E. REGULATION D AND RULE 701

1. Regulation D

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

2. Regulation D

In computing the various dollar amount ceilings for sales under Regulation D, a sale that was subsequently rescinded (e.g., because it was found that the investor was not "accredited") need not be counted.

3. Rule 501

Previous interpretations have stated that under Rule 501(e) foreign investors need not be counted toward the limit on investors in Regulation D offerings. Those interpretations are too narrow. Instead, if the foreign offering meets the safe harbor conditions set forth in Regulation S relating to offerings made outside the United States, then foreign investors are not subject to the conditions applicable in Regulation D offerings, including those relating to the calculation of the number of investors.

4. Rule 501

If a general partnership is making an investment in a Regulation D offering and seeking to be deemed an accredited investor, it may use the aggregate net worth of its partners to measure its net worth for purposes of Rule 501(a)(5). This assumes that the partnership was not organized for the specific purpose of investing in the securities being offered and thereby avoiding the limitation on the number of non-accredited purchasers specified in Rules 505 and 506. See Rule 501(e)(2).

5. Rule 501(a)(l)

An ERISA plan with less than $5 million in assets has an arrangement through its trustee with a registered investment adviser to receive investment advice. The ultimate investment decision is made by the trustee, however, and therefore the plan would not qualify as an accredited investor under Rule 501(a)(l). If the arrangement gave the registered investment adviser full discretion to make investment decisions for the plan, the plan then would qualify as an accredited investor. It should be noted that the failure of a plan to qualify under Rule 501(a)(l) would not preclude it from attempting to qualify under other provisions of Rule 501(a) as an accredited investor.

6. Rule 501(a)(3)

A hospital holding company issues financial statements that are combined with those of an affiliated hospital. The hospital is not technically a subsidiary of the holding company; both are

non-stock corporations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code. The holding company may consolidate its assets with those of the affiliated hospital in making the computation of total assets specified for Section 501(c)(3) organizations that wish to qualify as accredited investors under Rule 501(a)(3).

7. **** Rule 501(a)(3) ****

Although not specified in the list of organizations in Rule 501(a)(3), a limited liability company may be treated as an "accredited investor" as defined in that rule if it satisfies the other requirements of the definition. See Wolf, Block, Schorr and Solis-Cohen (Dec. 11, 1996).

8. Rule 501(a)(8)

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, the issuer would be permitted to look through the owner-entity to its natural person owners to determine whether they are all accredited investors. The result of this interpretation is to permit an issuer to look through various forms of equity ownership to natural persons in judging accreditation under Rule 501(a)(8).

9. Rule 501(a)(8)

Under this provision, an entity is an accredited investor if all its equity owners are accredited investors. Thus, if one director holds one qualifying share of an entity's stock and is not an accredited investor, the entity would not be accredited under this provision.

10. Rule 501(c)

In calculating the aggregate offering price under Rule 504 or 505, an issuer should 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.

11. Rule 501(c)

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. In computing the aggregate offering price under Rule 501(c), only the initial cash payment should be considered. This position reflects the fact that the royalty payments that will be made to the seller of the property are treated as operating expenses, rather than capitalized costs for the property.

12. Rule 501(c); Rule 504; Rule 505

In computing the aggregate offering price of an offering under Rule 504 or 505, a limited partnership issuer is not required to aggregate sales by other limited partnerships solely because the other partnerships have the same general partner.

13. Rule 501(e)

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

14. Rule 501(e)

A not-for-profit corporation formed for the specific purpose of an investment would 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.

15. Rule 501(e)(l)

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)(l), which governs the calculation of the number of purchasers, does not specifically exempt either trust from the count, its policy of exempting related purchasers with the same residence justifies counting the trusts as one purchaser. 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.

16. Rule 501(e)(2)

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. A beneficial owner who also happens to be an accredited investor, for instance, would be excluded from the count.

17. Rule 501(f)

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

18. Rule 501(h)

A lawyer in the law firm representing the issuer may 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.

19. Rule 502

Under Regulation D, an issuer that must provide a disclosure document is required to identify and make available those exhibits that would accompany the registration form or report upon which the disclosure document is modeled. Thus, a Regulation D issuer must 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 consequences.

20. Rule 502(b)(2)

The reference in Rule 502(b)(2)(ii)(A) to the annual report to shareholders for the "most recent fiscal year" includes the annual report prepared for the previous year, provided that delivery of the annual report for the present year is not yet required under Rules 14a-3 or 14c-3 and the prior year's report meets the requirements of Rule 14a-3 or 14c-3.

21. Rule 502(b)(2)

Where an issuer of a Regulation D offering is a limited partnership, the issuer, where required to provide the information specified in Rule 502(b)(2), should furnish for any corporate general partner an audited balance sheet as of the most recently completed fiscal year.

22. ** Rule 502(b)(2)(i) **

Rules 502(b)(2)(i)(A) and (B) provide that where the issuer is a limited partnership and cannot obtain the required financial statements for a Regulation D offering without unreasonable effort or expense, it may present tax basis financials. These provisions are construed to apply also to the financial statements required in Regulation D offerings for general partners as well as properties to be acquired.

23. Rule 502(b)(2)(iii)

In an offering under Regulation D, the opinion of counsel regarding the legality of the issuance of the securities need not contain an opinion as to whether the issuer has a valid claim to the Regulation D exemption.

24. Rule 502(c)

Rule 502(c), which prohibits general solicitation and general advertising in connection with the offer and sale of securities, 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), however, is a question of fact that the Division generally is not in a position to resolve.

25. Rule 502(c)

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.

26. Rule 502(c)

A reporting company proposes to offer securities under Regulation D. Because of the size and price of the offering, the issuer feels compelled by Section 10(b) of the Exchange Act to issue a

press release discussing the offering. The issuer is concerned that such a release might constitute a general solicitation or general advertising, activities which are not permitted by Rule 502(c) in connection with most Regulation D offerings. The issuer should refer to the Rule 135(c) safe harbor for reporting issuers giving notice of unregistered offerings.

27. Rule 502(d)

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).

28. Rule 503

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

29. Rule 503

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

30. Rule 503(a)(l)

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.

31. Rule 504

The aggregate offering price of a Rule 504 offering under Regulation D must be reduced by the amount of a secondary offering made by the issuer's parent within the prior 12 months in reliance on Regulation A.

32. Rule 504

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. 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) would be eligible to utilize Rule 504.

33. Rule 504; Rule 505

Both Rules 504 and 505 are unavailable to investment companies. Section 3(c)(l) of the Investment Company Act exempts from the definition of investment company any issuer with not more than 100 stockholders that is not making and does not propose to make a "public offering."

For purposes of Section 3(c)(1), offerings under Rules 504 and 505 could be public or non-public depending on the facts and circumstances.

34. Rule 504; Rule 505

In computing the aggregate offering price for the ceiling limitations of Rules 504 and 505, a limited partnership issuer is not required to include payment by active general partners for limited partnership interests. Since the general partners are essentially investing in their own efforts, and not those of others, any limited partnership interests so purchased are not deemed securities for purposes of this computation.

35. Rule 504; Rule 505

A condition of the availability of Rule 504 and 505 is that the aggregate offering price must not exceed the amounts specified in the rules, less the aggregate offering price of securities sold within the past 12 months pursuant to Section 3(b) or in violation of Section 5. Where securities were sold in violation of Section 5 more than 12 months before a Regulation D offering, and where the issuer makes a rescission offer within the 12-month period preceding the Regulation D offering, the rescission offer need not be deducted from the specified ceiling level for the exemption claimed.

36. Rule 504; Rule 505; Rule 501(c)

In computing the aggregate offering price of an offering under Rule 504 or 505, a limited partnership issuer is not required to aggregate sales by other limited partnerships solely because the other partnerships have the same general partner.

37. Rule 505

Rule 505 is not available to any issuer that falls within any of the disqualifications for the use of Regulation A. See Rule 505(b)(2)(iii). One such disqualification arises where the issuer or any of its directors, officers, general partners, or underwriters is subject to an order of the Commission entered under Section 15(b) of the Exchange Act, which deals with broker/dealer registration and regulation. See Rule 262(d)(3). The issuer in the case presented was a broker/dealer that was censured four years ago pursuant to a Commission order. Because that censure has no continuing force, the issuer is not "subject to an order of the Commission" and is thus not disqualified from using Rule 505.

38. Rule 505(b)(2)(iii)

The corporate parent of the general partner in a proposed limited partnership offering has recently undergone bankruptcy. Inasmuch as the bankruptcy proceeding would not disqualify the limited partnership from the use of Regulation A under Rule 262, the limited partnership would not be disqualified from Regulation D under Rule 505(b)(2)(iii).

39. Rule 505; Rule 504; Rule 501(c)

In computing the aggregate offering price of an offering under Rule 504 or 505, a limited partnership issuer is not required to aggregate sales by other limited partnerships solely because the other partnerships have the same general partner.

40. Rule 505; Rule 504

Both Rules 504 and 505 are unavailable to investment companies. Section 3(c)(l) of the Investment Company Act exempts from the definition of investment company any issuer with not more than 100 stockholders that is not making and does not propose to make a "public offering." For purposes of Section 3(c)(l), offerings under Rules 504 and 505 could be public or non-public depending on the facts and circumstances.

41. Rule 505; Rule 504

In computing the aggregate offering price for the ceiling limitations of Rules 504 and 505, a limited partnership issuer is not required to include payment by active general partners for limited partnership interests. Since the general partners are essentially investing in their own efforts, and not those of others, any limited partnership interests so purchased are not deemed securities for purposes of this computation.

42. Rule 505; Rule 504

A condition of the availability of Rule 504 and 505 is that the aggregate offering price must not exceed the amounts specified in the rules, less the aggregate offering price of securities sold within the past 12 months pursuant to Section 3(b) or in violation of Section 5. Where securities were sold in violation of Section 5 more than 12 months before a Regulation D offering, and where the issuer makes a rescission offer within the 12-month period preceding the Regulation D offering, the rescission offer need not be deducted from the specified ceiling level for the exemption claimed.

43. Rule 701(a)

Foreign private issuers that are not subject to the Exchange Act's reporting requirements are eligible to use Rule 701, even if they do not file reports pursuant to Rule 12g3-2(b).

44. Rule 701(b)(5)

An issuer may offer to sell $500,000 of securities under Rule 701 in any 12-month period regardless of the calculations in Rule 701(b)(5)(i) or (ii).

45. Rule 701(b)(5)(i)

An issuer may continue to rely upon the total assets calculation for outstanding offers and their ultimate consummation, even though total assets decrease in subsequent years. However, no new offers may be made in reliance upon the earlier higher assets figure.

46. Rule 701(b)(5)(i)

A start-up company may utilize its total assets as of a recent date instead of the prior fiscal year closing date when it was not in existence at the end of the prior fiscal year.