

Manual of Publicly Available Telephone Interpretations

L. EXCHANGE ACT SECTIONS

1. Section 3(a)(11); Section 12

A Form S-3 registrant is issuing debentures that will be guaranteed by its parent. Because the guarantee is neither listed on a stock exchange, nor considered to be an "equity security" as defined in Section 3(a)(11) of the Exchange Act, an Exchange Act registration statement is not required to be filed for it.

2. Section 10; Securities Act Section 5; Securities Act Section 17

The Liability Risk Retention Act of 1986 contains exemptions from the registration provisions of Section 5 of the Securities Act and Section 12 of the Exchange Act for interests in a "risk retention group." A risk retention group is a corporation the primary activity of which is to assume and spread all or a portion of the liability exposure of its members, if certain conditions are met. In the absence of a formal no-action request, the Division staff declined to express any view as to whether the exemptions for interests in a risk retention group would extend to interests in a holding company for such group. The question has arisen because the exemption written into the statute is silent on that point.

Ownership interests in a "risk retention group" are considered to be "securities" for purposes of Section 17 of the Securities Act and Section 10 of the Exchange Act, under the terms of The Liability Risk Retention Act of 1986.

3. Section 12; Section 3(a)(11)

A Form S-3 registrant is issuing debentures that will be guaranteed by its parent. Because the guarantee is neither listed on a stock exchange, nor considered to be an "equity security" as defined in Section 3(a)(11) of the Exchange Act, an Exchange Act registration statement is not required to be filed for it.

4. Section 12(g)

Benefit plan options are regarded as a separate class of equity securities for Section 12(g) purposes.

5. Section 12(h)

Lack of trading and the inability to locate a significant number of stockholders are not sufficient bases to warrant a Section 12(h) exemption for a Section 12(g) registered company.

6. Section 12(h)

Section 12(h) of Exchange Act does not afford any exemptive relief for periodic reports that are delinquent - i.e., filing date has passed.

7. **** Section 13; Section 15(d) ****

Issuers of certain asset-backed securities, in reports they file under Exchange Act Sections 13 and 15(d), may use the described examination report rather than a procedures report from an independent accountant relating to internal controls over the servicing function. The examination report would provide an independent accountant's report on the internal controls based upon "established" or "stated" criteria as set forth in the professional standards of the American Institute of Certified Public Accountants. The "stated" criteria approach would not be used, however, if there were other relevant "established" third party criteria (e.g., the Uniform Single Attestation Program for Mortgage Bankers). See Issuers of Asset-Backed Securities Filing Modified Reports under the Securities Exchange Act of 1934 (March 7, 1997).

8. Section 13(d); Section 13(g); Section 13(e)

Where a limited partnership voluntarily registered its securities under Section 12(g) of the Exchange Act in order to qualify those securities for sale to "direct participant" retirement plans, the Division staff would not provide relief under Sections 13(d), 13(g), and 13(e), since such relief would undermine the Department of Labor's intent to require the protections of the Exchange Act reporting requirements for pension plan instruments.

9. Section 13(e); Section 13(d); Section 13(g)

Where a limited partnership voluntarily registered its securities under Section 12(g) of the Exchange Act in order to qualify those securities for sale to "direct participant" retirement plans, the Division staff would not provide relief under Sections 13(d), 13(g), and 13(e), since such relief would undermine the Department of Labor's intent to require the protections of the Exchange Act reporting requirements for pension plan instruments.

10. Section 13(e); Section 14(e); Rule 14d-1; Rule 14d-9; Rule 13e-4

A general partner making a tender offer for the interests of the limited partners, which are registered under Section 12 of the Exchange Act, must file on a Schedule 14D-1 and may not use a Schedule 13E-4. The general partner, however, may include a statement in the Schedule and offering materials on behalf of the partnership to satisfy the partnership's obligations under Rules 14e-2 and 14d-9.

11. Section 13(d); Rule 13d-5(b)

A limited partnership and two general partners formed a control group in a non-public company. Since the time the company registered pursuant to Section 12(g), the group has been filing on Schedule 13G. Now the group would like to add a new member who owns more than 2% of the equity securities of the company. The Division staff took the position that the addition of a new member, with 2% or more beneficial ownership, would be deemed an acquisition by the group of 2% or more of a Section 12 security, and would require the group and all its members to report their holdings on Schedule 13D.

12. Section 13(d); Rule 13d-6

A shareholder could not rely on Rule 13d-6, which exempts from the requirements of Section 13(d) acquisitions by a 5 percent beneficial holder pursuant to subscription rights, to avoid amending a previously filed Schedule 13D to reflect such an acquisition. Rule 13d-6 should be read to relate only to the initial filing obligation; thus, a 5 percent holder, previously exempt from

filing on Schedule 13D, would not be subject to the filing requirement solely by virtue of the exercise of subscription rights. Rule 13d-2, however, requires an amendment to disclose any change in the information previously filed with the Commission, and should control where the shareholder has previously filed a Schedule 13D.

13. Section 13(g); Section 13(d); Section 13(e)

Where a limited partnership voluntarily registered its securities under Section 12(g) of the Exchange Act in order to qualify those securities for sale to "direct participant" retirement plans, the Division staff would not provide relief under Sections 13(d), 13(g), and 13(e), since such relief would undermine the Department of Labor's intent to require the protections of the Exchange Act reporting requirements for pension plan instruments.

14. Section 14(d); Regulation 14E

The proration, withdrawal and other provisions set forth in subsections (1) through (8) of Section 14(d) of the Exchange Act are only applicable to tender offers conducted pursuant to Regulation 14D. They do not apply to tender offers governed solely by Regulation 14E.

15. Section 14(d); Rule 14d-2(b)

Rule 14d-2(b) (commencement by public announcement of the terms of a tender offer) is applicable to offers to acquire companies in Chapter 11 reorganization proceedings. In order to obtain control of a company in reorganization, approval by the bankruptcy court is necessary. Therefore, a bidder is not likely to commence a tender offer unless it had court approval of its plan to take control. To obtain court approval, the bidder must submit its proposal to the debtor's board (which is usually functioning as a debtor in possession), since the debtor, at least for the first 90 days following the petition, has the exclusive right to submit a plan of reorganization.

If approved by the board, the proposal would have to be approved by all the various bankruptcy committees and eventually submitted to the bankruptcy court for approval. Any one of these steps is likely to result in public disclosure of the terms of the tender offer, and therefore could be viewed as a public announcement by the bidder of the terms of the tender offer within the meaning of Rule 14d-2(b). The Division staff has expressed the view that it would not object if the tender offer is not commenced within 5 days following public disclosure of the terms of the proposal under the above circumstances. Although public disclosure is certainly contemplated by the bidder when it makes its proposal to the board, any subsequent announcement in connection with the reorganization proceedings is properly attributed to the target, not the bidder.

16. Section 14(d); Rule 14d-2(b)

A foreign bidder and U.S. target have entered into a memorandum of understanding whereby the foreign bidder will buy shares from insiders and engage in a cash tender offer to acquire the rest of the shares. The bidder and the target made a joint statement setting forth the identities of the parties, the consideration to be paid and the amount and class of securities being sought. Counsel was advised that Rule 14d-2(b) is applicable to the joint statement, and a tender offer effectively commenced upon the issuance of the joint statement.

17. Section 14(e); Section 13(e); Rule 14d-1; Rule 14d-9; Rule 13e-4

A general partner making a tender offer for the interests of the limited partners, which are registered under Section 12 of the Exchange Act, must file on a Schedule 14D-1 and may not use a

Schedule 13E-4. The general partner, however, may include a statement in the Schedule and offering materials on behalf of the partnership to satisfy the partnership's obligations under Rules 14e-2 and 14d-9.

18. Section 15(d)

A registration statement offered limited partnerships in series. A Form 15 was filed for the first partnership after the close of its fiscal year. Subsequently, the offering commenced for the second partnership. Section 15(d) reporting with respect to the second partnership should commence beginning with the quarter in which the offering thereof starts.

19. **** Section 15(d); Section 13 ****

Issuers of certain asset-backed securities, in reports they file under Exchange Act Sections 13 and 15(d), may use the described examination report rather than a procedures report from an independent accountant relating to internal controls over the servicing function. The examination report would provide an independent accountant's report on the internal controls based upon "established" or "stated" criteria as set forth in the professional standards of the American Institute of Certified Public Accountants. The "stated" criteria approach would not be used, however, if there were other relevant "established" third party criteria (e.g., the Uniform Single Attestation Program for Mortgage Bankers). See Issuers of Asset-Backed Securities Filing Modified Reports under the Securities Exchange Act of 1934 (March 7, 1997).

20. Section 15(d); Rule 12h-3(c)-(d)

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

21. Section 15(d); Form 8-A

A company subject to Section 15(d) with respect to a fiscal quarter or fiscal year cannot delay the due date or avoid filing the related quarterly or annual report by filing a Form 8-A at or after the end of the fiscal quarter or fiscal year but prior to the due date of the applicable report. Form 8-A explicitly provides that a company subject to Section 15(d) with respect to a fiscal year cannot do so.

22. Section 15(d); Form 10-K

A limited partnership, which offers securities on Form S-11 that goes effective on December 15th, does not commence selling efforts nor does it acquire properties or admit limited partners until after December 31st, the end of its fiscal year. Escrow is not broken until June 30th of its next fiscal year. Regardless of the fact that selling efforts began in the next fiscal year, the partnership should file a Form 10-K for the fiscal year in which the Form S-11 went effective.

23. Section 16(a)

An insider who purchases units consisting of common stock and debentures of the insider's company must file a Section 16(a) report covering the acquisition of the stock. The debentures

need not be reported unless they are also deemed to be equity securities, as would occur, for example, if they were convertible into common stock.

24. Section 16(a); Form 3; Form 4

In connection with a bank holding company formation, wherein jurisdiction of a Section 12(g) entity passes from a banking agency to the SEC, officers, directors and ten percent shareholders are not required to file either a Form 3 or Form 4 with the Commission to reflect the transaction establishing the holding company.

25. Section 16(b)

Since the enforcement of Section 16(b) is left to private parties and the courts, the Division staff ordinarily will not express a view as to whether a particular transaction involves a "purchase or "sale" for purposes of this section.

26. Section 16(d)

A broker-dealer that had ceased making a market in a public company's securities could not rely upon the Section 16(d) exemption with respect to sales of securities remaining in its inventory. Furthermore, even if the cessation was only temporary, the broker-dealer would not regain eligibility for the exemption unless it resumed market-making activities on a bona fide basis, i.e., the broker-dealer could not re-register as a market maker simply to liquidate its inventory.