SEC Division of Corporation Finance

Manual of Publicly Available Telephone Interpretations

A. SECURITIES ACT SECTIONS

1. Section 2(a)(1)

A sale and leaseback arrangement may constitute an investment contract, depending on the terms of the transaction and the extent to which there are related arrangements (such as arrangements relating to financial or management services).

2. Section 2(a)(3); Section 5, Rule 135

The use of a general advertisement for the sale of a business that might involve the sale of all of the outstanding securities of the issuer could constitute a violation of Section 5 unless the ad complied with Rule 135.

3. Section 2(a)(3)

A dividend that is declared as payable in either cash or stock at the election of the recipients need not be registered, since, as explained in Release No. 33-929, there is no sale of the dividend shares.

4. Section 2(a)(3)

A transfer of restricted securities from a person's employee benefit plan account to the person's IRA need not be registered, since the transfer does not effect a change in the beneficial ownership of the securities.

5. Section 2(a)(3)

A shelf registration statement is filed for the sale of preferred stock. The issuer contemplates that some of the preferred stock may be issued at a later date in a series carrying a feature permitting immediate conversion of the preferred into common stock. At the time of effectiveness, it is not necessary to register the common stock. Of course, at the time the series of convertible preferred stock is to be offered, the common stock underlying it would have to be registered in a separate registration statement (unless exempt, e.g., under 3(a)(9)).

An acceptable alternative to the separate registration of the common stock that would avoid the necessity for paying a registration fee for such stock is to include in the shelf registration statement at the outset a sufficient amount of common stock to cover that issuable pursuant to the convertible series.

6. Section 2(a)(3); Rule 145

A holding company reorganization was to be carried out pursuant to Section 251(g) of the Delaware General Corporations Laws 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. Thus, the Division staff was unable to agree that such reorganization would not involve a "sale" or "offer to sell" for the purposes of Section 2(a)(3) and Rule 145.

7. Section 2(a)(3); Section 2(a)(11); Section 4(1)

An issuer eligible to use Form S-3 proposes to sell debt securities convertible into the common stock of an unaffiliated reporting company. The shares of common stock are restricted securities but may be resold freely in the public market under Rule 144(k). The registration statement for the offering need only cover the debt securities because the exemption provided by Section 4(1) would be available for the sale of the common stock upon conversion of the debt securities. With respect to the information to be provided regarding the issuer of the underlying common stock, see Morgan Stanley & Co., Incorporated (June 24, 1996).

8. Section 2(a)(3); Section 3(a)(9)

Company A purchased approximately 52% of the outstanding common stock of Company B in a tender offer. Company A proposes to complete the acquisition by means of a reverse statutory merger whereby Company B will become an indirect wholly-owned subsidiary of Company A. The plan of merger provides that each remaining share of Company B's common stock will be exchanged for cash and a note to be issued by Company B. As soon as possible after the merger, a reorganization will be effected in which Company B will be liquidated, its assets distributed to approximately 50 indirect wholly-owned subsidiaries of Company A, and its liabilities (including the notes issued in connection with the merger) assumed by another wholly-owned subsidiary of Company A, New Company B, whose assets will consist of stock of the 50 operating subsidiaries.

Because Company A already owns the requisite number of shares of Company B common stock to approve the merger, Company B will not solicit proxies in connection with the merger and therefore no commission or remuneration will be paid in connection with a solicitation. Shareholders will receive an information statement containing the information required to be provided by Regulation 14C and Rule 13e-3.

Since Company B will exist before and after the merger and will exchange notes with its own security holders, counsel took the position that Section 3(a)(9) would exempt the exchange from registration. Counsel also took the view that the assumption of the notes by New Company B in connection with the reorganization would not require registration under the Securities Act since such assumption did not constitute a "sale" or "offer to sell" as defined in Section 2(a)(3). Counsel's no-sale theory was based on the fact that the noteholders would neither exchange the notes for new notes nor give up any value, since they would not have relinquished any rights attached to the notes.

Further, the terms of the notes permit substitution of a successor obligor. Finally, counsel argued that Rule 145 would be inapplicable to the reorganization, since noteholders will not vote on or consent to the reorganization or assumption of the notes by New Company B.

Counsel's position was premised on treating the merger and reorganization as discrete, independent transactions or, alternatively, as one transaction in which New Company B would be substantially similar to Company B and thereby be a successor issuer.

The Division staff viewed the merger and reorganization as one transaction in which New Company B's corporate structure, operations and financial condition might differ materially from Company B's. Because the merger and reorganization may result in a substantial change, the Division staff concluded that Company B and New Company B should be viewed as different

issuers for purposes of Section 3(a)(9). Furthermore, given the time proximity between the merger and reorganization, New Company B could be viewed as the issuer of the notes. Therefore, the Division staff concluded that the notes should be registered prior to presenting the proposal at the special shareholder's meeting.

9. Section 2(a)(3); Section 5

Where convertible securities or warrants are being registered under the Securities Act, and such securities are convertible or exercisable within one year, the underlying securities also must be registered at that time, absent an exemption from registration for such conversion or exercise (such as Section 3(a)(9) for most conversions). When no such exemption is available and such securities are not convertible or exchangeable within one year, the issuer may choose not to register the underlying securities at the time of registering the convertible securities or warrants, but the underlying securities must be registered no later than the date such securities become convertible or exercisable by their terms. Where securities are exchangeable (i.e. the issuer may chose to convert the securities into other securities), the underlying securities must be registered at the time the exchangeable securities are registered since the entire investment decision that investors will make is made at the time of purchase. The security holder, by buying the exchangeable security, is in effect also deciding to accept the underlying security.

10. Section 2(a)(3); Section 5; Rule 135

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 Sections 2(a)(3) and 5. 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.

11. Section 2(a)(4); Section 3(a)(9)

Equipment trust notes are convertible into common stock of the user of the equipment deposited in an equipment trust. The term "issuer" with respect to equipment trust certificates is defined in Section 2(a)(4) to mean the person by whom the equipment is used. Accordingly, Section 3(a)(9) would be available for the conversion of the notes into common stock of the user, even though the notes would appear technically to be securities issued by the equipment trust.

12. **** Section 2(a)(10); Section 5(c) ****

A broker-dealer wanted to publish or distribute information, opinions and/or recommendations as to investment grade asset-backed securities, as defined in Securities Act Form S-3. The broker-dealer asked if the information, opinions and/or recommendations would be an offer of the asset-backed securities for purposes of Securities Act Sections 2(a)(10) or 5(c). The staff directed the broker-dealer to Dissemination of Research Materials Relating to Asset-Backed Securities (February 7, 1997). This no-action letter describes the conditions under which the information, opinions or recommendations are not offers of the asset-backed securities.

13. Section 2(a)(11); Section 4(1); Section 2(a)(3)

An issuer eligible to use Form S-3 proposes to sell debt securities convertible into the common stock of an unaffiliated reporting company. The shares of common stock are restricted securities but may be resold freely in the public market under Rule 144(k). The registration statement for the offering need only cover the debt securities because the exemption provided by Section 4(1)

would be available for the sale of the common stock upon conversion of the debt securities. With respect to the information to be provided regarding the issuer of the underlying common stock, see Morgan Stanley & Co., Incorporated (June 24, 1996).

14. Section 3(a)(2)

Securities of an investment company formed to invest only in bank stock would not be exempt securities under Section 3(a)(2) because the investment company is not a bank.

15. Section 3(a)(2)

Section 3(a)(2) provides an exemption for, inter alia, securities issued by states and political subdivisions or public instrumentalities thereof. The section also provides an independent exemption for certain tax exempt industrial development bonds. Taxable industrial development bonds can qualify for the broader exemption, i.e., securities issued by states or public instrumentalities thereof. However, such bond issues must be examined to determine whether they give rise to separate securities within the meaning of Rule 131. Absent another exemption, registration of the separate Rule 131 securities would be required.

16. Section 3(a)(2)

A bank guarantee of an industrial development bond is exempt under Section 3(a)(2) as a security issued by a bank. The underlying IDB likewise would be exempt under Section 3(a)(2), either because it satisfies the specific requirements applicable to IDBs or because it is a security guaranteed by a bank.

17. Section 3(a)(2)

Participations in a banker's acceptance, offered and sold by a broker who holds the banker's acceptance, are separate securities which are not exempt as securities issued by a bank within the meaning of Section 3(a)(2).

18. Section 3(a)(2)

The reference in Section 3(a)(2) to Section 103(c) of the Internal Revenue Code is now out of date and should read Section 103(b). This reference is important in determining which kinds of tax exempt industrial revenue bonds are exempted from Securities Act registration by Section 3(a)(2).

19. Section 3(a)(3)

Commercial paper payable on demand but in any event no later than 9 months from issuance, satisfies the maturity requirement of the exemption.

20. Section 3(a)(3)

Tracing of commercial paper proceeds to actual "current transactions" is not necessary under Section 3(a)(3) where the proceeds will be commingled with the issuer's general funds and such funds will be applied in part to current transactions equal in amount to the commercial paper proceeds.

21. Section 3(a)(6); Rule 144

A company issued securities under Section 3(a)(6) but has lost its eligibility to use that exemption in the future. Shares held by affiliates of the company must be resold pursuant to the provisions of Rule 144, (except for the holding period provisions), absent registration or the availability of another exemption.

22. Section 3(a)(9)

Where preferred stock is issued in a Section 3(a)(9) exchange, and dividends on the preferred will be paid in either additional stock or cash, at the company's option, the issuance of any additional stock paid as dividends would also be exempt.

23. Section 3(a)(9)

The Section 3(a)(9) exemption is available for the issuance of securities to the holders of debt securities of another issuer if the obligation on such debt securities of the other issuer had previously been assumed by the issuer of the new securities. This position is taken because once the issuer has assumed the obligations on the debt securities the transaction becomes the exchange of that obligation for the new security of the issuer with its existing security holders.

24. Section 3(a)(9)

An issuer wishes to solicit holders of outstanding debt securities to approve changes in certain indenture covenants. At the same time, the issuer will increase the interest rate. While this transaction may be deemed to involve the issuance of a new security if it represents a fundamental change in the nature of the investment, the issuance of the new security would be exempt under Section 3(a)(9) if all of the conditions of that provision were met. Since all of the outstanding debt securities were issued in registered public offerings, the new debt securities issued in exchange would not be "restricted" under Rule 144(a)(3). A new indenture would have to be qualified under the Trust Indenture Act of 1939 for the new debt securities.

25. Section 3(a)(9)

In connection with an exchange transaction for which an exemption from registration is claimed under Section 3(a)(9), an issuer proposes to use the services of a proxy solicitor. Section 3(a)(9) is not available where any commission or other remuneration is paid for soliciting the exchange. The Division is of the view, however, that where the services of the solicitor are ministerial and involve no recommendation with respect to the proposed exchange, or encouragement to vote in a particular manner, the exemption would be available.

26. Section 3(a)(9)

Section 3(a)(9) would be available for the conversion of preferred stock into common stock where a condition of the exchange would be the waiver of accrued dividend arrearage on the preferred stock.

27. Section 3(a)(9)

A subsidiary has outstanding a class of debentures that are guaranteed by its parent. The subsidiary proposes to offer a new debenture in exchange for the guaranteed debenture. The new

debenture will not be guaranteed by its parent. Because the proposed exchange of the parent guarantee for the subsidiary's debt involves two different issuers, Section 3(a)(9) would not be available.

28. Section 3(a)(9)

If an issuer retains an investment counselor for the purpose of consulting institutional investors as to what they would consider to be an acceptable exchange offer, the condition of Section 3(a)(9) that "no commission or other remuneration be paid or given directly or indirectly for soliciting such exchange" would not be met and the exemption would not be available.

29. Section 3(a)(9)

Company A proposes to exchange convertible preferred stock for its outstanding common stock. Two years after issuance, holders of Company A's new convertible preferred stock will have the option of converting such shares into Company B's common stock. Section 3(a)(9) would be available for Company A's exchange offer, assuming all the conditions of that exemption are complied with. Registration of Company B's common stock would be required at the time of conversion, absent some exemption.

30. Section 3(a)(9)

Company A agreed to buy 80% of Company B's common stock conditioned on the success of Company A's tender offer for Company B's outstanding convertible debentures. Company A hired investment bankers to solicit in connection with the tender offer, which failed. Company A then prepared to buy 85% of Company B's common stock, conditioned on the success of an exchange offer by Company B of cash and common stock for Company B's outstanding convertible debentures. No investment banker would be used to solicit the exchange, the Division staff advised that:

(1) The earlier solicitation in connection with the tender offer would not taint the exchange.
(2) Since Company B would not be merged into Company A, the "same issuer" requirement of Section 3(a)(9) would be met.
(3) Counsel should seriously consider whether the Section 4(2) issuance of common stock to Company A would be integrated with the issuance of common stock in the exchange offer; while there might be arguments that it would not be, the issue did not appear to be free from doubt.

31. Section 3(a)(9)

Subject to securityholders' approval, an issuer proposed that each share of its outstanding preferred stock would be exchanged for a new class of preferred stock. However, if a majority of holders voted in favor of the exchange, each share of outstanding preferred stock would be converted into the right to receive cash. The issuer instructed a broker-dealer to solicit securityholders for acceptance of the cash-only proposal with a commission payable upon majority approval of that proposal. The Division staff was of the view that Section 3(a)(9) would not be available for the exchange offer since the solicitation for acceptances of the cash offer was deemed to constitute an indirect solicitation for the rejection of the exchange offer. This position revises the position taken in Barnett Mortgage Trust (Oct. 11, 1977).

32. Section 3(a)(9)

An issuer proposes to conduct a going private issuer tender offer in which it will offer debt securities for its outstanding common stock. The issuer would not be precluded from relying on the exemption from registration provided by Section 3(a)(9) for the issuance of the debt securities simply because it pays an investment banker's fee for a fairness opinion on the terms of the transaction. In order to constitute the disqualifying type of remuneration or commission specified in Section 3(a)(9), the remuneration must be paid or given for soliciting the exchange of securities. Payment of a fee for an investment banker's opinion as to the fairness of the transaction is not considered by the Division staff to be a fee paid for soliciting the exchange of securities. It should be noted, however, that if the investment banker is also performing in the capacity of dealer manager for the transaction and thereby conducting soliciting activities, the Section 3(a)(9) exemption would not be available.

33. Section 3(a)(9); Section 2(a)(3)

Company A purchased approximately 52% of the outstanding common stock of Company B in a tender offer. Company A proposes to complete the acquisition by means of a reverse statutory merger whereby Company B will become an indirect wholly-owned subsidiary of Company A. The plan of merger provides that each remaining share of Company B's common stock will be exchanged for cash and a note to be issued by Company B. As soon as possible after the merger, a reorganization will be effected in which Company B will be liquidated, its assets distributed to approximately 50 indirect wholly-owned subsidiaries of Company A, and its liabilities (including the notes issued in connection with the merger) assumed by another wholly-owned subsidiary of Company A, New Company B, whose assets will consist of stock of the 50 operating subsidiaries.

Because Company A already owns the requisite number of shares of Company B common stock to approve the merger, Company B will not solicit proxies in connection with the merger and therefore no commission or remuneration will be paid in connection with a solicitation. Shareholders will receive an information statement containing the information required to be provided by Regulation 14C and Rule 13e-3.

Since Company B will exist before and after the merger and will exchange notes with its own security holders, counsel took the position that Section 3(a)(9) would exempt the exchange from registration. Counsel also took the view that the assumption of the notes by New Company B in connection with the reorganization would not require registration under the Securities Act since such assumption did not constitute a "sale" or "offer to sell" as defined in Section 2(a)(3). Counsel's no-sale theory was based on the fact that the noteholders would neither exchange the notes for new notes nor give up any value, since they would not have relinquished any rights attached to the notes.

Further, the terms of the notes permit substitution of a successor obligor. Finally, counsel argued that Rule 145 would be inapplicable to the reorganization, since noteholders will not vote on or consent to the reorganization or assumption of the notes by New Company B.

Counsel's position was premised on treating the merger and reorganization as discrete, independent transactions or, alternatively, as one transaction in which New Company B would be substantially similar to Company B and thereby be a successor issuer.

The Division staff viewed the merger and reorganization as one transaction in which New Company B's corporate structure, operations and financial condition might differ materially from Company B's. Because the merger and reorganization may result in a substantial change, the Division staff concluded that Company B and New Company B should be viewed as different issuers for purposes of Section 3(a)(9). Furthermore, given the time proximity between the merger and reorganization, New Company B could be viewed as the issuer of the notes.

Therefore, the Division staff concluded that the notes should be registered prior to presenting the proposal at the special shareholder's meeting.

34. Section 3(a)(9); Section 2(a)(4)

Equipment trust notes are convertible into common stock of the user of the equipment deposited in an equipment trust. The term "issuer" with respect to equipment trust certificates is defined in Section 2(a)(4) to mean the person by whom the equipment is used. Accordingly, Section 3(a)(9) would be available for the conversion of the notes into common stock of the user, even though the notes would appear technically to be securities issued by the equipment trust.

35. Section 3(a)(9); Rule 144(d)

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.

36. Section 3(a)(9); Rule 415

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 where the Section 3(a)(9) exemption is unavailable (for example, where securities are convertible into securities of another issuer, where conversion terms require that the shareholder pay consideration at the time of conversion, and where 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.

37. Section 3(a)(10)

Section 3(a)(10) does not exempt the issuance of shares in settlement of a suit by a creditor unless all of the requirements of Section 3(a)(10) are satisfied, including, among other things, the court holding a hearing as to the fairness of the issuance and expressly finding that it is fair.

38. Section 3(a)(11)

The intrastate offering exemption is not rendered unavailable solely because the proceeds of the offering will be temporarily invested in out-of-state CD's.

39. Section 3(a)(11)

An issuer makes an offering of securities in reliance upon the Section 3(a)(11) exemption and permits purchasers to pay for their securities in installments. The question was raised whether such purchasers must satisfy the residency requirement of Section 3(a)(11) until the completion of their installment payments. The Division staff expressed the view that if an installment payment represented a separate investment decision, the purchaser must be a resident at the time of that payment. On the other hand, if a purchaser was unconditionally committed by such purchaser's initial decision to purchase the securities, such purchaser need not remain a resident during the installment period.

40. Section 3(a)(11)

A Section 3(a)(11) offering is generally considered a public offering. Securities acquired in such an offering are not "restricted" under Rule 144(a)(3).

41. Section 3(a)(11)

An exchange offer would not be exempt pursuant to Section 3(a)(11) where it is necessary to make the offer to some joint holders of stock of the subject company who are non-residents of the state where the offeror is domiciled.

42. Section 3(a)(11)

A new corporation would not be precluded from relying on Section 3(a)(11) for an offering simply because a significant part of its business would be interstate mail order.

43. Section 3(a)(11)

A new bank holding company was being formed to hold the securities of two banks. It was intended to issue stock to acquire the securities of one bank in an intrastate offering under Section 3(a)(11), while simultaneously issuing stock to acquire the second bank pursuant to a registered exchange offer. Under the five-factor test of Release No. 33-4552, the two offerings would be integrated. Thus, the Section 3(a)(11) exemption would not be available due to its limitation to intrastate offerings.

44. Section 3(a)(11)

A purchaser in an offering exempt from registration under Section 3(a)(11) intends to transfer the securities purchased to the purchaser's Individual Retirement Account less than nine months after the offering. The IRA is administered by an out-of-state trustee. The residence of the trustee would not affect the availability of the intrastate exemption for the initial offering.

45. Section 3(a)(11); Section 4(2)

Sales of stock to promoters pursuant to Section 4(2) generally are not integrated with a subsequent intrastate offering exempt from registration pursuant to Section 3(a)(11).

46. Section 3(a)(11); Rule 147

There is no prohibition in Rule 147 regarding general advertising or general solicitation. However, any such advertising or solicitation must be conducted in a manner consistent with the requirement that offers pursuant to the rule be made only to persons resident within the state or territory of which the issuer is a resident.

47. Section 4(1); Section 2(a)(3); Section 2(a)(11)

An issuer eligible to use Form S-3 proposes to sell debt securities convertible into the common stock of an unaffiliated reporting company. The shares of common stock are restricted securities but may be resold freely in the public market under Rule 144(k). The registration statement for the offering need only cover the debt securities because the exemption provided by Section 4(1)

would be available for the sale of the common stock upon conversion of the debt securities. With respect to the information to be provided regarding the issuer of the underlying common stock, see Morgan Stanley & Co., Incorporated (June 24, 1996).

48. Section 4(2)

A limited partnership that owns a building will advertise for leases through newspaper advertisements. It is anticipated that some lessees may negotiate for an interest in the limited partnership as a condition of leasing space in the building. The private offering exemption for the sale of such limited partnership interests is not lost because of the general advertisements relating only to the availability of space.

49. Section 4(2)

Rule 506 sanctions the use of a representative who advises unsophisticated participants in the offering and thus furnishes the business sophistication required by Section 4(2) that the participants lack personally. Because of the safe-harbor character of the rules and because no-action positions generally are unavailable under Section 4(2), the Division will not express a view whether the use of a purchaser or offeree representative outside Rule 506 is an acceptable method to provide the sophistication requirement of Section 4(2) as construed by the courts and the Commission.

50. Section 4(2); Section 3(a)(11)

Sales of stock to promoters pursuant to Section 4(2) generally are not integrated with a subsequent intrastate offering exempt from registration pursuant to Section 3(a)(11).

51. Section 4(2); Section 5

The Division staff was asked about situations in which registration statements are filed for secondary offerings, even though the securities are not yet issued because the primary sale has not yet taken place. When the primary sale is to be made in reliance upon the Section 4(2) exemption, having a registration statement for resale on file before the private offering takes place would appear to cast doubt upon the validity of the exemption because distribution is clearly contemplated. Also, the registration of a secondary offering under such circumstances may suggest doubt as to whether it is a genuine secondary. The Division staff raises no objection when securities are privately placed with the closing of the private placement contingent on filing or effectiveness of a resale registration statement as long as the purchasers in the private placement are irrevocably bound to purchase the securities subject only to the filing or effectiveness of the registration statement or other conditions outside their control and the purchase price is established at the time of the private placement. The purchase price can not be contingent on the market price at the time of effectiveness of the registration statement. In addition, when the registration statement is on Form S-3, generally, the shares must be "outstanding" at the time of filing in order to be in compliance with General Instruction I.B.3. (This requirement is not applicable to the Form S-3 prospectus that is filed with a Form S-8 for resale of securities acquired in an employee benefit plan.)

52. Section 4(4)

A company planning to make an IPO advised the Division staff that it proposed to include in its prospectus a representation that its captive broker-dealer would maintain a list of persons who wished to buy or sell the company's securities. The Division staff advised that although Section

4(4) would exempt the execution of such orders, the solicitation of customer orders is specifically excepted from Section 4(4). Since maintaining such a list would be a form of solicitation, registration would be required to prevent offers from violating Section 5. (Merrill Lynch (4/26/76), which deals with a broker-dealer acting as an agent in off-floor odd-lot transactions is inapposite.)

53. Section 4(6); Rule 144(a)(3)

Securities issued under Section 4(6) are deemed restricted securities even though they are not referred to specifically in the definition of the term "restricted securities" set forth in Rule 144.

54. Section 5

The Division staff does not object if an issuer whose warrants are out of the money does not keep the prospectus for the exercise of those warrants up to date; of course, the prospectus must be amended at such time as the exercise of the warrants becomes economic.

55. Section 5

A registrant inquired whether an offering of shares under a stock purchase plan could be made by switching back and forth between:
(1) shares acquired from the issuer registered under the Securities Act; and (2) shares acquired on the open market not registered under the Securities Act in reliance on the limited issuer involvement/no registration positions in Securities Act Releases 4790 and 5515. The Division staff took the position that switching back and forth indicated too much issuer involvement to qualify for the limited issuer involvement exemption from registration. Accordingly, registration of all shares offered under the plan was required.

56. Section 5

Registration of securities issued pursuant to a TRASOP is not required where the plan complies with the requirements of Release Nos. 33-6188 and 33-6281. The use of employer contributions to purchase stock directly from the employer does not affect this position.

57. Section 5

An issuer should file new powers of attorney with respect to the signatures in a new registration statement, even though the registration statement relates only to additional securities to be issued in connection with a plan already registered under the Securities Act.

58. Section 5

In order to avoid a possible allegation of "gunjumping," an issuer should not initiate a magazine story relating to it while it is in registration.

59. Section 5

Warrants, and the shares issuable on their exercise, were registered. Now the warrants are being exchanged for warrants with a new expiration date and exercise price in reliance on Section

3(a)(9). The Division will not object if the original registration statement (updated) is used in connection with the exercise of the new warrants.

60. ** Section 5; Section 2(a)(3) **

An issuer may extend the exercise period for warrants and/or reduce the warrant exercise price through the issuance of an appropriate Rule 424(b) prospectus sticker supplement prior to the initial expiration date of the warrants. The issuer may not permit the exercise of such modified warrants, however, unless a current prospectus under Section 10(a)(3) with respect to the shares underlying the warrants is delivered.

61. Section 5

While the Division staff generally will not raise any question if small numbers of shares are issued as prizes or awards to employees without Securities Act registration, if such awards are tied to the attainment of specific goals (e.g., sales goals) by individual employees, an offer or sale requiring registration may be involved.

62. Section 5

In conducting a blind pool/blank check offering, the issuer should post-effectively amend to describe the operating business to be acquired as soon as it becomes reasonably probable that such business will be acquired, rather than waiting until the acquisition has been consummated. (Note: This interpretation does not apply to real estate offerings subject to Industry Guide 5, which has other provisions regarding the acquisition of property.)

63. Section 5

A corporation may register shares for issuance pursuant to an employee plan (along with other securities to be offered by the issuer) even though the plan has not yet been approved by shareholders and will not begin operations unless it is approved, provided that the prospectus makes the situation clear. The prospectus should be stickered when shareholder approval is obtained.

64. Section 5

A parent and its majority-owned subsidiary both have classes of securities registered under Section 12 of the Exchange Act. The parent wishes to make a public offering of convertible, exchangeable debentures. The debentures are immediately convertible into common stock of the parent, and exchangeable at the option of the parent into common stock of the subsidiary. All three securities must be registered.

65. Section 5

An issuer filed a Form S-3 registration statement for a secondary offering of common stock which is not yet effective. One of the selling shareholders wanted to do a short sale of common stock "against the box" and cover the short sale with registered shares after the effective date. The issuer was advised that the short sale could not be made before the registration statement becomes effective, because the shares underlying the short sale are deemed to be sold at the time

such sale is made. There would, therefore, be a violation of Section 5 if the shares were effectively sold prior to the effective date.

66. Section 5

The offer and sale of underwriters' warrants often are registered along with the public offering for which the warrants reflect underwriters' compensation. When the underwriters' warrants are registered, the securities underlying those warrants must be registered if the warrants are exercisable within one year. If the warrants are not exercisable for more than one year, there is not deemed to be a concurrent offering of the underlying securities and the offer and sale of those securities need not be registered along with the underwriters' warrants. If the offer and sale of the underlying securities were registered initially, the staff has permitted - due to the unique nature of underwriters' warrants - a post-effective amendment to the original registration statement to be filed for the resales of the securities using any form for which the registrant then qualifies. If the underlying securities were not registered initially, a new registration statement must be filed for the resales of the underlying securities.

67. Section 5; Section 17; Exchange Act Section 10

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.

68. Section 5

In King & Spalding (Nov. 17, 1992), the Division expressed its view concerning Securities Act registration requirements for operation by an issuer and/or its affiliates of a service to facilitate secondary resales of limited partnership interests of such issuer. The Division staff has advised that the position in the King & Spalding letter would apply to other finite-life entities whose securities do not have an organized secondary market, such as certain real estate investment trusts. Specifically, if the entity meets the definition of "partnership" in Item 901(b) of Regulation S-K, the King & Spalding position would apply to any issuer/affiliate-sponsored service designed to facilitate a secondary market.

69. Section 5; Section 2(a)(3)

Where convertible securities or warrants are being registered under the Securities Act, and such securities are convertible or exercisable within one year, the underlying securities also must be registered at that time, absent an exemption from registration for such conversion or exercise (such as Section 3(a)(9) for most conversions). When no such exemption is available and such securities are not convertible or exchangeable within one year, the issuer may choose not to register the underlying securities at the time of registering the convertible securities or warrants, but the underlying securities must be registered no later than the date such securities become convertible or exercisable by their terms. Where securities are exchangeable (i.e. the issuer may chose to convert the securities into other securities), the underlying securities must be registered

at the time the exchangeable securities are registered since the entire investment decision that investors will make is made at the time of purchase. The security holder, by buying the exchangeable security, is in effect also deciding to accept the underlying security.

70. Section 5; Rule 135; Section 2(a)(3)

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 Sections 2(a)(3) and 5. 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.

71. Section 5; Section 4(2)

The Division staff was asked about situations in which registration statements are filed for secondary offerings, even though the securities are not yet issued because the primary sale has not yet taken place. When the primary sale is to be made in reliance upon the Section 4(2) exemption, having a registration statement for resale on file before the private offering takes place would appear to cast doubt upon the validity of the exemption because distribution is clearly contemplated. Also, the registration of a secondary offering under such circumstances may suggest doubt as to whether it is a genuine secondary. The Division staff raises no objection when securities are privately placed with the closing of the private placement contingent on filing or effectiveness of a resale registration statement as long as the purchasers in the private placement are irrevocably bound to purchase the securities subject only to the filing or effectiveness of the registration statement or other conditions outside their control and the purchase price is established at the time of the private placement. The purchase price can not be contingent on the market price at the time of effectiveness of the registration statement. In addition, when the registration statement is on Form S-3, generally, the shares must be "outstanding" at the time of filing in order to be in compliance with General Instruction I.B.3. (This requirement is not applicable to the Form S-3 prospectus that is filed with a Form S-8 for resale of securities acquired in an employee benefit plan.)

72. Section 5; Rule 135; Section 2(a)(3)

The use of a general advertisement for the sale of a business that might involve the sale of all of the outstanding securities of the issuer could constitute a violation of Section 5 unless the ad complied with Rule 135.

73. Section 5(b)(2); Rule 153

Rule 153 allows prospectus delivery to a securities exchange in connection with the distribution of a security listed on that exchange. The rule may also be relied on for the distribution of a security admitted to unlisted trading privileges on an exchange.

74. **** Section 5(c); Section 2(a)(10) ****

A broker-dealer wanted to publish or distribute information, opinions and/or recommendations as to investment grade asset-backed securities, as defined in Securities Act Form S-3. The broker-dealer asked if the information, opinions and/or recommendations would be an offer of the asset-backed securities for purposes of Securities Act Sections 2(a)(10) or 5(c). The staff directed the broker-dealer to Dissemination of Research Materials Relating to Asset-Backed Securities (February 7, 1997). This no-action letter describes the conditions under which the information, opinions or recommendations are not offers of the asset-backed securities.

75. Section 6

A company filed a registration statement covering $12,500,000 of debentures, 12,500 warrants to purchase common stock and the common stock underlying such warrants. The registrant paid a filing fee of $8,620, $4,310 of which was attributable to the debentures (fee was then at 1/29th of 1% of the aggregate). Prior to the effective date, the registrant decided to change the offering and filed an amendment withdrawing all the original securities, and substituting $17,500,000 principal amount of convertible debentures with a delayed conversion feature. The filing fee for the new offering would amount to $6,034. Since the registrant had paid only $4,310 with respect to the debt portion of the initial offering, it was concerned that it might owe an additional fee of $1,724 attributable to the increased debt offering. The registrant was informed that no additional fee was required, and that the fee table should indicate by footnote that a $8,620 fee had already been paid.

76. Section 6

A Delaware limited partnership, with a foreign general partner, must provide the signature of an authorized U.S. representative of the general partner to satisfy the signature requirements for a Securities Act registration statement.

77. Section 6(b)

There is no upper limit on the amount of the Securities Act registration fee. The fee is fixed by Section 6(b). The fee (as of October 1, 1996) is set at 1/33rd of 1 percent of the aggregate offering amount. Under the National Securities Markets Improvements Act of 1996, the Section 6(b) fee rate would be authorized at declining rates, beginning at 1/34th of 1 percent of the aggregate offering amount in 1998, and would decline thereafter to 1/50th of 1 percent in 2006 and 1/150th of 1 percent in 2007.

78. Section 10(a)(3); Rule 401(b); Form S-3

For purposes of Rule 401(b), the updating of a Form S-3 registration statement through the incorporation of a Form 10-K is the equivalent of filing a post-effective amendment pursuant to Section 10(a)(3). This means that if the registrant were not eligible to use Form S-3 at the time of such updating, it would be required to file a post-effective amendment on whatever other Form would be available at the time.

79. Section 10(a)(3); Form 8-A

A company issued units of common stock and warrants, and more than a year has passed since effectiveness of the registration statement. The warrants are now exercisable and the company

wants the common stock to be quoted on NASDAQ. As to warrant exercises, post-effective amendments would be required to keep the prospectus current for Section 10(a)(3) purposes. If the company is still subject to Section 15(d), the company may use a Form 8-A to register under the Exchange Act.

80. Section 11(a); Form S-3

For purposes of Form S-3, the accountant's liability under Section 11(a) is determined as of the effective date of the registration statement, not as of the filing date of a previously filed Form 10-K incorporated by reference, nor the filing date of the registration statement.

81. Section 17; Section 5; Exchange Act Section 10

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.