

Appendix VI-1

ARTICLE 5. RULES RELATING TO UNDERWRITERS AND NON-PUBLIC OFFERINGS UNDER SECTIONS 2(11) AND 4(2) OF THE ACT

Preliminary Note:

Certain basic principles are essential to an understanding of the requirement of registration in the Act:

1. If any person utilizes the jurisdictional means to sell any non-exempt security to any other person, the security must be registered unless a statutory exemption can be found for the transaction.
2. Two exemptions should be dealt with at the outset. They are the so-called “intrastate” exemptions of a local nature, and the small offering exemption provided by Section 3(b) and the regulations of the Commission thereunder. The principal regulation adopted under Section 3(b) is Regulation A. Any offering (including a public offering) by any person of non-exempt securities which meets all of the requirements of Section 3(a)(11) or of Regulation A may be made without registration of the securities. (Two other exemptions in Section 3, namely, Sections 3(a)(9) and 3(a)(10), are designed primarily for transactions in which one security is exchanged for another).

3. The four remaining exemptions applicable to transactions in non-exempt securities are found in Section 4. Three of these are clearly not available to anyone acting as an “underwriter” of securities. (The fourth, found in Section 4(4), protects only those who act as brokers under certain limited circumstances.) An understanding of the term “underwriter” is therefore important to anyone who wishes to find out whether or not an exemption from registration is available for his sale of securities.

The term “underwriter” is broadly defined in Section 2(11). Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an “underwriter” under that section. Not so clear or so well understood is the fact that individual investors who are not professionals in the securities business may be “underwriters” within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. Instances of this latter sort are covered by the rules in this Article 5. These rules set forth objective tests to determine when such persons are “underwriters” and when they are not.

The keys to such determination are the terms “restricted securities,” defined in Rule 161 and “distribution,” defined in Rule 162. Persons are underwriters when they participate in or

are connected with a “distribution” of “restricted securities” (Rule 163).

Under Rule 162, a “distribution” means any public offering of securities excepting only a limited kind of public offering of the securities of a company which regularly provides public disclosure of its affairs by filing reports with the Commission under Sections 13 or 15(d) of the Securities Exchange Act of 1934. The names of such companies are available on the “Rule 164 Qualified List.”

An example of a “restricted security” would be a security sold directly by its issuer to a non-public group of investors. Under Rule 161 (provided certain tests stated therein are met) a “restricted security” of this type ceases to be such 5 years after it was first issued. Another example of a “restricted security” would be a security sold by a person in a control relationship with the issuer to a non-public group of investors; a “restricted security” of this type ceases to be such 5 years after it was privately sold by the control person. Rule 160 defines the phrase “directly or indirectly controlling” an issuer to exclude certain persons and provides illustrative examples of situations in which a control relationship is not deemed to exist.

If one of the investors in the examples given in the previous paragraph should resell his “restricted securities” in a

transaction not involving a public offering, he would not be making a “distribution.” Therefore, he would not be an “underwriter.” The securities, however, would remain “restricted securities” until the 5 year period had elapsed, and the purchaser of those securities in the non-public offering would be an “underwriter” if he should resell them prior to that time in a “distribution.”

Once securities have, as a result of a public offering, entered the regular trading market, they are no longer “restricted securities.” Thus, assume that a holder of restricted securities of a company on the “Rule 164 Qualified List” sells such securities to the public in a transaction which meets the requirements of Rule 162(b) and is therefore not a “distribution.” The securities cease to be “restricted securities.” Assume further that a portion of the securities so sold are purchased by a person not in a control relationship with the issuer and are later resold by him. His resale transaction may come within the definition of “distribution.” However, the securities he is selling are not “restricted securities”. Under these circumstances, he is not an underwriter. If he is not a dealer in securities, his transaction is exempt from registration under Section 4(1) of the Act; if he is a dealer in securities, his transaction would normally be exempt from registration under Section 4(3) of the Act.

Four of the rules in this Article 5 (Rules 180, 181, 182 and 183) define the phrase “transaction by an issuer not involving any public offering” in certain limited situations. Generally, whether or not an offering is public will depend on the facts and circumstances of the particular transaction. See S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1952) and Securities Act Release No. 4552 (1962).^{1/}

The rules in this Article 5 (the effect of which has been briefly outlined) are designed to implement the Act’s fundamental aim: “To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent fraud in the sale thereof . . .” Pursuant to that objective, the rules operate (1) to inhibit the creation of public markets in securities whose issuers have not disclosed material information about themselves in appropriate filings with the Commission, and (2) to permit the sale in ordinary trading transactions of reasonable quantities of the securities of issuers which are making such disclosures.

These rules in no way prevent holders of restricted securities from reselling them in bona fide “private placements”. Such placements can be made without registration even though the issuer has made no public disclosure of its affairs, provided they are not of such character as to convert an original private offering into a public

^{1/} The Study recommends that this release be revised and brought into consonance with the new rules.

offering. To assure that this does not occur, careful precautions by the issuer of the securities will ordinarily be essential. Although such assurance cannot be obtained merely by the use of an appropriate legend on stock certificates or other instruments evidencing securities originally sold in a “private placement”, a legend may serve as a very useful policing device. When the securities are subsequently transferred in private transactions and therefore remain restricted securities (as defined in Rule 161) the use of the legend on the certificates helps not only to prevent possible violation of the Act but also to alert the buyer to the restricted character of the securities he has acquired. It may thus assist in the prevention of fraud.

Absent a legend on the securities, the issuer may be unable, under applicable state law, to prevent a transfer thereof which would be inconsistent with exemption.

Accordingly, issuers of securities are urged to stamp or print on the face of certificates or other instruments evidencing restricted securities a conspicuous legend referring to the fact that the securities have not been registered under the Securities Act of 1933 and may be offered or sold only if registered under the provisions of that Act or if an exemption from registration is available. (Legends in general use frequently require an opinion of counsel satisfactory to the issuer as a condition precedent to an offer or sale. If the restrictions on transfer of the securities are contained in a written agreement, the appropriate legend may

consist of a statement that no transfer will be valid unless made in accordance with such agreement). Issuers are likewise urged to maintain such legend on the securities until they cease to be “restricted securities.” The Commission will regard the presence or absence of such a legend upon certificates or other instruments evidencing restricted securities as a significant indication as to whether or not the circumstances surrounding an offering are consistent with exemption under Section 4(2) of the Act.

Rule 160. Partial definition of “person directly or indirectly controlling” in Section 2(11).

(a) The phrase “person directly or indirectly controlling . . .” as used in Section 2(11) of the Act, when the issuer is a corporation, shall be deemed not to include a person who

- (1) is neither an executive officer nor a director of such corporation,
- (2) does not perform the functions of an executive officer or director of such corporation,
- (3) is not a person owning beneficially, or possessing voting rights respecting, securities representing more than 10% of the voting power of such corporation,
- (4) is neither father, mother, child, brother, sister or unseparated spouse of any individual referred to in (1), (2) or (3) above,

(5) is not a creditor of such corporation whose consent is presently required, or may be required under circumstances within his control, before changes in the management of the corporation, or other corporate transactions (apart from payment of dividends, increase in or extension of indebtedness, or the like) may take place.

(b) For the purposes of this rule, the term “executive officer” means the president, secretary, treasurer, any vice president in charge of a principal business function (such as sales, administration, or finance) and any other officer who performs similar policy-making functions for the registrant.

(c) As used in (a)(3) above, the term “person” shall include (1) an individual, (2) his spouse or minor children, (3) any relative of such individual or of his spouse who has the same home as such individual, (4) any trust or estate in which such individual, his spouse, any of his or his spouse’s minor children, and any relative of such individual or of his spouse who has the same home as such individual, collectively have a substantial beneficial interest or as to which any of the foregoing serves as trustee, executor, or in a similar fiduciary capacity, and (5) any corporation or other organization controlled by such individual, his

spouse, any minor child of such individual or of his spouse, or any relative of such individual or of his spouse who has the same home as such individual.

(d) In computing the number of outstanding voting securities of any class held by a person and the total number of all outstanding voting securities of such class, the following shall be included: (1) outstanding securities of the class, (2) all securities of the class into which other securities beneficially owned by such person are convertible or may (after the passage of time or upon the happening of any event) be convertible, and (3) all securities of the class which such person has any call, option, or other contract right to acquire.

Note: This rule is not intended to imply that persons who do not come within its terms are for that reason deemed to be “in control” of an issuer. Thus, depending upon the circumstances of the individual case, a person who is a director or who owns more than 10% of the voting securities of a corporation may nevertheless not be “in control” of such corporation. Examples of such possible circumstances are provided by the following illustrative cases:

Example one: Dr. A, a distinguished chemist, is “vice president in charge of research” of the X Company, a producer of chemicals. The extent of Dr. A’s participation in the management of the business as distinguished from the scientific side of the company’s affairs is

limited to advising the other officers and occasionally the directors as to the commercial feasibility of possible new products and processes. Dr. A is not a director of the company nor is he related by blood or marriage to any of its directors or officers. His holdings of the X's voting securities (when computed in accordance with this rule) do not reach the 10% level referred to therein.

Although Dr. A may be an executive officer of the X Chemical Company, he is not a person "directly or indirectly controlling" the company for purposes of Section 2(11) of the Securities Act. Since his role in the company is purely scientific, his influence over its management and policies is insufficient to be deemed controlling for Securities Act purposes. The result might be different if X were primarily a research organization as, for example, if it were primarily in the business of doing chemical research for others on a fee basis.

Example two: Messrs. C and D are directors of Z Company. They represent a group which owns about 20% of Z's voting securities. Another group associated with the Z family and with Z Company's executives owns 55% of Z's voting securities. Messrs. C and D have no allies on Z's 11-man board of directors. They owe their directorship solely to the fact that Z's certificate of incorporation provides for cumulative voting and they have been unable to get the board to accept their proposals.

C and D are not in control of Z.

Example three: Mr. E is the publisher of the leading daily newspaper in the city of K. Although journalism is his principal occupation, Mr. E also spends much time and energy in civic work and is regarded as one of the city's prominent citizens. At the request of its president, Mr. E has become a director of the K Machinery Company, one of the largest employers in K. The management of the machinery company wanted Mr. E on the board because it valued his demonstrated business judgment and knowledge of the community. Mr. E is unrelated to the officers or principal stockholders of the machinery company. He holds approximately 2% of the company's outstanding common stock. He spends relatively little time on the company's affairs apart from attendance at directors' meetings. He is not an officer of the company.

On these facts, Mr. E is not a controlling person of K machinery company.

Example four: Mr. and Mrs. E and their children sold their family-owned business to the X Corporation several years ago. As a result of that transaction the E family acquired 25% of X's stock. Mr. E thereupon retired from business to devote himself to various charitable endeavors in which he had long been interested. Neither he nor any member of his family serves as either an officer or a director of X Corporation. X Corporation's officers occasionally consult Mr. E with respect to the affairs of the segment of the corporation's business formerly operated by Mr. E. The Corporation's voting securities are held as follows:

Mr. E and his family	25%
Public investors	22%
The X family, which consists of the descendants of the founder of X Corporation and whose members act as a unit	<u>53%</u>
Total	100%

It is reasonably clear that the X Corporation is controlled by the X family and that in spite of its substantial holdings the E family has no dominion over the enterprise. Accordingly, the members of the E family are not deemed to be controlling persons of X Corporation for '33 Act purposes.

Example five: Mr. F, the founder of F, Inc. was its president for many years. He still owns 25% of F, Inc.'s voting securities. Some years ago however, Mr. G, an investment banker and a group of his associates accumulated about 45% of F, Inc.'s stock. The balance of the stock is widely distributed. As a result of a proxy contest between Mr. F and his friends, on the one hand, and the G group on the other, the founder and his closest associations were removed from the board and from their executive positions with the company. The present board consists of Mr. G, his nominees and of two representatives of institutional investors who hold substantial blocks of the company's securities and were allied with Mr. G in the proxy contest.

Mr. F has ceased to be a controlling person of F, Inc.

Rule 161. Definition of “Restricted Security”

(a) A “restricted” security” means any security acquired directly or indirectly from its issuer, or from any person in a control relationship with its issuer, in a transaction or chain of transactions none of which was a public offering or other public disposition.

(b) Shares issued as a result of a stock dividend on, stock split-up of or other recapitalization affecting outstanding restricted securities shall be deemed to be restricted securities and to have been such for a similar period of time.

(c) If a restricted security has been such for a period of at least 5 years during the last 4 of which its issuer has had annual gross revenues from the conduct of its business in the ordinary course amounting to at least \$250,000, it shall cease to be a restricted security. Such 5-year period shall be deemed to begin upon any acquisition of a restricted security from a person in a control relationship with its issuer, whether or not the security was a restricted security in the hands of such person.

(d) The term “control relationship” as used herein means the relationship with an issuer of any person directly or indirectly controlling or controlled by or under direct or indirect common control with the issuer.

Rule 162. General Definition of “Distribution” in Section 2(11)

(a) For purposes of this Rule 162, the term “offeror” shall mean the person who offers a security, together with: (i) his spouse and minor children, (ii) any relative of such person or of his spouse who has the same home as such person, (iii) any trust or estate in which such person, his spouse, any of his or his spouse’s minor children, and any relative of such person or of his spouse who has the same home as such person, collectively have a substantial beneficial interest or as to which any of the foregoing serves as trustee, executor or in a similar fiduciary capacity, and (iv) any corporation or other organization controlled by such person, his spouse, any minor child of such person or of his spouse, or any relative of such person or of his spouse who has the same home as such person.

(b) The term “distribution” in Section 2(11) of the Act means any public offering of a security excepting only a transaction which meets all of the following requirements:

(1) Issuer on Rule 164 Qualified List.

At the time of the transaction, the issuer of the security is listed on the Commission’s Rule 164 Qualified List.

(2) Holding period for restricted securities. If the security is a restricted security, it has been held by the offeror for the period, and in accordance with the provisions, specified in part (c) of this Rule 162.

(3) Limitations on the Transaction. The offering is made through a broker acting as agent for the offeror and

(A) The broker does no more than execute an order or orders to sell as broker and receives in the case of a security listed on the New York Stock Exchange or other non-exempt national securities exchange no more than the applicable minimum commission and, in the case of a security not listed on any such exchange, no more than the minimum commission that would have been applicable had the security been listed on the New York Stock Exchange.

(B) The offeror makes no payment in connection with the execution of the transaction to any other person.

(C) The offeror neither solicits nor arranges for the solicitation of orders to buy in anticipation of or in connection with the transaction.

(D) The broker neither solicits nor arranges for the solicitation of customers' orders to buy in anticipation of or in connection with the transaction.

The foregoing shall not preclude inquiries by the broker of other bona fide brokers or dealers as to their interest in the security, nor shall it preclude the publications by the broker of bid and offer quotations for the security in an inter-dealer quotation service, provided (i) that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the broker's own account, and (ii) the broker has published bona fide bid and offer quotations for the security in an inter-dealer quotation service on at least 7 of the 10 consecutive business days before his receipt of the offeror's order.

(E) The amount involved in the transaction is not substantial in relation to the number of shares or units of the security outstanding and the aggregate volume of trading in the security. Without limiting the generality of the foregoing, an amount shall not be deemed substantial for purposes of this paragraph if it involves a sale or series of sales of the security which, together with all other sales of securities of the same class by or on behalf of the same offeror with the preceding six months (excepting only sales of the security in non-public offerings)

will not exceed the following: (i) if the security is traded only otherwise than on a securities exchange, approximately one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions; or (ii) if the security is admitted to trading on a securities exchange the lesser of (aa) one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (bb) the largest aggregate reported volume of trading on securities exchanges during any one week within the four calendar weeks preceding the receipt of such order.

(c) The required holding period for restricted securities under paragraph (2) of part (b) of this Rule shall be determined in accordance with the following principles:

(1) General Rule. The restricted securities shall have been beneficially owned by the offeror for at least one year prior to the transaction. If purchased by the offeror, the full purchase price of such securities shall have been paid at least one year prior to the transaction. During a period of one year prior to the transaction, the offeror shall not have purchased or agreed to purchase any other restricted securities of the same issuer, whether or not of the same class as the securities offered by him;

provided, however that this limitation does not apply to stock purchased on exercise of an option which meets the requirements of either Section 422, Section 423 or Section 424 of the Internal Revenue Code.

Shares acquired directly from the issuer by reason of a stock dividend, stock split-up or other recapitalization shall, for the purposes of this part (c), be deemed to have been held under the same conditions and for the same period of time as the changed or split shares or the shares on which the dividend was paid. Shares acquired on complete or partial liquidation of a partnership shall be deemed to have been purchased on the date of such liquidation.

Shares acquired by offeror directly from the issuer as an installment payment of the purchase price of assets sold to the issuer at least one year prior to such acquisition shall, for purposes of this part (c), be deemed to have been purchased at the time of such sale if, at the time of such sale, the issuer was committed to issue such shares subject only to conditions not involving the payment of any money or property by any person.

(2) Securities Acquired in Certain Business combinations. Where the offeror acquired the restricted securities for a consideration consisting primarily of an interest in a bona fide going business which has had, in the ordinary course of its business, gross revenues of not less than \$250,000 during the immediately preceding twelve calendar months, then the

holding requirement shall be deemed satisfied if the period during which the offeror owned such interest, combined with the period during which he has owned the restricted security, totals at least one year. For purposes of the preceding sentence, any part or parts of such interest acquired by the offeror within one year prior to his acquisition of the restricted securities shall be treated separately, and the holding requirement as to an equivalent proportion of the restricted securities shall be deemed satisfied one year after the acquisition of each such part.

(3) Securities Acquired by Reason of Death, Gift or Termination of a Bona Fide Trust.

(a) Where the offeror acquired the restricted security from a person other than its issuer by reason of death, or inter-vivos gift, or distribution to beneficiaries on termination of a bona fide trust, the holding requirement shall be deemed satisfied if the period during which the offeror has owned the security, combined with the period during which the decedent, donor or trustee, as the case may be, owned the security, totals at least one year, and if, during a period of one year prior to the transaction, the offeror has neither purchased nor agreed to purchase any other restricted securities of the same issuer, whether or not of the same class as the securities offered by him.

(b) Where the offeror acquired the restricted securities from a person directly or indirectly controlling or controlled by or under direct or indirect common control with the issuer of such securities by reason of death, inter-vivos gift, or distribution to beneficiaries on termination of a bona fide trust, the holding requirement shall not apply if the securities were not restricted securities in the hands of such person.

(4) Pledged securities.

(a) Where the offeror is a bona fide pledgee of the restricted securities, the holding requirement shall be deemed satisfied if the period during which the pledgee has held the securities in pledge subsequent to the loan for which the pledge was received, combined with the period during which the pledgor owned the restricted securities prior to the pledge, totals at least one year, and if, during a period of one year prior to the offer, the pledgee has neither accepted in pledge nor agreed to accept in pledge from the same pledgor, any other restricted securities of the same issuer, whether or not of the same class as the securities offered by him.

(b) Where the offeror is a bona fide pledgee of the restricted securities and where the pledgor of the securities at the time the pledge was made directly or indirectly controlled, was controlled by, or was under common control with, the issuer of such securities, the holding requirement shall not apply if the securities were not restricted securities in the hands of the pledgor.

(c) Where the offeror has acquired the restricted securities in a non-public transaction from a pledgee thereof by reason of default on the loan for which the pledge was received, the holding requirement shall be deemed satisfied if the period during which the offeror has owned the securities, combined with the periods during which the pledgee held the securities in pledge and the pledgor owned the securities prior to the pledge, totals at least one year, and if, during a period of one year prior to the transaction, neither the offeror nor the pledgee has purchased or agreed to purchase any other restricted securities of the same issuer, whether or not of the same class as the securities offered by him.

(5) Securities Acquired by Conversion of Other Restricted Securities.

Where the offeror acquired the restricted securities directly from the issuer for a consideration consisting solely of other restricted securities of the same issuer surrendered for conversion, the holding requirement shall be deemed satisfied if the period during which the offeror owned the securities so surrendered for conversion, combined with the period during which he has owned the securities issued on conversion, totals at least one year, and if during a period of one year prior to the transaction the offeror has neither purchased nor agreed to purchase any other restricted securities of the same issuer, whether or not of the same class as the securities offered by him.

Rule 163. Certain Persons Deemed to be “Underwriters”

The phrase “person who . . . offers or sells for an issuer in connection with the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking” in Section 2(11) shall include (but not be limited to) any person who disposes of a restricted security (as defined in Rule 161) in a distribution (as defined in Rule 162).

Rule 164. Rule 164 Qualified List

The Commission shall maintain a list to be known as the Rule 164 Qualified List, in accordance with this rule.

(a) Subject to paragraphs (b), (c) and (d) below, the Rule 164 Qualified List shall include (1) all issuers of any security registered on a national securities exchange pursuant to Section 12(b) of the Securities Exchange Act, (2) all issuers of any security as to which a registration statement filed with the Commission pursuant to Section 12(g) of the Securities Exchange Act has been effective for a period of six months, or such shorter period as the Commission may determine as to a particular issuer, and (3) all issuers required to file reports with the Commission pursuant to Section 15(d) of the Securities Exchange Act.

(b) The Rule 164 Qualified List shall include only these issuers referred to in paragraph (a) above which are required by the Commission's rules to file annual reports on one of the following forms: 10-K, 12-K, U5-S and N1-R.

(c) The Commission may at any time enter an order temporarily barring from the Rule 164 Qualified List an issuer of a security as to which registration statement filed pursuant to Section 12(g) of the Securities Exchange Act has become effective, (1) if it has reason to believe that such registration statement contains any untrue statement of a material fact or

omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (2) if it believes such order otherwise necessary or appropriate for the protection of investors.

(d) The Commission may at any time enter an order temporarily removing an issuer from the Rule 164 Qualified List (1) if it has reason to believe that the issuer has failed to file a report required to be filed pursuant to the Securities Exchange Act on or before the due date thereof or any extended filing date; or (2) if the issuer is subject to a proceeding under Sections 8(b) or 8(d) of the Act or Section 15(c)(4) of the Securities Exchange Act or any of the rules under Section 3(b) of the Act relating to the suspension of exemptions thereunder; or (3) if the Commission believes such order otherwise necessary or appropriate for the protection of investors.

(e) Upon the entry of an order under paragraphs (c) or (d) of this rule, the Commission will promptly give notice to the issuer (i) that such order has been entered, together with a brief statement of the reason for the entry of the order, and (ii) that the Commission, upon receipt of a written request within 30 days after the entry of such order, will, within 20 days after receipt of such request, set the matter down for hearing at a place to be designated by the Commission. If no hearing is requested and none is ordered by the Commission,

the order shall become permanent on the thirtieth day after its entry and shall remain in effect unless and until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of opportunity for such hearing, either vacate the order or make the order permanent. All notices required by this rule shall be given to the issuer by personal service, registered or certified mail, or confirmed telegraphic notice at the office of the issuer set forth in the issuer's filings with the Commission.

Rule 165. Same as present Rule 140.

Rule 166. Same as present Rule 141.

Rule 167. Same as present Rule 142.

Rule 168. Same as present Rule 143.

Rule 169. Definition of Certain Terms Used in Section 2(11) in Relation to Certain Business Combinations

The terms "has purchased," "offers or sells for," "participates," and "participation" in Section 2(11) shall not be deemed to apply to the following persons, as respects their activities in submitting to the vote of the security holders of a corporation a plan or agreement of statutory merger or consolidation or a proposal for the

transfer of assets of such corporation to another person:

- (a) such corporation;
- (b) the officers and directors of such corporation;
- (c) any person or organization retained or employed by such corporation to assist in the solicitation of proxies in connection with such submission; and
- (d) any person who merely transmits proxy soliciting material or performs ministerial or clerical duties in connection with such solicitation or to a corporation or its officers and directors as respects their activities in recommending to security holders of such corporation the acceptance of an offer of exchange of securities made to such security holders by another corporation.

Rule 180. Effect of Transactions not Constituting “Distributions” Under Rule 162 on Applicability of the Exemption Contained in Section 4(2) of the Act

Resales of securities by persons other than the issuer thereof in public offerings which, by reason of the provisions of Rule 162(b)(1), (2) and (3), do not constitute “distributions”, shall not be deemed to affect the availability of the exemption contained in Section 4(2) of the Act for the previous sale of such securities by the issuer, if such exemption is otherwise available.

Rule 181. Definition of “Not Involving Any Public Offering” in Section 4(2) of the Act in Connection with the Acquisition by the Issuer of a Bona Fide Going Business

(a) A transaction by an issuer shall be deemed a transaction “not involving any public offering”, as that phrase is used in Section 4(2) of the Act, if it consists of an offer and sale of securities made solely in connection with the acquisition by the issuer of a bona fide going business, to not more than 25 offerees who are holders of interests in such business, whether the acquisition takes the form of a voluntary exchange of securities, a statutory merger or consolidation, or a purchase of assets of such business, unless a reoffering of such securities by one or more of such original offerees shall cause the entire transaction to involve a public offering.

(b) For purposes of this rule 181, an “offeree” shall include (1) an individual, (2) his spouse and minor children, (3) any trust or estate in which such individual, his spouse, and any of his or his spouse’s minor children, collectively have a substantial beneficial interest or as to which any of the foregoing serves as trustee, executor, or in a similar fiduciary capacity, (4) any partnership substantially all of the partnership interests in which are held by such individual, his spouse and minor children of such individual or of his spouse, and (5) any corporation or

other organization substantially all of the shares of which are held beneficially by such individual, his spouse and minor children of such individual or of his spouse.

Note: This rule is not intended to be exclusive. Depending upon the circumstances of the individual case, a transaction by an issuer of the type referred to in the rule in which securities are offered or sold to more than 25 persons may be a transaction “not involving any public offering”. Issuers of securities should be aware of the fact that they bear the burden of proving that the exemption provided by Section 4(2) applies to any such transaction.

Rule 182. Same as present Rule 152.

Rule 183. Same as present Rule 156.