

Manual of Publicly Available Telephone Interpretations

I. REGULATION S-K

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

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

2. Item 101 of Regulation S-K

Item 101 does not require discussion of entry into a new segment after the close of the fiscal year for which the Form 10-K is being prepared.

3. **** Item 101(c)(xiii) of Regulation S-K ****

In the narrative description of business, a registrant is required to specify "the number of persons employed by the registrant." In industries where registrants' general practice is to hire independent contractors (sometimes called "contract employees" or "freelancers") rather than "employees" to perform the work of the company, this disclosure should indicate the number of persons retained as independent contractors, as well as the number of regular employees.

4. Item 103 of Regulation S-K

The bank subsidiary of a one bank holding company initiates a lawsuit to collect a debt that exceeds 10% of the current assets of the bank and its holding company parent. Due to the unusual size of the debt, Item 103 requires disclosure of the lawsuit, even though the collection of debts is a normal incident of the bank's business.

5. Item 103 of Regulation S-K

Contrary to Release No. 33-5170 (July 19, 1971), it is no longer the practice of the Division to require registrants automatically to furnish, as supplemental information, either a description of civil rights litigation omitted from a newly-filed disclosure document or the reasons for the omission.

6. Item 103 of Regulation S-K

The Division's former view that all environmental legal proceedings involving \$100,000 or more instituted by a governmental authority are subject to the disclosure provisions of Instruction 5(C) to Item 103 of Regulation S-K, regardless of whether the money involved is characterized as damages (as in the "Superfund" cases) or fines has been superseded by Footnote 30 of Release No. 33-6835 and the letter to Thomas A. Cole (January 17, 1989). Footnote 30 of Release No. 33-6835 and the Cole letter clarify that, while there are many ways a Superfund "potential monetary sanction" may be triggered, including the stipulated penalty clause in a remedial agreement, the

costs anticipated to be incurred under Superfund, pursuant to a remedial agreement entered into in the normal course of negotiation with the EPA, generally are not "sanctions" within Instruction 5(C) to Item 103.

7. **** Item 103 of Regulation S-K ****

The reference in Instruction 5 to an administrative or judicial proceeding arising under "local provisions" is sufficiently broad to require disclosure of environmental actions brought by a foreign government.

8. Item 103 of Regulation S-K, Instructions 2 and 4

A caller inquired whether a proceeding against an officer of the registrant, which could require the registrant to indemnify the officer for damages, should be considered a proceeding in which the officer has material interest adverse to the registrant that should be disclosed pursuant to Instruction 4 to Item 103. The caller was advised that if the exposure under the indemnification provision was material, the proceeding would be disclosable pursuant to Instructions 2 and 4 of Item 103.

9. Item 201(a)(ii) and (iii) of Regulation S-K

Since NASDAQ is now quoting actual sales prices, as opposed to high and low bids, NASDAQ registrants may satisfy Item 201(a) by quoting high and low sales prices in the manner prescribed by Item 201(a)(ii).

10. Item 202 of Regulation S-K

Items 202(a)(1)(x) and (xi) require disclosure of certain restrictions on ownership of the registrant's securities. The purchase and sale restrictions imposed by Section 16 of the Exchange Act are not the types of restrictions required to be disclosed under these items.

11. Item 304(a)(1)(iv) of Regulation S-K

The Division staff was asked whether the period of "the registrant's two most recent fiscal years and any subsequent interim period" referenced in Item 304(a)(1)(iv) is (1) coterminous with the period referenced in Item 304(a)(1), or (2) refers to a period of such duration preceding the accountant's resignation or dismissal, as the language would literally suggest. The Division staff took the position that Paragraph (a)(1)(iv) refers to the time period preceding the resignation or dismissal.

12. Item 401 of Regulation S-K

Section 16(b) liability that has been discharged by an officer or director need not be disclosed under Item 402(e) of Regulation S-K. See Instruction 4.

13. Item 401 of Regulation S-K

Item 401 information with respect to executive officers need not be included in proxy statements if it is included separately in the Form 10-K. Although Instruction 3 to Item 401(b) does not refer

to Item 401(e), which requires an employment history, Item 401(e) information need not be included in the proxy statement if it is presented in the Form 10-K.

14. Item 401(b) of Regulation S-K

The Item 401(b) information presented in the Form 10-K should be furnished for current officers, rather than for those who held such positions during the last fiscal year.

15. Item 401(b) of Regulation S-K

Where a director's wife is the first cousin of an executive officer of the same company, the family relationship is required to be disclosed since the director and executive officer are related by marriage "not more remote than first cousin."

16. Item 401(c) of Regulation S-K

Item 401(f) is not applicable to persons in the "significant employee" category, unless such persons are de facto executive officers.

17. Item 401(d) of Regulation S-K

A director of a public company is the general partner (and 50% owner) of limited partnership A which, in turn, is the general partner of limited partnership B, now in bankruptcy. The Division staff took the position that disclosure was required in B's filings under Item 401(f)(1), noting particularly that the director's general partnership in and percentage ownership of A are evidence of control of A, the general partner of B.

18. Item 401(f) of Regulation S-K

Item 401(f) would require the disclosure by an issuer of an order temporarily restraining another corporation from pursuing a tender offer where a director of the issuer, who is the president of the other corporation, has been specifically named in the order.

19. Item 401(f) of Regulation S-K

The president of a company about to go public was convicted within the past year of misdemeanor criminal offenses, involving two small checks of \$30 and \$50, respectively. Counsel argued that disclosure was not required under Item 401(f) because of the exclusion of 401(f)(2) for "traffic violations and other minor offenses." The Division staff disagreed, taking the position that such disclosure was "material to an evaluation of the ability or integrity of any ... executive officer of the registrant".

**[INTERPRETATIONS OF ITEM 402 OF REGULATION S-K
ARE SET FORTH IN SECTION J. BELOW.]**

20. Item 403 of Regulation S-K

Item 403(b), by its terms, requires the disclosure of shareholdings of all directors named in the registrant's proxy statement, even if the terms of some directors will not continue beyond the annual meeting.

21. Item 403 of Regulation S-K

A limited partnership holds restricted voting securities in a company which plans to make a public offering of its securities. The limited partnership agreement requires the limited partnership to distribute the restricted securities to its general and limited partners within 60 days following such public offering. In light of the beneficial ownership provisions of Section 13(d), the beneficial ownership of shares to be held by the general and limited partners whose holdings will be in excess of 5% (or if such persons are directors) following such distribution should be included in the beneficial ownership table contained in the company's prospectus.

22. Item 403(a) of Regulation S-K

When asked whether an issuer would be required to consider Form 13-F reports of "investment discretion" in determining the identity of 5% beneficial owners under Item 403(a), the Division staff advised that the concept of "investment discretion" was not the same as "beneficial ownership", noting that investment managers subject to Form 13-F reporting would also have to file Schedule 13D or 13G if their interest in the securities constituted beneficial ownership. The Division staff emphasized the statement in Item 403 that the issuer could rely on Schedules 13D and 13G, but that such reliance could not be exclusive if it had knowledge of any 5% beneficial owners who had not filed such reports.

23. Item 403(c) of Regulation S-K

A caller inquired whether the requirement of Item 403(c) of Regulation S-K that "any arrangement . . . including any pledge . . . which may at a subsequent date result in a change of control of the registrant" be disclosed would apply to a "negative pledge" of the company's stock by a principal shareholder. The caller explained that a "negative pledge" is a covenant granted by a borrower to a lender in which a promise is made not to convey the shares to a third party or to otherwise encumber them. Assuming a default by the borrower, the "negative pledge" would not transfer title by operation of law, but would instead require a foreclosure. The Division staff took the position that, in the ordinary course, such an arrangement would not be disclosable under Item 403(c). However, the registrant should consider whether any circumstances, such as insolvency of the borrower or takeover activity with respect to the company, would render a change of control arising from such an arrangement foreseeable and, hence, disclosable.

24. Item 404 of Regulation S-K

The term "any member of the immediate family", as used in Item 404 of Regulation S-K, is defined to include, among others, mothers and fathers-in-law, sons and daughters-in-law, and brothers and sisters-in-law. For purposes of this item, such relatives are deemed to be: (1) only those persons who are currently related to the primary reporting person (e.g., a person who is divorced from a director's daughter would no longer be a son-in-law whose transactions must be reported); and (2) only those persons who are related by blood to the primary reporting person or his spouse (e.g., the sister of a director's spouse is considered a sister-in-law for purposes of this item; the sister's husband, however, is not considered a brother-in-law for purposes of this item).

25. Item 404 of Regulation S-K

A is the President of X Corporation. X Corporation is a supplier of the registrant. A is also on the registrant's board of directors. The registrant purchased supplies from X Corporation in an amount that exceeded the \$60,000 disclosure threshold of Item 404(a), but which did not exceed 5% of either registrant's or X Corporation's consolidated gross revenues, the disclosure threshold of Item 404(b). The registrant was advised that disclosure of such transactions would not be required, as long as the relationship between the corporation was solely a business relationship which did not afford A any special benefits. Under these circumstances, it is the Division staff's position that if a transaction or relationship is permitted to be excluded pursuant to Item 404(b), disclosure under 404(a) is not required.

26. Item 404 of Regulation S-K

X, a director of the registrant, is a partner in a law firm that provides services to the registrant. The payments for such services exceeded \$60,000 during the last fiscal year but were not greater than 5% of the firm's revenues. The registrant was advised that the transactions would not be required to be disclosed under Item 404(a). The existence of the director's relationship would be required to be disclosed, however, pursuant to Item 404(b).

27. Item 404 of Regulation S-K

Loans to 5% shareholders, not disclosable under Item 404(c), may be required to be disclosed as "management transactions" under Item 404(a), pursuant to Instruction 1.

28. Item 404 of Regulation S-K

A is an officer and director of Y corporation, a wholly owned subsidiary of registrant X. A is not an officer or director of X and holds only a nominal amount of X's shares. Y does business in an amount in excess of \$60,000 with B, A's brother. That relationship need not be disclosed under Item 404(a), since A is not a person described in Item 404(a)(1)-(4).

29. Item 404 of Regulation S-K

A corporation enters into a lease in an amount substantially in excess of \$60,000 with a lessor completely unaffiliated with the corporation. The lease, however, is negotiated through a person specified in Item 404(a)(1)-(4), who is paid a \$10,000 commission by the lessor for those services. Since the amount of that person's commission is dependent upon the value of the lease, that person is considered to have an interest in the lease transaction, and the transaction, together with the commission, should be reported.

30. Item 404 of Regulation S-K

Y, the President and a director of Z Corporation, a supplier of the registrant, is a member of the registrant's board of directors. The registrant solicited bids from Z and various other companies on a supply contract involving an amount in excess of the \$60,000 threshold of Item 404(a), and Item 404(b)'s disclosure threshold of 5% of Z's consolidated gross revenues. The registrant plans to award the contract to Z, even though this supplier did not submit the lowest bid in what purportedly was a competitive bidding contest. Under these circumstances, the Division staff took the position that the registrant could not avail itself of the exclusions in Item 404(a), Instruction 7.A and Item 404(b), Instruction 2.A., for payments made where the rates or charges

involved in the transaction are determined by competitive bids. Disclosure under both Items therefore would be required.

31. Item 404(a) of Regulation S-K

Instruction 7.A. to Item 404(a) of Regulation S-K does not permit non-disclosure of an equipment lease transaction between a company owned by a director of a reporting company and the reporting company, simply because the reporting company solicited proposals from other unrelated persons and selected the director's company only after an internal analysis of the available terms. The procedure used was not deemed to be a competitive bid because it did not involve the formal procedures normally associated with competitive bidding situations. There were no specifications established for the lease being bid upon and there was no indication of the basis upon which a bid was to be accepted.

32. Item 404(a) of Regulation S-K

An officer of a corporation contributed less than \$60,000 to the officer's church which, in turn, used the money (along with other unrelated contributions) to purchase property from the corporation. This transaction would not be required to be disclosed under Item 404, since the officer was not considered to have a material interest in the transaction.

33. Item 404(a) of Regulation S-K

A contract between a reporting company and the fund manager of the company's pension plan, who is also a more than 5% beneficial owner under Rule 13d-3, should be disclosed under Item 404(a) of Regulation S-K where the amount involved in the contract exceeds \$60,000.

34. Item 404(a) of Regulation S-K

Item 404 information is being presented on a three-year basis in a Securities Act registration statement. In determining whether information is required under Item 404(b), business relationships should be considered on a year-by-year basis. For example, if a director of the registrant was an executive officer of a customer which accounted for 3%, 6%, and 4% of gross revenues respectively, disclosure of the relationship should be furnished for the middle year. It was suggested that in such a situation the disclosure should also indicate that in the subsequent year the percentage had declined to less than 5%.

35. Item 404(a) of Regulation S-K

X is a director of the registrant. X's child is employed by the registrant and receives a yearly salary exceeding \$60,000. The child's compensation is not reported under Item 402 since the child is not one of the registrant's five most highly compensated executive officers, nor is the child an officer or director. The registrant was advised that the child's salary should be disclosed under Item 404(a) as a transaction in which the director has a material interest.

36. Item 404(a) of Regulation S-K

An agreement by a company with an affiliate to repurchase company shares from the affiliate's estate upon death with the proceeds of a life insurance policy paid for by the company should be disclosed pursuant to Item 404(a).

37. Item 404(a) of Regulation S-K

In connection with a move of company headquarters, a company purchased and resold the homes owned by all affected employees. The price paid was determined by an independent appraiser. The company was advised that the Division staff will raise no objection if the company discloses under Item 404(a) only the general features of the program (including how the price was determined) and the total spent by the company on the program.

38. Item 404(a) of Regulation S-K

A corporation made a loan to X during its last fiscal year, but prior to X's election as a director of the corporation. That loan should be disclosed in the proxy statement relating to the meeting at which X is nominated for election.

39. Item 404(a) of Regulation S-K

The Division staff was asked how to value unexercised stock options for purposes of determining whether the Item 404(a) \$60,000 threshold had been met. The Division staff took the view that no valuation could be assigned to the options until a gain had been realized pursuant to their exercise. [However, if the option holder met the \$60,000 test through receipt of cash and other compensation in the year the options were granted, the grant would be reportable to the extent required by Item 402(b)(4)(i) of S-K.]

40. Item 404(a) of Regulation S-K

The \$60,000 materiality threshold contained in Item 404(a) is to be applied on a transaction-by-transaction basis, rather than to the total of all transactions with the registrant, unless the transactions may be regarded as "similar."

41. ** Item 404(a) of Regulation S-K **

Item 404(a) requires, in pertinent part, disclosure of any transaction since the beginning of the registrant's last fiscal year between the registrant and any 5 percent shareholder where the amount involved exceeds \$60,000. The Division staff was asked whether disclosure was required of such a transaction that occurred since the beginning of the fiscal year but prior to the date the person became a 5 percent shareholder. Such disclosure is required if the transaction: (a) was continuing (such as through the on-going receipt of payments) on and/or after the date the person became a 5 percent shareholder; or (b) resulted in the person becoming a 5 percent shareholder. If the transaction concluded before the person became a five percent shareholder, disclosure would not be required.

42. Items 404(a) and (b) of Regulation S-K

A retiring director provides consulting services to an issuer through an entity of which the director is sole shareholder. The transaction is excludable under Item 404(b) pursuant to Instruction 4 to that paragraph, which states that no information need be provided in a proxy or information statement for any director whose term of office will not extend beyond the meeting to which the statement relates. Because the transaction exceeded \$60,000, counsel asked whether Item 404(a) disclosure, which does not contain a similar instruction, would be required. The Division staff stated that such disclosure would be required because the relationship between the issuer and the consulting entity was not "solely a business relationship that did not afford the director any special benefits." (The relationship could be viewed as doing business with the

director personally through the director's company, rather than doing business with a company where the director happened to be an officer or shareholder.)

43. **** Item 404(b)(1) of Regulation S-K; Rule 16b-3(b)(3)(i) ****

The issuer's director is chief executive officer of a company that in the ordinary course of business borrows money from the issuer, which is a bank. The issuer discloses this indebtedness and the interest to be paid thereon pursuant to S-K Item 404(c)(4), consistent with Instruction 3 to Item 404(c). Counsel inquired whether interest payments on the loan also required disclosure under Item 404(b)(1) of Regulation S-K as payments for property or services. Rule 16b-3(b)(3)(i)(D) provides that a business relationship for which disclosure would be required under Item 404(b) would disqualify the director from service as a "Non-Employee Director." The staff took the view that Item 404(b) disclosure would not be required because Instruction 1 to Item 404 states that no information need be given in response to any paragraph of Item 404 as to any transaction reported in response to any other paragraph of Item 404. Accordingly, the director would not be precluded from service as a "Non-Employee Director," as defined in Rule 16b-3(b)(3)(i).

44. **** Item 404(b)(2) of Regulation S-K; Rule 16b-3(b)(3)(i)(D) ****

The president-director of a publicly-held corporation is also the sole owner of a small private company. The publicly-held corporation rented an airplane from the small company for \$2,000, an amount which represented a large portion of that company's revenues. Although disclosure of the rental transaction would not be required under Item 404(a) of Regulation S-K because it is below the \$60,000 exclusion, or under Item 402(b)(2)(iii)(C) of Regulation S-K because it is below the \$50,000 exclusion, it would be required under Item 404(b)(2) of Regulation S-K if the \$2,000 represented more than 5% of the small company's consolidated gross revenues. As long as the transaction remains in effect and disclosable under Item 404(b)(2), the director will be precluded from service as a Non-Employee Director pursuant to Rule 16b-3(b)(3)(i)(D).

45. Item 404(c) of Regulation S-K

Item 404(c) requires disclosure of "non-performing" loans from banks, savings and loan associations or broker-dealers extending credit under Federal Reserve Regulation T. Instruction 3 of Item 404(c) refers to Industry Guide 3, Statistical Disclosure by Bank Holding Companies, for the definition of "non-performing." Guide 3 requires disclosure where such loans are non-performing at the end of each "reported period." In a proxy statement, therefore, where the reported period is the last fiscal year, only those loans which were non-performing at the end of the last fiscal year are required to be reported.

46. Item 404(c) of Regulation S-K

A bank may follow Instruction 3 to Item 404(c) in computing indebtedness.

47. Item 404(c) of Regulation S-K

Where Section 16(b) liability was incurred during the course of the year, but has been discharged prior to the mailing of the company's proxy statement or filing of the report requiring Item 404(c) disclosure, no disclosure is required pursuant to Item 404(c). Under these circumstances, such liability is not regarded as indebtedness. See Instruction 4 to Item 404(c).

48. Item 404(c) of Regulation S-K

A loan used to purchase stock of the issuer may come within the "ordinary course of business" provisions of Instruction 3 to Item 404(c) where all other conditions of the instruction are satisfied.

49. Item 404 of Regulation S-K; Item 402 of Regulation S-K

A parent and its subsidiary are both Exchange Act reporting companies. Some of the executive officers of the parent may receive a portion of their compensation from the subsidiary corporation. The Division staff advised that if an executive spends 100% (or near 100%) of the executive's time for the subsidiary but is paid by the parent, then the compensation paid by the parent has to be reported in the executive compensation table of the subsidiary. However, if an allocation of the monies paid by the parent would be necessary because the executive officer splits time between the parent and the subsidiary, the payments made by the parent need not be included in the subsidiary's executive compensation table. In the event that the subsidiary pays a management fee to the parent for use of the executives, disclosure of the structure of the management agreement and fees would have to be reported under Item 404. Compensation paid by the subsidiary to executives of the parent company must be included in the parent's executive compensation table if such payments are paid directly by the subsidiary. However, if the payments are part of a management contract, disclosure of the structure of the management agreement and fees would have to be reported under Item 404.

50. Item 404 of Regulation S-K; Item 402 of Regulation S-K

A company's reimbursement to an officer of legal expenses with respect to a lawsuit in which the officer was named as a defendant, in her capacity as officer, is disclosable pursuant to Item 404 of Regulation S-K rather than pursuant to Item 402 of Regulation S-K.

51. Item 404 of Regulation S-K; Form S-4

Form S-4 permits the incorporation by reference of Item 404 information from the Form 10-K of a company meeting the requirements for use of Form S-2 or Form S-3 (see Items 17(b), 18(c)). If such information is incorporated by reference, it is not necessary to furnish the three years of information that would ordinarily be required in a Securities Act registration statement (Instruction 2 to Item 404). This is consistent with Form S-2 and Form S-3, which also permit the furnishing of Item 404 information by incorporation by reference from Form 10-K, and therefore only include such information for the latest fiscal year.

52. Item 501 of Regulation S-K

Instruction 3 of Item 501 requires disclosure as to the presence or absence of an escrow only when the best-efforts offering is conditioned on a minimum number of securities being sold.

53. Item 501(b)(1) of Regulation S-K

Counsel for a company named Geo-Search was informed that if the company registered under the Exchange Act, the Division staff would not suggest a name change solely because there is an existing registrant named Geosearch.

54. Item 501(b)(7) of Regulation S-K

The cover page of a prospectus relating to a secondary equity offering, registered for the shelf pursuant to Rule 415, need not contain the tabular presentation required by Item 501(b)(7) where the offering will not be underwritten, the securities will be offered at the market, and brokerage commissions will be negotiated at the time of the offering. The reason is that no meaningful figures as to "price to the public" and "underwriting discounts" would be available.

55. Item 501(b)(8) of Regulation S-K

The legend should be printed on all Rule 430 preliminary prospectuses used before the effective date of the registration statement and in any prospectus contained in an effective registration statement omitting Rule 430A information that is to be used after effectiveness and prior to pricing.

56. Items 501(b)(8) and (b)(10) of Regulation S-K

The placement of the "Subject to Completion" caption and prospectus date on the prospectus cover page should be such that the information is clearly understandable to any user.

57. Item 502(d)(1)(ii) of Regulation S-K

Stabilizing transactions begun on the day a registration statement became effective, but prior to the time of effectiveness (e.g., stabilizing began at 10:00 A.M. and the registration statement was declared effective at 2:00 P.M.), are not deemed to be "prior to the effective date of the registration statement" for purposes of Rule 502(d)(1)(ii). Accordingly, the disclosure set forth in 502(d)(1)(ii) need not be made for such transactions.

58. Item 503 of Regulation S-K

The ratio of earnings to fixed charges required by Item 503(d) of Registration S-K is required for registration statements relating to both short and long term debt. However, if the ratio already is contained in a Form 10-Q filed by the issuer, it can be incorporated by reference into the registration statement, provided the registration form (e.g., S-3 or S-2) permits such incorporation.

59. Item 507 of Regulation S-K

Item 507 of Regulation S-K requires certain disclosure concerning each selling shareholder for whose account the securities being registered are to be offered. The Division staff has permitted this disclosure to be made on a group basis, as opposed to an individual basis, where the aggregate holding of the group is less than 1% of the class prior to the offering. Where the aggregate holding of the group is less than 1% of the class but for a few major shareholders, the disclosure for the members of the group other than the major shareholders also may be made on a group basis.

60. Item 507 of Regulation S-K

The term "security holder", as used in Item 507 of Regulation S-K, means beneficial holders, not nominee holders or other such holders of record.

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

The Division staff was asked how registration statements for secondary offerings should reflect the addition or substitution of selling shareholders. Normally, absent circumstances indicating that the change is material, the change may be reflected by the filing of a Rule 424(b) prospectus supplement describing the change and setting forth the information required by Item 507 of Regulation S-K. (Of course, this assumes the change does not involve increasing the number of shares or dollar amount registered, or include shares from a transaction other than the one to which the original filing related.) The ability to reflect changes in selling shareholders by Rule 424 does not permit the names of known selling shareholders to be omitted from the original filing.

62. Item 508 of Regulation S-K

Item 508(a) of Regulation S-K, which calls for disclosure of the identity of "principal underwriters" and their material relationships with the registrant, does not require disclosure as to each member of the selling group, but is limited to those underwriters who are in privity of contract with the issuer with respect to the offering.

63. Item 509 of Regulation S-K

A legal fee incurred in the preparation of a registration statement, even if in excess of \$50,000, is not the kind of "substantial interest" in the registrant requiring disclosure under Item 509. Such fees, of course, are normally disclosed in Part II of the registration statement.

64. Item 509 of Regulation S-K

Where a registrant's attorney has a 10% limited partnership interest in a limited partnership in which the registrant has a 50% limited partnership interest, the registrant's relationship to the partnership is sufficiently analogous to a parent-subsidiary relationship to warrant furnishing the disclosure required by Item 509 of Regulation S-K.

65. Item 509 of Regulation S-K

A law firm is charging a flat fee to a registrant for services performed in connection with preparation of the registrant's Securities Act registration statement. However, as the company will declare bankruptcy if the offering is unsuccessful, the law firm is not certain it will be paid unless the offering is successful. The Division staff took the position that this is not a form of "contingent interest" the disclosure of which was contemplated by Item 509.

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

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

67. Item 512(a) of Regulation S-K; Rule 415

A Rule 415 offering provides that purchasers within the first 60 days will receive a security with a higher yield than that to be received by subsequent purchasers. The registrant wished to extend the preferential purchase period for an additional 30 days. The Division staff took the position

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

68. Item 512(a) of Regulation S-K; Form S-3

Item 512(a) of Regulation S-K, which is applicable to Rule 415 offerings, sets forth three circumstances requiring a post-effective amendment: Section 10(a)(3) updating, fundamental changes, and changes to the plan of distribution. (Form S-3 issuers may accomplish the first two of these by incorporation by reference from Exchange Act reports, if the reports contain the required information.) A Rule 424(b) supplement should not be used for these purposes.

69. Item 512(f) of Regulation S-K

In an offering of limited partnership interests registered under the Securities Act, the undertaking required by Item 512(f) that the issuer provide certificates to the underwriter need not be included in the registration statement where no certificates will be used.

70. Item 601 of Regulation S-K

Former Rule 472(d) provided that when filing amendments to registration statements, a registrant need not include copies of exhibits which have been modified only to correct minor typographical errors or to put in pricing terms. This provision is now set forth in Instruction 1 to Item 601(a) of Regulation S-K. It should be noted that Instruction 1 also states that the incomplete exhibits already on file that do not reflect the pricing or typographical modifications noted above may not be incorporated by reference in any subsequent filing.

71. Item 601 of Regulation S-K

Item 601 of Regulation S-K provides that a Form 10-Q must include, among other things, the exhibits required by Item 601(b)(4) (viz., instruments defining the rights of security holders, including indentures). However, an indenture need be filed with a Form 10-Q only in those situations where the Form 10-Q discloses a new debt issue in the quarter for which the report is filed. See Item 601(b)(4)(v). If the indenture has already been filed as part of a Securities Act registration statement, it can be incorporated by reference into the Form 10-Q pursuant to Rule 12b-23.

72. Item 601 of Regulation S-K

Item 601(b)(23)(ii) of Regulation S-K and Rule 439 permit the incorporation by reference of consents filed with Exchange Act reports only into an already effective Securities Act registration statement. Consents may not be incorporated by reference into a registration statement that becomes effective after the filing of the consent with an Exchange Act document.

73. Item 601 of Regulation S-K

A remuneration plan applicable to 300 key executives in a company with 18,000 employees would not be considered a plan available to employees generally. Therefore, it would not fall within the exemption provided by Item 601(b)(10)(iii)(B)(4) and would have to be filed as an exhibit.

74. Item 601 of Regulation S-K; Form S-4

Two companies propose a joint Form S-4 registration statement for a stock-for-assets acquisition. Although the company to be acquired is not the registrant, it should file as exhibits any contracts or other documents that would be material to the new entity.

75. Item 601 of Regulation S-K; Form 10-K

For purposes of Form 10-K, Item 601(b)(10)(iii) of Regulation S-K requiring disclosure of remunerative contracts would apply to a deferred compensation plan entered into during the fiscal year, even though the officer/director retired during that fiscal year and no longer was an officer/director.

76. Item 601(a)(2) of Regulation S-K

Under Item 601(a)(2), the exhibit index for each year's Form 10-K must list each of the exhibits required in the Form 10-K, even if some of the exhibits have previously been filed. Of course, the previously filed exhibits may be incorporated by reference from the prior year's Form 10-K or another appropriate document.

77. Item 601(b)(3) of Regulation S-K

This Item requires that the entire amended text of the articles or by-laws be filed, along with the text of the new amendments. This could be accomplished by filing the entire amended text, redlined to show the new amendments.

78. Item 601(b)(4) of Regulation S-K

The exhibits to be filed with a Form 10-Q need only include instruments defining the rights of security holders with respect to long-term debt that was issued during the quarter covered by the form. Thus, documents defining the rights of commercial paper holders are not required to be filed as exhibits since commercial paper is not long-term indebtedness. See Item 601(b)(4)(v) of Regulation S-K.

79. Item 601(b)(4) of Regulation S-K

A registrant adopted a resolution providing confidential proxy voting rights for shareholders. The registrant asked whether the resolution should be filed as an "instrument defining the rights of security holders" pursuant to Regulation S-K Item 601(b)(4). The Division staff advised that it should be so filed.

80. Item 601(b)(4) of Regulation S-K

Subparagraph (ii) of Item 601(b)(4) requires filing as an exhibit instruments defining the rights of holders of long-term debt. Subparagraph (iii)(A) excludes from this requirement such instruments where the amount of indebtedness authorized thereunder does not exceed 10% of the total assets of the company and there is filed an agreement to furnish a copy of the instrument to the Commission upon request. The confidential treatment procedures set forth in Rule 83(c) would apply to such documents furnished upon request.

81. Items 601(b)(4) and (b)(10) of Regulation S-K

A company issues a series of notes, amounting to 5% of its total assets, in a private placement and pursuant to an indenture. Since the amount involved is less than 10 percent of its total assets, the indenture is not required to be filed pursuant to Item 601(b)(4) as an exhibit to the Form 10-K and, although not made in the ordinary course of business, the indenture would not be required to be filed as a material contract pursuant to Item 601(b)(10).

82. Item 601(b)(5) of Regulation S-K

In connection with a rights offering, a foreign company registering: (1) warrants evidencing the rights to purchase American depository shares representing ordinary shares; (2) provisional allotment letters ("PALs") evidencing rights to purchase ordinary shares; and (3) ordinary shares underlying the warrants and PALs, must provide an opinion of counsel as to the legal issuance of the warrants and PALs and the fact that they are valid and binding obligations of the company, in addition to the opinion regarding the valid issuance and fully-paid and non-assessable nature of the ordinary shares.

83. Item 601(b)(10) of Regulation S-K

Item 601(b)(10) requires the filing of material contracts. A contract for the acquisition of real estate must be filed if consideration in excess of 15% of the fixed assets of the company is paid for the real estate. When computing the consideration paid for the real estate, an issuer should include the cash purchase price plus the amount of any indebtedness assumed as a result of the purchase.

84. Item 601(b)(10) of Regulation S-K

A written arrangement whereby officers are provided company cars and other perquisites would not have to be filed as a "material contract," provided that such benefits do not constitute a material portion of total compensation.

85. Item 601(b)(10) of Regulation S-K

Where a registrant is party to an oral contract that would be required to be filed as an exhibit pursuant to Item 601(b)(10) if it were written, the registrant should provide a written description of the contract similar to that required for oral contracts or arrangements pursuant to Item 601(b)(10)(iii).

86. Item 601(b)(10) of Regulation S-K

Instruction 2 to Item 601(b)(10) indicates that Exhibit 10 material contracts need to be filed with the Forms 10-K and 10-Q if a material contract is created or becomes effective during the reporting period. Thus, if a company enters into a new material contract, it should be filed as an exhibit to that corresponding period's Form 10-Q or Form 10-K.

87. Item 900 et. seq. of Regulation S-K

A registrant inquired whether the Item 900 Series of Regulation S-K (the "Roll-up Rules") is applicable to transactions exempt from registration under the Securities Act. Pursuant to Item 901(c)(2)(ii), a "roll-up transaction" does not include transactions in which the securities to be

issued or exchanged are not required to be, and are not, registered under the Securities Act. The Roll-up Rules are not applicable except from an anti-fraud perspective. See Securities Act Release 6922 (Oct. 30, 1991).