

§ 228.509

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transactions, syndicate short covering transactions, penalty bids, or any other transaction that affects the offered security's price. Describe the nature of the transactions clearly and explain how the transactions affect the offered security's price. Identify the exchange or other market on which these transactions may occur. If true, disclose that the underwriter may discontinue these transactions at any time;

(2) If the stabilizing began before the effective date of the registration statement, disclose the amount of securities bought, the prices at which they were bought, and the period within which they were bought. If you use § 230.430A of this chapter, the final prospectus must contain information on the stabilizing transactions that took place before the public offering price was set; and

(3) If you are making a warrant or rights offering of securities to existing security holders and the securities not purchased by existing security holders are to be reoffered to the public, disclose the following information in the reoffer prospectus:

(i) The amount of securities bought in stabilization activities during the offering period and the price or range of prices at which the securities were bought;

(ii) The amount of the offered securities subscribed for during the offering period;

(iii) The amount of the offered securities purchased by the underwriter during the offering period;

(iv) The amount of the offered securities sold by the underwriter during the offering period and the price or range of prices at which the securities were sold; and

(v) The amount of the offered securities that will be reoffered to the public and the offering price.

[57 FR 36449, Aug. 13, 1992, as amended at 58 FR 19605, Apr. 15, 1993; 62 FR 543, Jan. 3, 1997; 62 FR 11323, Mar. 12, 1997; 63 FR 6380, Feb. 6, 1998]

**§ 228.509 (Item 509) Interest of Named Experts and Counsel.**

If an "expert" or "counsel" was hired on a contingent basis, will receive a direct or indirect interest in the small

business issuer or was a promoter, underwriter, voting trustee, director, officer, or employee, of the small business issuer, describe the contingent basis, interest, or connection.

(a) *Expert*—is a person who is named as preparing or certifying all or part of the small business issuer's registration statement or a report or valuation for use in connection with the registration statement.

(b) *Counsel*—is counsel named in the prospectus as having given an opinion on the validity of the securities being registered or upon other legal matters concerning the registration or offering of the securities.

*Instruction to Item 509:* 1. The small business issuer does not need to disclose the interest of an expert (other than an accountant) or counsel if their interest (including the fair market value of all securities of the small business issuer received and to be received, or subject to options, warrants or rights received or to be received) does not exceed \$50,000.

**§ 228.510 (Item 510) Disclosure of Commission Position on Indemnification for Securities Act Liabilities.**

Describe the indemnification provisions for directors, officers and controlling persons of the small business issuer against liability under the Securities Act. This includes any provision in the underwriting agreement which indemnifies the underwriter or its controlling persons against such liabilities where a director, officer or controlling person of the small business issuer is such an underwriter or controlling person or a member of any firm which is such an underwriter. In addition, provide the undertaking in the first sentence of Item 512(e).

**§ 228.511 (Item 511) Other Expenses of Issuance and Distribution.**

(a) Give an itemized statement of all expenses of the offering, other than underwriting discounts and commissions. If any of the securities are registered for sale by security holders, state how much of the expenses the security holders will pay.

(1) The itemized list should generally include registration fees, federal taxes, state taxes and fees, trustees' and transfer agents' fees, costs of printing

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and engraving, legal, accounting, and engineering fees and any listing fees.

(2) Include as a separate item any premium paid by the small business issuer or any selling security holder on any policy to insure or indemnify directors or officers against any liabilities they may incur in the registration, offering, or sale of these securities.

(b) [Reserved]

*Instruction to Item 511:* 1. If the amounts of any items are not known, give estimates but identify them as such.

### § 228.512 (Item 512) Undertakings.

Include each of the following undertakings that apply to the offering.

(a) *Rule 415 Offering.* If the small business issuer is registering securities under Rule 415 of the Securities Act (§230.415 of this chapter), that the small business issuer will:

(1) File, during any period in which it offers or sells securities, a post-effective amendment to this registration statement to:

(i) Include any prospectus required by section 10(a)(3) of the Securities Act;

(ii) Reflect in the prospectus any facts or events which, individually or together, represent a fundamental change in the information in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) (§230.424(b) of this chapter) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement; and

(iii) Include any additional or changed material information on the plan of distribution.

NOTE: Small business issuers do not need to give the statements in paragraphs (a)(1)(i) and (a)(1)(ii) of this Item if the registration statement is on Form S-3 or S-8 (§§239.13 or 239.16b of this chapter), and the information

required in a post-effective amendment is incorporated by reference from periodic reports filed by the small business issuer under the Exchange Act.

(2) For determining liability under the Securities Act, treat each post-effective amendment as a new registration statement of the securities offered, and the offering of the securities at that time to be the initial bona fide offering.

(3) File a post-effective amendment to remove from registration any of the securities that remain unsold at the end of the offering.

(b) *Warrants and rights offerings.* If the small business issuer will offer the securities to existing security holders under warrants or rights and the small business issuer will reoffer to the public any securities not taken by security holders, with any modifications that suit the particular case—The small business issuer will supplement the prospectus, after the end of the subscription period, to include the results of the subscription offer, the transactions by the underwriters during the subscription period, the amount of unsubscribed securities that the underwriters will purchase and the terms of any later reoffering. If the underwriters make any public offering of the securities on terms different from those on the cover page of the prospectus, the small business issuer will file a post-effective amendment to state the terms of such offering.

(c) *Competitive bids.* If the small business issuer is offering securities at competitive bidding, with modifications to suit the particular case, the small business issuer will:

(1) Use its best efforts to distribute before the opening of bids, to prospective bidders, underwriters, and dealers, a reasonable number of copies of a prospectus that meet the requirements of section 10(a) of the Securities Act, and relating to the securities offered at competitive bidding, as contained in the registration statement, together with any supplements; and

(2) File an amendment to the registration statement reflecting the results of bidding, the terms of the reoffering and related matters where required by the applicable form, not later than the first use, authorized by the