

CHAPTER 45 SECURITIES REGULATION

ANSWERS TO PROBLEM CASES

1. No, the LLC interests were not securities, because they did not meet the third requirement of the *Howey* investment contract test. The Tschettters exercised considerable management control over the business, and therefore, they had no expectation of profits solely from the efforts of persons other than themselves.

A dissenting judge would have found the LLC interests to be securities on the grounds that the undeniably significant efforts that determined the success of the LLC were those of Country Hospitality Corporation. The Tschettters's actions were in the nature of somebody on the outside beating on the window trying to get in. Instead of making management decisions, they were left, due to the agreement with Country Hospitality, with only the ability to write letters complaining about how the investment was being managed. Further, a substantial portion of the actions by Tschettters were taken after the restaurant had undergone significant financial losses and its ability to survive under any circumstances was at best, very questionable. *Tschetter v. Berven*, 621 N.W.2d 372 (S. Dak. S. Ct. 2001).

2. Yes. The *Howey* test applies. All three *Howey* elements are met, making the LLC interests investment contracts. There is an investment of money because each investor made monetary investments, totaling \$190 million for all the investors. There was a common enterprise, because investments made pursuant to the "Directions to Purchase" were for the purchase of loans from Mortgages Limited. There was an expectation of profits solely from the efforts of the promoters, because profits were to come from efforts of the managers of Radical Bunny LLC. Investors did not exercise any control over the loans; only the LLC's managers had the authority to manage the investments. *SEC v. Radical Bunny LLC*, 2013 U.S. App. LEXIS 13953 (9th Cir. 2013).
3. AltaVerba may release any information about itself more than 30 days prior to filing the registration statement provided it does not reference the prospective offering of securities. Therefore, releasing historical information 72 days before the filing day is OK. AltaVerba may not release forward-looking information less than 30 days prior to the filing date, because it is not a public issuer. Therefore, 23 days before the filing day, it may not release forward-looking information about its business and financial results. Also, while a free-writing prospectus may contain any information when used less than 30 days prior to the filing date, it may be used only by a well-known, seasoned issuer, not a nonpublic issuer like AltaVerba. Oral offers are permitted after the filing date. Therefore, Streel and the VP of Finance may speak on the phone with the Fidelity Magellan manager. During the waiting period, AltaVerba may conduct a road show if the attendees can ask unlimited questions, every attendee has a copy of the preliminary prospectus, the road show is live to live audience, or if the road show meets the requirements of a free-writing prospectus. After the effective date, AltaVerba can use a free writing prospectus containing any information that does not conflict with the registration statement, if the recipients have a final prospectus or have received an email with a hyperlink to the final prospectus. Therefore, AltaVerba's providing historical and forward-looking information in the free-writing prospectus should be OK.
4. \$2 billion is not too much for Rule 506, because Rule 506 does not limit the dollar amount of securities offered. The number of purchasers is not a problem, because Rule 506 is limited to 35 unaccredited purchasers and an unlimited number of accredited purchasers. The investor

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Lingsheng Yao

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