

Rule 168/169. Regularly released factual business information and forward-looking information.

Preliminary Note. This section is only available for factual business information and forward-looking information released or disseminated as provided in this section. This section is not available for any communication that may be in technical compliance with this section but is part of a plan or scheme to evade the requirements of section 5 of the Act.¹

(a) Applicability. This section is not available to any investment company registered under the Investment Company Act of 1940 or any business development company as defined in section 2(a)(48) of the Investment Company Act of 1940.

(b) Definitions. For the purposes of this section,

(1) Factual business information is limited to some or all of the following information:

(i) factual information about the issuer or some aspect of its business;

(ii) advertisements of, or other information about, the issuer's products or services;

(iii) factual information about business or financial developments with respect to the issuers;

(iv) dividend notices; and

(v) factual information set forth in any report that the issuer files pursuant to the Securities Exchange Act of 1934;

but excluding

¹ Is this really necessary?

(vi) information about the registered offering or information released or disseminated as part of the offering activities in the registered offering; and

(vii) forward-looking information.

(2) Forward-looking information is limited to some or all of the following information:

(i) projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(ii) statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

(iii) statements about the issuer's future economic performance, including statements of the type contemplated by the management's discussion and analysis of financial condition and results of operation described in Item 303 of Regulations S-B and S-K or the operating and financial review and prospects described in Item 5 of Form 20-F; and

(iv) assumptions underlying or relating to any of the information described in the foregoing subclauses of this clause (2);

but excluding

(v) information about the registered offering or information released or disseminated as part of the offering activities in the registered offering.

(3) Information is released or disseminated on behalf of the issuer if the issuer or an agent or representative of the issuer authorizes the

communication and approves the communication before its use.²

(c) Reporting issuers. In the case of an issuer that is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934, the continued regular release or dissemination by or on behalf of the issuer of factual business information and forward-looking information in accordance with the requirements of clauses (i) and (ii) of paragraph (e) shall, for the purposes of sections 2(a)(10) and 5(c) of the Act, be deemed not to constitute an offer to sell or offer for sale of a security that is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective.

(d) Non-reporting issuers. In the case of an issuer that is not required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934, the continued regular release or dissemination by or on behalf of the issuer of factual business information (other than dividend notices) in accordance with the requirements of clauses (i), (ii) and (iii) of paragraph (e) shall, for the purposes of sections 2(a)(10) and 5(c) of the Act, be deemed not to constitute an offer to sell or offer for sale of a security that is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective.

(e) Limitations. The following limitations must be satisfied with respect to the information:

(i) The issuer has previously released or disseminated information of this type in the ordinary course of its business;

(ii) The information is released or disseminated in the ordinary course of the issuer's business and the timing, manner and form

² Should this clause (3) be moved to a definition of "by or on behalf of a person" in Rule 405?

in which the information is released or disseminated is materially consistent with similar past disclosures; and

(iii) In the case of an issuer not required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934, the information is released or disseminated to persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who regularly and historically have provided such information to such persons.