Question 271.12

Question: Rule 701(e) prescribes additional disclosure that must be delivered a reasonable time before sale if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $~~5~~10 million. Must this disclosure be provided to all investors in the Rule 701 offering, or only to those investors who purchase securities after the issuer exceeds the $~~5~~10 million threshold? What are the consequences of non-compliance?

Answer: The Rule 701(e) disclosure must be provided to all investors in the Rule 701 offering if the issuer believes that sales will exceed the $~~5~~10 million threshold in the coming 12-month period, not only to those who purchase securities after the issuer exceeds the $~~5~~10 million threshold. As stated in Securities Act Release No. 7645 (Feb. 25, 1999):

"This requirement will obligate issuers to provide disclosure to all investors if the issuer believes that sales will exceed the $~~5~~[10] million threshold in the coming 12-month period. If the disclosure has not been provided to all investors before sale, the issuer will lose the exemption for the entire offering when sales exceed the $~~5~~[10] million threshold." [~~Jan. 26~~March 6, ~~2009~~2026]