Manual of Publicly Available Telephone Interpretations

B. SECURITIES ACT RULES

1. Rule 134

Paragraph (a)(14) of Rule 134 permits security ratings to be included in tombstone ads only when such ratings have been assigned. Tentative or expected ratings are not permitted by the rule. As indicated in Release No. 33-6336, the Commission does not consider such preliminary indications to be actual assignments of a security rating.

2. Rule 134

Rule 134 does not authorize the inclusion in tombstone ads of photographs of investment properties or descriptions of the tax benefits of investments.

3. Rule 134

A tombstone ad prepared pursuant to Rule 134 for use in connection with a registered public offering generally can be mailed to existing shareholders along with the quarterly report during the pre-effective period. If, however, the Rule 134 announcement is of an offering solely being made to existing shareholders, the Division staff would be unable to conclude that the quarterly report was not part of the Rule 134 announcement if the two were mailed together.

4. Rule 134

A broker-dealer participating in a registered public offering may send its clients a small reply card, along with a copy of a tombstone advertisement, to assist customers who wish to request a copy of the prospectus.

5. Rule 134

A commodity fund was advised that even though it bears some resemblance to an investment company, this fact does not automatically entitle it to include in its Rule 134 notice all of the information about its business that investment companies are permitted to include. The fund was reminded that Rule 134 permits only a brief indication of an issuer's business and that the investment company provisions of the rule can be used for guidance in preparing this description only to the extent that they contain items clearly analogous to the issuer's own situation.

6. Rule 134

Under Rule 134, a tombstone ad for a real estate investment trust may not include information comparable to that permitted investment companies. The principal reasons for the rule's distinction between investment companies and other issuers are (1) investment companies are heavily regulated under the securities laws while other issuers are not; and (2) investment companies are considered to be unusual investment vehicles whose organization, operation and purposes require greater explanation than other issuers.

7. Rule 134

Although the Division staff has traditionally indicated that suitability requirements are not permitted under a literal reading of Rule 134, Rule 134(a)(12) does permit the inclusion of "any statement or legend required by any state law or administrative authority." In light of the position by the California State Corporations Commission that advertisements for direct participation programs (limited partnerships) must include suitability requirements, the Division staff will not object to the use of suitability requirements in Rule 134 advertisements distributed in California. This position was communicated to the NASD's advertising office.

8. Rule 134

The Division staff would not object to the inclusion in tombstone ads of a statement that the securities would be subject to early redemption or could be called by the issuer.

9. Rule 134

The Division staff was asked whether a communication, which otherwise complied with Rule 134, could also contain notice of the time and place at which a seminar would be conducted about the offering where prospectuses would be distributed. The Division staff responded that it would not view such a communication as permissible within Rule 134, as the purpose of the Rule is to facilitate distribution of prospectuses rather than to solicit attendees for seminars. (Note that the caller directed our attention to Highland Malt Ltd. (6/1/79), in which the Division staff reached a similar conclusion regarding a proposed Rule 134 communication that contained more information about the seminar than time and place.)

10. Rule 134

A sponsor of real estate programs with varying investments and objectives proposed to mail invitations to the public to attend seminars at which the programs would be described in detail. Only programs covered by effective registration statements would be discussed at the seminars. The sponsor expected that there would be an effective registration statement covering at least one program in each type of investment at any time a seminar would be held. In order to permit continued use of the invitation, the sponsor proposed that the invitation would omit the name of the specific issuers of the securities offered in the programs. Because the name of the issuer is an item that may be included or excluded from a Rule 134 announcement under subparagraph (a)(1) of the rule, no objection was raised to the proposed form of invitation.

11. Rule 134; Item 10 of Regulation S-K

Although the Commission's policy on security ratings, as set forth in Item 10(c) of Regulation S-K and Rule 134(a)(14), relates only to debt securities, convertible debt securities and preferred stock, the Division will apply the policy and the rule to ratings of mortgage pass-through certificates.

12. Rule 135

A press release issued pursuant to Rule 135 in connection with an initial public offering may state that the shares to be offered have not yet been authorized and therefore their issuance is subject to shareholder approval.

13. Rule 135

Company A is required under the Public Utility Holding Company Act to publish a public notice of competitive bidding at least 6 days prior to accepting bids. The information included in the notice would exceed that permitted by Rule 135. In light of the fact that the notice is required by the Public Utility Holding Company Act, the Division indicated that it would not object if such notice was published prior to the filing of a registration statement so that the company could take advantage of brief market "windows."

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

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.

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

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.

16. Rule 135(b)

A cash out merger of Company A by Company B has been approved by Company B's shareholders. Prior to consummation of the merger, Company B intends to make a registered public offering and proposes to send a Rule 135 notice to Company A's shareholders. The Division staff took the position that such a notice would come within the term "other published statement" in Rule 135 and thus is permissible.

17. Rule 135(c)

An exchange-listed company wanted to rely on the provisions of Rule 135(a)(3) and (c) to issue a press release providing pricing information regarding a rights offering. A registration statement for the rights offering had already been declared effective, with pricing information omitted pursuant to Rule 430A. In light of the fact that Rule 430A(b) provides that when omitted pricing information is filed under Rule 424(b) it shall be deemed to be part of the registration statement as of the effective date, the Division staff took the position that if the press release was issued simultaneously with the filing of the Rule 424(b) prospectus, the Rule 135(c) prohibition against including information not already disclosed in a registration statement filed with the Commission would not apply.

18. Rule 135b

An option disclosure document, prepared in compliance with Rule 9b-1 under the Exchange Act, is not a prospectus within the meaning of Section 2(a)(10) of the Securities Act and, thus, is not subject to liability under Section 12(a)(2) of the Securities Act.

19. ** Rule 139 **

Rule 139 defines "offer for sale" in relation to certain dealer publications, and provides limited relief from the application of Section 5 to such publications when used in connection with registered offerings by reporting companies or certain foreign private issuers with offshore trading histories. The rule should not be extended by analogy to offerings of other non-reporting companies, since the public availability of the information contained in Exchange Act reports is a fundamental basis of the rule.

20. Rule 139

A question was raised whether a distribution had been concluded so that a broker-dealer could resume publishing research reports without regard to Rule 139 in the following circumstances. A reporting company filed a registration statement on Form S-4 for a Rule 145 merger transaction. Shareholders had voted to approve the transaction and no further shareholder vote regarding valuation contingencies was required. The approval of a regulatory authority was needed before the transaction could be closed. The Division staff concluded that the sale of the shares occurred when shareholders voted to approve the merger; accordingly, the distribution had been completed for purposes of Rule 139.

21. Rule 139

The broker-dealer that acted as underwriter in an IPO now has a small long position in the underwritten stock in its investment account as a result of bad orders. The issue otherwise sold out. The Division staff took the position that the distribution was concluded for purposes of the Rule 139 safe harbor provisions, notwithstanding the stock held in the investment account. As a result, the broker-dealer could make recommendations regarding the issuer's securities without concern that those recommendations would be deemed to be offers or sales.

[RULE 144 INTERPRETATIONS ARE SET FORTH IN SECTION C. BELOW.]

22. Rule 145

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

23. Rule 145

A person selling both Rule 145 shares and shares not subject to Rule 144(e) need not take into account the sales of the shares not subject to Rule 144(e) in determining whether the volume limitation of Rule 145(d) has been exceeded .

24. Rule 145

Corporation A merged into Corporation B. After completion of that transaction, Company B merged into Corporation C in a transaction unrelated to the earlier merger. Rule 145 was applicable to both mergers, and each was registered. Although affiliates of A (who do not become affiliates of B or C) would have been subject to such limitations of Rule 145(d)in reselling their B

shares, they are not subject to any limitations in reselling their shares of C Corporation. For a further discussion of this issue, see United Counties Bancorporation (March 22, 1996).

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

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.

26. Rule 145(a)(2)

A change from business trust status in one state to corporate status in another state would not be within the change of domicile exception of Rule 145(a)(2) because of the significant change in organizational structure that will occur.

27. Rule 145(a)(2)

The exception from Rule 145 provided by Rule 145(a)(2) for a change in domicile is not available when, in addition to a change in domicile, a new organizational structure is created. For example, a merger by Company A with a new holding company formed by Company A in another state would not qualify for the change in domicile exception.

28. Rule 145(a)(3)

A transaction in which a corporation will sell its assets for a promissory note issued by another corporation, but will not distribute interests in the note to its shareholders, is not a Rule 145 transaction within the meaning of Rule 145(a)(3).

29. Rule 145(c)

A proposed Rule 145 merger is submitted for a vote of shareholders at an annual meeting at which directors are also to be elected. Incumbent directors would be deemed "underwriters" with respect to the securities issuable in the merger transaction for purposes of paragraph (c) of Rule 145, even though they are not candidates for reelection.

30. Rule 145(d)

A former affiliate of a company that disappeared two months ago in a registered Rule 145 transaction received four percent of the outstanding shares of the acquiring company. Although Rule 145(d) would permit the former affiliate to sell publicly one percent of the outstanding every three months, the former affiliate wishes to sell the entire four percent in a single transaction. The former affiliate (who is not an affiliate of the acquiring company) was advised that Rule 145(d) did not preclude a private sale of the entire amount, but the buyer in any such private transaction would have to step into the shoes of the seller and comply with Rule 145(d) in making public resales of the securities.

31. Rule 145(d)

A person subject to Rule 145(c) converts preferred stock received in a Rule 145 transaction into common stock. Such person may tack the holding period for the preferred to that of the common in determining eligibility to use Rule 145(d)(2).

32. Rule 145(d)

In determining the Rule 145(d)(2) holding period, the holding period for restricted securities surrendered in the Rule 145 transaction cannot be tacked to the holding period for the shares received.

33. Rule 145(d)

A partnership distributes restricted shares of corporation A to its partners, X and Y. X and Y hold enough shares of A to be regarded as affiliates. Therefore, when corporation B later acquires corporation A, the two partners must sell their shares of B pursuant to Rule 145(d). However, they need not aggregate their sales for purposes of the volume limitation of Paragraph (e) of Rule 144.

34. Rule 145(d)

An affiliate of company A acquires securities of company B in a Rule 145 transaction. The affiliate gives some of those securities to a charity, and then - some time later - becomes an affiliate of B. Although such affiliate must now sell B shares pursuant to all the provisions of Rule 144 since such person is an affiliate of B, the charity can continue to sell pursuant to the provisions of Rule 145(d).

35. Rule 145(d)

X acquires stock in a registered Rule 145 offering, but is subject to the resale restrictions of Rule 145(d) because X is an affiliate of the acquired company. Pursuant to and on or subsequent to the date of a divorce settlement, X transfers some of the shares to spouse Y who was not an affiliate. The shares are free shares in Y's hands because Y is not subject to the Rule 145(d) restrictions, and because it has traditionally been the view of the Division staff that the resale status of a spouse receiving securities in a divorce proceeding under these circumstances will be determined by the status of Y and not by the status of X.

36. ** Rule 145(d) **

Less than one year after a Rule 145 transaction, a person deemed to be an underwriter by Rule 145(c) dies. The estate of the 145(c) underwriter may in general sell publicly in the same manner the decedent could have, that is under Paragraphs (c), (e), (f), and (g) of Rule 144, which are imported by Rule 145(d)(1). If the estate is not an affiliate of the issuer, it may sell subject only to Rule 144(c) because of the relief provided to unaffiliated estates by Rule 144(e) and Rule 144(f).

37. ** Rule 145(d); Form 8-K, Item 7 **

Item 17(b)(7) of Form S-4 states generally that the financial statements of acquired companies not previously public need only be audited to the extent practicable, unless the Form S-4 prospectus is to be used for resales, in which case such financial statements must be audited to the extent

required by Rule 3-05. The Division staff was asked whether a resale pursuant to Rule 145(d), in lieu of the Form S-4 prospectus, would require the financial statements to be audited to the extent required by Rule 3-05. The Division staff noted that Rule 145(d) is not included in Instruction 2 to Item 7 of Form 8-K regarding sales pursuant to Rule 144 during the 60-day extension period for filing financial statements. As the audited financial statements for the acquired company would be required pursuant to
Item 7 of Form 8-K, a resale pursuant to Rule 145(d) would not be permitted until they are filed.

38. Rule 145; Form S-4

A registration statement on Form S-4 is filed to register stock to be issued in the acquisition of a non-reporting company by a reporting company. Only the non-reporting company will solicit proxies. Although this solicitation is not subject to Regulation 14A, it nevertheless will involve a "sale" under Rule 145, which cannot be consummated without an effective registration statement. Accordingly, a proxy card can be sent only with the Rule 424(b) prospectus, not with the red herring.

39. Rule 147

A local bank, whose shares are held only by Texas residents, is planning to form a bank holding company and exchange shares with its shareholders under Rule 147. If shareholders move out of state during the time required to obtain regulatory approvals, such shareholders may be "cashed out" to retain the Rule 147 exemption, assuming cashing out is permitted under the applicable state law.

40. Rule 147

A family trust is located in a state where a Rule 147 offering is to be made. A beneficiary with a half-interest in the trust resides in another state. The trust may not purchase securities in the Rule 147 offering.

41. Rule 147

Offerings under Rule 147 must be made only to persons resident within the state where the issuer conducts its principal business. Since residence means "principal residence" for purposes of the rule, an individual whose principal residence is in the state of the offering, but who resides temporarily out of that state for vacation or other reasons, may purchase securities while out of state without rendering Rule 147 unavailable.

42. Rule 147

A broker-dealer may be employed to distribute securities in an intrastate offering made in reliance on Rule 147 without jeopardizing the exemption provided by that rule.

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

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.

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

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.

45. Rule 174

A registrant's initial public offering has been consummated, but the 90-day prospectus delivery period is still applicable. The registrant is considering making a material acquisition. Counsel to the registrant asked whether the Securities Act requirement to stop sales and file a post-effective amendment giving the Article 11 and Rule 3-05 information is applicable to the prospectus during the 90-day period once the acquisition is deemed probable. Counsel stated the belief that the prospectus delivery requirement was in connection with market transactions, as opposed to sales by the company, and therefore the post-effective amendment requirement would not be triggered. (Form 8-K would, of course, not be required until the transaction was consummated.) Counsel also stated that the registrant would sticker the prospectus with all material information regarding the acquisition. The Division staff agreed to the use of a sticker rather than a post-effective amendment, noting that "all material information" presumably would include some financial information.

46. Rule 174(b)

Company A, which is not an Exchange Act reporting company, proposes to use Form S-3 to issue debt securities that would be guaranteed by its Exchange Act reporting Parent. Company A is a wholly-owned subsidiary of Parent and the guarantee is full and unconditional. The exemption from prospectus delivery requirements provided by Rule 174(b) would be available for this offering because Parent would be subject to the Exchange Act reporting requirements immediately prior to the time of filing the registration statement, Company A would be wholly-owned by Parent and Parent would fully and unconditionally guarantee the debt securities.

47. Rule 174(d)

The Division staff took the position that if an exchange has approved an issue for trading as of the earlier of the effective date or the day the offering commences, but actual trading cannot commence until closing, with when-issued trading occurring in the interim, Rule 174(d) would be available.

48. Rule 174(d)

The Division staff was asked whether the 25-day prospectus delivery period would be available for an IPO if it did not trade on the first day due to "mechanical difficulties." The Division staff took the position that if the failure to trade was the result of a system failure on NASDAQ's part, although the securities had been authorized for quotation, Rule 174(d) would remain available. However, if the "mechanical failure" resulted in the securities not yet being authorized for quotation, Rule 174(d) would not be available.

49. Rule 174(d)

The Division staff was asked how the abbreviated prospectus delivery requirements of Rule 174(d) would work in the context of savings and loan conversions, where a subscription offering to existing depositors at a specified price range is followed by an offering to the general public at a

fixed price. The Division staff advised that (1) the commencement of the subscription offer would be the commencement of a bona fide public offering for purposes of Rule 174(d), and (2) although the security would not commence trading until closing, if as of commencement of the offering the security is authorized for inclusion in the NASD inter-dealer quotation system, the 25-day prospectus delivery period of Rule 174(d) would be available.

50. Rule 174(d); Rule 15c2-8

The Division staff was asked why Release No. 33-6763, which amended Rule 174 to shorten to 25 days the prospectus delivery period for IPOs that are immediately listed for trading on an exchange or eligible for quotation on NASDAQ, also amends Rule 15c2-8(d) to provide that broker-dealers must continue to deliver the same prospectuses, upon request, for the full 90-day period. The inquirer was advised that Rule 174(d) was designed to relieve broker-dealers of an obligation to deliver prospectuses in connection with every deal during the full 90-day period, but not to change broker-dealers' obligations to deliver prospectuses upon request during that time.

51. Rule 175

The Division staff interpreted Rule 175 to provide "safe harbor" protection to a statement made in a Form 6-K, notwithstanding the fact that the Form 6-K is not "filed." Rule 175 protects statements, besides those in filed documents, appearing in Part I of a Form 10-Q or 10-QSB and in the Rule 14a-3 annual report to shareholders. The addition of protection for statements in Part 1 of a Form 10-Q was the subject of a technical corrections release (33-6305). Although Rule 175 was amended in Release No. 33-6437 (the foreign integrated disclosure release) to provide safe harbor protection to Form 20-F issuers as well as Form 10-K issuers, the problem arising from the fact that Form 6-K is not filed was not addressed. That appears to have been an oversight, the rationale that protects statements in annual reports and Form 10-Q and Form 10-QSB being equally applicable to statements in Form 6-Ks.

52. ** Rule 236 **

Rule 236 provides an exemption from Securities Act registration for aggregation of fractional shares in connection with certain transactions. The rule requires that specified information be furnished to the Commission at least 10 days prior to the offering. There is no specific Securities Act form for this information, therefore a letter should be filed that specifies the nature of the submission. It should be sent to the Commission filing desk. No fee is applicable.

53. Rule 401

As set forth in Rule 401, a registration statement must meet the form requirements at the time it is first filed, and also at the time of any Section 10(a)(3) post-effective amendment. A registration statement on one form may be changed to any other form for which it is then eligible by pre-effective or post-effective amendment. Once a filing is declared effective, it is deemed to be on the proper form.

54. Rule 401(b)

An issuer that no longer meets Form S-3 requirements but has to file Section 10(a)(3) updating information can file such amendment only on a form for which it qualifies at the time of filing such amendment.

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

56. Rule 401(e)

A registrant updating a Form S-1 registration statement pursuant to Section 10(a)(3) may file a post-effective amendment on whatever form it is eligible to use with respect to such offering at the time the amendment is filed.

57. Rule 401(g); Form S-3

Pursuant to Instruction 3 to the signature requirements for Form S-3, a corporation may sign and file a registration statement on Form S-3 for an offering of non-convertible debt or preferred securities if it has a reasonable basis to believe that the investment rating of such securities at the time of sale will permit use of the form. If an investment grade rating is not received, a post-effective amendment would be required where the issuer cannot satisfy Form S-3 eligibility requirements without such a rating.

58. Rule 401; Form S-3

A registrant has an effective Form S-3 for a secondary offering. At the time of filing, all requirements for use of the form were met. Now, three months later, it appears that a dividend payment on certain preferred stock may be missed. Counsel inquired as to what effect this might have on the Form S-3. The Division staff advised that the registrant may continue to use the effective Form S-3 so long as there is no need to update the registration statement for the purposes of Section 10(a)(3). At the time that updating is necessary, Rule 401 would require the use of whatever form is available to the registrant at that time.

59. **** Rule 402(e); Forms F-7, F-8, F-9, F-10, F-80;
Exchange Act Rule 12b-11(d); Exchange Act Form 40-F ****

Eligible Canadian issuers may rely on Securities Act Rule 402(e) or Exchange Act Rule 12b-11(d) to use typed, duplicated or facsimile versions of manual signatures in connection with Forms F-7, F-8, F-9, F-10, F-80 and 40-F, provided that the issuer complies with the requirements of those rules regarding retention of manual signatures and provision of copies thereof to the Commission or its staff upon request. See Cleary, Gottlieb, Steen & Hamilton (Aug. 13, 1996).

60. Rule 405

Under Rule 405 the definition of "dividend or interest reinvestment plan" would include a plan whereby limited partners could reinvest cash flow distributions into the partnership for additional partnership interests.

61. ** Rule 405; Item 10(a) of Regulation S-B **

A "small business issuer" is defined as a company with revenues of less than $25,000,000 and whose public float (the aggregate market value of the outstanding voting and non-voting common equity held by non-affiliates) does not exceed $25,000,000. For purposes of determining an issuer's public float, book value may substitute for market value where there is no market for a company's securities.

62. Rule 411

Rule 411 states that incorporation by reference into a prospectus (as distinct from the incorporation of exhibits to registration statements) is prohibited unless the form specifically permits it. Therefore, there should be no incorporation by reference into a Form S-1 prospectus, even if the additional documents would be furnished with the prospectus. Form S-2 requires the incorporation by reference of certain previously filed documents, but does not permit the incorporation of subsequently filed documents. Form S-3 requires the incorporation by reference not only of previously filed reports but also of subsequent reports, and most updating of Form S-3 filings is therefore accomplished by the filing of Exchange Act reports. However, changes to information required to be in the prospectus itself and not specifically permitted to be incorporated by reference, such as information relating to selling security holders or the plan of distribution, must be accomplished by a Rule 424(b) prospectus supplement or post-effective amendment, as appropriate. See Item 512(a) of Regulation S-K.

63. Rule 411; Form S-1

An issuer filing a post-effective amendment on Form S-1 for purposes of complying with Section 10(a)(3) may not provide the required financial statements by incorporation by reference to its Form 10-K. That procedure is not authorized by either Form S-1 or Rule 411.

64. Rule 411; Form S-1

A registrant filing a Form S-1 is including some information about a Form S-3 company in its prospectus, and proposes to incorporate this information by reference. This procedure is not authorized by Form S-1 or Rule 411, and there can be no incorporation by reference into a Form S-1 prospectus. If the information about the other company is material, it must be set forth in the prospectus in full.

65. Rule 411(c)

Pursuant to the terms of Rule 411(c), exhibits may be incorporated by reference from a registration statement filed by another issuer.

66. Rule 411(c); Rule 477

Counsel inquired whether a registrant filing an IPO could incorporate by reference exhibits filed with a previous Securities Act registration statement which had been withdrawn pursuant to Rule 477. The Division staff took the position that the withdrawn registration statement remained a "filed document" for purposes of Rule 411(c) and, accordingly, the exhibits could be incorporated by reference.

67. Rule 412

A calendar year company proposes to file a registration statement on Form S-2 on February 1, 1996. The registrant will include financial statements for the year ended December 31, 1995, and incorporate its Form 10-K for the year ended December 31, 1994. The registrant was concerned because the financial statements in the Form 10-K would be out of date. Rule 412(a), however, has the effect in these circumstances of automatically superseding the 12/31/94 financial statements for purposes of the Form S-2 filing. In the event the registrant wishes to remove all doubt about outdated financial statements in the Form 10-K being superseded by later financials included in the Form S-2, Rule 412(b) permits it to include a specific statement in the Form S-2 on the subject.

68. Rule 412; Form S-2, Item 12

Certain issuers using Form S-2, who intend to deliver their annual report to shareholders along with the Form S-2 prospectus, wish to upgrade the description of business required by Item 12(a)(3) of the form. Where the annual report is delivered along with the Form S-2, the issuer must incorporate the description of business from such report. An issuer that wishes to upgrade that description can include the new revised description in the Form S-2 prospectus, and rely on Rule 412 to supersede the description incorporated from the earlier annual report. Pursuant to Rule 412(b), the description in the Form S-2 prospectus may, but need not, state that it modifies or supersedes the statements in the incorporated description of business section.

69. Rule 413

No waivers are granted from the requirement of Rule 413 that a post-effective amendment cannot be used to register additional securities to be included in an offering. The proper procedure in such situations is to file a separate registration statement for the additional securities. If needed, the registrant may use Rule 429 to combine the prospectuses for the offering.

70. Rule 413; Rule 429; Rule 462(b)

An issuer filed a registration statement on Form S-4 for a merger. Inadvertently, the number of shares registered was not sufficient to cover certain shares issuable upon the exercise of options during the period after the effective date of the registration statement but prior to the consummation of the merger. Rule 413 does not permit the registration of additional shares by post-effective amendment. Counsel was informed that: (1) it could rely on Rule 462(b) to prepare and file a short-form registration statement provided the amount to be registered was within the 20% limit and the other conditions were met; or (ii) that it could otherwise file a new registration statement that could be combined with the earlier registration statement pursuant to Rule 429. The prospectus was not recirculated.

71. Rule 414

A California corporation merged with a Delaware corporation for the purpose of changing its domicile. Rule 414 permits the Delaware corporation to use the registration statements of the California corporation by filing an amendment expressly adopting the statements of the predecessor. Because the merger entails the issuance of securities of a corporation different from the original registrant, the amendment should contain a new opinion of counsel on the legality of the issuance and counsel's consent.

72. Rule 414(c)

In order for Rule 414 to effect registration of a successor issuer, paragraph (c) requires that the succession be approved by the predecessor's security holders at a meeting for which proxies were solicited pursuant to Exchange Act Section 14(a) or information was furnished to security holders pursuant to Exchange Act Section 14(c). Where the predecessor is an Exchange Act Section 15(d) company rather than a Section 12 company, and thus not subject to Section 14, the requirements of Rule 414(c) will be met where the proxy or information statement is prepared and votes are solicited substantially in accordance with Section 14.

73. Rule 414; Form S-4

A Form S-4 registration statement will be filed to convert an existing corporation into a real estate investment trust that will have the same assets and management as its predecessor. Because of certain provisions of the tax law applicable to REITs, the new trust will not be created until after the Form S-4 has become effective. The company sought advice as to who would be the registrant for the Form S-4 and who should sign the registration statement. Using Rule 414 as a model, the Division staff suggested that the existing company execute and file the registration statement. At the time the trust is formed, it should file a post-effective amendment adopting the registration statement.

[RULE 415 INTERPRETATIONS ARE SET FORTH IN SECTION D. BELOW.]

74. Rule 416

Where a registrant has a stock split prior to the completion of a registered distribution that is not covered by anti-dilution provisions, Rule 416(b) provides that the registration statement may be deemed to cover the additional securities if a post-effective amendment is filed to reflect the increase in the amount of securities registered. A company with securities registered on Form S-3 asked whether it could file a Form 8-K to reflect the increased number of shares registered, rather than a post-effective amendment. The company noted that such a procedure appeared to be in accord with the undertaking provisions of Item 512(a) of Regulation S-K which are applicable to Form S-3. The registrant was advised that the Form 8-K procedure would be acceptable. The Form 8-K procedure also is acceptable in connection with securities registered on Form S-8.

75. Rule 416

Where a registrant splits its stock prior to the completion of the distribution of securities included in a registration statement, and the registration statement does not specifically refer to the existence of anti-dilution provisions for such situations, the registrant must file a post-effective amendment to the registration statement to reflect the change in the amount of securities registered. Similarly, a pre-effective amendment would have been required if the split had occurred prior to effectiveness and no mention had been made of anti-dilution provisions. No additional filing fee is required.

76. Rule 416

A registration statement for warrants and the underlying common stock was declared effective. The terms of the warrants included an anti-dilution clause, providing for a change in the amount of securities to be issued to prevent dilution resulting from stock splits or stock dividends. Subsequent to effectiveness, the issuer declared a preferred stock dividend on its common stock. Under the terms of the anti-dilution provision, warrant holders, upon exercise, would receive shares of common stock and a corresponding number of shares of preferred stock. Assuming a

"sale" of preferred stock to the warrant holders is involved in the exercise of the warrant, the registration statement would not, under Rule 416, be deemed to cover the shares of preferred stock to be issued in connection with the anti-dilution provision, since these shares are of a different class from those registered.

77. Rule 416; Rule 457

A company asked how to compute the number of underlying common shares to be registered in an offering of immediately convertible debentures, where the conversion ratio would be based on fluctuating market prices and no additional consideration would be paid to effect the conversion. Although pursuant to Rule 457(i) no additional fee would be required since the underlying must be registered at the same time as the convertible securities, an amount of shares based on a reasonable good faith estimate of the maximum amount needed should be registered.

78. Rule 419

In a blank check offering, if a consummated acquisition meeting the requirements of Rule 419 has not occurred by a date 18 months after the effective date of the initial registration statement, funds held in the escrow or trust account must be returned to investors pursuant to Rule 419(e)(2)(iv) and escrowed securities must be returned to the registrant. In sum, the transaction must be unwound. For example, where the securities of a blank check company are all gifted to charities and no cash is actually paid, if after the expiration of the 18-month period no acquisition has been consummated, such escrowed shares must be returned to the registrant.

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

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).

80. Rule 424(a)

A registrant wishes to correct a number of typographical errors contained in a preliminary prospectus. Rule 424(a) was amended in Securities Act Release No. 6714 to eliminate the filing of revised preliminary prospectuses in any manner other than pursuant to a pre-effective amendment to the registration statement. As amended, Rule 424(a) provides that any preliminary prospectus that contains substantive changes from the previously filed prospectus must be filed as part of a formal pre-effective amendment to the registration statement. If the changes are non-substantive, the revised preliminary prospectus is not to be filed. The registrant should determine whether the corrections present a substantive change to the prospectus and apply the requirements of Rule 424(a) accordingly.

81. Rule 424(b); Item 507 of Regulation S-K

The Division staff was asked how registration statements for secondary offerings should reflect the addition or substitution of selling shareholders. Normally, absent circumstances indicating that the change is material, the change may be reflected by the filing of a Rule 424(b) prospectus

supplement describing the change and setting forth the information required by Item 507 of Regulation S-K. (Of course, this assumes the change does not involve increasing the number of shares or dollar amount registered, or include shares from a transaction other than the one to which the original filing related.) The ability to reflect changes in selling shareholders by Rule 424 does not permit the names of known selling shareholders to be omitted from the original filing.

82. Rule 424(b); Rule 462(b)

For purposes of EDGAR, when filing a Rule 424(b) prospectus supplement in connection with an offering that involves an original effective registration statement and a second registration statement registering additional securities under Rule 462(b), the Rule 424(b) supplement must be filed under the registration number (33- or 333-) for the initial registration statement. The cover page of the Rule 424(b) supplement should, however, set forth the registration numbers of both the initial registration statement and the Rule 462(b) registration statement.

83. Rule 424(c)

Absent reliance on Rule 434, Securities Act prospectus delivery requirements are not satisfied by delivery of a sticker to broker/dealers unattached to the prospectus, even where, to insure delivery of the sticker by broker/dealers to customers, the sticker would include a tear-off portion that would be required to be returned with subsequent subscriptions. The sticker must be attached to the prospectus to ensure that investors received the entire package. See Securities Act Release No. 6714. The exceptions to this position involve Form S-8 and Dividend Reinvestment Plans filed on Form S-3. In those cases, updating of the existing registration statement, without including the full prospectus, is accomplished through the use of Rule 424 stickers that are distributed to Plan Participants who have previously received a prospectus. Such stickers must include a legend indicating that a full prospectus will be provided upon request.

84. Rule 428; Form S-8

Rule 428(b)(2) requires the registrant to deliver, along with the documents constituting the Rule 428 prospectus, one of: the latest Rule 14a-3(b) annual report, the latest 10-K, or the latest Rule 424(b) prospectus. An issuer that changed its fiscal year filed a six-month transition report on Form 10-K subsequent to its latest annual report on Form 10-K. Where such issuer is relying on the Rule 428(b) 10-K delivery alternative, it must deliver both the latest annual report on Form 10-K and the transition report on Form 10-K in order to satisfy the Rule 428(b) requirement.

85. Rule 429

A company that is eligible for registration of a primary offering on Form S-3 wishes to use Rule 429 to carry forward registration fees paid for securities that were registered on an earlier registration statement but were not sold. Since the company is eligible for primary offerings on Form S-3, it may transfer the fees associated with one class of securities to cover registration fees due for a different class of securities on a new registration statement. (Since a Form S-3 eligible company can post-effectively amend an allocated shelf registration statement to create an unallocated shelf registration statement, Rule 429 would be available to transfer fees paid from one class of securities to another.) If the company were not eligible for primary offerings on Form S-3, the fees would be transferable only for a later registration of the same class of securities.

86. Rule 429; Rule 462(b); Rule 413

An issuer filed a registration statement on Form S-4 for a merger. Inadvertently, the number of shares registered was not sufficient to cover certain shares issuable upon the exercise of options during the period after the effective date of the registration statement but prior to the consummation of the merger. Rule 413 does not permit the registration of additional shares by post-effective amendment. Counsel was informed that: (1) it could rely on Rule 462(b) to prepare and file a short-form registration statement provided the amount to be registered was within the 20% limit and the other conditions were met; or (ii) that it could otherwise file a new registration statement that could be combined with the earlier registration statement pursuant to Rule 429. The prospectus was not recirculated.

87. Rule 429; Rule 415

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.

88. Rule 429; Form S-8, General Instruction C.

A resale prospectus filed under cover of Form S-8 registers "restricted" or "control" shares. Rule 429 may be used to update that prospectus if a new Form S-8 is filed solely for the purpose of registering additional shares for resale pursuant to the reoffer prospectus with regard to the same plan.

89. Rule 430A

For purposes of the Rule 430A(a)(3) fifteen-business-day filing requirement, Saturdays, Sundays and Federal holidays are not counted as business days.

90. Rule 430A

The principal amount of securities to be offered (i.e., volume) is not price-related information or a term of the security dependent upon the offering date, and therefore such amount cannot be omitted from the registration statement in reliance on Rule 430A(a).

91. Rule 430A, Instruction to paragraph (a)

The second sentence of this Instruction provides that a Rule 424(b) prospectus supplement may be used, rather than a post-effective amendment, where the 20% threshold is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus supplement. When there is a change in offering size or deviation from the price range beyond the 20% threshold noted in the second sentence of the Instruction, a post-effective amendment would be required only if such change or deviation materially changes the previous disclosure. Regardless of the size of the increase, a new registration statement must be filed to register any additional securities that are offered. Additional securities can not be registered by post-effective amendment.

92. Rule 430A, Instruction to paragraph (a)

An issuer sets forth a bona fide estimate of the maximum aggregate offering price in its Form S-1 prospectus of $7-$10. The price at which the issuer will be able to sell the securities turns out to be $6. The 20% threshold noted in the second sentence of Instruction to paragraph (a) should be measured as a 20% decrease from $7 or a 20% increase from $10, even if the issuer chose to register in the calculation of registration fee table at the $10 per share maximum end of the bona fide range. Thus, where no other changes are made, a post-effective amendment would not be required since $6 does not represent more than a 20% decrease in $7.

93. Rule 430A, Instruction to paragraph (a)

Where an issuer, at the time its registration statement becomes effective, registers a significantly greater amount than intended to be offered due to the fact that the offering was decreased between the time of the original filing of the registration statement and the effective date, the Division staff has in certain cases agreed that the issuer need not file a post-effective amendment to reflect such decrease when it exceeds 20%, particularly where the preliminary prospectus distributed to investors reflects an offering size much closer to the final size than the size reflected in the original filing's calculation of registration fee table.

94. Rule 430A, Instruction to paragraph (a)

A registration statement went effective listing $800 million of debt generically in its fee table and containing a prospectus specifying 3 classes of debt. The prospectus states that $300 million would be offered of each of the first two classes of debt and $200 million of the third class would be offered. The registrant wishes to change the allocation of the $800 million among the 3 classes after the effective date. Instruction to paragraph (a) of Rule 430A would allow the registrant, without filing a post-effective amendment, to increase a class or classes of debt by up to $160 million (20% of $800 million) with a corresponding reduction of the other class or classes by $160 million. The decrease and increase are not each counted as a 20% change (and thereby equating to a 40% change) since they are made in parallel as one reallocation.

95. Rule 430A, Instruction to paragraph (a)

A registration statement went effective registering, pursuant to Rule 457(a), 5,750,000 shares of common stock at $28.25 per share in its fee table. The prospectus, unlike the fee table, broke down the shares into 4 million shares being offered by the registrant and 1 million shares being sold by selling shareholders (the 750,000 remaining represented the green shoe). The prospectus identified the price as $27.75. The registrant wishes to change the allocation of some of the shares from one of the selling shareholders to the issuer. In addition, the price has dropped to $24. To calculate how many shares could be reallocated within the 20% threshold in Instruction to paragraph (a) of Rule 430A, which would allow the registrant to proceed through use of a Rule 424(b) prospectus supplement, the registrant would multiply 4 million times $27.75, take 20% of the product of those numbers, and divide that number by $24. The shares allocated in the prospectus to selling shareholders and the green shoe amount would be disregarded for purposes of the calculation. The price in the prospectus, rather than the price in the fee table, would be used in the calculation. Since the total number of shares for the offering would not exceed the 5,750,000, because it is simply a reallocation, registration of additional shares would not be required. Counsel did not request advice with respect to, and the Division staff did not consider, whether the anticipated change would result in a requirement to file a post-effective amendment pursuant to Rule 512(a) of Regulation S-K.

96. **** Rule 430A, Instruction to paragraph (a); Rule 462(c) ****

Rule 462(c) provides a mechanism for issuers to file a post-effective amendment that becomes automatically effective. It allows issuers the flexibility of automatic effectiveness where the sole purpose of the post-effective amendment is to re-start the 15-business-day period in which pricing must occur under Rule 430A(a)(3). Rule 462(c) may not be used if the post-effective amendment contains any substantive change from, or addition to, the prospectus in the effective registration statement. It is generally inappropriate, therefore, to file a post-effective amendment under Rule 462(c) if the information contained therein reflects changes in price and volume that represent more than a 20% change in the maximum aggregate offering price set forth in the effective registration statement.

97. Rule 434

Companies that intend to deliver prospectuses pursuant to Rule 434 do not need to amend existing shelf registration statements simply to check the box on the cover page to indicate they may use Rule 434. Similarly companies that check the box are not required to amend simply to remove the check from such box if they decide subsequently not to use Rule 434.

98. Rule 436

Where the consent of counsel or of an expert (other than an accountant) has been included as an exhibit to a prior filing, an updated consent is generally not required to be included in an amendment to the registration statement absent a change in the portion of the filing expertised by that person.

99. Rule 436; Form S-8

A registrant filing on Form S-8 incorporated a Form 10-K that contained its 1995 financial statements certified by one accounting firm, and its 1993 and 1994 financial statements certified by a different accounting firm. Rule 436 would require the filing of the consents of both accounting firms for purposes of the Form S-8 registration statement.

100. Rule 438

The registrant has 2 directors who will sign the registration statement. The registration statement will indicate the names of 4 more persons who will become directors before the registration statement becomes effective. Those person will sign any amendments to the registration statement, but not the original filing. Rule 438 consents should be obtained from the prospective directors in connection with the original filing.

101. Rule 457

Where a registrant has filed a registration statement for two separate securities and then wishes to increase the amount of one security and decrease the other, the registrant can file a pre-effective amendment to reflect such increase and decrease in the calculation of registration fee table and reallocate the fees already paid under the registration statement between the two securities.

102. Rule 457

A registrant can increase the number of shares covered by a registration statement by adding them in the pricing amendment prior to effectiveness. The registration fee for the additional shares should be based on the actual offering price, rather than the estimated offering price used for the initial filing.

103. Rule 457

In a Form S-4 registration statement registering both the securities offered in a business combination transaction and the resale of those securities by affiliates, a filing fee must be paid with respect to the securities offered in the business combination transaction, but no separate filing fee is assessed for the registration of resale transactions.

104. Rule 457; Rule 416

A company asked how to compute the number of underlying common shares to be registered in an offering of immediately convertible debentures, where the conversion ratio would be based on fluctuating market prices and no additional consideration would be paid to effect the conversion. Although pursuant to Rule 457(i) no additional fee would be required since the underlying must be registered at the same time as the convertible securities, an amount of shares based on a reasonable good faith estimate of the maximum amount needed should be registered.

105. Rule 457(a); Rule 457(o)

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

106. Rule 457(a); Rule 462(b)

A registration statement for 1,000,000 shares of preferred stock went effective with an estimated offering price of $15 per share. The fee was calculated and paid in reliance on Rule 457(a). After the effective date, but prior to the commencement of sales, the registrant sought to increase the number of shares to 1,150,000 and increase the offering price to $17.50 per share. Because more shares are going to be sold than were registered, the registrant must file a new registration statement to register the additional 150,000 shares at $17.50 per share. A short-form registration statement under Rule 462(b) would be possible since the number of additional shares (150,000) times the new price ($17.50) is less than 20% of the aggregate dollar amount in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement.

107. Rule 457(d)

Company A planned to register its securities for issuance in connection with the purchase of company B's assets. Company B would not be liquidated after completion of the transaction. In calculating the filing fee, the registrant, (Company A) should look to paragraph (d) and base the fee on the market value of the assets to be received.

108. Rule 457(f)

When computing the filing fee for a spin-off, the registrant should look to Rule 457(f) for guidance. Although the rule does not specifically mention spin-offs, it does contain provisions, such as Rule 457(f)(2), that may be helpful in determining the proper fee. In a registered spin-off transaction, the filing fee is based on the market value of the securities to be spun off. In a registered spin-off of a newly-formed corporation, where there has been no market for the shares being spun off, the filing fee may be based on the book value of the assets being placed in the corporation to be spun off.

109. Rule 457(f)

A question was raised as to the filing fee for a letter of credit guarantee backing municipal bonds. Because the letter of credit was issued by a corporation rather than a bank, it had to be registered even though the underlying securities were exempt. Counsel argued that to base the filing fee on the amount of municipal securities covered by the guarantee would overstate the fee. The Division staff agreed that the entire amount of the offering need not be allocated to the guarantee, and permitted the filing fee to be based on the amount charged by the corporation for issuing the letter of credit, by analogy to Rule 457(k) and (l).

110. Rule 457(f)

Rule 457 provides that the filing fee for an acquisition registration statement is determined on the basis of the value of the shares of the acquired company. However, this method does not work for a registration statement filed for an acquisition shelf, since the entities to be acquired are not yet known. The filing fee for such a shelf registration statement should therefore be based on the market value of the registrant's shares as provided in Rule 457(c).

111. Rule 457(g)

Where an issuer is registering units composed of common stock, common stock purchase warrants, and the common stock underlying the warrants, the registration fee is based on the sale price of the units and the exercise price of the common stock to be purchased on the exercise of the warrants.

112. Rule 457(g)

The fees payable in connection with the simultaneous registration of warrants and the common stock underlying the warrants is based on the value of the warrants plus the exercise price of the common stock. This is analogous to Rule 457(i) which provides that the registration fee for the simultaneous registration of a convertible security and the underlying security is the proposed offering price of the convertible security plus any additional conversion consideration. All of this fee is allocated to the common stock and no separate fee is recorded for the warrants.

113. Rule 457(h)

Calculation of a registration fee under Rule 457(h) should be based on a good faith estimate of the employee contributions to the employee benefit plan being registered.

114. Rule 457(h); Form S-8

Rule 457(h) states that if the exercise price of the options is not known in the case of a stock option plan, the fee should be based upon the price of the securities of the same class. Release No. 33-6867 clarifies that this refers to securities of the same class as those securities being registered.

115. Rule 457(h)(3); Form S-8

A registrant wishing to add a resale prospectus with respect to control securities that were previously registered on Form S-8 may do so by post-effective amendment. No calculation of registration fee table would be included since securities are not being registered by post-effective amendment and, pursuant to Rule 457(h)(3), no fee need be paid for resales where a fee is paid in connection with the registration of such securities for sale to the employees.

116. Rule 457(m)

An issuer proposed to register redeemable notes in a series of registration statements. 90% of the notes to be issued under each registration statement was expected to redeemed within 30 days of issuance. Because most of the securities being registered would be outstanding for only a brief period of time, the issuer sought relief from the filing fee requirements. The issuer cited Rule 457(m), which provides relief in certain circumstances where exempt commercial paper is being registered along with non-exempt commercial paper. Since the notes in question were not commercial paper, the full filing fee was payable.

117. Rule 457(o)

A registration statement went effective registering $15,000,000 of preferred stock under Rule 457(o). The prospectus indicated that 1,000,000 shares were being offered. After the effective date, but prior to the commencement of sales, the registrant sought to increase the number of shares in the offering to 1,300,000 and decrease the price from the intended $15 to $11.50. Because the new aggregate offering amount (1,300,000 x $11.50) does not exceed the $15,000,000 registered, no new registration statement need be filed.

118. Rule 457(o); Rule 457(a)

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

shares offered times the per share price does not exceed the maximum aggregate offering amount listed in the calculation of registration fee table.

119. Rule 457(o); Rule 462(b)

A registration statement went effective registering $15,000,000 of preferred stock under Rule 457(o). The prospectus indicated that 1,000,000 shares were being offered. After the effective date, but prior to the commencement of sales, the registrant sought to increase the price from the intended $15 maximum to $17.50, without changing the number of shares in the offering. Because registration was done by dollar amount (Rule 457(o)), not by number of shares (Rule 457(a)), and such dollar amount is increasing, the registrant must file a new registration statement to register the additional $2,500,000 of preferred stock. A short-form registration statement under Rule 462(b) would be possible since the $2,500,000 is less than 20% of the aggregate dollar amount registered in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement.

120. Rule 461

Written notification that the issuer and the underwriter will be making oral acceleration requests may be made by counsel for the issuer or the underwriter in its cover letter accompanying the registration statement or an amendment thereto. Oral acceleration requests should not simply be left on voicemail of a Division staff member.

121. Rule 461; Rule 415

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.

122. Rule 461; Rule 415

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

123. Rule 462(b)

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

124. Rule 462(b)

Pursuant to Rule 457(a), a company registered 2,300,000 shares at $22.6875 per share for an aggregate offering price of $52,181,250. After effectiveness, the shares were priced at $31. That higher price was never reflected in the calculation of registration fee table on the cover page of the registration statement. The company wishes to increase the size of the offering using Rule 462(b). It must register the additional shares at the $31 price. Thus, the company may register up to

336,653 additional shares at $31 under Rule 462(b) (calculated by taking 20% of $52,181,250 and dividing it by $31).

125. Rule 462(b)

Pursuant to Rule 457(a), a company included in the calculation of registration fee table on its initially filed version of Form S-3 1,000,000 shares of common stock at $20 per share for an aggregate offering price of $20,000,000. Before effectiveness, the company included a supplemental fee table in an amendment to the S-3 to register 200,000 more shares of common stock at the new higher bona fide estimate of $25 per share (for an increase in the aggregate offering of $5,000,000). After effectiveness and pricing at $26 per share, the company wishes to register additional shares under Rule 462(b). The Rule 462(b) limit for registering additional shares is calculated by taking 20% of $25,000,000 (derived by adding the $20,000,000 and the $5,000,000) and dividing it by the $26 actual price to permit registration under Rule 462(b) of no more than 192,307 shares.

126. Rule 462(b)

When calculating the available dollar amount to be registered under Rule 462(b) for a delayed shelf registration statement, the 20% is based upon the amount remaining on the shelf immediately prior to the final takedown from the shelf that depletes all shelf-registered securities. Thus, Rule 462(b) can only be used once per delayed shelf registration statement and only at the time of the final takedown. Similar treatment is afforded to registration statements that are used solely for the purpose of continuous offerings in connection with dividend reinvestment plans.

127. Rule 462(b)

Rule 462(b) is available in connection with a selling shareholder registration statement in order to increase the number of shares or add selling shareholders, provided that no material information is newly disclosed by virtue of such increase or by virtue of the change in identity of selling shareholders.

128. Rule 462(b)

In an offering that is both primary and secondary, the 20% increase in the offering size available under Rule 462(b) is calculated on the total aggregate dollar amount of the offering and may be allocated between the primary and secondary sellers in any manner desired. For example, an offering of $100 million in securities -- $80 million primary and $20 million secondary could be increased by $20 million under Rule 424(b) and all $20 million could be allocated to the secondary seller(s).

129. Rule 462(b)

Rule 462(b) is available for registration of additional securities if the conditions of the rule are satisfied, notwithstanding the fact that the financial statements in the original effective registration statement for the offering, which were within the age limitations of Rule 3-12 of Regulation S-X as of the effective date, are at the filing date of the Rule 462(b) registration statement not within the age limitations set by Rule 3-12. The registrant should consider, however, whether more current financial information would be required to be disclosed to investors to make the information in the registration statement not misleading.

130. Rule 462(b); Rule 457(a)

A registration statement for 1,000,000 shares of preferred stock under Rule 457(a) went effective with an offering price of $15 per share. After the effective date, but prior to the commencement of sales, the registrant sought to increase the number of shares to 1,150,000 and increase the offering price to $17.50 per share. Because more shares are going to be sold than were registered, the registrant must file a new registration statement to register the additional 150,000 shares at $17.50 per share. A short-form registration statement under Rule 462(b) would be possible since the number of additional shares (150,000) times the new price ($17.50) is less than 20% of the aggregate dollar amount in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement.

131. Rule 462(b); Rule 457(o)

A registration statement went effective registering $15,000,000 of preferred stock under Rule 457(o). The prospectus indicated that 1,000,000 shares were being offered. After the effective date, but prior to the commencement of sales, the registrant sought to increase the price from the intended $15 maximum to $17.50, without changing the number of shares in the offering. Because registration was done by dollar amount (Rule 457(o)), not by number of shares (Rule 457(a)), and such dollar amount is increasing, the registrant must file a new registration statement to register the additional $2,500,000 of preferred stock. A short-form registration statement under Rule 462(b) would be possible since the $2,500,000 is less than 20% of the aggregate dollar amount registered in the calculation of registration fee table in the original effective registration statement ($15,000,000); provided, however, that no confirmations may be sent prior to the filing of the Rule 462(b) registration statement.

132. Rule 462(b); Rule 424(b)

For purposes of EDGAR, when filing a Rule 424(b) prospectus supplement in connection with an offering that involves an original effective registration statement and a second registration statement registering additional securities under Rule 462(b), the Rule 424(b) supplement must be filed under the registration number (33- or 333-) for the initial registration statement. The cover page of the Rule 424(b) supplement should, however, set forth the registration numbers of both the initial registration statement and the Rule 462(b) registration statement.

133. Rule 462(b); Rule 413; Rule 429

An issuer filed a registration statement on Form S-4 for a merger. Inadvertently, the number of shares registered was not sufficient to cover certain shares issuable upon the exercise of options during the period after the effective date of the registration statement but prior to the consummation of the merger. Rule 413 does not permit the registration of additional shares by post-effective amendment. Counsel was informed that: (1) it could rely on Rule 462(b) to prepare and file a short-form registration statement provided the amount to be registered was within the 20% limit and the other conditions were met; or (ii) that it could otherwise file a new registration statement that could be combined with the earlier registration statement pursuant to Rule 429. The prospectus was not recirculated.

134. **** Rule 462(c); Rule 430A, Instruction to paragraph (a) ****

Rule 462(c) provides a mechanism for issuers to file a post-effective amendment that becomes automatically effective. It allows issuers the flexibility of automatic effectiveness where the sole purpose of the post-effective amendment is to re-start the 15-business-day period in which pricing

must occur under Rule 430A(a)(3). Rule 462(c) may not be used if the post-effective amendment contains any substantive change from, or addition to, the prospectus in the effective registration statement. It is generally inappropriate, therefore, to file a post-effective amendment under Rule 462(c) if the information contained therein reflects changes in price and volume that represent more than a 20% change in the maximum aggregate offering price set forth in the effective registration statement.

135. Rule 463

Rule 463 requires periodic reports on Form SR of sales of securities and use of proceeds during an issuer's first registered offering. If the offering involves collateralized mortgage obligations, the SR reporting obligation is deemed satisfied by a report at the end of the first takedown. However, if new issuers are formed in connection with subsequent takedowns, for example, a series of trusts or single purpose corporations, each takedown by a new issuer will give rise to a new SR obligation.

136. Rule 463

Since a registered spin-off transaction normally generates no proceeds to the issuer, a report on Form SR pursuant to Rule 463 is not required to be filed.

137. Rule 463

Rule 463 requires that Form SR be filed within 10 days of certain three and six month periods following the effective date of a registration statement. The reference to months rather than 90 or 180 day periods means that the first Form SR report with respect to a registration statement which became effective on February 15 should be filed within 10 days of May 15, not taking into account the actual number of days in each month.

138. Rule 463

Securities of a one-bank holding company are issued pursuant to an automatically effective registration statement on Form S-4. At a later date, the company files a registration statement on Form S-1 covering an offering for cash. The Form SR reporting obligation of Rule 463 is conditioned on the effectiveness of the issuer's first registration statement and, accordingly reports on Form SR need not be filed with respect to the offering registered on Form S-1.

139. Rule 463

Where a registration statement contemplates separate closings of limited partnerships to be formed in a series, the closing of each partnership in the series will be considered an "effective date" for purposes of triggering an obligation to file Forms SR under Rule 463.

140. Rule 463; Form SR

If a registrant's first filing under the Securities Act is a secondary offering, no Form SR need be filed since there is no use of proceeds. However, such a secondary offering would not constitute "the first registration statement filed under the Act by an issuer" for purposes of Rule 463. Accordingly, the first primary Securities Act offering by that registrant would necessitate a Form SR.

141. Rule 463; Form SR

Form SR is required to be filed within 10 days of the end of the three-month period following the effective date even if the registration statement covered a best-efforts offering that has not closed on the due date for the form.

142. Rule 463(d)(3); Form SR

On the same registration statement, in its initial public offering, a company registered X shares for sale to the public and Y shares for issuance pursuant to employee benefit plans. The Division staff agreed with the company's analysis that it need file Form SR only for the shares sold to the public, and could omit Form SRs relating to the employee benefit plan shares in reliance on 463(d)(3). The Division staff's response was premised on the representation that the employee benefit plan shares were originally registered for that purpose; had it been a matter of converting shares originally registered for sale to the public that remained unsold to the employee benefit purpose, this position would not apply.

143. Rule 477

The withdrawal procedure specified in Rule 477 applies before the effective date of a registration statement or before any sale is made. Deregistration procedure applies after the effective date and after a sale has been made.

144. Rule 477; Rule 411(c)

Counsel inquired whether a registrant filing an IPO could incorporate by reference exhibits filed with a previous Securities Act registration statement which had been withdrawn pursuant to Rule 477. The Division staff took the position that the withdrawn registration statement remained a "filed document" for purposes of Rule 411(c) and, accordingly, the exhibits could be incorporated by reference.