

## Manual of Publicly Available Telephone Interpretations

---

### M. EXCHANGE ACT RULES

1. \*\* Rule 0-11 \*\*

A registrant need not pay a filing fee calculated under Rule 0-11 for proxy material relating to a sale of assets that does not involve the sale of substantially all of its assets. However, if a registrant seeks shareholder approval and provides Item 14 disclosure, it must pay a filing fee calculated under Rule 0-11.

2. \*\* Rule 0-11 \*\*

Where Company A files proxy material for the transfer of substantially all of its assets to its wholly-owned subsidiary Company B in exchange for additional shares of Company B stock, Company A need not pay the filing fee contemplated by Rule 0-11. In reaching this position, the Division staff noted that because the transaction would result in no change on a consolidated basis, it did not appear to be an "acquisition, disposition, business combination ... or similar transaction."

3. Rule 12a-5

"Poison pill" rights issuable under Stockholder Rights Plans are not the type of right contemplated by Rule 12a-5 which provides a temporary exemption from registration for substituted or additional securities to allow when issued trading.

4. Rule 12b-11; Rule 12b-15

Form 8 has been rescinded and Rule 12b-15 requires that amendments to Exchange Act registration statements and reports be filed under cover of the form being amended, marked with the letter A (e.g. "10-K/A"). Registrants in paper format should file only three copies of amendments to Exchange Act registration statements and reports in compliance with Rule 12b-11. The provisions in various Exchange Act forms requiring more than three copies do not apply to such amendments.

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

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

6. Rule 12b-12(d)

Rule 12b-12(d) provides that "if any exhibit or other papers or document filed with a statement or report is in a foreign language, it shall be accompanied by a summary, version or translation in the English language." A "summary" of an exhibit must include a summary of each provision of the exhibit, just as an English language version or translation would include each provision.

7. Rule 12b-15

Where several Exchange Act reports are being amended at the same time, the amendments should not be made in a single filing. Amendments should be filed separately for each Exchange Act report to be amended.

8. Rule 12b-15

An amendment to Form 10-K does not require signatures of the majority of the board of directors. Rule 12b-15 provides that amendments may be signed by only a duly authorized representative of the registrant.

9. Rule 12b-15; Rule 12b-11

Form 8 has been rescinded and Rule 12b-15 requires that amendments to Exchange Act registration statements and reports be filed under cover of the form being amended, marked with the letter A (e.g. "10-K/A"). Registrants in paper format should file only three copies of amendments to Exchange Act registration statements and reports in compliance with Rule 12b-11. The provisions in various Exchange Act forms requiring more than three copies do not apply to such amendments.

10. Rule 12b-23

Within the guidelines specified by Rule 12b-23, an issuer may incorporate by reference into its own Exchange Act documents any information contained in the filed documents of another issuer.

11. Rule 12b-23

Where a company is being acquired, Rule 12b-23 does not prevent the incorporation by reference of its Form 10-K financial statements into a Form 8-K filed by the acquiring company so long as copies of the pertinent pages of the Form 10-K are filed as an exhibit to the Form 8-K. The consent of the principal accountant for the acquired company should be filed with the Form 8-K.

12. Rule 12b-23; Form 10-K

An issuer with a pending Securities Act registration statement files its Form 10-K and seeks to incorporate by reference into the Form 10-K information from the pending registration statement. This is permissible, provided two conditions are met: (1) the portion of the registration statement to be incorporated does not include any incorporation by reference to another document (see Item 10(d) of Regulation S-K), and (2) a copy of the incorporated portion of the registration statement is filed as an exhibit to the 10-K, as required by Rule 12b-23(a)(3) under the Exchange Act.

13. Rule 12b-25

Rule 12b-25 provides that an annual or quarterly report shall be deemed timely filed if a Form 12b-25 making certain specified representations is filed no later than one business day after the due date of the annual or quarterly report, and the report itself is filed no later than fifteen or five calendar days, respectively, after the due date. Rule 0-3 under the Exchange Act provides that when the due date of a report falls on a Saturday, Sunday or holiday, the report will be considered timely filed if it is filed on the first business day following the due date. If a report is due on a Saturday, Sunday or holiday, the issuer can timely file a Form 12b-25 on the second business day following the due date and timely file the report fifteen calendar days (annual report) or five calendar days (quarterly report) after the first business day following the due date. For example, where the due date for a Form 10-K is Sunday, March 31, the 10-K would be due on Monday, April 1 and the Form 12b-25 would be timely if filed on Tuesday, April 2. The Form 10-K would then be due for filing on Tuesday, April 16 (15 days after April 1st, not 15 days after April 2).

14. Rule 12b-25

Pursuant to the terms of Rule 12b-25 and the adopting release, there are no additional extensions of time beyond the 15 days for annual reports and 5 days for quarterly reports.

15. Rule 12b-25

A registrant's fiscal year ends April 30 and its Form 10-K is due on July 29. The registrant has filed under Rule 13e-3 to take the company private. That transaction will be implemented on August 10. The registrant inquired whether the filing of a Form 12b-25, to secure an extension of time until August 13 for the filing of the Form 10-K, would eliminate the filing requirement since the registrant would be a private company before the 15-day extension expired. The registrant was advised that the Form 10-K would be required.

16. Rule 12b-25(d); Rule 144(c)

Rule 12b-25(d) prohibits an issuer from using a Securities Act registration statement predicated on timely filed reports (e.g. Form S-2 or Form S-3) until the Exchange Act report to which the extension applies is filed. That rule does not, however, prevent the issuer's security holders from making resales of the issuer's securities under Rule 144 unless the extension period has expired and the report is delinquent.

17. Rule 12b-25(d); Form S-3

During the pendency of the 15-day extension for filing Form 10-K pursuant to Rule 12b-25, ongoing secondary offerings utilizing a previously effective Form S-3 may continue. Of course, should the Form 10-K not be filed after the Rule 12b-25 extension is over, this use also would have to discontinue.

18. Rule 12b-25(f)

Paragraph (f) of Rule 12b-25 excludes from the operation of the rule a company with a subsidiary whose financial statements are to be filed by amendment to the company's Form 10-K as provided in Section 3-09 of Regulation S-X. However, in cases in which the subsidiary under Section 3-09: (1) is less than 50% owned, (2) is itself a reporting company, and (3) will be filing its financial statements late and is itself eligible to use Rule 12b-25 for an extension, the Division staff will construe Rule 12b-25(b) to be available to the parent with respect to the sub's late filing.

19. Rule 12g-3

Rule 12g-3 under the Exchange Act provides for the registration of successor issuers under the Exchange Act. The securities of a successor issuer described in Rule 12g-3 are deemed to be registered under Section 12(g) by operation of law and no Exchange Act registration statement on Form 8-A or any other form need be filed. Such registration is implemented by the Commission's acceptance of the filing of an appropriate Form 8-K report by the successor and the continuation of the predecessor's file number.

20. Rule 12g-3

Under Rule 12g-3, the securities issued by a holding company that acquires a company registered under Section 12(g) of the Exchange Act are automatically deemed to be registered under Section 12(g) whether or not a Form 8-K or 8-A has been filed with respect to such securities. The rule attempts to eliminate any possible gap in the application of Exchange Act protection to the security holders of the predecessor.

21. Rule 12g-3

When two reporting companies consolidate, the procedures established under Rule 12g-3 would not apply. Instead, upon consummation of the consolidation, the two previously reporting companies would each file on Form 15 and the consolidated company would file a Form 8-B.

22. Rule 12g-3

The successor to a Section 12(g) registrant that underwent a re-incorporation merger to change its state of incorporation reported the merger in the next Form 10-Q that would have been required of the Section 12(g) registrant, and thereafter continued to file Exchange Act reports in reliance upon Rule 12g-3. The successor later learned that at the time of the merger, the predecessor had fewer than 300 record shareholders. Although Rule 12g-3 does not provide for the succession to the predecessor's Section 12(g) registration if at the time of the succession the securities of the class are held by fewer than 300 record holders, the Division staff took the position that Section 12(g) registration could be continued by the successor pursuant to Rule 12g-3 in these circumstances without the filing of a new Exchange Act registration statement.

23. Rule 12g-3

Where the Rule 12g-3 succession involves the formation of a one-bank holding company, the subsidiary bank does not have an Exchange Act file number. In such situations, the Commission assigns an Exchange Act file number for the successor holding company when the Form 8-K is filed.

24. Rule 12g-4

An issuer which files a Form 12b-25 for an extension of the period for filing a Form 10-K, and which subsequently files a Form 15 pursuant to Rule 12g-4 prior to the expiration of the extension, would still be required to file the Form 10-K. Rule 12g-4 does not suspend the obligation to file the Form 10-K because the Form 10-K was due before the Form 15 was filed.

25. Rule 12g-4

Rule 12g-4 immediately suspends Section 13(a) reporting requirements that arise from Section 12(g) registration but does not affect any reporting requirement under Section 15(d) of the Exchange Act that becomes operative in connection with the termination of Section 12(g) registration.

26. Rule 12g-4

The filing of a notification on Form 15 pursuant to Rule 12g-4 immediately suspends an issuer's obligation to file periodic reports pursuant to Section 13(a) when filed, but the issuer's obligations under Section 14(a) continue until the effective date of the issuer's Section 12(g) deregistration.

27. Rule 12g-4

Following a tender offer, a company has sufficiently few shareholders to file a Form 15 pursuant to Rules 12g-4 and 12h-3. Subsequently, the company will have a back-end merger. The Division staff ordinarily will not accelerate termination of Section 12(g) registration under Rule 12g-4 where an Exchange Act event is anticipated. Accordingly, the company will be required to file a Schedule 14A proxy statement or a Schedule 14C information statement relating to the back-end merger during the 90-day period between filing the Form 15 and termination of registration pursuant to Rule 12g-4.

28. Rule 12g5-1

Rule 12g5-1 does not require an issuer to look through record ownership to the beneficial holders in determining whether it has 500 security holders for purposes of registration under Section 12(g) of the Exchange Act.

29. Rule 12g5-1

An ESOP is a "trust," and counts as one holder of record for purposes of Rule 12g5-1(a)(2). An ESOP is not a "voting trust" under Rule 12g-5(b)(1).

30. Rule 12g5-1

Rule 12g5-1 defines "held of record" for purposes of Exchange Act Section 12(g) and 15(d). It is the counting rule for determining whether an issuer has sufficient securityholders to become or remain subject to Section 12(g) and to remain subject to Section 15(d). Rule 12g5-1(a)(3) provides a special counting method for securities held in a custodial capacity for a single trust, estate or account. In such a case, each trust, estate or account is a distinct holder of record for purposes of Sections 12(g) and 15(d). Institutional custodians, such as Cede & Co. and other commercial depositories, are not single holders of record for purposes of the Exchange Act's registration and periodic reporting provisions. Instead, each of the depository's accounts for which the securities are held is a single record holder.

In contrast, securities held in street name by a broker-dealer are held of record under the rule only by the broker-dealer. The Commission originally proposed a version of the rule that would have looked through to the beneficial owners of the street-name securities, but adopted the rule in a form that does not produce this result.

31. Rule 12h-3

A registrant formed two limited partnerships, the A partnership and the B partnership, both having between 300 and 500 shareholders. The registrant has been filing a combined Form 10-K report for those partnerships using the 2- file number from the Securities Act registration statement. The B partnership is now eligible to suspend filing pursuant to Rule 12h-3 because it has had less than \$10 million in assets for its last three fiscal years. The registrant can file a Form 15 relating to the B partnership indicating the suspension of reporting with respect to that partnership, and continue filing reports under the 2- number for the remaining partnership.

32. Rule 12h-3; Rule 15d-6; Form 15

Section 15(d) of the Exchange Act provides an automatic suspension of the periodic reporting obligation as to any fiscal year (except for the fiscal year in which the registration statement became effective) if an issuer has fewer than 300 security holders of record at the beginning of such fiscal year. Under Rule 15d-6, a Form 15 should be filed to notify the Commission of such suspension, but the suspension is granted by statute and is not contingent on filing the Form 15. In contrast, Rule 12h-3 permits a company to suspend its reporting obligation under Section 15(d) if the requirements of the rule are met at any time during the fiscal year. Because situations exempted by Rule 12h-3 (e.g. fewer than 300 security holders of record in the middle of a fiscal year) do not meet the literal test of Section 15(d), Rule 12h-3 requires the filing of Form 15 as a condition of the suspension.

33. Rule 12h-3(c)-(d); Section 15(d)

Rule 12h-3(c)-(d) operates to relieve a holding company of the Section 15(d) reporting obligation which would normally arise from the registration statement filed for the reorganization of a non-reporting company into a one-subsiary holding company where the equity holders receive the same proportional interests in the holding company and the holding company emerges from the reorganization with more than 300 shareholders.

34. Rule 13a-1

A registrant files a Form 10 in November 1995 which goes effective in January 1996. The registrant's first Form 10-K should be filed with respect to its fiscal year ended December 31, 1995.

35. \*\* Rule 13a-1; Rule 15d-2 \*\*

An issuer goes effective with a Securities Act registration statement after its fiscal year end without including audited financial statements as of such year end in such registration statement. Concurrently, the issuer registers under the Exchange Act using a Form 8-A that also does not contain the final year end audited financial statements. The issuer is not permitted to file a special financial statement report containing such audited financial statements pursuant to Rule 15d-2 (as opposed to an annual report in accordance with Rule 13a-1). The Rule 13a-1 annual report would be due at the same time as any other such annual report (e.g., 90 days after the end of the fiscal year if on Form 10-K). This position overturns an earlier Division staff interpretation.

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

The Division staff was asked why Release No. 33-6763, which amended Rule 174 to shorten to 25 days the prospectus delivery period for IPOs that are immediately listed for trading on an

exchange or eligible for quotation on NASDAQ, also amends Rule 15c2-8(d) to provide that broker-dealers must continue to deliver the same prospectuses, upon request, for the full 90-day period. The inquirer was advised that Rule 174(d) was designed to relieve broker-dealers of an obligation to deliver prospectuses in connection with every deal during the full 90-day period, but not to change broker-dealers' obligations to deliver prospectuses upon request during that time.

37. \*\* Rule 15d-2; Rule 13a-1 \*\*

An issuer goes effective with a Securities Act registration statement after its fiscal year end without including audited financial statements as of such year end in such registration statement. Concurrently, the issuer registers under the Exchange Act using a Form 8-A that also does not contain the final year end audited financial statements. The issuer is not permitted to file a special financial statement report containing such audited financial statements pursuant to Rule 15d-2 (as opposed to an annual report in accordance with Rule 13a-1). The Rule 13a-1 annual report would be due at the same time as any other such annual report (e.g., 90 days after the end of the fiscal year if on Form 10-K). This position overturns an earlier Division staff interpretation.

38. Rule 15d-6; Rule 12h-3; Form 15

Section 15(d) of the Exchange Act provides an automatic suspension of the periodic reporting obligation as to any fiscal year (except for the fiscal year in which the registration statement became effective) if an issuer has fewer than 300 security holders of record at the beginning of such fiscal year. Under Rule 15d-6, a Form 15 should be filed to notify the Commission of such suspension, but the suspension is granted by statute and is not contingent on filing the Form 15. In contrast, Rule 12h-3 permits a company to suspend its reporting obligation under Section 15(d) if the requirements of the rule are met at any time during the fiscal year. Because situations exempted by Rule 12h-3 (e.g. fewer than 300 security holders of record in the middle of a fiscal year) do not meet the literal test of Section 15(d), Rule 12h-3 requires the filing of Form 15 as a condition of the suspension.

39. Rule 15d-10; Form 8-K, Item 8

Exchange Act Release No. 26589, which significantly amended Rule 15d-10, states that "[a] change from a fiscal year ending as of the last day of the month to a 52-53 week fiscal year commencing within seven days of the month end (or from a 52-53 week to a month end) is not deemed a change in fiscal year for purposes of reporting subject to Rule 13a-10 or 15d-10 if the new fiscal year commences with the end of the old fiscal year. In such cases, a transition report would not be required. Either the old or new fiscal year could, therefore, be as short as 359 days, or as long as 371 days (372 in a leap year)." While a transition report would not be required, a Form 8-K (Item 8) would have to be filed to report the change in fiscal year-end.

40. Rule 15d-10; Form 11-K

A company planned to do an 11-K for a 6-month year period for an ERISA plan. Form 11-K provides that the due date for an ERISA plan 11-K is 180 days after fiscal year end. However, Rule 15d-10 provides that for short years of 6 months or more, an annual report would be due 90 days after the fiscal year end. The Division staff took the position that the short-year 11-K could be filed 180 days after the fiscal year end.

41. Rule 15d-21(b)

Separate annual reports for employee benefit plans are not required if the information required is provided in the issuer's Form 10-K. Under Rule 15d-21(b), this information may be filed 120 days after the end of the fiscal year. As a result, the information can be provided in an amendment to the Form 10-K.

42. Rule 15g-9

A registration statement under the Securities Act relates to the initial public offering of common stock. After the offering, the issuer's net tangible assets will be less than \$2 million and the common stock will not be eligible for listing on a national securities exchange or for quotation on NASDAQ. The public offering price is \$5 a share.

The question is whether the prospectus forming part of the registration statement should disclose the applicability of Rule 15g-9, the penny stock cold-calling rule, in the event of a price decline in the aftermarket. With the advice of the Division of Market Regulation, the Division staff recommended disclosure concerning the rule in the prospectus. The purpose of the disclosure in these circumstances is to alert dealers required to deliver a prospectus in the 90 days after the effective date of their additional responsibilities under Rule 15g-9 if the trading price falls below \$5.