

## Corporate & Financial Weekly Digest

Posted at 12:44 PM on March 11, 2011 by [Robert L. Kohl](#)

### SEC Division of Corporation Finance Issues Nine New C&DIs

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On March 4, the Securities and Exchange Commission's Division of Corporation Finance issued Compliance and Disclosure Interpretations (C&DIs) with respect to several topics under the Securities Act of 1933 and the Securities Exchange Act of 1934.

[C&DI 139.32](#) states that if an Exchange Act reporting company is conducting an exempt offering pursuant to Regulation S and Rule 144A under the Securities Act and includes material non-public information in the offering memorandum, it should not file the complete offering memorandum under Item 7.01 of Form 8-K to satisfy its obligations under Regulation FD. Because the public filing of the offering memorandum is likely to be inconsistent with the offering exemptions, the company could file a Form 8-K that sets forth only the material non-public information included in the offering memorandum along with no more information about the offering than is permitted to be disclosed in accordance with Securities Act Rule 135c.

[C&DI 132.18](#) states that for purposes of Securities Act Rule 144(d)(i), when an investor purchases in a private placement mandatorily exchangeable notes that can be exchanged for a fixed number of shares of common stock of a company that is an affiliate of the issuer, there is deemed to be a concurrent private placement of the affiliated company's common stock, and the investor's holding period for such common stock is deemed to begin on the date of the purchase of the notes. But, if the notes include a provision allowing for the exchange to occur at the investor's option and the investor exercises that option, the Rule 144(d)(i) holding period for such common stock would begin on the date of the exchange. However, if the notes contain such an investor option but the exchange occurs for a reason other than the investor's decision, the Rule 144(d)(i) holding period will be deemed to have begun on the date the investor first purchased the notes.

[C&DI 136.09](#) clarifies that for purposes of Securities Act Rule 144(h), a Form 144 should be transmitted to the SEC on the same day as the placing of a sale order or the execution of the sale.

[C&DI 228.03](#) states that a primary shelf registration-eligible issuer that is not a Well-Known Seasoned Issuer may not register for resale unspecified common shares and then, following the effectiveness of the registration statement, specify the common shares registered. The transaction

under which the common shares were initially sold by the company must be completed and the registration statement must identify the initial transaction.

[C&DI 232.13](#) clarifies that the Securities Act Rule 433(f)(2)(i) exemption from filing a Free Writing Prospectus is only available with respect to materials that have been previously filed with the SEC. Materials that were furnished with the SEC (e.g. under Items 2.02 or 7.01 of Form 8-K) do not satisfy this requirement and accordingly Rule 433(f)(2)(i) is unavailable with respect to such filings.

[C&DI 232.14](#) states that an issuer is not required to file (1) a package of written materials provided in connection with an interview of an officer with unaffiliated and uncompensated media or (2) the media publication containing such interview as a Free Writing Prospectus under Securities Act Rule 433(f)(2)(i) if the written materials provided by such officer include only information that has previously been filed with the SEC.

[C&DI 116.08](#) states that if certain director information under Regulation S-K Items 401(a) and 401(e) is omitted from a proxy statement as permitted by Instruction 3 of Item 401(a), such information is nevertheless required to be included in Part III of an issuer's Form 10-K that otherwise incorporates information from the proxy statement.

[C&DI 116.09](#) states that when a director is appointed to a company's board by the holders of a class of preferred stock, the company must provide the same business qualification disclosure required under Item 401(e) of Regulation S-K about that director as it would other directors nominated by the board or provide Item 401(e) disclosure for such director that is provided by such preferred stockholders.

[C&DI 118.07](#) states that although Instruction 2 to Item 402(b) of Regulation S-K provides that Compensation Discussion and Analysis should cover actions taken with regard to executive compensation after the issuer's last fiscal year end, such requirement only applies to information that could affect the understanding of a named executive officer's compensation in the issuer's last fiscal year.

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