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SEC Rule 415: Resolving the Dilemma of Shelf Registrations Creates Problems of Its Own

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SEC Rule 415: Resolving the Dilemma of Shelf Registrations Creates Problems of Its Own

I. Introduction

Section 5 of the Securities Act of 1933[1] prohibits the sale or delivery of a security through the means or other channels of interstate commerce, unless a registration statement is in effect as to the security.[2] Section 6(a) of that Act provides that "[a] registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered."[3] The Securities and Exchange Commission (SEC) stated in *In re Shawnee Chiles Syndicate*[4] that this provision prohibited the inclusion of securities in a registration statement which were not intended to be presently offered.[5]

The SEC has since recognized that the exigencies of business require offerings of securities which do not comply with the registration scheme of the Securities Act.[6] Although the SEC has

1. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (current version at 15 U.S.C. §§ 77a-77aa (1976 & Supp. IV 1981). By requiring adequate and current disclosure about the issuer and the offered securities, this Act seeks to protect investors in their investment decisions.

2. Securities Act of 1933, § 5, 15 U.S.C. § 77e (1976). Section 4(1) of the Securities Act excepts from § 5 "transactions by any person other than an issuer, underwriter, or dealer," *id.* § 4(1), 15 U.S.C. § 77d, which are respectively defined in §§ 2(4), 2(11), and 2(12).

3. *Id.* § 6(a), 15 U.S.C. 77f(a) (1976). For the legislative history of section 6(a) *see* Hodes, *Shelf Registrations: The Dilemma of the Securities and Exchange Commission*, 49 VA. L. REV. 1106, 1108-1115 (1963).

4. 10 S.E.C. 109 (1941).

5. *Id.* at 113. In *Shawnee*, warrants to purchase common stock were offered in addition to registered common stock. The SEC held that the common stock underlying the warrants could not be effectively registered with the principal securities since section 6(a) assures investors that registration statements provide current information at the time of offering. *Id.*

6. The Act requires that issuers register securities to be publicly offered, specifiying the character and amount of the offering. *See* Securities Act of 1933, §§ 6, 7, 15 U.S.C. §§ 77f, 77g (1976); Regulation S-K, 17 C.F.R. § 229.10 to .802 (1982) (Standard Instructions

never repudiated *Shawnee,* it has through its no-action interpretative proceedings allowed or required issuers to register securities to be offered and sold on a delayed or continuous basis, commonly referred to as "shelf" registrations.[7]

Rule 415,[8] recently adopted by the SEC as a temporary rule,[9] attempts to codify the existing "shelf" policy of the SEC. The rule expands the methods of introducing securities at the markets beyond what was administratively permitted before its enactment, by permitting shelf registration of primary at the market offerings of equity securities which the issuer intends to sell within two years. Rule 415 has generated lively debate on the merits of this novel registration technique.

This comment considers the relationship between shelf registrations of equity securities under Rule 415 and Rule 10b-6.[10] Enacted in 1955,[11] Rule 10b-6 is an antimanipulative rule that, subject to certain exceptions, regulates trading in securities by persons who are engaged in a distribution of the securities.[12] The SEC recently recognized that, in order for issuers to be generally able to take advantage of the novel securities offerings under Rule 415, Rule 10b-6 needed to be amended. Otherwise, application of the present rule in some situations would prohibit the

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for Filing Forms Under the Securities Act of 1933 and Securities Exchange Act of 1934).

7. Generally, the SEC required that there be a bona fide intent to offer and sell the registered securities, accurate and current information about the issuer and the offering, and assurance that investors receive full liability protection under the Securities Act. *See infra* notes 35-38, 70-74 and accompanying text. For a discussion of the various situations where shelf registrations were permitted by the SEC, *see* Hodes, *supra* note 3, at 1115-1146. *See also* ABA Section on Corporations, Banking & Currency, *Current Problems of Securities Underwriters and Dealers,* 18 BUS. LAW. 27, 44-55 (Nov. 1962) (Panel discussion) [hereinafter referred to as *Current Problems*].

8. 17 C.F.R. § 230.415 (1982), SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,438. Rule 415 became effective on March 16, 1982, but early compliance was permitted from March 5, 1982, when Release No. 33-6383 became publicly available, 47 Fed. Reg. 11,380. The text of Rule 415 appears in Appendix I.

9. Rule 415(c) set the expiration date of the temporary effective period at December 10, 1982. That date was extended to December 31, 1983 based upon the SEC's determination that additional experience was necessary in order to fully assess the issues raised by shelf registrations. SEC Sec. Act Release No. 33-6423 (Sept. 10, 1982), 47 Fed. Reg. 39,799.

10. 17 C.F.R. § 240.10b-6 (1982). *See* SEC Sec. Exch. Act Release No. 34-5194 (July 5, 1955).

11. SEC Sec. Exch. Act Release No. 34-5194 (July 5, 1955).

12. The text of Rule 10b-6 appears in Appendix II.

very sales the registrant envisioned.[13]

This comment analyzes these important developments in securities law. Part II outlines the background of Rule 415. Part III discusses the proposed Rule 10b-6 amendments as they affect Rule 415 equity shelf registrations. Part IV sets forth the significant issues commented on during the Rule 415 rulemaking proceedings and Commissioner Thomas' dissent when the temporary trial period was extended. Part V hypothesizes that shelf registrations of equity securities may be currently under-utilized and that their effect on the securities markets may not be realized until some unforeseeable future time. Part VI concludes that the temporary effective period may not be long enough to assess the wisdom of final adoption of equity shelf offerings.

II. Rule 415 — Background

A. *Congressional Response to Shawnee*

Following the SEC decision in *Shawnee*,[14] Congress, in 1941, considered two bills which would have amended section 6(a) and the general prohibition of shelf registrations announced in *Shawnee*.[15] H.R. 4344[16] would have permitted registration of securities for offerings at future dates without requiring any undertaking to file post-effective amendments to the registration statement.[17] S. 3985[18] would have permitted registration of securities for future offerings provided that the SEC could impose a twelve-month limitation from the effective date of the registration, unless within that time the registrant updated the registration statement by amendments. Congress enacted neither bill,

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13. SEC Sec. Exch. Act. Release No. 34-18528 (March 3, 1982), 47 Fed. Reg. 11,483 - 484. For a thumbnail sketch of how Rule 10b-6 affects broker-dealers engaged in sales off the shelf, *see* Yerkes, *Shelf Registrations: The Role of the Broker-Dealer*, 29 Bus. Law. 397, 398-405 (Nov. 1973).

14. *In re* Shawnee Chiles Syndicate, 10 S.E.C. 109 (1941). *See supra* notes 4-5 and accompanying text.

15. *See* Hodes, *supra* note 3, at 1111-1113.

16. H.R. 4344, 77th Cong., 1st Sess. (1941).

17. *See Proposed Amendments to the Securities Act of 1933 and to the Securities Exchange Act of 1934: Hearings on H.R. 4344 Before the House Committee in Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 44 (1941) (SEC Report). *See infra* note 25 for a definition of "undertaking."

18. S. 3985, 76th Cong., 3d Sess. (1940).

offering indirect support that Congress agreed with the SEC's interpretation of section 6(a) in *Shawnee*.[19]

This interpretation posed a dilemma to the SEC, particularly in connection with the numerous offerings of convertible stock, and stock warrants or rights.[20] Section 2(3) of the Securities Act[21] excludes from the terms "offer" and "sale" the issue of a right or privilege issued with a security exercisable at some future date to convert a security into another security. However, the "issue or transfer of such other security upon the exercise of such right of conversion or subscription" is deemed to be a sale of such other security.[22] Professor Loss suggests that, by negative implication, if a warrant is issued independent of any other security, there is an immediate offer of a security which must then be registered.[23] The SEC developed administrative procedures which permitted or required[24] the registration of the securities underlying the warrants if an undertaking[25] to file post-effective amendments was included with the registration statement.[26]

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19. In 1954, Congress amended the Investment Company Act, adopting a simplified registration procedure which allowed the continuous offering of securities by either filing amendments to the registration statement then in effect, or by filing a new registration statement. Investment Company Act § 24(e), 15 U.S.C. § 80a-24(e) (1976) (originally enacted as Act of August 10, 1954, ch. 667, title IV, § 403, 68 Stat. 689).

20. Section 2(1) of the Securities Act includes in the definition of "security" a "warrant or right to subscribe to or purchase, any of the foregoing." Securities Act of 1933, § 2(1), 15 U.S.C. § 77b(1) (1976).

21. *Id.* § 2(3), 15 U.S.C. § 77b(3).

22. *Id.*

23. I Loss, Securities Regulation 299 (2d ed. 1961).

24. When the delayed offer concept applies under section 2(3), the SEC required the immediate registration of the underlying security if the warrants were exercisable after a period of not more than ninety days. *See* Loss, *supra* note 23, at 300.

25. An undertaking is a statement by the registrant in the registration statement which provides that if the offering does not go forward within a specified period of time, the registrant will file post-effective amendments to the registration statement which updates the financial and other information required by the Securities Act. *See Current Problems*, *supra* note 7, at 54 (remarks of Manuel F. Cohen). Item 512 of Regulation S-K, adopted in connection with the integrated disclosure system, *see* SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,427, sets forth the circumstances which require undertakings. 17 C.F.R. § 229.512 (1982). The statutory support for the undertaking procedures is thoroughly analyzed in Hodes, *supra* note 3.

26. *See* Loss, *supra* note 23, at 300; Hodes, *supra* note 3, at 1107-08. *See generally Current Problems*, *supra* note 7, at 44-55 (policy behind the adoption of the undertaking procedure commented on by noted securities panel).

Manuel Cohen regarded the undertaking procedures adopted by the SEC as supplying a reasonable measure of currentness with the least inconvenience to the registrants.[27] The procedures were undertaken, according to Cohen, "largely as an experiment to determine whether again we could exercise some ingenuity to make these various statutory threads join together to produce what [the issuer wants] . . . ready access to the market and, at the same time, produce what the statute demands, reasonably accurate information that is timely."[28]

B. *Guide 4*

In 1968, the SEC reiterated its interpretation of section 6(a) as generally prohibiting shelf registrations in Guide 4 of the Guides for Preparation and Filing of Registration Statements.[29] The bulk of Guide 4, however, consists of descriptions of situations when a shelf registration will be permitted.[30] Those situations were not exclusive and the SEC continued to permit shelf registration of securities if they were reasonably expected to be offered and sold at some foreseeable future time; for example, dividend or interest reinvestment plans or employee benefit plans registered on Forms S-16 or S-8.[31]

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27. *Current Problems, supra* note 7, at 53 (remarks of Manuel F. Cohen).

28. *Id.* at 55.

29. SEC Sec. Act Release No. 33-4936 (Dec. 9, 1968), 33 Fed. Reg. 18,617.

30. Permissible shelf registrations in Guide 4 included:

1. Offerings issued in a continuing acquisition program or pledged by persons in control of the issuer.
2. Securities underlying exercisable options, warrants, rights, or convertible securities.
3. Secondary offerings made by statutory underwriters and secondary offerings of securities received as underwriter compensation.
4. Offerings registered with a representation made that they will be publicly offered within a reasonable period of time after the effective date of the registration statement.

See Guide 4, SEC Sec. Act Release No. 33-4936 (Dec. 9, 1968), 33 Fed. Reg. 18,617. For a thorough administrative discussion of Guide 4 see SEC Sec. Act Release No. 33-6276 (Dec. 23, 1980), 46 Fed. Reg. 78, 87-88 (1981) (SEC proposal of Rule 462A).

31. *See* SEC Sec. Act Release No. 33-6276 (Dec. 23, 1980), 46 Fed. Reg. 78, 88 (1981); *SEC's Spencer Analyzes Rule 415, Doubts Many Innovations Under Shelf Offering Rule (BNA), reprinted in* REPRESENTING PUBLICLY TRADED CORPORATIONS UNDER THE NEW INTEGRATED DISCLOSURE SYSTEM 331 (PLI 1982).

C. *Proposed Rule 462A*

In connection with the move toward integrated disclosure under the securities laws and acting upon the recommendation of the Advisory Committee on Corporate Disclosure to the SEC to "keep the disclosure requirements current and effective . . .,"[32] the SEC issued the "Guides Release"[33] which proposed, *inter alia,* the rescission of all but the Industry Guides and the incorporation into Regulation S-K of appropriate disclosure requirements of the remaining Guides. The SEC proposed to codify shelf registrations and to replace Guide 4 by adding proposed Rule 462A — Delayed or Continuous Offering and Sale of Securities.[34] Generally, proposed Rule 462A required a series of undertakings to be filed with the registration statement to ensure the following: (1) a bona fide intent to offer and sell the securities, generally within two years from the effective date of the registration statement;[35] (2) accurate and current information about the issuer and the offering throughout the life of the shelf registration statement[36] and (3) liability protection to investors under the Securities Act.[37] Offerings which satisfied these condi-

32. House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Report on Corporate Disclosure to the Securities and Exchange Commission 338 (Comm. Print 95-29 1977).

33. SEC Sec. Act Release No. 33-6276 (Dec. 23, 1980), 46 Fed. Reg. 78 (1981).

34. *Id.*

35. The two-year limitation was derived from general staff practice in evaluating the reasonableness of the amount of securities that were proposed to be registered in light of the purposes of the proposed offering. The two-year limitation does not apply to the actual sale of securities but to the reasonable expectations of the sellers at the time the registration statement is filed. Thus, if the amount of securities registered is reasonable at the initial filing and there continues a reasonable expectation of sales, it is not necessary to deregister shares after two years and then register them again. 46 Fed. Reg. 88. Conversely, at any time circumstances arise in which there is no longer a bona fide intent to offer the registered securities, the registrant must de-register the unsold shares. *Id.*

36. This is achieved by requiring the registrant to file undertakings, discussed *supra* in note 25 and accompanying text. *See* Item 512(a) of Regulation S-K, which sets forth the circumstances which require the filing of undertakings. 17 C.F.R. § 229.512(a) (1982). The amendments are required only during periods of offers or sales: the registrant is not required to file amendments when no offerings are in progress. *See* Ferrara & Sweeney, *Shelf Registration Under SEC Temporary Rule 415,* 5 Corp. L. Rev. 308, 310-12 (1982) for a discussion of information required by Item 512(a) of Regulation S-K and problems which may arise thereunder.

37. To satisfy this condition the undertaking had to state that each post-effective amendment would be deemed to be a new registration statement, thus beginning anew the statute of limitations contained in the Securities Act. *See* 17 C.F.R. § 229.512(a)(2)

tions would be deemed to satisfy the statutory provision of section 6(a) that the registration statement shall register only securities "proposed to be offered."[38] Hence, the general rule of proposed Rule 462A is not prohibitive, as seen in *Shawnee* and *Guide 4,* but is permissive.[39]

Proposed Rule 462A added categories of permissible shelf registrations to those specifically set forth in Guide 4.[40] The proposed rule also expanded permissible shelf registrations to include offerings of equity securities " 'at the market' or otherwise."[41] The SEC recognized that issues were raised under the antimanipulative provisions of the Securities Exchange Act.[42] The SEC stated:

> It would be necessary for participants in a continuous distribution of securities to limit their market purchases of the class of securities being offered (or rights to acquire or securities convertible into that class) in a manner consistent with those antimanipulative rules.[43]

In connection with these concerns, the SEC sought comment on the potential for manipulative abuse with at the market offerings of equity securities; on what limitations, if any, should be imposed on at the market offerings on the basis of outstanding value or float in the market for the securities; on whether and what conditions, if any, should be imposed on the timing and amounts of sales in an at the market offering.[44]

(1982). *See infra* text accompanying note 74.

38. Securities Act of 1933, § 6(a), 15 U.S.C. § 77e(a) (1976). *See supra* note 7 and accompanying text.

39. In SEC Sec. Act Release No. 33-6276 (Dec. 23, 1980), 46 Fed. Reg. 88 (1981), the SEC remarked that since the SEC was not aware of major abuses of shelf registrations that were administratively sanctioned, a restrictive policy was neither appropriate nor necessary.

40. *See supra* note 30.

41. SEC Sec. Act Release No. 33-6276 (Dec. 23, 1980), 46 Fed. Reg. 90 (1981). "At the market offering" was subsequently defined by the SEC when it reproposed Rule 462A. *See infra* note 50 and accompanying text.

42. *Id.*

43. *Id.*

44. *Id.*

D. *Response to Proposed Rule 462A and Reproposed Rule 462A*

1. *General*

Commentators, comprising mainly corporate law firms and associations and the securities industry, generally observed that proposed Rule 462A would provide issuers with flexibility to take advantage of favorable market conditions and facilitate the development of innovative capital-raising techniques, thus reducing burdens and costs to registrants.[45]

In August of 1981, the SEC reproposed Rule 462A.[46] The revisions clarified when the two-year benchmark would apply[47] and the circumstances which would require the registrant to furnish undertakings to file post-effective amendments.[48]

The SEC defined "at the market offering" as

> an offering of securities into an existing trading market for outstanding shares of the same class at other than a fixed price on or through the facilities of a national securities exchange or to a market maker[49] otherwise than on an exchange.[50]

Responding to the antimanipulative issues raised by such offerings, the commentators generally opposed limiting at the

45. SEC Sec. Act Release No. 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,002-003. Such comments are reminiscent of Manny Cohen's remarks given two decades previously:

> The Commission agreed to expedite its own procedures as best it could so as to permit prompt disposition of . . . shares.
>
> . . . .
>
> There began to develop a series of undertakings which were designed . . . to give effect to these various statutory purposes . . . and to permit, with the least possible hindrance the going forward of these transactions.

Current Problems, supra note 7, at 54 (remarks of Manuel F. Cohen).

46. SEC Sec. Act Release No. 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,001.

47. Reproposed Rule 462A(a)(1)(i), SEC Sec. Act Release 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,014, contains the two-year provision. Sub-sections (ii) to (viii) set forth the circumstances where the two-year limitation does not apply.

48. *See* Item 512 of Regulation S-K, 17 C.F.R. § 229.512 (1982).

49. "Market maker" means

> any person permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out . . . as being willing to buy and sell such security for his own account on a regular or continuous basis.

Securities Act of 1934, § 3(a)(38), 15 U.S.C. § 78c(a)(38) (1976).

50. Reproposed Rule 462A(a)(3), SEC Sec. Act Release 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,014.

market offerings by the amount of the issuer's outstanding float or value in the market.[51] They argued that since the issuer strives to preserve an orderly trading market in its securities, such a limitation is unnecessary.[52] The commentators noted that the primary reasons issuers use shelf offerings are flexibility and the opportunity to take advantage immediately of increases in market price.[53] Several commentators, however, recommended imposing conditions upon the availability of shelf registrations for an at the market offering, such as requiring an underwriter or limiting the use of shelf registrations to issuers eligible to use Form S-3.[54] In response to these and other comments and suggestions, the SEC decided that full investor protection would be achieved by requiring that in the case of primary at the market offerings of equity securities, an underwriter or underwriters be named in the prospectus which is part of the shelf registration statement and that such securities be sold through such underwriter(s).[55] For purposes of reproposed Rule 462A an "underwriter" includes only those market professionals who have entered into special selling arrangements with the registrant.[56]

2. *Proposed Rule 462A and Rule 10b-6*

The commentators to proposed Rule 462A were concerned that continuous at the market offerings of equity securities raised antimanipulative issues under Rule 10b-6.[57] When repro-

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51. SEC Sec. Act Release No. 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,010. *See supra* text accompanying note 44.

52. *Id.*

53. *Id.* Such flexibility was early recognized by the SEC in developing its "shelf" policy. *See supra* notes 27-28 and accompanying text.

54. SEC Sec. Act Release No. 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 43,010. *See infra* note 78.

55. Reproposed Rule 462A provides in part that:

> (3) In the case of a registration statement pertaining to an at the market offering of equity securities by or on behalf of the registrant, the securities so registered must be sold through an underwriter or underwriters, acting as principal(s) or as agent(s) for the issuer, and the underwriter or underwriters must be named in the prospectus.

Id.

56. Compare the statutory definition of "underwriter" which includes "any person who has purchased from an issuer with a view to, . . . the distribution of any security . . . ." Securities Act of 1933, § 2(11), 15 U.S.C. § 77b(2)(11) (1976).

57. SEC Sec. Act Release No. 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,011. *See supra*

posing Rule 462A, the SEC acknowledged these concerns but stated that "the current framework of substantive antimanipulative rules, together with the existing disclosure requirements, appear to provide sufficient protection against market abuses."[58] In response to the commentators' concern that present interpretation of Rule 10b-6 would interfere with at the market offerings under proposed Rule 462A, the SEC stated its belief that any issues which may arise could be resolved on an ad hoc basis, by interpretative release or by amendment to Rule 10b-6.[59] The SEC noted, however, that the term "distribution," which triggers Rule 10b-6, needed clarification for purposes of shelf-registered offerings.[60] The SEC solicited comments on when a distribution should be deemed to occur in connection with shelf registration statements and also on what kinds of limitations should be imposed on purchases off the shelf.[61]

The SEC specifically addressed issues raised under proposed Rule 462A and Rule 10b-6 in connection with broker-dealers and market makers.[62] Under present interpretations of Rule 10b-6, broker-dealers who have agreements with the issuer to participate in the shelf distributions would be subject to the prohibitions of Rule 10b-6 from the time of the agreement until their participation is complete, i.e., when the agreement terminates or when all agreed-upon securities are sold.[63] The SEC recognized the dilemma posed with shelf offerings, when it would be appropriate for a broker-dealer to purchase or bid for securities during the life of the shelf; such transactions could be presently effected only by exemption under Rule 10b-6. The SEC sought comment on whether such exemption should be conditioned upon a "cooling off" period.[64] As to broker-dealers with

notes 43-44 and accompanying text.

58. *Id.*

59. *Id.*

60. *Id. See infra* note 88 and accompanying text for the current definition of "distribution."

61. *Id.*

62. *Id. See supra* note 49 for statutory definition of "market maker."

63. *See* Yerkes, *Shelf Registrations: The Role of the Broker-Dealer*, 29 Bus. Law. 397, 398-99 (1974). *See also* 17 C.F.R. § 240.10b-6(c)(3) (1982) which prescribes when participation in a distribution is deemed complete.

64. SEC Sec. Act. Release No. 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,012 n.89, 42,013.

no continuing agreements with the issuer, the SEC noted that they would be subject to the trading prohibitions of Rule 10b-6 from the time they agreed to participate in the distribution.[65]

Several commentators raised the issue of potential liability under Rule 10b-6 of market makers, block positioners, or specialists who buy shelf-registered securities directly from the issuer or from a broker-dealer acting for the issuer as agent or principal.[66] The SEC clarified its position that for Rule 10b-6 such market professionals will not be deemed participants in the distribution if they purchase the securities in the ordinary course of business.[67]

E. *Rule 415*

1. *General*

On March 3, 1982, the SEC announced the adoption of the integrated disclosure system — the culmination of the SEC integrated disclosure program which sought to improve and simplify the disclosure requirements under the Securities Act and the Securities Exchange Act.[68] As part of this system, and following its review and rescission of Guide 4, and its consideration of the comments received under proposed and reproposed Rule 462A, the SEC announced its adoption of a temporary rule governing shelf registrations — Rule 415.[69] The Rule revised reproposed

65. *Id.*

66. *Id.*, 46 Fed. Reg. 42,012-013. The commentators were concerned that certain staff interpretations, *e.g.*, Letter *re* Victory Markets (Sept. 21, 1972) and Letter *re* Continental Coffee (Mar. 3, 1972), which subjected the market professionals to Rule 10b-6 and which were never rescinded, left the issue of liability unsettled. *Id.*

67. SEC Sec. Act Release No. 33-6334 (Aug. 6, 1981), 46 Fed. Reg. 42,013. The SEC cautioned, however, that such professionals might be involved in a separate distribution subject to Rule 10b-6, and that their resales might constitute a separate distribution subject to the Rule. *Id.* at n.91.

68. SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,380. For an early discussion of the integrated disclosure concept, see Cohen, *Truth in Securities Revisted*, 79 HARV. L. REV. 1340 (1966). For a discussion of the legislative and administrative background of the integrated disclosure program see SEC Sec. Act Release No. 33-6235 (Sept. 2, 1980), 45 Fed. Reg. 63,693.

69. 17 C.F.R. § 230.415 1982, SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. at 11,438. Initially, the Rule was effective until December 10, 1982. 17 C.F.R. § 230.415(c) (1982), 47 Fed. Reg. at 11,439. In SEC Sec. Act Release No. 33-6423 (Sept. 2, 1982), 47 Fed. Reg. 39,799, the SEC announced the extension of the effective date to December 31, 1983, in order to obtain more experience with the Rule before deciding

Rule 462A only with regard to at the market offerings of equity securities. Thus, the basic conditions underlying Rule 462A remained intact.[70] To assure a bona fide intent to offer and sell the securities, the SEC retained the two-year benchmark in Rule 415(a)(1)(i).[71] Further, Rule 415(a)(2) requires, as did predecessor proposed Rule 462A(a)(2),[72] that, to assure accurate and current information, the registrant must furnish the undertakings required by Item 512(a) of Regulation S-K to file post-effective amendments in specified circumstances.[73] The post-effective amendments also satisfy the third general condition of ensuring full statutory liability since each amendment

> shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.[74]

2. *At the market equity offerings*

The SEC determined to impose further conditions on at the market offerings of equity securities.[75] In addition to requiring that the securities be sold through a named underwriter(s),[76]

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upon its final adoption. *See infra* notes 146-152 and accompanying text for discussion of Commissioner Thomas's dissent in extending the effective period.

70. *See supra* notes 35-38 and accompanying text for the general conditions shelf registrations must satisfy.

71. 17 C.F.R. § 230.415(a)(1)(i) (1982), SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,438. *See supra* note 35 and accompanying text. Rule 415(a)(1)(ii) to (a)(1)(vii) allows, as did reproposed Rule 462(A), shelf offerings without a two-year limitation. These include securities that are: (1) offered or sold by or on behalf of a person other that the registrant; (2) offered and sold pursuant to a dividend or interest reinvestment plan or employee benefit plan; (3) issued upon the exercise of outstanding options, warrants, or rights; (4) issued upon the conversion of other outstanding securities; (5) pledged as collateral; or (6) registered on Form S-12, 17 C.F.R. §§ 239.19 (1982) (American depository receipts), or Form C-3, 17 C.F.R. §§ 239.5 (American certificates). 17 C.F.R. § 230.415(a)(1)(ii) to (a)(1)(vii) (1982), SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,438.

72. *See supra* note 36 and accompanying text.

73. *See supra* notes 25, 36, 48 and accompanying text.

74. 17 C.F.R. § 229.512(b) (1982).

75. *See* SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,397. *See supra* notes 51-55 and accompanying text.

76. 17 C.F.R. § 230.415(a)(3)(iii) (1982), SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,438-439. *See supra* text accompanying note 55.

Naming an underwriter or underwriters in the prospectus of a registration statement

Rule 415(a)(3)(i)[77] requires that the registrant meet the registrant and transaction requirements of Form S-3,[78] and that the amount of the securities registered must not exceed ten percent of the registrant's non-affiliate float.[79] The SEC's adoption of these further conditions, which it had previously regarded as unnecessary,[80] was prompted by its view of the experimental nature of the novel approach into the market provided by Rule 415(a)(3).[81]

3. *The "Issues Release"*

Concurrent with the announcement of the adoption of temporary Rule 415, the SEC published a list of issues to be considered during the rulemaking proceedings.[82] The SEC sought comment on numerous issues which generally fall within the following categories:

(1) Investor protection and administrative practice under the Securities Act;
(2) Shelf registrations and the structure of public offerings;
(3) Raising of capital by corporate issuers through shelf registrations;
*(4) Competition in the investment banking industry;
*(5) Participation of institutions in the securities markets;
*(6) The effect of shelf registrations on the secondary market for corporate securities;

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providing for an at the market equity offering is not required where the offering will not begin immediately after the registration statement's effective date. Hence, no underwriter is required where shelf offerings are not made at the market. Conversely, the registrant must file a post-effective amendment naming participating underwriter(s) before an at the market offering can proceed. *See* Rule 415(a)(3)(iv), 17 C.F.R. § 230.415(a)(3)(iv) (1982). Ferrara & Sweeney, *Shelf Registration Under SEC Temporary Rule 415,* 5 CORP. L. REV. 308 (1982).

77. 17 C.F.R. § 230.415(a)(3)(i) (1982), SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,438-439.

78. *See* 17 C.F.R. § 239.13 (1982). Form S-3 allows the maximum use of incorporation by reference of Exchange Act reports and requires the least disclosure to be presented in the prospectus and delivered to investors. For a description of Form S-3, as well as Forms S-1 and S-2, the so-called three-tiered Securities Act registration framework, see SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,382-386.

79. 17 C.F.R. § 230.415(a)(3)(ii) (1982), SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,438.

80. *See supra* text accompanying notes 51-55.

81. SEC Sec. Act Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 11,397.

82. SEC Sec. Act Release No. 33-6391 (Mar. 12, 1982), 47 Fed. Reg. 11,701- 704.

*(7) Due diligence techniques under section 11 of the Securities Act;
(8) The ability of foreign issuers to use Rule 415;
*(9) The interrelationship of Rule 10b-6 to shelf registrations under Rule 415.[83]

The highlighted categories will be discussed following presentation of the SEC's proposed amendments to Rule 10b-6.

III. Rule 10b-6

A. *General*

Pursuant to its rulemaking authority,[84] the SEC adopted Rule 10b-6 in 1955 as an antimanipulative rule which generally prohibits persons who are engaged in a distribution of securities from bidding for or purchasing, or inducing other persons to bid for or purchase, such security or any security of the same class and series, or any right to purchase such security, until they have completed their participation in the distribution.[85] The purpose of the rule is to prevent the participants from artificially affecting the market to facilitate the distribution.[86] The rule codified administrative interpretations and proceedings in connection with trading activity.[87]

Rule 10b-6 is triggered when there is a "distribution," a term not defined in the rule but which has been consistently interpreted by the courts and the SEC to include transactions which are distinguishable from ordinary trading transactions in magnitude, selling efforts, and methods used.[88] Concurrent with the announcement of Rule 415 and the "Issues Release," the SEC announced its recognition that, since 1955, the structure and operations of the securities markets have changed and that a literal application of Rule 10b-6 would prohibit transactions

83. *Id.*

84. Securities Exchange Act of 1934, § 23(a)(1), 15 U.S.C. § 78(v)(a)(1) (1976) gives the SEC power "to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title . . . ." *Id.* The text of the Rule is set forth in Appendix II.

85. 17 C.F.R. § 240.10b-6 (1982).

86. *See* SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,483 (proposed amendments to Rule 10b-6).

87. *Id.*, 47 Fed. Reg. 11,483 & n. 2.

88. *See, e.g., In re* Bruns, Nordeman & Co., 40 S.E.C. 652, 660 (1961).

not otherwise manipulative.[89] The SEC had developed an administrative posture which relaxed the general prohibitions of the rule in situations which neither threatened the integrity of the trading market nor eroded investor confidence.[90]

The SEC also recognized that, in light of the quicker dissemination of material information regarding the issuer since 1955, the general prohibitions of Rule 10b-6 may be more restrictive than necessary.[91] The SEC specifically cited the effect of the rule on participating broker-dealers who are prohibited, without exemption, from making a market in distributed securities for substantial periods of time.[92] Since the market effect of the broker-dealer purchases may be fully dissipated in a much shorter period of time than that reflected in the Rule, it had been argued that the liquidity and pricing of offered securities was adversely affected despite the absence of manipulation.[93]

Regarding shelf offerings under Rule 415, the SEC evinced concern that the term "distribution" needed clarification as did the general applicability of Rule 10b-6 to participants in shelf offerings.[94]

In order to clarify existing staff interpretations of Rule 10b-6, to relax the general prohibitions of the rule, and to clarify "distribution" and the general applicability of the rule to participants in shelf offerings, the SEC proposed amendments to the rule.[95] Where appropriate, the SEC discussed the operation of the proposed amendments to shelf offerings under Rule 415.

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89. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,483-484.

90. *Id. See, e.g.,* Letter from SEC to The Continental Group, Inc. (Oct. 1, 1981) (issuer exempted from Rule 10b-6 for the purchase of issuer common stock to be "distributed" to issuer's employee incentive plans).

91. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,487.

92. *Id. See supra* note 49 for statutory definition of "market maker." *See* Jaffee & Co., SEC Sec. Exch. Act Release No. 34-8866 (Apr. 20, 1970); Jaffee & Co. v. SEC, 446 F.2d 387 (2d Cir. 1971) (firm making a market in securities of same class as those distributed, purchased part of distributed securities from exclusive broker, held "participant" in distribution thus violating Rule 10b-6). For a critique of *Jaffee* see Posner, *Developments in Federal Securities Regulation,* 26 Bus. Law. 1677, 1713-14 (1971).

93. *See* SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,484 (citing letter from Frank J. Wilson, Esq., Exec. Vice President of the NASD, to Douglas Scarff, Esq., Director, Division of Market Regulation (Nov. 19, 1981)).

94. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,484.

95. *Id.*

B. *The Proposed Rule 10b-6 Amendments*

1. *"Distribution"*

The SEC reconsidered its traditional position of defining "distribution" on an ad hoc basis,[96] stating that the lack of certainty outweighed the SEC's and the courts' need for flexibility.[97] The SEC proposed a definition of "distribution" which essentially codifies current case law as well as the staff's view that transactions which comply with the volume limitations and manner of sale provisions of SEC Rule 144[98] are not deemed "distributions" for purposes of Rule 10b-6.[99]

In proposing such definition, the SEC reiterated its longstanding interpretations that a distribution under Rule 10b-6 commences when the "incentive to engage in manipulative conduct is first present."[100] Hence, as to an issuer, a distribution commences at the time the determination is made to go forward with a public offering.[101] An underwriter becomes a participant in a distribution from the time it agrees with the issuer to participate in a future public offering.[102] The SEC further reiterated its position that Rule 10b-6 is not limited to public offerings under the Securities Act but extends to nonpublic offerings.[103]

As to shelf-registered securities, the SEC determined that

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96. *See supra* text accompanying note 58.

97. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg, 11,484.

98. 17 C.F.R. § 230.144 (1982).

99. The proposed definition provides that "distribution" means:

> an offering of securities, whether or not subject to registration under the Securities Act of 1933, which is distinguished from ordinary trading transactions by the magnitude of the offering or the presence of either special selling efforts and selling methods or the payment of compensation greater than that normally paid in connection with ordinary trading transactions; *provided, however,* that the sale of securities will not constitute a distribution for purposes of this section if the sale has been made in compliance with both the volume limitations and manner of sale provisions contained in paragraphs (e) and (f) of Rule 144 under the Securities Act of 1933.

SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,494.

100. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,485.

101. *Id.*

102. *Id.*

103. *Id. See supra* note 99 for statutory definition of "distribution" which includes such offerings. The SEC cited to *In re* Collins Securities Corp., SEC Sec. Exch. Act Release No. 34-11,766 (Oct. 23, 1975), *rev'd on other grounds,* Collins Securities Corp. v. SEC, 502 F.2d 320 (D.C. Cir. 1977).

the application of the term "distribution" will be the same as in the context of conventional offerings.[104] The SEC stated that, generally, an entire shelf registration will constitute a single distribution if the sales off the shelf will utilize "selling efforts or compensation of the type normally associated with a distribution."[105]

To implement its intention to relax the application of Rule 10b-6 where appropriate,[106] the SEC proposed amending current Exception XI to the rule (pertaining to underwriters and broker-dealers), proposed Exception XII (pertaining to issuers) and proposed Exception XIII (pertaining to qualifying purchases of investment grade securities).[107]

2. *Proposed Exception XI amendment*

This exception currently provides that underwriters, prospective underwriters and participating dealers may make purchases or bids over the counter until ten business days prior to the proposed commencement of the distribution (or until five business days if purchases are unsolicited).[108] The ten day "cooling off" period was a compromise between the need to preserve liquidity in the markets for unlisted over the counter securities and the need to ensure the elimination of participant influence.[109]

The SEC determined that current Exception XI is more restrictive than necessary in its application to conventional offerings as well as to the new kinds of shelf offerings permitted under Rule 415.[110] Since participating broker-dealers with continuing agreements with the issuers to sell securities registered on the shelf are participants until such agreements are terminated or until their sales are completed, it was argued that the extended restrictions imposed on them by Rule 10b-6 (Exception XI being unavailable)[111] would adversely affect the liquidity

104. *See* SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,485-486.
105. *Id.*, 47 Fed. Reg. 11,485.
106. *See supra* text accompanying notes 91-93.
107. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,486-492.
108. 17 C.F.R. § 240.10b-6(a)(3)(xi) (1982).
109. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,486.
110. *Id.*
111. Current Exception XI only protects over the counter purchases. *See supra* text

of the subject securities and would undercut the ability of the issuers to take advantage of the flexibility Rule 415 otherwise affords.[112]

For these reasons, the SEC proposed that the Exception XI "cooling off" period be reduced to three business days for solicited purchases and to permit unsolicited purchases until the commencement of sales.[113] Due to the quality of information regarding exchange-traded securities, the SEC also proposed to eliminate the over the counter requirement; thus bids and purchases could be made on an exchange as well as in the over the counter market.[114]

As amended, Exception XI will permit broker-dealers with continuing agreements with an issuer to bid for or purchase a security in distribution until three business days before the commencement of sales.[115] Other broker-dealers will be required to refrain from bidding or purchasing from the later of three business days before the commencement of sales or the time of agreement to participate in sales.[116] The SEC announced an interim no-action position if broker-dealers participating in distributions subject to Rule 10b-6 conform their activities to the proposed amendments and if the issuer is qualified to use Forms S-2 or S-3.[117] The SEC stated its concern that the potential for manipulative abuse may be greater with issuers required to use Form S-1, since the market for the securities may be less stable and there is less publicly available information concerning Form S-1 issuers.[118]

3. *Proposed Exception XII*

Rule 10b-6 currently prohibits issuers, selling shareholders

accompanying note 108.

112. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,486 (citing NASD Letter, *supra* note 93, at 2-6). *See supra* note 63 and accompanying text.

113. *Id.*, 47 Fed. Reg. 11,487. The SEC noted its belief that "unsolicited purchases by participants as principals prior to the commencement of sales generally present the potential for manipulative abuse to which Rule 10b-6 is addressed." *Id.*, 47 Fed. Reg. 11,487 n.32.

114. *Id.*, 47 Fed. Reg. 11,487.

115. *Id.*

116. *Id.*, 47 Fed. Reg. 11,487-488 & n.36.

117. *Id.*, 47 Fed. Reg. 11,488. *See supra* note 78.

118. *Id.*, 47 Fed. Reg. 11,487-488.

on whose behalf the distribution is made, and affiliates of issuers[119] from bidding for or purchasing securities subject to a distribution from the time of the decision to go forward with the distribution.[120] The SEC has proposed relaxing these restrictions by permitting bidding and purchasing until three business days prior to any offers or sales of the securities.[121] The SEC noted that issuers, selling shareholders, and affiliates may have a greater interest in facilitating distributions than broker-dealers and thus solicited comment on whether additional conditions should be imposed.[122]

Regarding shelf offerings under Rule 415, the SEC announced an interim no-action position if the issuer is qualified to use Forms S-2 or S-3 and proposed Exception XII is complied with.[123]

iv. *Proposed Exception XIII*

The SEC proposed a new exception to Rule 10b-6 which generally codifies its interpretative position contained in a no-action letter to AT & T, dated February 26, 1975.[124] Proposed

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119. *See id.*, 47 Fed. Reg. 11,488; 17 C.F.R. § 240.10b-6(a) (1982). The SEC proposed adding the following definition:

> The term "affiliated purchaser" means (i) A person acting in concert with the issuer or other person for the purpose of acquiring the issuer's securities, or (ii) An affiliate who, directly or indirectly, controls the issuer's or orther person's purchases of such securities, whose purchases are controlled by the issuer or such other person or whose purchases are under common control with those of the issuer or such other person.

SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,494.

120. *See* SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11488.

121. *Id.* The three-day "cooling off" period applies as well to unsolicited bids or purchases. The text of the proposed Exception is as follows:

> (xii) bids or purchases by an issuer or other person on whose behalf the distribution is being made, or by any affiliated purchaser . . . of such issuer or other person if such bids or purchases are made no later than 3 business days before the commencement of any offers or sales of the securites to be distributed, if none of such bids is for the purpose of creating actual, or apparent, active trading in or raising the price of such security.

Id., 47 Fed. Reg. 11,494.

122. *Id.*, 47 Fed. Reg. 11,488.

123. *Id.*, 47 Fed. Reg. 11,488-489.

124. In such letter, the SEC staff granted no-action relief to permit the purchase of debt securities of the same class and series as those being distributed upon the satisfaction of certain prescribed conditions. *See* SEC Sec. Act. Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,491.

Exception XIII permits persons subject to Rule 10b-6 to purchase certain investment grade securities of an issuer during the distribution of other debt securities of the same class and series.[125] Regarding shelf offerings the SEC announced an interim no-action position if all conditions are met.[126]

C. *Clarification*

On March 25, 1982, the Securities Industry Association (SIA) requested guidance from the SEC regarding the application of the proposed Rule 10b-6 amendments to broker-dealers participating in Rule 415 equity shelf-registered offerings.[127] In response, the SEC clarified when broker-dealers without continuing agreements with the issuer would be deemed participants[128] and on when participation commences.[129] The SEC agreed with SIA's interpretation concerning the case of an issuer's invitation for bids to broker-dealers that no broker-dealer becomes a "prospective underwriter" within Rule 10b-6(c)(2) until it agrees to submit, or does submit, a bid; the identification of a broker-dealer in the registration statement does not alone constitute an

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125. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,491-492. The text of the Exception is as follows:

> (xiii) transactions in debt securities that are not convertible into another security, *provided, however,* that (A) either the issuer of such securities is subject to the regular reporting requirements of section 13 or section 15(d) of the Act or the securities are registered pursuant to section 12(b) of the Act; (B) both the securities being distributed and the securities to be purchased are rated in one of the four highest rating categories by at least two nationally recognized statistical rating organizations; and (C) all of the outstanding public debt of the issuer amounts in the aggregate to at least $100 million in face amount.

Id., 47 Fed. Reg. 11,494.

126. *Id.*, 47 Fed. Reg. 11,492.

127. See SEC Sec. Exch. Act Release No. 34-18,666 (Apr. 20, 1982), 47 Fed. Reg. 18,359, 18,360, for the contents of the SIA letter.

128. If the broker-dealer has a continuing agreement with the issuer relating to his participation in unspecified future offerings, his participation commences at the time he reaches such agreement. SEC Sec. Act Release No. 33-6387 (Mar. 3, 1982), 47 Fed. Reg. 11,486. *See supra* notes 100-116 and accompanying text.

129. Such a broker-dealer commences his participation in a shelf-registered distribution when there are "communications between him and the issuer relating to a reasonably imminent sale of particular securities and resulting, together with other relevant 'facts and circumstances,' in an understanding that the broker-dealer will participate in such sale." SEC Sec. Exch. Act Release No. 34-18,666 (Apr. 20, 1982), 47 Fed. Reg. 18,361.

agreement to submit a bid.[130] The SEC also clarified the meaning of the reference to "the commencement of offers or sales" — the phrase refers to the actual "commencement of solicitation efforts in such offering."[131]

IV. Aftermath to Rule 415

Rarely has a dryly written little snippet of regulation caused such an outpouring of verbiage[132]

A. *General Commentary*

One hundred nineteen commentators participated in the rulemaking proceeding phase of Rule 415.[133] Corporations and associations comprised nearly 44 percent of the commentators; the securities bar comprised nearly 43 percent. The remaining 13 percent were law firms and associations (3 percent); self-regulatory organizations (1.5 percent); government agencies (1.5 percent); individuals (4.5 percent).[134] Approximately 50 percent, including all issuers, supported the rule asserting that it reduced regulatory burdens and increased the economy efficiency and flexibility of capital raising.[135] Only about 12 percent of the commentators were generally opposed to the rule.[136]

B. *Specific Concerns*

The bulk of the concerns went beyond the technical param-

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130. *Id.*

131. The three-day "cooling off" period in Proposed Exception XI looks to the commencement of offers or sales. *Id.*

132. Osborn, *The Furor Over Shelf Registration*, INSTITUTIONAL INVESTOR, June, 1982, at 61.

133. SEC Summary of Comments to Rule 415, at 1 [hereinafter referred to as *Comments*]. The Summary is on file with the SEC, File No. S7-925 and is available for public inspection and copying.

134. *See id.*

135. *Id.* at 11. *See* Letter from Donald S. Howard, Executive Vice President of Citicorp, to George A. Fitzsimmons, SEC Secretary (June 7, 1982), *reprinted in* REPRESENTING PUBLICLY TRADED CORPORATIONS UNDER THE NEW INTEGRATED DISCLOSURE SYSTEM 333 (PLI 1982) ("Rule 415 makes the process of registering securities in the U.S. more flexible and more responsive to conditions in the world's securities markets and thus will allow securities distributions to proceed uninhibited by a mandated minimum delay period").

136. *Comments, supra* note 133, at 12.

eters of Rule 415 to the broad effect the rule would have on the securities markets.[137] Almost half of the commenting securities firms and the National Association of Securities Dealers, Inc. (NASD) expressed concern that equity shelf offerings permitted under Rule 415 might accelerate the institutionalization of the American securities markets.[138] The institutionalization argument is generally premised on the following sequence:

> [The issuer is able] to gain rapid access to the capital markets, and to sell large amounts of securities on short notice . . . . Issuers will more frequently demand that investment bankers bid on little if any notice to purchase off the shelf large blocks of securities. Because of the short time frame, investment bankers will not have the opportunity to form traditional underwriting syndicates. As a consequence, only the largest players — those that have the capital for, and can afford to bear the risks of, huge purchases — will inevitably come to be exclusive underwriters and selling dealers for major new issues. In addition, to reduce their market risks, these investment bankers will be compelled immediately to resell their securities. Only a few well-capitalized institutions will be ready or willing to make such large purchases rapidly.[139]

The above described Euromarket-style "bought deal"—where one or a few investment bankers or institutional investors handle the entire deal, or a large portion of it — contrasts with the conventional offering where a lead underwriter assembles a syndicate of underwriting firms which buy an offering then sell it to the public, usually at a single fixed price.[140] Issues implicated by

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137. *Id.* at 6, 14.

138. *See id.* at 14-17.

139. SEC Sec. Act Release No. 33-6423 (Sept. 2, 1982), 47 Fed. Reg. 39,805 (Thomas, Commissioner, dissenting) [hereinafter referred to as Thomas Dissent].

140. *See* Osborne, *supra* note 132, at 61; Ehrbar, *Upheaval in Investment Banking,* FORTUNE, Aug. 23, 1982, at 90; Hershman, *The New World of Corporate Finance,* DUN'S BUS. MONTH, Aug., 1982, at 48; *Bankers on the Shelf?,* THE ECONOMIST, March 6, 1982, at 89. *See also* Letter, *supra* note 135, at 335 (attractiveness of bought deals to issuers and dealers).

The profit derived from bought deals is whatever the investment banker nets upon the resale of the securities. Profits from conventional fixed-price offerings are derived from the "spread" — generally a fixed rate agreed upon by the issuer and the investment banker and paid when the securities are sold. When investment banking firm Morgan Stanley & Co., Inc. bought on its own two million shares of AT&T stock in May 1982 then resold the shares to institutional investors, it netted approximately $400,000. Fees on a syndicated deal would have been near $3 million at last year's spread. Ehrbar,

"bought deals" and institutionalization, which concerned several commentators, include an anticompetitive effect of squeezing out regional securities firms and individual investors,[141] an adverse impact on small issuers who would use the services of regional broker-dealers,[142] inadequate disclosure to investors,[143] due diligence,[144] and an adverse impact on the nation's capital-

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supra, at 90. Competitive bidding for the deal and the attendant general decrease in profits, coupled with the risks discussed *infra* notes 141-45 account for much of the disdain for Rule 415 echoed by many prominent investment bankers. *See generally Comments supra* note 133, at 14-37.

For a discussion of some disadvantages of the bought deal to the issuer, see Monahan, *Are Companies Capping Stock Prices by Using Shelves?*, INVESTMENT DEALERS' DIGEST, January 3, 1983, at 6.

141. *See Comments, supra* note 133, at 18; Thomas Dissent, *supra* note 139, 47 Fed. Reg. 39,805. For numerous reasons regional securities firms may be bypassed in many primary offerings by an increase in bought deals. They do not have the capital to purchase the offering; they must compete against any number of other bidding firms; the issuers can deal directly with institutional investors. This would leave the regional firms relying principally upon less substantial commissions from the secondary trading market which itself is implicated, *infra*. *See* Ehrbar, *supra* note 140, at 64; *Comments, supra* note 133, at 17-23; *Heavy Traffic On a New SEC Shortcut*, BUS. WK., May 24, 1982, at 142.

Two-tiered pricing (i.e., a pricing preference given to institutional investors who purchase substantial portions on short notice) may drive individual investors from the marketplace. *See* Osborn, *supra* note 132, at 64; *Comments, supra* note 133, at 18-19. This, in turn, would impact volatility and liquidity of the secondary markets, as well as capital raising emergency businesses. *Id.* Furthermore, if the major underwriting firms pull their capital out of the secondary market and put it into bought deals, the liquidity of the secondary market may be diminished. Osborn, *supra* note 132, at 93.

142. *See* Thomas Dissent, *supra* note 139, 47 Fed. Reg. 39,805; *Comments, supra* note 133, at 23-24. The Roundtable commented that "in the absence of an ability to provide adequate and sophisticated investment banking and secondary market support for equity securities, we fear the capital needs of these [emerging regional] corporations will increasingly be met by financing techniques which are not best suited to their needs but will become courses of last resort." *Id.*

143. *See Comments, supra* note 133, at 28-30. Although investment banking firm Goldman, Sachs & Co. has been involved with several Rule 415 offerings, Ehrbar, *supra* note 140, at 93, senior partner John Whitehead has been vociferously concerned with the effects on investors caused by the limited disclosure involved in shelf registrations. This "threatens to sweep away 50 years of investor protection and return the new-issue market to the jungle environment of the 1920's." Osborn, *supra* note 132, at 66 (quoting from an open letter published in *Financier* magazine). Accordingly, during SEC rulemaking procedures, Goldman Sachs urged a 10-day cooling off period and an expanded prospectus. *See Comments, supra* note 133, at 43.

144. Securities Act of 133, § 11(b)(3)(A), 15 U.S.C. § 77k(b)(3)(A) (1976), provides persons, other than issuers, a "due diligence" defense against civil liability arising from a fraudulent registration statement if:

after reasonable investigation, reasonable ground to believe and did believe . . .

raising system as a whole.[145]

C. *Commissioner Thomas' Views*

Commissioner Barbara Thomas shared these concerns, expressing them in her dissent from the SEC decision to extend Rule 415 on a temporary basis without substantial change.[146] Commissioner Thomas argued that Rule 415 as applied to equity offerings:

> (1) jeopardizes the liquidity and stability of our primary and secondary securities markets by encouraging greater concentration of underwriters, market-makers, and other financial intermediaries and by discouraging individual investor participation in the capital markets thereby furthering the trend toward institutionalization of securities holders, and (2) reduces the quality and timeliness of disclosure available to investors when making their investment decisions.[147]

Thomas argued that due to the potential risks and absent the evidence of need of the novel capital-raising technique, the SEC should modify Rule 415 to "target it more precisely" to

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> that the statements [in the registration statement] were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Id.

Short form registration, in general, has generated an ongoing debate concerning how due diligence should be carried out. *See, e.g.*, SEC Sec. Act. Release Nos. 33-6335 (Aug. 6, 1981) (proposing Rule 176) and 33-6383 (Mar. 3, 1982) (adopting Rule 176). *See* Ehrbar, *supra* note 140, at 93. During SEC rulemaking proceedings Goldman Sachs opined that less due diligence investigation is being done now than at any other time during thirty-five years in the business. *Comments, supra* note 133, at 25. Facing the problem headon, Citicorp has significantly expanded its due diligence program by setting up quarterly meetings for all ten investment banking firms named on its S-3 shelf registration statement of $500 million of debt securities, to question principal corporate financial and officers, and by appointing outside counsel to provide continuous information to underwriters. Letter, *supra* note 135, at 134. *See* Hershman, *supra* note 140, at 51; *Comments, supra* note 133, at 27.

145. *See* Commissioner Thomas' summary, Thomas Dissent, *supra* note 139, 47 Fed. Reg. 39,808.

146. *Id.*, 47 Fed. Reg. 39,808-809. Commissioner Thomas expressed her concern that equity offerings under Rule 415 intensify the risk of harm to the capital markets occasioned by the streamlined registration process (e.g., Form S-3) and the SEC's selective review process. *Id.*

147. *Id.*, 47 Fed. Reg. 39,804-805.

debt offerings.[148] Thomas cautioned that "experiments for the sake of experimentation are to be avoided."[149] Finally, Thomas encouraged the SEC to monitor the rule during the effective temporary period so that timely modifications may be adopted as problems arise.[150] She observed that the longer a temporary rule remains in place, the more difficult it becomes to make necessary modifications.[151]

Notwithstanding Commissioner Thomas' concerns and those of several commentators regarding the possible adverse impact on the capital market system of equity shelf offerings under Rule 415, the SEC extended the effective period of the rule until December 31, 1983.[152]

D. *The Issuers' Response*

Between the announcement of the adoption of temporary Rule 415 in March 1982, and September 15, 1982, 1290 registration statements and 139 post-effective amendments were filed with the SEC pursuant to the rule.[153] Approximately 60 percent were offerings regarding dividend or interest reinvestment plans or employee benefit plans, under Rule 415(a)(1)(iii).[154] About 26 percent comprised primary offerings under Rule 415(a)(1)(i) (the two year intent to offer and sell provision).[155] Of these, the delayed debt offerings far exceeded all offerings in per offering amount.[156] Only about 20 percent of all "two year" offerings were equity offerings. Significantly, less than one percent (.38 percent) of the registration statements were primary at the mar-

148. *Id.*, 47 Fed. Reg. 39,803-804.
149. *Id.*, 47 Fed. Reg. 39,804.
150. *Id.*
151. *Id.*
152. SEC Sec. Act Release No. 33-6423 (Sept. 2, 1982), 47 Fed. Reg. 39,799.
153. E. Greene & L. Spencer, *Outline: Rule 415, Delayed or Continuous Offering and Sale of Securities* 1 (1982) (available in Pace University School of Law Library).
154. *Id.* at 2.
155. *Id.*
156. As of August 25, 1982, 63 delayed debt offerings totalling $14,665,920,000 were registered — averaging $232,792,380 per offering. *See* SEC Sec. Act Release No. 33-6423 (Sept. 10, 1982), 47 Fed. Reg. 39,799. A recent surge in the offerings of debt securities "off the shelf" has been attributed to declining interest rates. In October 1982, close to 70% of offerings of debt securities were from shelf registrations. *See* Bonner, *New Issues Pour Off the Shelf*, N.Y. Times, Oct. 18, 1982, at D1, col. 3.

ket equity offerings under the controversial Rule 415(a)(3).[157]

V. Hypothesis

Rule 415 essentially codifies prior SEC practice for shelf registrations. The rule can be regarded as procedural since it does not affect the registrant's ability to use any particular registration form and it does not change the disclosure requirements imposed by the forms, except for the undertakings the registrant is required to furnish by Item 512(a) of Regulation S-K.[158] The simplified shelf registration procedure afforded by Rule 415 has spawned shelf registrations.[159] Going beyond prior SEC practice, the rule has expanded permissible shelf registrations to include primary at the market offerings of equity securities. This novel method of registering equity securities has been a major subject of concern to the SEC and commentators alike.[160]

One area of concern was the antimanipulative issues that equity shelf offerings implicate.[161] These issues were adressed by the recent proposed Rule 10b-6 amendments which relax the general prohibitions of the Rule, define what constitutes a "dis-

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157. *See* Greene, *supra* note 153, at 2. Aside from the legal reasons which might militate against issuers using Rule 415 to shelf register equity securities, there are numerous business reasons why issuers generally favor using the Rule only for debt securities. *See* Letter, *supra* note 135, at 333-34; Monahan, *supra* note 140, at 6. Downward price pressure on the stock is not uncommon when an issuer publishes a stock filing which increases the float in that stock. Since the timing, size, and method of distribution are known, the pressure is usually only momentary — on the announcement and offering dates. An equity shelf offering gives no such assurances; not knowing when a large block of stock will be sold from the shelf, or the date, underwriter, or timing of future offerings, creates what is known as an "overhang" problem, and intensifies the downward pressure, effectively placing a lid on the stock price. *Id. See also* Ehrbar, *supra* note 140, at 93 ("instant offerings [off the shelf] could permit herds of companies to try to rush through every window in the bond market . . . caus[ing] such fear of a price drop that no one will buy"); *Heavy Traffic on a New SEC Shortcut,* Bus. Wk., May 24, 1982, at 142 (AT&T's announcement of its shelf registration of 10 million shares of common stock may have caused depressed AT&T stock prices for a few days). Notwithstanding these fears, First Boston syndicate department manager, James Davin, recently stated his opinion that issuers and investors alike will begin to like "equity shelves" once they become more common. *See* Monahan, *supra* note 140 at 7.

158. *See supra* notes 72-74 and accompanying text.

159. *See supra* notes 153-57 and accompanying text.

160. *See supra* text accompanying note 83 for issues the SEC sought comment on. *See supra* notes 137-51 for the commentators' response.

161. *See supra* notes 42-44, 57-67, 75-81, 83, 94-95 and accompanying text.

tribution" for purposes of shelf offerings, and clarify when the various actors in a distribution off the shelf will be deemed participants subject to trading restrictions.[162] The no-action interim position advanced by the SEC only protects registrants qualified to use Forms S-2 or S-3. The Form S-1 registrant and broker-dealers associated with it must comply with Rule 10b-6 as it now exists — which means that bidding for or purchasing securities in the same class as those being distributed off the shelf is prohibited from the commencement of the distribution until the distribution is complete, or where appropriate, until the broker-dealer's participation is complete.[163]

Hence, although the proposed Rule 10b-6 amendments remove a major impediment to a registrant's decision to register equity securities for the shelf, there are arguably numerous registrants who are presently discouraged from utilizing this offering technique. In addition to presently discouraged Form S-1 registrants, there may be many S-2 and S-3 registrants which do not feel sufficiently illumined by the SEC's efforts to define and clarify the operation of Rule 10b-6 vis à vis Rule 415.[164]

If and when the S-1 registrants receive guidance (or, even better, an interpretative no-action letter) from the SEC, and if and when the proposed Rule 10b-6 amendments are adopted, might there be more of an incentive for registrants to register equity securities on the shelf? Since a major legal obstacle which has been acknowledged by the SIA will be removed,[165] the logical response would appear to be in the affirmative. Further, the amendments may catalyze the institutionalization of the securities markets; by relaxing the trading restrictions of Rule 10b-6, are not the amendments "encouraging greater concentration of underwriters, market-makers, and other financial intermediaries . . . thereby furthering the trend toward institutionalization"?[166] Until the proposed amendments are adopted or at least until their application to equity shelf offerings is more certain, the present utility of Rule 415 to shelf register equity securities is

162. *See supra* notes 96-126 and accompanying text.

163. *See supra* notes 84-95 and accompanying text.

164. The SIA letter requesting guidance in this area is illustrative. *See supra* notes 125-30 and accompanying text.

165. *See supra* notes 127-32 and accompanying text.

166. *See supra* text accompanying note 147.

arguably not representative of its utility over the long haul.

Another factor which assuredly affects the present utility of registering equity securities for the shelf under Rule 415 is the current attraction of debt offerings. The recent decline in interest rates has prompted a surge in both shelf registration statements of debt securities and offerings of debt securities off the shelf.[167] When the rates stabilize or increase, the incentive to shelf register equity securities will probably increase.[168]

For these reasons, and due generally to the novelty of shelf registering equity securities, the assertion that Rule 415 is currently under-utilized regarding future equity offerings seems inescapable.[169] Two alternate observations come to mind: (1) perhaps the need for this capital-raising technique is not great enough to counterbalance the risk of permanent injury to the capital markets, as predicted by Commissioner Thomas and others;[170] or (2) if shelf offerings of equity securities do, in fact, increase in time, the statistics gathered from March 1982 until December 1983 may not be representative of the problems which may arise; indeed such statistics may even be misleading to the SEC and to the securities industry in general. Hence, at the end of the temporary effective period of Rule 415, statistics which support a finding that equity shelf offerings do not promote institutionalization, or otherwise threaten harm to the securities industry, will hardly be reliable if such offerings are only temporarily under-utilized. If, relying upon such statistics, the SEC adopts Rule 415 without modifying the provisions permitting shelf registration of equity securities, a future increase in using the rule to shelf register equity securities may trigger major and permanent injury to the securities markets.

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167. *See supra* note 156.

168. *But see supra* note 157 for some business reasons issuers generally disfavor using Rule 415 for equity securities.

169. Business reasons (e.g., the "overhang" problem) militating against "equity shelves" may abate once those shelves become more common. *See supra* note 157. Perhaps when the current attraction to debt offerings subsides, issuers will risk possible momentary price drops and shelf-register equity securities. *See supra* note 156 and accompanying text.

170. *See supra* notes 133-52 and accompanying text.

VI. Conclusion

The temporary effective period of Rule 415 may not be long enough to adequately assess the effect equity shelf offerings will have on the American securities markets. Due to present uncertainty regarding the application of Rule 10b-6 to equity shelf offerings, the current decline in interest rates, and the novelty of shelf registrations of equity securities, registrants are probably not using this method to introduce their securities at the market with the degree of frequency attainable upon the resolution of these current impediments.

Upon the expiration of the effective period and during its evaluation of the experimental period of Rule 415, the SEC must diligently and exhaustively study not only what has occurred during the trial period, but what is likely to arise in the future. Commissioner Thomas' dissent aptly presents the points of inquiry.

Mary C. Neary

APPENDIX I

§230.415 Delayed or continuous offering and sale of securities

(a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, provided that—

(1) The registration statement pertains to:

(i) Securities in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration statement by or on behalf of the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary; or

(ii) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary; or

(iii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant; or

(iv) Securities which are to be issued upon the exercise of outstanding options, warrants or rights; or

(v) Securities which are to be issued upon conversion of other outstanding securities; or

(vi) Securities which are pledged as collateral; or

(vii) Securities which are registered Form S-12 [17 CFR 239.19] or Form C-3 [17 CFR 239.5].

(2) The registrant furnishes the undertakings required by Item 512(a) of Regulation S-K.

(3) In the case of a registration statement pertaining to an at the market offering of equity securities by or on behalf of the registrant: (i) The registrant must meet the registrant requirements and the applicable transaction requirements of Form S-3 (17 CFR 239.13); (ii) where voting stock is registered, the amount of securities registered for such purposes must not exceed 10% of the aggregate market value of the registrant's outstanding voting stock held by non-affiliates of the registrant (calculated as of a date within 60 days prior to the date of filing); (iii) the securities must be sold through an underwriter or underwriters, acting as principal(s) or as agent(s) for the registrant; and (iv) the underwriter or underwriters must be named

in the prospectus which is part of the registration statement. As used in this paragraph, the term "at the market offering" means an offering of securities into an existing trading market for outstanding shares of the same class at other than a fixed price on or through the facilities of a national securities exchange or to or through a market maker otherwise than on an exchange.

(b) This section shall not apply to any registration statement pertaining to securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investment trust under the Investment Company Act of 1940 or any registration statement filed by any foreign government or political subdivision thereof.

(c) This section shall be effective until December 10, 1982.*

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* In SEC Sec. Act Release No. 33-6423 (Sept. 2, 1982), 47 Fed. Reg. 39,799, date changed to December 31, 1983.

APPENDIX II

§ 240.10b-6 Prohibitions against trading by persons interested in a distribution.

(a) It shall constitute a "manipulative or deceptive device or contrivance" as used in section 10(b) of the act for any person,

(1) Who is an underwriter or prospective underwriter in a particular distribution of securities, or

(2) Who is the issuer or other person on whose behalf such a distribution is being made, or

(3) Who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution: *Provided, however,* That this section shall not prohibit:

(i) Transactions in connection with the distribution effected otherwise than on a securities exchange with the issuer or other person or persons on whose behalf such distribution is being made or among underwriters, prospective underwriters, or other persons who have agreed to participate or are participating in such distribution;

(ii) Unsolicited privately negotiated purchases, each involving a substantial amount of such security, effected neither on a securities exchange nor from or through a broker or dealer; or

(iii) Purchases by an issuer effected more than forty days after the commencement of the distribution for the purpose of satisfying a sinking fund or similar obligation to which it is subject; or

(iv) Odd-lot transactions (and the off-setting round-lot transactions hereinafter referred to) by a person registered as an odd-lot dealer in such security on a national securities exchange who offsets such odd-lot transactions in such security by round-lot transactions as promptly as possible; or

(v) Brokerage transactions not involving solicitation of the

customer's order; or

(vi) Offers to sell or the solicitation of offers to buy the securities being distributed (including securities or rights acquired in stabilizing) or securities or rights offered as principal by the person making such offer to sell or solicitation; or

(vii) The exercise of any right or conversion privilege to acquire any security; or

(viii) Stabilizing transactions not in violation of § 240.10b-7; or

(ix) Bids for or purchases of rights not in violation of § 240.10b-8; or

(x) Transactions effected on a national securities exchange in accordance with the provisions of a plan filed by such exchange under § 240.10b-2(d) and declared effective by the Commission; or

(xi) Purchases or bids by an underwriter, prospective underwriter or dealer otherwise than on a securities exchange, 10 or more business days prior to the proposed commencement of such distribution (or 5 or more business days in the case of unsolicited purchases), if none of such purchases or bids are for the purpose of creating actual, or apparent, active trading in or raising the price of such security. In the case of securities offered pursuant to an effective registration statement under the Securities Act of 1933 the distribution shall not be deemed to commence for purposes of this subdivision prior to the effective date of the registration statement.

(b) The distribution of a security (1) which is immediately exchangeable for or convertible into another security, or (2) which entitles the holder thereof immediately to acquire another security, shall be deemed to include a distribution of such other security within the meaning of this section.

(c) The following shall be applicable for the purposes of this section.

(1) The term "underwriter" means a person who has agreed with an issuer or other person on whose behalf a distribution is to be made (i) to purchase securities for distribution or (ii) to distribute securities for or on behalf of such issuer or other person or (iii) to manage or supervise a distribution of securities for or on behalf or such issuer or other person.

(2) The term "prospective underwriter" means a person (i)

who has agreed to submit or has submitted a bid to become an underwriter of securities as to which the issuer, or other person on whose behalf the distribution is to be made, has issued a public invitation for bids, or (ii) who has reached an understanding, with the issuer or other person on whose behalf a distribution is to be made, that he will become an underwriter, whether or not the terms and conditions of the underwriting have been agreed upon.

(3) A person shall be deemed to have completed his participation in a particular distribution as follows: (i) The issuer or other person on whose behalf such distribution is being made, when such distribution is completed; (ii) an underwriter, when he has distributed his participation, including all other securities of the same class acquired in connection with the distribution, and any stabilization arrangements and trading restrictions with respect to such distribution to which he is a party have been terminated; (iii) any other person, when he has distributed his participation. A person, including an underwriter or dealer, shall be deemed for purposes of this subparagraph to have distributed securities acquired by him for investment.

(4) The term "plan" shall include any bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, stock ownership, stock appreciation, stock option, dividend reinvestment or similar plan for employees or shareholders of an issuer or its subsidiaries.

(d) The provisions of this section shall not apply to any of the following securities:

(1) "Exempted securities" as defined in section 3(a)(12) of the act, including securities issued, or guaranteed both as to principal and interest, by the International Bank for Reconstruction and Development; or

(2) Face-amount certificates issued by a face-amount certificate company, or redeemable securities issued by an open-end management company or a unit investment trust. Any terms used in paragraph (d)(2) of this section which are defined in the Investment Company Act of 1940 shall have the meanings specified in such act.

(e) The provisions of this section shall not apply to any distribution of securities by an issuer or a subsidiary of an issuer to employees or shareholders of the issuer or its subsidiaries, or to

a trustee or other person acquiring such securities for the account of such employees or shareholders pursuant to a plan, as that term is defined in paragraph (c)(4) of this section.

(f) If the provisions of this section would apply to bids for or purchases of any equity security pursuant to an issuer tender offer, as that term is defined in Rule 13e-4(a)(2) under the Act, or to a tender offer subject to section 14(d) of the act and the rules applicable thereto, solely because the issuer has outstanding securities which are immediately convertible into, or exchangeable or exercisable for, the security for which the tender offer is to be made, such provisions shall not apply to such bids and purchases if such bids and purchases are subject to and made in accordance with the provisions of Rule 13e-4 or section 14(d) and the rules applicable thereto.

(g) This section shall not prohibit any transaction or transactions if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally or on specified terms and conditions, as not constituting a manipulative or deceptive device or contrivance comprehended within the purpose of this section.