

§ 230.160

issuer authorizes or approves the information or communication before its provision or use. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.

2. Paragraph (a) of this section shall not affect in any respect the determination of whether any person other than an issuer is a "seller" for purposes of section 12(a)(2) of the Act.

(b) *Definition of by means of for purposes of section 12(a)(2) of the Act.* (1) For purposes of section 12(a)(2) of the Act only, an offering participant other than the issuer shall not be considered to offer or sell securities that are the subject of a registration statement by means of a free writing prospectus as to a purchaser unless one or more of the following circumstances shall exist:

(i) The offering participant used or referred to the free writing prospectus in offering or selling the securities to the purchaser;

(ii) The offering participant offered or sold securities to the purchaser and participated in planning for the use of the free writing prospectus by one or more other offering participants and such free writing prospectus was used or referred to in offering or selling securities to the purchaser by one or more of such other offering participants; or

(iii) The offering participant was required to file the free writing prospectus pursuant to the conditions to use in Rule 433 (§230.433).

(2) For purposes of section 12(a)(2) of the Act only, a person will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed the free writing prospectus with the Commission pursuant to Rule 433.

[70 FR 44805, Aug. 3, 2005, as amended at 74 FR 4584, Jan. 26, 2009]

§ 230.160 Registered investment company exemption from Section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

A prospectus for an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et*

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seq.) that is sent or given for the sole purpose of permitting a communication not to be deemed a prospectus under section 2(a)(10)(a) of the Act (15 U.S.C. 77b(a)(10)(a)) shall be exempt from the requirements of section 101(c)(1) of the Electronic Signatures in Global and National Commerce Act.

[65 FR 47284, Aug. 2, 2000]

§ 230.161 Amendments to rules and regulations governing exemptions.

The rules and regulations governing the exemption of securities under section 3(b) of the Act, as in effect at the time the securities are first bona fide offered to the public in conformity therewith, shall continue to govern the exemption of such securities notwithstanding the subsequent amendment of such rules and regulations. This section shall not apply, however, to any new offering of such securities by an issuer or underwriter after the effective date of any such amendment, nor shall it apply to any offering after January 1, 1959, of securities by an issuer or underwriter pursuant to Regulation D or pursuant to Regulation A as in effect at any time prior to July 23, 1956.

[23 FR 4454, June 20, 1958]

§ 230.162 Submission of tenders in registered exchange offers.

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), an offeror may solicit tenders of securities in an exchange offer before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules, and either:

(1) The exchange offer is subject to §240.13e-4 or §§240.14d-1 through 14d-11 of this chapter; or

(2) The offeror provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of §240.13e-4 or §§240.14d-1 through 14d-11 of this chapter; and if a material change occurs in the information published, sent or given to security holders, the offeror complies with the provisions of §240.13e-4(e)(3) or §240.14d-4(b) and (d)