

Manual of Publicly Available Telephone Interpretations

D. RULE 415

1. Rule 415

A registrant inquired as to the circumstances when an over-allotment offering constitutes a delayed offering and therefore compliance with Rule 415 is necessary. As a matter of administrative practice, the Division staff will permit over-allotment options with terms of up to 45 days to be made without triggering compliance with Rule 415.

2. Rule 415

A question has been posed as to the appropriate way of treating the amount of securities being registered on the cover page of a Form S-3, where the registration statement covers debt securities that will be issued as zero coupon or other deep discount bonds and where Rule 415 will apply. Although the general rule in the case of debt securities is that the registration statement should cover the face amount of the debt being registered, counsel for the issuer is concerned that this will be misleading for a shelf registration of deep discount debt. Based on the representations from the issuer, the Division has agreed to accept the registration of the maximum probable amount of aggregate proceeds with a footnote containing substantially the following language -- "or, if any debt securities are issued at any original issuance discount, such greater amount as shall result in net proceeds of [the maximum probable amount listed above] to the registrant."

3. Rule 415

Securities that are registered on a shelf registration statement pursuant to Rule 415 may be sold concurrently in any of the transactions for which they were registered. Thus, for example, if the shelf registration statement indicated that the securities registered could be sold in acquisitions, firm commitment underwriting and at-the-market offerings, all three types of transactions could be undertaken at the same time (subject to form eligibility).

4. Rule 415

Where an issuer registers an offering of convertible debt securities and also registers the common stock to be issued upon conversion, the 10% test of Rule 415(a)(4)(ii) would not be applied to the common stock issuable upon conversion.

5. Rule 415

As discussed in Release No. 33-6383 there are no presumptive underwriter standards under Rule 415. Thus, the determination whether a person is an underwriter with respect to a large amount of securities acquired in one or a series of offerings under the rule depends on the particular facts and circumstances.

6. Rule 415

A pending registration statement can be amended to become a shelf registration statement prior to its effective date. Prior to such initial effective date, additional securities may be added for registration with the payment of the requisite additional fee.

7. Rule 415

Rule 415(a)(4) requires that in an "at-the-market" equity offering by the registrant, the underwriter must be named in a prospectus that is "part of the registration statement." If the registration statement becomes effective without naming the underwriter, a post-effective amendment must be filed for this purpose. A sticker supplement to the prospectus is not appropriate in these circumstances.

8. Rule 415

Among the many innovative plans of financing seen today are those involving 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. Filings involving such plans require an analysis of Section 5 and Rule 415 issues. 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.

9. Rule 415

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 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). (In this regard, it should be noted that Form S-3 is available for investment grade asset-backed securities offerings and therefore Rule 415(a)(1)(x) would be available for such offerings.) Both Rule 415(a)(1)(ix) and (x), unlike subsection (vii), are subject to the two-year limitation of Rule 415(a)(2). Permitting subsection (vii) to be available only for mortgage-related securities as defined by Section 3(a)(41), but at the same time permitting other subsections of Rule 415 to be available for other filings involving mortgages, is consistent with the Congressional policy of facilitating the marketability of mortgages.

10. Rule 415

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 does 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)(vi). Therefore, another paragraph of Rule 415(a)(1) would have to be available.

11. Rule 415

A registration statement under Rule 415 cannot be made effective without an opinion of counsel as to the legality of the securities being issued, even though no immediate sales are contemplated. Where sales are not expected in the near future, however, the Division staff will accept a qualified opinion of counsel, subject to the understanding that an unqualified opinion will be filed prior to the time any sales are made under 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.

12. Rule 415

The existence of an effective registration statement governed by Rule 415 does not automatically require that sales under that registration statement be integrated with sales in a separate offering for which an exemption is claimed. Rather, the transactions will or will not be integrated depending on all the facts and circumstances surrounding the actual sales, after giving consideration to the criteria set forth in Release No.33-4552.

13. Rule 415

A change in currency in which securities may be issued is not a fundamental change and may be accomplished by sticker under 424(c).

14. Rule 415

A reduction of the commission paid to the underwriter or selling agent may be accomplished by sticker where the price of the securities is not changed.

15. Rule 415

An issuer that does not meet the requirements of Instruction I.B.1. of Form S-3 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. Even though the firm commitment could be analyzed as a delayed offering, it may be made in reliance on Rule 415. Item 512(c) of Regulation S-K contemplates this result.

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

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.

17. Rule 415

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.

18. Rule 415

For shelf registration of preferred stock to be issued in series, a prospectus supplement filed under Rule 424 may be used to set forth more specifically the terms of the preferred stock not inconsistent with the more general terms contained in the core prospectus. The instrument defining the specific terms of the preferred stock is permitted to be filed as an exhibit to a Form 8-K (assuming the registration is on Form S-3).

19. Rule 415

A company inquired whether it could update a Form S-1 for a warrant offering by sticking the prospectus with a Form 10-Q, which would be provided to securityholders. If the Form 10-Q contains no disclosure that would constitute a fundamental change, there is no Item 512(a) requirement to file a post-effective amendment. If the company, based on advice of counsel, must update for anti-fraud purposes, it may do so by a supplement that clearly and concisely discloses updated information. If such disclosure cannot be done clearly and concisely in a supplement, then a fundamental change may have occurred and a post-effective amendment would be required.

20. Rule 415

A registrant wished to follow the acquisition shelf procedure described in the Form S-4 adopting release (33-6578) and The Service Corporation International interpretive letter (October 31, 1985). Noting that information about the acquired company might be omitted from the registration statement for an acquisition that would be exempt from registration but for the possibility of integration, the registrant asked whether the same procedure would apply where the acquisition was deemed exempt and there was no possibility of integration. The Division staff agreed that the same procedure could be used.

21. Rule 415

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. Others, however, may be called "delayed/continuous" since they do not begin promptly after effectiveness, but are continuous in nature once begun. One registration statement may cover several "delayed/continuous" offerings, each a different program for a new series of Notes.

22. Rule 415

The prospectus ("core prospectus") filed as part of a registration statement covering a "delayed/continuous" offering of medium term notes, *i.e.*, a continuous offering not commencing promptly after effectiveness, generally will contain only a generic description of the security terms. When the medium term note program begins, the core 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 ("securities prospectus supplement") will be distributed to interested persons. When the notes are priced, a second prospectus supplement ("pricing supplement") that contains the price, specific maturity date and other limited terms previously omitted from the prospectus supplement is printed. The core prospectus, securities prospectus supplement and pricing supplement are delivered to investors with the confirmation. For each series of pricing supplements reflecting prices changing frequently in response to market and economic factors. Under this form of medium term note program offering, the securities 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)(3), in recognition of the fact that, once under way, the offering is continuous in nature.

23. Rule 415; Item 512 of Regulation S-K

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 took the position that such an extension was a material change in the plan of distribution, which according to the Item 512(a)(iii) undertaking would require a post-effective amendment.

24. Rule 415; Rule 144

Where 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 of the particular case.

25. Rule 415; Rule 429

The combined prospectus technique of Rule 429 may be used in the context of Rule 415, where an amount of securities remains unsold on an earlier shelf registration statement at the time the issuer files a new shelf registration statement. 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.

26. Rule 415; Rule 461

The Division staff will not insist on compliance with the requirement of Rule 461 that managing underwriters join in the written request for acceleration in connection with a shelf registration statement naming a substantial number of potential underwriters.

27. Rule 415; Rule 461

An underwriter need not join in the registrant's request for acceleration when the registration statement is a delayed-offering shelf filing.

28. Rule 415; Form S-1; Form S-2

Where Form S-1 or Form S-2 is used for a continuous offering under Rule 415, a post-effective amendment is necessary to meet the requirements of Section 10(a)(3), to reflect fundamental

changes, or to disclose material changes in the plan of distribution. Other changes may be made by sticker. A post-effective amendment is required for updating because neither Form S-1 nor Form S-2 provides for incorporation by reference of Exchange Act reports after the effective date.

29. Rule 415; Form S-3

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.

30. Rule 415; 1939 Act

After a shelf registration statement for debt securities has been declared effective and the related indenture has been qualified, a post-effective amendment may not be used for the purpose of qualifying a new indenture for another class of securities deemed to be previously registered.

31. Rule 415; 1939 Act

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

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").
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 the prospectus and in a supplemental indenture at the time such series is to be offered. However, in order to avoid the delays attendant to post-effective amendments, in the case of the Form S-3 registration statement a Rule 424 sticker may be used to make the requisite prospectus disclosures, and the supplemental indenture may be filed as an exhibit to an 8-K (in the same manner as specified for underwriting agreements).

32. Rule 415; Form S-2

If Form S-2 is used for a continuous offering, it must be updated by means of post-effective amendments since, unlike Form S-3, the form does not provide for incorporation by reference of subsequent periodic reports. For example, in an offering subject to Rule 415, an S-2 registrant proposed that in lieu of following the procedures for updating described in the undertakings of Item 512(a) of Regulation S-K, it be permitted to incorporate by reference future Exchange Act reports and to provide such reports to users of the prospectus. The Division staff informed

counsel that since the registrant is an S-2 company, rather than an S-3, it is not permitted to utilize this procedure. Instead the issuer would be required to file a post-effective amendment each year to satisfy its Section 10(a)(3) updating requirement (See Item 512(a)(1)(i) of Regulation S-K). The quarterly results set forth in Form 10-Q could be included in the registration statement by sticker rather than post-effective amendment, so long as such information does not constitute a fundamental change in the information set forth or included in the registration statement.

33. Rule 415; Form S-3

Where 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, it is permissible for the registrant to name the underwriter in a prospectus supplement (so long as it is not an equity offering "at-the-market" under Rule 415(a)(4)) and to file the underwriting agreement as an exhibit under cover of Form 8-K.

34. Rule 415; Form S-3; Rule 424

Rule 3-01 of Regulation S-X contains a 45 to 90-day window period in which a "filing," other than on Form 10-K or Form 10, may be made without the current fiscal year-end balance sheet. The rule, however, is conditioned upon the registrant's reasonable and good faith expectation that it will report income during the current fiscal year. A registrant wished to sell securities from an effective Form S-3 registration statement during the window period and file a prospectus supplement under Rule 424 to reflect the take-down. The Division staff took the position that Rule 3-01 did not prevent the shelf take-down and would not apply to the prospectus supplement as it was not for the purpose of updating the prospectus under Section 10(a)(3).

35. Rule 415; Item 512 of Regulation S-K; Form S-8

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

36. Rule 415; Form SB-2

Form SB-2 is available for Rule 415 offerings. The omission of the Rule 415 box on the cover page of the form does not mean that Rule 415 is not available. Rather, the issuer should add a box to its form.

37. Rule 415; Form S-11

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 and reviewed at the time the registration is declared effective and the basic indenture is qualified; and
2. The registrant files a prospectus supplement in sticker form describing the issuance of the series and the collateral therefore.

This position is consistent with Instruction 1 to Item 601(a) of Regulation S-K. Where a registrant does not satisfy these conditions, supplemental indentures and amended underwriting agreements may only be filed 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.

38. Rule 415(a)(1)(i); Form S-3

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.

39. Rule 415(a)(1)(vii)

In Certain Mortgage Related Securities Under Rule 415(a)(1)(vii) and Prospectus Filing Requirements of Rule 424(b)(2) and (5) (Aug. 18, 1987), the Division staff advised that a form of prospectus or prospectus supplement (collectively referred to as "prospectus") used in connection with described primary offerings of mortgage related securities on a delayed basis pursuant to Rule 415(a)(1)(vii) under the Securities Act that is filed with the Commission no later than the second business day following the date the prospectus is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date, shall be deemed in compliance with the prospectus filing requirements of Rule 424(b)(2) or (5) under the Securities Act. For purposes of Rule 424(b) and subparagraphs (2) and (5) thereunder, the concept of "first use" is not limited to providing the prospectus to purchasers with their confirmations, but also refers to availability of the prospectus to the managing underwriter, syndicate members or offerees. See Securities Act Release No. 6714 (May 27, 1987). In its response, the Division noted particularly the process described in the letter of determining the exact structure of mortgage-related securities offered on a delayed basis and preparing the prospectus to be used in connection with such offerings.

40. Rule 415(a)(1)(viii); Form S-2, General Instruction I; Form S-3, General Instruction I.B.1.

Securities to be issued in connection with business combinations may be registered on a shelf filing pursuant to Rule 415(a)(1)(viii). While this section does not limit the Securities Act registration form used, not all forms are available for business combinations. In particular, Forms S-2 and S-3 are not available for business combinations of any kind - exchange offers, Rule 145(a) transactions, etc. General Instruction I. to Form S-2 states that the Form may be used for offerings of securities "in any transaction other than an exchange offer for securities of another person." This instruction 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. The "for cash" proviso in General Instruction I.B.1. of Form S-3 has a similar effect. See Note 14 to Release No. 33-6534 (May 9, 1984). Form S-2 or 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.

41. Rule 415(a)(l)(ix)

A prospectus filed as part of an effective registration statement covering a continuous medium term note offering under Rule 415(a)(l)(ix) should contain a complete description of the terms of the notes, including price, to be offered under the first program; provided, however, that if the registrant uses Rule 430A, the registration statement may omit the information permitted to be omitted under that Rule. If the registrant elects to file a pricing amendment in lieu of using Rule 430A and there is no substantive change between the prospectus contained in the registration statement at the time of effectiveness and the prospectus used after effectiveness, there would be no prospectus filing obligation pursuant to Rule 424(b) for the initial prospectus. Subsequent prospectuses reflecting changes in the price, maturity date and other limited terms (a "pricing supplement") should be filed under paragraph (b)(3) of Rule 424. If Rule 430A were used, the initial pricing supplement would be filed under Rule 424(b)(l) or (4), and subsequent pricing supplements under (b)(3). See footnote 90 in Release 33-6714 (5/27/87).

42. Rule 415(a)(1)(x); Form S-3

The Division staff permits issuers to register on a single shelf registration statement asset-backed securities supported by more than one category of underlying assets without specifying the amount of each type to be offered. The Division staff requires, however, that the registration statement specifically identify the various asset categories and include a separate core prospectus for each such category. In considering whether a separate core prospectus is required, the Division staff will consider whether the assets described are intended to be pooled together or securitized separately. If the latter, separate core prospectuses ordinarily would be required.

43. Rule 415(a)(2)

Rule 415(a)(l)(viii) through (x) may be utilized only for securities registered in an amount reasonably expected to be offered and sold within two years from the initial effective date. The registrant must make a bona fide estimate of this amount at the time of the initial filing. If unsold securities remain at the end of the two years, the registration statement may continue to be used. There is no requirement that such unused securities be deregistered at the end of two years.

44. ** Rule 415(a)(4) **

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), which places certain limitations on "at-the-market" equity offerings, 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). But see Rule 461(b)(7) for certain factors that the Commission must take into consideration when deciding whether or not to accelerate the effective date of a registration statement covering a significant secondary offering "at-the-market."

45. **** Rule 415(a)(4) ****

This rule limits the amount of voting securities registered for "at-the-market" offerings to 10% of the aggregate market value of the registrant's outstanding voting stock held by non-affiliates. ("Affiliate" is defined in Rule 405.) This aggregate market value should be calculated on the basis of either the last sale price, or the average of the bid and asked prices of such stock, as of a date within 60 days prior to filing.