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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

REGULATION D

RULES GOVERNING THE LIMITED OFFER AND SALE OF SECURITIES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

Preliminary Notes

1. The following rules relate to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the "Act") [15 U.S.C. 77a et seq., as amended]. Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under this regulation, in light of the circumstances under which it is furnished, not misleading.

2. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities. Regulation D is intended to be a basic element in a uniform system of federal-state limited offering exemptions consistent with the provisions of sections 18 and 19(c) of the Act. In those states that have adopted Regulation D, or any version of Regulation D, special attention should be directed to the applicable state laws and regulations, including those relating to registration of persons who receive remuneration in connection with the offer and sale of securities, to disqualification of issuers and other persons associated with offerings based on state administrative orders or judgments, and to requirements for filings of notices of sales.

3. Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption. For instance, an issuer's failure to satisfy all the terms and conditions of Rule 506 shall not raise any presumption that the exemption provided by section 4(2) of the Act is not available.

4. These rules are available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. The rules provide an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

5. These rules may be used for business combinations that involve sales by virtue of Rule 145(a) (17 CFR 230.145(a)) or otherwise.

6. In view of the objectives of these rules and the policies underlying the Act, Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

7. Securities offered and sold outside the United States in accordance with Regulation S need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this note, however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States.

Definitions and Terms Used in Regulation D

Reg. § 230.501. As used in Regulation D [§§ 230.501-230.508], the following terms shall have the meaning indicated:

(a) *Accredited investor*. "Accredited investor" shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

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(1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, savings and loan association, insurance company, or registered adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000;

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii); and

(8) Any entity in which all of the equity owners are accredited investors.

(b) *Affiliate.* An "affiliate" of, or person "affiliated" with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

(c) *Aggregate offering price.* "Aggregate offering price" shall mean the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities. Where securities are being offered for both cash and non-cash consideration, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of non-cash consideration must be reasonable at the time made.

(d) *Business combination.* "Business combination" shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act (17 CFR 230.145) and any transaction involving the acquisition by one issuer, in exchange for all or a part of its own or its parent's stock, of stock of another issuer if, immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).

(e) *Calculation of number of purchasers*. For purposes of calculating the number of purchasers under §§ 230.505(b) and 230.506(b) only, the following shall apply:

(1) The following purchasers shall be excluded:

(i) Any relative, spouse or relative of the spouse of a purchaser who has the same principal residence as the purchaser;

(ii) Any trust or estate in which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(iii) of this § 230.501 collectively have more than 50 percent of the beneficial interest (excluding contingent interests);

(iii) Any corporation or other organization of which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(ii) of this § 230.501 collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and

(iv) Any accredited investor.

(2) A corporation, partnership or other entity shall be counted as one purchaser. If, however, that entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under paragraph (a)(8) of this section, then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D (§§ 230.501-230.508), except to the extent provided in paragraph (e)(1) of this section.

(3) A non-contributory employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 shall be counted as one purchaser where the trustee makes all investment decisions for the plan.

Note: The issuer must satisfy all the other provisions of Regulation D for all purchasers whether or not they are included in calculating the number of purchasers. Clients of an investment adviser or customers of a broker or dealer shall be considered the "purchasers" under Regulation D regardless of the amount of discretion given to the investment adviser or broker or dealer to act on behalf of the client or customer.

(f) *Executive officer*. "Executive officer" shall mean the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.

(g) *Issuer.* The definition of the term "issuer" in section 2(4) of the Act shall apply, except that in the case of a proceeding under the Federal Bankruptcy Code (11 U.S.C. 101 et seq.], the trustee or debtor in possession shall be considered the issuer in an offering under a plan or reorganization, if the securities are to be issued under the plan.

(h) *Purchaser representative*. "Purchaser representative" shall mean any person who satisfies all of the following conditions or who the issuer reasonably believes satisfies all of the following conditions:

(1) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the purchaser is:

(i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;

(ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(iii) of this § 230.501 collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or

(iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(ii) of this § 230.501 collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests;

(2) Has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment;

(3) Is acknowledged by the purchaser in writing, during the course of the transaction, to be his purchaser representative in connection with evaluating the merits and risks of the prospective investment; and

(4) Discloses to the purchaser in writing a reasonable time prior to the sale of securities to that purchaser any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually

understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

Note 1: A person acting as a purchaser representative should consider the applicability of the registration and antifraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78a *et seq*., as amended] and relating to investment advisers under the Investment Advisers Act of 1940.

Note 2: The acknowledgment required by paragraph (h)(3) and the disclosure required by paragraph (h)(4) of this § 230.501 must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for "all securities transactions" or "all private placements," is not sufficient.

Note 3: Disclosure of any material relationships between the purchaser representative or his affiliates and the issuer or its affiliates does not relieve the purchaser representative of his obligation to act in the interest of the purchaser.

General Conditions to be Met

Reg. § 230.502. The following conditions shall be applicable to offers and sales made under Regulation D (§§ 230.501-230.508):

(a) *Integration.* All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in Rule 405 under the Act [17 CFR 230.405].

Note: The term "offering" is not defined in the Act or in Regulation D. If the issuer offers or sells securities for which the safe harbor rule in paragraph (a) of this § 230.502 is unavailable, the determination as to whether separate sales of securities are part of the same offering (i.e., are considered "integrated") depends on the particular facts and circumstances. Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S. See Release No. 33-6863.

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

(a) whether the sales are part of a single plan of financing;

(b) whether the sales involve issuance of the same class of securities;

(c) whether the sales have been made at or about the same time;

(d) whether the same type of consideration is being received; and

(e) whether the sales are made for the same general purpose.

See Release No. 33-4552 (November 6, 1962) [27 F.R. 11316].

(b) *Information requirements.*

(1) *When information must be furnished.*

If the issuer sells securities under § 230.505 or § 230.506 to any purchaser that is not an accredited investor, the issuer shall furnish the information specified in paragraph (b)(2) of this section to such purchaser a reasonable time prior to sale. The issuer is not required to furnish the specified information to purchasers when it sells securities under § 230.504, or to any accredited investor.

Note: When an issuer provides information to investors pursuant to paragraph (b)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.

(2) *Type of information to be furnished.*

(i) If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities, the issuer shall furnish to the purchaser, to the extent material to an understanding of the issuer, its business, and the securities being offered:

(A) *Non-financial statement information.* If the issuer is eligible to use Regulation A (§ 230.251-263), the same kind of information as would be required in Part II of Form 1-A (§ 239.90 of this chapter). If the issuer is not eligible to use Regulation A, the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.

(B) *Financial Statement Information.*

(1) *Offerings up to $2,000,000*. The information required in Item 310 of Regulation S-B (§ 228.310 of this chapter), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.

(2) *Offerings up to $7,500,000*. The financial statement information required in Form SB-2 [§ 239.10 of this chapter]. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(3) *Offerings over $7,500,000.* The financial statement as would be required in a registration statement filed under the Act on the form that the issuer would be entitled to use. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(C) If the issuer is a foreign private issuer eligible to use Form 20-F (§ 249.220f of this chapter), the issuer shall disclose the same kind of information required to be included in a registration statement filed under the Act on the form that the issuer would be entitled to use. The financial statements need be certified only to the extent required by paragraph (b)(2)(i)(B)*(1), (2) or (3)* of this section, as appropriate.

(ii) If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities, the issuer shall furnish to the purchaser the information specified in paragraph (b)(2)(ii)(A) or (B) of this section, and in either event the information specified in paragraph (b)(2)(ii)(C) of this section:

(A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of § 240.14a-3 or 240.14c-3 under the Exchange Act, the definitive proxy statement filed in connection with that annual report, and, if requested by the purchaser in writing, a copy of the issuer's most recent Form 10-K and 10-KSB [17 CFR 249.310 and 249.310b] under the Exchange Act.

(B) The information contained in an annual report on Form 10-K (§ 249.310 of this chapter) or 10-KSB (§ 249.310b of this chapter) under the Exchange Act or in a registration statement on Form S-1 (§ 239.11 of this chapter), SB-1 (§ 239.9 of this chapter), SB-2 (§ 239.10 of this chapter) or S-11 (§ 239.18 of this chapter) under the Act or on Form 10 (§ 249.210 of this chapter) or Form 10-SB (§ 249.210b of this chapter) under the Exchange Act, whichever filing is the most recent required to be filed.

(C) The information contained in any reports or documents required to be filed by the issuer under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act since the distribution or filing of the report or registration statement specified in paragraph (A) or (B), and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished.

(D) If the issuer is a foreign private issuer, the issuer may provide in lieu of the information specified in paragraph (b)(2)(ii)(A) or (B) of this section, the information contained in its most recent filing on Form 20-F or Form F-1 (§ 239.31 of this chapter).

(iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10-K and Form 10-KSB report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his written request, a reasonable time prior to his purchase.

(iv) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.505 or § 230.506, the issuer shall furnish to the purchaser a brief description in writing of any material written information concerning the offering that has been provided by the issuer to any accredited investor but not previously delivered to such unaccredited purchaser. The issuer shall furnish any portion or all of this information to the purchaser, upon his written request a reasonable time prior to his purchase.

(v) The issuer shall also make available to each purchaser at a reasonable time prior to his purchase of securities in a transaction under § 230.505 or 230.506 the opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished under paragraph (b)(2)(i) or (ii) of this § 230.502.

(vi) For business combinations or exchange offers, in addition to information required by Form S-4 [17 CFR 239.25], the issuer shall provide to each purchaser at the time the plan is submitted to security holders, or, with an exchange, during the course of the transaction and prior to sale, written information about any terms or arrangements of the proposed transactions that are materially different from those for all other security holders. For purposes of this subsection, an issuer which is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act may satisfy the requirements of Part I.B. or C. of Form S-4 by compliance with paragraph (b)(2)(i) of this § 230.502.

(vii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.505 or § 230.506, the issuer shall advise the purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of this section. Such disclosure may be contained in other materials required to be provided by this paragraph.

(c) *Limitation on manner of offering.* Except as provided in § 230.504(b)(1), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.

Provided, however, that publication by an issuer of a notice in accordance with §230.135c shall not be deemed to constitute general solicitation or general advertising for purposes of this section. *Provided further*, that, if the requirements of §230.135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.

(d) *Limitations on resale.* Except as provided in § 230.504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(11) of the Act, which reasonable care may be demonstrated by the following:

Provided, however, that publication by an issuer of a notice in accordance with §230.135c shall not be deemed to constitute general solicitation or general advertising for purposes of this section.

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;

(2) Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and

(3) Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, § 230.502(b)(2)(vii) requires the delivery of written disclosure of the limitations on resale to investors in certain instances.

Filing of Notice of Sales

Reg. § 230.503.

(a) An issuer offering or selling securities in reliance on § 230.504, § 230.505 or § 230.506 shall file with the Commission five copies of a notice on Form D (17 CFR 239.500) no later than 15 days after the first sale of securities.

(b) One copy of every notice on Form D shall be manually signed by a person duly authorized by the issuer.

(c) If sales are made under § 230.505, the notice shall contain an undertaking by the issuer to furnish to the Commission, upon the written request of its staff, the information furnished by the issuer under § 230.502(b)(2) to any purchaser that is not an accredited investor.

(d) Amendments to notices filed under paragraph (a) of this § 230.503 need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B.

(e) A notice on Form D shall be considered filed with the Commission under paragraph (a) of this § 230.503:

(1) As of the date on which it is received at the Commission's principal office in Washington, D.C.; or

(2) As of the date on which the notice is mailed by means of United States registered or certified mail to the Commission's principal office in Washington, D.C., if the notice is delivered to such office after the date on which it is required to be filed.

Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000

Reg. § 230.504.

(a) *Exemption*. Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.504 by an issuer that is not:

(1) subject to the reporting requirements of section 13 or 15(d) of the Exchange Act;

(2) an investment company; or

(3) a development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person, shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) *Conditions to be met.*

(1) To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502.

(i) Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with those state provisions;

(ii) In one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or

(iii) Exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to "accredited investors" as defined in 230.501(a).

(2) The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504, in reliance on any exemption under section 3(b) of the Act, or in violation of section 5(a) of the Securities Act.

Note 1: The calculation of the aggregate offering price is illustrated as follows:

If an issuer sold $900,000 on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

Note 2: If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

Exemption for Limited Offers and Sales of Securities Not Exceeding $5,000,000

Reg. § 230.505.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.505 by an issuer that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) *Conditions to be met.*

(1) *General conditions.* To qualify for exemption under this section, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502.

(2) *Specific conditions.*

(i) *Limitations on aggregate offering price.* The aggregate offering price for an offering of securities under this § 230.505, as defined in § 230.501(c), shall not exceed $5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.505 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act.

Note: The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sold $2,000,000 of its securities on June l, 1982 under this § 230.505 and an additional $1,000,000 on September 1, 1982, the issuer would be permitted to sell only $2,000,000 more under this § 230.505 until June 1, 1983. Until that date the issuer must count both prior sales towards the $5,000,000 limit. However, if the issuer made its third sale on June 1, 1983, the issuer could then sell $4,000,000 of its securities because the June l, 1982 sale would not be within the preceding twelve months.

Example 2. If an issuer sold $500,000 of its securities on June 1, 1982 under § 230.504 and an additional $4,500,000 on December 1, 1982 under this § 230.505, then the issuer could not sell any of its securities under this § 230.505 until June l, 1983. At that time it could sell an additional $500,000 of its securities.

(ii) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section § 230.505.

Note: See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under this section.

(iii) *Disqualifications*. No exemption under this section shall be available for the securities of any issuer described in § 230.262 of Regulation A, except that for purposes of this section only:

(A) The term "filing of the offering statement required by § 230.252" as used in § 230.262(a), (b) and (c) shall mean the first sale of securities under this section;

(B) The term "underwriter" as used in § 230.262(b) and (c) shall mean a person that has been or will be paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and

(C) Paragraph (b)(2)(iii) of this § 230.505 shall not apply to any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering

Reg. § 230.506.

(a) *Exemption.* Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) of this § 230.506 shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act.

(b) *Conditions to be met.*

(1) *General conditions*. To qualify for exemption under this section, offers and sales must satisfy all the terms and conditions of §§ 230.501 and 230.502.

(2) *Specific conditions.*

(i) *Limitation on number of purchasers*. There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this § 230.506.

Note: See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under this section 230.506.

(ii) *Nature of purchasers*. Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

Disqualifying Provision Relating to Exemptions Under §§ 230.504, 230.505 and 230.506

Reg. § 230.507.

(a) No exemption under § 230.504, § 230.505 or § 230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminarily or permanently enjoining such person for failure to comply with § 230.503.

(b) Paragraph (a) of this section shall not apply if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that exemption be denied.

Insignificant Deviations From a Term, Condition or Requirement of Regulation D

Reg. § 230.508.

(a) A failure to comply with a term, condition or requirement of §230.504, § 230.505 or § 230.506 will not result in the loss of the exemption from the requirements of section 5 of the Act for any offer or sale to a particular individual or entity, if the person relying on the exemption shows:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of § 230.502, paragraph (b)(2) of § 230.504, paragraphs (b)(2)(i) and (ii) of § 230.505 and paragraph (b)(2)(i) of § 230.506 shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of § 230.504, § 230.505 or § 230.506.

(b) A transaction made in reliance on § 230.504, § 230.505 or § 230.506 shall comply with all applicable terms, conditions and requirements of Regulation D. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act.

SECURITIES AND EXCHANGE COMMISSION
17 CFR Part 231
[Release No. 6455]
Interpretive Release On Regulation D
AGENCY: Securities and Exchange Commission.
ACTION: Publication of Staff Interpretations.

SUMMARY: The Commission has authorized the issuance of this release setting forth the views of its Division of Corporation Finance on various interpretive questions regarding the rules contained in Regulation D under the Securities Act of 1933. These views are being published to answer frequently raised questions with respect to the regulation.

FOR FURTHER INFORMATION CONTACT: David B. H. Martin, Jr., Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, Washington, D.C. 20549, (202) 272-2573.

SUPPLEMENTARY INFORMATION: In Release No. 33-6389 (March 8, 1982) (47 FR 11251), the Commission adopted Regulation D (17 CFR 230.501-.506) which provides three exemptions from the registration requirements of the Securities Act of 1933 (the "Securities Act" or the "Act") (15 U.S.C. 77a-77bbbb (1976 & Supp. IV 1980), as amended by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261 §19(d), 96 Stat. 1121 (1982)).[1] Regulation D became effective on April 15, 1982.

In the course of administering the regulation, the staff of the Division of Corporation Finance has answered numerous oral and written requests for interpretation of the new provisions. This release is intended to assist those persons who wish to make offerings in reliance on the exemptions in Regulation D by presenting the staff's views on frequently raised questions. As indicated in Preliminary Note 3 to the regulation, Regulation D is intended to be a basic element in a uniform system of federal-state exemptions. As such, aspects of Regulation D have been incorporated in many state statutes and regulations. The interpretations set forth in this release relate only to the federal provisions.

Regulation D is composed of six rules, Rules 501–506. The first three rules set forth general terms and conditions that apply in whole or in part to the exemptions. The questions arising under Rules 50.1–503 fall into four general categories: definitions, disclosure requirements, operational conditions, and notice of sale requirements. The exemptions of Regulation D are set forth in Rules 504–506. Questions concerning those rules usually raise issues pertaining to more than one exemption. This release, an outline of which follows, is organized so as to reflect this pattern of inquiries.

I. Definitions — Rule 501

A. Accredited Investor — Rule 501(a) (Questions 1 – 30)
   1. General
   2. Certain Institutional Investors — Rules 501(a)(1) – (3)
   3. Insiders — Rule 501(a)(4)
   4. $150,000 Purchasers — Rule 501(a)(5)
      a. $150,000 Purchase
      b. 20 Percent of Net Worth Limitation
   5. Natural Persons — Rules 501(a)(6) – (7)
   6. Entities Owned By Accredited Investors — Rule 501(a)(8)
   7. Trusts as Accredited Investors

B. Aggregate Offering Price — Rule 501(c) (Questions 31 – 36)

C. Executive Officer — Rule 501(f) (Question 37)

D. Purchaser Representative — Rule 501(h) (Questions 38 – 39)

II. Disclosure Requirements — Rule 502(b)

A. When Required (Questions 40 – 41)

B. What Required (Questions 42 – 51)
   1. Non-reporting Issuers — Rule 502(b)(2)(i)
   2. Reporting Issuers — Rule 502(b)(2)(ii)

[1] Prior releases leading to the adoption of Regulation D included Release No. 33-6274 (December 23, 1980) (46 FR 2631) in which the Commission considered and requested comments on various exemptions under the Securities Act and Release No. 33-6339 (August 7, 1981) (46 FR 41791) in which the Commission published proposed Regulation D for comment.

I. Definitions — Rule 501

A. Accredited Investor — Rule 501(a)

Defined in Rule 501(a), the term "accredited investor" is significant to the operation of Regulation D.[2] Under Rule 501(e), for instance, accredited investors are not included in computing the number of purchasers in offerings conducted in reliance on Rules 505 and 506. Also, if accredited investors are the only purchasers in offerings under Rules 505 and 506, Regulation D does not require delivery of specific disclosure as a condition of the exemptions. Finally, in an offering under Rule 506, the issuer's obligation to ensure the sophistication of purchasers applies to investors that are not accredited. See Rule 506(b)(2)(ii).

The definition sets forth eight categories of investor that may be accredited. The following questions and answers cover certain issues under various of those categories. Given the frequency of questions regarding the application of the definition to trusts, however, there is a separate section addressing that area.

1. General

The definition of "accredited investor" includes any person who comes within or "who the issuer reasonably believes" comes within one of the enumerated categories "at the time of the sale of the securities to that person." What constitutes "reasonable" belief will depend on the facts of each particular case. For this reason, the staff generally will not be in a position to express views or otherwise endorse any one method for ascertaining whether an investor is accredited.

(1) *Question: A director of a corporate issuer purchases securities offered under Rule 505. Two weeks after the purchase, and prior to completion of the offering, the director resigns due to a sudden illness. Is the former director an accredited investor?*

Answer: Yes. The preliminary language to Rule 501(a) provides that an investor is accredited if he falls into one of the enumerated categories "at the time of the sale of securities to that person." One such category includes directors of the issuer. See Rule 501(a)(4). The investor in this case had that status at the time of the sale to him.[3]

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[2] The term also is essential to the operation of section 4(6) of the Securities Act which exempts certain transactions involving sales solely to accredited investors. The definition of accredited investor for section 4(6) is found at section 2(15) of the Securities Act and Rule 215 (17 CFR 230.321). Rule 501(a) combines and repeats those provisions. As a result, interpretations regarding the definition of "accredited investor" in Regulation D also apply to the definition of that term under section 4(6).

[3] Preliminary Note 6 to Regulation D would support a different analysis if it could be shown that the director's appointment or resignation was "part of a plan or scheme to evade the registration provisions of the Act."

2. Certain Institutional Investors — Rules 501(a)(1) – (3)

(2) *Question: A national bank purchases $100,000 of securities from a Regulation D issuer and distributes the securities equally among ten trust accounts for which it acts as trustee. Is the bank an accredited investor?*

Answer: Yes. Rule 501(a)(1) accredits a bank acting in a fiduciary capacity.[4]

(3) *Question: An ERISA employee benefit plan will purchase $200,000 of the securities being offered. The plan has less than $5,000,000 in total assets and its investment decisions are made by a plan trustee who is not a bank, insurance company, or registered investment adviser. Does the plan qualify as an accredited investor?*

Answer: Not under Rule 501(a)(1). Rule 501(a)(1) accredits an ERISA plan that has a plan fiduciary which is a bank, insurance company, or registered investment adviser or that has total assets in excess of $5,000,000. The plan, however, may be an accredited investor under Rule 501(a)(5), which accredits certain persons who purchase at least $150,000 of the securities being offered.

(4) *Question: A state run, not-for-profit hospital has total assets in excess of $5,000,000. Because it is a state agency, the hospital is exempt from federal income taxation. Rule 501(a)(3) accredits any organization described in section 501(c)(3) of the Internal Revenue Code that has total assets in excess of $5,000,000. Is the hospital accredited under Rule 501(a)(3)?*

Answer: Yes. This category does not require that the investor have received a ruling on tax status under section 501(c)(3) of the Internal Revenue Code. Rather, Rule 501(a)(3) accredits an investor that falls within the substantive description in that section.[5]

(5) *Question: A not-for-profit, tax exempt hospital with total assets of $3,000,000 is purchasing $100,000 of securities in a Regulation D offering. The hospital controls a subsidiary with total assets of $3,000,000. Under generally accepted accounting principles, the hospital may combine its financial statements with that of its subsidiary. Is the hospital accredited?*

Answer: Yes, under Rule 501(a)(3). Where the financial statements of the subsidiary may be combined with those of the investor, the assets of the subsidiary may be added to those of the investor in computing total assets for purposes of Rule 501(a)(3).[6]

3. Insiders — Rule 501(a)(4)

(6) *Question: The executive officer of a parent of the corporate general partner of the issuer is investing in the Regulation D offering. Is that individual an accredited investor?*

Answer: Rule 501(a)(4) accredits only the directors and executive officers of the general partner itself. Unless the executive officer of the parent can be deemed an executive officer of the subsidiary,[7] that individual is not an accredited investor.

4. $150,000 Purchasers — Rule 501(a)(5)

This provision accredits any person[8] who satisfies two separate tests. To be accredited under Rule 501(a)(5), an investor must purchase at least $150,000 of the securities being offered, by one or a combination of four specific methods: cash, marketable securities, an unconditional obligation to pay cash or marketable securities over not more than five years, and cancellation of indebtedness. The rule also requires that "the total purchase price" may not exceed 20 percent of the purchaser's net worth. The two tests under Rule 501(a)(5) must be considered separately. Thus, for instance, in computing the a "total purchase price" for the 20 percent of net worth limitation, the investor may have to include amounts that could not be included towards the $150,000 purchase test.

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4 Rule 501(a)(1) refers to "[a]ny bank as defined in section 3(a)(2) of the Act." Section 3(a)(2) provides that the term "bank" includes "any national bank." Section 3(a)(2) also provides that where a common or collective trust fund is involved, the term "bank" has the same meaning as in the Investment Company Act of 1940 (the "Investment Company Act") (15 U.S.C. 80a-1-80a-65 (1976 & Supp. IV 1980)). Section 2(a)(5) of the Investment Company Act defines "bank."

5 See letter re *Voluntary Hospitals of America, Inc.* dated November 30, 1982.

6 See letter re *Voluntary Hospitals of America, Inc.* dated September 10, 1982.

7 See Question 37.

8 Section 2(2) of the Securities Act includes corporations and partnerships within the definition of "person."

a. $150,000 Purchase

(7) *Question: Two issuers, a general partner and its limited partnership, are selling their securities simultaneously as units consisting of common stock and limited partnership interests. The issues are part of a plan of financing made for the same general purpose. If an investor purchases $150,000 of these units, would it satisfy the $150,000 purchase element of Rule 501(a)(5)?*

Answer: Yes. The issuers are affiliated and the simultaneous sale of their separate securities as units for a single plan of financing would be deemed one integrated offering. Rule 501(a)(5) applies to a purchase "of the securities being offered." The rule thus applies not to the securities of a particular issuer, but to the securities of a particular offering.[9]

(8) *Question: An investor will purchase securities in cash installments. Each installment payment will include amounts due on the principal as well as interest. If the total of all payments is $150,000, will the investor have purchased "at least $150,000 of the securities being offered" for purposes of Rule 501(a)(5)?*

Answer: No. Under Rule 501(a)(5), any amount constituting interest due on the unpaid purchase price is not payment for the "securities being offered."

(9) *Question: The installment payments for interests in a limited partnership that will develop commercial real estate will be conditioned under completion of certain phases of the project. Will the obligation to make those payments be deemed "an unconditional obligation to pay" for purposes of Rule 501(a)(5)?*

Answer: Yes, as long as the only conditions relate to completion of successive stages of the development project.

(10) *Question: An investor will purchase securities in a Regulation D offering by delivering $75,000 in cash and a letter of credit for $75,000. Will such a purchase satisfy the $150,000 element of Rule 501(a)(5)?*

Answer: No. Because there is no assurance that the letter of credit will ever be drawn against, the staff does not deem it to be an unconditional obligation to pay.

(11) *Question: In connection with the sale of limited partnership interests in an oil and gas drilling program, an investor in a Regulation D offering commits to pay subsequent assessments that are mandatory, non-contingent, and for which the investor will be personally liable. Will the commitment to pay the assessments constitute an "unconditional obligation to pay" under Rule 501(a)(5)?*

Answer: Yes. The assessments are essentially installment payments for which the investor makes the investment decision at the time the limited partnership interest originally is purchased.[10]

(12) *Question: If the assessments in Question 11 are voluntary, contingent and non-recourse, can they be included in determining whether or not the investor has purchased $150,000 of the securities being offered?*

Answer: No. Voluntary assessments of this nature are not deemed to constitute an unconditional obligation to pay.[11]

(13) *Question: A purchaser of interests in a limited partnership makes a partial down payment and commits unconditionally to pay the balance over five years. Formation of the partnership is conditioned upon the sale of a specified number of interests. Under Rule 501(a)(5), when must the five year period for installment payments begin to run?*

Answer: Rule 501(a)(5) provides that the unconditional obligation is to be discharged "within five years of the sale of the securities to the purchaser." For ease in the administration of an offering that is conditioned on a certain minimum level of sales, the staff believes it is reasonable to compute the length of installment obligations from the same date for the investors involved in reaching that minimum. Therefore, without any bearing on when the sale of the security actually occurs, the five-year time period of the investor's obligation may be measured from the date such minimum level of sales has been reached.[12]

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9 See letter re *Intuit Telecom Inc.* dated March 24, 1982.
10 See letter to *Kim R. Clark, Esq.* dated November 8, 1982.
11 See letter to *Kim R. Clark, Esq.* dated November 8, 1982.
12 See letter re *Winthrop Financial Co., Inc.* dated May 25, 1982.

b. 20 Percent of Net Worth Limitation

(14) *Question: Where an investor makes installment payments composed of principal and interest, must the interest payments be included in computing the "total purchase price" for purposes of meeting the 20 percent of net worth limitation?*

Answer: No. The interest is not part of the total purchase price but rather is an expense associated with financing the total purchase price.

(15) *Question: A corporate investor will purchase $200,000 of the securities being offered for cash. Additionally, the investor will deliver an irrevocable letter of credit for $50,000 which the issuer will use as collateral in connection with a line of credit it will establish with a lending institution. Must the issuer include the $50,000 letter of credit when determining whether or not the purchaser's total purchase price exceeds 20 percent of its net worth under Rule 501(a)(5)?*

Answer: Yes. Since the investor has committed to pay the $50,000 at the election of the issuer, that amount must be included with other forms of consideration in order to measure what percentage of the investor's net worth has been committed in the investment.[13]

(16) *Question: As part of the purchase of an interest in a sale and lease-back program, the purchaser will deliver "non-recourse" debt where the source of payment for the debt is limited exclusively to the income generated by the security being purchased or the assets of the entity in which the security is being purchased. Must the non-recourse debt be included in the total purchase price for purposes of the 20 percent of net worth limitation under Rule 501(a)(5)?*

Answer: No. Because the investor has no personal liability for the non-recourse debt, and because no part of the investor's assets at the time of purchase is available as a source of payment for the debt, the debt should not be included as part of the purchase price.[14]

(17) *Question: Where the purchaser is a natural person, Rule 501(a)(5) provides that the total purchase price may be measured against the purchaser's net worth combined with that of a spouse. Would property held solely by one spouse be available for calculating the net worth of the other spouse who is making the $150,000 investment?*

Answer: Yes.

(18) *Question: An investment general partnership is purchasing securities in a Regulation D offering. The partnership was not formed for the specific purpose of acquiring the securities being offered. May the issuer consider the aggregate net worth of the general partners in calculating the net worth of the partnership?*

Answer: Yes. An investment general partnership is functionally a vehicle in which profits and losses are passed through to general partners and in which the net worths of the general partners are exposed to the risk of partnership investments.[15]

(19) *Question: A totally held subsidiary"*[16] *makes a cash investment of $200,000 in a Regulation D offering. May that subsidiary use the consolidated net worth of its parent in determining whether or not its total purchase price exceeds 20 percent of its net worth?*

Answer: Yes.[17]

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[13] Note that this $50,000 is not deemed to be "an unconditional obligation to pay" and cannot be included in calculating whether or not the investor meets the 150,000 purchase test of Rule 501(a)(5). See Question 10.

[14] See letter to *Lola M. Hate, Esq.* dated July 1, 1982.

[15] See letter re *Smith Barney, Harris Upham & Co.* dated July 14, 1982.

[16] See 17 CFR 230.405 for the definition of "totally held subsidiary."

[17] See letter re *Federated Financial Corporation* dated May 13, 1982.

5. Natural Persons — Rules 501(a)(6) – (7)

Rules 501(a)(6) and (7) apply only to natural persons. Paragraph (6) accredits any natural person with a net worth at the time of purchase in excess of $1,000,000. If the investor is married, the rule permits the use of joint net worth of the couple. Paragraph (7) accredits any natural person whose income has exceeded $200,000 in each of the two most recent years and is reasonably expected to exceed $200,000 in the year of investment.

(20) *Question: A corporation with a net worth of $2,000,000 purchases securities in a Regulation D offering. Is the corporation an accredited investor under Rule 501(a)(6)?*

Answer: No. Rule 501(a)(6) is limited to "natural" persons.

(21) *Question: In calculating net worth for purposes of Rule 501(a)(6), may the investor include the estimated fair market value of his principal residence as an asset?*

Answer: Yes. Rule 501(a)(6) does not exclude any of the purchaser's assets from the net worth needed to qualify as an accredited investor.

(22) *Question: May a purchaser take into account income of a spouse in determining possible accreditation under Rule 501(a)(7)?*

Answer: No. Rule 501(a)(7) requires "individual income" over $200,000 in order to qualify as an accredited investor.

(23) *Question: May a purchaser include unrealized capital appreciation in calculating income for purposes of Rule 501(a)(7)?*

Answer: Generally, no.

6. Entities Owned By Accredited Investors — Rule 501(a)(8)

Any entity in which each equity owner is an accredited investor under any of the qualifying categories, except that of the $150,000 purchaser, is accredited under Rule 501(a)(8).

(24) *Question: All but one of the shareholders of a corporation are accredited investors by virtue of net worth or income. The unaccredited shareholder is a director who bought one share of stock in order to comply with a requirement that all directors be shareholders of the corporation. Is the corporation an accredited investor under Rule 501(a)(8)?*

Answer: No. Rule 501(a)(8) requires "all of the equity owners" to be accredited investors. The director is an equity owner and is not accredited. Note that the director cannot be accredited under Rule 501(a)(4). That provision extends accreditation to a director of the issuer, not of the investor.

(25) *Question: Who are the equity owners of a limited partnership?*

Answer: The limited partners.

7. Trusts as Accredited Investors

(26) *Question: May a trust qualify as an accredited investor under Rule 501(a)(1)?*

Answer: Only indirectly. Although a trust standing alone cannot be accredited under Rule 501(a)(1), if a bank is its trustee and makes the investment on behalf of the trust, the trust will in effect be accredited by virtue of the provision in Rule 501(a)(1) that accredits a bank acting in a fiduciary capacity.

(27) *Question: May a trust qualify as an accredited investor under Rule 501(a)(5)?*

Answer: Yes. The Division interprets "person" in Rule 501(a)(5) to include any trust.[18]

[18] Section 2(2) of the Securities Act includes "A trust" within the definition of "person" but limits that inclusion to "a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security." The Division does not view that limitation as being necessary in the context of a trust as a purchaser of securities under Rule 501(a)(5).

(28) *Question: In qualifying a trust as an accredited investor under Rule 501(a)(5), whose net worth should be considered in determining whether the total purchase price meets the 20 percent of net worth limitation test?*

Answer: The net worth of the trust.

(29) *Question: A trustee of a trust has a net worth of $1,500,000. Is the trustee's purchase of securities for the trust that of an accredited investor under Rule 501(a)(6)?*

Answer: No. Except where a bank is a trustee, the trust is deemed the purchaser, not the trustee. The trust is not a "natural" person.

(30) *Question: May a trust be accredited under Rule 501(a)(8) if all of its beneficiaries are accredited investors?*

Answer: Generally, no. Rule 501(a)(8) accredits any entity if all of its "equity owners" are accredited investors. The staff does not interpret this provision to apply to the beneficiaries of a conventional trust. The result may be different, however, in the case of certain non-conventional trusts where, as a result of powers retained by the grantors, a trust as a legal entity would be deemed not to exist.[19] Thus, where the grantors of a revocable trust are accredited investors under Rule 501(a)(6) (i.e., net worth exceeds $1,000,000) and the trust may be amended or revoked at any time by the grantors, the trust may be amended or revoked at any time by the grantors, the trust is accredited because the grantors will be deemed the equity owners of the trust's assets.[20] Similarly, where the purchase of Regulation D securities is made by an Individual Retirement Account and the participant is an accredited investor, the account would be accredited under Rule 501(a)(8).

B. Aggregate Offering Price — Rule 501(c)

The "aggregate offering price," defined in Rule 501(c), is the sum of all proceeds received by the issuer for issuance of its securities. The term is important to the operation of Rules 504 and 505, both of which impose a limitation on the aggregate offering price as a specific condition to the availability of the exemption.[21]

(31) *Question: The sole general partner of a real estate limited partnership contributes property to the program. Must that property be valued and included in the overall proceeds of the offering as part of the aggregate offering price?*

Answer: No, assuming the property is contributed in exchange for a general partnership interest.

(32) *Question: An owner of a mining or oil and gas property is selling interests in the property to investors for cash. The owner will retain a royalty interest in the property. Must any subsequent royalty payments be included in the aggregate offering price of the property interests?*

Answer: No. Royalty payments to the seller of the property are treated as operating expenses, rather than capitalized costs for the property. As such, the royalty payments are not part of the consideration received by the issuer for issuance of the securities.

(33) *Question: Where the investors pay for their securities in installments and these payments include an interest component, must the issuer include interest payments in the "aggregate offering price?"*

Answer: No. The interest payments are not deemed to be consideration for the issuance of the securities.[22]

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19 The result would also be different in the case of a business trust, a real estate investment trust, or other similar entities.

20 *See* letter re *Rule 501(a)(8) of Regulation D* dated July 16, 1982.

21 The basis for a limitation on the aggregate offering price derives from section 3(b) of the Securities Act. Section 3(b) accords authority to the Commission to adopt rules exempting any class of securities as long as no issue of securities is exempted "where the aggregate amount at which such issue is offered to the public exceeds $5,000,000." See also section 4(6) which exempts a transaction involving offers and sales solely to one or more accredited investors "if the aggregate offering price of an issue" does not exceed the amount allowed under section 3(b).

22 This presumes that the payments are in fact for interest. See Preliminary Note 6 to Regulation D.

(34) *Question: An offering of interests in an oil and gas limited partnership provides for additional voluntary assessments. These assessments, undetermined at the time of the offering, may be called at the general partner's discretion for developmental drilling activities. Must the assessments be included in the aggregate offering price, and if so, in what amount?*

Answer: Because it is unclear that the assessments will ever be called, and because if they are called, it is unclear at what level, the issuer is not required to include the assessments in the aggregate offering price. In fact, the assessments will be consideration received for the issuance of additional securities in the limited partnership. The issuance will need to be considered along with the original issuance for possible integration, or, if not integrated, must find its own exemption from registration.

(35) *Question: In purchasing interests in an oil and gas partnership, investors agree to pay mandatory assessments. The assessments, essentially installment payments, are non-contingent and investors will be personally liable for their payment. Must the issuer include the assessments in the aggregate offering price?*

Answer: Yes.[23]

(36) *Question: As part of their purchase of securities, investors deliver irrevocable letters of credit. Must the letters of credit be included in the aggregate offering price?*

Answer: If these letters of credit were drawn against, the amounts involved would be considered part of the aggregate offering price. For this reason in planning the transaction, the issuer should consider the full amount of the letters of credit in calculating the aggregate offering price.

C. Executive Officer — Rule 501(f)

The definition of executive officer in Rule 501(f) is the same as that in Rule 405 of Regulation C (17 CFR 230.405).

(37) *Question: The executive officer of the parent of the Regulation D issuer performs a policy making function for its subsidiary. May that individual be deemed an "executive officer" of the subsidiary?*

Answer: Yes.

D. Purchaser Representative — Rule 501(h)

A purchaser representative is any person who satisfies, or who the issuer reasonably believes satisfies, four conditions enumerated in Rule 501(h). Beyond the obligations imposed by that rule, any person acting as a purchaser representative must consider whether or not he is required to register as a broker-dealer under section 15 of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78a-78kk (1976 & Supp. IV 1980)) or as an investment adviser under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-1-80b-21 (1976 & Supp. IV 1980)).[24]

(38) *Question: May the officer of a corporate general partner of the issuer qualify as a purchaser representative under Rule 501(h)?*

Answer: Rule 501(h) provides that "an affiliate, director, officer or other employee of the issuer" may not be a purchaser representative unless the purchaser has one of three enumerated relationships with the representative. The staff is of the view that an officer or director of a corporate general partner comes within the scope of "affiliate, director, officer or other employee of the issuer."

(39) *Question: May the issuer in a Regulation D offering pay the fees of the purchaser representative?*

Answer: Yes. Nothing in Regulation D prohibits the payment by the issuer of the purchaser representative's fees. Rule 501(h)(4), however, requires disclosure of this fact.[25]

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[23] See letter to *Kim R. Clark, Esq*. dated November 8, 1982.

[24] See letters to *Winstead, McGuire, Sechrest & Trimble* dated February 21 and 25, 1975 and re *Kenisa Oil Company* dated April 6, 1982. Questions regarding registration as a broker-dealer should be directed to the Office of Chief Counsel, Division of Market Regulation, (202) 272-2844. Questions regarding registration as an investment adviser should be directed to the Office of Chief Counsel, Division of Investment Management, (202) 272-2030.

[25] Note 3 to Rule 501(h) points out that disclosure of a material relationship between the purchaser representative and the issuer will not relieve the purchaser representative of the obligation to act in the interest of the purchaser.

II. Disclosure Requirements — Rule 502(b)

A. When Required

Rule 502(b)(1) sets forth the circumstances when disclosure of the kind specified in the regulation must be delivered to investors, The regulation requires the delivery of certain information "during the course of the offering and prior to sale" if the offering is conducted in reliance on Rule 505 or 506 and if there are unaccredited investors. If the offering is conducted in compliance with Rule 504 or if securities are sold only to accredited investors, Regulation D does not specify the information that must be disclosed to investors.[26]

(40) *Question: An issuer furnishes potential investors a short form offering memorandum in anticipation of actual selling activities and the delivery of an expanded disclosure document. Does Regulation D permit the delivery of disclosure in two installments?*

Answer: So long as all the information is delivered prior to sale, the use of a fair and adequate summary followed by a complete disclosure document is not prohibited under Regulation D. Disclosure in such a manner, however, should not obscure material information,

(41) *Question: An issuer commences an offering in reliance on Rule 505 in which the issuer intends to make sales only to accredited investors, The issuer delivers those investors an abbreviated disclosure document. Before the completion of the offering, the issuer changes its intentions and proposes to make sales to non-accredited investors. Would the requirement that the issuer deliver the specified information to all purchasers prior to sale if any sales are made to non-accredited investors preclude application of Rule 505 to the earlier sales to the accredited investors?*

Answer: No. If the issuer delivers a complete disclosure document to the accredited investors and agrees to return their funds promptly unless they should elect to remain in the program, the issuer would not be precluded from relying on Rule 505.

B. What Required

Regulation D divides disclosure into two categories: that to be furnished by non-reporting companies and that required for reporting companies. In either case, the specified disclosure is required to the extent material to an understanding of the issuer, its business and the securities being offered,

1. Non-reporting Issuers — Rule 501(b)(i)

If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act,[27] it must furnish the specified information "to the extent material to an understanding of the issuer, its business and the securities being offered." For offerings up to $5,000,000, the issuer should furnish the "same kind of information" as would be contained in Part I of Form S-18,[28] except that only the most recent year's financial statements need be certified. For offerings over $5,000,000, the issuer should furnish "the same kind of information" as would be required in Part I of an available registration statement.[29]

(42) *Question: When an issuer is required to deliver specific disclosure, must that disclosure be in written form?*

Answer: Yes.

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[26] As noted in Preliminary Note 1, Regulation D transactions are exempt from the registration requirements of the Securities Act, not the antifraud provisions. Thus, nothing in Regulation D states that an issuer need not give disclosure to an investor. Rather, the regulation provides that in certain instances the exemptions from registration will not be conditioned on a particular content, format or method of disclosure.

[27] An issuer is subject to section 13 reporting obligations if it has a class of securities registered under section 12 of the Exchange Act. An issuer is subject to section 15(d) reporting obligations if it has had a Securities Act registration statement go effective, or if in any year after the year of effectiveness, it has at least 300 holders of the class of securities to which the registration statement applied. In the latter instance, however, even if the issuer has 300 or more shareholders, it may not be subject to section 15(d) reporting obligations if it has had less than 500 shareholders and less than $3,000,000 in assets during the last three years. See Rule 15d-6 (17 CFR 240.15d-6) under the Exchange Act.

[28] See 17 CFR 239.28. Form S-18 is an abbreviated registration form for certain offerings not exceeding $5,000,000. The form is not available to issuers that report under the Exchange Act.

[29] Rules 502(b)(2)(i)(C) and 502(b)(2)(ii)(D) contain special provisions for foreign issuers recently adopted by the Commission. See Release No. 33-6437 (November 19, 1982) (47 FR 54764).

(43) *Question: Form S-18 requires the issuer's audited balance sheet as of the end of its most recently completed fiscal year or within 135 days if the issuer has been in existence for a shorter time. With a limited partnership that has been formed with minimal capitalization immediately prior to a Regulation D offering, must the Regulation D disclosure document contain an audited balance sheet for the issuer?*

Answer: In analyzing this or any other disclosure question under Regulation D, the issuer starts with the general rule that it is obligated to furnish the specified information "to the extent material to an understanding of the issuer, its business, and the securities being offered." Thus, in this particular case, if an audited balance sheet is not material to the investor's understanding, then the issuer may elect to present an alternative to its audited balance sheet.

(44) *Question: Is Securities Act Industry Guide 5[30] applicable in a $4,000,000 Regulation D offering of interests in a real estate limited partnership?*

Answer: Rule 502(b)(2)(i)(A) requires the issuer to provide the same kind of information as that required in Part I of Form S-18.[31] Form S-18 directs the issuer's attention to the Industry Guides, noting that such guides "represent Division practices with respect to the disclosure to be provided by the affected industries in registration statements." In preparing its Regulation D offering material, therefore, an issuer of interests in a real estate limited partnership should consider Guide 5 in determining the disclosure that will be material to the investor's understanding of the issuer, its business and the securities being offered.

(45) *Question: In a $4,000,000 Regulation D offering of interests in an oil and gas limited partnership, what are the issuer's disclosure obligations with respect to financial statements of the general partner?*

Answer: Item 21(h) of Form S-18 provides that the issuer should furnish the audited balance sheet as of the end of the most recent fiscal year of any corporation or partnership that is a general partner of the issuer. For any general partner that is a natural person, in lieu of an audited balance sheet, the issuer may furnish a statement of that individual's net worth in the text of the disclosure document, where assets and liabilities are estimated at fair market value with provisions for estimated income taxes on unrealized gains.[32]

(46) *Question: The issuer in a $3,000,000 Regulation D offering is a limited partnership that will acquire certain real estate operations with the offering proceeds. What is the appropriate consideration for disclosure of the operating history of these operations?*

Answer: Item 21(g) of Form S-18, which provides special guidance for such disclosure, calls for the audited income statements of the operations, with certain exclusions, for the two most recent fiscal years. If the issuer can meet certain conditions, however, the instruction reduces that requirement to only one year of audited income statements.[33]

Under Regulation D, Rule 502(b)(i)(A) provides that only the financial statements for the issuer's most recent fiscal year must be certified in an offering not in excess of $5,000,000. The staff is of the view that this provision applies to all financial statements in the disclosure document. Thus, in the Regulation D offering described, the following considerations apply. If the issuer can meet the conditions in Item 21(g) of Form S-18, it may present one year of audited income statements on the operations to be acquired. If the issuer cannot meet the conditions in Form S-18, then it should present two years of income statements, only one of which must be audited.

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30 The Commission adopted 53 Securities Act Guides in 1968 (Release No. 33-4936 (December 9, 1968) (33 FR 18617)) and 10 additional ones subsequently. The Guides served as an expression of the policies and practices of the Division of Corporation Finance. Most of those Guides have been incorporated into Regulation C (17 CFR 230.400-.494) and Regulation S-K (17 CFR 229.10-.802) (see Release No. 33-6383 (March 3, 1982) (47 FR 11380)) and thus were rescinded (see Release No. 33-6384 (March 3, 1982) (47 FR 11476)). Five of the Guides applicable to specific industries were not rescinded, however, and were redesignated. Guide 5, which was Guide 60, applies to the preparation of registration statements relating to interests in real estate limited partnerships. Guide 5 was revised in Release No. 33-6405 (June 3, 1982) (47 FR 25140).

31 Form S-18 has been amended recently to permit its use by limited partnerships. Release No. 33-6406 (June 4, 1982) (47 FR 25126).

32 The same general rule would be applicable to an offering in excess of $5,000,000. See Release No. SAB-40, Topic 6.D.3.d. (January 23, 1981).

33 The parallel to this instruction under other forms of registration is Rule 3-14 of Regulation S-X (17 CFR 210.3-14). Rule 3-14 requires income statements of the three most recent fiscal years, unless the issuer meets certain conditions, in which case the issuer need present only one year of audited income statements.

(47) *Question: If the issuer in Question 46 cannot obtain the financial statements on the operations to be acquired without unreasonable effort or expense, what further considerations are applicable under Regulation D?*

Answer: Rule 502(b)(2)(i)(A) provides that "[i]f the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant." The staff interprets this provision to apply to all financial statements that the issuer presents in the offering document. Thus, the issuer described above may present tax basis operating statements on the operations to be acquired.[34]

(48) *Question: Has the Commission defined or will the staff issue interpretations on the term "unreasonable effort or expense?"*

Answer: No. The meaning of "unreasonable effort or expense" depends on the particular facts and circumstances attending each case. Only the issuer will know the facts and circumstances and be able to evaluate them with respect to the requirements of the rule.

(49) *Question: The issuer in a Regulation D offering of $7,000,000 is a corporation. That corporation is acquiring a business. The issuer is unable to obtain the financial statements for that business without unreasonable effort or expense.[35] What are the relevant considerations under Regulation D?*

Answer: Rule 502(b)(2)(i)(B) provides that if the issuer is not a limited partnership and "cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited." The staff has interpreted this provision in the context of Rule 3-05 of Regulation S-X to apply to the financial statements of the business being acquired. Thus, if the business being acquired is other than a limited partnership, and if the issuer cannot obtain audited financial statements of that business without unreasonable effort or expense, then the issuer may provide the relevant financial statements for the business being acquired on an unaudited basis so long as it also provides an audited balance sheet for that business dated within 120 days of-the start of the offering, or, if appropriate, as of the date of acquisition of the business.[36]

2. Reporting Issuers — Rule 502(b)(2)(ii)

If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, Regulation D sets forth two alternatives for disclosure: the issuer may deliver certain recent Exchange Act reports (the annual report, the definitive proxy statement, and, if requested, the Form 10-K (17 CFR 249.310)) or it may provide a document containing the same information as in the Form 10-K or Form 10 (17 CFR 249.210) under the Exchange Act or in a registration statement under the Securities Act. In either case the rule also calls for the delivery of certain supplemental information.

(50) *Question: Rule 502(b)(2)(ii)(B) refers to the information contained "in a registration statement on Form S-1." Does this requirement envision delivery of Parts I and II of the Form S-1?*

Answer: No. Rule 502(b)(2)(ii)(B) should be construed to mean Part l of Form S-1.

(51) *Question: A reporting company with a fiscal year ending on December 31 is making a Regulation D offering in February. It does not have an annual report to shareholders, an associated definitive proxy statement, or a Form 10-K for its most recently completed fiscal year. The issuer's last registration statement was filed more than two years ago. What is the appropriate disclosure under Regulation D?*

Answer: The issuer may base its disclosure on the most recently completed fiscal year for which an annual report to shareholders or Form 10-K was timely distributed or filed. The issuer should supplement the information in the report used with the information contained in any reports or documents required to be filed under sections 13(a), 14(a), 14(c) and 15(d) of the Exchange Act since the distribution or filing of that report and with a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished. See Rule 502(b)(2)(ii)(C).

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[34] *See* letter re *Winthrop Financial Co., Inc.* dated May 25, 1982. In response to inquiries regarding the appropriateness of tax basis financial statements, issuers should refer to Statement on Auditing Standards No. 14, Special Reports, American Institute of Certified Public Accountants, December 1976.

[35] The issuer should refer to Rule 3-05 of Regulation S-X (17 CFR 210.3-05) for the disclosure guidelines on businesses to be acquired. If the offering were for less than $5,000,000 and the issuer were thus referring to Form S-18, Item 21(d) of that form provides a parallel rule on businesses to be acquired.

[36] *See* letter re *Walnut Valley Special Cable TV Fund* dated May 13, 1982.

C. General

Rule 501(b)(2) also contains four general provisions applicable to all classes of issuer in all offerings where specified disclosure is required. These provisions govern exhibits, disclosure of additional information to non-accredited investors, the opportunity for further investor inquiries, and disclosure of certain additional information in business combinations.

(52) *Question: Is a Rule 505 or 506 offering of interests in a limited partnership where certain purchasers are not accredited investors, must the issuer obtain an opinion of counsel regarding the legality of the securities being issued or an opinion regarding the tax consequences of an investment in the offering?*

Answer: Rule 502(b)(2)(iii) provides that the issuer is not required to furnish the exhibits that would accompany the form of registration or report governing the issuer's disclosure document if the issuer identifies the contents of those exhibits and makes them available to purchasers upon written request prior to purchase.[37] Any form of registration to which the issuer refers in preparing its disclosure document under Regulation D requires that the issuer furnish the exhibits required by Item 601 of Regulation S-K. Item 601 requires that the issuer furnish, among other exhibits, an opinion of counsel as to the legality of the securities being issued. Thus, under Rule 502(b)(2)(iii), the issuer should identify the contents of this opinion of counsel and make it available to purchasers upon written request. Item 601 also sets forth certain requirements for an opinion as to tax matters. Such an opinion is required to support any representations in a prospectus as to material tax consequences. Thus, assuming the Regulation D issuer will make representations in the disclosure document as to material tax consequences of investing in a limited partnership, the issuer should identify the contents of and make available upon request an opinion supporting that discussion.[38]

III. Operational Conditions

A. Integration — Rule 502(a)

Rule 502(a) achieves two purposes. First, it explicitly incorporates the doctrine of integration into Regulation D. Second, it establishes an exception to the operation of that doctrine.

Integration operates to identify the scope of a particular offering by considering the relationship between multiple transactions. It is premised on the concept that the Securities Act addresses discrete offerings and on the recognition that not every offering is in fact a discrete transaction. The integration doctrine prevents an issuer from circumventing the registration requirements of the Securities Act by claiming a separate exemption for each part of a series of transactions that comprises a single offering. Because the determination of whether transactions should be integrated into one offering is so dependent on particular facts and circumstances, the staff does not issue interpretations in this area.[39] The Note to Rule 502(a), however, does set forth a number of factors that should be considered in making an integration determination.

Rule 502(a) also sets forth an exception to the integration doctrine. It provides that a Regulation D offering will not be integrated with offers or sales that occur more than six months before or after the Regulation D offering. This six month safe harbor rule only applies, however, where there have been no offers or sales (except under an employee benefit plan) or securities similar to those in the Regulation D offering within the applicable six months.[40]

(53) *Question: An issuer conducts offering (A) under Rule 504 of Regulation D that concludes in January. Seven months later the issuer commences offering (B) under Rule 506. During that seven month period the issuer's only offers or sales of securities are under an employee benefit plan (C). Must the issuer integrate (A) and (B)?*

Answer: No. Rule 502(a) specifically provides that (A) and (B) will not be integrated.[41]

B. Calculation of the Number of Purchasers — Rule 501(e)

Rule 501(e) governs the calculation of the number of purchasers in offerings that rely either on Rule 505 or 506. Both of these rules limit the number of non-accredited investors to 35. Rule 501(e) has two parts. The first excludes certain purchasers from the calculation. The second establishes basic principles for counting of corporations, partnerships, or other entities.

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37 This provision is similar to that found in former Rule 146 at paragraph (e)(1)(ii)(c).

38 *See* letters to *Hecker & Phillips* dated December 22, 1982 and *Hopper, Kanouff, Smith and Peryam* dated September 10, 1982.

39 *See* Release No. 33-6253 (October 28, 1980) (45 FR 72644); letters re *Security Bancorp, Inc.* dated January 21, 1980 and *Kearney Plaza Company* dated March 8, 1979.

40 The Note to Rule 502(a) also points out that certain foreign offerings are not integrated with domestic exempt offerings.

41 Rule 502(a), however, does not provide a safe harbor to the possible integration of offering (C) with either offering (A) or (B). In resolving that question, the issuer should consider the factors listed in the Note to Rule 502(a).

(54) *Question: One purchaser in a Rule 506 offering is an accredited investor. Another is a first cousin of that investor sharing the same principal residence. Each purchaser is making his own investment decision. How must the issuer count these purchasers for purposes of meeting, the 35 purchaser limitation?*

Answer: The issuer is not required to count either investor. The accredited investor may be excluded under Rule 501(e)(1)(iv). and the first cousin may then be excluded under Rule 501(e)(1)(i).[42]

(55) *Question: An accredited investor in a Rule 506 offering will have the securities she acquires placed in her name and that of her spouse. The spouse will not make an investment decision with respect to the acquisition. How many purchasers will be involved?*

Answer: The accredited investor may be excluded from the count under Rule 501(e)(1)(iv) and the spouse may be excluded under Rule 501(e)(1)(i). The issuer may also take the position, however, that the spouse should not be deemed a purchaser at all because he did not make any investment decision, and because the placement of the securities in joint name may simply be a tax or estate planning technique.

(56) *Question: An offering is conducted in the United States under Rule 505. At the same time certain sales are made overseas. Must the foreign investors be included in calculating the number of purchasers?*

Answer: Offers and sales of securities to foreign persons made outside the United States in such a way that the securities come to rest abroad generally do not need to be registered under the Act. This basis for non-registration is separate from Regulation D and offers and sales relying on this interpretation are not required to be integrated with a coincident domestic offering.[43] Thus, assuming the sales in this question rely on this interpretation, foreign investors would not be counted.

(57) *Question: An investor in a Rule 506 offering is a general partnership that was not organized for the specific purpose of acquiring the securities offered. The partnership has ten partners, five of whom do not qualify as accredited investors. The partnership will make an investment of $100,000. How is the partnership counted and must the issuer make any findings as to the sophistication of the individual partners?*

Answer: Rule 501(e)(2) provides that the partnership shall be counted as one purchaser. The issuer is not obligated to consider the sophistication of each individual partner.

(58) *Question: If the partnership in Question 57 purchases $200,000 of the securities being offered and if that amount does not exceed 20 percent of the partnership's net worth, how should the partnership be counted?*

Answer: Rule 501(e)(2), which provides that the partnership shall be counted as one purchaser, operates in tandem with Rule 501(e)(1). Thus, because the partnership is an accredited investor (in this case under Rule 501(a)(5)), the partnership may be excluded from the count under Rule 501(e)(2)(iv).

(59) *Question: An investor in a Rule 506 offering is an investment partnership that is not accredited under Rule 501(a)(8). Although the partnership was organized two years earlier and has made investments in a number of offerings, not all the partners have participated in each investment. With each proposed investment by the partnership, individual partners have received a copy of the disclosure document and have made a decision whether or not to participate. How do the provisions of Regulation D apply to the partnership as an investor?*

Answer: The partnership may not be treated as a single purchaser. Rule 501(e)(2) provides that if the partnership is organized for the specific purpose of acquiring the securities offered, then each beneficial owner of equity interests should be counted as a separate purchaser. Because the individual partners elect whether or not to participate in each investment, the partnership is deemed to be reorganized for the specific purpose of acquiring the securities in each investment.[44] Thus, the issuer must look through the partnership to the partners participating in the investment. The issuer must satisfy the conditions of Rule 506 as to each partner.

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[42] The Note to Rule 501(e) provides that the issuer must satisfy all other conditions of Regulation D with respect to purchasers that have been excluded from the count. Thus, for instance, the issuer would have to ensure the sophistication of the first cousin under Rule 506(b)(2)(ii).

[43] *See* Release No. 334708 (July 9, 1964) (29 FR 828), Preliminary Note 7 to Regulation D and Note to Rule 502(a).

[44] *See* letter re *Madison Partners Ltd.* 1982-1 dated January 18, 1982. *See also* letter re *Kenai Oil & Gas, Inc*. dated April 27, 1979.

C. Manner of Offering — Rule 502(c)

Rule 502(c) prohibits the issuer or any person acting on the issuer's behalf from offering or selling securities by any form of general solicitation or general advertising. The analysis of facts under Rule 502(c) can be divided into two separate inquiries. First, is the communication in question a general solicitation or general advertisement? Second, if it is, is it being used by the issuer or by someone on the issuer's behalf to offer or sell the securities? If either question can be answered in the negative, then the issuer will not be in violation of Rule 502(c). Questions under Rule 502(c) typically present issues of fact and circumstance that the staff is not in a position to resolve. In several instances, however, the staff has been able to address questions under the rule.

In analyzing what constitutes a general solicitation, the staff considered a solicitation by the general partner of a limited partnership to limited partners in other active programs sponsored by the same general partner. In demanding that this did not constitute a general solicitation the Division underscored the existence and substance of the pre-existing business relationship between the general partner and those being solicited. The general partner represented that it believed each of the solicitees had such knowledge and experience in financial and business matters that he or she was capable of evaluating the merits and risks of the prospective investment. See letter re Woodtrails-Seattle, Ltd. dated July 8, 1982.

In analyzing whether or not an issuer was using a general advertisement to offer or sell securities, the staff declined to express an opinion on a proposed tombstone advertisement that would announce the completion of an offering. See letter re Alma Securities Corporation dated July 2, 1982. Because the requesting letter did not describe the proposed use of the tombstone announcement and because the announcement of the completion of one offering could be an indirect solicitation for a new offering, the staff did not express a view. In a letter re Tax Investment Information Corporation dated January 7, 1983, the staff considered whether the publication of a circular analyzing private placement offerings, where the publisher was independent from the issuers and the offerings being analyzed, would violate Rule 502(c). Although Regulation D does not directly prohibit such a third party publication, the staff refused to agree that such a publication would be permitted under Regulation D because of its susceptability to use by participants in an offering. Finally, in the letter re Aspen Grove dated November 8, 1982 the staff expressed the view that the proposed distribution of a promotional brochure to the members of the "Thoroughbred Owners and Breeders Association" and at an annual sale for horse owners and the proposed use of a magazine advertisement for an offering of interests in a limited partnership would not comply with Rule 502(c).

(60) *Question: If a solicitation were limited to accredited investors, would it be deemed in compliance with Rule 502(c)?*

Answer: The mere fact that a solicitation is directed only to accredited investors will not mean that the solicitation is in compliance with Rule 502(c). Rule 502(c) relates to the nature of the offering not the nature of the offerees.

D. Limitations on Resale — Rule 502(d)

Rule 502(d) makes it clear that Regulation D securities have limitations on transferability and requires that the issuer take certain precautions to restrict the transferability of the securities.

(61) *Question: An investor in a Regulation D offering wishes to resell his securities within a year after the offering. The issuer has agreed to register the securities for resale. Will the proposed resale under the registration statement violate Rule 502(d)?*

Answer: No. The function of Rule 502(d) is to restrict the unregistered resale of securities. Where the resale will be registered, however, such restriction are unnecessary.

IV. Exemptions

A. Rule 504

Rule 504 is an exemption under section 3(b) of the Securities Act available to non-reporting and non-investment[45] companies for offerings not in excess of $500,000.

(62) *Question: A foreign issuer proposes to use Rule 504. The issuer is not subject to section 15(d) and its securities are exempt from registration under Rule 12g3-2 (17 CFR 240.12g3-2). May this issuer use Rule 504?*

Answer: Yes.

[45] The Division is of the view that the provision in Rules 504 and 505 that bars an investment company from using the exemptions should be construed to mean an investment company as that term is defined in section 3 of the Investment Company Act.

(63) *Question: An issuer proposes to make an offering under Rule 504 in two states. The offering will be registered in one state and the issuer will deliver a disclosure document pursuant to the state's requirements. The offering will be made pursuant to an exemption from registration in the second state. Must the offering satisfy the limitations on the manner of offering and on resale in paragraphs (c) and (d) of Rule 502?*

Answer: Yes. An offering under Rule 504 is exempted from the manner of sale and resale limitations only if it is registered in each state in which it is conducted and only if a disclosure document is required by state law.

(64) *Question: The state in which the offering will take place provides for "qualification" of any offer or sale of securities. The state statute also provides that the securities commissioner may condition qualification of an offering on the delivery of a disclosure document prior to sale. Would the issuer be making its offering in a state that "provides for registration of the securities and requires the delivery of a disclosure document before sale" if its offering were qualified in this state on the condition that it deliver a disclosure document before sale to each investor?*

Answer: Yes.[46]

(65) *Question: If an issuer is registering securities at the state level, are there any specific requirements as to resales outside of that state if the issuer is attempting to come within the provision in Rule 504 that waives the limitations on the manner of offering and on resale in Rules 502(c) and (d)?*

Answer: No.[47] The issuer, however, must intend to use Rule 504 to make bona fide sales in that state and not to evade the policy of Rule 504 by using sales in one state as a conduit for sales into another state. *See* Preliminary Note 6 to Regulation D.

B. Rule 505

Rule 505 provides an exemption under section 3(b) of the Securities Act for non-investment companies for offerings not in excess of $5,000,000.

(66) *Question: An issuer is a broker that was censured pursuant to a Commission order. Does the censure bar the issuer from using Rule 505?*

Answer: No. Rule 505 is not available to any issuer who falls within the disqualifications for the use of Regulation A (17 CFR 230.251-.264). *See Rule* 505(b)(2)(iii). One such disqualification occurs when the issuer is subject to a Commission order under section 15(b) of the Exchange Act. A censure has no continuing force and thus the issuer is not subject to an order of the Commission.

C. Questions Relating to Rules 504 and 505

Both Rules 504(b)(2)(i) and 505(b)(2)(i) require that the offering not exceed a specified aggregate offering price. The allowed aggregate offering price, however, is reduced by the aggregate offering price for all securities sold within the last 12 months in reliance on section 3(b) or in violation of section 5(a) of the Securities Act.

(67) *Question: An issuer preparing to conduct an offering of equity securities under Rule 505 raised $2,000.000 from the sale of debt instruments under Rule 505 eight months earlier. How much may the issuer raise in the proposed equity offering?*

Answer: $3,000,000. A specific condition to the availability of Rule 505 for the proposed offering is that its aggregate offering price not exceed $5,000,000 less the proceeds for all securities sold under section 3(b) within the last 12 months.

(68) *Question: An issuer is planning a Rule 505 offering. Ten months earlier the issuer conducted a Rule 506 offering. Must the issuer consider the previous Rule 506 offering when calculating the allowable aggregate offering price for the proposed Rule 505 offering?*

Answer: No. The Commission issued Rule 506 under section 4(2), and Rule 505(b)(2)(i) requires that the aggregate offering price be reduced by previous sales under section 3(b).[48]

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[46] *See* letter to *Geraldine D. Green* dated November 22, 1982.
[47] *See* letter re *Free port Resources, Inc.* dated December 9, 1982.
[48] Note that under Rule 502(a) these offerings may not have to be integrated because they are separated by six months.

(69) *Question: Seven months before a proposed Rule 504 offering the issuer conducted a rescission offer under Rule 504. The rescission offer was for securities that were sold in violation of section 5 more than 12 months before the proposed Rule 504 offering. Must the aggregate offering price for the proposed Rule 504 offering be reduced either by the amount of the rescission offer or the earlier offering in violation of section 5?*

Answer: No. The offering in violation of section 5 took place more than 12 months earlier and thus is not required to be included when satisfying the limitation in Rule 504(b)(2)(i). The staff is of the view that the rescission offer relates back to the earlier offering and therefore should not be included as an adjustment to the aggregate offering price for the proposed Rule 504 offering.

(70) *Question: Rules 504 and 505 contain examples as to the calculation of the allowed aggregate offering price for a particular offering. Do these examples contemplate integration of the offerings described?*

Answer: No. The examples have been provided to demonstrate the operation of the limitation on the aggregate offering price in the absence of any integration questions.

(71) *Question: Note 2 to Rule 504 is not restated in Rule 505. Does the principal of the note apply to Rule 505?*

Answer: Yes. Note 2 to Rule 504 sets forth a general principal to the operation of the rule on limiting the aggregate offering price which is the same for both Rules 504 and 505. It provides that if, as a result of one offering, an issuer exceeds the allowed aggregate offering price in a subsequent unintegrated offering, the exemption for the first offering will not be affected.

D. Rule 506

(72) *Question: May an issuer of securities with a projected aggregate offering price of $3,000,000 rely on Rule 506?*

Answer: Yes. The availability of Rule 506 is not dependent on the dollar size of an offering.

(73) *Question: Rule 506 requires that the issuer shall reasonably believe that each purchaser who is not an accredited investor either alone or with a purchaser representative has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment. Former Rule 146 required the issuer to make a similar determination with respect to each offeree. Rule 506 is not an exclusive basis for satisfying the requirements of the private offering exemption in section 4(2). See Preliminary Note 3 to Regulation D. What is the Commission's view of the relevance of the nature of the offerees in an offering that relies exclusively on section 4(2) as its basis for exemption from registration?*

Answer: Clearly, in an offering relying exclusively on section 4(2) for an exemption from registration, all offerees who purchase must possess the requisite level of sophistication. The sophistication of each of those to whom the securities are offered who do not purchase is not a fact that in and of itself should determine mechanically the availability of the exemption; the number and the nature of the offerees, however, are relevant in determining whether an issuer has engaged in a general solicitation or general advertising that would preclude reliance on the exemption in section 4(2).

E. Questions Relating to Rules 504–506

(74) *Question: If an issuer relies on one exemption, but later realizes that exemption may not have been made available, may it rely on another exemption after the fact?*

Answer: Yes, assuming the offering met the conditions of the new exemption. No one exemption is exclusive of another.

(75) *Question: May foreign issuers use Regulation D?*

Answer: Yes. Recent amendments to Regulation D have clarified the disclosure requirements for foreign issuers.[49]

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[49] *See* Release No. 33-6437 (November 19, 1982) (47 FR 54764).

(76) *Question: Is Regulation D available to an underwriter for the sale of securities acquired in a firm commitment offering?*

Answer: No. As Preliminary Note 4 indicates, Regulation D is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. See also Rule 502(d) which limits the resale of Regulation D securities.

(77) *Question: Regulation T (12 CFR 220.1-.8) of the Federal Reserve Board imposes certain restrictions on brokers and dealers for the use of credit in the purchase of securities. Regulation T provides an exemption from those provisions for the arrangement of credit in a sale of securities that is exempt from the registration requirements of the Securities Act under section 4(2). See 12 CFR 220.7(g). What is the applicability of this provision to offerings conducted under Regulation D?*

Answer: Regulation T is interpreted by the Federal Reserve Board which has expressed the view that the exemption from Regulation T in 12 CFR 220.7(a) is available for offerings conducted in reliance on Rules 505 and 506,[50] but not for those under 504.[51]

(78) *Question: A corporation proposes to implement an employee stock option plan for key employees. Can the issuer rely on Regulation D for an exemption from registration for the issuance of securities under the plan?*

Answer: The corporation may use Regulation D for the sale of its securities under the plan to the extent that such offering complies with Regulation D. In a typical plan, the grant of the options will not be deemed a sale of a security for purposes of the Securities Act. The issuer, therefore, will be seeking an exemption for the issuance of the stock underlying the options. The offering of this stock generally will commence when the options become exercisable and will continue until the options are exercised or otherwise terminated. Where the key employees involved are directors or executive officers, such individuals will be accredited investors under Rule 501(a)(4) if they purchase securities through the exercise of their options. Other key employees may be accredited as a result of net worth or income under Rules 501(a)(6) or (a)(7).

(79) *Question: In an "all or none" or minimum-maximum Regulation D offering of interests in a limited partnership, the general partner proposes, if necessary, to purchase enough interests for the issuer to sell a specified level of interests by the specified expiration date of the offering. What disclosure and other considerations are relevant?*

Answer: The staff is of the view that pursuant to Rule 10b-9 under the Exchange Act, the issuer must disclose the possibility that the general partner may make purchases of the limited partnership interests in order to meet the specified minimum. In addition, the issuer should disclose the maximum amount of the possible purchases. Finally, these purchases must be for investment and not resale. Questions regarding these views should be directed to the Division of Market Regulation, Office of Trading Practices, (202) 272-2874.

(80) *Question: An issuer will conduct a Regulation D offering on an "all or none" basis within a specified time. What considerations are there for the issuer if it wishes to extend the offering beyond the specified time in order to sell the specified amount of securities?*

Answer: The staff is of the view that an offering may be extended beyond the specified time without resulting in a violation of Rule 10b-9 under the Exchange Act or, in the case of an offering in which a broker-dealer is a participant, Rule 15c2-4 under the Exchange Act, under the following conditions:

a. Prior to the specified expiration date, a reconfirmation offer must be made to all subscribers that discloses the extension of the offering and any other material information necessary to update previously provided disclosure.

b. The reconfirmation offer must be structured so that the subscriber affirmatively elects to continue his investment and so that those subscribers who take no affirmative action will have their funds returned to them.

c. The reconfirmation offer must be made far enough in advance of the specified expiration date so that any subscriber who does not elect to continue his investment will have his funds returned to him promptly after the specified expiration date.

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[50] Letters from Laura Homer, Securities Credit Officer, Board of Governors of the Federal Reserve System to Ardith Eymann, Esq., Chief Counsel, Division of Market Regulation, Securities and Exchange Commission (April 10, 1982) and to Mrs. Mary E.T. Beach, Associate Director, Securities and Exchange Commission (January 8, 1982).

[51] Letter from Laura Homer, Securities Credit Officer, Board of Governors of the Federal Reserve System to Alan G. Rosenberg, Esg. (May 20, 1982).

Questions regarding these views should be directed to the Division of Market Regulation, Office of Trading Practices, (202) 272-2874.

V. Notice of Sale — Form D

Rule 503 requires the issuer to file a notice of sale on Form D. The notice must be filed not later than 15 days after the first sale, every six months thereafter, and no later than 30 days after the last sale.[52]

(81) *Question: Where can an issuer obtain copies of Form D and where must the form be filed?*

Answer: Form D is available through the Public Reference Branch of the Commission's main office, 450 5th Street, N.W., Washington, D.C. 20549, (202) 272-7460, or any of its regional or branch offices. The form should be filed at the Commission's main office. There is no filing fee.

(82) *Question: In a minimum-maximum offering where subscription funds are held in escrow pending receipt of minimum subscriptions, when is the first Form D required to be filed?*

Answer: In the context of Rule 503, the first sale takes place upon receipt of the first subscription agreement and the deposit of the first funds into escrow. The issuer, therefore, should file its first Form D not later than 15 days after the receipt of the first subscription agreement.

(83) *Question: An issuer conducting a minimum-maximum offering has received subscriptions for the minimum number of interests needed to form the limited partnership. Subsequent to closing and formation of the partnership, the issuer continues to offer interests. After two months in which no sales take place, the issuer decides to terminate the offering. Because more than 30 days have elapsed since the last sale, how can the issuer comply with Rule 503 in the filing of its final Form D?*

Answer: The staff is of the view that a final Form D may be filed not later than 30 days after the last sale or after the termination of the offering, whichever occurs later.

(84) *Question: In an employee stock option plan, when would the first and last Form D be filed?*

Answer: The First Form D should be filed not later than 15 days after the exercise of the first option. The final Form D would be due not later than 30 days after the exercise or expiration of the last outstanding option, whichever occurs later.

(85) *Question: An issuer commences a Regulation D offering and files an original Form D not later than 15 days after the first sale. Subsequently, because no further sales are made, the issuer returns the money to the one investor and terminates the offering. How should the issuer reflect the unsuccessful offering on its Form D?*

Answer: The issuer should file a final Form D indicating zero sales, investors, and proceeds.

(86) *Question: If the issuer is a limited partnership, who would be considered the chief executive officer for purposes of Form D questions?*

Answer: The chief executive officer of a limited partnership is that individual who fulfills the function of chief executive officer. That individual may be the chief executive officer of a corporate general partner.

(87) *Question: What is a Standard Industrial Classification ("SIC") and where is it obtained?*

Answer: The SIC is a code associated with a particular economic activity. The SIC system, developed by the Bureau of the Census under the auspices of the Office of Management and Budget, is used in classification of establishments by the type of activities in which they are engaged. An issuer's SIC can be found in the Standard Industrial Classification Manual, a publication of the U.S. Government that may be obtained from the Superintendent of Documents and is generally available in public and university libraries.

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[52] A Form D is also required to be filed in connection with an offering conducted pursuant to section 4(6). See 17 CFR 239.500.

(88) *Question: Question 8 of Part A asks for the issuer's CUSIP number. What is a CUSIP number?*

Answer: CUSIP[53] is the trademark for a system that identifies specific security issuers and their classes of securities. Under the CUSIP plan, a CUSIP number is permanently assigned to each class and will identify that class and no other. Generally, a CUSIP number will be assigned only to a class for which there is a secondary trading market. The operation of the CUSIP numbering system is controlled by the CUSIP Board of Trustees which awarded a contract to Standard & Poor's Corporation to function as the CUSIP Service Bureau, the operational arm of the system. Issuers relying on Regulation D that do not have a class of securities with a secondary trading market and thus do not have a CUSIP number should answer Question 8 in the negative.

(89) *Question: Part B of Form D requests statistical information about the issuer. In an offering of interests in a limited partnership to be formed, how should this part be answered?*

Answer: The answers to Part B should be with respect to the partnership to be formed and will be zero or "not applicable." This will reflect the statistical profile of a start-up issuer.

(90) *Question: Question 2 to Part C requests certain information as to the number of accredited and non-accredited investors in a Rule 505 or 506 offering. Must an issuer make a finding as to accredited investors even if the issuer is not relying on the accredited investor concept in its offering?*

Answer: No. Where an issuer under Rule 505 or 506 is not relying on the accredited investor concept for all or certain investors, it should treat those investors as non-accredited for purposes of this question.

(91) *Question: Questions 5 and 6 to Part C request certain information regarding the offering expenses and the use of proceeds. May the issuer attach a separate schedule listing expenses and use of proceeds in lieu of completing these questions?*

Answer: No. The Form D has been formulated for keypunching and entry of the information into an automatic data storage system. Failure to complete the questions on the form in the space provided frustrates the objectives of the form.

(92) *Question: May the Form D be signed by the issuer's attorney?*

Answer: Form D may be signed on behalf of the issuer by anyone who is duly authorized.

Text of Amendment

List of subjects in 17 CFR 231
Reporting Requirements
Securities

In accordance with the foregoing, Title 17, Chapter Il, of the Code of Federal Regulations is amended as follows:

PART 231 — INTERPRETIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER.

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1. Part 231 is amended by adding this Release No. 33-6455 (March 3, 1983) to the list of interpretive releases.

By the Commission.

George A. Fitzsimmons
Secretary

March 3, 1983.

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[53] The acronym "CUSIP" derives from the title of the American Banker's Association committee that developed the CUSIP system — Committee on Uniform Security Identification Procedures.

The attached Interpretive Release is for reference purposes only. Please refer to the current rules.

For further information contact:

Division of Corporation Finance	
Office of Chief Counsel	**(202) 942-2900**
Office of Small Business Policy	**(202) 942-2950**
Division of Market Regulation	
Office of Trading Practices	**(202) 942-0770**
Public Reference Branch	**(202) 942-8090**