on the Form 144?

Answer: A person who files a Form 144 indicating that it may sell shares through either of two brokers need not allocate a specific number of shares to each broker on the form. [Jan. 26, 2009]

Question 136.04

Question: Does the de minimis exemption of Rule 144(h) apply to each individual seller who is required to file a Form 144 when sales are required to be aggregated under Rule 144(e)?

Answer: Yes. In a situation in which sales under Rule 144 are required to be aggregated for purposes of Rule 144(e), the de minimis exemption of Rule 144(h) (for filing Form 144), nonetheless, applies to each individual seller who is required to file a Form 144. [Jan. 26, 2009]

Question 136.05

Question: When a Form 144 is required to be filed, is a waiting period required between the time the person places an order with a broker and the time the broker executes the order?

Answer: When a person is required to file a Form 144, no waiting period is required between the time the person places an order with a broker and the time the broker executes the order so long as the person concurrently, with giving the order, transmits the form to the Commission and the principal exchange on which the securities are listed. [Jan. 26, 2009]

Question 136.06

Question: Should a Form 144 be amended to reflect a change in broker?

Answer: Yes. A Form 144 should be amended to reflect a change in broker. However, amending Form 144 to reflect a change in the broker does not permit the calculation of a new volume limitation based on trading. [Jan. 26, 2009]

Question 136.07

Question: What is the effect of an amended Form 144 that is filed to correct inaccuracies?

Answer: An amended Form 144 may be filed to correct inaccuracies in the original Form 144 at the time of, or subsequent to, its filing. However, the filing of an amended Form 144 does not cure any deficiencies with regard to sales made after filing the initial Form 144 and prior to the filing of the amended Form 144. [Jan. 26, 2009]

Question 136.08

Question: Under what circumstances does a sell order that is placed with a broker at above the current market price contravene the requirement in Rule 144(h) that the person filing a Form 144 have a bona fide intention to sell the securities referred to in the Form 144 within a reasonable time?

Answer: The fact that a sell order is placed with a broker at a price above the current market price does not contravene this requirement in Rule 144(h), unless the price reflected in the sell order was not consistent with a bona fide intention to sell within a reasonable time. [Jan. 26, 2009]

Question 136.09

Question: Rule 144(h) provides that the Form 144 shall be transmitted for filing "concurrently" with either the placing of a sale order with a broker or the execution of the sale directly with a market maker. Does "concurrently" mean that the Form 144 should be transmitted for filing on the same day as the placing of a sale order or the execution of the sale?

Answer: Yes. For example, if a person is filing a Form 144 by mail, he or she meets the requirements of Rule 144(h) if the Form is mailed on the same day as the placing of a sale order or the execution of the sale. The envelope should be addressed to the Commission's Office of the Secretary. [Mar. 4, 2011]

Section 137. Rule 144(i) — Unavailability to Securities of Issuers with No or Nominal Operations and No or Nominal Non-Cash Assets

Question 137.01

Question: If an issuer had previously been a shell company but is an operating company at the time that it issues securities, is the Rule 144 safe harbor available for the resale of such securities if all of the conditions in Rule 144(i)(2) are not satisfied at the time of the proposed sale?

Answer: No. Rule 144(i)(1) states that the Rule 144 safe harbor is not available for the resale of securities "initially issued" by a shell company (other than a business combination related shell company) or an issuer that has "at any time previously" been a shell company (other than a business combination related shell company). Consequently, the Rule 144 safe harbor is not available for the resale of such securities unless and until all of the conditions in Rule 144(i)(2) are satisfied at the time of the proposed sale. [Jan. 26, 2009]

Question 137.02

Question: Does Rule 144(i) apply to securities issued before February 15, 2008, which was the effective date of the amendments to Rule 144 in which the Commission adopted Rule 144(i)?

Answer: Yes. [Jan. 26, 2009]

Section 138. Rule 144A — Private Resales of Securities to Institutions

Question 138.01

Question: May affiliates of an issuer make resales of the issuer's eligible securities under Rule 144A?

Answer: Yes. Affiliates of the issuer may make resales of eligible securities under Rule 144A. The rule is available to any person other than the issuer. "Issuer," as used in Rule 144A(b), has only the meaning given by Securities Act Section 2(a)(4). (The "control" clause of Securities Act Section 2(a)(11) equates the issuer and its affiliates solely for the purpose of identifying intermediaries to the public market who are underwriters within the statute's meaning. By definition, sales effected under Rule 144A are ***not*** made to the public market.) [Jan. 26, 2009]

Question 138.02

Question: When determining its status as a qualified institutional buyer eligible to participate in an offering eligible for resale under Rule 144A, may a buyer include the amount of securities expected to be purchased in such offering?

Answer: No. A buyer may not include the amount of securities expected to be purchased in the offering when calculating the amount of securities it owns or invests on a discretionary basis for the purpose of determining its status as a qualified institutional buyer eligible to participate in the offering. [Jan. 26, 2009]

Question 138.03

Question: Under Rule 144A, securities may be offered to persons other than qualified institutional buyers by means of general solicitation. Does the rule require that the general solicitation be conducted by only the issuer?

Answer: No. In Rule 144A offerings in which the securities were initially sold to financial intermediaries in transactions exempt under Securities Act

Section 4(a)(2) or Regulation S, the general solicitation may be conducted by the issuer as well as initial purchasers involved in the Section 4(a)(2) or Regulation S transaction and other distribution participants. [Nov. 13, 2013]

Question 138.04

Question: Did the amendments to Rule 144A permitting the use of general solicitation change how directed selling efforts under Regulation S are analyzed in concurrent Rule 144A and Regulation S offerings?

Answer: No. [Nov. 13, 2013]

Question 138.05

Question: When determining its status as a qualified institutional buyer under Rule 144A, may an entity include securities that it purchased and continued to hold on margin in calculating whether it meets the $100 million threshold under Rule 144A(a)(1)(i)?

Answer: Yes. The fact that securities were purchased or are held on margin does not mean they are not owned by the entity. Therefore, the securities may be included in calculating whether the entity meets the threshold, so long as they are not subject to a repurchase agreement. See Rule 144A(a)(2). [December 8, 2016]

Question 138.06

Question: When determining its status as a qualified institutional buyer under Rule 144A, may an entity include securities that it owns but has loaned out to borrowers of securities in calculating whether it meets the $100 million threshold under Rule 144A(a)(1)(i)?

Answer: Yes. The fact that the entity may lend out securities does not mean they are not owned by the entity and thus may be included in calculating whether it meets the threshold. [December 8, 2016]

Question 138.07

Question: When determining its status as a qualified institutional buyer under Rule 144A, may an entity include securities that it has borrowed in calculating whether it meets the $100 million threshold under Rule 144A(a)(1)(i)?

Answer: No. Borrowed securities are not owned by the entity and thus may not be included in calculating whether it meets the threshold. [December 8, 2016]

Question 138.08

Question: When determining its status as a qualified institutional buyer under Rule 144A, may an entity include short positions in securities that it has established in calculating whether it meets the $100 million threshold under Rule 144A(a)(1)(i)?

Answer: No. Short positions do not represent ownership of securities but rather sales of securities and thus may not be included in calculating whether the entity meets the threshold. [December 8, 2016]

Question 138.09

Question: An investment company that is not registered under the Investment Company Act of 1940 is part of a family of funds, some of which may or may not be registered investment companies. When determining its status as a qualified institutional buyer under Rule 144A, may the non-registered investment company aggregate investments by the other funds that are part of the family in the manner described under Rule 144A(a)(1)(iv)?

Answer: No, only registered investment companies may use the aggregation method permitted under Rule 144A(a)(1)(iv). [December 8, 2016]

Question 138.10

Question: When determining its status as a qualified institutional buyer under Rule 144A, Rule 144A(a)(1)(v) provides that an entity will be deemed a qualified institutional buyer if all of its equity owners are qualified institutional buyers. Who are the equity owners of a limited partnership for purposes of Rule 144(a)(1)(v)?

Answer: The limited partners are the equity owners of a limited partnership. The general partner, unless that person is also a limited partner, need not be considered in determining whether a limited partnership is a qualified institutional buyer for purposes of Rule 144(a)(1)(v). See also Securities Act Rule CDI 255.18. [December 8, 2016]

Section 139. Rule 145 — Reclassification of Securities, Mergers, Consolidations and Acquisitions of Assets

Question 139.01

Question: Can an issuer that plans to register a Rule 145 transaction, and whose proxy statement will necessarily contain unrelated items such as election of directors, avoid Securities Act liability for the unrelated items by filing a Form S-1 registration statement dealing solely with the Rule 145 transaction, and incorporating the S-1 prospectus by reference into its proxy statement?

Answer: Yes. [Jan. 26, 2009]

Question 139.02

Question: Must a person subject to Rule 145(c) who is selling both Rule 145 shares and shares not subject to Rule 144(e) take into account the sales of the shares not subject to Rule 144(e) in determining whether the volume limitation of Rule 145(d) has been exceeded?

Answer: No. [Jan. 26, 2009]

Question 139.03

Question: Would a merger by Company A with a new holding company formed by Company A in another state qualify for the change in domicile exception in Rule 145(a)(2)?

Answer: No. The exception from Rule 145 provided by Rule 145(a)(2) for a change in domicile is not available when, in addition to a change in domicile, a new organizational structure is created, such as a new holding company. [Jan. 26, 2009]

Question 139.04

Question: If a corporation determines to sell its assets for a promissory note issued by another corporation, but will not distribute interests in the note to its shareholders, is the transaction a "transfer of assets" within the meaning of Rule 145(a)(3)?

Answer: No. [Jan. 26, 2009]

Question 139.05

Question: Can sales be made in reliance on Rule 145(d) before the one-year period in Rule 144(i)(2) is met?

Answer: No. [Jan. 26, 2009]

Question 139.06

Question: In determining the Rule 145(d)(2) holding period, can the holding period for restricted securities surrendered in the Rule 145 transaction be tacked to the holding period for the shares received?

Answer: No. *See* Rule 144(d)(3)(viii). [Jan. 26, 2009]

Question 139.07

Question: A registration statement on Form S-4 is filed to register stock to be issued in the acquisition of a non-reporting company by a reporting company. Only the non-reporting company will solicit proxies. Can a proxy card be sent with the red herring prospectus?

Answer: No. Although this solicitation is not subject to Regulation 14A, it nevertheless will involve a "sale" under Rule 145, which cannot be consummated without an effective registration statement. Accordingly, a proxy card can be sent only with the Rule 424(b) prospectus, not with the red herring. [Jan. 26, 2009]

Section 140. Rule 146 [Reserved]

Section 141. Rule 147 — Intrastate offers and sales

Question 141.01

Question: May an issuer rely on Rule 147 to offer or sell securities within a single state to a person whose principal residence is in such state but who resides temporarily out of the state?

Answer: Yes. [Jan. 26, 2009]

Question 141.02

Question: May a broker-dealer distribute securities in an intrastate offering made in reliance on Rule 147 without jeopardizing the exemption available under that rule?

Answer: Yes. [Jan. 26, 2009]

Question 141.03

Question: If an issuer plans to conduct an intrastate offering pursuant to Rule 147, may the issuer engage in general advertising or a general solicitation?

Answer: Securities Act Rule 147 does not prohibit general advertising or general solicitation. Any such general advertising or solicitation, however, must be conducted in a manner consistent with the requirement that offers made in reliance on Section 3(a)(11) and pursuant to its Rule 147 safe harbor be made only to persons resident within the state or territory of which the issuer is a resident. [April 10, 2014*]

Question 141.04

Question: An issuer plans to use a third-party Internet portal to promote an offering to residents of a single state in accordance with a state statute or regulation intended to enable securities crowdfunding within that state. Assuming the issuer met the other conditions of Rule 147, could it rely on Rule 147 for an exemption from Securities Act registration for the offering, or would use of an Internet portal necessarily entail making offers to persons outside the relevant state or territory?

Answer: Use of the Internet would not be incompatible with a claim of exemption under Rule 147 if the portal implements adequate measures so that offers of securities are made only to persons resident in the relevant state or territory. In the context of an offering conducted in accordance with state crowdfunding requirements, such measures would include, at a minimum, disclaimers and restrictive legends making it clear that the offering is limited to residents of the relevant state under applicable law, and limiting access to information about specific investment opportunities to persons who confirm they are residents of the relevant state (for example, by providing a representation as to residence or in-state residence information, such as a zip code or residence address). Of course, any issuer seeking to rely on Rule 147 for the offering also would have to meet all the other conditions of Rule 147. [April 10, 2014]

Question 141.05

Question: Can an issuer use its own website or social media presence to offer securities in a manner consistent with Rule 147?

Answer: Issuers generally use their websites and social media presence to advertise their market presence in a broad and open manner so that information is widely disseminated to any member of the general public. Although whether a particular communication is an "offer" of securities will depend on all of the facts and circumstances, using such established Internet presence to convey information about specific investment opportunities would likely involve offers to residents outside the particular state in which the issuer did business.

We believe, however, that issuers could implement technological measures to limit communications that are offers only to those persons whose Internet Protocol, or IP, address originates from a particular state or territory and prevent any offers to be made to persons whose IP address originates in other states or territories. Offers should include disclaimers and restrictive legends making it clear that the offering is limited to residents of the relevant state under applicable law. Issuers must comply with all other conditions of Rule 147, including that sales may only be made to residents of the same state as the issuer. [October 2, 2014]

Question 141.06

Question: Would an issuer making ongoing offers and sales pursuant to Rule 147 be able to transition to offers and sales in reliance on Rule 147A?

Answer: Yes. Under Rule 147A(g)(1), offers and sales made in reliance on Rule 147A will not be integrated with prior offers and sales of securities. An issuer, however, must comply with all applicable state securities law requirements. [April 19, 2017]

Sections 142 to 149. Rules 148 to 152a [Reserved]

Section 150. Rules 153, 153a and 153b

Question 150.01

Question: An issuer has registered an "at the market" offering of its common stock in reliance on Rule 415(a)(4) and has engaged a broker dealer to sell the securities into the existing trading market. Does the broker dealer have a prospectus delivery obligation with respect to the primary offering of the issuer's securities into the trading market and, if so, may the broker dealer rely on Rule 153 to satisfy such prospectus delivery obligation? Also, does the broker dealer have an obligation to provide a Rule 173 notice and, if so, to whom?

Answer: An "at the market" offering of securities by a broker dealer on behalf of an issuer is a primary offering of the issuer's securities. There is a prospectus delivery obligation as to such primary offering. The provisions of Rule 153 apply only to transactions between brokers, as it covers the requirement of a broker or dealer to deliver a prospectus to a broker or dealer. Rule 153 does not affect a broker's delivery obligation to purchasers other than brokers or dealers. As a consequence, brokers or dealers effecting transactions in the issuer's securities under the registration statement may have a prospectus delivery obligation to their clients who acquired those securities (which may be satisfied in reliance on Rule 172) and similarly may have an obligation to provide a notice pursuant to Rule 173. Rule 173 excludes transactions solely between brokers or dealers in reliance on Rule 153, but not as to other purchasers of the issuer's securities under the registration statement. [Aug. 14, 2009]

Section 151. Rule 154 [Reserved]

Section 152. Rule 155 — Integration of Abandoned Offerings

Question 152.01

Question: Can an issuer rely on Rule 155(b) for an abandoned private offering followed by a shelf takedown if the shelf registration statement was filed prior to the private offering?

Answer: Yes, provided that the takedown is not done until after the time provided in Rule 155(b). [Jan. 26, 2009]

Question 152.02

Question: If an issuer is unsuccessful in completing an offering as a takedown from an existing shelf registration statement, may it rely on Rule 155(c) to complete the offering privately?

Answer: Yes. In a shelf offering, the filing of a prospectus supplement disclosing the termination of the offering is deemed to satisfy the Rule 155(c)(2) requirement to withdraw the registration statement. [Jan. 26, 2009]

Question 152.03

Question: Rule 155(c)(5) requires any written disclosure document used in the subsequent private offering to disclose any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement and are material to the investment decision in the private offering. Does this requirement apply whether the written disclosure is provided on a mandatory (Rule 502(b)(1)) or voluntary basis?

Answer: Yes. [Jan. 26, 2009]

Sections 153 to 160. Rules 156 to 162 [Reserved]

Section 161. Rule 163 — Exemption from Section 5(c) of the Act for Certain Communications by or on Behalf of Well-Known Seasoned Issuers

Question 161.01

Question: If an issuer has not previously filed any shelf registration statement and at the date of its last Form 10-K did not qualify as a well-known seasoned issuer, would it be able to determine its status as a well-known seasoned issuer at the time it wants to rely on Rule 163 for pre-filing offers?

Answer: No. The definition of well-known seasoned issuer permits an issuer to evaluate its status as a well-known seasoned issuer only upon specified events; the date of intended reliance on Rule 163 is not one of those events. Therefore, if there is no shelf registration statement on file and the issuer did not satisfy the definition of well-known seasoned issuer at the time it filed its most recent Form 10-K, the issuer's status would not change until it either files a shelf registration statement or files its next Form 10-K. [Jan. 26, 2009]

Question 161.02

Question: May Rule 163 be used for communications by an underwriter if the issuer previously authorized the communication?

Answer: No. Rule 163 is not available for use by an underwriter. [Jan. 26, 2009]

Sections 162 to 163. Rules 163A to 164 [Reserved]

Section 164. Rule 165 — Offers Made in Connection With a Business Combination Transaction

Question 164.01

Question: May an issuer contemplating a registered exchange offer subject to Exchange Act Rule 13e-4 rely on Rules 165 and 166 to communicate with its security holders before and after the first public announcement of the offering?

Answer: Yes, so long as the issuer satisfies the conditions set forth in Rules 165 and 166. In particular, the primary purpose or effect of the communication must be to convey information concerning a business combination transaction, as defined in Rule 165(f), and not to condition the market for a capital raising or resale transaction. Rules 165 and 166 are intended to apply to communications relating to exchange offers made in accordance with the applicable tender offer rules, including offers subject to Exchange Act Rule 13e-4. [June 4, 2010]

Question 164.02

Question: An electronic communication relying on the exemption in Rule 165 must contain the legend required by paragraph (c)(1) of that rule. Some electronic communication platforms, such as those made available through certain social media websites, limit the number of characters or amount of text that can be included in the communication, effectively precluding display of the legend together with the other information. Under what circumstances would the use of a hyperlink to the legend satisfy the Rule 165(c)(1) requirement?

Answer: Recognizing the growing interest in using technologies such as social media to communicate with security holders, the staff will not object to the use of an active hyperlink to satisfy the requirements of Rule 165(c)(1) in the following limited circumstances:

- The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;
- Including the legend in its entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and
- The communication contains an active hyperlink to the required legend and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

Where an electronic communication is capable of including the required legend, along with the other information, without exceeding the applicable limit on number of characters or amount of text, the use of a hyperlink to the required legend would be inappropriate. This position also applies to written communications that constitute solicitations made in reliance on Exchange Act Rule 14a-12 and pre-commencement written communications subject to Exchange Act Rules 13e-4(c), 14d-2(b) and 14d-9(a). [April 21, 2014]

Section 165. Rule 166 — Exemption from Section 5(c) for Certain Communications in Connection With Business Combination Transactions

Question 165.01

Question: May an issuer contemplating a registered exchange offer subject to Exchange Act Rule 13e-4 rely on Rules 165 and 166 to communicate with its security holders before and after the first public announcement of the offering?

Answer: Yes, so long as the issuer satisfies the conditions set forth in Rules 165 and 166. In particular, the primary purpose or effect of the communication must be to convey information concerning a business combination transaction, as defined in Rule 165(f), and not to condition the market for a capital raising or resale transaction. Rules 165 and 166 are intended to apply to communications relating to exchange offers made in accordance with the applicable tender offer rules, including offers subject to Exchange Act Rule 13e-4. [June 4, 2010]

Sections 166 to 170. Rules 167 to 171 [Reserved]

Section 171. Rule 172 — Delivery of Prospectuses

Question 171.01

Question: Are the provisions of Rule 172 available to dealers that are participants in the underwriting as well as to those dealers that are not participants in the underwriting?

Answer: Yes. Rule 172 is available to dealers that participate in the underwriting, including selling an unsold allotment, as well as to dealers that do not participate. A dealer may not rely on Rule 174 to not deliver a prospectus when the dealer is participating in the offering or is selling an unsold allotment. When Section 4(3) requires delivery of a prospectus, the dealer may rely on Rule 172 to satisfy its delivery obligation, except in the case of offerings of blank check companies. [Jan. 26, 2009]

Question 171.02

Question: Securities Act Section 2(a)(10) sets forth the definition of "prospectus." Clause (a) of Section 2(a)(10) provides an exception from the definition of "prospectus" for a communication that is sent or given after the effective date of the registration statement if "it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of [S]ection 10 at the time of such communication was sent or given to the person to whom the communication was made." Is Rule 172 available to satisfy the condition to the exception in clause (a) of Section 2(a)(10) that the Section 10(a) prospectus be "sent or given to the person to whom the communication was made?"

Answer: No. Rule 172 provides that a final Section 10(a) prospectus will be deemed to precede or accompany the carrying or delivery of a security for sale for purposes of Securities Act Section 5(b)(2) and provides a conditional exemption from Securities Act Section 5(b)(1) for written confirmations and notices of allocations. As the Commission stated in Securities Act Release No. 8591 (July 19, 2005), at footnote 561, "a final prospectus only filed as provided in Rule 172 will not be considered to be sent or given prior to or with a written offer within the meaning of clause (a) of Securities Act Section 2(a)(10)." [Jan. 26, 2009]

Question 171.03

Question: Can special purpose acquisition companies (SPACs) rely on Rule 172 to satisfy their prospectus delivery obligations following their initial public offerings?

Answer: Yes. [Jan. 26, 2009]

Question 171.04

Question: Is Rule 172 available to satisfy prospectus delivery obligations of selling security holders if the requirements of the rule are met?

Answer: Yes. Selling security holders with a prospectus delivery obligation may rely on Rule 172. [Jan. 26, 2009]

Section 172. Rule 173 — Notice of Registration

Question 172.01

Question: Rule 173 requires that each underwriter or dealer participating in a registered offering must provide to each of its purchasers a copy of the final prospectus or, in lieu of the final prospectus, a notice that the sale was

made pursuant to a registration statement, within two business days following the "completion of such sale." In the context of Rule 173, does "completion of such sale" mean the date of settlement?

Answer: Yes. For purposes of Rule 173, "completion of such sale" means the date of settlement. The date of sale under Securities Act Section 2(a)(3) may be earlier than the date of the "completion of such sale." [Jan. 26, 2009]

Question 172.02

Question: Must an issuer, underwriter or dealer that intends to deliver a Rule 173 notice in lieu of a final prospectus ensure that the notice is received by the purchaser within two business days in order to comply with the Rule 173 requirement to "provide" the Rule 173 notice "not later than two business days following the completion of such sale?"

Answer: No. The requirement to "provide" the Rule 173 notice requires that the notice be sent, not necessarily received, within two business days. [Jan. 26, 2009]

Section 173. Rule 174 — Delivery of Prospectus by Dealers; Exemptions Under Section 4(3) of the Act

Question 173.01

Question: Are the provisions of Rule 172 available to dealers that are participants in the underwriting as well as to those dealers that are not participants in the underwriting?

Answer: Yes. Rule 172 is available to dealers that participate in the underwriting, including selling an unsold allotment, as well as to dealers that do not participate. A dealer may not rely on Rule 174 to not deliver a prospectus when the dealer is participating in the offering or is selling an unsold allotment. When Section 4(3) requires delivery of a prospectus, the dealer may rely on Rule 172 to satisfy its delivery obligation, except in the case of offerings of blank check companies. [Jan. 26, 2009]

Section 174. Rule 175 — Liability for Certain Statements by Issuers

Question 174.01

Question: Rule 175 provides a safe harbor for forward-looking statements made by or on behalf of an issuer that are contained in (1) a document filed with the Commission, (2) Part I of a Form 10-Q or (3) an annual report to security holders meeting the requirements of Exchange Act Rule 14a-3(b) and (c) or Rule 14c-3(a) and (b). Does Rule 175's forward-looking statements safe harbor also apply to statements made in a Form 6-K, notwithstanding the fact that Form 6-K is not explicitly mentioned in Rule 175 and the form is submitted and not "filed"?

Answer: Yes. The rationale for the forward-looking statements safe harbor applies with equal force to statements in Form 6-K reports as it does to statements in annual reports and Form 10-Q reports. [Jan. 26, 2009]

Sections 175 to 178. Rules 176 to 191 [Reserved]

Section 179. Rule 215 – Accredited Investor

Question 179.01

[withdrawn, February 27, 2012]

Section 180. Rule 236 — Exemption of Shares Offered in Connection with Certain Transactions

Question 180.01

Question: Rule 236 provides an exemption from Securities Act registration for the aggregation of fractional shares in connection with certain transactions. The rule requires that specified information be furnished to the Commission at least 10 days prior to the offering. Is there a specific Securities Act form for this information?

Answer: No. A letter should be sent to the Commission that specifies the nature of the submission. No fee is applicable. [Jan. 26, 2009]

Section 181. Rules 237 to 250 [Reserved]

Section 182. Rules 251 to 263

Question 182.01

Question: Where an issuer elects to non-publicly submit a draft offering statement for staff review pursuant to Rule 252(d) of Regulation A before publicly filing its Form 1-A, Item 15 (Additional Exhibits) of Part III (Exhibits) to Form 1-A requires issuers to file as an exhibit to the publicly-filed offering statement: (1) any non-public, draft offering statement previously submitted pursuant to Rule 252(d), and (2) any related, non-public correspondence submitted by or on behalf of the issuers. Would an issuer that elects to make the non-public, draft offering statements public on the EDGARLink submissions page of EDGAR (*see* Chapter 7 (Preparing and Transmitting EDGARLink Online Submissions) of Volume II of the EDGAR Filer Manual, *available at*: http://www.sec.gov/info/edgar/edmanuals.htm) at the time it publicly files its Form 1-A also be required to refile such material as an exhibit pursuant to Item 15 of Part III?

Answer: No. If, at the time it first files the offering statement publicly, the issuer makes public on the EDGARLink submissions page all prior non-public, draft offering statements, the offering statements will no longer be non-public and the issuer will not be required to file them as exhibits. The issuer is still required to file as an exhibit any related, non-public correspondence submitted by or on behalf of the issuer regarding non-public draft offering statements submitted pursuant to Rule 252(d). [June 23, 2015]

Question 182.02

Question: If an issuer elects to submit a draft offering statement for non-public staff review before public filing pursuant to Rule 252(d), and, as part of that process, submits correspondence relating to its offering statement, what must it do if it wants to protect portions of that correspondence from public release?

Answer: During the review of the draft offering statement, the issuer would request confidential treatment of any information in the related correspondence pursuant to Rule 83, in the same manner it would during a typical review of a registered offering. It would submit a redacted copy of the correspondence via EDGAR, with the appropriate legend indicating that it was being submitted pursuant to a confidential treatment request under Rule 83. At the same time, it would submit an unredacted paper version to

the SEC, in the manner required by that rule. When the issuer makes its public filing of the offering statement, it will be required to file as an exhibit to the electronically filed offering statement any previously submitted non-public correspondence related to the non-public review. Since that correspondence will be information required to be filed with the SEC, the issuer must redact the confidential information from the filed exhibit, include the required legends and redaction markings, and submit in paper format to the SEC's Office of the Secretary an application for confidential treatment of the redacted information under Rule 406. The staff will consider and act on that application in the same manner it would with any other application under Rule 406 for other types of filed exhibits. As with registered offerings, the review staff will act on Rule 406 confidential treatment applications before the offering statement is qualified. For the requirements a registrant must satisfy when requesting confidential treatment, *see* Division of Corporation Finance Staff Legal Bulletin No. 1 (with Addendum). [June 23, 2015]

Question 182.03

Question: Would a company with headquarters that are located within the United States or Canada, but whose business primarily involves managing operations that are located outside those countries be considered to have its "principal place of business" within the United States or Canada for purposes of determining issuer eligibility under Regulation A?

Answer: Yes, an issuer will be considered to have its "principal place of business" in the United States or Canada for purposes of determining issuer eligibility under Rule 251(b) of Regulation A if its officers, partners, or managers primarily direct, control and coordinate the issuer's activities from the United States or Canada. [June 23, 2015]

Question 182.04

Question: Is a company that was previously required to file reports with the Commission under Section 15(d) of the Exchange Act, but that has since suspended its Exchange Act reporting obligation, an eligible issuer under Rule 251(b)(2) of Regulation A?

Answer: Yes. A company that has suspended its Exchange Act reporting obligation by satisfying the statutory provisions for suspension in Section 15(d) of the Exchange Act or the requirements of Exchange Act Rule 12h-3 is not considered to be subject to Section 13 or 15(d) of the Exchange Act for purposes of Rule 251(b)(2) of Regulation A. [June 23, 2015]

Question 182.05

Question: Is a voluntary filer under the Exchange Act an eligible issuer for purposes of Rule 251(b)(2) of Regulation A?

Answer: Yes. A voluntary filer is not subject to Exchange Act Section 13 or 15(d) because it is not obligated to file Exchange Act reports pursuant to either of those provisions. [June 23, 2015]

Question 182.06

Question: Is a private wholly-owned subsidiary of an Exchange Act reporting company parent eligible to sell securities pursuant to Regulation A?

Answer: Yes, although the Exchange Act reporting company parent could not be a guarantor or co-issuer of the securities of the private wholly-

owned subsidiary. [June 23, 2015]

Question 182.07

Question: Can Regulation A be relied upon by an issuer for business combination transactions, such as a merger or acquisition?

Answer: Yes. The final rules do not limit the availability of Regulation A for business combination transactions, but, as the Commission (SEC Rel. No. 33-9497) indicated, Regulation A would not be available for business acquisition shelf transactions, which are typically conducted on a delayed basis. [June 23, 2015]

Question 182.08

Question: May a recently created entity choose to provide a balance sheet as of its inception date?

Answer: Yes, as long as the inception date is within nine months before the date of filing or qualification and the date of filing or qualification is not more than three months after the entity reached its first annual balance sheet date. The date of the most recent balance sheet determines which fiscal years, or period since existence for recently created entities, the statements of comprehensive income, cash flows and changes in stockholders' equity must cover. When the balance sheet is dated as of inception the statements of comprehensive income, cash flows and changes in stockholders' equity will not be applicable. [June 23, 2015]

Question 182.09

Question: Can an issuer solicit interest (or "test the waters") in a Regulation A offering on a platform that limits the number of characters or amount of text that can be included, thereby preventing the inclusion in such communication of the information required by Rule 255?

Answer: Yes. The staff will not object to the use of an active hyperlink to satisfy the requirements of Rule 255 in the following limited circumstances:

- The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;
- Including the required statements in their entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and
- The communication contains an active hyperlink to the required statements that otherwise satisfy Rule 255 and, where possible, prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

Where an electronic communication is capable of including the entirety of the required statements, along with the other information, without exceeding the applicable limit on number of characters or amount of text, the use of a hyperlink to the required statements would be inappropriate. [June 23, 2015]

Question 182.10

Question: Are state securities law registration and qualification requirements preempted with respect to resales of securities purchased in a

Tier 2 offering?

Answer: No. State securities law registration and qualification requirements are only preempted with respect to primary offerings of securities by the issuer or secondary offerings by selling securityholders that are qualified pursuant to Regulation A and offered or sold to qualified purchasers pursuant to a Tier 2 offering. Resales of securities purchased in a Tier 2 offering must be registered, or offered or sold pursuant to an exemption from registration, with state securities regulators. [June 23, 2015]

Question 182.11

Question: When is an issuer required to engage the services of a registered transfer agent before being able to avail itself of the conditional exemption from mandatory registration under Section 12(g) of the Exchange Act described in Exchange Act Rule 12g5-1(a)(7)?

Answer: An issuer that seeks to rely on the conditional exemption from mandatory registration under Section 12(g) of the Exchange Act must at the time of reliance on the conditional exemption satisfy the requirements of Rule 12g5-1(a)(7). [June 23, 2015]

Question 182.12

Question: For an issuer that seeks to qualify an additional class of securities by post-qualification amendment to a previously qualified offering statement, does Item 4 to Part I of Form 1 A require disclosure of only the additional class of securities for which qualification is being sought?

Answer: Yes. An issuer that seeks to qualify an additional class of securities by post-qualification amendment to a previously qualified offering statement would satisfy the requirements of Item 4 to Part I of Form 1 A by providing responses that relate only to the additional class of securities for which qualification is being sought. In Item 6 to Part I of Form 1 A, an issuer is required to provide disclosure with respect unregistered securities issued or sold within the previous year, which would include any class of securities previously issued or sold pursuant to Regulation A within the previous year. [November 17, 2016]

Question 182.13

Question: How does an issuer calculate whether the change in price in an offering exceeds 20% of the maximum aggregate offering price?

Answer: The Note to Rule 253(b) provides that a change in price representing no more than a 20% change in the maximum aggregate offering price in a qualified offering statement may be made pursuant to an offering circular supplement and does not require a post-qualification amendment. The 20% change may be measured from either the high end (in the case of an increase in the offering price) or the low end (in the case of a decrease in the offering price) of that range. In no circumstances, however, may this provision be used to offer securities where the maximum aggregate offering price would result in the offering exceeding the limit set forth in Rule 251(a) or if the change would result in a Tier 1 offering becoming a Tier 2 offering. [November 17, 2016]

Question 182.14

Question: May an issuer seeking to rely on Regulation A omit financial information for historical periods if it reasonably believes that those

financial statements will not be required at the time of the qualification of the Form 1-A?

Answer: Yes. Consistent with the treatment of "emerging growth companies" in Section 71003 of the Fixing America's Surface Transportation (FAST) Act, a company filing or non-publicly submitting an offering statement pursuant to Regulation A may omit financial information for historical periods otherwise required by Part F/S of the Form 1 A, including financial information of other entities required to be included in Part F/S, if it reasonably believes the omitted information will not be required to be included in a filing at the time of qualification, so long as the issuer amends the offering statement prior to qualification to include all financial information required to be included in Part F/S at the time of the qualification.

Issuers that rely on this accommodation and solicit interest from potential investors pursuant to Rule 255 should be aware of their obligation to redistribute solicitation materials under the circumstances described in Rule 255(d) at the time that any financial information previously omitted pursuant to this accommodation has been included in an amended offering statement. [November 17, 2016]

Question 182.15

Question: An issuer's ability to use the Form 8-A (short form registration statement) to register a class of securities pursuant to Section 12(b) or (g) of the Exchange Act concurrent with the qualification of a Tier 2 offering statement is conditioned on the filing of the Form 8-A and, where applicable, the receipt by the Commission of certification from the national securities exchange listed on the Form 8-A within five calendar days after the qualification of the offering statement. *See* Note to General Instruction A of Form 8-A. If the fifth calendar day falls on a Saturday, Sunday or federal holiday, is the issuer permitted to register its class of securities if the Form 8-A is filed and, where applicable, the certification by the national securities exchange is received by the Commission on the next business day?

Answer: Yes. *See* Exchange Act Rule 0-3. [March 31, 2017]

Question 182.16

Question: An issuer — not currently subject to a Tier 2 Regulation A reporting obligation — qualifies an offering statement pursuant to Tier 2 and prior to making any sales in that offering withdraws its offering statement pursuant to Rule 259. Can the issuer suspend its Tier 2 reporting obligation by filing a Form 1-Z, even though the issuer has not filed an annual report pursuant to Regulation A or the Exchange Act for the fiscal year in which the offering statement was qualified?

Answer: The staff will not object to an issuer filing a Form 1-Z to suspend its Tier 2 reporting obligation where the Tier 2 offering is validly withdrawn pursuant to Rule 259 prior to making any sales and such withdrawal occurs before the issuer has filed an annual report pursuant to Regulation A or the Exchange Act for the fiscal year in which its offering statement was qualified. [March 31, 2017]

Question 182.17

Question: Paragraph (c)(1)(i) of Part F/S of Form 1-A requires an issuer and, when applicable, other entities for which financial statements are required, to comply with Article 8 of Regulation S-X, as if the issuer was

conducting a registered offering on Form S-1, with the exception of the age of financial statement requirements. What are the age of financial statement requirements for Tier 2 offerings?

Answer: While paragraph (c)(1)(i) of Part F/S specifies that Tier 2 offerings may follow paragraphs (b)(3)-(4) of Part F/S for the age of interim financial statements, as the Commission discussed in the Regulation A adopting release, an issuer in a Tier 2 offering may follow the age of financial statements requirements specified in paragraphs (b)(3)-(4) of Part F/S for financial statements covering both the fiscal year and interim periods. *See* SEC Rel. No. 33-9741 (March 25, 2015), at Section II.C.3.b.(2). [March 31, 2017]

Question 182.18

Question: Is an issuer qualifying an offering statement pursuant to Regulation A required to file a tax opinion as an exhibit to its Form 1-A?

Answer: No. Although not required, an issuer may elect to file additional exhibits, including a tax opinion, pursuant to paragraph 15(b) of Item 17 of Part III to Form 1-A. [March 31, 2017]

Question 182.19

Question: Will the staff object if an issuer with an ongoing Regulation A reporting obligation does not include an auditor's consent to the use of an audit report for the financial statements included in a Form 1-K (Annual Report) as an exhibit to the Form 1-K?

Answer: No. [March 31, 2017]

Question 182.20

Question: Item 19.D of Securities Act Industry Guide 5 states that an issuer should submit its sales material supplementally to the staff prior to its use. Does this guidance apply to sales material used in connection with an offering under Regulation A?

Answer: No. Item 7(c) of Part II of Form 1-A requires an issuer to follow the disclosure guidelines in the Securities Act Industry Guides. Because submission of sales material pursuant to Item 19.D is not a disclosure guideline, it is outside the scope of Item 7(c) of Part II of Form 1-A and does not apply to sales material used in connection with an offering under Regulation A. [March 31, 2017]

Question 182.21

Question: A Regulation A issuer may register a class of its securities pursuant to the Exchange Act on a Form 8-A concurrently with (i.e., within 5 days after) the qualification of a post-qualification amendment to a Form 1-A. Must the financial statements in the post-qualification amendment be current at the time it is qualified?

Answer: Yes. As the Commission stated in the Regulation A adopting release, Form 8-A eligibility as it relates to a Regulation A offering is limited to situations in which the Form 8-A goes effective concurrently with (i.e., within 5 days after) the qualification of the Form 1-A (or a post-qualification amendment to the Form 1-A) to help ensure that the disclosures in the Form 1-A, including financial statements, are generally current at the time

of effectiveness of the Exchange Act registration. *See* SEC Rel. No. 33-9741 (March 25, 2015), at p. 190. [September 14, 2017]

Question 182.22

Question: An issuer registers a class of securities pursuant to the Exchange Act on a Form 8-A concurrently with (i.e., within 5 days after) the qualification of a Form 1-A (Offering Statement). The issuer's qualified Form 1-A did not contain financial statements for the last full fiscal year preceding the fiscal year of effectiveness of the Form 8-A. When is the issuer required to file an annual report on Form 10-K for the preceding fiscal year?

Answer: The staff would not object if the issuer files its first annual report on Form 10-K for the fiscal year preceding the fiscal year in which the Form 8-A went effective within 90 calendar days after effectiveness of the Form 8-A.

For example, the staff would not object if a calendar year-end issuer that qualifies a Form 1-A on March 30, 2018 and registers a class of securities pursuant to the Exchange Act on April 4, 2018 files its first annual report on Form 10-K within 90 calendar days after effectiveness of the Form 8-A. [September 14, 2017]

Question 182.23

Question: An issuer registers a class of securities pursuant to the Exchange Act on a Form 8-A concurrently with (i.e., within 5 days after) the qualification of a Form 1-A (Offering Statement). The issuer's qualified Form 1-A did not contain financial statements for one or more quarterly periods that followed the most recent annual or semiannual period for which financial statements were included in the Form 1-A and that were completed prior to effectiveness of the Form 8-A. When is the issuer required to file quarterly reports for these quarterly periods?

Answer: Exchange Act Rule 13a-13 requires the issuer to file a quarterly report on Form 10-Q for the first fiscal quarter following the most recent annual or interim period for which financial statements were included in the registration statement. This report must be filed within 45 days of the effective date of the registration statement or on or by the required due date of the Form 10-Q (as if the issuer already had been required to file Forms 10-Q), whichever is later. Where the issuer's qualified Form 1-A did not contain financial statements for one or more quarterly periods that followed the most recent annual or semiannual period for which financial statements were included in the Form 1-A and that were completed prior to effectiveness of the Form 8-A, the staff would not object if the issuer files a Form 10-Q for the completed quarterly period, or two Forms 10-Q if financial statements for more than one quarterly period were not included in the Form 1-A, within 45 days after effectiveness of the Form 8-A.

For example, a calendar year-end issuer registers a class of securities pursuant to the Exchange Act on August 10, 2018, concurrent with the qualification of a Form 1-A that includes financial statements for the fiscal year ended December 31, 2017, but no financial statements for the two most recently completed quarterly periods in 2018. The staff would not

object if that issuer files its Forms 10-Q for the first and second fiscal quarters of 2018 on or before September 24, 2018. Unlike the Regulation A issuer, a calendar year-end issuer that registers a class of securities pursuant to the Exchange Act on August 10, 2018, concurrent with the effectiveness of a Form S-1, would have been required to include financial statements for the first fiscal quarter of 2018 in its registration statement and would be required to file its Form 10-Q for its second fiscal quarter on or before September 24, 2018. [September 14, 2017]

Sections 183 to 197. Rules 264 to 400 [Reserved]

Section 198. Rule 401 — Requirements as to Proper Form

Question 198.01

Question: When an issuer with an effective Form S-3 registration statement no longer satisfies the applicable Form S-3 requirements, how can the issuer update the registration statement for purposes of complying with Section 10(a)(3)?

Answer: The issuer can update the registration statement by filing a post-effective amendment on a Securities Act registration form for which it qualifies at the time of filing such amendment, such as a Form S-1 or Form S-11. [Jan. 26, 2009]

Question 198.02

Question: A registrant has an effective registration statement on Form S-3, but at the time of filing its Form 10-K, it no longer satisfies the eligibility requirements of Form S-3. Does the filing of the registrant's Form 10-K affect the ability of the registrant to continue using its Form S-3?

Answer: Yes. For purposes of Securities Act Rule 401(b), the filing of a Form 10-K containing the registrant's audited financial statements for its most recently completed fiscal year operates as a Section 10(a)(3) update to a Form S-3 registration statement. Therefore, if a registrant was not eligible to use Form S-3 at the time of such updating through the filing of the Form 10-K, it would be required to file a post-effective amendment on whatever other Securities Act registration form would be available to the registrant at the time. [Nov. 26, 2008]

Question 198.03

Question: If a well-known seasoned issuer files an automatic shelf registration statement at the beginning of the year, and during that year but before its Section 10(a)(3) update is due, the issuer loses its status as a well-known seasoned issuer, what is the impact on the effectiveness and use of that automatic shelf registration statement?

Answer: An issuer's loss of eligibility to use a registration form after effectiveness and before its Section 10(a)(3) update will not affect its ability to use that registration statement until the time of its Section 10(a)(3) update. If the issuer is no longer a well-known seasoned issuer at the time of its Section 10(a)(3) update, the issuer would be required to amend its automatic shelf registration statement onto a form it is then eligible to use to offer and sell securities. [Jan. 26, 2009]

Question 198.04

Question: Does Rule 401(e) permit a registrant updating a Form S-1 registration statement pursuant to Section 10(a)(3) to file a post-effective amendment on Form S-3 if it is eligible to use that form with respect to such offering at the time the amendment is filed?

Answer: Yes. The registrant could not, however, convert the Form S-1 to an automatic shelf registration statement by filing a post-effective amendment. [Jan. 26, 2009]

Question 198.05

Question: May an issuer file or use an automatic shelf registration statement on Form S-3 after the issuer has filed its Form 10-K but prior to filing the Part III information that will be incorporated by reference into the Form 10-K?

Answer: Yes. However, issuers are responsible for ensuring that any prospectus used in connection with a registered offering contains the information required to be included therein by Securities Act Section 10(a) and Schedule A. [Jan. 26, 2009]

Question 198.06

Question: Under Rule 401(b), if an amendment to a registration statement is filed to satisfy Securities Act Section 10(a)(3), the form and contents of the amendment must conform to the applicable rules and forms as in effect on the filing date of the amendment. For example, if an issuer is no longer eligible to use Form S-3 for a primary offering at the time it files its Form 10-K that acts as a Section 10(a)(3) update, the issuer must file a post-effective amendment or new registration statement to convert the Form S-3 registration statement onto a form that the issuer is then eligible to use in order to continue offers and sales. If a well-known seasoned issuer with an effective automatic shelf registration statement will no longer be a well-known seasoned issuer at the time of filing its Form 10-K, it will no longer be eligible to rely on General Instruction I.D to Form S-3. If that issuer will remain eligible to conduct primary offerings under General Instruction I.B.1 or I.B.2 of Form S-3, may the issuer continue to offer and sell securities off of its automatic shelf registration statement pending the effectiveness of the post-effective amendment that the issuer will file in order to convert the registration statement from an automatic shelf registration statement on Form S-3 filed in reliance on General Instruction I.D to a non-automatic shelf registration statement on Form S-3 filed in reliance on General Instruction I.B.1 or I.B.2?

Answer: Yes. In this situation, the issuer may continue to offer and sell securities using the automatic shelf registration statement, but only if, prior to filing the Form 10-K, the issuer amends the automatic shelf registration statement so that it conforms to the requirements that apply to a Form S-3 filed in reliance on General Instruction I.B.1 or I.B.2. Specifically, the following conditions must be satisfied:

- Prior to filing the Form 10-K, the issuer must file a post-effective amendment to the automatic shelf registration statement (on EDGAR submission type POSASR) to register a specific amount of securities and to pay the associated filing fee;

- The prospectus included in the post-effective amendment to the automatic shelf registration statement may not omit information in reliance on provisions of Rule 430B that are available only to automatic shelf registration statements and instead must contain all information required to be included in a Form S-3 filed in reliance on

General Instruction I.B.1 or I.B.2; and

- The issuer must remain eligible to use Form S-3 in reliance on General Instruction I.B.1 or I.B.2 at the time of the filing of the Form 10-K.

At least promptly after the Form 10-K is filed, the issuer must file either a post-effective amendment using EDGAR submission type POS AM or a new Form S-3 registration statement using EDGAR submission type S-3 to convert the Form S-3 to the proper EDGAR submission type for a non-automatic shelf registration statement. Pending the effectiveness of the filing, the issuer may continue to offer and sell securities using the amended automatic shelf registration statement. [Jan. 26, 2009]

Question 198.07

Question: Rule 401(g)(2) requires an issuer to file a new registration statement or post-effective amendment "promptly" once the staff notifies the issuer of its objection to the issuer's use of an automatic shelf registration statement. Does the "promptly" requirement also extend to responding to staff comments, if any, and submitting a request for effectiveness of the new registration statement or post-effective amendment?

Answer: Yes. [Aug. 14, 2009]

Question 198.08

Question: An issuer has a registration statement on Form S-3 or Form F-3 that was declared effective before July 22, 2010 and includes or incorporates by reference ratings information that is not limited to issuer disclosure-related ratings information. Can the issuer continue to use its registration statement without filing a consent by the credit rating agency?

Answer: Yes. In this fact pattern, the staff would not object to reliance upon Rule 401(a) under the Securities Act to allow continued use of the registration statement for the limited period permitted under Rule 401(a). This would be applicable only until the next post-effective amendment to such registration statement and only if no subsequently incorporated periodic or current report contains ratings information that is not limited to issuer disclosure-related ratings information. Note that the filing of the issuer’s next annual report on Forms 10-K, 20-F or 40-F is deemed to be the post-effective amendment of such registration statement for purposes of Securities Act Section 10(a)(3), so that in accordance with Rule 401(a), the registration statement could no longer be used after the annual report is filed without the filing of the consent. [July 27, 2010]

Sections 199 to 202. Rules 401a to 404 [Reserved]

Section 203. Rule 405 — Definition of Terms

Question 203.01

Question: The Rule 405 definition of “employee benefit plan” states that consultants or advisors may participate in an employee benefit plan only if (1) they are natural persons, (2) they provide bona fide services to the registrant, and (3) the services are not in connection with the offer or sale of securities in a capital-raising transaction and do not directly or indirectly promote or maintain a market for the registrant’s securities. Can securities issuable under a plan that permits consultants to be compensated for

capital-raising services, as well as services that qualify under Rule 405, be registered on Form S-8?

Answer: No. The plan does not satisfy the Rule 405 definition of "employee benefit plan," and therefore, no securities issuable under the plan can be registered on Form S-8. [Jan. 26, 2009]

Question 203.02

Question: A stock option plan registered on Form S-8 permits the issuance of transferable options. The registration statement covers only the issuance of the common stock on the exercise of the options. Can a non-employee, who acquires an option from an employee, exercise that option under the Form S-8 registration statement?

Answer: No. While securities issuable under the plan can continue to be registered on Form S-8, a non-employee (other than an employee's family member who acquires an option from an employee through a gift or domestic relations order) cannot exercise options under the Form S-8 registration statement. In addition, when the issuer sponsors a program or otherwise actively arranges for employees to sell employee benefit plan options or otherwise transfer employee benefit plan options to persons who are not family members, the plan no longer would be "solely for employees" and the other persons specified in the Rule 405 definition of "employee benefit plan." In this situation, securities issuable under the plan could not continue to be registered on Form S-8 unless a plan amendment removes the transferred options and the securities underlying them from the plan, so that the plan would continue to satisfy the Rule 405 definition of "employee benefit plan." [Jan. 26, 2009]

Question 203.03

Question: The definition of "ineligible issuer" in Rule 405 includes an issuer, or any entity that at the time was a subsidiary of the issuer, that within the past three years "was convicted of any felony or misdemeanor described in paragraphs (i) through (iv) of [S]ection 15(b)(4)(B) of the Securities Exchange Act of 1934." How is a conviction by a foreign court treated under this provision?

Answer: A conviction by a foreign court as to the activities described in paragraphs (i) through (iv) of Section 15(b)(4)(B) of the Exchange Act would trigger ineligibility under the definition. [Jan. 26, 2009]

Question 203.04

Question: A well-known seasoned issuer wants to form a wholly-owned finance subsidiary to sell non-convertible debt that will be fully and unconditionally guaranteed by the well-known seasoned issuer. Prior to the first offer and sale of the finance subsidiary's debt securities, the subsidiary would have nominal assets and operations. Would the finance subsidiary be a "shell company" as defined in Rule 405, and therefore an "ineligible issuer" that could not register its debt securities on the well-known seasoned issuer parent's automatic shelf registration statement?

Answer: Assuming the finance subsidiary satisfies the conditions of a well-known seasoned issuer majority-owned subsidiary and is not otherwise an ineligible issuer, the finance subsidiary borrowing with its parent's full and unconditional guarantee would not be a shell company for purposes of the definition of ineligible issuer. [Jan. 26, 2009]

Question 203.05

Question: An issuer whose predecessor had previously been in bankruptcy is planning an initial public offering. The planned Form S-1 would include audited financial statements of the issuer following its emergence from bankruptcy. Under the definition of "ineligible issuer," an issuer's ineligibility due to a bankruptcy filing terminates when the issuer files audited financial statements in an annual report subsequent to its emergence from bankruptcy. Would the issuer continue to be an "ineligible issuer" if it included audited financials in the Form S-1 but did not file an annual report?

Answer: No. The issuer would have emerged from bankruptcy prior to the filing of the registration statement and its audited financial statements filed as part of its registration statement would be of the entity as of a date after it emerged from bankruptcy. [Jan. 26, 2009]

Question 203.06

Question: Under Rule 405, a limited partnership that "is offering and selling its securities other than through a firm commitment underwriting" is an ineligible issuer. Would a master limited partnership be an ineligible issuer if it occasionally offers securities in other than firm commitment underwritten deals?

Answer: A master limited partnership is an "ineligible issuer" with respect to any offerings conducted on other than a firm commitment underwritten basis, including resales by selling security holders. For any offering conducted on a firm commitment basis, the master limited partnership would not be an ineligible issuer. [Jan. 26, 2009]

Question 203.07

Question: Is an issuer an "ineligible issuer" that may not incorporate by reference into a Form S-1 if any registered securities offering (whether primary or resale) or any private primary securities offering occurred during the three-year look-back window at a time when the issuer's securities would have qualified as penny stock?

Answer: Yes. The issuer would not, however, need to consider unregistered resale transactions in making this determination. [Jan. 26, 2009]

Question 203.08

Question: In determining whether an issuer qualifies as a penny stock issuer that is an ineligible issuer under Rule 405, must the issuer consider offerings registered on Form S-8 if no sales were made during the applicable three-year window?

Answer: Yes. Offers registered on Form S-8 would be considered ongoing offers during the pendency of the registration statement and therefore may result in the issuer being considered a penny stock issuer, whether or not sales occurred at a time when the issuer's stock would have qualified as penny stock. [Jan. 26, 2009]

Question 203.09

Question: An issuer that has not previously filed a shelf registration statement believes that it meets the test for well-known seasoned issuer status and decides to file an automatic shelf registration statement. What is this issuer's initial determination date for well-known seasoned issuer

status for purposes of determining its eligibility to file an automatic shelf registration statement?

Answer: The issuer's initial determination date for well-known seasoned issuer status will be the time it files the automatic shelf registration statement. [Jan. 26, 2009]

Question 203.10

Question: An issuer with an effective shelf registration statement believes that it meets the test for well-known seasoned issuer status and decides to file an automatic shelf registration statement. What is this issuer's initial determination date for well known seasoned issuer status for purposes of determining its eligibility to file an automatic shelf registration statement?

Answer: The issuer's initial determination date for well-known seasoned issuer status will be the time it files the automatic shelf registration statement. [Jan. 26, 2009]

Question 203.11

Question: If a well-known seasoned issuer files an automatic shelf registration statement, is its status as a well-known seasoned issuer re-evaluated when it files its Form 10-K or Form 20-F for the fiscal year in which the automatic shelf registration statement is filed and becomes effective? For example, if an issuer with a December 31 fiscal year end files an automatic shelf registration statement on August 15, 2006 and files its Form 10-K for its 2006 fiscal year on February 28, 2007, must it re-evaluate its well-known seasoned issuer status on the date it files that Form 10-K?

Answer: Yes. For purposes of Securities Act Section 10(a)(3), Item 512(b) of Regulation S-K provides that "each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 … that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein …" As such, the issuer in this example must re-evaluate its well-known seasoned issuer status when it files its Form 10-K on February 28, 2007. Further, issuers are required to indicate their well-known seasoned issuer status on the cover page of their Form 10-K or Form 20-F. When an issuer that was a well-known seasoned issuer and has an effective automatic shelf registration statement determines that it no longer is a well-known seasoned issuer at the time it files its annual report (or on the due date of such report in the event the annual report is not filed by the due date of the Section 10(a)(3) update), that issuer should amend its automatic shelf registration statement on the form that it is then eligible to use. [Jan. 26, 2009]

Question 203.12

Question: Can a Canadian issuer filing annual reports on Form 40-F under the Multi-Jurisdictional Disclosure System be a "well-known seasoned issuer" under the definition in Rule 405?

Answer: No. Only issuers filing annual reports on Form 10-K or Form 20-F are eligible to be well-known seasoned issuers. The Commission's intent to limit well-known seasoned issuer status only to those issuers filing annual reports on Form 10-K and Form 20-F is evidenced by, among other things, the fact that Form 40-F was not revised to include either a well-known seasoned issuer check box or to require the disclosure of unresolved staff

comments (each of which the Commission included in amended Form 10-K and Form 20-F). [Jan. 26, 2009]

Question 203.13

Question: If an issuer has not previously filed any shelf registration statement and at the date of its last Form 10-K did not qualify as a well-known seasoned issuer, would it be able to determine its status as a well-known seasoned issuer at the time it wants to rely on Rule 163 for pre-filing offers?

Answer: No. The definition of well-known seasoned issuer permits an issuer to evaluate its status as a well-known seasoned issuer only upon specified events; the date of intended reliance on Rule 163 is not one of those events. Therefore, if there is no shelf registration statement on file and the issuer did not satisfy the definition of well-known seasoned issuer at the time it filed its most recent Form 10-K, the issuer's status would not change until it either files a shelf registration statement or files its next Form 10-K. [Jan. 26, 2009]

Question 203.14

Question: The definition of "well-known seasoned issuer" refers to the time of filing of an issuer's "most recent shelf registration statement." Would an issuer's most recent shelf include a Form S-4 or Form S-8 under which securities might be offered pursuant to Rule 415 on a delayed or continuous basis?

Answer: Yes. It would include any registration statement filed in reliance on Rule 415. [Jan. 26, 2009]

Question 203.15

Question: In the definition of "well-known seasoned issuer," does the phrase "within 60 days of the determination date" include both the 60 days before and the 60 days after filing the registration statement or the Section 10(a)(3) update?

Answer: No. It includes only a date that is within 60 days before the determination date. [Jan. 26, 2009]

Question 203.16

Question: If a spun-off subsidiary meets the conditions discussed in Questions 8 and 9 of Staff Legal Bulletin No. 4, including the 12-month segment financial reporting requirement, that permit a subsidiary to consider the parent's reporting history when determining whether the subsidiary is eligible to use Form S-3, may the subsidiary rely on the parent's pre-spin-off reporting history for purposes of evaluating whether the subsidiary is a well-known seasoned issuer and eligible to file a Form S-3ASR?

Answer: Yes. The spun-off subsidiary also would need to independently meet all other requirements for well-known seasoned issuer status. It should be noted that if a spun-off entity relies on its parent's reporting history for purposes of filing a Form S-3 or a Form S-3ASR, it would need to comply with Items 308(a) and 308(b) of Regulation S-K in the first annual report that it files, to the extent its parent is required to do so. *See* Securities Act Release No. 8760 (Dec. 15, 2006), at fn. 76. [Jan. 26, 2009]

Question 203.17

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 203.18

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 203.19

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 203.20

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 203.21

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 203.22

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 203.23

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]

Sections 204 to 207. Rules 406 to 410 [Reserved]

Section 208. Rule 411 — Incorporation by Reference

Question 208.01

Question: May a registrant filing a Form S-1 include information about a Form S-3 company in its prospectus through incorporation by reference?

Answer: No. This procedure is not authorized by Form S-1 or Rule 411. If the information about the other company is material, it must be set forth in the prospectus in full. [Jan. 26, 2009]

Question 208.02

Question: May exhibits be incorporated by reference from a registration statement filed by another issuer?

Answer: Yes. Rule 411(c) permits exhibits to be incorporated by reference from a registration statement filed by another issuer. [Jan. 26, 2009]

Question 208.03

Question: May a registrant filing a Form S-1 to register an initial public offering incorporate by reference exhibits filed with a previous Securities Act registration statement which was withdrawn pursuant to Rule 477?

Answer: Yes. The withdrawn registration statement remains a filed document for purposes of Rule 411(c) and, accordingly, the exhibits may be incorporated by reference. [Jan. 26, 2009]

Section 209. Rule 412 [Reserved]

Section 210. Rule 413 — Registration of Additional Securities and Additional Classes of Securities

Question 210.01

Question: May a registrant request a waiver from the requirement in Rule 413(a) that a post-effective amendment cannot be used to register additional securities to be included in an offering?

Answer: No. Unless the registration statement is an automatic shelf registration statement covered by Rule 413(b), the proper procedure is to file a separate registration statement for the offer and sale of the additional securities. The registrant can use a combined prospectus pursuant to Rule 429 for the offering. [Jan. 26, 2009]

Question 210.02

Question: May a pending registration statement be amended to add additional securities prior to its effective date?

Answer: Yes. Prior to the effective date, additional securities may be added for registration with the payment of the requisite additional fee. [Jan. 26, 2009]

Question 210.03

Question: An issuer files an automatic shelf registration statement on Form S-3 to register the offer and sale of a specified number of securities of a specified class of securities. May the issuer post-effectively amend this Form S-3 to add more securities of the same class already registered?

Answer: Yes. An issuer may add to the automatic shelf registration statement on Form S-3, by post-effective amendment, more securities of the same class already registered. [May 16, 2013]

Section 211. Rule 414 [Reserved]

Section 212. Rule 415 — Delayed or Continuous Offering and Sale of Securities

Question 212.01

Question: In what circumstances does an over-allotment offering constitute a delayed offering such that compliance with Rule 415 is necessary?

Answer: As a matter of administrative practice, over-allotment options with terms of up to 45 days may be made without triggering compliance with Rule 415. [Jan. 26, 2009]

Question 212.02

Question: May securities that are registered on a shelf registration statement pursuant to Rule 415 be sold concurrently in any of the transactions for which they were registered?

Answer: Yes. For example, if the shelf registration statement indicates that the securities registered could be sold in firm commitment underwriting and at-the-market offerings, both types of transactions could be undertaken at the same time (subject to form eligibility). [Jan. 26, 2009]

Question 212.03

Question: Is there a presumptive underwriter standard under Rule 415?

Answer: No. [Jan. 26, 2009]

Question 212.04

Question: If an issuer is eligible to file a shelf registration statement on Form S-3, may it amend a pending non-shelf registration statement to become a shelf registration statement on Form S-3 prior to its effective date?

Answer: Yes. [Jan. 26, 2009]

Question 212.05

Question: Can a registration statement under Rule 415 be declared effective without an opinion of counsel as to the legality of the securities being issued when no immediate sales are contemplated?

Answer: No. However, when sales are not expected in the near future, the registrant may file a qualified opinion of counsel and have its registration statement be declared effective, subject to the understanding that an unqualified opinion will be filed no later than the closing date of the offering of the securities covered by the registration statement. An updated opinion of counsel with respect to the legality of the securities being offered may be filed in a Form 8-K report rather than a post-effective amendment to a Form S-3 shelf registration statement. This position is limited to opinions of counsel regarding the legality of the securities being offered, which are required to be filed in connection with shelf takedowns. [Aug. 14, 2009]

Question 212.06

Question: Does the existence of an effective registration statement governed by Rule 415 automatically require that sales under that registration statement be integrated with sales in a separate offering for which an exemption is claimed?

Answer: No. The existence of an effective shelf registration statement does not, in and of itself, raise integration concerns. However, a takedown off the shelf registration statement may raise integration concerns if the offering is made concurrently with another offering for which an exemption is claimed. Please see Securities Act Release No. 8828 (Aug. 3, 2007) for guidance on integration in the context of concurrent public and private offerings. [Jan. 26, 2009]

Question 212.07

Question: May a company update a Form S-1 for a continuous offering by supplementing the prospectus with a Form 10-Q?

Answer: If the Form 10-Q contains no disclosure that would constitute a fundamental change in the information contained in the prospectus, there is no Item 512(a) requirement to file a post-effective amendment. If the company must update for anti-fraud and Rule 159 purposes, it may do so by a prospectus supplement. [Jan. 26, 2009]

Question 212.08

Question: Pursuant to Rule 461**,** must the managing underwriters join in the written request for acceleration in connection with a shelf registration statement naming potential underwriters?

Answer: No. [Jan. 26, 2009]

Question 212.09

Question: May the combined prospectus technique of Rule 429 be used in the context of Rule 415, when an amount of securities remains unsold on an earlier shelf registration statement at the time the issuer files a new shelf registration statement?

Answer: Yes, provided that the new shelf registration statement is not an automatic shelf registration statement and complies with Rules 415(a)(5) and (6). Once Rule 429 is used to create a combined prospectus, the prospectus that is a part of the earlier registration statement generally may not be used by itself. [Jan. 26, 2009]

Question 212.10

Question: May a well-known seasoned issuer rely on Rule 429 to combine a prospectus from a prior non-automatic shelf registration statement with the prospectus in a newly filed automatic shelf registration statement?

Answer: No. Under Rule 429(b), a registration statement containing a combined prospectus acts, upon effectiveness, as a post-effective amendment to the earlier registration statement whose prospectus is combined in the latest registration statement. Because a registrant cannot file a post-effective amendment to convert a non-automatic shelf registration statement into an automatic shelf registration statement, a well-known seasoned issuer may not rely on Rule 429 to combine a prospectus from a prior non-automatic shelf registration statement with the prospectus in a newly filed automatic shelf registration statement. Instead, a well-known seasoned issuer with unused capacity on a prior non-automatic shelf may either utilize the unused fees upon filing a new automatic shelf registration statement, in accordance with Rule 457(p), or continue to sell off of the old registration statement until the capacity is used up. [Jan. 26, 2009]

Question 212.11

Question: When Form S-1 is used for a continuous offering under Rule 415, is a post-effective amendment necessary to meet the requirements of Section 10(a)(3), to reflect fundamental changes, or to disclose material changes in the plan of distribution?

Answer: Yes. A post-effective amendment is required to reflect those changes because Form S-1 does not provide for forward incorporation by reference of Exchange Act reports filed after the effective date. Other changes may be made by prospectus supplement to the extent permitted by Rule 424. [Jan. 26, 2009]

Question 212.12

Question: When a shelf registration statement is filed on Form S-3 for offerings of securities on a delayed basis under Rule 415(a)(1)(x) and the plan of distribution includes underwritings on a firm commitment basis, in connection with a shelf takedown offering, is it permissible for the registrant to name the participating underwriters in a prospectus supplement and file the underwriting agreement as an exhibit under cover of Form 8-K?

Answer: Yes. *See* Securities Act Release No. 8591 (July 19, 2005), at fn. 488. [Jan. 26, 2009]

Question 212.13

Question: Rule 3-01 of Regulation S-X specifies certain time periods (depending on the registrant's accelerated filer status) in which a "filing," other than on Form 10-K or Form 10, may be made without the balance sheet for the most recent fiscal year end. The rule is conditioned on (1) the registrant's reasonable and good faith expectation that it will report income for the most recently completed fiscal year and (2) the registrant having reported income for at least one of the last two fiscal years. May a registrant sell securities from an effective Form S-3 registration statement during the relevant time period and file a prospectus supplement under Rule 424 to reflect the take-down, if the balance sheet for the most recent fiscal year end has not been filed and the registrant does not have a reasonable and good faith expectation that it will report income for the most recently completed fiscal year?

Answer: Yes. Rule 3-01 does not prevent the shelf take-down from occurring and would not apply to the prospectus supplement as it is not for the purpose of updating the prospectus under Section 10(a)(3). [Jan. 26, 2009]

Question 212.14

Question: Must a registration statement on Form S-8, covered by Rule 415, include all applicable undertakings in Item 512 of Regulation S-K, including specifically those in Items 512(a), (b) and (h)?

Answer: Yes. However, the Form S-8 does not have to include the undertakings contained in Items 512(a)(5)(i), 512(a)(5)(ii), and 512(a)(6). [July 3, 2008]

Question 212.15

Question: May parents, subsidiaries or affiliates of the issuer rely on Rule 415(a)(1)(i) to register secondary offerings?

Answer: Rule 415(a)(1)(i) excludes from the concept of secondary offerings sales by parents or subsidiaries of the issuer. Form S-3 does not specifically so state; however, as a practical matter, parents and most subsidiaries of an issuer would have enough of an identity of interest with the issuer so as not to be able to make "secondary" offerings of the issuer's securities. Aside from parents and subsidiaries, affiliates of issuers are not necessarily treated as being the alter egos of the issuers. Under appropriate circumstances, affiliates may make offerings which are deemed to be genuine secondaries. [Jan. 26, 2009]

Question 212.16

Question: Pursuant to Rule 415(a)(2), securities registered in reliance on Rule 415(a)(l)(ix) that are not registered on Form S-3 or Form F-3 and securities registered in reliance on Rule 415(a)(1)(viii) may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date. If unsold securities remain at the end of the two years, may the registration statement continue to be used?

Answer: At the time of the initial filing, the registrant must make a bona fide estimate of the amount of securities reasonably expected to be offered and sold within two years from the initial effective date. There is no requirement that any unsold securities be deregistered at the end of two years, and the registration statement may continue to be used after that time, to the extent permitted by Rule 415(a)(5). [Jan. 26, 2009]

Question 212.17

Question: How does a company register, as a primary offering (rather than as a "resale" registration in a private equity line financing), the issuance of the put securities under an equity line?

Answer: An equity line financing done as a primary offering in which the put price is based on or at a discount to the underlying stock's market price at the time of the put exercise is an "at the market" offering under Rule 415(a)(4) and must comply with the requirements of that rule. Further, to register the primary offering, the company must be eligible to register primary offerings on Form S-3 in reliance on General Instruction I.B.1 or General Instruction I.B.6 of such form or on Form F-3 in reliance on General Instruction I.B.1 or General Instruction I.B.5 of such form. In addition, if a company is relying on General Instruction I.B.6 of Form S-3 or on General Instruction I.B.5 of Form F-3, the total amount of securities issuable under the equity line agreement may represent no more than one-third of the company's public float at the time of execution of the equity line agreement. [Nov. 26, 2008]

Question 212.18

Question: When does an indenture relating to securities to be issued under an automatic shelf registration statement need to be qualified under the Trust Indenture Act?

Answer: The indenture covering securities to be issued, offered and sold pursuant to a registration statement must be qualified at the time the registration statement relating to those securities becomes effective. The indenture may not be qualified by post-effective amendment. Under the automatic shelf registration process adopted in Securities Act Release No. 8591 (July 19, 2005), a well-known seasoned issuer is permitted to add securities to an automatic shelf registration statement by means of a post-effective amendment. Because the effectiveness of a registration statement is deemed the time "when registration becomes effective as to such security(ies)," as that term is used in Section 309(a)(1) of the Trust Indenture Act, the well-known seasoned issuer will satisfy Section 309(a)(1) if the indenture is included as an exhibit to the registration statement at the time that post-effective amendment becomes effective. *See* Securities Act Release No. 8591 (July 19, 2005), at fn. 527. [Jan. 26, 2009]

Question 212.19

Question: If a registrant intends to file a shelf registration statement and periodically offer multiple series of debt, when is the indenture required to be qualified under the Trust Indenture Act?

Answer: The following approach has been taken with respect to shelf registration statements that contemplate a series of debt offerings under Rule 415 requiring an indenture to be qualified under the Trust Indenture Act.

(1) The indenture that is filed with, and qualified upon the effectiveness of, the registration statement may be "open-ended" (i.e., it may provide a generic, non-specific description of the securities, such as "unsecured debentures, notes or other evidences of indebtedness" which are to be issued in series). For automatic shelf registration statements, the "open-ended" indenture must be filed as an exhibit to the registration statement or as an exhibit to a post-effective amendment to the registration statement that registers the securities to be issued under the indenture.

(2) The details of the securities to be offered in each series under the indenture (i.e., type of securities [notes, debentures, or other], interest rates, and maturities) must be disclosed both in a prospectus supplement and in a supplemental indenture at the time such series is to be offered. For an automatic shelf registration statement, the base prospectus only needs to include a general description of the securities. The supplemental indenture may be filed as an exhibit to a Form 8-K (in the same manner as specified for underwriting agreements), or in an automatically effective, exhibits-only, post-effective amendment filed pursuant to Rule 462(d). For automatic shelf registration statements, the post-effective amendment would be filed pursuant to Rule 462(e). [Jan. 26, 2009]

Question 212.20

Question: How should a registrant conducting a continuous offering on Form S-1 update the prospectus to reflect the information in its subsequently filed Exchange Act reports?

Answer: If Form S-1 is used for a continuous offering, the prospectus may have to be revised periodically to reflect new information since, unlike Form S-3, the form does not provide for incorporation by reference of subsequent periodic reports. For example, in a continuous offering on a Form S-1 pursuant to Rule 415(a)(1)(ix), a registrant wants to update the prospectus to include Exchange Act reports filed after the effective date of the Form S-1. Item 512(a)(1) of Regulation S-K requires certain changes, including a Section 10(a)(3) update, to be reflected in a post-effective amendment. Other changes may be made in a prospectus supplement filed pursuant to Rule 424(b). If the registrant files a post-effective amendment, it could incorporate by reference previously filed Exchange Act reports if it satisfied the conditions in Form S-1 allowing incorporation by reference. [Apr. 24, 2009]

Question 212.21

Question: For a registration statement offering securities immediately exchangeable at the option of the security holder into securities of another issuer, must there be a registration statement to register the offer and sale of the securities that would be received in exchange and if so, what provision of Rule 415 may be relied on to cover such exchange?

Answer: The offer and sale of securities to be received in exchange for registered exchangeable securities must be registered, unless an exemption from registration is available. If no exemption from registration is available, the offer and sale of the securities to be issued in exchange could be registered as a continuous offering in reliance on Rule 415(a)(1)(ix) or as

an offering of securities upon conversion of outstanding securities pursuant to Rule 415(a)(1)(iv). [June 4, 2010]

Question 212.22

Question: When does the three-year period specified in Rule 415(a)(5) expire?

Answer: The three-year period in Rule 415(a)(5) begins on the initial effective date of the registration statement, except that for registration statements effective before December 1, 2005, the three-year period begins on December 1, 2005 and ends on November 30, 2008. After November 30, 2008, an issuer may use a registration statement that was effective on or before December 1, 2005 to offer and sell securities only to the extent permitted by the grace period provisions of Rule 415(a)(5). [Nov. 21, 2008]

Question 212.23

Question: For a registration statement that was effective on or before December 1, 2005, when must the replacement registration statement be filed?

Answer: A replacement registration statement filed pursuant to Rule 415(a)(6) must be filed on or before the expiration date of the expiring registration statement. EDGAR does not accept new registration statements for filing on Saturdays or Sundays. Therefore, with respect to registration statements effective on or before December 1, 2005, any replacement registration statement filed pursuant to Rule 415(a)(6) must be filed no later than Friday, November 28, 2008. [Nov. 21, 2008]

Question 212.24

Question: How can an issuer include securities that remain unsold on the expiring registration statement as registered securities on the replacement registration statement, and when should the issuer include such unsold securities on the replacement registration statement?

Answer: Rule 415(a)(6) provides that an issuer may include on its replacement registration statement any unsold securities covered by the expiring registration statement by identifying on the facing page of the replacement registration statement, or a pre-effective amendment thereto, the amount of the unsold securities being included on the replacement registration statement and any filing fee paid in connection with the unsold securities, which will continue to be applied to such unsold securities. The issuer should include the file number of the expiring registration statement as part of this disclosure. The issuer is not required to pay any additional fee with respect to such securities included in reliance on Rule 415(a)(6), because the unsold securities (and associated fees) are being moved from the expiring registration statement to the replacement registration statement. A filing fee is required, however, for any new securities registered on the replacement registration statement.

An issuer may only rely on Rule 415(a)(6) to include on a new replacement registration statement securities that remain unsold on an expiring registration statement. For example, if the expiring registration statement had a remaining capacity of $1 million of common stock, Rule 415(a)(6) permits the issuer to include on the replacement registration statement $1 million of common stock. Rule 415(a)(6) does not, however, permit the issuer instead to include on the replacement registration statement $1 million in preferred stock.

The inclusion of unsold securities on the replacement registration statement has EDGAR filing implications. When completing the EDGAR header tags for a replacement registration statement, or any pre-effective amendment thereto, that is not an automatic shelf registration statement, the filer will be required to specify a "Proposed Maximum Aggregate Offering Price." This EDGAR header tag should include only newly-registered securities for which a fee will be payable at the time of filing the replacement registration statement.

Except as noted below, the amount of unsold securities that are being included on the replacement registration statement pursuant to Rule 415(a)(6) should not be included as part of the "Proposed Maximum Aggregate Offering Price" EDGAR header tag. If the issuer opts not to register any new securities and the replacement registration statement therefore will cover only securities included from the expiring registration statement pursuant to Rule 415(a)(6), the filer should enter "$1" in the "Proposed Maximum Aggregate Offering Price" EDGAR header tag. The filer should enter "$0" as the fee paid. This is necessary because the EDGAR system will not accept a Securities Act registration statement (other than an automatic shelf registration statement using the "pay as you go" fee provisions of Rule 456(b)) unless a "Proposed Maximum Aggregate Offering Price" is specified in the EDGAR header tag. The $1 amount will not result in a fee assessment by the EDGAR system and will allow the acceptance of the replacement registration statement without the filing being blocked. [Nov. 21, 2008]

Question 212.25

Question: How does an issuer reflect in the replacement registration statement any sales from the expiring registration statement completed during the grace period in Rule 415(a)(5)?

Answer: Rule 415(a)(5) provides that if an issuer has filed a replacement registration statement pursuant to Rule 415(a)(6) that is not an automatic shelf registration statement, the issuer may continue to offer and sell securities covered by the expiring registration statement until the earlier of the effective date of the replacement registration statement or 180 days after the third anniversary of the initial effective date of the expiring registration statement. A continuous offering of securities covered by the expiring registration statement that commenced within three years of the initial effective date may continue until the effective date of the replacement registration statement if such offering is permitted under the replacement registration statement. Any Commission filings, such as prospectus supplements or free-writing prospectuses, related to offerings during the grace period should reflect the expiring registration statement file number. To reflect sales completed during the Rule 415(a)(5) grace period, the issuer should pre-effectively amend the replacement registration statement so that, at effectiveness, the registration statement correctly specifies on the bottom of the facing page the amount of securities that will actually be included in reliance on Rule 415(a)(6). [Nov. 21, 2008]

Question 212.26

Question: How can an issuer use the filing fee offsets under Rule 457(p) as it transitions from the expiring registration statement to the replacement registration statement, and how would that differ from including unsold securities on the replacement registration statement in reliance on Rule 415(a)(6)?

Answer: If an issuer uses Rule 415(a)(6) to include securities on a replacement registration statement, the offering of securities on the

expiring registration statement will not be deemed terminated until the replacement registration statement is effective. As a result, any securities that are identified in the replacement registration statement as included pursuant to Rule 415(a)(6) may still be offered and sold from the expiring registration statement during the Rule 415(a)(5) grace period prior to effectiveness of the new registration statement.

If, instead of including unsold securities from the expiring registration statement, an issuer determines to rely on the provisions of Rule 457(p) to offset fees owed upon the initial filing of, or any pre-effective amendment to, the replacement registration statement relating to the registration of new securities, the related securities from the expiring registration statement are immediately deemed deregistered upon the filing of the replacement registration statement (or any pre-effective amendment registering the new securities). These deregistered securities may not be offered or sold during the Rule 415(a)(5) grace period off the expiring registration statement or included as unsold securities on the new registration statement in reliance on Rule 415(a)(6).

With respect to securities registered on an expiring registration statement, an issuer may choose to include a portion of the previously-registered unsold securities under Rule 415(a)(6) and, if the conditions of Rule 457(p) are satisfied, use the fees already paid attributable to the balance of the securities registered on the expiring registration statement as an offset against any new fees due in respect of newly-registered securities on the replacement registration statement. The cover page of the registration statement should clearly explain the amount of securities included (or the potential that they may be included) pursuant to Rule 415(a)(6), the amount of fees offset pursuant to Rule 457(p), and identify the related registration statements. The specific amounts of unsold securities that may be included do not need to be identified in the initial filing and may be included in a pre-effective amendment to the replacement registration statement (such as just before effectiveness of the replacement registration statement).

For example: under Rule 415(a)(6), an issuer files a new registration statement to replace a shelf registration statement that went effective November 1, 2005 and relates to a $2 million continuous offering of debt and $8 million in common stock to be offered on a delayed basis. The replacement registration statement reflects on the cover page the expiring registration statement and states that the issuer will identify in a pre-effective amendment the securities included in the replacement registration statement pursuant to Rule 415(a)(6) and the amount of any new securities to be registered. If the replacement registration statement does not include, at that time, any new securities being registered, the issuer would reflect in the "Proposed Maximum Aggregate Offering Price" EDGAR header tag an amount of $1 and a fee paid of $0.

Prior to the effectiveness of the replacement registration statement, the issuer then sells $1 million of debt and $2 million of common stock, using the expiring registration statement pursuant to Rule 415(a)(5). When the issuer is ready to request effectiveness of the replacement registration statement, it would then file a pre-effective amendment to reflect that the new registration statement is including the unsold securities from the expiring registration statement in the amounts of $1 million of debt and $6 million in common stock pursuant to Rule 415(a)(6). If the issuer does not register new securities in the pre-effective amendment, it will not need to record any "Proposed Maximum Aggregate Offering Price" in the EDGAR header tag.

Alternatively, instead of including the unsold securities from the expiring registration statement, the issuer may elect to use Rule 457(p) to utilize

the fees relating to all or a portion of the unsold shares on the expiring registration statement as a fee offset. In that case, if the conditions of Rule 457(p) are satisfied, the issuer may offset fees previously paid in connection with all or a portion of the $1 million of debt and $6 million of common stock that remain unsold on the expiring registration statement against the fees due for any securities newly registered on the pre-effective amendment. The shares covered by the fees used as offsets would be deemed deregistered from the expiring registration statement and could not be offered or sold during the remainder of the Rule 415(a)(5) grace period. The EDGAR header for the pre-effective amendment would reflect as the "Proposed Maximum Aggregate Offering Price" the amount of securities to be included on the replacement registration statement other than those securities included in reliance on Rule 415(a)(6). The issuer would also need to complete the fee offset header tags in EDGAR to reflect the fee offset claimed pursuant to Rule 457(p). [Jan. 26, 2009]

Question 212.27

Question: If an issuer is no longer a well-known seasoned issuer at the time it files a replacement registration statement pursuant to Rule 415(a)(5), can the issuer continue to use its expiring automatic shelf registration statement for offers and sales during the Rule 415(a)(5) grace period?

Answer: Yes. An issuer that must file a replacement registration statement to an expiring Form S-3ASR on Form S-3 due to the issuer not satisfying the definition of well-known seasoned issuer at the time the new Form S-3 is filed may continue to use its expiring automatic shelf for offers and sales during the Rule 415(a)(5) grace period. A registration statement filed solely for purposes of complying with Rule 415(a)(5) will not be considered a reassessment of the issuer's status as a well-known seasoned issuer for purposes of any outstanding Form S-3ASR or the Securities Act exemptions available to a well-known seasoned issuer. [Nov. 21, 2008]

Question 212.28

Question: If during the Rule 415(a)(5) grace period an issuer that is no longer a well-known seasoned issuer files a Form 10-K that acts as a Section 10(a)(3) update to its Form S-3ASR, may the issuer continue to use the Form S-3ASR for the remainder of the grace period?

Answer: The issuer's status as a well-known seasoned issuer and its continued eligibility to use its expiring Form S-3ASR will be re-measured at the time of the filing of a Form 10-K that acts as a Section 10(a)(3) update to the Form S-3ASR registration statement. If the issuer is not a well-known seasoned issuer at the time of the Section 10(a)(3) amendment to its expiring Form S-3ASR, the issuer may no longer use the Form S-3ASR until it post-effectively amends the Form S-3ASR to a form that the issuer is then eligible to use.

A Form S-3ASR that utilizes the "pay-as-you-go" fee provisions of Rule 456(b) may not be converted to another form via a post-effective amendment because fees cannot be paid to register securities via a post-effective amendment on any form other than an automatic shelf registration statement. Consequently, registrants intending to convert a Form S-3ASR, in which payment of fees has been deferred pursuant to Rule 456(b), to another form, such as a Form S-3, should file an automatically effective post-effective amendment to the Form S-3ASR prior to the filing of the Form 10-K to pay a fee for securities it intends to offer and sell upon subsequent conversion to the new form. The filing of an automatically effective post-effective amendment for these purposes does not require a

re-measurement of form eligibility as provided in Rule 401(c). [Nov. 21, 2008]

Question 212.29

Question: In an offering relying on Rule 415(a)(1)(x) and Rule 430B, the prospectus filed as part of a registration statement covering a "delayed/continuous" medium term note offering generally will contain only a generic description of the security terms. When the medium term note program begins, this base prospectus and a prospectus supplement containing a complete description of the terms of the notes other than price, specific maturity date and other limited terms will be distributed to interested persons. When the notes are priced, a pricing supplement that contains the price, specific maturity date and other limited terms previously omitted from the prospectus supplement is prepared. For each series of notes, there would be one prospectus supplement, but numerous pricing supplements reflecting prices changing frequently in response to market and economic factors. How should the prospectus supplement and pricing supplements be filed?

Answer: Under this form of medium term note program offering, the prospectus supplement should be filed under Rule 424(b)(2) or, if it also contains other substantive changes, under Rule 424(b)(5). The pricing supplements should be filed under Rule 424(b)(2). [Jan. 26, 2009]

Question 212.30

Question: May a registrant continue to use a non-automatic shelf registration statement that registers offers and sales pursuant to a dividend reinvestment plan (DRIP) more than three years after the initial effective date of the registration statement if the DRIP also permits new investors to purchase shares through the plan?

Answer: Dividend reinvestment and existing investor direct stock purchases are continuous or delayed offerings that may be made in reliance on Rule 415(a)(1)(ii). The registration of these offers and sales does not expire pursuant to Rule 415(a)(5). On the other hand, new investor direct stock purchases may only be made pursuant to Rule 415(a)(1)(ix) or Rule 415(a)(1)(x) because they do not fit within the definition of "dividend or interest reinvestment plan" in Rule 405. Consequently, the registration statement may not be used for new investor direct stock purchases upon expiration of the Rule 415(a)(5) three-year period. If the issuer continues to use the registration statement for dividend reinvestment and existing investor direct stock purchases, then the prospectus should be revised to reflect the changes to the offering. [June 4, 2010]

Question 212.31

Question: If an issuer registers the offer and sale of securities immediately exchangeable at the option of the issuer into other securities of that issuer, does the registration statement also have to register the offering of the underlying securities and, if so, does Rule 415 apply to the offering of the underlying securities?

Answer: Because the exchange is at the option of the issuer only, the investor's decision to purchase the exchangeable security is also, in effect, a decision to accept the underlying security whenever the exchange takes place. Accordingly, both offerings must be registered, and the offering of the underlying securities is deemed to be completed at the same time as the offering of the exchangeable securities. As there is no continuous or

delayed offering of the underlying securities, Rule 415 would not apply. [June 4, 2010]

Section 213. Rule 416 — Securities to be Issued as a Result of Stock Splits, Stock Dividends and Anti-Dilution Provisions and Interests to be Issued Pursuant to Certain Employee Benefit Plans

Question 213.01

Question: How should a company compute the number of underlying common shares to be registered in a primary offering of immediately convertible debentures, when the conversion ratio is based on fluctuating market prices and the investors pay no additional consideration to effect the conversion?

Answer: Although the company does not have to pay an additional fee to register the underlying common shares under Rule 457(i), the company should register an amount of shares based on a reasonable good-faith estimate of the maximum amount of shares it will need to cover conversions. If the company is required to issue more shares than the estimate due to the operation of the conversion ratio disclosed in the registration statement, the company would have to file an additional registration statement or rely on an available exemption from registration, such as Securities Act Section 3(a)(9). These additional shares would not be covered by Rule 416(a). [Jan. 26, 2009]

Question 213.02

Question: May a company that has convertible securities outstanding with a conversion formula based on fluctuating market prices register for resale a good-faith estimate of the maximum amount of shares issuable upon conversion, and rely on Rule 416 to cover the resale of any additional shares issuable due to the operation of the conversion formula?

Answer: No. The company may not rely on Rule 416 to register for resale an indeterminate number of shares of common stock that it may issue under a conversion formula based on fluctuating market prices. The company must register for resale the maximum number of shares that it thinks it may issue on conversion, based on a good-faith estimate and, if the estimate turns out to be insufficient, the company must file a new registration statement to register the additional shares for resale. If available, Rule 462(b) may be used in this context. [Jan. 26, 2009]

Question 213.03

Question: When a registrant splits its stock prior to the completion of the distribution of securities included in a registration statement, and the registration statement does not specifically refer to the existence of anti-dilution provisions for such situations, must the registrant file a post-effective amendment to the registration statement to reflect the change in the amount of securities registered?

Answer: Yes. In this situation, the use of Rule 416(b) is premised upon the filing of a post-effective amendment. Similarly, a pre-effective amendment would have been required to use Rule 416(b) if the split had occurred prior to effectiveness and no mention had been made of anti-dilution provisions in the registration statement. No additional filing fee is required. [Jan. 26, 2009]

Sections 214 to 217. Rules 417 to 420 [Reserved]

Section 218. Rule 421 - Presentation of Information in Prospectuses

Question 218.01

Question: Do the "plain English" requirements of Rule 421(d) apply to forms used under the U.S./Canadian Multijurisdictional Disclosure System ("MJDS")?

Answer: No. The provisions of Regulation C would apply only if they are specified on the particular MJDS form. Since Rule 421(d) is not specified on the MJDS forms, its "plain English" requirements do not apply. [Jan. 26, 2009]

Section 219. Rule 423 [Reserved]

Section 220. Rule 424 — Filing of Prospectuses, Number of Copies

Question 220.01

Question: Rule 3-01 of Regulation S-X specifies certain time periods (depending on the registrant's accelerated filer status) in which a "filing," other than on Form 10-K or Form 10, may be made without the balance sheet for the most recent fiscal year end. The rule is conditioned on (1) the registrant's reasonable and good faith expectation that it will report income for the most recently completed fiscal year and (2) the registrant having reported income for at least one of the last two fiscal years. May a registrant sell securities from an effective Form S-3 registration statement during the relevant time period and file a prospectus supplement under Rule 424 to reflect the take-down, if the balance sheet for the most recent fiscal year end has not been filed and the registrant does not have a reasonable and good faith expectation that it will report income for the most recently completed fiscal year?

Answer: Yes. Rule 3-01 does not prevent the shelf take-down from occurring and would not apply to the prospectus supplement as it is not for the purpose of updating the prospectus under Section 10(a)(3). [Jan. 26, 2009]

Question 220.02

Question: A registrant wishes to correct a number of non-substantive typographical errors contained in a preliminary prospectus. Must it file a revised preliminary prospectus?

Answer: No. Rule 424(a) provides that any preliminary prospectus that contains substantive changes from the previously filed prospectus must be filed as part of a formal pre-effective amendment to the registration statement. If the changes are non-substantive, the revised preliminary prospectus is not required to be filed. [Jan. 26, 2009]

Question 220.03

Question: A registrant that is not eligible to use Rule 430B(b) plans to file a resale registration statement on behalf of selling security holders related to securities issued to such selling security holders in a transaction that has already been completed. The securities to be offered on the resale registration statement are already issued and outstanding. The registrant sends questionnaires to selling security holders for the purpose of determining the names and amount of securities to be included in the resale registration statement and disclosed in the prospectus. However, a few questionnaires will not be returned until after effectiveness. May the

registrant register the resale of the total amount of securities issued in the initial transaction and offered for resale, but omit from the prospectus the names and specific amounts to be offered by the unknown selling security holders?

Answer: Yes. In this case, the registrant may omit from the prospectus in the resale registration statement at the time of effectiveness the identities of, and amount of securities to be sold by, these selling security holders in accordance with Rule 409 as the information is unknown or not reasonably available to the registrant at that time. The prospectus in the registration statement at the time of effectiveness should refer to any unnamed selling security holders in a generic manner by identifying the initial offering transaction in which the securities were sold. A post-effective amendment must be filed in order to add the formerly unnamed selling security holders. [Jan. 26, 2009]

Question 220.04

Question: How should registration statements for secondary offerings reflect the addition of selling shareholders or the substitution of new selling shareholders for already named selling shareholders?

Answer: If the company is eligible to rely on Rule 430B when the registration statement was originally filed, the company may add or substitute selling shareholders to a registration statement related to a specific transaction by prospectus supplement. The supplement is filed under Rule 424(b)(7).

If the company is not eligible to rely on Rule 430B when the registration statement is initially filed, it must file a post-effective amendment to add selling shareholders to a registration statement related to a specific transaction that was completed prior to the filing of the resale registration statement. A Rule 424(b) prospectus supplement may be used to post-effectively update the selling shareholder table to reflect a transfer from a previously identified selling shareholder. The new investor's shares must have been acquired or received from a selling shareholder previously named in the resale registration statement and the aggregate number of securities or dollar amount registered cannot change. [Apr. 24, 2009]

Sections 221 to 223. Rules 425 to 427 [Reserved]

Section 224. Rule 428 — Documents Constituting a Section 10(a) Prospectus for Form S-8 Registration Statement; Requirements Relating to Offerings of Securities Registered on Form S-8

Question 224.01

Question: Should documents constituting the current Form S-8 prospectus, as updated for Section 10(a)(3) purposes, be delivered concurrently to new plan participants?

Answer: Yes. For example, if the information to be provided pursuant to Items 1 and 2 of the Form S-8 is contained in more than one document, those documents should be delivered concurrently to new plan participants. [Jan. 26, 2009]

Question 224.02

Question: Does the Rule 428(b)(5) obligation to deliver company proxy statements and reports to employees participating in a stock option plan or plan fund that invests in the company's securities extend to former

employees, within the scope of General Instruction A.1(a)(3) to Form S-8, who participate in a stock option plan or plan fund that invests in the company's securities?

Answer: Yes. [Jan. 26, 2009]

Section 225. Rule 429 — Prospectus Relating to Several Registration Statements

Question 225.01

Question: May the combined prospectus technique of Rule 429 be used in the context of Rule 415, when an amount of securities remains unsold on an earlier shelf registration statement at the time the issuer files a new shelf registration statement?

Answer: Yes, provided that the new shelf registration statement is not an automatic shelf registration statement and complies with Rules 415(a)(5) and (6). Once Rule 429 is used to create a combined prospectus, the prospectus that is a part of the earlier registration statement generally may not be used by itself. [Jan. 26, 2009]

Question 225.02

Question: May a well-known seasoned issuer rely on Rule 429 to combine a prospectus from a prior non-automatic shelf registration statement with the prospectus in a newly filed automatic shelf registration statement?

Answer: No. Under Rule 429(b), a registration statement containing a combined prospectus acts, upon effectiveness, as a post-effective amendment to the earlier registration statement whose prospectus is combined in the latest registration statement. Because a registrant cannot file a post-effective amendment to convert a non-automatic shelf registration statement into an automatic shelf registration statement, a well-known seasoned issuer may not rely on Rule 429 to combine a prospectus from a prior non-automatic shelf registration statement with the prospectus in a newly filed automatic shelf registration statement. Instead, a well-known seasoned issuer with unused capacity on a prior non-automatic shelf may either utilize the unused fees upon filing a new automatic shelf registration statement, in accordance with Rule 457(p), or continue to sell off of the old registration statement until the capacity is used up. [Jan. 26, 2009]

Question 225.03

Question: Is Rule 429 available to foreign governments or subdivisions filing registration statements on Schedule B?

Answer: Yes. Schedule B registrants may use Rule 429 to the same extent as other registrants under the Securities Act. [Jan. 26, 2009]

Section 226. Rule 430 [Reserved]

Section 227. Rule 430A — Prospectus in a Registration Statement at the Time of Effectiveness

Question 227.01

Question: For purposes of the Rule 430A(a)(3) 15-business-day filing requirement, are Saturdays, Sundays and federal holidays counted as business days?

Answer: No. [Jan. 26, 2009]

Question 227.02

Question: May a registrant omit the principal amount of securities to be offered from its registration statement in reliance on Rule 430A?

Answer: No. The principal amount of securities to be offered (i.e., volume) is not price-related information or a term of the security dependent upon the offering date, and therefore such amount cannot be omitted from the registration statement in reliance on Rule 430A(a). [Jan. 26, 2009]

Question 227.03

Question: A registrant omits pricing information from the prospectus in a registration statement at the time of effectiveness in reliance on Rule 430A. Is it required to reflect pricing information or the inclusion of additional securities in a post-effective amendment?

Answer: The second sentence of the Instruction to Rule 430A provides that a Rule 424(b) prospectus supplement may be used, rather than a post-effective amendment, when the 20% threshold is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus supplement. When there is a change in offering size or deviation from the price range beyond the 20% threshold noted in the second sentence of the Instruction, a post-effective amendment would be required only if such change or deviation materially changes the previous disclosure. Regardless of the size of the increase, in the case of a registration statement that is not an automatic shelf registration statement, a new registration statement must be filed to register any additional securities that are offered. Additional securities cannot be registered by post-effective amendment except on automatic shelf registration statements. [Jan. 26, 2009]

Question 227.04

Question: Is it appropriate to file a post-effective amendment under Rule 462(c) if the information contained therein reflects changes in price and volume that represent more than a 20% change in the maximum aggregate offering price set forth in the effective registration statement?

Answer: No. Rule 462(c) provides a mechanism for issuers to file a post-effective amendment that becomes automatically effective. It allows issuers the flexibility of automatic effectiveness when the sole purpose of the post-effective amendment is to restart the 15-business-day period in which pricing must occur under Rule 430A(a)(3). Rule 462(c) may not be used if the post-effective amendment contains any substantive change from, or addition to, the prospectus in the effective registration statement, other than price-related information omitted from the registration statement in reliance on Rule 430A. [Jan. 26, 2009]

Section 228. Rule 430B — Prospectus in a Registration Statement After Effective Date

Question 228.01

Question: Can an issuer that has a plan of distribution that does not include "at-the-market" offerings amend that plan of distribution by prospectus supplement and then conduct at-the-market offerings in compliance with the provisions of Rule 415(a)(4)?

Answer: Yes. An issuer eligible to engage in at-the-market offerings under the provisions of Rule 415(a)(4) may amend the plan of distribution by a prospectus supplement that is deemed part of the registration statement to provide for at-the-market offerings in accordance with the provisions of Rule 415(a)(4). [Jan. 26, 2009]

Question 228.02

Question: For shelf registration of preferred stock to be issued in series, may a prospectus supplement be filed under Rule 424 to set forth more specifically the terms of the preferred stock not inconsistent with the more general terms contained in the core prospectus?

Answer: Yes. In addition, if the registration statement is on Form S-3, the instrument defining the specific terms of the preferred stock may be filed as an exhibit to a Form 8-K. [Jan. 26, 2009]

Question 228.03

Question: Under Rule 430B, may a primary shelf-eligible issuer that is not a WKSI file a resale registration statement for a dollar amount of common stock and make a general statement that the registration statement covers common stock previously sold by the company in unregistered transactions?

Answer: No. This issuer may not register the resale of unspecified common shares and then, after the effectiveness of the registration statement, specify the common shares registered. The initial offering transaction of the securities, the resale of which are being registered on behalf of the selling securityholders, must be completed, and the resale registration statement must identify the initial transaction. Because the resale registration statement must register specific securities, the issuer can include the amount of securities in the registration statement fee table pursuant to Rule 457(a). [Mar. 4, 2011]

Question 228.04

Question: If an issuer files a non-automatic shelf registration statement and is entitled to rely on Rule 430B(b) to omit from the prospectus "the identities of selling security holders and amounts of securities to be registered on their behalf" until after effectiveness of the registration statement, may the issuer also omit from the prospectus, until after effectiveness, the aggregate number of shares being registered for resale?

Answer: No. The prospectus for the non-automatic shelf registration statement must disclose the aggregate number of shares being registered for resale before effectiveness, even if the issuer is entitled to rely on Rule 430B(b) to omit information required by Item 507 of Regulation S-K regarding specific selling security holders until after effectiveness. [May 16, 2013]

Section 229. Rule 430C — Prospectus in a Registration Statement Pertaining to an Offering Other Than Pursuant to Rule 430A or Rule 430B After the Effective Date

Question 229.01

Question: Must a registration statement for an offering that is subject to Rule 430C include the undertaking in Item 512(a)(5)(ii) of Regulation S-K if the offering is not registered pursuant to Rule 415?

Answer: Yes. Although the Item 512(a) undertakings relate to Rule 415 offerings, the undertaking in Item 512(a)(5)(ii) is required for all registration statements subject to Rule 430C by Rule 430C(d). [Jan. 26, 2009]

Sections 230 to 231. Rules 431 to 432 [Reserved]

Section 232. Rule 433 — Conditions to Permissible Post-Filing Free Writing Prospectuses

Question 232.01

Question: If an offering participant, other than the issuer, unintentionally distributes a free writing prospectus in a broad, unrestricted manner, must that offering participant file the free writing prospectus?

Answer: Yes. Rule 433(d)(1)(ii) requires an offering participant, other than the issuer, to file any free writing prospectus that is used or referred to by that offering participant and distributed by or on behalf of that offering participant in a manner reasonably designed to lead to its broad unrestricted dissemination. This filing requirement applies whether or not the distribution is intentional. [Jan. 26, 2009]

Question 232.02

Question: If an issuer uses a free writing prospectus at a time when EDGAR does not accept filings, when can the issuer file the free writing prospectus and still be in compliance with Rule 433?

Answer: The issuer should file the free writing prospectus on EDGAR within the time frame provided in the rule, even if the filing is not "accepted" by EDGAR until a later time. For example, if an issuer first uses a free writing prospectus at 10:00 p.m. on a Monday night, the issuer is required to file the free writing prospectus no later than that Monday, as Rule 433(d)(1) requires the filing to be made "no later than the date of first use." The issuer in this example would, therefore, be required to file the free writing prospectus on EDGAR no later than that Monday, even if the EDGAR system is closed for accepting filings for that day. [Jan. 26, 2009]

Question 232.03

Question: If an issuer free writing prospectus contains both descriptions of certain terms of the securities and other information, when must the issuer file the free writing prospectus?

Answer: The issuer can consider separately the filing requirements for the terms of the securities and the other information that is contained in the free writing prospectus.

With regard to the "other information," the issuer must file the issuer free writing prospectus, other than the description of certain terms of the securities, no later than the date of first use. With regard to the terms of the securities, the issuer must file the description of the terms of the securities only if that description represents the final terms of the securities. If the description represents the final terms of the securities, the issuer must file that description of the final terms within two days after the later of:

- the date of first use of that description; and

- the date the final terms have been established for all classes of securities in the offering. [Jan. 26, 2009]

Question 232.04

Question: After the filing of the registration statement for an offering, if the issuer's CEO participates in a live interview with unaffiliated and uncompensated media that is broadcast on radio or television, would that interview be an issuer free writing prospectus that the issuer must file?

Answer: Yes, if the interview constitutes an offer. In that case, the CEO's interview on a live television or radio program conducted by unaffiliated and uncompensated media would be a written offer and would be treated the same as any other unaffiliated, uncompensated media publication or broadcast. The issuer would have to satisfy its filing obligation with regard to the interview within four business days after the broadcast. [Jan. 26, 2009]

Question 232.05

Question: After the filing of the registration statement for an offering, if the issuer's CEO participates in an interview with unaffiliated and uncompensated media that is published and the substance of the information in the interview is contained in the registration statement, does the issuer have to file the interview as an issuer free writing prospectus?

Answer: No, even if the interview with the unaffiliated and uncompensated media constitutes an offer. If the CEO interview is an offer, it will be an issuer free writing prospectus, but it does not have to be filed as a free writing prospectus. Rule 433(f)(2) contains an exception from the filing conditions for unaffiliated and uncompensated media publications and broadcasts if the substance of the free writing prospectus has been filed previously with the Commission. Of course, the issuer will be responsible for determining whether the substance of the information has been filed previously. [Jan. 26, 2009]

Question 232.06

Question: After the filing of the registration statement for an issuer's initial public offering, but before that registration statement becomes effective, can the issuer's CEO participate in a broadcast that is a paid "infomercial"?

Answer: While there is an exclusion in Rule 433(f) from the requirement that the statutory prospectus must precede or accompany a media broadcast in an initial public offering, that exclusion is available only if no payment is made or consideration given by or on behalf of the issuer or such other offering participant for the written communication or its dissemination, and the other conditions to the exclusion are satisfied. Because the "no payment" condition is not satisfied for paid infomercials, the requirement that the statutory prospectus precede or accompany the communication applies and cannot be satisfied for a broadcast. Therefore, Rule 164 and Rule 433 would not be available for that communication. [Jan. 26, 2009]

Question 232.07

Question: For issuer free writing prospectuses, must the free writing prospectus be filed even if the information in the free writing prospectus is contained in the prospectus in the filed registration statement?

Answer: Yes, unless the Rule 433(f)(2) exclusion for media publications or broadcasts applies. Further, the Rule 433(d)(4) exception from the condition for an issuer to file issuer information would not be available in this situation, as that exception applies only to free writing prospectuses of offering participants other than the issuer when the information is contained in a previously filed prospectus or free writing prospectus relating to the offering. [Jan. 26, 2009]

Question 232.08

Question: For issuer free writing prospectuses, must the issuer file the free writing prospectus if the free writing prospectus does not contain substantive changes from or additions to a previously filed free writing prospectus that relates to the offering?

Answer: No. Rule 433(d)(3) provides an exception from the filing requirement in this situation. [Jan. 26, 2009]

Question 232.09

Question: If an issuer and underwriter agree that the underwriter will not use a free writing prospectus without the consent of the issuer, will the issuer's consent to that underwriter's use of a free writing prospectus mean that the issuer has authorized or approved the communication for purposes of determining whether it is an issuer free writing prospectus as defined in Rule 433(h)(1)?

Answer: The consent given by the issuer to the use of an underwriter free writing prospectus under these circumstances is not, in and of itself, authorization or approval. In this regard, "authorize[d]" or "approve[d]" as used in Rule 433(h)(3) refers to the substance, not the use, of the free writing prospectus. If the issuer's actions amount to adoption of or entanglement with the free writing prospectus, then the issuer would have approved or authorized the underwriter free writing prospectus. [Jan. 26, 2009]

Question 232.10

Question: During a company's initial public offering, an underwriter sends a free writing prospectus to its clients. A member of the media then receives the free writing prospectus from a client of that firm and not from the underwriter, and writes an article containing information derived from information in the underwriter's free writing prospectus. Will the article be a free writing prospectus of the underwriter?

Answer: The media provisions of the free writing prospectus rules apply to articles based on information provided by or on behalf of the issuer or other offering participants to the media. If a free writing prospectus (or the information contained therein) is not provided to the media by an issuer or other offering participant or any person acting on behalf of either of them, a media publication based on that free writing prospectus (or information) would not be a free writing prospectus of the issuer or other offering participant. The staff may request information about the role, if any, that the underwriter or issuer played with regard to the provision of the free writing prospectus (or information contained therein) or the publication, at least in certain circumstances when it is not clear. If the issuer or underwriter, or a person acting on their behalf, provided, authorized, or approved the publication, the free writing prospectus rules might apply to the publication. [Jan. 26, 2009]

Question 232.11

Question: Can a non-reporting issuer that is registering an initial public offering of common equity post a transcript of an electronic road show on its web site as a "bona fide electronic road show" instead of providing an electronic presentation constituting a "bona fide electronic road show?"

Answer: No. A bona fide electronic road show is defined in Rule 433(h) as "a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management … and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications." A transcript of a road show is not a "presentation" within the meaning of the rule and would not be considered a "bona fide electronic road show." Such a transcript would be an issuer free writing prospectus that would have to be filed with the Commission pursuant to Rule 433. [Jan. 26, 2009]

Question 232.12

Question: If an issuer intends to distribute a subscription agreement to a limited number of institutional investors in a registered directed offering conducted through a placement agent, and the subscription agreement will not be widely disseminated, must the issuer file the subscription agreement as a free writing prospectus?

Answer: A subscription agreement that contains provisions in addition to the final terms of the securities would not qualify for the exclusion from filing in Rule 433(d)(5)(i). If the subscription agreement is not filed as an annex or appendix to the registration statement, it will be subject to Rule 433 and must be filed as an issuer free writing prospectus. The method of dissemination of the subscription agreement is not relevant in analyzing the filing conditions of an issuer free writing prospectus. The issuer could include the subscription agreement in the Form S-3 as an annex or appendix to such Form by filing it under cover of Form 8-K. [Jan. 26, 2009]

Question 232.13

Question: Under Rule 433(f)(2)(i), an issuer or offering participant does not have to file a free writing prospectus if the substance of that free writing prospectus has "previously been filed" with the Commission. Is Rule 433(f)(2)(i) available if the substance of the free writing prospectus was previously disclosed in a document that is deemed to be furnished, not filed, with the Commission (e.g., Item 2.02 Form 8-K)?

Answer: No. For Rule 433(f)(2)(i) to be available, the substance of the free writing prospectus must have previously been *filed*, not furnished, with the Commission. [Mar. 4, 2011]

Question 232.14

Question: An officer participates in an interview with unaffiliated and uncompensated media and provides, as part of the interview, a package of written materials consisting only of the issuer's Commission filings for possible use in the media publication. Does the package of written materials or a copy of the media publication need to be filed as a free writing prospectus?

Answer: No. Pursuant to Rule 433(f)(2)(i), the issuer is not obligated to file either the package of written materials or the media publication as a free writing prospectus so long as the package of written materials includes only information that has previously been filed with the Commission. [Mar. 4, 2011]

Question 232.15

Question: With the exception of free writing prospectuses that comply with Rule 433(f)(1), a free writing prospectus distributed in reliance on Rule 433 must contain the legend required by Rule 433(c)(2)(i). Some electronic communication platforms, such as those made available through certain social media websites, limit the number of characters or amount of text that can be included in the communication, effectively precluding display of the required legend together with the other information. Under what circumstances would the use of a hyperlink to the required legend satisfy Rule 433(c)(2)(i)?

Answer: Recognizing the growing interest in using technologies such as social media to communicate with security holders and potential investors, the staff will not object to the use of an active hyperlink to satisfy the requirements of Rule 433(c)(2)(i) in the following limited circumstances:

- The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;
- Including the required legend in its entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and
- The communication contains an active hyperlink to the required legend and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

Where an electronic communication is capable of including the required legend, along with the other information, without exceeding the applicable limit on number of characters or amount of text, the use of a hyperlink to the required legend would be inappropriate. [April 21, 2014]

Question 232.16

Question: Some electronic communication platforms, such as those made available through certain social media websites, permit users to re-transmit a posting or message they receive from another party. When an issuer distributes an electronic communication in compliance with Rule 134 or Rule 433, must the issuer ensure compliance with Rule 134 or Rule 433 of a re-transmission of that communication by a third party that is not an offering participant?

Answer: If the third party is neither an offering participant nor acting on behalf of the issuer or an offering participant and the issuer has no involvement in the third party's re-transmission beyond having initially prepared and distributed the communication in compliance with either Rule 134 or Rule 433, the re-transmission would not be attributable to the issuer. As explained in Securities Act Release No. 33-8591 (July 19, 2005), "[W]hether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or other offering participant depends upon whether the issuer or other offering participant

has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information." [April 21, 2014]

Section 233. Rule 436 — Consents Required in Special Cases

Question 233.01

Question: Registration statements covering securities offered and sold in business combinations and reorganizations often describe or include opinions from investment bankers on the financial fairness of the transaction to prospective purchasers in the transaction. Must a consent be filed under Section 7 in regard to such opinions?

Answer: Yes. Section 7 and Securities Act Rule 436 require that the banker's consent to the inclusion or summary of the opinion in the registration statement be filed as an exhibit to that registration statement in these circumstances. [Nov. 26, 2008]

Question 233.02

Question: A registrant has engaged a third party expert to assist in determining the fair values of certain assets or liabilities disclosed in the registrant's Securities Act registration statement. Must the registrant disclose in the registration statement that it used a third party expert for this purpose? In what circumstances must the registrant disclose the name of the third party expert in its registration statement and obtain the third party's consent to be named?

Answer: The registrant has no requirement to make reference to a third party expert simply because the registrant used or relied on the third party expert's report or valuation or opinion in connection with the preparation of a Securities Act registration statement. The consent requirement in Securities Act Section 7(a) applies only when a report, valuation or opinion of an expert is included or summarized in the registration statement and attributed to the third party and thus becomes "expertised" disclosure for purposes of Securities Act Section 11(a), with resultant Section 11 liability for the expert and a reduction in the due diligence defense burden of proof for other Section 11 defendants with respect to such disclosure, as provided in Securities Act Section 11(b).

If the registrant determines to make reference to a third party expert, the disclosure should make clear whether any related statement included or incorporated in a registration statement is a statement of the third party expert or a statement of the registrant. If the disclosure attributes a statement to a third party expert, the registrant must comply with the requirements of Securities Act Rule 436 with respect to such statement. For example, if a registrant discloses purchase price allocation figures in the notes to its financial statements and discloses that these figures were taken from or prepared based on the report of a third party expert, or provides similar disclosure that attributes the purchase price allocation figures to the third party expert and not the registrant, then the registrant should comply with Rule 436 with respect to the purchase price allocation figures. On the other hand, if the disclosure states that management or the board prepared the purchase price allocations and in doing so considered or relied in part upon a report of a third party expert, or provides similar disclosure that attributes the purchase price allocation figures to the registrant and not the third party expert, then there would be no requirement to comply with Rule 436 with respect to the purchase price allocation figures as the purchase price allocation figures are attributed to the registrant.

Independent of Section 7(a) considerations, a registrant that uses or relies on a third party expert report, valuation or opinion should consider whether the inclusion or summary of that report, valuation or opinion is required in the registration statement to comply with specific disclosure requirements, such as Item 1015 of Regulation M-A, Item 601(b) of Regulation S-K or the general disclosure requirement of Securities Act Rule 408. [Nov. 26, 2008]

Question 233.03

Question: When the consent of counsel or of an expert (other than an accountant) has been included as an exhibit to a prior filing, is an updated consent generally required to be included in an amendment to the registration statement?

Answer: No. Absent a change in the portion of the filing expertized by that person, and assuming the filed consent is not limited to that particular amendment, an updated consent is not required. [Jan. 26, 2009]

Question 233.04

Question: When would a consent by a credit rating agency be required if information about credit ratings is included in, or incorporated by reference into, a Securities Act registration statement or a Section 10(a) prospectus?

Answer: A consent would be required if the issuer includes the credit rating in its registration statement or Section 10(a) prospectus (directly or through incorporation by reference), unless the rating information is included only for the purpose of satisfying disclosure requirements as described below.

For an issuer not subject to Regulation AB disclosure requirements: If the disclosure of a credit rating in a filing with the Commission is related only to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings ("issuer disclosure-related ratings information"), then a consent by the credit rating agency would not be required. For example, some issuers note their ratings in the context of a risk factor discussion regarding the risk of failure to maintain a certain rating and the potential impact a change in credit rating would have on the registrant. An issuer also may refer to, or describe, its ratings in the context of its liquidity discussion in Management's Discussion and Analysis of Financial Condition and Results of Operations. Issuers may also need to discuss ratings when they describe debt covenants, interest or dividends that are tied to credit ratings or potential support to variable interest entities. *See* Release No. 33-9070 (Oct. 7, 2009) [74 FR 53086].

For an issuer subject to Regulation AB disclosure requirements: The staff anticipates that its letter to Ford Motor Credit Company LLC (July 22, 2010) should make it unnecessary for ABS issuers to include references to ratings in ABS registration statements or prospectuses as set forth in that letter. ABS issuers with questions about the need to reference ratings in their registration statements or prospectuses should contact the staff. [July 27, 2010]

Question 233.05

Question: Would a consent by a credit rating agency be required if ratings information, other than issuer disclosure-related ratings information, is included in, or incorporated by reference into, a prospectus or prospectus supplement first filed on or after July 22, 2010?

Answer: Yes. [July 27, 2010]

Question 233.06

Question: If ratings information is included in a free writing prospectus that complies with Securities Act Rule 433 or in a term sheet or press release that complies with Securities Act Rule 134, is a consent from a credit rating agency required?

Answer: No. Securities Act Rule 436, which requires the filing of written consents by experts, applies only to "registration statements" and to "prospectuses." A Rule 433 free writing prospectus is not part of a registration statement, nor, as a Section 10(b) prospectus, is it included in the definition of "prospectus" in Securities Act Rule 405. Communications that are in compliance with Rule 134 are not prospectuses. If any of these documents are also filed as prospectuses under Rule 424, a consent would be required. [July 27, 2010]

Question 233.07

Question: An issuer has a registration statement on Form S-3 or Form F-3 that was declared effective before July 22, 2010 and includes or incorporates by reference ratings information that is not limited to issuer disclosure-related ratings information. Can the issuer continue to use its registration statement without filing a consent by the credit rating agency?

Answer: Yes. In this fact pattern, the staff would not object to reliance upon Rule 401(a) under the Securities Act to allow continued use of the registration statement for the limited period permitted under Rule 401(a). This would be applicable only until the next post-effective amendment to such registration statement and only if no subsequently incorporated periodic or current report contains ratings information that is not limited to issuer disclosure-related ratings information. Note that the filing of the issuer's next annual report on Forms 10-K, 20-F or 40-F is deemed to be the post-effective amendment of such registration statement for purposes of Securities Act Section 10(a)(3), so that in accordance with Rule 401(a), the registration statement could no longer be used after the annual report is filed without the filing of the consent. [July 27, 2010]

Question 233.08

Question: If a registration statement or post-effective amendment becomes effective on or after July 22, 2010 and includes or incorporates by reference ratings information that is not limited to issuer disclosure-related ratings information, is a consent by a credit rating agency required to be filed with the registration statement or post-effective amendment?

Answer: Yes. [July 27, 2010]

Sections 234 to 235. Rules 437 to 437a [Reserved]

Section 236. Rule 438 — Consents of Persons About to Become Directors

Question 236.01

Question: The registrant has two directors who will sign the registration statement. The registration statement will indicate the names of four more persons who will become directors before the registration statement becomes effective. Those persons will sign any amendments to the registration statement, but not the original filing. Should Rule 438 consents

be obtained from the prospective directors in connection with the original filing?

Answer: Yes. [Jan. 26, 2009]

Sections 237 to 238. Rules 439 to 455 [Reserved]

Section 239. Rule 456 — Date of Filing; Timing of Fee Payment

Question 239.01

Question: If a well-known seasoned issuer files a prospectus supplement to pay a filing fee on its automatic shelf registration statement in advance of an offering or sale, must the issuer include the calculation of registration fee table in a prospectus supplement provided to an investor?

Answer: No. A well-known seasoned issuer may file a prospectus supplement pursuant to Rule 424(b) solely for the purpose of paying a filing fee and then file another prospectus supplement that is provided to investors. The prospectus supplement used to pay a filing fee (and which includes the calculation of registration fee table) does not have to be the same prospectus supplement used to reflect the takedown of securities from an automatic shelf registration statement. [Jan. 26, 2009]

Section 240. Rule 457 — Computation of Fee

Question 240.01

Question: After the initial filing of a registration statement, must a company pay an additional filing fee if its per share offering price changes?

Answer: When registering pursuant to Rule 457(a), the company registers the number of securities offered, not the dollar amount. Therefore, no additional fee need be paid if the per share price rises. If the per share price falls, however, the company cannot increase the number of shares it offers without registration of additional shares and payment of an additional registration fee. Under Rule 457(o), a company registers the dollar amount of securities being offered. Consequently, if the per share price increases so that the maximum aggregate offering price would be greater than the maximum aggregate offering amount listed in the calculation of registration fee table, the company would be required to register an additional dollar amount and pay an additional registration fee, or reduce the number of shares it offers. If the per share price decreases, additional shares could be offered without further registration so long as the amount of shares offered times the per share price does not exceed the maximum aggregate offering amount listed in the calculation of registration fee table. [Jan. 26, 2009]

Question 240.02

Question: How does one calculate the filing fee under Section 6(b) for debt securities sold with original issue discount?

Answer: The public offering price for a security is always the basis for calculating the filing fee under Section 6(b). As a result, the principal amount for debt securities sold with original issue discount will not be the amount on which the fee is calculated. Instead, the substantially smaller amount to be paid by purchasers in the public offering will determine the fee. [Nov. 26, 2008]

Question 240.03

Question: How should a company compute the filing fee for a registered spin-off?

Answer: The registrant should look to Rule 457(f) for guidance. Although the rule does not specifically mention spin-offs, it does contain provisions, such as Rule 457(f)(1) and (2), that may be helpful in determining the proper fee. Consistent with Rule 457(f)(1), the filing fee is based on the market value of the securities to be spun off. When there has been no market for the shares being spun off, consistent with Rule 457(f)(2), the filing fee may be based on the book value of the assets of the spun-off subsidiary. [Jan. 26, 2009]

Question 240.04

Question: In a Form S-4 registration statement registering both the securities offered in a business combination transaction and the resale of those securities by affiliates, must a filing fee be paid with respect to both the securities offered in the business combination transaction and the subsequent resale of those securities?

Answer: No. Under Rule 457(f)(5), if a filing fee is paid with respect to the securities offered in the business combination transaction, no separate filing fee is assessed for the registration of resale transactions. [Jan. 26, 2009]

Question 240.05

Question: When an issuer is registering units composed of common stock, common stock purchase warrants, and the common stock underlying the warrants, how is the registration fee calculated?

Answer: The registration fee is based on the offer price of the units and the exercise price of the warrants. [Jan. 26, 2009]

Question 240.06

Question: How should an issuer calculate the fee payable in connection with the simultaneous registration of warrants and the common stock underlying the warrants?

Answer: The fee payable is based on the offer price plus the exercise price of the warrants. This is analogous to Rule 457(i) which provides that the registration fee for the simultaneous registration of a convertible security and the underlying security is the proposed offering price of the convertible security plus any additional conversion consideration. The entire fee is allocated to the common stock, and no separate fee is recorded for the warrants. [Jan. 26, 2009]

Question 240.07

Question: A company's 401(k) plan provides for an automatic company contribution of 1% of the employee's salary, employee contributions up to 10% of the employee's salary and a matching contribution by the company of the employee contributions up to 5% of the employee's salary. The investment options for the 401(k) plan are such that Securities Act registration is required. For which of these contributions would the company need to pay a registration fee?

Answer: The company would not have to pay a fee for the automatic contribution since it is made without regard to employee contributions. A fee would be paid with respect to the employee contributions and the matching contributions. [Jan. 26, 2009]

Question 240.08

Question: Rule 457(h) states that if the exercise price of the options is not known in the case of an employee stock option plan, the fee should be based upon the price of the securities of the "same class." What does "same class" refer to?

Answer: Securities Act Release No. 6867 (June 6, 1990) clarifies that "same class" refers to those securities underlying the options that are being registered. [Jan. 26, 2009]

Question 240.09

Question: If a registrant adds by post-effective amendment a resale prospectus with respect to control securities that were previously registered on Form S-8, must a filing fee be paid for the resale of such control securities?

Answer: Pursuant to Rule 457(h)(3), no additional fee need be paid for resales when a fee has been paid in connection with the registration of such securities for sale to the employees. [Jan. 26, 2009]

Question 240.10

Question: After selling securities off of a registration statement, an issuer filed a post-effective amendment to deregister the remaining unsold securities, and that post-effective amendment became effective. May the issuer transfer the fee associated with those unsold securities to a registration statement that it plans to file in the future?

Answer: No. As stated in Securities Act Release No. 7943 (Jan. 26, 2001), at footnote 68, fee transfers are not available from unsold shares that were deregistered before the new registration statement is filed. When a post-effective amendment to deregister becomes effective, filing fee transfer from the deregistered securities becomes unavailable. [Jan. 26, 2009]

Question 240.11

Question: An issuer has a Form S-8 on file that registers shares of common stock to be issued upon the exercise of outstanding options. The issuer has decided to stop granting stock options and believes that it has more shares registered on the Form S-8 than it will need to cover the exercise of the outstanding options. May the issuer transfer to a new registration statement the filing fees associated with the securities that the issuer believes it will not need to issue, and continue to use the Form S-8 to cover the exercise of the outstanding options?

Answer: No. Rule 457(p) permits filing fees to be transferred only after the registered offering has been completed or terminated or the registration statement has been withdrawn. As a result, the issuer may not transfer the fees associated with the excess securities until it completes or terminates the offering registered on Form S-8. However, as provided in Securities Act Forms CDI 126.43, if the excess securities are or may become authorized for issuance under another issuer plan, the issuer may file a post-effective amendment to the Form S-8 to disclose that these securities will be sold under the other plan. The Part I information delivered pursuant to Rule 428 with respect to each plan should be specific to that plan. [Nov. 9, 2016]

Question 240.12

Question: If a well-known seasoned issuer has an effective Form S-3 or Form F-3 registration statement, can it change that registration statement to an automatic shelf registration statement by filing a post-effective amendment?

Answer: No. If the issuer has an effective Form S-3 or Form F-3 that was not an automatic shelf registration statement when it became effective, it cannot amend that registration statement to become an automatic shelf registration statement. Instead, the issuer must file a new registration statement on Form S-3 or Form F-3 designated as an automatic shelf registration statement. When permitted by Rule 415(a)(6), the issuer may include on the new registration statement any unsold securities covered by the effective Form S-3 or Form F-3. Alternatively, the issuer may rely on Rule 457(p) to carry forward unused filing fees for unsold securities from the effective registration statement if the automatic shelf registration statement is filed within five years of the initial filing date of the effective registration statement. This approach is necessary because automatic shelf registration statements filed on Form S-3 or Form F-3 and post-effective amendments to automatic shelf registration statements are designated separately from other registration statements on Form S-3 or Form F-3 to enable them to become effective immediately. [Jan. 26, 2009]

Question 240.13

Question: Can a continuous offering registered on an effective Form S-3 (such as a dividend reinvestment program, including a program with a direct stock purchase plan) be transitioned to an automatic shelf registration statement?

Answer: Yes. When an issuer files an automatic shelf registration statement, it can register any primary offerings for cash, including continuous offerings that were previously registered on a shelf registration statement. This would include, without limitation, unallocated shelf offerings, dividend reinvestment programs with direct stock purchase plans, and offerings of securities by selling security holders. The issuer cannot include business combination transactions, such as acquisition shelf registration statements, on the automatic shelf registration statement.

When an issuer includes an ongoing offering that was registered on an effective shelf registration on a subsequently filed automatic shelf registration statement, it may include on the new registration statement any unsold securities covered by the effective registration statement in the manner provided in Rule 415(a)(6). Alternatively, it may carry forward the filing fees paid for any unsold securities under Rule 457(p) if the automatic shelf registration statement is filed within five years of the initial filing date of the effective registration statement. [Jan. 26, 2009]

Question 240.14

Question: How should the issuer complete the calculation of registration fee table on the face of an automatic shelf registration statement?

Answer: The calculation of registration fee table should list each type of security being registered and either state whether a filing fee is being paid with the filing (in which case the dollar amount of the fee should be set forth, as in the case of an unallocated shelf registration statement today), or indicate "$0" in the filing fee table and state that the filing fee will be paid subsequently in advance or on a pay-as-you-go basis. [Jan. 26, 2009]

Question 240.15

Question: An issuer has an effective Form S-8 that registers shares of common stock to be issued under the issuer's 2006 equity compensation plan, and has recently adopted a new 2016 equity compensation plan. The 2006 plan authorized the issuer to grant awards for up to 20 million shares, and to date the issuer has granted options (all of which remain outstanding) exercisable for 15 million shares. Upon effectiveness of the 2016 plan, no further awards may be granted pursuant to the 2006 plan and the 5 million shares not covered by any award under the 2006 plan become authorized for issuance under the 2016 plan. The terms of the 2016 plan provide that the 15 million shares underlying outstanding options granted pursuant to the 2006 plan will also become authorized for issuance under the 2016 plan when the outstanding options under the 2006 plan expire or are terminated or canceled. The issuer plans to file a new Form S-8 to register 10 million shares that are newly authorized for issuance under the 2016 plan. May it also include on that registration statement the 5 million shares and an estimated number of shares that will become available upon the cancellation or termination of awards, all of which were previously authorized for issuance pursuant to the 2006 plan and that will roll over to the 2016 plan? Alternatively, is there another way the issuer can offer and sell under the 2016 plan the 5 million shares that are not subject to outstanding options under the 2006 plan and any shares that become authorized under the 2016 plan upon the cancellation or termination of options under the 2006 plan without paying a new registration fee?

Answer: Yes, the issuer may register on the new Form S-8 the 5 million shares that have become authorized for issuance under the 2016 plan, an estimated number of shares that will become authorized for issuance under the 2016 plan upon cancellation or termination of awards granted under the 2006 plan, and the newly authorized 10 million shares. Because the offering is not yet completed under the 2006 plan, however, Rule 457(p) does not permit the registrant to claim the registration fee associated with the shares from the 2006 plan as an offset against the registration fee due for the new registration statement. See Securities Act Rules CDI 240.11.

Alternatively, the issuer can file a post-effective amendment to the earlier Form S-8 for the 2006 plan to indicate that the registration statement will also cover the issuance of those shares under the 2016 plan once they are no longer issuable pursuant to the 2006 plan and instead become authorized for issuance under the 2016 plan. The post-effective amendment, which would be required under Item 512(a)(1)(iii) of Regulation S-K to disclose a material change in the plan of distribution, should identify both the 2006 plan and the 2016 plan on the cover page, and describe how shares that will not be issued under the 2006 plan have or may become authorized for issuance under the 2016 plan. No new filing fee would be due upon the filing of the post-effective amendment. Because additional securities may not be added to a registration statement by means of a post-effective amendment (see Securities Act Rule 413(a)), the newly authorized 10 million shares must be registered on a separate registration statement. This alternative applies only with respect to Form S-8. [Nov. 9, 2016]

Question 240.16

Question: When filing fees paid in connection with a prior registration statement are used to offset fees due on a subsequent registration statement pursuant to Rule 457(p), what information pertaining to the offset should the issuer include in a note to the Calculation of Registration Fee table?

Answer: Rule 457(p) requires a note to the table to state the name of the registrant, the file number and initial filing date of the earlier registration statement from which the offset is claimed and the dollar amount of the offset. In addition, to assist the staff in assessing the registrant's eligibility for offset, the registrant should quantify the amount of unsold securities from the prior registration statement associated with the claimed offset and disclose either that the prior registration statement has been withdrawn or that any offering that included the unsold securities has been terminated or completed. An offering registered on Form S-8 is only completed or terminated when no additional securities will be issued pursuant to the plan covered by the Form S-8, including through the exercise of any outstanding awards. [Nov. 9, 2016]

Sections 241 to 242. Rules 459 to 460 [Reserved]

Section 243. Rule 461 — Acceleration of Effective Date

Question 243.01

Question: Pursuant to Rule 461**,** must the managing underwriters join in the written request for acceleration in connection with a shelf registration statement naming potential underwriters?

Answer: No. [Jan. 26, 2009]

Question 243.02

Question: Does an underwriter need to join in the registrant’s request for acceleration when the registration statement is a delayed-offering shelf filing?

Answer: No. [Jan. 26, 2009]

Section 244. Rule 462 — Immediate Effectiveness of Certain Registration Statements and Post-Effective Amendments

Question 244.01

Question: In order to rely on the automatic effectiveness provisions of Rules 462 and 464 that apply to a Form S-3 or Form F-3 for a dividend reinvestment plan, must the plan satisfy the Rule 405 definition of “dividend or interest reinvestment plan?”

Answer: Yes. In particular, any plan that allows any person (including an employee) to make an initial purchase of the securities through the plan would not be a dividend or reinvestment plan under Rule 405. [Jan. 26, 2009]

Question 244.02

Question: What information may an abbreviated registration statement filed pursuant to Rule 462(b) contain?

Answer: Other than Rule 430A price-related information, an abbreviated registration statement filed pursuant to Rule 462(b) may not contain any information other than the cover page, the page incorporating the earlier registration statement by reference, the required signatures and any additional opinions and consents required as exhibits. Rule 462(b) registration statements are not available as a mechanism to make any material changes required to be made to the original effective registration statement. [Jan. 26, 2009]

Question 244.03

Question: How is the available dollar amount permitted to be registered under Rule 462(b) determined for a delayed primary shelf registration statement?

Answer: The dollar amount is based upon the amount remaining on the shelf immediately prior to the final takedown from the shelf that depletes all shelf-registered securities. Thus, Rule 462(b) can only be used once per delayed shelf registration statement and only at the time of the final takedown. Similar treatment is afforded to registration statements that are used solely for the purpose of continuous offerings in connection with dividend reinvestment plans. [Jan. 26, 2009]

Question 244.04

Question: When may Rule 462(b) be used in connection with a continuous primary offering or a delayed or continuous secondary offering pursuant to Rule 415?

Answer: Except for continuous offerings in connection with dividend reinvestment plans, Rule 462(b) may only be used to increase the number of shares registered prior to sending the confirmation for the first sale of securities in the offering. [Jan. 26, 2009]

Question 244.05

Question: Is it appropriate to file a post-effective amendment under Rule 462(c) if the information contained therein reflects changes in price and volume that represent more than a 20% change in the maximum aggregate offering price set forth in the effective registration statement?

Answer: No. Rule 462(c) provides a mechanism for issuers to file a post-effective amendment that becomes automatically effective. It allows issuers the flexibility of automatic effectiveness when the sole purpose of the post-effective amendment is to restart the 15-business-day period in which pricing must occur under Rule 430A(a)(3). Rule 462(c) may not be used if the post-effective amendment contains any substantive change from, or addition to, the prospectus in the effective registration statement, other than price-related information omitted from the registration statement in reliance on Rule 430A. [Jan. 26, 2009]

Question 244.06

Question: Is Rule 462(b) available for registration of additional securities if the conditions of the rule are satisfied, notwithstanding the fact that the financial statements in the original effective registration statement for the offering, which were within the age limitations of Rule 3-12 of Regulation S-X as of the effective date, are no longer within the age limitations set by Rule 3-12 at the filing date of the Rule 462(b) registration statement?

Answer: Yes. The registrant should consider, however, whether more current financial information would be required to be disclosed to investors to make the information in the registration statement not misleading. [Jan. 26, 2009]

Section 245. Rule 463 [Reserved]

Section 246. Rule 464 — Effective Date of Post-Effective Amendments to Registration Statements Filed on Form S-8 and on Certain Forms S-3, S-4, F-2 and F-3

Question 246.01

Question: In order to rely on the automatic effectiveness provisions of Rules 462 and 464 that apply to a Form S-3 or Form F-3 for a dividend reinvestment plan, must the plan satisfy the Rule 405 definition of "dividend or interest reinvestment plan?"

Answer: Yes. In particular, any plan that allows any person (including an employee) to make an initial purchase of the securities through the plan would not be a dividend or interest reinvestment plan under Rule 405. [Jan. 26, 2009]

Section 247. Rule 466 — Effective Date of Certain Registration Statements on Form F-6

Question 247.01

Question: May a depositary rely on Rule 466 to designate a date and time for a registration statement on Form F-6 to go effective when, in addition to a change in the ratio of American Depositary Receipts to the underlying foreign shares, the registration statement contains terms of deposit that differ from those disclosed in a previously filed registration statement on Form F-6?

Answer: No. Rule 466 may be used only for changes in the ratio of ADRs to the underlying foreign shares. In all other respects, the terms of deposit for the new registration statement on Form F-6 must be identical to a previously filed registration statement on Form F-6. [Jan. 26, 2009]

Section 248. Rules 467 to 476 [Reserved]

Section 249. Rule 477 — Withdrawal of Registration Statement or Amendment

Question 249.01

Question: Does the withdrawal procedure specified in Rule 477 apply only before the effective date of a registration statement and/or before any sale is made?

Answer: Yes. A registration statement may be withdrawn under Rule 477 before effectiveness or after effectiveness if no securities were sold. Once any security has been sold under a registration statement, Rule 477 withdrawal becomes unavailable. Instead, the registration statement can be post-effectively amended to deregister the remaining unsold securities. [Jan. 26, 2009]

Question 249.02

Question: May a registrant filing an initial public offering on Form S-1 incorporate by reference exhibits it filed with a previous Securities Act registration statement which was withdrawn pursuant to Rule 477?

Answer: Yes. The withdrawn registration statement remains a filed document for purposes of Rule 411(c) and, accordingly, the exhibits may be incorporated by reference. [Jan. 26, 2009]

Sections 250 to 251. Rules 478 to 479 [Reserved]

Section 252. Rules 480 to 489 [Reserved]

Section 253. Rules 490 to 498 [Reserved]

Section 254. Regulation D Interpretations of General Applicability

Question 254.01

Question: If an issuer relies on one exemption in Regulation D, but later realizes that exemption may not have been available, may it rely on another exemption in Regulation D after the fact?

Answer: Yes, assuming the offering met the conditions of the new exemption. No one exemption in Regulation D is exclusive of another. [Jan. 26, 2009]

Question 254.02

Question: May foreign issuers use Regulation D?

Answer: Yes. Disclosure requirements for foreign private issuers are set forth in Rule 502(b)(2)(i)(C). [Jan. 26, 2009]

Question 254.03

Question: Is Regulation D available to an underwriter for the sale of securities acquired in a firm commitment offering?

Answer: No. As Rule 500(d) states, Regulation D is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. See also Rule 502(d), which limits the resale of Regulation D securities. [Jan. 26, 2009*]

Question 254.04

Question: A corporation proposes to implement an employee stock option plan for key employees. Can the issuer rely on Regulation D for an exemption from registration for the issuance of securities under the plan?

Answer: The corporation may use Regulation D for the sale of securities under the plan to the extent that such offering complies with Regulation D. The corporation may also want to explore whether the exemption from registration in Securities Act Rule 701 is available. Rule 701 was adopted after Regulation D and was designed specifically for stock option and other compensatory employee benefit plans. In a typical plan, the grant of the options will not be deemed a sale of a security for purposes of the Securities Act. The issuer, therefore, will be seeking an exemption for the issuance of the stock underlying the options. The offering of this stock generally will commence when the options become exercisable and will continue until the options are exercised or otherwise terminated. Where the key employees involved are directors or executive officers, such individuals will be accredited investors under Rule 501(a)(4) if the corporation is relying on Regulation D and they purchase securities through the exercise of their options. Other key employees may be accredited as a result of net worth or income under Rules 501(a)(5) or (a)(6). [Jan. 26, 2009]

Section 255. Rule 501 — Definitions and Terms Used in Regulation D

Question 255.01

Question: A director of a corporate issuer purchases securities offered under Rule 506. Two weeks after the purchase, and prior to completion of the offering, the director resigns due to a sudden illness. Is the former director an accredited investor?

Answer: Yes. The preliminary language to Rule 501(a) provides that an investor is accredited if the investor falls into one of the enumerated categories "at the time of the sale of securities to that person." One such category includes directors of the issuer. *See* Rule 501(a)(4). The investor in this case had director status at the time of the sale. [Jan. 26, 2009*]

Question 255.02

Question: A national bank purchases $100,000 of securities from a Regulation D issuer and distributes the securities equally among ten trust accounts for which it acts as trustee. Is the bank an accredited investor?

Answer: Yes. Rule 501(a)(1) accredits a bank acting in a fiduciary capacity. [Jan. 26, 2009]

Question 255.03

Question: An ERISA employee benefit plan will purchase securities being offered under Regulation D. The plan has less than $5,000,000 in total assets and its investment decisions are made by a plan trustee that is not a bank, insurance company, or registered investment adviser. Does the plan qualify as an accredited investor?

Answer: The plan would not satisfy the requirements of Rule 501(a)(1), which accredits an ERISA plan that has a plan fiduciary that is a bank, insurance company, or registered investment adviser or that has total assets in excess of $5,000,000. Unless it satisfied another provision of Rule 501(a)(1), it would not be an accredited investor. [Jan. 26, 2009]

Question 255.04

Question: Would an ERISA plan qualify as an accredited investor under Rule 501(a)(1) if it had less than $5 million in assets but had an arrangement through its trustee with a registered investment adviser to receive investment advice, when the ultimate investment decision is made by the trustee?

Answer: The plan would not qualify as an accredited investor under Rule 501(a)(1) if the ultimate investment decision is made by the trustee. However, if the arrangement gave the registered investment adviser full discretion to make investment decisions for the plan, the plan would then qualify as an accredited investor. It should be noted that the failure of a plan to qualify under Rule 501(a)(1) would not preclude it from attempting to qualify under other provisions of Rule 501(a) as an accredited investor. [Jan. 26, 2009]

Question 255.05

Question: Although not specified in the list of organizations in Rule 501(a)(3), may a limited liability company be treated as an "accredited investor" as defined in that rule if it satisfies the other requirements of the definition?

Answer: Yes. See the *Wolf, Block, Schorr and Solis-Cohen* no-action letter (Dec. 11, 1996) issued by the Division. [Jan. 26, 2009]

Question 255.06

Question: Rule 501(a)(8) accredits any entity in which all of the equity owners are accredited investors. In some cases, an equity owner is itself an entity rather than a natural person. If the owner-entity does not qualify on

its own merits as an accredited investor, may the issuer look through the owner-entity to its natural person owners to determine whether they are all accredited investors?

Answer: Yes. An issuer can look through various forms of equity ownership to natural persons in judging accreditation under Rule 501(a)(8). [Jan. 26, 2009]

Question 255.07

Question: Under Rule 501(a)(8), an entity is an accredited investor if all its equity owners are accredited investors. If one director of a corporate investor holds one qualifying share of the entity's stock and is not an accredited investor, would the corporate investor be considered accredited under this provision?

Answer: No, the corporate investor would not be considered accredited. Rule 501(a)(8) requires "all of the equity owners" to be accredited investors. The director is an equity owner and is not accredited. Note that the director cannot be accredited under Rule 501(a)(4). That provision extends accreditation to a director of the issuer, not of the investor. [Jan. 26, 2009]

Question 255.08

Question: A state run, not-for-profit hospital has total assets in excess of $5,000,000. Because it is a state agency, the hospital is exempt from federal income taxation. Rule 501(a)(3) accredits any organization described in Section 501(c)(3) of the Internal Revenue Code that has total assets in excess of $5,000,000. Is the hospital accredited under Rule 501(a)(3)?

Answer: Yes. This category does not require that the investor have received a ruling on tax status under Section 501(c)(3) of the Internal Revenue Code. Rather, Rule 501(a)(3) accredits an investor that falls within the substantive description in that section. See the *Voluntary Hospitals of America, Inc.* no-action letter (Nov. 30, 1982) issued by the Division. [Jan. 26, 2009]

Question 255.09

Question: A not-for-profit, tax exempt hospital with total assets of $3,000,000 is purchasing securities in a Regulation D offering. The hospital controls a subsidiary with total assets of $3,000,000. Under generally accepted accounting principles, the hospital may combine its financial statements with those of its subsidiary. Is the hospital accredited? Would the result be the same if one hospital were a holding company with financial statements that are combined with those of an affiliated hospital, where the affiliated hospital is not technically a subsidiary?

Answer: Yes to both questions under Rule 501(a)(3). When the financial statements of a subsidiary or affiliate may be combined with those of the investor under generally accepted accounting principles, the assets of the subsidiary or affiliate may be added to those of the investor in computing total assets for purposes of Rule 501(a)(3). [Jan. 26, 2009]

Question 255.10

Question: The executive officer of a parent of the corporate general partner of the issuer is investing in the Regulation D offering. Is that individual an accredited investor?

Answer: Rule 501(a)(4) accredits only the directors and executive officers of the general partner itself. Unless the executive officer of the parent can be deemed an executive officer of the subsidiary, that individual is not an accredited investor. See the *Prometheus Development Co., Inc.* no-action letter (Nov. 6, 1985) issued by the Division. [Jan. 26, 2009]

Question 255.11

Question: Must property be held jointly between spouses to be included in the joint net worth calculation in Rule 501(a)(5), and must the securities be purchased jointly by spouses for the investor to be considered "accredited" under the joint net worth standard?

Answer: No. Joint net worth can be the aggregate net worth of an investor and the investor's spouse; such property need not be held jointly; and the purchase need not be made jointly for an investor to qualify under the joint net worth standard. [Jan. 26, 2009]

Question 255.12

Question: A corporation with a net worth of $2,000,000 purchases securities in a Regulation D offering. Is the corporation an accredited investor under Rule 501(a)(5)?

Answer: No. Rule 501(a)(5) is limited to "natural" persons. [Jan. 26, 2009]

Question 255.13

[withdrawn, July 22, 2010]

Question 255.14

Question: May the value of vested employee stock options be included in a person's net worth under the definition of accredited investor in Rule 501(a)(5)?

Answer: Yes. Net worth is simply the excess of assets over liabilities. The value of vested employee stock options may be included in the net worth calculation under Rule 501(a)(5). [Jan. 26, 2009]

Question 255.15

Question: For purposes of the income test in Rule 501(a)(6), may a natural person satisfy the test for the requisite three-year period by satisfying either the individual income test or the joint income test in each of the three years and neither of the tests in all three years?

Answer: If the person has had the same marital status for all three years, then no. A natural person must satisfy Rule 501(a)(6) based on that person's satisfying the $200,000 individual income test for all three years or the $300,000 joint income test with that person's spouse for all three years. If a person has been married for some but not all of the three years, however, he or she may satisfy the rule on the basis of the joint income test for the years during which the person was married and on the basis of the individual income test for the other years. [Jan. 26, 2009]

Question 255.16

Question: Does the term "income" in Rule 501(a)(6) include amounts contributed on the participant's behalf to a profit-sharing plan or pension

plan to the extent that a participant's rights to benefits attributable to such contributions are vested?

Answer: Yes. See the *Raymond, James & Associates, Inc.* no-action letter (Nov. 19, 1984) issued by the Division. [Jan. 26, 2009]

Question 255.17

Question: May a purchaser include unrealized capital appreciation in calculating income for purposes of Rule 501(a)(6)?

Answer: Generally, no. *See* Securities Act Release No. 6455, Question No. 23 (Mar. 3, 1983). [Jan. 26, 2009]

Question 255.18

Question: Who are the equity owners of a limited partnership?

Answer: The limited partners. [Jan. 26, 2009]

Question 255.19

Question: May a trust qualify as an accredited investor under Rule 501(a)(1)?

Answer: Only indirectly. Although a trust standing alone cannot be accredited under Rule 501(a)(1), if a bank is its trustee and makes the investment on behalf of the trust, the trust will in effect be accredited by virtue of the provision in Rule 501(a)(1) that accredits a bank acting in a fiduciary capacity. Furthermore, a trust having a bank as a co-trustee is an accredited investor as interpreted under Rule 501(a)(1) so long as the bank is "acting" in its fiduciary capacity on behalf of the trust in reference to the investment decision and the trust follows the bank's direction. See the *Nemo Capital Partners L.P.* no-action letter (Mar. 11, 1987) issued by the Division. [Jan. 26, 2009]

Question 255.20

Question: A trustee of a trust has a net worth of $1,500,000. Is the trustee's purchase of securities for the trust that of an accredited investor under Rule 501(a)(5)?

Answer: No. Except where a bank is a trustee, the trust is deemed the purchaser, not the trustee. The trust is not a "natural" person. [Jan. 26, 2009]

Question 255.21

Question: May a trust be accredited under Rule 501(a)(8) if all of its beneficiaries are accredited investors?

Answer: Generally, no. Rule 501(a)(8) accredits any entity if all of its "equity owners" are accredited investors. This provision does not apply to the beneficiaries of a conventional trust. The result may be different, however, in the case of certain non-conventional trusts where, as a result of powers retained by the grantors, a trust as a legal entity would be deemed not to exist. The result also would be different in the case of a business trust, a real estate investment trust, or other similar entities. Thus, where the grantors of a revocable trust are accredited investors under Rule 501(a)(5) (e.g., the net worth of each exceeds $1,000,000) and the trust may be amended or revoked at any time by the grantors, the trust

as a legal entity would be deemed not to exist, and the trust would be deemed accredited, because the grantors would be deemed the equity owners of the trust's assets. See the *Lawrence B. Rabkin, Esq.* no-action letter (July 16, 1982) issued by the Division. [Jan. 26, 2009]

Question 255.22

Question: If the participant in an Individual Retirement Account is an accredited investor, is the account accredited under Rule 501(a)(8)?

Answer: Yes. [Jan. 26, 2009]

Question 255.23

Question: If all participants of an employee benefit or retirement plan are accredited investors under any of the categories of Rule 501 except Rule 501(a)(8), is the plan deemed accredited?

Answer: Yes. See the *Thomas Byrne Swartz* no-action letter (June 10, 1982) issued by the Division. [Jan. 26, 2009]

Question 255.24

Question: Are there circumstances under which the grantor of an irrevocable trust would be considered the equity owner of the trust under Rule 501(a)(8)?

Answer: The grantor of an irrevocable trust with the following characteristics could be considered the equity owner of the trust:

(1) The trust was a grantor trust for federal tax purposes. The grantor was the sole funding source of the trust. The grantor would be taxed on all income of the trust during at least the first 15 years following the investment and would be taxed on any sale of trust assets during that period. During this period, all of the assets of the trust would be includable in the grantor's estate for federal estate tax purposes.

(2) The grantor was a co-trustee of the trust and had total investment discretion on behalf of the trust at the time the investment decision was made.

(3) The terms of the trust provided that the entire amount of the grantor's contribution to the trust plus a fixed rate of return on the contribution would be paid to the grantor (or his estate) before any payments could be made to the beneficiaries of the trust.

(4) The trust was established by the grantor for family estate planning purposes to facilitate the distribution of his estate. In order to effectuate the estate planning goals, the trust was irrevocable.

(5) Creditors of the grantor would be able to reach the grantor's interest in the trust at all times.

See the *Herbert S. Wander* no-action letter (Nov. 25, 1983) and the *Herrick, Feinstein LLP* no-action letter (Jan. 5, 2001) issued by the Division. [Jan. 26, 2009]

Question 255.25

Question: In computing the various dollar amount ceilings for sales under Regulation D, is a sale that was subsequently rescinded (e.g., because it

was found that the investor was not "accredited") required to be counted?

Answer: No. [Jan. 26, 2009]

Question 255.26

Question: In calculating the aggregate offering price under Rule 504, should an issuer include any additional capital contributions or assessments which investors will be obligated to meet, despite the fact that the issuer may never make such assessments?

Answer: Yes. [Jan. 26, 2009*]

Question 255.27

Question: In purchasing interests in an oil and gas partnership, investors agree to pay mandatory assessments. The assessments, essentially installment payments, are non-contingent and investors will be personally liable for their payment. Must the issuer include the assessments in the aggregate offering price?

Answer: Yes. *See* the *Kim R. Clark, Esq.* no-action letter (Nov. 8, 1982) issued by the Division. [Jan. 26, 2009]

Question 255.28

Question: In computing the aggregate offering price of an offering under Rule 504, is a limited partnership issuer required to aggregate sales by other limited partnerships solely because the other partnerships have the same general partner?

Answer: No. [Jan. 26, 2009*]

Question 255.29

Question: In computing the aggregate offering price limitation for Rule 504, is a limited partnership issuer required to include purchases of limited partnership interests by active general partners?

Answer: No. Since the general partners are essentially financing their own efforts, and not investing in those of others, any limited partnership interests so purchased are not deemed securities for purposes of this computation. [Jan. 26, 2009*]

Question 255.30

Question: Where the investors pay for their securities in installments and these payments include an interest component, must the issuer include interest payments in the "aggregate offering price"?

Answer: No. The interest payments are not deemed to be consideration for the issuance of the securities. [Jan. 26, 2009]

Question 255.31

Question: An offering of interests in an oil and gas limited partnership provides for additional voluntary assessments. These assessments, undetermined at the time of the offering, may be called at the general partner's discretion for developmental drilling activities. Must the

assessments be included in the aggregate offering price, and, if so, in what amount?

Answer: Because it is unclear that the assessments will ever be called, and because if they are called, it is unclear at what level, the issuer is not required to include the assessments in the aggregate offering price. In fact, the assessments will be consideration received for the issuance of additional securities in the limited partnership. The issuance will need to be considered along with the original issuance for possible integration, or, if not integrated, must be registered or find its own exemption from registration. [Jan. 26, 2009]

Question 255.32

Question: As part of their purchase of securities, investors deliver irrevocable letters of credit. Must the letters of credit be included in the aggregate offering price?

Answer: Yes. If these letters of credit were drawn against, the amounts involved would be considered part of the aggregate offering price. For this reason, in planning the transaction, the issuer should consider the full amount of the letters of credit in calculating the aggregate offering price. [Jan. 26, 2009]

Question 255.33

Question: Do non-U.S. investors need to be counted under Rule 501(e) in calculating whether an issuer has exceeded the limit of 35 non-accredited investors in a Rule 506(b) offering under Regulation D?

Answer: As explained in Rule 500(g), if the foreign offering meets the safe harbor conditions set forth in Regulation S relating to offerings made outside the United States, then the foreign offering is not required to comply with the conditions of Regulation D, including those limiting the number of investors. But if the issuer elects to rely on Regulation D for offers and sales to non-U.S. investors, the issuer must count the non-U.S. investors in calculating whether it meets the conditions of Regulation D limiting the number of investors. [Jan. 26, 2009*]

Question 255.34

Question: For purposes of calculating the number of purchasers in an offering under Regulation D, may an individual and the individual's IRA be regarded as a single purchaser?

Answer: Yes. Furthermore, if an individual purchases stock in an offering both directly and indirectly through a self-directed employee savings plan, the individual will count as only one purchaser if non-accredited. *See* the *Lane Enterprises, Inc.* no-action letter (Feb. 9, 1987) issued by the Division. [Jan. 26, 2009]

Question 255.35

Question: A group of trusts with no current beneficiaries, separately created for estate tax planning purposes, will have the same set of beneficiaries and the same trustees. May the group be treated as a single purchaser under Regulation D?

Answer: Yes. [Jan. 26, 2009]

Question 255.36

Question: Two trusts purchase securities in a Regulation D offering. The beneficiaries of these trusts are related and share the same principal residence. Even though Rule 501(e)(1), which governs the calculation of the number of purchasers, does not specifically exempt either trust from the count, does its policy of exempting related purchasers with the same residence justify counting the trusts as one purchaser?

Answer: Yes. Similarly, where a parent and a trust benefiting a child who shares the parent's residence purchase securities in a Regulation D offering, the issuer may count these two investors as one purchaser. [Jan. 26, 2009]

Question 255.37

Question: Rule 501(e)(2) provides that in determining the number of purchasers in an offering under Regulation D, "each beneficial owner of equity securities or equity interests" in a corporation, partnership or other entity that was organized for the specific purpose of acquiring the securities offered "shall count as a separate purchaser for all provisions of Regulation D". This means that the rules for counting individual purchasers would apply to each such beneficial owner. Would a beneficial owner who also happens to be an accredited investor, for instance, be excluded from the count?

Answer: Yes. [Jan. 26, 2009]

Question 255.38

Question: Would a not-for-profit corporation formed for the specific purpose of an investment be counted as a single purchaser under Regulation D where the members were not equity owners and could not regain any part of their investment or receive any return thereon?

Answer: Yes. [Jan. 26, 2009]

Question 255.39

Question: One purchaser in a Rule 506 offering is an accredited investor. Another is a first cousin of that investor sharing the same principal residence. Each purchaser is making his own investment decision. How must the issuer count these purchasers for purposes of meeting the 35 purchaser limitation?

Answer: The issuer is not required to count either investor. The accredited investor may be excluded under Rule 501(e)(1)(iv), and the first cousin may then be excluded under Rule 501(e)(1)(i). The issuer must satisfy all other conditions of Regulation D, however, with respect to purchasers that have been excluded from the count. Thus, for instance, the issuer would have to ensure the sophistication of the first cousin under Rule 506(b)(2)(ii). [Jan. 26, 2009]

Question 255.40

Question: An accredited investor in a Rule 506 offering will have the securities she acquires placed in her name and that of her spouse. The spouse will not make an investment decision with respect to the acquisition. How many purchasers will be involved?

Answer: The accredited investor may be excluded from the count under Rule 501(e)(1)(iv) and the spouse may be excluded under Rule 501(e)(1)(i). The issuer may also take the position, however, that the spouse should not be deemed a purchaser at all because he did not make any investment

decision, and because the placement of the securities in joint name may simply be a tax or estate planning technique. [Jan. 26, 2009]

Question 255.41

Question: An investor in a Rule 506 offering is an investment partnership that is not accredited under Rule 501(a)(8). Although the partnership was organized two years earlier and has made investments in a number of offerings, not all the partners have participated in each investment. With each proposed investment by the partnership, individual partners have received a copy of the disclosure document and have made a decision whether or not to participate. How do the provisions of Regulation D apply to the partnership as an investor?

Answer: The partnership may not be treated as a single purchaser. Rule 501(e)(2) provides that if the partnership is organized for the specific purpose of acquiring the securities offered, then each beneficial owner of equity interests should be counted as a separate purchaser. Because the individual partners elect whether or not to participate in each investment, the partnership is deemed to be organized for the specific purpose of acquiring the securities in each investment. *See* the *Madison Partners Ltd. 1982-1* no-action letter (Jan. 18, 1982) and the *Kenai Oil & Gas, Inc.* no-action letter (Apr. 27, 1979) issued by the Division. Thus, the issuer must look through the partnership to the partners participating in the investment. The issuer must satisfy the conditions of Rule 506 as to each partner. [Jan. 26, 2009]

Question 255.42

Question: For purposes of Regulation D, may an executive officer of the parent of the issuer be deemed an executive officer of the issuer if such officer meets the definition of "executive officer" set forth in Rule 405?

Answer: Yes. [Jan. 26, 2009]

Question 255.43

Question: Is a manager of an LLC considered an executive officer under Rule 501(f) and therefore an accredited investor?

Answer: Yes, so long as the manager of the LLC performs a policy making function for the issuer, the manager will be considered an executive officer of the issuer and therefore an accredited investor under Rule 501(a)(4). [Jan. 26, 2009]

Question 255.44

Question: May a lawyer in the law firm representing the issuer serve as a purchaser representative for an investor so long as that lawyer is not an affiliate, director, officer, employee, or 10 percent stockholder of the issuer and so long as the lawyer discloses to the purchaser such relationship and any other material relationship with the issuer?

Answer: Yes. [Jan. 26, 2009]

Question 255.45

Question: May the officer of a corporate general partner of the issuer qualify as a purchaser representative under Rule 501(i)?

Answer: Not unless the purchaser has a relationship with the officer enumerated in paragraph (i), (ii) or (iii) of Rule 501(i)(1). Rule 501(i) provides that "an affiliate, director, officer or other employee of the issuer" may not be a purchaser representative unless the purchaser has one of those three enumerated relationships with the representative. An officer or director of a corporate general partner comes within the scope of "affiliate, director, officer or other employee of the issuer." [Jan. 26, 2009*]

Question 255.46

Question: May the issuer in a Regulation D offering pay the fees of the purchaser representative?

Answer: Yes. Nothing in Regulation D prohibits the payment by the issuer of the purchaser representative's fees. Rule 501(i)(4), however, requires the disclosure of this fact. Note 3 to Rule 501(i) points out that disclosure of a material relationship between the purchaser representative and the issuer will not relieve the purchaser representative of the obligation to act in the interest of the purchaser. [Jan. 26, 2009*]

Question 255.47

[withdrawn, February 27, 2012]

Question 255.48

Question: If a purchaser's annual income is not reported in U.S. dollars, what exchange rate should an issuer use to determine whether the purchaser's income meets the income test for qualifying as an accredited investor?

Answer: The issuer may use either the exchange rate that is in effect on the last day of the year for which income is being determined or the average exchange rate for that year. [July 3, 2014]

Question 255.49

Question: Can assets in an account or property held jointly with another person who is not the purchaser's spouse be included in determining whether the purchaser satisfies the net worth test in Rule 501(a)(5)?

Answer: Yes, assets in an account or property held jointly with a person who is not the purchaser's spouse may be included in the calculation for the net worth test, but only to the extent of his or her percentage ownership of the account or property. [July 3, 2014]

Section 256. Rule 502 — General Conditions to be Met

Question 256.01

Question: An issuer conducts offering A under Rule 504 that concludes in January. Seven months later the issuer commences offering B under Rule 506. During that seven-month period, the issuer's only offers or sales of securities are made in offering C under an employee benefit plan C. Must the issuer integrate A and B?

Answer: No. Rule 502(a) specifically provides that A and B will not be integrated. Rule 502(a), however, does not provide a safe harbor to the possible integration of offering C with either offering A or B. In resolving that question, the issuer should consider the factors listed in the Note to Rule 502(a). [Jan. 26, 2009]

Question 256.02

Question: Would simultaneous offerings by affiliated issuers, such as a corporate general partner and its limited partnership, selling their securities as units in a single plan of financing for the same general purpose be considered to be an integrated offering?

Answer: Yes. See the *Intuit Telecom Inc.* no-action letter (Mar. 24, 1982) issued by the Division. [Jan. 26, 2009]

Question 256.03

Question: May the reference in Rule 502(b)(2)(ii)(A) to the annual report to shareholders for the "most recent fiscal year" include the annual report prepared for the previous year?

Answer: Yes, provided that delivery of the annual report for the present year is not yet required under Exchange Act Rules 14a-3 or 14c-3, and the prior year's report meets the requirements of Rule 14a-3 or 14c-3. [Jan. 26, 2009]

Question 256.04

Question: A reporting company with a fiscal year ending on December 31 is making a Regulation D offering in February. The company has filed all the material required to be filed under Sections 13, 14 and 15(d) of the Exchange Act in the last 12 calendar months. It does not have an annual report to shareholders, an associated definitive proxy statement, or a Form 10-K for its most recently completed fiscal year. The issuer's last registration statement was filed more than two years ago. What is the appropriate disclosure under Regulation D?

Answer: The issuer may base its disclosure on the most recently completed fiscal year for which an annual report to shareholders or Form 10-K was timely distributed or filed. The issuer should supplement the information in the report used with the information contained in any reports or documents required to be filed under Sections 13(a), 14(a), 14(c) and 15(d) of the Exchange Act since the distribution or filing of that report and with a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished. *See* Rule 502(b)(2)(ii)(C). [Jan. 26, 2009]

Question 256.05

Question: If the issuer is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, what information does Regulation D require to be delivered to non-accredited investors in a Rule 506(b) offering?

Answer: In these types of offerings, Rule 502(b)(2)(ii) of Regulation D sets forth two alternatives for disclosure: the issuer may deliver certain recent Exchange Act reports (the annual report, the definitive proxy statement, and, if requested, the Form 10-K) or it may provide a document containing the same information as in the Form 10-K or Form 10 under the Exchange Act or in a Form S-1 or Form S-11 registration statement under the Securities Act, whichever is the most recent filing. In either case, Rule 502(b)(2)(ii)(C) calls for the delivery of certain supplemental information. [Jan. 26, 2009*]

Question 256.06

Question: Under Rule 502(b)(2)(iii), an issuer that must provide a disclosure document, whether it is a reporting or non-reporting issuer, is required to identify and make available those exhibits that would accompany the registration form or report upon which the disclosure document is modeled. Does a Regulation D issuer have to make available an opinion of counsel as to the legality of the securities being issued and, if there are representations made as to material tax consequences, a supporting opinion of counsel regarding such tax consequences?

Answer: Yes. [Jan. 26, 2009]

Question 256.07

Question: In an offering under Regulation D, must the opinion of counsel regarding the legality of the issuance of the securities contain an opinion as to whether the issuer has a valid claim to the Regulation D exemption?

Answer: No. [Jan. 26, 2009]

Question 256.08

Question: What type of information specified in Rule 502(b)(2) is an issuer required to furnish for any corporate general partner in a Regulation D offering where the issuer is a limited partnership?

Answer: The issuer should furnish for any corporate general partner an audited balance sheet as of the most recently completed fiscal year. [Jan. 26, 2009]

Question 256.09

Question: Under Rule 502(b)(2)(i)(B)(2) and (3), if a limited partnership issuer cannot obtain the required financial statements for a Regulation D offering without unreasonable effort or expense, it may provide tax basis financials. Do these provisions also apply to the financial statements required in a Regulation D offering for general partners as well as properties to be acquired?

Answer: Yes. [Jan. 26, 2009]

Question 256.10

Question: What are the information delivery requirements under Rule 502(b) for a private fund excluded from the definition of "investment company" by virtue of Section 3(c)(1) of the Investment Company Act of 1940 that sells securities to non-accredited investors relying on Rule 506(b)?

Answer: Such a company must furnish to non-accredited investors, to the extent material to an understanding of the company, its business, and the securities being offered:

- the same kind of non-financial information as would be required in a registration statement under the Securities Act for a registered investment company on a form that it would be entitled to use if it were registering the offering under the Securities Act, such as a registration statement on Form N-1A, or Form N-2; and

- financial statement information equivalent to that required under Rule 502(b)(2)(i)(B). [Jan. 26, 2009*]

Question 256.11

Question: May an issuer of securities provide the disclosure required by Rule 502(b) by means of electronic delivery, such as an email message with electronic attachments?

Answer: Yes. Rule 502(b) requires only that the disclosures be "furnished." It contains no requirement that the disclosures be provided or delivered using a particular medium. The Commission's views regarding the use of electronic delivery are provided in Securities Act Release No. 7856 (Apr. 28, 2000). [Jan. 26, 2009]

Question 256.12

Question: An issuer furnishes potential investors a short form offering memorandum in anticipation of actual selling activities and the delivery of an expanded disclosure document later. Does Regulation D permit the delivery of disclosure in two installments?

Answer: So long as all the information is delivered a reasonable amount of time before sale, the use of a fair and adequate summary followed by a complete disclosure document is permitted under Regulation D. Disclosure in such a manner, however, should not obscure material information. [Jan. 26, 2009]

Question 256.13

Question: Under Rule 502(b)(2)(i)(B), for a non-reporting issuer that has been formed with minimal capitalization immediately before a Regulation D offering, must the Regulation D disclosure document contain an audited balance sheet for the issuer?

Answer: In analyzing this or any other disclosure question under Regulation D, the issuer starts with the general rule that it is obligated to furnish the specified information "to the extent material to an understanding of the issuer, its business, and the securities being offered." Thus, in this particular case, if an audited balance sheet is not material to the investor's understanding, then the issuer may elect to present an alternative to its audited balance sheet. [Jan. 26, 2009]

Question 256.14

Question: Rule 502(b)(2)(ii)(B) refers to the information contained "in a registration statement on Form S-1." Does this requirement envision delivery of Parts I and II of the Form S-1?

Answer: No, only Part I. [Jan. 26, 2009*]

Question 256.15

Question: May a Canadian issuer filing under the MJDS use its most recent filing on Form 40-F, F-9 or F-10 to satisfy the information requirements of Rule 502(b)?

Answer: Yes. Although Rule 502(b)(2)(ii)(D) permits a foreign private issuer to use its most recent Form 20-F or Form F-1 to meet Rule 502's information requirements, but does not mention the MJDS forms, an MJDS filer may use its most recent filing on Form 40-F, F-9 or F-10 to satisfy Rule 502(b)'s information requirements. [Jan. 26, 2009]

Question 256.16

Question: Does Rule 502(c), which prohibits general solicitation and general advertising in connection with the offer and sale of securities, bar product advertising?

Answer: Rule 502(c) does not bar product advertising, although such advertising is not permitted under the rule when it involves the solicitation of an offer to buy a security. Whether or not particular product advertising constitutes a solicitation in contravention of Rule 502(c) depends on the facts and circumstances. [Jan. 26, 2009]

Question 256.17

Question: A reporting company proposes to offer securities under Regulation D. Because of the size and price of the offering, the company feels compelled by Section 10(b) of the Exchange Act to issue a press release discussing the offering. Would such a press release by the issuer constitute general solicitation or general advertising, activities which are not permitted by Rule 502(c) in connection with most Regulation D offerings?

Answer: The company should refer to the Rule 135c safe harbor for reporting issuers giving notice of proposed unregistered offerings. [Jan. 26, 2009]

Question 256.18

Question: If a solicitation were limited to accredited investors, would it be deemed in compliance with Rule 502(c)?

Answer: The mere fact that a solicitation is directed only to accredited investors will not mean that the solicitation is in compliance with Rule 502(c). Rule 502(c) relates to the nature of the offering, not the nature of the offerees. [Jan. 26, 2009]

Question 256.19

Question: An issuer is preparing a private placement in reliance on Rule 506(b). The offering will require the issuance of more than 20% of the outstanding stock of the corporation, triggering a NYSE shareholder approval requirement. Thus, the issuer must file a proxy statement at the same time as the beginning of the offering. At the time of filing the proxy statement, the offering will not be completed. Would the information about the private placement required in the proxy statement by the NYSE rule and Item 11 of Schedule 14A violate the ban on general solicitation in Rule 502(c)?

Answer: If the proxy statement disclosure about the private placement satisfies the conditions of Rule 135c(a), then the issuer may rely upon Rule 135c for the information about the private placement required by the NYSE rule and Item 11 of Schedule 14A. In general, issuers should be mindful that, unless the closing of the offering and the solicitation of shareholder votes are timed correctly, information about the private placement included in the proxy statement beyond that permitted by Rule 135c(a) could be viewed as conditioning the market for the securities offered in the private placement. [Jan. 26, 2009*]

Question 256.20

Question: An investor in a Regulation D offering wishes to resell the securities within three months after the offering. The issuer has agreed to

register the securities for resale. Will the proposed resale under the registration statement violate Rule 502(d)?

Answer: No. The function of Rule 502(d) is to restrict the unregistered resale of securities. Where the resale will be registered, however, such restriction is unnecessary. [Jan. 26, 2009]

Question 256.21

Question: A "private" money market fund undertakes to comply with Rule 2a-7 under the Investment Company Act in order to permit registered investment companies to invest in the fund under Rule 12d1-1 under the Investment Company Act in excess of the limits set forth in Section 12(d) of the Investment Company Act. Pursuant to Rule 2a-7(h)(10), a "private" money market fund is required to post monthly on its publicly available web site specific information about securities in its portfolio as well as the weighted average maturity and weighted average life maturity of its portfolio. Would compliance with the conditions of this web posting requirement cause the fund to violate the prohibition on general solicitation and advertising in Rule 502(c) under the Securities Act? The fund relies on the exclusion provided in Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act from the definition of "investment company" in Section 3(a) of that Act. Sections 3(c)(1) and 3(c)(7) both require that a fund not make or propose to make a public offering of its securities.

Answer: The fund will not be deemed to violate the prohibition on general solicitation and advertising by posting information on its web site in compliance with Rule 2a-7 for purposes of permitting registered investment companies to invest in the fund under Rule 12d1-1 in excess of the limits set forth in Section 12(d) of the Investment Company Act, so long as the fund posts only the information required by the rule and does not use its web site to offer or sell securities or in a manner that is deemed to be general solicitation or advertising for offers or sales of its securities. [Aug. 11, 2010*]

Question 256.22

Question: If an acquiror seeks written consents from the target's shareholders, which include non-accredited investors, to approve a business combination transaction involving the issuance of securities in reliance on Rule 506(b) of Regulation D, when must the financial statement and other information specified in Rule 502(b)(2) be provided to those target shareholders that are non-accredited investors?

Answer: Rule 502(b)(1) requires such information to be delivered to non-accredited investors in "a reasonable amount of time prior to sale." The delivery of a written consent constitutes the "sale" of securities in an offer conducted in reliance on Rule 506(b). Accordingly, to comply with the timing requirement set forth in Rule 502(b)(1), an acquiror issuing securities in a Rule 506(b) offering must provide the disclosure required by Rule 502(b)(2) to non-accredited investors a reasonable amount of time prior to obtaining any written consents from them. [May 16, 2013*]

Question 256.23

Question: Rule 502(c) prohibits an issuer or any person acting on the issuer's behalf from offering or selling securities by any form of general solicitation or general advertising when conducting certain offerings in reliance on Regulation D. Does the use of an unrestricted, publicly available website to offer or sell securities constitute a general solicitation for purposes of Rule 502(c)?

Answer: Yes. As the Commission stated in Securities Act Release No. 7856 (Apr. 28, 2000), the use of an unrestricted, publicly available website constitutes a general solicitation and is not consistent with the prohibition on general solicitation and advertising in Rule 502(c) if the website contains an offer of securities. However, Rule 506(c) — which does not require compliance with Rule 502(c) — may be available to issuers when offering or selling securities through unrestricted, publicly available websites or other forms of general solicitation. [August 6, 2015]

Question 256.24

Question: What information can an issuer widely disseminate about itself without contravening Rule 502(c)?

Answer: Information not involving an offer of securities may be disseminated widely without violating Rule 502(c). For example, factual business information that does not condition the public mind or arouse public interest in a securities offering is not an offer and may be disseminated widely. Information that involves an offer of securities through any form of general solicitation would contravene Rule 502(c). [August 6, 2015]

Question 256.25

Question: What is factual business information?

Answer: What constitutes factual business information depends on the facts and circumstances. Factual business information typically is limited to information about the issuer, its business, financial condition, products, services, or advertisement of such products or services, provided the information is not presented in such a manner as to constitute an offer of the issuer's securities. Factual business information generally does not include predictions, projections, forecasts or opinions with respect to valuation of a security, nor for a continuously offered fund would it include information about past performance of the fund. (Release No. 33-5180). [August 6, 2015]

Question 256.26

Question: Does an offer of securities in a Regulation D offering to a prospective investor with whom the issuer, or a person acting on the issuer's behalf, has a pre-existing, substantive relationship constitute a general solicitation in contravention of Rule 502(c)?

Answer: No. The existence of such a pre-existing, substantive relationship is one means, but not the exclusive means, of demonstrating the absence of a general solicitation in a Regulation D offering. *See* Securities Act Release No. 6825 (Mar. 15, 1989), at fn. 12. Accordingly, an offer of the issuer's securities to the person with whom the issuer, or a person acting on its behalf, has such a relationship would not constitute a general solicitation and, therefore, would not be in contravention of Rule 502(c). [August 6, 2015]

Question 256.27

Question: Are there circumstances under which an issuer, or a person acting on the issuer's behalf, can communicate information about an offering to persons with whom it does not have a pre-existing, substantive relationship without having that information deemed a general solicitation?

Answer: Yes. The staff is aware of long-standing practices where issuers and persons acting on their behalf are introduced to prospective investors who are members of an informal, personal network of individuals with experience investing in private offerings. For example, we acknowledge that groups of experienced, sophisticated investors, such as "angel investors," share information about offerings through their network and members who have a relationship with a particular issuer may introduce that issuer to other members. Issuers that contact one or more experienced, sophisticated members of the group through this type of referral may be able to rely on those members' network to establish a reasonable belief that other offerees in the network have the necessary financial experience and sophistication. Whether there has been a general solicitation is a fact-specific determination. In general, the greater the number of persons without financial experience, sophistication or any prior personal or business relationship with the issuer that are contacted by an issuer or persons acting on its behalf through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation. [August 6, 2015]

Question 256.28

Question: Is someone other than a broker-dealer able to form a pre-existing, substantive relationship with a prospective offeree as a means of establishing that a general solicitation is not present in a Regulation D offering?

Answer: Yes. We believe investment advisers registered with the Securities and Exchange Commission may be able to form a pre-existing relationship with prospective offerees that are clients of the adviser. As fiduciaries, such advisers owe their clients the duty to provide only suitable investment advice. To fulfill the obligation, an adviser must make a reasonable determination that the investment advice provided is suitable for the client based on the client's financial situation and investment objective, such that a substantive relationship could exist. [August 6, 2015]

Question 256.29

Question: What makes a relationship "pre-existing" for purposes of demonstrating the absence of a general solicitation under Rule 502(c)?

Answer: A "pre-existing" relationship is one that the issuer has formed with an offeree prior to the commencement of the securities offering or, alternatively, that was established through either a registered broker-dealer or investment adviser prior to the registered broker-dealer or investment adviser participation in the offering. *See, e.g.*, the *E.F. Hutton & Co.* letter (Dec. 3, 1985). [August 6, 2015]

Question 256.30

Question: Is there a minimum waiting period required for an issuer, or a person acting on its behalf, to establish a pre-existing, substantive relationship with a prospective offeree in order to demonstrate that a general solicitation is not involved?

Answer: No. While there is no minimum waiting period, the issuer must establish such a relationship prior to the commencement of the offering, or, if the relationship was established through either a registered broker-dealer or investment adviser, the relationship must be established prior to the time the registered broker-dealer or investment adviser began participating in the offering. The staff, however, has allowed a limited accommodation for offerings by private funds that rely on the exclusions from the definition

of "investment company" set forth in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act. This limited accommodation permits an individual who qualifies as an accredited or sophisticated investor to purchase, after the end of a waiting period, securities in private fund offerings that were posted on a website platform prior to the investor's subscription to the platform, in view of the fact that private fund offerings are made on a semi-continuous basis (quarterly or annually). *See* the *Lamp Technologies, Inc.* letter (May 29, 1997). [August 6, 2015]

Question 256.31

Question: What makes a relationship "substantive" for purposes of demonstrating the absence of a general solicitation under Rule 502(c)?

Answer: A "substantive" relationship is one in which the issuer (or a person acting on its behalf) has sufficient information to evaluate, and does, in fact, evaluate, a prospective offeree's financial circumstances and sophistication, in determining his or her status as an accredited or sophisticated investor. Self-certification alone (by checking a box) without any other knowledge of a person's financial circumstances or sophistication is not sufficient to form a "substantive" relationship. [August 6, 2015]

Question 256.32

Question: Can anyone other than registered broker-dealers and investment advisers form a pre-existing, substantive relationship with a prospective offeree as a means of establishing that a general solicitation is not involved in a Regulation D offering?

Answer: Yes. The Commission has stated that:

> Generally, staff interpretations of whether a "pre-existing, substantive relationship" exists have been limited to procedures established by broker-dealers in connection with their customers. This is because traditional broker-dealer relationships require that a broker-dealer deal fairly with, and make suitable recommendations to, customers, and, thus, implies that a substantive relationship exists between the broker-dealer and its customers. [The Commission has] long stated, however, that the presence or absence of a general solicitation is always dependent on the facts and circumstances of each particular case. Thus, there may be facts and circumstances in which a third party, other than a registered broker-dealer, could establish a "pre-existing, substantive relationship" sufficient to avoid a "general solicitation." [Securities Act Release No. 7856 (Apr. 28, 2000)]

The staff has also recognized particular instances where issuers have developed pre-existing, substantive relationships with prospective offerees. *See, e.g.*, the *Woodtrails — Seattle, Ltd*. letter (Aug. 9, 1982). However, in the absence of a prior business relationship or a recognized legal duty to offerees, we believe it is likely more difficult for an issuer to establish a pre-existing, substantive relationship, especially when contemplating or engaged in an offering over the Internet. Issuers would have to consider not only whether they have sufficient information about particular offerees, but also whether they in fact use that information appropriately to evaluate the financial circumstances and sophistication of the prospective offerees prior to commencing the offering. Issuers may therefore wish to consider whether conducting the offering under Rule 506(c) would provide greater certainty that an exemption may be available for the offering. [August 6, 2015]

Question 256.33

Question: Does a demo day or venture fair necessarily constitute a general solicitation for purposes of Rule 502(c)?

Answer: No. Whether a demo day or venture fair constitutes a general solicitation for purposes of Rule 502(c) is a facts and circumstances determination. Of course, if a presentation by the issuer does not involve an offer of a security, then the requirements of the Securities Act are not implicated. Where a presentation by the issuer involves an offer of a security, the presentation at a demo day or venture fair may not constitute a general solicitation if, for example, attendance at the demo day or venture fair is limited to persons with whom the issuer or the organizer of the event has a pre-existing, substantive relationship or have been contacted through an informal, personal network as described in Question 256.27. If potential investors are invited to the presentation by the issuer or a person acting on its behalf by means of a general solicitation and the presentation involves the offer of a security, Rule 506(c) may be available if the issuer takes reasonable steps to verify that any purchaser is an accredited investor and the purchasers in the offering are limited to accredited investors. [August 6, 2015]

Question 256.34

Question: An issuer has been conducting a private offering in which it has made offers and sales in reliance on Rule 506(b). Less than six months after the most recent sale in that offering, the issuer decides to generally solicit investors in reliance on Rule 506(c). Is the five-factor integration analysis in the Note to Rule 502(a) the sole means by which the issuer determines whether all of the offers and sales constitute a single offering?

Answer: No. Under Securities Act Rule 152, a securities transaction that at the time involves a private offering will not lose that status even if the issuer subsequently decides to make a public offering. Therefore, we believe under these circumstances that offers and sales of securities made in reliance on Rule 506(b) prior to the general solicitation would not be integrated with subsequent offers and sales of securities pursuant to Rule 506(c). So long as all of the applicable requirements of Rule 506(b) were met for offers and sales that occurred prior to the general solicitation, they would be exempt from registration and the issuer would be able to make offers and sales pursuant to Rule 506(c). Of course, the issuer would have to then satisfy all of the applicable requirements of Rule 506(c) for the subsequent offers and sales, including that it take reasonable steps to verify the accredited investor status of all subsequent purchasers. [November 17, 2016*]

Section 257. Rules 503 and 503T– Filing of Notice of Sales

Question 257.01

Question: Where must an issuer’s notice to the SEC of an exempt offering on Form D be filed?

Answer: On September 15, 2008, a transition period of six months began during which filers have the option of making Form D filings with the SEC in three different ways:

- The old Form D (called “Temporary Form D”), on paper at the SEC’s main office, 100 F Street, N.E., Washington, D.C. 20549;
- The new Form D, on paper at the address noted above; and

- The new Form D, electronically, through the Internet, on the SEC's EDGAR filing system.

Beginning March 16, 2009, all filers will be required to file the new Form D electronically, through the Internet, on the SEC's EDGAR filing system. Additionally, beginning March 16, 2009, whenever a company amends a Form D filing — regardless of whether it was originally submitted on paper or electronically, or on Temporary Form D or on new Form D — the company will be required to submit the amendment electronically on the revised Form D. [Jan. 26, 2009]

Question 257.02

Question: When must an issuer file the initial Form D for an offering with the SEC?

Answer: Form D is required to be filed with the SEC within 15 days after the first sale of securities sold based on a claim of exemption under Rule 504 or 506 of Regulation D or Section 4(a)(5) of the Act. For this purpose, the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or check. If the date on which a Form D is required to be filed falls on a Saturday, Sunday or holiday, the due date is the first business day following. [Jan. 26, 2009*]

Question 257.03

Question: May the Form D be signed by the issuer's attorney?

Answer: Form D may be signed on behalf of the issuer by anyone who is duly authorized to do so. [Jan. 26, 2009]

Question 257.04

Question: In order to avoid questions concerning when the first "sale" of securities in an offering under Regulation D takes place, may an issuer file its Form D as soon as the offering commences even though no sales have yet been made?

Answer: Yes. [Jan. 26, 2009]

Question 257.05

Question: Rule 503 requires an issuer to file a Form D not later than 15 days after the first sale in a Regulation D offering. When should the Form D be filed in a best efforts offering where subscriptions are held in escrow until a minimum level is attained?

Answer: The Form D should be filed not later than 15 days after the first subscription is received into escrow. [Jan. 26, 2009]

Question 257.06

Question: When Regulation D is used in connection with a stock option plan, when should the Form D be filed?

Answer: When Regulation D is used in connection with a stock option plan, the Form D should be filed not later than 15 days after the first option exercise. [Jan. 26, 2009]

Question 257.07

Question: Is the filing of a Form D in connection with an offer or sale a condition to the availability of a Regulation D exemption for that offer or sale?

Answer: No. The filing of a Form D is a requirement of Rule 503(a), but it is not a condition to the availability of the exemption pursuant to Rule 504 or 506 of Regulation D. Rule 507 states some of the potential consequences of the failure to comply with Rule 503. [Jan. 26, 2009*]

Question 257.08

Question: Will a Rule 506 offering lose "covered security" status under Section 18 of the Securities Act if an issuer fails to file a Form D with the SEC?

Answer: No. A "covered security" under Section 18 of the Securities Act is defined to include a security with respect to an offering that is exempt from registration under the Act pursuant to SEC rules or regulations issued under Section 4(a)(2) of the Act. Rule 506(b) was issued under Section 4(a)(2) of the Act; Congress determined in the JOBS Act that Rule 506(c) would be treated as a regulation issued under Section 4(a)(2). Filing a Form D is not a condition that must be met to qualify for the Rule 506 exemption. [Sept. 20, 2017]

Section 258. Rule 504 — Exemption for Limited Offerings and Sales of Securities Not Exceeding $5,000,000

Question 258.01

Question: May a foreign issuer that is not subject to Section 15(d) and whose securities are exempt from Section 12(g) under Rule 12g3-2(b) be eligible to use Rule 504?

Answer: Yes. Rule 504 is available to any issuer that is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act. [Jan. 26, 2009]

Question 258.02

Question: The exemption under Rule 504 is not available to an investment company. How is the term “investment company” defined for purposes of Rule 504?

Answer: The provision in Rule 504 that bars an investment company from using the exemption means an investment company as that term is defined in Section 3 of the Investment Company Act of 1940. [Jan. 26, 2009*]

Question 258.03

Question: Is Rule 504 available to a private fund excluded from the definition of “investment company” by Section 3(c)(1) or 3(c)(7) of the Investment Company Act?

Answer: Private funds are precluded from relying on Section 3(c)(1) or 3(c)(7) of the Investment Company Act if they make a “public offering” of their securities. Offerings under Rule 504 may be public or non-public depending on the provision of the rule that is relied upon for the offering. If a private fund made a “public offering” of its securities, that private fund would no longer be able to rely on the applicable exclusion under Section

3(c)(1) or (7) and thus would be required to be registered under the Investment Company Act, unless another exclusion or exemption is available. If no other exclusion or exemption is available, the private fund would be an "investment company" as defined in Section 3 of the Investment Company Act and would therefore be precluded from using the Rule 504 exemption. *See e.g.*, footnote 241 in Securities Act Release No. 33-10238. We note that Rule 504 offerings differ from Rule 506(c) offerings in this respect because Section 201(b)(2) of the JOBS Act deemed offers and sales under that exemption to not be "public offerings" under the federal securities laws. [Sept. 20, 2017]

Question 258.04

[withdrawn, Sept. 20, 2017]

Question 258.05

Question: Instruction to paragraph (b)(2) of Rule 504 contains the example as to the calculation of the aggregate offering price. Does this example contemplate integration of the offerings described?

Answer: No. The example has been provided to demonstrate the operation of the limitation on the aggregate offering price without regard to whether two or more offerings are integrated. [Sept. 20, 2017]

Question 258.06

Question: When is an issuer required to determine whether bad actor disqualification applies?

Answer: Rule 504 is not available to any issuer that is subject to disqualification under Rule 506(d) on or after January 20, 2017. On or after this date, issuers must determine if they are subject to bad actor disqualification any time they are offering or selling securities in reliance on Rule 504. *See* Rule 504(b)(3), Rule 506(d) and the interpretations of Rule 506(d) below. [Sept. 20, 2017]

Section 259. Rule 505 — Repealed, effective May 22, 2017

[withdrawn, Sept. 20, 2017]

Section 260. Rule 506 — Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering

Question 260.01

Question: May an issuer of securities with a projected aggregate offering price of $3,000,000 rely on Rule 506?

Answer: Yes. The availability of Rule 506 is not dependent on the dollar size of an offering. [Jan. 26, 2009]

Question 260.02

[withdrawn, Sept. 20, 2017]

Question 260.03

Question: Must offerings exempt under Rule 506 comply with state securities law requirements?

Answer: Securities issued in Rule 506 offerings are considered "covered securities" under Section 18 of the Securities Act of 1933. *See* Section 18(b)(4)(E) and Question 257.08 above. Section 18(a) preempts state registration and review of, but not state anti-fraud authority with respect to, offerings for these "covered securities." For Rule 506 offerings, however, Section 18 does not preempt state requirements that the issuer file a notice with the states together with a consent to service of process and any required fee with the states. *See* Section 18(b)(4)(E) and Section 18(c) of the Securities Act. [Jan. 26, 2009*]

Question 260.04

Question: A company is conducting a single continuing private offering in reliance on Rule 506(b), which may be available to an unlimited number of accredited investors but is limited to 35 non-accredited, but sophisticated investors. There have been 35 non-accredited investors in the offering as calculated pursuant to Rule 501(e). May a company sell securities to additional non-accredited investors in the offering and rely on Rule 506(b) if some of the original 35 non-accredited investors have now redeemed their securities such that there are currently less than 35 non-accredited holders of the company's securities?

Answer: No. Once a company sells to 35 non-accredited investors in a single offering, as calculated pursuant to Rule 501(e), the company has reached the limitation on sales to non-accredited investors as set forth in Rule 506(b). The fact that a non-accredited investor subsequently transfers or redeems her securities does not reset the number of non-accredited investors or enable the company to sell to additional non-accredited investors. [Jan. 26, 2009*]

Question 260.05

Question: An issuer commenced an offering in reliance on Rule 506 before September 23, 2013, the effective date of the new Rule 506(c) exemption, and filed a Form D notice for the offering. If, pursuant to the transition guidance in Securities Act Release No. 9415 (July 10, 2013), the issuer decides to continue that offering after September 23, 2013 in accordance with Rule 506(c), is the issuer required to file an amendment to the previously-filed Form D to indicate that the issuer is now relying on the Rule 506(c) exemption?

Answer: Yes. As the decision to continue the offering in reliance on Rule 506(c) represents a change in the information provided in the previously-filed Form D, the issuer must file an amendment to the Form D and check the Rule 506(c) box to indicate its reliance on this exemption. If the issuer decides to continue the offering in reliance on Rule 506(b), no amendment to the previously-filed Form D is required solely to reflect this decision. [Nov. 13, 2013]

Question 260.06

Question: An issuer takes reasonable steps to verify the accredited investor status of a purchaser and forms a reasonable belief that the purchaser is an accredited investor at the time of the sale of securities. Subsequent to the sale, it becomes known that the purchaser did not meet the financial or other criteria in the definition of "accredited investor" at the time of sale. Assuming that the other conditions of Rule 506(c) were met, is the exemption available to the issuer for the offer and sale to the purchaser?

Answer: Yes. An issuer does not lose the ability to rely on Rule 506(c) for an offering if a person who does not meet the criteria for any category of accredited investor purchases securities in the offering, so long as the issuer took reasonable steps to verify that the purchaser was an accredited investor and had a reasonable belief that such purchaser was an accredited investor at the time of the sale of securities. [Nov. 13, 2013]

Question 260.07

Question: An issuer intends to conduct an offering under Rule 506(c). If all of the purchasers in the offering met the financial and other criteria to be accredited investors but the issuer did not take reasonable steps to verify the accredited investor status of these purchasers, may the issuer rely on the Rule 506(c) exemption?

Answer: No. The verification requirement in Rule 506(c) is separate from and independent of the requirement that sales be limited to accredited investors. The verification requirement must be satisfied even if all purchasers happen to be accredited investors. Under the principles-based method of verification, however, the determination of what constitutes reasonable steps to verify is an objective determination based on the particular facts and circumstances of each purchaser and transaction. [Nov. 13, 2013]

Question 260.08

Question: An issuer chooses to verify the accredited investor status of a purchaser in a Rule 506(c) offering by using the net worth verification method provided in the rule and, as required under this method, reviews the relevant documentation dated within the prior three months. If, at the time the purchaser decides to purchase securities in the offering, the previously submitted documentation is not dated within the prior three months of the time of the sale of securities, may the issuer continue to rely on the net worth verification method provided in the rule?

Answer: No. An issuer may satisfy the verification requirement of Rule 506(c) by either using the principles-based method of verification or relying upon one of the specific, non-exclusive verification methods listed in the rule. Although use of the non-exclusive verification methods is not required, an issuer that chooses to use one of the methods must satisfy the specific requirements of that method. In order to comply with the net worth verification method provided in the rule's non-exclusive list, the relevant documentation must be dated within the prior three months of the sale of securities. If the documentation is older than three months, the issuer may not rely on the net worth verification method, but may instead determine whether it has taken reasonable steps to verify the purchaser's accredited investor status under the principles-based method of verification. [Nov. 13, 2013]

Question 260.09

Question: Does the third-party verification method in the non-exclusive list of verification methods in Rule 506(c) include written confirmations from an attorney or certified public accountant who is licensed or duly registered, as the case may be, in good standing in a foreign jurisdiction?

Answer: Yes. This method of verification is not limited to written confirmations from attorneys and certified public accountants who are licensed or registered in a jurisdiction within the United States. [Nov. 13, 2013]

Question 260.10

Question: Does the verification method for existing investors in the non-exclusive list of verification methods apply to new issuers that have the same sponsor as the issuer in which the investor purchased securities in a prior Rule 506(b) offering (for example, a new limited partnership organized by a general partner where the investor purchased securities of a prior limited partnership sponsored by the same general partner)?

Answer: No. This non-exclusive method of verification is, by its terms, limited to verification of existing investors who purchased securities in the same issuer's Rule 506(b) offering as accredited investors prior to September 23, 2013 and continue to hold such securities. [Nov. 13, 2013]

Question 260.11

Question: If an issuer commenced an offering intending to rely on Rule 506(c) but did not engage in any form of general solicitation in connection with the offering, may the issuer subsequently determine to rely on Rule 506(b) for the offering?

Answer: Yes, as long as the conditions of Rule 506(b) have been satisfied with respect to all sales of securities that have occurred in the offering. To the extent the issuer already filed a Form D indicating its reliance on Rule 506(c), it must amend the Form D to indicate its reliance on Rule 506(b) instead, as that decision represents a change in the information provided in the previously-filed Form D. [Nov. 13, 2013]

Question 260.12

Question: If an issuer commenced an offering in reliance on Rule 506(b), may the issuer determine, prior to any sales of securities in the offering, to rely on Rule 506(c) for the offering?

Answer: Yes, as long as the conditions of Rule 506(c) are satisfied with respect to all sales of securities in the offering. To the extent the issuer already filed a Form D indicating its reliance on Rule 506(b), it must amend the Form D to indicate its reliance on Rule 506(c) instead, as that decision represents a change in the information provided in the previously-filed Form D. [Nov. 13, 2013]

Question 260.13

Question: If the conditions of Rule 506(c) are not met in a purported Rule 506(c) offering, could the Securities Act Section 4(a)(2) private offering exemption be available to the issuer?

Answer: If the issuer has engaged in general solicitation, no. As stated in Securities Act Release No. 9415 (July 10, 2013), the mandate in the JOBS Act to permit general solicitation for a subset of Rule 506 offerings affects only Rule 506 and not Section 4(a)(2) offerings in general. The use of general solicitation continues to be incompatible with a claim of exemption under Section 4(a)(2). [Nov. 13, 2013]

Question 260.14

Question: When is an issuer required to determine whether bad actor disqualification under Rule 506(d) applies?

Answer: Rule 506(d) disqualifies an offering of securities from reliance on a Rule 506 exemption from Securities Act registration. Issuers must

therefore determine if they are subject to bad actor disqualification any time they are offering or selling securities in reliance on Rule 506. An issuer that is not offering securities, such as a fund that is winding down and is closed to investment, need not determine whether Rule 506(d) applies unless and until it commences a Rule 506 offering. An issuer may reasonably rely on a covered person's agreement to provide notice of a potential or actual bad actor triggering event pursuant to, for example, contractual covenants, bylaw requirements, or an undertaking in a questionnaire or certification. However, if an offering is continuous, delayed or long-lived, the issuer must update its factual inquiry periodically through bring-down of representations, questionnaires and certifications, negative consent letters, periodic re-checking of public databases, and other steps, depending on the circumstances. [Dec. 4, 2013]

Question 260.15

Question: If a placement agent or one of its covered control persons, such as an executive officer or managing member, becomes subject to a disqualifying event while an offering is still ongoing, could the issuer continue to rely on Rule 506 for that offering?

Answer: Yes, the issuer could rely on Rule 506 for future sales in that offering if the engagement with the placement agent was terminated and the placement agent did not receive compensation for the future sales. Alternatively, if the triggering disqualifying event affected only the covered control persons of the placement agent, the issuer could continue to rely on Rule 506 for that offering if such persons were terminated or no longer performed roles with respect to the placement agent that would cause them to be covered persons for purposes of Rule 506(d). [Dec. 4, 2013]

Question 260.16

Question: For purposes of Rule 506(d), does an "affiliated issuer" mean every affiliate of the issuer that has issued securities?

Answer: No. Under Rule 506(d), an "affiliated issuer" of the issuer is an affiliate (as defined in Rule 501(b) of Regulation D) of the issuer that is issuing securities in the same offering, including offerings subject to integration pursuant to Rule 502(a) of Regulation D. Securities Act Forms C&DIs 130.01 and 130.02 provide examples of co-issuer or multiple issuer offerings. [Dec. 4, 2013]

Question 260.17

Question: Are compensated solicitors limited to brokers, as defined in Exchange Act Section 3(a)(4), who are subject to registration pursuant to Exchange Act Section 15(a)(1), and their associated persons?

Answer: No. All persons who have been or will be paid, directly or indirectly, remuneration for solicitation of purchasers are covered by Rule 506(d), regardless of whether they are, or are required to be, registered under Exchange Act Section 15(a)(1) or are associated persons of registered broker-dealers. The disclosure required in Item 12 of Form D expressly contemplates that compensated solicitors may not appear in FINRA's Central Registration Depository (CRD) of brokers and brokerage firms. [Dec. 4, 2013]

Question 260.18

Question: Does the term "participating" include persons whose sole involvement with a Rule 506 offering is as members of a compensated solicitor's deal or transaction committee that is responsible for approving such compensated solicitor's participation in the offering?

Answer: No. [Dec. 4, 2013]

Question 260.19

Question: Are officers of a compensated solicitor deemed to be "participating" in a Rule 506 offering only if they are involved with the solicitation of investors for that offering?

Answer: No. Participation in an offering is not limited to solicitation of investors. Examples of participation in an offering include participation or involvement in due diligence activities or the preparation of offering materials (including analyst reports used to solicit investors), providing structuring or other advice to the issuer in connection with the offering, and communicating with the issuer, prospective investors or other offering participants about the offering. To constitute participation for purposes of the rule, such activities must be more than transitory or incidental. Administrative functions, such as opening brokerage accounts, wiring funds, and bookkeeping activities, would generally not be deemed to be participating in the offering. [Dec. 4, 2013]

Question 260.20

Question: Is disqualification under Rule 506(d) triggered by actions taken in jurisdictions other than the United States, such as convictions, court orders, or injunctions in a foreign court, or regulatory orders issued by foreign regulatory authorities?

Answer: No. [Dec. 4, 2013]

Question 260.21

Question: Is disqualification under Rule 506(d)(1)(v) triggered by all Commission orders to cease and desist from violations of Commission rules promulgated under Exchange Act Section 10(b)?

Answer: No. Disqualification is triggered only by orders to cease and desist from violations of scienter-based provisions of the federal securities laws, including scienter-based rules. An order to cease and desist from violations of a non-scienter based rule would not trigger disqualification, even if the rule is promulgated under a scienter-based provision of law. For example, an order to cease and desist from violations of Exchange Act Rule 10b-5 would not trigger disqualification, even though Rule 10b-5 is promulgated under Exchange Act Section 10(b). [Dec. 4, 2013*]

Question 260.22

Question: If an order issued by a court or regulator provides, in accordance with Rule 506(d)(2)(iii), that disqualification from Rule 506 should not arise as a result of the order, is it necessary to seek a waiver from the Commission or to take any other action to confirm that bad actor disqualification will not apply as a result of the order?

Answer: No. The provisions of Rule 506(d)(2)(iii) are self-executing. [Dec. 4, 2013]

Question 260.23

Question: Does the reasonable care exception only cover circumstances where the issuer has identified all covered persons but, despite the exercise of reasonable care, was unable to discover the existence of a disqualifying event? Or could it also apply where, despite the exercise of reasonable care, the issuer (i) was unable to determine that a particular person was a covered person (for example, an officer of a financial intermediary that the issuer did not know was participating in the offering, despite the exercise of reasonable care) or (ii) initially determined that the person was not a covered person but subsequently determined that the person should have been deemed a covered person?

Answer: The reasonable care exception applies whenever the issuer can establish that it did not know and, despite the exercise of reasonable care, could not have known that a disqualification existed under Rule 506(d)(1). This may occur when, despite the exercise of reasonable care, the issuer was unable to determine the existence of a disqualifying event, was unable to determine that a particular person was a covered person, or initially reasonably determined that the person was not a covered person but subsequently learned that determination was incorrect. Issuers will still need to consider what steps are appropriate upon discovery of Rule 506(d) disqualifying events and covered persons throughout the course of an ongoing Rule 506 offering. An issuer may need to seek waivers of disqualification, terminate the relationship with covered persons, provide Rule 506(e) disclosure, or take such other remedial steps to address the Rule 506(d) disqualification. [Dec. 4, 2013]

Question 260.24

Question: Is there a procedure provided in Rule 506(e) for issuers to seek a waiver of the obligation to disclose past events that would have been disqualifying, except that they occurred before September 23, 2013 (the effective date of Rule 506(d))?

Answer: No. The disclosure obligation is not subject to waiver. [Dec. 4, 2013]

Question 260.25

Question: Does Rule 506(e) require disclosure of past events that would no longer trigger disqualification under Rule 506(d), such as a criminal conviction that occurred more than ten years before the offering or an order or bar that is no longer in effect at the time of the offering?

Answer: No. Rule 506(e) requires only disclosure of events that would have triggered disqualification at the time of the offering had Rule 506(d) been applicable. Because events outside the applicable look-back period and orders that do not have continuing effect would not trigger disqualification, Rule 506(e) does not mandate disclosure of such matters in order for the issuer to be able to rely on Rule 506. [Dec. 4, 2013]

Question 260.26

Question: In an offering in which the issuer uses multiple placement agents or other compensated solicitors, is the issuer required to provide investors with disclosure under Rule 506(e) only with respect to the particular compensated solicitor or placement agent that solicited those investors and its covered control persons (i.e., general partners, managing members, directors, executive officers, and other officers participating in the offering)?

Answer: No. Issuers are required to provide all investors with the Rule 506(e) disclosure for all compensated solicitors who are involved with the offering at the time of sale and their covered control persons. [Dec. 4, 2013]

Question 260.27

Question: In a continuous offering, is the issuer required to provide disclosure under Rule 506(e) for all solicitors that were ever involved during the course of the offering?

Answer: No. A reasonable time prior to the sale of securities in reliance on Rule 506, the issuer must provide the required disclosure with respect to all compensated solicitors that are involved at the time of sale. Disclosure with respect to compensated solicitors who are no longer involved with the offering need not be provided under Rule 506(e) in order for the issuer to be able to rely on Rule 506. [Dec. 4, 2013]

Question 260.28

Question: Is a shareholder that becomes a 20% beneficial owner by purchasing securities in an offering a covered person with respect to that offering?

Answer: Rule 506(d) looks to the time of each sale of securities, and provides that no exemption will be available for the sale if any covered person is subject to a bad actor triggering event at that time. A shareholder that becomes a 20% beneficial owner upon completion of a sale of securities is not a 20% beneficial owner at the time of the sale. However, it would be a covered person with respect to any sales of securities in the offering that were made while it was a 20% beneficial owner. [Jan. 3, 2014]

Question 260.29

Question: Is the term "beneficial owner" in Rule 506(d) interpreted the same way as under Exchange Act Rule 13d-3?

Answer: Yes, "beneficial owner" under Rule 506(d) means any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, under Exchange Act Rule 13d-3 has or shares, or is deemed to have or share: (1) voting power, which includes the power to vote, or to direct the voting of, such security; and/or (2) investment power, which includes the power to dispose, or to direct the disposition of, such security. [Jan. 3, 2014]

Question 260.30

Question: For purposes of determining 20% beneficial owners under Rule 506(d), is it necessary to "look through" entities to their controlling persons?

Answer: Beneficial ownership includes both direct and indirect interests, determined as under Exchange Act Rule 13d-3. [Jan. 3, 2014]

Question 260.31

Question: Some of the shareholders of a Rule 506 issuer have entered into a voting agreement under which each shareholder agrees to vote its shares of voting equity securities in favor of director candidates designated by one

or more of the other parties. Are the parties to the agreement required to aggregate their holdings for purposes of determining whether they as a group are, or any single party is, a 20% beneficial owner of the issuer and, therefore, a covered person under Rule 506(d)?

Answer: Beneficial ownership of group members and groups should be analyzed the same as under Exchange Act Rules 13d-3 and 13d-5(b). Under that analysis, the shareholders have formed a group, and the group beneficially owns the shares beneficially owned by its members. In addition, the parties to the voting agreement that have or share the power to vote or direct the vote of shares beneficially owned by other parties to the agreement (through, for example, the receipt of an irrevocable proxy or the right to designate director nominees for whom the other parties have agreed to vote) will beneficially own such shares. Parties that do not have or share the power to vote or direct the vote of other parties' shares would not beneficially own such shares solely as a result of entering into the voting agreement. See Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting CDI 105.06. If the group is a 20% beneficial owner, then disqualification or disclosure obligations would arise from court orders, injunctions, regulatory orders or other triggering events against the group itself. If a party to the voting agreement becomes a 20% beneficial owner because shares of other parties are added to its beneficial ownership, disqualification or disclosure obligations would arise from triggering events against that party. [Jan. 3, 2014]

Question 260.32

Question: Does an order issued by a court or regulator, in accordance with Rule 506(d)(2)(iii), waive the disclosure obligation set forth in Rule 506(e)?

Answer: No. The disclosure obligation in Rule 506(e) pertains to an issuer's obligation to provide investors disclosure of disqualifying events that would have triggered disqualification, except that these events occurred before September 23, 2013. Rule 506(d)(2)(iii) permits issuers to rely on the self-executing statement of a regulatory authority to avoid Rule 506 disqualification when that regulatory authority advises the Commission in writing or in its order, decree or judgment, that Rule 506 disqualification should not arise a consequence of a disqualifying event that occurred on or after September 23, 2013.

A regulatory authority such as a state securities commission may, however, determine that an order entered before September 23, 2013 would not have triggered disqualification under Rule 506(d)(1) because the violation was not a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale. [Jan. 3, 2014]

Question 260.33

Question: An issuer commenced an offering in reliance on Rule 506 before September 23, 2013, the effective date of the new Rule 506(c) exemption. The issuer decides, at some point after September 23, 2013, to continue that offering as a Rule 506(c) offering under the transition guidance in Securities Act Release No. 9415 (July 10, 2013). In such circumstances, is the issuer required to take "reasonable steps to verify" the accredited investor status of investors who purchased securities in the offering before the issuer conducted the offering in reliance on Rule 506(c)?

Answer: No. For an offering that commenced before September 23, 2013 and that, pursuant to the Commission's transition guidance, the issuer

continues in accordance with Rule 506(c) after that date, the issuer must take reasonable steps to verify the accredited investor status of only investors who purchase securities in the offering after the issuer begins to make offers and sales in reliance on Rule 506(c). The issuer must amend any previously-filed Form D to indicate its reliance on the Rule 506(c) exemption for its offering. *See* Securities Act Rules C&DI 260.05. [Jan. 23, 2014]

Question 260.34

Question: An issuer commenced a Rule 506 offering before September 23, 2013 and made sales either before or after that date in reliance on the exemption that, as a result of Securities Act Release No. 9415 (July 10, 2013), became Rule 506(b). The issuer now wishes to continue the offering in reliance on Rule 506(c). Can the issuer rely on the transition guidance in Securities Act Release No. 9415 that permits switching from Rule 506(b) to Rule 506(c) if it already sold securities to non-accredited investors before relying on the Rule 506(c) exemption?

Answer: Yes, as long as all sales of securities in the offering after the issuer begins to offer and sell in reliance on Rule 506(c) are limited to accredited investors and the issuer takes reasonable steps to verify the accredited investor status of those purchasers. [Jan. 23, 2014]

Question 260.35

Question: Rule 506(c)(2)(ii)(A) sets forth a non-exclusive method of verifying that a purchaser is an accredited investor by, among other things, reviewing any Internal Revenue Service form that reports the purchaser's income for the "two most recent years." If such an Internal Revenue Service form is not yet available for the recently completed year (*e.g.*, 2013), can the issuer still rely on this verification method by reviewing the Internal Revenue Service forms for the two prior years that are available (*e.g.*, 2012 and 2011)?

Answer: No, the verification safe harbor provided in Rule 506(c)(2)(ii)(A) would not be available under these circumstances. We believe, however, that an issuer could reasonably conclude that a purchaser is an accredited investor and satisfy the verification requirement of Rule 506(c) under the principles-based verification method by:

- reviewing the Internal Revenue Service forms that report income for the two years preceding the recently completed year; and

- obtaining written representations from the purchaser that (i) an Internal Revenue Service form that reports the purchaser's income for the recently completed year is not available, (ii) specify the amount of income the purchaser received for the recently completed year and that such amount reached the level needed to qualify as an accredited investor, and (iii) the purchaser has a reasonable expectation of reaching the requisite income level for the current year.

Where the issuer has reason to question the purchaser's claim to be an accredited investor after reviewing these documents, it must take additional verification measures in order to establish that it has taken reasonable steps to verify that the purchaser is an accredited investor. For example, if, based on this review, the purchaser's income for the most recently completed year barely exceeded the threshold required, the foregoing procedures might not constitute sufficient verification and more diligence might be necessary. [July 3, 2014]

Question 260.36

Question: A purchaser is not a U.S. taxpayer and therefore cannot provide an Internal Revenue Service form that reports income. Can an issuer review comparable tax forms from a foreign jurisdiction in order to rely on the verification method provided in Rule 506(c)(2)(ii)(A)?

Answer: No, the verification safe harbor provided in Rule 506(c)(2)(ii)(A) would not be available under these circumstances. In adopting this safe harbor, the Commission noted that there are "numerous penalties for falsely reporting information" in Internal Revenue Service forms. *See* Securities Act Release No. 33-9415 (July 10, 2013). Although the safe harbor is not available for tax forms from foreign jurisdictions, we believe that an issuer could reasonably conclude that a purchaser is an accredited investor and satisfy the verification requirement of Rule 506(c) under the principles-based verification method by reviewing filed tax forms that report income where the foreign jurisdiction imposes comparable penalties for falsely reported information.

Where the issuer has reason to question the reliability of the information about the purchaser's income after reviewing these documents, it must take additional verification measures in order to establish that it has taken reasonable steps to verify that the purchaser is an accredited investor. [July 3, 2014]

Question 260.37

Question: Under the non-exclusive verification method set forth in Rule 506(c)(2)(ii)(B), an issuer can verify that a purchaser is an accredited investor on the basis of net worth by reviewing certain documentation of the purchaser's assets and liabilities "dated within the prior three months." Tax assessments, which are one of the types of documentation listed in this provision of the rule, are often prepared annually. Would an issuer be able to rely on this non-exclusive verification method if it reviewed the most recent tax assessment that is available, even if it is dated more than three months?

Answer: No, the verification safe harbor provided in Rule 506(c)(2)(ii)(B) would not be available under these circumstances. Although the safe harbor is not available, we believe that an issuer could reasonably conclude that a purchaser is an accredited investor and satisfy the verification requirement of Rule 506(c) under the principles-based verification method if it uses the most recently available tax assessment when determining whether the purchaser has the requisite net worth. For example, if the most recent tax assessment shows a value that, after deducting the purchaser's liabilities results in a net worth substantially in excess of $1 million, it may be sufficient verification that the purchaser has met the net worth test.

Where the issuer has reason to question whether the assessment reasonably reflects the value of the purchaser's assets, it must take additional verification measures in order to establish that it has taken reasonable steps to verify that the purchaser is an accredited investor. [July 3, 2014]

Question 260.38

Question: Under the non-exclusive verification method set forth in Rule 506(c)(2)(ii)(B), an issuer must review a consumer report from one of the "nationwide consumer reporting agencies" to determine the purchaser's liabilities. Would a consumer report from a non-U.S. consumer reporting

agency that performs similar functions as a U.S. nationwide consumer reporting agency be sufficient for purposes of this verification method?

Answer: No, such a consumer report would not satisfy the requirements of the verification safe harbor in Rule 506(c)(2)(ii)(B). Although the safe harbor is not available, we believe that an issuer could reasonably conclude that a purchaser is an accredited investor and satisfy the verification requirement of Rule 506(c) under the principles-based verification method by reviewing this report and taking any other steps necessary to determine the purchaser's liabilities (such as a written representation from the purchaser that all liabilities have been disclosed) in determining whether the purchaser has the requisite net worth.

Where the issuer has reason to question the extent of the purchaser's liabilities after reviewing these documents, it must take additional verification measures in order to establish that it has taken reasonable steps to verify that the purchaser is an accredited investor. [July 3, 2014]

Sections 261 to 270. Rules 507 to 610 [Reserved]

Section 271. Rule 701 — Exemption for Offers and Sales of Securities Pursuant to Certain Compensatory Benefit Plans and Contracts Relating to Compensation

Question 271.01

Question: Are terms used in (but not defined in) Rule 701 interpreted to have the same meanings as the same terms defined in Rule 405?

Answer: Yes. Examples of such terms include "affiliate," "majority-owned subsidiary," "parent," and "subsidiary." [Jan. 26, 2009]

Question 271.02

Question: Is a company that files Exchange Act reports on a voluntary basis, or in accordance with a contractual obligation, eligible to use Rule 701?

Answer: Yes. [Jan. 26, 2009]

Question 271.03

Question: Are foreign private issuers that are not subject to the Exchange Act's reporting requirements eligible to use Rule 701, whether or not they publish their non-U.S. disclosure documents in accordance with Exchange Act Rule 12g3-2(b)?

Answer: Yes. [Jan. 26, 2009]

Question 271.04

Question: A company that is not subject to the reporting requirements of Exchange Act Section 13 or 15(d) issued options in reliance on Rule 701. This company is acquired by another company, which is subject to the reporting requirements of Exchange Act Section 13(a) or 15(d) and assumes the private company's outstanding options so that they become exercisable for shares of the acquiring company. Does the acquiring company need to register the offer and sale of the shares issuable upon the exercise of the options?

Answer: No. Rule 701(b)(2) permits an issuer to rely on Rule 701 to sell securities offered prior to the issuer becoming a reporting company. Similarly, an acquirer that is subject to Exchange Act reporting requirements may rely on Rule 701 for the exercise of the assumed options. For purposes of compliance with any disclosure that may be required by Rule 701(e), the acquirer's Exchange Act reports would satisfy any disclosure requirement under Rule 701(e). [October 19, 2016]

Question 271.05

Question: Are securities analysts excluded from receiving securities issued under Rule 701 or registered on Form S-8 as "consultants" or "advisors" because their services, as securities industry professionals, are inherently capital-raising or promote or maintain a market for the issuer's securities?

Answer: Yes. [Jan. 26, 2009]

Question 271.06

Question: Must an issuer use a rolling period consisting of the 12 months immediately preceding the date of the transaction in question for determining whether it has exceeded the sales ceiling in Rule 701(d)(2) and whether it must comply with the additional disclosure requirements under Rule 701(e); or may the issuer elect a fixed 12-month period such as the calendar year or its fiscal year?

Answer: The issuer may choose to calculate its sales under Rule 701(d)(2) and 701(e) on the basis of either a fixed period or a rolling 12-month period but must continue using the chosen calculation method consistently. [Jan. 26, 2009]

Question 271.07

Question: If an issuer sells shares in excess of the Rule 701(d) limits, does it lose the Rule 701 exemption for all shares sold in the applicable 12-month period or just for the excess shares? May the issuer rely on another available exemption from Securities Act registration for sales of excess shares for which Rule 701 is not available?

Answer: The Rule 701 exemption would not be available for sales of shares that exceed the Rule 701(d) limits. Rule 701(f) provides, however, that sales under Rule 701 are not subject to integration with other sales that are otherwise exempt from the registration requirements of the Securities Act. Therefore, an issuer may rely on an available alternative exemption such as a limited offering exemption under Rule 504 of Regulation D or a private placement exemption under Rule 506 of Regulation D or Section 4(2) for the sales in excess of the Rule 701(d) limits, and rely on Rule 701 for sales that do not exceed the Rule 701(d) limits. [Jan. 26, 2009]

Question 271.08

Question: May an issuer sell $1,000,000 of securities under Rule 701(d)(2)(i) during any consecutive 12-month period, regardless of the calculations in Rules 701(d)(2)(ii) and (iii)?

Answer: Yes. Rule 701(d) limits the amount that may be sold to the "greatest" of $1,000,000, 15% of total assets, or 15% of the outstanding amount of the class of securities being offered. [Jan. 26, 2009]

Question 271.09

Question: To calculate the 15% of assets and the 15% of securities tests under Rule 701(d)(2)(ii) and (iii), may an issuer use either its balance sheet as of the last day of its most recently ended fiscal year or a more recent balance sheet?

Answer: Yes, an issuer is permitted to choose either balance sheet. See the *American Bar Association* no-action letter (Dec. 7, 2000) issued by the Division. [Jan. 26, 2009]

Question 271.10

Question: Within 12 months of an original option grant, the issuer reprices the option grant at a lower exercise price, which, in turn, lowers the aggregate sales price or amount of securities sold during the 12-month period. May the issuer exclude the original grant in determining the amount of securities that may be sold and whether it has an obligation under Rule 701 to deliver the additional disclosure called for when its issuance level exceeds $5 million?

Answer: Yes, but the issuer must count the repriced options as a new sale, and include them in determining its aggregate sales price or amount of securities sold within any consecutive 12-month period that includes the repricing date. [Jan. 26, 2009]

Question 271.11

Question: May an issuer disregard options that are cancelled or forfeited when applying the Rule 701(d) and (e) limits?

Answer: Yes. Once options are forfeited or cancelled, those options need not be counted for purposes of the Rule 701(d) and (e) limits. [Jan. 26, 2009]

Question 271.12

Question: Rule 701(e) prescribes additional disclosure that must be delivered a reasonable time before sale if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $5 million. Must this disclosure be provided to all investors in the Rule 701 offering, or only to those investors who purchase securities after the issuer exceeds the $5 million threshold? What are the consequences of non-compliance?

Answer: The Rule 701(e) disclosure must be provided to all investors in the Rule 701 offering if the issuer believes that sales will exceed the $5 million threshold in the coming 12-month period, not only to those who purchase securities after the issuer exceeds the $5 million threshold. As stated in Securities Act Release No. 7645 (Feb. 25, 1999):

> "This requirement will obligate issuers to provide disclosure to all investors if the issuer believes that sales will exceed the $5 million threshold in the coming 12-month period. If the disclosure has not been provided to all investors before sale, the issuer will lose the exemption for the entire offering when sales exceed the $5 million threshold." [Jan. 26, 2009]

Question 271.13

Question: A private issuer has a broad-based employee stock purchase plan that relies on the Rule 701 exemption. Employees sign up for payroll deductions at the start of a year, and the payroll deductions accumulated

over the course of the year are applied to purchase shares on a single purchase date at the end of the year. Employees have the right to withdraw from the plan and have their payroll deductions refunded at any time during the year until shortly before the single purchase date. May the private issuer provide the Rule 701(e) disclosure shortly before the single purchase date?

Answer: Yes. [Jan. 26, 2009]

Question 271.14

Question: A foreign issuer intends to conduct a Rule 701 offering exceeding the $5 million threshold in Rule 701(e). Is the issuer required under Rule 701(e)(4) to deliver to investors financial statements that are no more than 180 days old, or can the issuer deliver its annual and interim financial statements only at the frequency required of foreign issuers that are Exchange Act reporting companies?

Answer: The issuer must follow the 180-day requirement, regardless of whether it furnishes financial statements reconciled to U.S. GAAP or prepared in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, both of which are allowed under Rule 701(e)(4). The 180-day requirement effectively means that the financial statements must be available on at least a quarterly basis unless sales of securities are limited to particular times of the year. [Jan. 26, 2009]

Question 271.15

Question: May an issuer of securities provide the disclosure required by Rule 701(e) by means of electronic delivery, such as an email with attachments?

Answer: Yes. Rule 701(e) requires only that the disclosures be "provided" and "delivered." It contains no requirement that the disclosures be provided or delivered using a particular medium. In general, the federal securities laws do not prescribe the medium to be used for providing information to investors by or on behalf of issuers of securities. For guidance on using electronic delivery to provide disclosure under the federal securities laws, see Securities Act Release No. 7856 (Apr. 28, 2000). [Jan. 26, 2009]

Question 271.16

Question: A company is no longer required to file reports under Exchange Act Sections 13(a) or 15(d). With respect to employee stock options that are outstanding upon the suspension or termination of the company's Exchange Act reporting obligations and for which underlying shares previously registered on Form S-8 have been removed from registration by post-effective amendment (the "Outstanding Stock Options"), is the Rule 701 exemption available to the company for the exercise of the Outstanding Stock Options? Is the Rule 701 exemption available for the exercise of stock options that the company grants in the future?

Answer: Rule 701 is available to a company upon suspension or termination of its Exchange Act reporting obligations. With respect to the Outstanding Stock Options, if the aggregate exercise price of those options exceeds $5 million, the company must deliver the disclosure required by Rule 701(e) in a reasonable period of time before the options are exercised in order to rely on the Rule 701 exemption for the sale of the underlying shares upon exercise of the options. With respect to future grants, the company is considered to start with a clean slate under Rule 701 upon

suspending or terminating its Exchange Act reporting obligations. Shares underlying the Outstanding Stock Options are not included for purposes of determining compliance with the 12-month sales limitation requirements in Rule 701(d) and the disclosure requirements in Rule 701(e). [June 4, 2010]

Question 271.17

Question: In a merger transaction in which the acquirer assumes derivative securities of a target company and such derivative securities thereafter become derivative securities of the acquirer, does the acquirer need an exemption from registration for such assumption?

Answer: No. In a merger transaction, where derivative securities of the target company are assumed by the acquirer and by their terms become derivative securities for an economically equivalent amount of acquirer securities, the acquirer would not need an exemption for the assumption of such derivative securities, provided that at the time of grant by the target the compensatory benefit plan under which they were issued permitted this assumption without the consent of the holders of the derivative securities. [June 23, 2016]

Question 271.18

Question: Is the exercise or conversion of the derivative securities that the acquirer has assumed in Question 271.17 eligible for exemption under Rule 701?

Answer: Under Rule 701, an issuer must be eligible for, and comply with, the exemption at the time that any sales are made pursuant to it. For these purposes, when an eligible issuer grants derivative securities pursuant to Rule 701, the securities underlying the derivative securities are considered to have been sold on the date of the grant of the derivative securities (without regard to when the derivative securities become exercisable or convertible). So long as the target company complied with Rule 701 at the time the derivative securities assumed in the merger transaction were originally granted, the exercise or conversion of the derivative securities would be exempt, subject to compliance, where applicable, with Rule 701(e). *See* Questions 271.22 and 23 below. [June 23, 2016]

Question 271.19

Question: After the completion of a merger transaction, is an acquirer required to include securities previously sold by the target company pursuant to Rule 701 in its calculations for purposes of determining the amount of securities it may sell pursuant to Rule 701(d) on a going forward basis?

Answer: Yes. Post-merger, for purposes of determining the amount of securities that the acquirer may sell pursuant to Rule 701(d), the acquirer would be required to include the aggregate sales price and amount of securities for which the target company claimed the Rule 701 exemption during the same 12-month period for which the acquirer is making the determination. [June 23, 2016]

Question 271.20

Question: After the completion of a merger transaction, to calculate compliance with Rule 701(d)(2) on a going forward basis, could an acquirer use a pro forma balance sheet as of its most recent balance sheet date that reflects the merger transaction as if it had occurred on that date?

Answer: Yes. Alternatively, the acquirer also could use a balance sheet date after the merger transaction that will reflect the total assets and outstanding securities of the combined entity. [June 23, 2016]

Question 271.21

Question: Where an obligation to provide disclosure pursuant Rule 701(e) is triggered, Rule 701(e)(4) requires an issuer to provide investors with the financial statements required to be furnished by Part F/S of Form 1-A a reasonable time before the date of sale. In these circumstances, is an issuer required to follow the financial statement requirements of Part F/S as they relate to Tier 1 or Tier 2 Regulation A offerings?

Answer: An issuer could elect to provide financial statements that follow the requirements of either Tier 1 or Tier 2 Regulation A offerings, without regard to whether the amount of sales that occurred pursuant to Rule 701 during the time period contemplated in Rule 701(e) would have required the issuer to follow the Tier 2 financial statement requirements in a Regulation A offering of the same amount. [June 23, 2016]

Question 271.22

Question: After the completion of a merger transaction, for assumed derivative securities for which the target company was required to provide disclosure pursuant to Rule 701(e), does the acquirer assume that obligation? How does the acquirer satisfy the obligation?

Answer: For assumed derivative securities for which the target company was required to provide disclosure pursuant to Rule 701(e) that are exercised or converted post-merger, the acquirer would satisfy that obligation by providing information meeting the requirements of Rule 701(e) consistent with the timing requirements of Rule 701(e)(6). [June 23, 2016]

Question 271.23

Question: After the completion of the merger transaction, how does the acquirer treat securities previously sold by the target company pursuant to Rule 701 in its calculations for purposes of determining whether it has triggered a disclosure obligation pursuant to Rule 701(e)?

Answer: For purposes of Rule 701(e), following the merger transaction, in determining whether the amount of securities the acquirer sold during any consecutive 12-month period exceeds $5 million, the acquirer must include any securities that the target company sold during the same period. [June 23, 2016]

Question 271.24

Question: An issuer is relying on Rule 701 to exempt the offer and sale of a restricted stock unit (RSU) award it is making to one of its employees. The RSU award will settle upon the satisfaction of conditions based on length of service and/or company performance. No additional consideration is paid by the employee at the time of settlement. If the issuer sells an aggregate amount of securities (including the RSUs) during the consecutive 12-month period that exceeds $5 million, thus triggering the requirement to deliver the additional information specified in paragraphs (1) through (4) of Rule 701(e), when is the issuer required to provide the additional information?

Answer: Under Rule 701(e), the issuer must deliver the information specified in paragraphs (1) through (4) to investors "a reasonable period of time before the date of the sale." For the sale of an RSU award that relies on Rule 701 for exemption, the date of sale is the date it is granted. As such, the issuer must provide the required information a reasonable time before the date the RSU award is granted. Although RSUs are derivative securities (as their value is derived from value of the underlying common stock), they are not "exercised or converted," and thus Rule 701(e)(6) relating to the exercise or conversion of derivative securities does not apply. [October 19, 2016]

Sections 272 to 275. Rules 800 to 901 [Reserved]

Section 276. Rule 902 - Definitions

Question 276.01

Question: What factors should be applied to determine the status of an individual as a "natural person resident in the United States" for purposes of the U.S. person definition under Rule 902(k)(1)(i)?

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]

Section 277. Rule 903 — Offers or Sales of Securities by the Issuer, a Distributor, Any of their Respective Affiliates, or Any Person Acting on Behalf of Any of the Foregoing; Conditions Relating to Specific Securities

Question 277.01

Question: When must a foreign private issuer determine the particular category of the Regulation S safe harbor for an offering of securities outside the United States?

Answer: An issuer must determine the particular category of the Regulation S safe harbor upon which it will rely at the time it makes the offshore offering. If, after the offering is made, changes occur in the issuer's circumstances that would permit it to qualify for a different category of the safe harbor in the future, there will be no change in the distribution compliance period for the outstanding securities issued under the prior category. [Jan. 26, 2009]

Question 277.02

Question: May an issuer rely on Rule 903(b)(1)(ii) for an offering of securities in more than one country that is part of the European Union?

Answer: Yes. Regulation S was adopted before the integration of the capital markets within the European Union as a result of application of EU-wide laws and regulations relating to prospectuses, transparency, trading and other matters. Given that level of integration, issuers may rely on Rule 903(b)(1)(ii) to the extent the local laws and customary practices and

documentation are those of the European Union rather than of a single country within the European Union. [December 8, 2016]

Question 277.03

Question: May an issuer rely on Rule 903(b)(1)(iv) for an offering of securities to employees if the laws, customary practices and documentation are those of the European Union rather than of a country other than the United States?

Answer: Yes, for the reasons discussed in Securities Act Rules CDI 277.02. [December 8, 2016]

Question 277.04

Question: In adopting Regulation S, the Commission stated that persons relying on the second issuer safe harbor [now referred to as Category 2] must "ensure (by whatever means they choose) that any non-distributor to whom they sell securities is a non-U.S. person and is not purchasing for the account or benefit of a U.S. person." The Commission also noted that the "safe harbor protection would not be available where offers and sales were made nominally to non-U.S. persons to evade the restrictions." See Securities Act Release No. 6863 (April 24, 1990). May a person seeking to rely on the Category 3 safe harbor under Rule 903 apply this guidance in establishing that offers and sales are not made to a U.S. person or for the account or benefit of a U.S. person?

Answer: Yes. [December 8, 2016]

Question 277.05

Question: Can the certification and agreement required under Regulation S (such as those required under Category 3 and those required with respect to warrants) be provided electronically?

Answer: There are no specific requirements under Regulation S relating to the manner in which certifications and agreements are made. As a result, issuers and distributors may use electronic procedures to obtain the certifications and agreements. Such processes may be implemented by third parties and issuers and distributors may rely on those procedures to the same extent and in the same manner as when certifications and agreements are obtained in paper. [December 8, 2016]

Question 277.06

Question: Does Rule 903(b)(4) relating to guaranteed debt securities apply to offerings of debt securities that are guaranteed by subsidiaries of a parent company guarantor or parent company issuer?

Answer: Yes. Rule 903(b)(4) would apply in situations when the parent company is the issuer (or a co-issuer) of the debt securities and one or more subsidiaries is a guarantor, and when the parent company is a guarantor and there are one or more subsidiaries which are also guarantors of the securities, in each case as long as the payment obligation of the parent company is full and unconditional. [December 8, 2016]

Section 278. Rule 904 [Reserved]

Section 279. Rule 905 — Resale Limitations

Question 279.01

Question: Rule 905 provides that any "restricted securities" under Rule 144 that are equity securities of a domestic issuer will continue to be deemed to be restricted securities notwithstanding that they were acquired in a resale transaction pursuant to Rule 901 or 904. May a holder of restricted securities, which were originally acquired from a foreign private issuer in a transaction described in Rule 144(a)(3) (other than Rule 144(a)(3)(v)), resell those securities offshore pursuant to Rule 904 and without regard to Rule 905, if the issuer no longer qualifies as a foreign private issuer at the time of resale?

Answer: Yes. Rule 905 only applies to equity securities that, at the time of issuance, were those of a domestic issuer. [Jan. 23, 2015]

Section 280. Rules 906 to 1001 [Reserved]

INTERPRETIVE RESPONSES REGARDING PARTICULAR SITUATIONS

Sections 501 to 509. Rules 100 to 133 [Reserved]

Section 510. Rule 134 — Communications Not Deemed a Prospectus

510.01 Rule 134 does not authorize the inclusion in tombstone ads of photographs of investment properties or descriptions of the tax benefits of investments. [Jan. 26, 2009]

510.02 A tombstone ad prepared pursuant to Rule 134 for use in connection with a registered public offering generally can be provided to existing shareholders along with a regularly provided quarterly report during the pre-effective period. [Jan. 26, 2009]

510.03 A broker-dealer participating in a registered public offering may send its clients a small reply card, along with a copy of a tombstone advertisement, to assist customers who wish to request a copy of the prospectus. [Jan. 26, 2009]

510.04 Although suitability requirements are not permitted under a literal reading of Rule 134, Rule 134(a)(16) does permit the inclusion of "any statement or legend required by any state law or administrative authority." In light of the position by the California Department of Corporations that advertisements for direct participation programs (limited partnerships) must include suitability requirements, issuers may use suitability requirements in Rule 134 advertisements distributed in California when they are included to comply with the Department's position. [Jan. 26, 2009]

510.05 Tombstone ads may contain a statement that the securities would be subject to early redemption or could be called by the issuer. [Jan. 26, 2009]

510.06 A commodity fund was advised that even though it bears some resemblance to an investment company, this fact does not automatically entitle it to include in its Rule 134 notice all of the information about its business that investment companies are permitted to include pursuant to Rule 482. The fund was reminded that Rule 134 permits only a brief indication of an issuer's business. [Jan. 26, 2009]

Sections 511 to 512. Rules 134a to 134b [Reserved]

Section 513. Rule 135 — Notice of Proposed Registered Offerings

513.01 A press release issued pursuant to Rule 135 in connection with an initial public offering may state that the shares to be offered have not yet been authorized and therefore their issuance is subject to shareholder approval. [Jan. 26, 2009]

513.02 A letter to be sent to holders of limited partnership units in various oil and gas programs, for the purpose of determining their interest in converting the smaller programs into one new large program, may involve the offer of a security of the new program within the meaning of Securities Act Sections 2(a)(3) and 5. Any such communication, if it is an offer, would either have to be registered under the Securities Act or exempt from Securities Act registration. For registered offerings, Rule 135 would permit a simple notice describing the purpose and terms of such an offering, but would not allow the solicitation of indications of interest. [Jan. 26, 2009]

513.03 A cash out merger of Company A by Company B has been approved by Company B's shareholders. Prior to consummation of the merger, Company B intends to make a registered public offering and proposes to send a Rule 135 notice to Company A's shareholders. Such a notice would come within the term "publishe[d] through any medium" in Rule 135 and thus is permissible. [Jan. 26, 2009]

Sections 514 to 521. Rules 135a to 138 [Reserved]

Section 522. Rule 139 — Publications or Distributions of Research Reports by Brokers or Dealers Distributing Securities

522.01 Rule 139 defines "offer for sale" in relation to certain dealer publications, and provides limited relief from the application of Section 5 to such publications when used in connection with registered offerings by reporting companies or certain foreign private issuers with offshore trading histories or that have a $700 million worldwide public float. The rule cannot be extended by analogy to offerings of other non-reporting companies, since the public availability of the information contained in Exchange Act reports is a fundamental basis of the rule. [Jan. 26, 2009]

522.02 A reporting company filed a registration statement on Form S-4 for a Rule 145 merger transaction. Shareholders had voted to approve the transaction and no further shareholder vote regarding valuation contingencies was required. The approval of a regulatory authority was needed before the transaction could be closed. On these facts the sale of the shares occurred when shareholders voted to approve the merger; accordingly, the registered offering had been completed for purposes of Rule 139. [Jan. 26, 2009]

522.03 The broker-dealer that acted as underwriter in an initial public offering now has a small long position in the underwritten stock in its investment account as a result of bad orders. The issue otherwise sold out. On these facts, the distribution was concluded for purposes of the Rule 139 safe harbor provisions, notwithstanding the stock held in the investment account. As a result, the broker-dealer could make recommendations regarding the issuer's securities without concern that those recommendations would be deemed to be offers or sales. [Jan. 26, 2009]

Section 523. Rules 139a [Reserved]

Section 524. Rule 140 — Definition of "Distribution" in Section 2(a)(11) for Certain Transactions

524.01 A limited liability company sought to issue to its employees the stock of its financing member, which has the sole purpose of issuing stock to the public and investing the proceeds thereof in the LLC's securities. Because of this relationship, Rule 140 requires the LLC to register as co-issuer on any Securities Act registration statement filed by the financing member for the sale of the financing member's stock. Accordingly, the LLC would be included as a registrant on any Form S-8 filed by the financing member. It is therefore not necessary to analyze whether the financing

member is a "subsidiary" of the LLC for purposes of determining whether the finance member may register its stock on Form S-8 for sale to employees of its "parent." [Jan. 26, 2009]

Sections 525 to 527. Rules 141 to 143 [Reserved]

Section 528. Rule 144 — Persons Deemed Not to be Engaged in a Distribution and therefore Not Underwriters — General Guidance

528.01 Rule 144 is not available for sales of an issuer's securities by its subsidiary, since a parent-issuer may not do indirectly through a subsidiary what it may not do directly under Rule 144. *See* Securities Act Release No. 5306 (Sept. 26, 1972). For example, a subsidiary, which is not a bank or trust company, that acts as trustee for its parent's employee benefit plan would not be permitted to rely on Rule 144 for sales of its parent's securities in connection therewith. [Jan. 26, 2009]

528.02 Unregistered resales of restricted securities may be made in markets outside the United States, including foreign exchanges, in reliance on Rule 144 or the safe harbor provisions of Regulation S. Any arrangement to return the restricted securities to U.S. markets may indicate, as suggested by Securities Act Release No. 7190 (June 27, 1995), an evasive scheme to avoid registration, which would invalidate any safe harbor claim. [Jan. 26, 2009]

528.03 A person holds only restricted securities and has held them for less than the requisite Rule 144(d) holding period. Such person cannot effect a short sale of securities of that class, and then cover with such person's restricted securities (even though the restricted securities are now eligible for sale) since the initial short sale did not qualify under Rule 144. *See* Securities Act Release No. 6099, Question 82 (Aug. 2, 1979). [Jan. 26, 2009]

528.04 Rule 144 is not available for the sale of securities acquired by an underwriter or finder as compensation for services rendered in connection with a registered public offering. The securities held by the underwriter or finder are not considered restricted securities because they were not acquired in a transaction or chain of transactions not involving any public offering. As such, Rule 144 may not be relied upon for their sale. However, Rule 144 may be applied constructively for the resale of such shares in the following manner:

(1) provided that six months has elapsed since the last sale under the registration statement, an underwriter or finder may resell the shares in accordance with the provisions of Rule 144(c), (e), and (f), except for the notice requirement. *See* Securities Act Release No. 6099, Question 10 (Aug. 2, 1979);

(2) a purchaser of the shares from an underwriter or finder receives restricted securities unless the sale is made with an appropriate, current prospectus, or unless the sale is made pursuant to the conditions contained in (a) above;

(3) a purchaser of the shares from an underwriter or finder who receives restricted securities may include the underwriter's or finder's holding period, provided that the underwriter or finder is not an affiliate of the issuer; and

(4) if an underwriter or finder transfers the shares to its employees, the employees may tack the firm's holding period for purposes of Rule 144(d), but they must aggregate sales of the distributed shares with those of other employees, as well as those of the underwriter or finder,

for a six-month period from the date of the transfer to the employees. [Jan. 26, 2009]

528.05 A company in bankruptcy proposes to issue stock to an unrelated party for the acquisition of another business. Although the issuance will be part of the court-approved reorganization plan, it will not meet the requirements for the Securities Act exemption afforded by Section 1145(a) of the Bankruptcy Code because the issuance will not be in exchange for a bankruptcy claim or administrative expense. The company will rely on Securities Act Section 4(2) for its registration exemption. Because the offer and sale of the securities under the plan of reorganization are not exempt under Section 1145, the securities are restricted securities under Rule 144(a)(3) and may be publicly resold under Rule 144 or registered prior to resale. [Jan. 26, 2009]

528.06 The cessation of affiliate status is a facts-and-circumstances determination, and counsel should not assume that it ceases instantly when, for example, the former affiliate resigns from his or her position at the company. [Jan. 26, 2009]

528.07 A company issued securities under Securities Act Section 3(a)(6) but has lost its eligibility to use that exemption in the future. Shares held by affiliates of the company may be resold pursuant to the provisions of Rule 144 (except for the holding period provisions). [Jan. 26, 2009]

528.08 A private purchaser wishes to invest directly in an issuer but wants to acquire unrestricted securities. Through arrangements and understandings with the issuer, an existing shareholder with shares that are either restricted securities currently eligible for sale under Rule 144 or unrestricted securities sells the shares to the private purchaser. At about the same time, the issuer sells an equivalent number of shares to the existing shareholder. The Division's view is that the shares taken by the private purchaser from the existing shareholder will be restricted securities within the meaning of Rule 144(a)(3). The holding period will date to the private acquisition. A public resale of the shares acquired from the existing shareholder without regard to the conditions of Rule 144 would raise serious issues under Securities Act Section 5 for all parties to the transactions. [Jan. 26, 2009]

Section 529. Rule 144(a) — Definitions

529.01 An affiliate settlor transfers unrestricted shares to a charitable remainder trust. The control securities are the only asset of the trust. The entire income interest in the trust is held by the affiliate and the affiliate's family members sharing the same residence. Income distributions are made annually. Whether the trust is an "affiliate" of the issuer under Rule 144(a)(1) and whether the trust and the settlor are the same "person" under Rule 144(a)(2) are separate questions to be resolved under the separate standards of Rules 144(a)(1) and (a)(2), respectively. Further, the affiliate status of the trust is not necessarily changed by the use of an independent trustee. [Jan. 26, 2009]

529.02 An affiliate purchased common stock of its company in a private transaction from a non-affiliate who acquired the shares in the open market. Since such shares are not restricted securities within the meaning of Rule 144(a)(3), the Rule 144(d)(1) holding period requirement does not apply to resales of these shares by the affiliate. However, all of the other requirements of the rule would have to be complied with by the affiliate for any of its sales of the shares under the rule. [Jan. 26, 2009]

529.03 Securities were inadvertently sold to a company's employees under a "stale" Form S-8 registration statement. For purposes of resale by the

purchasing employees, the securities would be treated as if they were unrestricted so as not to penalize innocent purchasers under the "stale" Form S-8. [Jan. 26, 2009]

529.04 An affiliate transfers securities acquired in the open market to her spouse (a non-affiliate) pursuant to, and on or subsequent to the date of, a court-approved divorce settlement agreement. The non-affiliate spouse need not consider such securities restricted because the securities were not "sold" to the spouse by the affiliate. [Jan. 26, 2009]

529.05 An underwriter receives, as compensation for managing an exempt industrial development bond offering, warrants to purchase securities of the corporation using the industrial development bond-financed facility. Such warrants will be deemed restricted securities for purposes of Rule 144. [Jan. 26, 2009]

Section 530. Rule 144(b) — Conditions to be Met

530.01 Where a non-affiliate acquired securities in a private transaction under Rule 144(b)(1), the fact that it executed an investment letter for the acquired securities would not prevent it from reselling the securities without any restrictions under Rule 144. [Jan. 26, 2009]

530.02 An affiliate pledges restricted securities of an Exchange Act reporting issuer (an issuer that is, and has been for at least the 90-day period immediately before the sale, subject to the reporting requirements of Exchange Act Section 13 or 15(d)) to a non-affiliate pledgee on a non-recourse basis. The non-affiliate pledgee receives those restricted securities after the affiliate pledgor defaults. The non-affiliate pledgee (who has not been an affiliate during the preceding three months) may utilize Rule 144(b)(1)(i) to sell the securities, provided six months have elapsed from the time of the pledge and the Rule 144(c)(1) condition is satisfied as required under Rule 144(b)(1)(i). If, however, the pledge had been made with recourse, the pledgee could tack the pledgor's holding period to its own for purposes of satisfying the six-month holding period requirement of Rule 144(d)(1)(i). [Jan. 26, 2009]

530.03 Provided that the donor and donee have held the stock for a combined period of six months and that the Rule 144(c)(1) condition is satisfied as required under Rule 144(b)(1)(i), a non-affiliate donee (who has not been an affiliate during the preceding three months) who receives stock of an Exchange Act reporting issuer (an issuer that is, and has been for at least the 90-day period immediately before the sale, subject to the reporting requirements of Exchange Act Section 13 or 15(d)) from an affiliate donor may resell the stock under Rule 144(b)(1)(i) without a three-month waiting period because the donor and the donee are not the same "person" as defined in Rule 144(a)(2). [Jan. 26, 2009]

530.04 A non-affiliate estate may utilize Rule 144(b)(1), even though the decedent was an affiliate. [Jan. 26, 2009]

530.05 A person who enters into a binding contract for the sale of restricted securities within three months after ceasing to be an affiliate of the issuer of such securities may not utilize Rule 144(b)(1), even though the delivery of the securities takes place more than three months after such person loses affiliate status. [Jan. 26, 2009]

530.06 The settlor of a trust for the benefit of the settlor's children (who are past the age of majority and do not live with the settlor) is an affiliate of the issuer, and the trust holds restricted securities. Neither the independent trustee nor the beneficiaries are affiliates or have been

affiliates during the preceding three months. The trustee may sell the restricted securities under Rule 144(b)(1). [Jan. 26, 2009]

530.07 A person owns 20% of newly formed Company A and has held restricted securities of Company B for more than one year. The person, who is not an affiliate of Company B and has not been an affiliate during the preceding three months, effects a negotiated sale of the restricted securities to Company A, in accordance with all of the applicable requirements of Rule 144(b)(1). As a result, Company A now owns unrestricted securities of Company B. [Jan. 26, 2009]

Section 531. Rule 144(c) — Current Public Information

531.01 A corporation had a registered public offering in 2000. Since then, it has continuously filed periodic reports under Section 15(d) of the Exchange Act, even though it has always had fewer than 300 record holders. The corporation has just had a second public offering. In view of the history of voluntary reporting, the Division staff was of the view that holders of restricted securities need not wait 90 days from the effective date of the registration statement before commencing sales of such securities pursuant to Rule 144, assuming the issuer is current in its voluntary reporting. [Jan. 26, 2009]

531.02 An issuer was required to file a Form 10-K on February 14, 2005. Because its executive offices had burned down in early February, the issuer filed a Form 12b-25 for an extension of time, extending the due date for the Form 10-K to March 1. The issuer was unable to file on March 1, and thereby became delinquent. A director sold the issuer's stock on March 4 pursuant to Rule 144. Before the sale was made, the director's broker checked with the Division's staff, and was told that the issuer was current in its Exchange Act filings. This information was incorrect. The issuer's attorney was advised that Rule 144 was not available for the sale by the director, because the director's relationship to the issuer was such that the director had reason to believe that the issuer was not current in reporting. It should be noted that a seller under Rule 144 may not rely on a verbal representation by any Division staff member as to the current reporting status of an issuer, and Division staff members therefore will decline to answer inquiries on such matters. [Jan. 26, 2009]

531.03 A parent has guaranteed the outstanding debt securities (all of which are unlisted) of its wholly owned subsidiary and furnishes summarized disclosure with respect to the subsidiary in its Exchange Act reports. The subsidiary does not file Exchange Act reports. In these circumstances, the subsidiary will be deemed to satisfy the public information requirement of Rule 144(c)(1) with respect to the guaranteed debt securities so long as its parent satisfies that requirement with respect to itself and continues to provide summarized disclosure concerning the subsidiary in accordance with Rule 3-10 of Regulation S-X. Restricted debt securities of the subsidiary could be sold in accordance with the provisions of the rule. [Jan. 26, 2009]

Section 532. Rule 144(d) — Holding Period for Restricted Securities

532.01 A pledgor who is an affiliate defaults on a loan that is secured, either with or without recourse, by a bona fide pledge of company stock acquired in the open market (i.e., these securities are not "restricted securities" in the pledgor's hands). In the pledgee's hands, these securities are "restricted securities" because they have been "acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering." If the pledgee is a non-affiliate and has not been an affiliate during the preceding three months, the pledgee may resell such securities pursuant to Rule 144(b)(1)

without regard to the holding period requirement in Rule 144(d) but subject to the current public information requirement in Rule 144(c)(1), as applicable. No other requirements in Rule 144 are applicable to the pledgee's resale. [May 16, 2013]

532.02 If a preferred stockholder tenders shares to the issuer and receives in return cash plus a new series of preferred, the stockholder may tack its holding period for the old preferred to that for the new series. [Jan. 26, 2009]

532.03 New investors in a closely-held investment partnership, and existing partners to whom assets have been redistributed upon withdrawal of other partners, may rely on the position on tacking set forth in Question 34(a) in Securities Act Release No. 6099 (Aug. 2, 1979), provided the fundamental character of the partnership is not changed. [Jan. 26, 2009]

532.04 In a stock-for-stock acquisition, the closing will be delayed until the acquired corporation's year-end revenues have been determined, giving the acquiring corporation an "out" if such revenues do not reach a pre-determined level. The Rule 144 holding period for recipients of the acquiring corporation's stock will not begin until the closing because the recipients will not be at economic risk until that time. [Jan. 26, 2009]

532.05 A closely-held corporation distributes restricted securities of an issuer pro rata and without consideration to its shareholders, which are three limited partnerships. Each of these limited partnerships, in turn, distributes the restricted securities pro rata and without consideration to its partners (about 10 people in each instance). Tacking of holding periods from corporation to partnerships, and from partnership to partners, is permitted for purposes of Rule 144(d). [Jan. 26, 2009]

532.06 Question 23 of Securities Act Release No. 6099 (Aug. 2, 1979), dealing with the commencement of the Rule 144(d) holding period for restricted securities issued pursuant to a written agreement, provides that the holding period starts when the person who will receive the securities is deemed to have paid for the securities and thereby assumed the full risk of economic loss with respect to them. The holding period for restricted securities that an employee receives pursuant to an individually negotiated employment agreement commences when investment risk for the securities passes to the employee (which is the date that the employee is deemed to have paid for them). For full value awards, if the vesting of the securities is conditioned solely on continued employment and/or satisfaction of performance conditions that are not tied to the employee's individual performance and the employee pays no further consideration for the securities, that date would be the date of the agreement. For awards that require additional payment upon exercise, conversion or settlement, that date would be the date on which such payment is made. [October 19, 2016]

532.07 Pro rata redemptions of partnership interests in a closely-held investment partnership with partners receiving distributions of restricted securities in kind, as, for example, in liquidation, would allow partners to tack the partnership holding period for purposes of Rule 144(d). [Jan. 26, 2009]

532.08 An affiliate transfers restricted stock to a corporation of which the affiliate owns 84%. The corporation intends to sell the restricted stock and convey to the affiliate an interest in the corporation equal to the proceeds of the sale. Tacking by the corporation of the affiliate's holding period would not be permitted for purposes of Rule 144 because the transfer to the corporation is deemed to be a private sale which commences a new holding period for the purchaser. [Jan. 26, 2009]

532.09 Investor A purchased 100 shares of restricted stock of a reporting company by executing a promissory note which did not meet the requirement of Rule 144(d)(2). Since this obligation is not considered to be "full payment of the purchase price" under the rule, Investor A's holding period commences only at such time or times as Investor A actually makes payment on the note. Investor A paid off half the amount of the note over six months ago and, accordingly, the holding period requirement for 50 shares (half the total of 100) has been met. Investor A recently sold 50 shares of the restricted stock in a registered offering. The question presented was whether the shares sold in the registered offering must be regarded as the shares as to which the holding period had run. Although Rule 144 does not establish a guide for this situation, it was decided that Investor A could deem the registration statement to relate solely to the shares for which the holding period requirement had not been satisfied. As a result, Investor A may now sell all of the remaining 50 shares under Rule 144, assuming Rule 144(c) is satisfied. [Jan. 26, 2009]

532.10 Securities have been escrowed by an issuer as a contingent payment in connection with an acquisition. The escrow agreement gives the intended beneficiary the right to sell the securities during the life of the escrow, on condition that the sale proceeds are returned to the escrow account. Rule 144(d)(3)(iii) provides that securities acquired as a contingent payment in connection with the sale of a business shall be deemed to have been acquired at the time of the sale, for purposes of the holding period requirement of Rule 144(d). This provision, however, applies only to those securities that have actually been acquired in satisfaction of a contingency. Since the shares in this case are still subject to a contingency and have not been formally acquired, the beneficiary may not rely on Rule 144(d)(3)(iii) to satisfy the holding period requirement of the rule for sales made during the period the escrow arrangement is in effect. [Jan. 26, 2009]

532.11 A corporation distributes to its employees as a bonus restricted securities of an affiliated issuer which it acquired at an earlier date. For purposes of the holding period provisions of Rule 144(d), the employees would not be able to tack the corporation's holding period to their own. The employer-employee relationship of the parties suggests that the distribution is being made as a form of compensation for services rendered, rather than as a gift (for which tacking would be permitted). [Jan. 26, 2009]

532.12 An employee acquires restricted stock pursuant to a "price hook" plan, whereby the employee pays only a portion of the purchase price when acquiring the stock from the company. The remainder is to be paid when the stock is resold. The stock may not be resold under Rule 144, because the holding period requirement cannot be met under this arrangement, as the stock will not be fully paid for until the time of sale. [Jan. 26, 2009]

532.13 Convertible notes with accrued but unpaid interest are exchanged for shares of the issuer. The holding period for the notes can be tacked to the holding period on the shares under Rule 144(d)(3)(ii) only if the exchange "consist[s] solely of other securities of the same issuer." Although the right to receive payment for the accrued interest could be construed as additional consideration that is inconsistent with Rule 144(d)(3)(ii), the holding period for the convertible notes can be tacked to the holding period for all of the shares received in the exchange. This position is consistent with Securities Act Section 3(a)(9), which exempts certain exchanges where securities of the same issuer are the only consideration. [Jan. 26, 2009]

532.14 A private offering is made on a minimum/maximum basis (i.e., shares are not issued and proceeds not delivered to the company from an escrow account unless a minimum amount is sold). The Rule 144 holding

period for shares acquired in such an offering would begin at the time a shareholder pays for its shares and its payment is deposited in the escrow account. At that time, the shareholder is at risk for purposes of Rule 144(d), since it is committed to participating in the offering if the minimum amount is sold. [Jan. 26, 2009]

532.15 A Nevada corporation that holds restricted securities of another issuer effects a merger to change its domicile to Delaware. The restricted securities become the property of the Delaware successor as a result of the merger. Because of the exception for migratory transactions in Rule 145(a)(2), the merger is not a sale within the meaning of the Securities Act. The holding period of the Nevada predecessor for the restricted securities is not disturbed by the succession. [Jan. 26, 2009]

532.16 The holder of restricted securities of a foreign private issuer exchanges them for an equivalent number of American Depositary Receipts ("ADR") with the depositary. The ADR will be a restricted security itself with a holding period identical to that on the underlying security. The ADR may be sold in reliance on Rule 144 to the same extent the underlying security could have been sold. Note that Form F-6, which relates to the issuance of depositary shares evidenced by American Depositary Receipts, requires that the deposited securities be offered and sold in transactions registered under the Securities Act or exempt from registration. *See* General Instruction I.A(2) of Form F-6. [Jan. 26, 2009]

532.17 An affiliate holder of restricted securities bona fide pledges the securities to a bank to secure payment of a loan. In the event of default, the bank is required to exhaust the collateral before proceeding against the pledgor personally. For purposes of Rule 144(d)(3)(iv), the pledge is a recourse arrangement, so that the bank will have the benefit of the pledgor's holding period. [Jan. 26, 2009]

532.18 A promissory note, secured by the restricted securities purchased with the note, will meet the collateral standard of Rule 144(d)(2)(ii) if the note is also secured by other property with independent fair market value at least equal to the purchase price of the restricted securities. [Jan. 26, 2009]

532.19 An officer purchases securities from an issuer paying the full purchase price in cash. Thereafter, the officer purchases an equal number of shares through the use of a promissory note, securing the note with the officer's first purchase of securities. The use of such collateral to secure the promissory note is within the requirements of Rule 144(d)(2)(ii), and the holding period for the second purchase would begin when the note is given to the issuer. [Jan. 26, 2009]

532.20 A company sold shares to its employees pursuant to a private placement. The employees could borrow the entire purchase price from a non-affiliate bank, giving a note guaranteed by the company and placing the shares in escrow. If the company had to repay the note, it could repurchase the shares at book value. This arrangement, in substance, is the same as giving a note to the company in payment for the shares, and therefore, pursuant to Rule 144(d)(2), full payment of the purchase price has not been satisfied. [Jan. 26, 2009]

532.21 A non-affiliate acquired warrants from an issuer more than two years ago in partial consideration for the sale of a subsidiary. The non-affiliate wanted to pay the exercise price with shares of the issuer that it planned to purchase just prior to the exercise (for tax reasons) and then tack the holding period of the warrants to the holding period for the shares received upon exercise. The holding period of warrants that are turned in for the spread's worth of shares underlying the warrants (a "cashless

exercise") can be tacked to the holding period for the shares received. However, under these facts, because the proposed transaction would allow the non-affiliate to do indirectly what the non-affiliate could not do directly (pay the exercise price in cash and tack the holding period of the warrants to the holding period of the shares received upon exercise), tacking would not be permitted under Rule 144. A person using securities to exercise restricted stock purchase warrants should use the shorter of the holding period on the warrants or on the other securities used in payment to find the holding period for the shares received on exercise. [Jan. 26, 2009]

532.22 Where a seller surrendered a secured promissory note of the issuer as consideration for the cashless exercise of a warrant from the same issuer, the Division staff was of the view that the holding period of the note could not be tacked to the common stock received upon the exercise of the warrant. Under the particular facts, the note did not appear to be a "security" under the standards enunciated in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), and therefore, it would not qualify as a security of the issuer for purposes of tacking under Rule 144(d)(3)(ii). [Jan. 26, 2009]

532.23 An affiliate of an issuer secures a loan with restricted securities. The restricted securities are hypothecated to the lender, rather than pledged, and an irrevocable stock power is granted. On a default under the loan, the lender could use the two instruments to cause legal title to be transferred to itself. For purposes of the lender's holding period calculation, the hypothecation agreement and the irrevocable stock power may be construed as the equivalent of a pledge. Subject to the requirements for good faith and recourse against the borrower, the lender would be able to use the borrower's holding period under Rule 144(d)(3)(iv). [Jan. 26, 2009]

532.24 A company issues a convertible note with interest payable in shares of the company. The decision to pay the interest on the convertible note in the form of shares is solely at the discretion of the company. In determining whether the Rule 144(d)(1) holding period requirement has been satisfied in regard to such shares received as interest, the holding period of the note may be tacked to the holding period of the shares. [Apr. 24, 2009]

Section 533. Rule 144(e) — Limitation on Amount of Securities Sold

533.01 A company's common stock trades both on an individual share basis and in units, with each unit consisting of one share of common stock together with a detachable warrant. For purposes of Rule 144, the volume limitation for the common stock may be computed on the basis of all common shares traded, including those traded as part of a unit, since the common shares in the units are separable from the warrants. [Jan. 26, 2009]

533.02 H transfers stock to W in connection with a divorce settlement. H and W need not aggregate sales under Rule 144 once they are no longer married. Moreover, they will not be deemed to be selling in concert merely because of the settlement arrangement. [Jan. 26, 2009]

533.03 An affiliate sells both restricted convertible notes and restricted shares. The shares attributable to the notes sold plus the shares sold separately amount to less than one percent of the outstanding stock. Such sales would be within the volume limitations of Rule 144(e). *See* Securities Act Release No. 6099 (Aug. 2, 1979), at Question 46. [Jan. 26, 2009]

533.04 An affiliate of an issuer is the general partner of three limited partnerships which hold restricted securities of the issuer. If such limited partnerships transfer the restricted securities to all the partners, the affiliate must, for purposes of determining its volume limit under Rule

144(e), aggregate its Rule 144 sales of the distributed securities with (1) the Rule 144 sales of the distributed securities by the other partners who are affiliates of the issuer and (2) the Rule 144 sales of the same class of securities by the limited partnerships, for a period of six months following the distribution (if the issuer had been subject to the reporting requirements of Exchange Act Section 13 or 15(d) for a period of at least 90 days immediately before the distribution) or one year following the distribution. Further aggregation may also be required if the affiliate is "acting in concert" with other persons under Rule 144(e)(3)(vi). Absent "acting in concert," the affiliate partners and the limited partnerships need not aggregate their sales of the distributed shares with the sales of the distributed shares by partners who are not affiliates of the issuer. The non-affiliate partners are not subject to the volume limitation under Rule 144(e). [Jan. 26, 2009]

533.05 A closely-held investment partnership is an affiliate of ABC Co. The partnership distributed all of its restricted securities of ABC Co. held in its portfolio to all of its partners on a pro rata basis and without consideration from its partners. The partners who are affiliates of ABC Co. must aggregate their Rule 144 sales of the distributed shares of ABC Co. with (1) the Rule 144 sales of the distributed shares by all other partners who are affiliates of ABC Co. and (2) the Rule 144 sales of the same class of securities by the partnership, for a period of six months following the distribution (if ABC Co. had been subject to the reporting requirements of Exchange Act Section 13 or 15(d) for a period of at least 90 days immediately before the distribution) or for a period of one year following the distribution. Aggregation may also be required if the partners are "acting in concert" under Rule 144(e)(3)(vi). Absent "acting in concert," the partnership and the partners who are affiliates of ABC Co. need not aggregate their sales of the distributed shares with the sales of the distributed shares by partners who are not affiliates of ABC Co. The non-affiliate partners are not subject to the volume limitation under Rule 144(e). [Jan. 26, 2009]

533.06 Warrants originally issued in tandem with common shares are now trading separately. Holders of the warrants who wish to sell rather than exercise the warrants must consider the warrants a class of securities separate from the common stock for purposes of complying with the volume limitations of Rule 144(e). [Jan. 26, 2009]

533.07 A company has notified its transfer agent of the issuance of additional common stock. No other announcement has been made. Rule 144(e)(1)(i) permits the sale of one percent of the shares outstanding as shown by "the most recent report or statement published by the issuer." The notice to the transfer agent is insufficient publication to allow use of the increased number of shares for purposes of the alternative one percent volume limit of Rule 144(e)(1)(i). [Jan. 26, 2009]

533.08 An affiliate wishing to sell shares pursuant to Rule 144 discovered that a broker-dealer had executed, during the last week of the four-week period, a 100,000 share trade in the issuer's stock that had not been reported in the average weekly reporting volume of trading of such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association. The Division staff advised that the affiliate would have to rely solely on the reported volume. [Jan. 26, 2009]

533.09 Non-affiliates pledged unrestricted bank holding company securities to the holding company's affiliated bank as collateral for loans made by the affiliated bank in the ordinary course of its business. Following default, the affiliated bank foreclosed and sought to sell the holding company securities. The Division staff took the position that sales of pledged securities by the

affiliated bank could be effected pursuant to Rule 144 since the bank was effecting the sale as a pledgee in a bona fide loan situation and its decision to sell was occasioned solely by the borrowers' default. For purposes of Rule 144(e), the Division staff also took the position that such sales would have to be aggregated with any other sales by the bank as pledgee, but not with other sales by the pledgors. The latter conclusion was based on the fact that had the pledgors sold the securities themselves, they would not have been subject to Rule 144. [Jan. 26, 2009]

533.10 [withdrawn]

Sections 534 to 535. Rules 144(f) to 144(g) [Reserved]

Section 536. Rule 144(h) — Notice of Proposed Sale

536.01 An affiliate distributee from a partnership who is required to aggregate its sales with those of other affiliate distributees need not file a Form 144 if such affiliate distributee sells no more than 5,000 shares or shares with a market value not exceeding $50,000 in any three-month period, notwithstanding sales made by other distributees. [Jan. 26, 2009]

536.02 A subsidiary bank, acting in its fiduciary capacity, sells unrestricted shares of its holding company parent for an unaffiliated trust account. Form 144 need not be filed solely because of the bank's involvement, because the bank is not making a sale for its own account. [Jan. 26, 2009]

536.03 An affiliate of the issuer files a notice on Form 144 reporting the proposed sale of less than the full amount of securities that could be sold under the volume tests of Rule 144(e). During the same three-month period, the affiliate wishes to make additional Rule 144 sales in an amount that, taken together with the original sales, would not exceed the maximum number of securities that could have been sold at the time of the notice. The affiliate may not file an amended Form 144 to accomplish additional sales because a Form 144 must represent the affiliate's intent at the time of its filing. The affiliate may file a new Form 144 to sell additional securities, so long as these new sales satisfy the volume limitations existing when the new Form 144 is filed. [Jan. 26, 2009]

536.04 A Form 144, filed on behalf of an affiliate of the issuer by an attorney in fact, should be accompanied by a signed copy of the power of attorney. After such power of attorney is attached to the Form 144, it does not have to be re-filed as an attachment to subsequently filed Forms 144 while it remains in effect. [Jan. 26, 2009]

536.05 An affiliate of the issuer proposes to make Rule 144 sales of both common stock and securities convertible into common stock. For purposes of determining whether the 5,000 shares or $50,000 condition to filing Form 144 has been met, the convertible securities should be regarded as having been converted into the common stock in the same manner as provided by Rule 144(e)(3)(i). [Jan. 26, 2009]

536.06 After an affiliate files a Form 144, the issuer declares a stock split. No new filing is required within the three-month period to sell the entire number of shares, on a post-split basis, for which the seller had originally filed. [Jan. 26, 2009]

Sections 537 to 538. Rules 144(i) to 144A [Reserved]

Section 539. Rule 145 — Reclassification of Securities, Mergers, Consolidations and Acquisitions of Assets

539.01 A holding company reorganization was to be carried out pursuant to Section 251(g) of the Delaware General Corporation Law and would not

trigger a shareholder vote or appraisal rights. The reorganization was linked to an acquisition transaction with a third party (i.e., its consummation was a condition to closing with respect to the acquisition agreement). The purpose of the reorganization was to obtain more favorable tax treatment for the acquisition. When viewed together with the acquisition, the overall transaction changed the nature of the shareholders' investment. Therefore the reorganization would involve a "sale" or "offer to sell" for the purposes of Securities Act Section 2(a)(3) and Rule 145. [Jan. 26, 2009]

539.02 A change from business trust status in one state to corporate status in another state would not be within the change of domicile exception of Rule 145(a)(2) because of the significant change in organizational structure that will occur. [Jan. 26, 2009]

539.03 Statutory mergers by means of security holders' vote are defined by Rule 145(a)(2), for purposes of Section 2(a)(3), as events of sale. The rule excludes from this definition mergers for the sole purpose of changing the issuer's state of incorporation. The exclusion itself is limited to migratory transactions occurring exclusively within the United States, from one state to another. Despite the rule's express domestic limitation, similar transactions changing a foreign issuer's domicile from one political subdivision of a country to another (such as reincorporation from one Canadian province to another) likewise should not be treated as a sale. However, if a non-U.S. corporation undertakes a merger to incorporate within the United States, the migratory transaction is an event of sale that must be registered with the Commission or exempt from registration. [Nov. 26, 2008]

539.04 Item 17(b)(7) of Form S-4 states generally that the financial statements of acquired companies that were not previously Exchange Act reporting companies need be audited only to the extent practicable, unless the Form S-4 prospectus is to be used for resales by any person deemed an underwriter within the meaning of Rule 145(c), in which case such financial statements must be audited. The Division staff was asked whether a resale pursuant to Rule 145(d), in lieu of the Form S-4 prospectus, would require the financial statements to be audited. The Division staff noted that Rule 145(d) is not included in the Instruction to Item 9.01 of Form 8-K regarding sales pursuant to Rule 144 during the 71-day extension period for filing financial statements. As the audited financial statements for the acquired company would be required pursuant to Item 9.01 of Form 8-K, a resale pursuant to Rule 145(d) would not be permitted until they are filed. [April 2, 2008]

539.05 A proposed Rule 145 merger is submitted for a vote of shareholders at an annual meeting at which directors are also to be elected. Incumbent directors would be deemed "underwriters" with respect to the securities issuable in the merger transaction for purposes of paragraph (c) of Rule 145, even though they are not candidates for reelection. [Jan. 26, 2009]

539.06 A former affiliate of a shell company that was acquired in a registered Rule 145 transaction received four percent of the outstanding shares of the acquiring company. Although Rule 145(d)(2)(i) would permit the former affiliate to sell publicly one percent of the outstanding shares every three months, the former affiliate wishes to sell the entire four percent in a single transaction. The former affiliate (who is not an affiliate of the acquiring company) was advised that Rule 145(d) did not preclude a private sale of the entire amount, but the buyer in any such private transaction would have to step into the shoes of the seller and comply with Rule 145(d) in making public resales of the securities. [Jan. 26, 2009]

539.07 A person subject to Rule 145(c) converts preferred stock received in a Rule 145 transaction into common stock. Such person may tack the holding period for the preferred to that of the common in determining eligibility to use Rule 145(d)(2) to the extent permitted by Rule 144(d). [Jan. 26, 2009]

539.08 A partnership distributes restricted shares of shell company A to its partners, X and Y. X and Y hold enough shares of A to be deemed to be affiliates. Consequently, when corporation B later acquires shell company A, and the shares of A are exchanged for shares of B, the two partners must sell their shares of B pursuant to Rule 145(d), as Rule 145(c) applies because A is a shell company. However, they need not aggregate their sales for purposes of the volume limitation of paragraph (e) of Rule 144, except to the extent that they are acting in concert or are the same person for purposes of Rule 144. [Jan. 26, 2009]

539.09 An affiliate of company A acquires securities of company B in a Rule 145 transaction. The affiliate gives some of those securities to a charity, and then — some time later — becomes an affiliate of B. Although such affiliate must now sell B shares pursuant to all the provisions of Rule 144 since such person is an affiliate of B, the charity can continue to sell pursuant to the provisions of Rule 145(d), to the extent Rule 145(c) applies. [Jan. 26, 2009]

539.10 X acquires stock in a registered Rule 145 offering, but is subject to the resale restrictions of Rule 145(d) because X is an affiliate of the acquired company and Rule 145(c) applies. Pursuant to and on or subsequent to the date of a court-approved divorce settlement, X transfers some of the shares to spouse Y who is not an affiliate. The shares are not subject to resale restrictions in Y's hands because Y is not subject to the Rule 145(d) restrictions and the resale status of a spouse receiving securities in a divorce proceeding under these circumstances will be determined by the status of Y and not by the status of X. [Jan. 26, 2009]

539.11 Less than six months after a Rule 145 transaction, a person deemed to be an underwriter by Rule 145(c) dies. The estate of the 145(c) underwriter may in general sell publicly in the same manner the decedent could have, that is, under paragraphs (c), (e), (f), and (g) of Rule 144, which apply due to Rule 145(d)(2)(i). If the estate is not an affiliate of the issuer, it will be able to sell subject only to the current public information requirement in Rule 144(c) because of the relief provided to unaffiliated estates by Rule 144(e) and Rule 144(f). [Jan. 26, 2009]

Section 540. Rule 146 [Reserved]

Section 541. Rule 147 — Intrastate offers and sales

541.01 A local bank, whose shares are held only by Texas residents, is planning to form a bank holding company and exchange shares with its shareholders under Rule 147. If shareholders move out of state during the time required to obtain regulatory approvals, such shareholders may be "cashed out" to retain the Rule 147 exemption, assuming cashing out is permitted under the applicable state law. [Jan. 26, 2009]

541.02

[withdrawn, Sept. 20, 2017]

541.03 A family trust that is not deemed to be a separate legal entity has two trustees – only one of which resides in a state where a Rule 147 offering is being made. Following Securities Act Release No. 33-10238, because one of the trustees resides in the state where the Rule 147 offering

is being made, the issuer in the Rule 147 offering may offer and sell securities to the trust in the Rule 147 offering. [Sept. 20, 2017]

Sections 542 to 572. Rules 148 to 173 [Reserved]

Section 573. Rule 174 — Delivery of Prospectus by Dealers; Exemptions Under Section 4(3) of the Act

573.01 A registrant's initial public offering has been consummated, but the Rule 174 prospectus delivery period is still applicable. The registrant is considering making a material acquisition that it considers probable. The registrant would need to supplement the prospectus as appropriate so that the prospectus complies with Securities Act Section 10(a) at the time of any delivery required pursuant to Rule 174. [Jan. 26, 2009]

573.02 Company A, which is not an Exchange Act reporting company, proposes to use Form S-3 to issue debt securities that would be guaranteed by its Exchange Act reporting parent. Company A is a wholly-owned subsidiary of parent and the guarantee is full and unconditional. The exemption from prospectus delivery requirements provided by Rule 174(b) would be available for this offering because the parent would be subject to the Exchange Act reporting requirements immediately prior to the time of filing the registration statement, Company A would be wholly-owned by parent, and parent would fully and unconditionally guarantee the debt securities. [Jan. 26, 2009]

573.03 If an exchange has approved an issue for trading as of the earlier of the effective date or the day the offering commences, but actual trading cannot commence until closing, with when-issued trading occurring in the interim, Rule 174(d) would be available for the when-issued trading. [Jan. 26, 2009]

573.04 The prospectus delivery requirements of Rule 174(d) apply in the context of savings and loan conversions, when a subscription offering to existing depositors at a specified price range is followed by an offering to the general public at a fixed price. The commencement of the subscription offer would be the commencement of a bona fide public offering for purposes of Rule 174(d). Although the security would not commence trading until closing, if, as of commencement of the offering, the security is authorized for inclusion in an electronic inter-dealer quotation system sponsored and governed by the rules of a registered securities association, the 25-day prospectus delivery period of Rule 174(d) would be available. [Jan. 26, 2009]

573.05 Rule 174 shortens to 25 days the prospectus delivery period for initial public offerings that are immediately listed for trading on an exchange or eligible for quotation on an automated quotation system of a national securities association. However, Exchange Act Rule 15c2-8(d) provides that broker-dealers must continue to deliver the same prospectuses, upon request, for the full 90-day period. While Rule 174(d) relieves broker-dealers of an obligation to deliver prospectuses in connection with every deal during the full 90-day period, it does not change broker-dealers' obligations to deliver prospectuses *upon request* during that time. [Jan. 26, 2009]

Sections 574 to 597. Rules 175 to 400 [Reserved]

Section 598. Rule 401 — Requirements as to Proper Form

598.01 As set forth in Rule 401, a registration statement must meet the form requirements at the time it is first filed, and also at the time of any Section 10(a)(3) post-effective amendment. A registration statement on

one form may be changed to any other form for which it is then eligible by pre-effective or post-effective amendment, with one exception. An issuer may not file a pre-effective or post-effective amendment to change a registration statement that is not an automatic shelf registration statement to an automatic shelf registration statement. Instead, the issuer must file a new registration statement on Form S-3 or Form F-3, designated as an automatic shelf registration statement. Except for registration statements and post-effective amendments described in Rule 401(g), once a registration statement is declared effective, it is deemed to be on the proper form. [Apr. 24, 2009]

598.02 Pursuant to Instruction 3 to the signature requirements for Form S-3, a corporation may sign and file a registration statement on Form S-3 for an offering of non-convertible debt or preferred securities if it has a reasonable basis to believe that the investment rating of such securities at the time of sale will permit use of the form. If an investment grade rating is not received, a post-effective amendment would be required when the issuer cannot satisfy Form S-3 eligibility requirements without such a rating. [Jan. 26, 2009]

598.03 A registrant has an effective Form S-3 for a secondary offering. At the time of filing, all requirements for use of the form were met. Now, three months later, it appears that a dividend payment on certain preferred stock may be missed. The registrant may continue to use the effective Form S-3 so long as there is no need to update the registration statement for purposes of Securities Act Section 10(a)(3). At the time that updating is necessary, Rule 401 would require the use of whatever form is available to the registrant at that time. [Jan. 26, 2009]

Sections 599 to 602. Rules 401a to 404 [Reserved]

Section 603. Rule 405 — Definition of Terms

603.01 Under Rule 405, the definition of "dividend or interest reinvestment plan" would cover a plan whereby limited partners could reinvest cash flow distributions into the partnership for additional partnership interests. [Jan. 26, 2009]

603.02 A company with a December 31 fiscal year-end emerged from bankruptcy in mid-January of 2008. In March 2008, the company filed a Form 10-K with audited financial statements for the fiscal year ended December 31, 2007. The Form 10-K did not include audited financial statements for the period in the beginning of January prior to the company's emergence from bankruptcy. The company will remain an "ineligible issuer" pursuant to sub-paragraph (1)(iv)(B) of the definition of "ineligible issuer" in Rule 405 until it files audited financial statements for a period ending subsequent to its emergence from bankruptcy. [Jan. 26, 2009]

603.03 A well-known seasoned issuer with an effective automatic shelf registration statement filed a Form 10-K prior to the Form 10-K due date. Because the Form 10-K failed to include audited financial statements and was therefore materially deficient, the issuer planned to amend the Form 10-K, and asked whether eligibility as a well-known seasoned issuer would be reassessed at the time of the amendment. Rule 405 requires an issuer to reassess its well-known seasoned issuer status at the time it files a Form 10-K to update a shelf registration statement for Section 10(a)(3) purposes. Under these facts, as the originally filed Form 10-K was so materially deficient that it would not be considered filed for purposes of assessing form eligibility, the issuer would need to reassess its well-known seasoned issuer status at the time it files its amended Form 10-K. If the amended Form 10-K is not filed by the Form 10-K due date, the issuer

would not be eligible as a well-known seasoned issuer on or after that due date, because it would not be timely in its Exchange Act filings. [Jan. 26, 2009]

Sections 604 to 608. Rules 406 to 411 [Reserved]

Section 609. Rule 412 — Modified or Superseded Documents

609.01 A calendar year company proposed to file a registration statement on Form S-3 on February 1, 2006. The registrant would include financial statements for the year ended December 31, 2005, and incorporate its Form 10-K for the year ended December 31, 2004. The registrant was concerned because the financial statements in the 2004 Form 10-K would become out of date. Rule 412(a), however, has the effect in these circumstances of automatically superseding the December 31, 2004 financial statements for purposes of the Form S-3 filing. In the event the registrant wished to remove all doubt about outdated financial statements in the Form 10-K being superseded by later financials included in the Form S-3, Rule 412(b) permits it to include a specific statement in the Form S-3 on the subject. [Jan. 26, 2009]

Section 610. Rule 413 — Registration of Additional Securities and Additional Classes of Securities

610.01 An issuer filed a registration statement on Form S-4 for a merger. Inadvertently, the number of shares registered was not sufficient to cover certain shares issuable upon the exercise of options during the period after the effective date of the registration statement but prior to the consummation of the merger. Rule 413(a) does not permit the registration of additional shares by post-effective amendment. Counsel was informed that: (1) it could rely on Rule 462(b) to prepare and file a short-form registration statement provided the amount to be registered was within the 20% limit and the other conditions were met; or (2) it could file a new registration statement that could be combined with the earlier registration statement pursuant to Rule 429. [Jan. 26, 2009]

610.02 In its effective Form S-8, a company registered 500,000 shares for sale by the company pursuant to an option plan, and 1,000 previously unregistered shares for resale on a resale prospectus pursuant to General Instruction C to Form S-8. The company may not rely on General Instruction C.3.(a) (which applies only to control securities and allows the addition of persons to the resale prospectus list of selling shareholders by means of a post-effective amendment or Rule 424(b) prospectus supplement) to shift any of the 500,000 shares registered on the primary portion to the resale prospectus since to do so would amount to registering additional securities by means of a post-effective amendment in contravention of Rule 413. [Jan. 26, 2009]

Section 611. Rule 414 — Registration by Certain Successor Issuers

611.01 A California corporation merged with a Delaware corporation for the purpose of changing its domicile. Rule 414 permits the Delaware corporation to use the registration statements of the California corporation by filing an amendment expressly adopting the statements of the predecessor. Because the merger entails the issuance of securities of a corporation different from the original registrant, the amendment should contain a new opinion of counsel on the legality of the issuance and counsel's consent. [Jan. 26, 2009]

611.02 In order for Rule 414 to effect registration of a successor issuer, paragraph (c) requires that the succession be approved by the predecessor's security holders at a meeting for which proxies were solicited

pursuant to Exchange Act Section 14(a) or information was furnished to security holders pursuant to Exchange Act Section 14(c). When the predecessor is an Exchange Act Section 15(d) company rather than a Section 12 company, and thus not subject to Section 14, the requirements of Rule 414(c) will be met when the proxy or information statement is prepared and votes are solicited substantially in accordance with Section 14. [Jan. 26, 2009]

611.03 A Form S-4 registration statement will be filed to convert an existing corporation into a trust that will have the same assets and management as its predecessor. Because of applicable tax law or state law provisions, the new trust will not be created until after the Form S-4 has become effective. The company sought advice as to who would be the registrant for the Form S-4 and who should sign the registration statement. Using Rule 414 as a model, the existing company may execute and file the registration statement. At the time the trust is formed, it should file a post-effective amendment adopting the registration statement. [Jan. 26, 2009]

Section 612. Rule 415 — Delayed or Continuous Offering and Sale of Securities

612.01 Rule 415(a)(1)(vii) permits a delayed or continuous offering in the case of mortgage-related securities. Although the Securities Act and the rules thereunder do not define mortgage-related securities, the Exchange Act was amended to provide such a definition in Section 3(a)(41). Because the term in Rule 415 was intended to have the same meaning as ultimately decided upon by Congress, a security meeting the definition in Exchange Act Section 3(a)(41) will also be deemed to be a mortgage-related security for purposes of Rule 415. In the case of a traditional mortgage-related securities offering which does not fall within the definition, consideration should be given to whether another subsection of Rule 415(a)(1) is available, for example, Rule 415(a)(1)(ix) or (x). Securities offerings registered in reliance on Rule 415(a)(i)(ix), unlike those registered in reliance on subsections (vii) and (x), are subject to the two-year limitation of Rule 415(a)(2), unless registered on Form S-3 or Form F-3. [Jan. 26, 2009]

612.02 An insurance company acquired 55% of the common stock of a company in a private transaction. It now holds these restricted securities as a reserve against claims. As the result of an annual state inspection, the insurance company has been questioned regarding the sufficiency of its reserves. In order to enhance the value of the restricted securities, it wishes to have them registered. Any registration statement filed for this purpose would be governed by Rule 415 because the insurance company may not intend to sell the securities immediately. Since the issuer would be deemed a subsidiary of the insurance company, it would be unable to rely upon Rule 415(a)(1)(i). Therefore, another paragraph of Rule 415 (a)(1) would have to be available in order to register the offering on a delayed or continuous basis. [Jan. 26, 2009]

612.03 An issuer that is not eligible to register a delayed primary offering on Form S-3 pursuant to Instruction I.B.1. of the form intends to conduct a rights offering for 30 days. Following that time, the shares not subscribed for will be sold in a firm commitment underwriting. The offering may be made in reliance on Rule 415(a)(1)(ix). Item 512(c) of Regulation S-K contemplates this result. [Jan. 26, 2009]

612.04 In the case of a registration statement pertaining to an offering of convertible debentures and the common stock underlying the debentures, Rule 415 typically is not applicable to the continuous offering of the underlying common stock because that offering is exempt from registration pursuant to Section 3(a)(9). In cases when the Section 3(a)(9) exemption

is unavailable (for example, when securities are convertible into securities of another issuer, when conversion terms require that the shareholder pay consideration at the time of conversion, or when conversion arrangements involve the payment of compensation for soliciting the exchange), absent another exemption, Rule 415(a)(1)(iv) is applicable. Rule 415 applies to registered offerings made on a delayed or continuous basis. [Jan. 26, 2009]

612.05 A registrant files a Form S-3 shelf registration statement for the delayed sale of debentures. Depending upon the level of interest rates at the time the offering actually takes place, the registrant may seek an opinion of California counsel to the effect that the offering does not violate the California usury laws. Such an opinion may be filed as an exhibit to a Form 8-K, since such forms are automatically incorporated by reference into Form S-3 registration statements. [Jan. 26, 2009]

612.06 An issuer with an effective acquisition shelf registration statement may follow the procedures described in Securities Act Release No. 6578 (Apr. 23, 1985) and the *Service Corporation International* interpretive letter (Oct. 31, 1985) issued by the Division to update the registration statement for use in subsequent acquisitions. [Jan. 26, 2009]

612.07 Questions have arisen concerning the application of Rule 415 to medium term note offerings. Many of these offerings begin promptly and are made on a continuous basis in reliance on Rule 415(a)(1)(ix). Others, however, are made on a delayed basis in reliance on Rule 415(a)(1)(x) since they do not begin promptly after effectiveness, but are continuous in nature once begun. An issuer eligible to rely on Rule 415(a)(1)(x) may file one registration statement that covers several immediate, continuous or delayed offerings, each a different program for a new series of notes. [Jan. 26, 2009]

612.08 A Rule 415 offering provides that purchasers within the first 60 days will receive a security with a higher yield than that to be received by subsequent purchasers. The registrant wished to extend the preferential purchase period for an additional 30 days. The Division staff has taken the position that such an extension is a material change in the plan of distribution, which according to the Item 512(a)(iii) undertaking would require a post-effective amendment (or, for registration statements on Form S-3 or F-3, compliance with one of the methods in Item 512(a)(1)(B)). [July 3, 2008]

612.09 It is important to identify whether a purported secondary offering is really a primary offering, i.e., the selling shareholders are actually underwriters selling on behalf of an issuer. Underwriter status may involve additional disclosure, including an acknowledgment of the seller's prospectus delivery requirements. In an offering involving Rule 415 or Form S-3, if the offering is deemed to be on behalf of the issuer, the Rule and Form in some cases will be unavailable (e.g., because of the Form S-3 "public float" test for a primary offering, or because Rule 415(a)(1)(i) is available for secondary offerings, but primary offerings must meet the requirements of one of the other subsections of Rule 415). The question of whether an offering styled a secondary one is really on behalf of the issuer is a difficult factual one, not merely a question of who receives the proceeds. Consideration should be given to how long the selling shareholders have held the shares, the circumstances under which they received them, their relationship to the issuer, the amount of shares involved, whether the sellers are in the business of underwriting securities, and finally, whether under all the circumstances it appears that the seller is acting as a conduit for the issuer. [Jan. 26, 2009]

612.10 The registrant filed a registration statement on Form S-11 relating to a "shelf" offering of mortgage backed bonds to be issued in series. The

registrant was informed that it would not be necessary to file post-effective amendments and supplemental indentures each time a new series of bonds was to be issued. The response was conditioned upon two factors:

1. A basic form of supplemental indenture including everything but the collateral for a particular series is filed at the time the registration is declared effective and the basic indenture is qualified; and

2. The registrant files a prospectus supplement in supplement form describing the issuance of the series and the collateral therefor.

This position is consistent with Instruction 1 to Item 601(a) of Regulation S-K. When a registrant does not satisfy these conditions, supplemental indentures and amended underwriting agreements may be filed only by post-effective amendment and not as exhibits to a Form 8-K. The reason is that Form S-11 does not permit incorporation by reference to subsequently filed Exchange Act reports, such as a Form 8-K. [Jan. 26, 2009]

612.11 Securities to be issued in connection with business combinations may be registered for the shelf pursuant to Rule 415(a)(1)(viii). While this rule does not limit the Securities Act registration form used, not all forms are available for business combinations. In particular, Form S-3 is not available for business combinations of *any* kind. The "for cash" proviso in General Instruction I.B.1 of Form S-3 is interpreted as prohibiting the use of the form not only for third-party exchange offers but also for any other business combination, however structured. *See* Securities Act Release No. 6534 (May 9, 1984), at fn. 14. Form S-3 may be used for a secondary offering of shares which were originally received from the issuer in connection with a business combination, assuming it is a genuine secondary offering. [Jan. 26, 2009]

612.12 A controlling person of an issuer owns a 73% block. That person will sell the block in a registered "at-the-market" equity offering. Rule 415(a)(4) applies only to offerings by or on behalf of the registrant. A secondary offering by a control person that is not deemed to be by or on behalf of the registrant is not restricted by Rule 415(a)(4). [Jan. 26, 2009]

612.13 Pursuant to a shelf registration statement, from time to time a company issues securities through a firm commitment underwriting at a fixed price based on the prior day's closing price. These firm commitment takedowns would not be considered "at the market offerings" because they are at a fixed price. However, sales into an existing trading market of securities of the same class made by broker-dealer firms who buy securities in such takedowns may be deemed indirect primary offerings made "at the market" within the meaning of Rule 415(a)(4), thereby triggering registration and prospectus delivery requirements. [Jan. 26, 2009]

612.14 In exchange for "consulting services," a private operating company intended to sell about 13 percent of its stock to a public company whose sole business was providing consulting services. The consulting services involved preparing a registration statement, applying for listing, obtaining market makers and several other services related to developing a market or raising capital. The public company intended to distribute about half of the 13 percent of the operating company stock it would receive to its stockholders as a "dividend" through a "spin-off." It also wanted to register the rest of the stock it would receive for resale pursuant to Rule 415(a)(1)(i). The transaction is a primary offering of the operating company through the public company and its shareholders and the registration statement would need to cover the entire distribution of these shares and the dividend shares, including their further distribution to the public. The registration statement would need to name the public company and its shareholders as underwriters and include appropriate disclosure about them, such as the

information described in Item 507 of Regulation S-K. In addition, because the operating company was not eligible to do an at the market offering on a primary basis pursuant to Rule 415(a)(4), the securities offered and sold pursuant to the registration statement would have to be offered and sold at a fixed price for the duration of the offering. [Jan. 26, 2009]

612.15 A company with minimal operations (parent company) and about 750 shareholders intended to create a subsidiary with no significant operations and spin it off to its shareholders, immediately after which the subsidiary would merge with a private operating company that has about 20 shareholders. After the merger, about 95 percent of the equity of the merged entity would be owned by former shareholders of the operating company, about four percent would be owned by the shareholders of the parent company, and about one percent would by owned by some insiders of the parent company who would receive stock in the operating company as a finder's fee in connection with structuring the transaction. It was contemplated that Securities Act registration statements covering the shares to be issued in the spin-off and the merger would be filed. In addition, after the merger some insiders of the parent company would sell shares of the merged entity that they would receive due to the spin-off and due to the exchange of the finder's fee shares in the merger.

Based on these facts, the transaction is a primary offering of the operating company through the parent company and its shareholders. As such, rather than registering parts of this transaction (i.e., the spin-off and merger), the entire distribution of the operating company shares to the public would need to be registered as a primary offering. The registration statement would have to name the parent company and its shareholders as underwriters, and include appropriate disclosure about them, such as the information described in Item 507 of Regulation S-K. In addition, because the operating company was not eligible to do an at the market offering on a primary basis pursuant to Rule 415(a)(4), the registration statement would have to include a fixed price for the duration of the offering. [Jan. 26, 2009]

612.16 A real estate investment trust utilizes an UPREIT structure whereby the REIT is the general partner of a limited partnership that holds all of the REIT's properties. Limited partners of the limited partnership may elect to convert their limited partnership units into common shares of the REIT on a one-for-one basis; however, the REIT may elect to pay cash instead of shares upon conversion. The REIT may register the issuance of common shares underlying outstanding limited partnership units pursuant to Rule 415(a)(1)(iv). If the REIT satisfies the registrant eligibility requirements in Instruction I.A of Form S-3, it may register the offering on Form S-3 pursuant to Instruction I.B.4 of the form. [Jan. 26, 2009]

612.17 Plans of financing can involve periodic adjustments of interest or dividend rates, rollovers of securities, and plans to buy back and re-market securities, sometimes coupled with "puts" or guarantees (which themselves are securities). Filings involving such plans require an analysis of Section 5 and Rule 415 issues with respect to all securities involved in the offerings. Even after the original offering of the securities has terminated, the registrant may still be engaged in a continuous or delayed offering with respect to the future periodic issuance or modification of securities. These subsequent transactions may involve primary offerings of the issuer's securities to the extent the issuer pays a remarketing or auction agent or otherwise is involved in subsequent sales such as in the remarketings or auctions. [Nov. 26, 2008]

Section 613. Rule 416 — Securities to be Issued as a Result of Stock Splits, Stock Dividends and Anti-Dilution Provisions and Interests to be Issued Pursuant to Certain Employee Benefit Plans

613.01 A registration statement for warrants and the underlying common stock was declared effective. The terms of the warrants included an anti-dilution clause, providing for a change in the amount of securities to be issued to prevent dilution resulting from stock splits or stock dividends. Subsequent to effectiveness, the issuer declared a preferred stock dividend on its common stock. Under the terms of the anti-dilution provision, warrant holders, upon exercise, would receive shares of common stock and a corresponding number of shares of preferred stock. Assuming a "sale" of preferred stock to the warrant holders is involved in the exercise of the warrant, the registration statement would not, under Rule 416, be deemed to cover the shares of preferred stock to be issued in connection with the anti-dilution provision, since these shares are of a different class from those registered. [Jan. 26, 2009]

613.02 When a registrant has a stock split prior to the completion of a registered distribution that is not covered by anti-dilution provisions, Rule 416(b) provides that the registration statement may be deemed to cover the additional securities if a post-effective amendment is filed to reflect the increase in the amount of securities registered. A company with securities registered on Form S-3 may not increase the number of shares registered by filing a Form 8-K. Instead, a post-effective amendment is required. The post-effective amendment could be limited to the facing page, an explanatory note and the Part II information, unless additional changes are being made to the prospectus. [Jan. 26, 2009]

Sections 614 to 615. Rules 417 to 418 [Reserved]

Section 616. Rule 419 — Offerings by Blank Check Companies

616.01 In a blank check offering, if a consummated acquisition meeting the requirements of Rule 419 has not occurred by a date 18 months after the effective date of the initial registration statement, funds held in the escrow or trust account must be returned to investors pursuant to Rule 419(e)(2)(iv) and escrowed securities must be returned to the registrant. In sum, the transaction must be unwound. For example, when the securities of a blank check company are all gifted to charities and no cash is actually paid, if after the expiration of the 18-month period no acquisition has been consummated, such escrowed shares must be returned to the registrant. [Jan. 26, 2009]

616.02 When a blank check company files a registration statement covering the resale of securities by selling shareholders, the issuer is required to comply with Rule 419 if the securities offered under the registration statement are "penny stock." Rule 419 applies to all registered offerings of securities by blank check companies when the securities are "penny stock," as defined in Exchange Act Rule 3a51-1. [Jan. 26, 2009]

Sections 617 to 619. Rules 420 to 423 [Reserved]

Section 620. Rule 424 — Filing of Prospectuses, Number of Copies

620.01 For EDGAR header purposes, when filing a Rule 424(b) prospectus supplement in connection with an offering that involves an initial effective registration statement and a second registration statement registering additional securities under Rule 462(b), the Rule 424(b) supplement must be filed under the registration number (33- or 333-) for the initial registration statement. The cover page of the Rule 424(b) supplement should, however, set forth the registration numbers of both the initial registration statement and the Rule 462(b) registration statement. [Jan. 26, 2009]

620.02 When a supplement to a prospectus is used, the Securities Act prospectus delivery requirements are not satisfied by delivery to broker/dealers of a supplement unattached to the prospectus. The supplement must be attached to the prospectus either physically or electronically so that the prospectus being delivered includes both the supplement and the prospectus. *See* Securities Act Release No. 6714 (May 27, 1987). The exceptions to this position involve Form S-8 and dividend reinvestment plans filed on Form S-3. In those cases, updating of the existing registration statement, without including the full prospectus, is accomplished through the use of Rule 424 supplements that are distributed to plan participants who have previously received a prospectus, or, in the case of Form S-8, through compliance with Rule 428. Such supplements must include a legend indicating that a full prospectus will be provided upon request. [Jan. 26, 2009]

620.03 A change in currency in which securities may be issued is not a fundamental change and may be accomplished by prospectus supplement under Rule 424(c). [Jan. 26, 2009]

620.04 A reduction of the commission paid to the underwriter or selling agent may be accomplished by prospectus supplement when the price of the securities is not changed. [Jan. 26, 2009]

Sections 621 to 623. Rules 425 to 427 [Reserved]

Section 624. Rule 428 — Documents Constituting a Section 10(a) Prospectus for Form S-8 Registration Statement; Requirements Relating to Offerings of Securities Registered on Form S-8

624.01 Rule 428(b)(2) requires the registrant to deliver, along with the documents containing the information required by Part I of Form S-8, one of: the latest Rule 14a-3(b) annual report, the latest Form 10-K, the latest Rule 424(b) prospectus, or an effective Form 10. An issuer that changed its fiscal year filed a six-month transition report on Form 10-K subsequent to its latest annual report on Form 10-K. When such issuer is relying on the Rule 428(b) Form 10-K delivery alternative, it must deliver both the latest annual report on Form 10-K and the transition report on Form 10-K in order to satisfy the Rule 428(b) requirement. [Jan. 26, 2009]

Section 625. Rule 429 — Prospectus Relating to Several Registration Statements

625.01 An issuer filed a registration statement on Form S-4 for a merger. Inadvertently, the number of shares registered was not sufficient to cover certain shares issuable upon the exercise of options during the period after the effective date of the registration statement but prior to the consummation of the merger. Rule 413(a) does not permit the registration of additional shares by post-effective amendment. Counsel was informed that: (1) it could rely on Rule 462(b) to prepare and file a short-form registration statement provided the amount to be registered was within the 20% limit and the other conditions were met; or (2) it could file a new registration statement that could be combined with the earlier registration statement pursuant to Rule 429. [Jan. 26, 2009]

Section 626. Rule 430 [Reserved]

Section 627. Rule 430A — Prospectus in a Registration Statement at the Time of Effectiveness

627.01 The instruction to paragraph (a) of Rule 430A provides that changes in volume and price representing no more than a 20% change in the maximum offering price set forth in the registration statement fee table

may be made pursuant to a Rule 424(b)(1) prospectus supplement. The 20% threshold may be calculated using the high end of the range in the prospectus at the time of effectiveness and may be measured from either the high end (in the case of an increase in the offering price) or low end (in the case of a decrease in the offering price) of that range. [Apr. 24, 2009]

627.02 [Reserved]

627.03 A registration statement went effective listing $800 million of debt generically in its fee table and containing a prospectus specifying three classes of debt. The prospectus states that $300 million would be offered of each of the first two classes of debt and $200 million of the third class would be offered. The registrant wishes to change the allocation of the $800 million among the 3 classes after the effective date. Instruction to paragraph (a) of Rule 430A would allow the registrant, without filing a post-effective amendment, to increase a class or classes of debt by up to $160 million (20% of $800 million) with a corresponding reduction of the other class or classes by $160 million. The decrease and increase are not each counted as a 20% change (and thereby equating to a 40% change) since they are made in parallel as one reallocation. [Jan. 26, 2009]

Section 628. Rule 430B — Prospectus in a Registration Statement After Effective Date

628.01 An issuer that was eligible to conduct a primary offering of securities pursuant to General Instruction I.B.1 of Form S-3 planned to file an unallocated shelf registration statement and conduct an immediate takedown following effectiveness. The issuer would include a base prospectus in the Form S-3 and asked whether a prospectus supplement for the immediate takedown would also need to be filed as part of the registration statement prior to effectiveness. With regard to the immediate takedown, the issuer was not required to include a prospectus supplement pre-effectively to disclose the information about the immediate takedown that would be known at the time of effectiveness because Rule 415(a)(1)(x) permits immediate takedowns and the prospectus supplement for such takedown would become part of the registration statement and the filing would cause a new effective date of the registration statement. [Jan. 26, 2009]

Sections 629 to 631. Rules 430C to 432 [Reserved]

Section 632. Rule 433 — Conditions to Permissible Post-Filing Free Writing Prospectuses

632.01 Rule 433(d)(4) does not provide an exception from the filing requirements of Rule 433(d)(1)(i)(C). Accordingly, if a free writing prospectus is used by the issuer or any offering participant that includes the final terms of the securities or of the offering, the issuer must file a description of the final terms regardless of whether the issuer has previously filed a final prospectus supplement that includes the final terms of the securities under Rule 424. [Jan. 26, 2009]

632.02 An underwriter distributed a free writing prospectus through a widely-used subscription news and financial data service and the free writing prospectus was available to all subscribers of the service. In this case, the free writing prospectus was "distributed . . . in a manner reasonably designed to lead to its broad unrestricted dissemination" for purposes of Rule 433(d)(1) notwithstanding the fact that the news and financial data service was a subscription service. [Jan. 26, 2009]

Section 633. Rule 436 — Consents Required in Special Cases

633.01 A registrant filing on Form S-8 incorporated a Form 10-K that contained its 2007 financial statements certified by one accounting firm, and its 2005 and 2006 financial statements certified by a different accounting firm. Rule 436 would require the filing of the consents of both accounting firms for purposes of the Form S-8 registration statement. [Jan. 26, 2009]

Sections 634 to 638. Rules 437 to 455 [Reserved]

Section 639. Rule 456 — Date of Filing; Timing of Fee Payment

639.01 After filing a Form S-3ASR that relied on the pay-as-you-go provisions in Rule 456(b), an issuer filed a Rule 424 prospectus supplement to reflect a completed takedown. The fee table included in the prospectus supplement failed to include a number of shares (or aggregate offering amount) that were later sold pursuant to the underwriter's over allotment option and the issuer did not pay a fee for those shares within the cure period permitted by Rule 456(b)(1)(i). Although failing to identify the over allotment shares in the fee table and pay the fee constituted a Section 6 violation, Rule 456(b)(2) provides that such failures do not cause the registrant to violate Section 5 because the registrant relied on the pay-as-you-go provisions and the class of securities sold pursuant to the over allotment option was identified in the Form S-3ASR at the time it was filed. The issuer was advised that it should address its Section 6 violation by filing an additional prospectus supplement under either Rule 424(b)(2) or (b)(5) and under Rule 424(b)(8) with a fee table reflecting the over allotment shares and paying the associated filing fee at that time. [Jan. 26, 2009]

639.02 Well-known seasoned issuers that rely on Rule 456(b) to defer payment of filing fees are required to pay the fees "within the time required to file the prospectus supplement pursuant to Rule 424(b) . . . for the offering." When an issuer plans to use both a preliminary and a final prospectus, the required fee must be paid within the time required to file the final prospectus supplement, as the issuer may not know the actual amount offered at the time the preliminary prospectus is filed. [Jan. 26, 2009]

Section 640. Rule 457 — Computation of Fee

640.01 When a registrant has filed a registration statement for two separate securities and then wishes to increase the amount of one security and decrease the other, the registrant can file a pre-effective amendment to reflect such increase and decrease in the calculation of registration fee table and reallocate the fees already paid under the registration statement between the two securities. [Jan. 26, 2009]

640.02 A registrant using Rule 457(a) can increase the number of shares covered by a registration statement by adding them in the pricing amendment prior to effectiveness. The registration fee for the additional shares should be based on the actual offering price, rather than the estimated offering price used for the initial filing. [Jan. 26, 2009]

640.03 A registration statement for 1,000,000 shares of preferred stock went effective with an estimated offering price of $15 per share. The fee was calculated and paid in reliance on Rule 457(a). After the effective date, but prior to the commencement of sales, the registrant sought to increase the number of shares to 1,150,000 and increase the offering price to $17.50 per share. Because more shares are going to be sold than were registered, the registrant must file a new registration statement to register the additional 150,000 shares at $17.50 per share. A short-form registration statement under Rule 462(b) would be possible since the number of additional shares (150,000) times the new price ($17.50) is less

than 20% of the aggregate dollar amount in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement. [Jan. 26, 2009]

640.04 A registration statement went effective registering $15,000,000 of preferred stock under Rule 457(o). The prospectus indicated that 1,000,000 shares were being offered. After the effective date, but prior to the commencement of sales, the registrant sought to increase the price from the intended $15 maximum to $17.50, without changing the number of shares in the offering. Because registration was done by dollar amount (Rule 457(o)), not by number of shares (Rule 457(a)), and such dollar amount is increasing, the registrant must file a new registration statement to register the additional $2,500,000 of preferred stock. A short-form registration statement under Rule 462(b) would be possible since the $2,500,000 is less than 20% of the aggregate dollar amount registered in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement. [Jan. 26, 2009]

640.05 A registration statement went effective registering $15,000,000 of preferred stock under Rule 457(o). The prospectus indicated that 1,000,000 shares were being offered. After the effective date, but prior to the commencement of sales, the registrant sought to increase the number of shares in the offering to 1,300,000 and decrease the price from the intended $15 to $11.50. Because the new aggregate offering amount (1,300,000 x $11.50) does not exceed the $15,000,000 registered, no new registration statement need be filed. [Jan. 26, 2009]

640.06 Company A planned to register its securities for issuance in connection with the purchase of company B's assets. Company B would not be liquidated after completion of the transaction. In calculating the filing fee, Company A should look to Rule 457(d) and base the fee on the market value of the assets to be received. [Jan. 26, 2009]

640.07 Rule 457(f) provides that the filing fee for an acquisition registration statement is determined on the basis of the value of the shares of the acquired company. However, this method does not work for a registration statement filed for an acquisition shelf, since the entities to be acquired are not yet known. The filing fee for such a shelf registration statement should therefore be based on the market value of the registrant's shares as provided in Rule 457(c). [Jan. 26, 2009]

640.08 A company was registering shares issuable on exercise of stock options. At the time of filing, the company had not yet issued options so that there was no option exercise price. The company only had public debt outstanding and there was no market for its common stock. The company had a negative book value. The company was advised to calculate the filing fee, for purposes of Rule 457(h), based on a good faith estimate of the value of the securities underlying the options. [Jan. 26, 2009]

640.09 A question was raised as to the filing fee for a letter of credit guarantee backing municipal bonds. Because the letter of credit was issued by a corporation rather than a bank, it had to be registered even though the underlying securities were exempt. If the filing fee were based on the amount of municipal securities covered by the guarantee the fee would be overstated. The entire amount of the offering need not be allocated to the guarantee and the filing fee may be based on the amount charged by the corporation for issuing the letter of credit by analogy to Rule 457(k) and (l). [Jan. 26, 2009]

640.10 An issuer proposed to register redeemable notes in a series of registration statements. 90% of the notes to be issued under each registration statement was expected to redeemed within 30 days of issuance. Because most of the securities being registered would be outstanding for only a brief period of time, the issuer sought relief from the filing fee requirements. The issuer cited Rule 457(m), which provides relief in certain circumstances when exempt commercial paper is being registered along with non-exempt commercial paper. Since the notes in question were not commercial paper, the full filing fee was payable. [Jan. 26, 2009]

640.11 A company filed a registration statement on October 1, 2003, paying a $50,000 filing fee. Only half of the securities so registered were sold. On March 1, 2008, the company filed a different registration statement for which it owed a filing fee of $15,000. The company was able to offset this fee by transferring $25,000 of the earlier $50,000 filing fee. The $25,000 represented the entire filing fee paid on all unsold shares from the October 1, 2003 registration statement. For purposes of future transfers under Rule 457(p), the $25,000 so transferred was considered paid on March 1, 2008. Assuming the other conditions of Rule 457(p) were satisfied, the $10,000 that was transferred in excess of the fee due for the second registration statement, as well as any portion of the $15,000 fee that remained unused after completion or termination of the offering would be available for transfer to another registration statement initially filed before March 1, 2013. [Jan. 26, 2009]

640.12 An asset-backed issuer inquired whether it could offset fees paid by another registrant/depositor if both registrant/depositors were wholly-owned subsidiaries of the same parent company. These "brother-sister" entities may use the fee offset provisions of Rule 457(p) to offset fees paid by the other "brother-sister" entity. [Jan. 26, 2009]

Sections 641 to 642. Rules 459 to 460 [Reserved]

Section 643. Rule 461 — Acceleration of Effective Date

643.01 Written notification that the issuer and the underwriter will be making oral acceleration requests may be made by counsel for the issuer or the underwriter in its cover letter accompanying the registration statement or an amendment thereto. Oral acceleration requests should not simply be left on voicemail of a Division staff member. [Jan. 26, 2009]

Section 644. Rule 462 — Immediate Effectiveness of Certain Registration Statements and Post-Effective Amendments

644.01 Pursuant to Rule 457(a), a company registered 2,300,000 shares at $22.6875 per share for an aggregate offering price of $52,181,250. After effectiveness, the shares were priced at $31. That higher price was never reflected in the calculation of registration fee table on the cover page of the registration statement. The company wishes to increase the size of the offering using Rule 462(b). It must register the additional shares at the $31 price. Thus, the company may register up to 336,653 additional shares at $31 under Rule 462(b) (calculated by taking 20% of $52,181,250 and dividing it by $31). [Jan. 26, 2009]

644.02 In a single offering not relying on Rule 415 that is both primary and secondary, the 20% increase in the offering size available under Rule 462(b) is calculated on the total aggregate dollar amount of the offering and may be allocated between the primary and secondary sellers in any manner desired. For example, an offering of $100 million in securities — $80 million primary and $20 million secondary — could be increased by $20 million under Rule 462(b) and all $20 million could be allocated to the previously identified secondary seller(s). [Jan. 26, 2009]

644.03 Pursuant to Rule 457(a), a company included in the calculation of registration fee table on its initially filed version of Form S-3 1,000,000 shares of common stock at $20 per share for an aggregate offering price of $20,000,000. Before effectiveness, the company included a supplemental fee table in an amendment to the S-3 to register 200,000 more shares of common stock at the new higher bona fide estimate of $25 per share (for an increase in the aggregate offering of $5,000,000). After effectiveness and pricing at $26 per share, the company wishes to register additional shares under Rule 462(b). The Rule 462(b) limit for registering additional shares is calculated by taking 20% of $25,000,000 (derived by adding the $20,000,000 and the $5,000,000) and dividing it by the $26 actual price to permit registration under Rule 462(b) of no more than 192,307 shares. [Jan. 26, 2009]

644.04 A registration statement for 1,000,000 shares of preferred stock under Rule 457(a) went effective with an offering price of $15 per share. After the effective date, but prior to the commencement of sales, the registrant sought to increase the number of shares to 1,150,000 and increase the offering price to $17.50 per share. Because more shares are going to be sold than were registered, the registrant must file a new registration statement to register the additional 150,000 shares at $17.50 per share. A short-form registration statement under Rule 462(b) would be possible since the number of additional shares (150,000) times the new price ($17.50) is less than 20% of the aggregate dollar amount in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement. [Jan. 26, 2009]

644.05 A registration statement went effective registering $15,000,000 of preferred stock under Rule 457(o). The prospectus indicated that 1,000,000 shares were being offered. After the effective date, but prior to the commencement of sales, the registrant sought to increase the price from the intended $15 maximum to $17.50, without changing the number of shares in the offering. Because registration was done by dollar amount (Rule 457(o)), not by number of shares (Rule 457(a)), and such dollar amount is increasing, the registrant must file a new registration statement to register the additional $2,500,000 of preferred stock. A short-form registration statement under Rule 462(b) would be possible since the $2,500,000 is less than 20% of the aggregate dollar amount registered in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement. [Jan. 26, 2009]

644.06 For EDGAR header purposes, when filing a Rule 424(b) prospectus supplement in connection with an offering that involves an initial effective registration statement and a second registration statement registering additional securities under Rule 462(b), the Rule 424(b) supplement must be filed under the registration number (33- or 333-) for the initial registration statement. The cover page of the Rule 424(b) supplement should, however, set forth the registration numbers of both the initial registration statement and the Rule 462(b) registration statement. [Jan. 26, 2009]

644.07 A registrant has an effective shelf registration statement with $500 million of unused capacity. The registrant wanted to use Rule 462(b) to increase the shelf capacity by 20% to $600 million, and then simultaneously takedown $200 million in common stock and $400 million in convertible debt, in separate offerings. However, Rule 462(b) was not available in this situation, as it can only be used once per delayed shelf

offering and only at the time of final takedown. The registrant could takedown $200 million in common stock and then increase the convertible debt capacity from $300 million to $360 million in connection with a final takedown of convertible debt that would deplete the shelf. [Jan. 26, 2009]

644.08 An issuer filed a registration statement on Form S-4 for a merger. Inadvertently, the number of shares registered was not sufficient to cover certain shares issuable upon the exercise of options during the period after the effective date of the registration statement but prior to the consummation of the merger. Rule 413(a) does not permit the registration of additional shares by post-effective amendment. Counsel was informed that: (1) it could rely on Rule 462(b) to prepare and file a short-form registration statement provided the amount to be registered was within the 20% limit and the other conditions were met; or (2) it could file a new registration statement that could be combined with the earlier registration statement pursuant to Rule 429. [Jan. 26, 2009]

Section 645. Rule 463 — Report of Offering of Securities and Use of Proceeds Therefrom

645.01 Rule 463 requires periodic disclosure of sales of securities and use of proceeds during an issuer's first registered offering. If the offering is a shelf offering of asset-backed securities, the Rule 463 reporting obligation is deemed satisfied by a report at the end of the first takedown. However, if new issuers are formed in connection with subsequent takedowns, for example, a series of single purpose corporations, each takedown by a new issuer will give rise to a new Form 10-D or Form 10-K Rule 463 reporting obligation. [Jan. 26, 2009]

645.02 Since a registered spin-off transaction typically does not generate any proceeds for the issuer, Item 701(f) of Regulation S-K disclosure pursuant to Rule 463 is not required. [Jan. 26, 2009]

645.03 Securities of a one-bank holding company are issued pursuant to an automatically effective registration statement filed in reliance on General Instruction G to Form S-4. At a later date, the company files a registration statement on Form S-1 covering an offering for cash. The reporting obligation of Rule 463 is conditioned on the effectiveness of the issuer's first registration statement and, accordingly Regulation S-K Item 701(f) disclosure need not be provided with respect to the offering registered on Form S-1. [Jan. 26, 2009]

645.04 When a registration statement contemplates separate closings of limited partnerships to be formed in a series, the closing of each partnership in the series will be considered an "effective date" for purposes of triggering an obligation to provide disclosure pursuant to Rule 463. [Jan. 26, 2009]

645.05 If a registrant's first filing under the Securities Act is a secondary offering, no disclosure need be provided in response to Item 701(f) of Regulation S-K since there is no use of proceeds. However, such a secondary offering would not constitute "the first registration statement filed under the Act by an issuer" for purposes of Rule 463. Accordingly, the first primary Securities Act offering by that registrant would necessitate disclosure under Item 701(f). [July 3, 2008]

645.06 Use of proceeds disclosure is required in the issuer's first periodic report filed following the effective date of its first registration statement filed under the Securities Act, even if the registration statement covered a best-efforts offering that has not closed on the due date of that periodic report. [July 3, 2008]

645.07 On the same registration statement, in its initial public offering, a company registered X shares for sale to the public and Y shares for issuance pursuant to employee benefit plans. The Division staff agreed with the company's analysis that it need report the use of proceeds as required by Rule 463 and Item 701(f) of Regulation S-K only for the shares sold to the public, and could omit the information relating to the employee benefit plan shares in reliance on Rule 463(d)(3). The Division staff's response is premised on the representation that the employee benefit plan shares were originally registered for that purpose; had it been a matter of converting shares originally registered for sale to the public that remained unsold to the employee benefit purpose, this position would not apply. [July 3, 2008]

Sections 646 to 654. Rules 464 to 498 [Reserved]

Section 655. Rule 501 — Definitions and Terms Used in Regulation D

655.01 In a Regulation D offering, an owner of a mining property is selling interests in the property to investors for cash. The owner is retaining a royalty interest in the property providing the owner the right to share in a percentage of production. In computing the aggregate offering price under Rule 501(c), only the purchase price should be considered, which may include the initial cash payment, plus any subsequent payments that are fixed at the transaction date. This position reflects the fact that the royalty payments that will be made to the seller of the property as a share in future production are treated as operating expenses, rather than capitalized costs for the property. *See* Securities Act Release No. 6455, Question No. 32 (Mar. 3, 1983). [Jan. 26, 2009]

Section 656. Rule 502 — General Conditions to be Met

656.01 A promotional brochure that solicits investors for a proposed Regulation D offering is intended to be mailed to the members of the Thoroughbred Owners and Breeders Association, to be distributed at a sale of horses, and to be run as an advertisement in a trade journal. These activities would constitute a general solicitation in connection with the offer or sale of a security, and therefore would render those aspects of Regulation D subject to Rule 502(c) unavailable. [Jan. 26, 2009]

656.02 A corporation that has purchased securities in a Regulation D offering commences dissolution proceedings before it has received the actual stock certificates. The corporation requests the issuer to issue the certificates in the name of the corporation's three shareholders to whom the corporation is distributing all of its assets. The Regulation D issuer may do this without violating the limitations on resale in Rule 502(d). [Jan. 26, 2009]

Sections 657 to 658. Rules 503 to 1001 [Reserved]

http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm

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