U.S. Securities and Exchange Commission

Securities Act Forms

Last Update: August 17, 2017

These Compliance and Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of Securities Act Forms. Some of these C&DIs were first published in prior Division publications and have been revised in some cases. The bracketed date following each C&DI is the latest date of publication or revision.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Section 101. Securities Act Forms Generally

Question 101.01

Question: May a registrant obtain a waiver from form eligibility requirements?

Answer: Requests for waivers of form eligibility requirements are granted only under very limited circumstances and are handled solely by the Division's Office of Chief Counsel. [Feb. 27, 2009]

Question 101.02

Question: In many registered public offerings, registrants choose to include text and/or artwork inside the front and back cover pages. Are graphic presentations permitted in the prospectus?

Answer: Yes. Registrants should refer to Rule 304 of Regulation S-T. In addition, when including graphic presentations in the prospectus, registrants should be sure that:

- The graphic presentations accurately represent their current business — for example, it would not be appropriate to depict products that do not exist or are not the registrant's products, to present only the most favorable aspects of a registrant's business, to include testimonials or statistical data that are taken out of context, or to identify specific customers that are not representative of the registrant's overall customer base;
- The text in the graphic presentations adheres to plain English principles — for example, it would not be appropriate to use industry jargon or terms that are unfamiliar to the average investor or to include extensive narrative text that repeats information already contained in the summary or business sections; and
- The graphic presentations are not confusing, do not obscure other prospectus disclosure, or give undue prominence to selected portions of the registrant's business or operations. [Feb. 27, 2009]

Question 101.03

Question: Immediately after an issuer files a Securities Act registration statement, it appoints a new principal financial officer. Is the new principal financial officer required to sign any amendments to the registration statement in his or her capacity as principal financial officer?

Answer: Yes. This would be the case even if the individual had been employed as principal financial officer for only one week. [Feb. 27, 2009]

Question 101.04

Question: What financial information may an Emerging Growth Company omit from its draft and publicly filed registration statements?

Answer: Under Section 71003 of the FAST Act, an Emerging Growth Company may omit from its filed registration statements annual and interim financial information that "relates to a historical period that the issuer reasonably believes will not be required to be included…at the time of the contemplated offering." Interim financial information that will be included in a longer historical period relates to that period. Accordingly, interim financial information that will be included in a historical period that the issuer reasonably believes will be required to be included at the time of the contemplated offering may not be omitted from its filed registration statements. However, under staff policy, an Emerging Growth Company may omit from its draft registration statements interim financial information that it reasonably believes it will not be required to present separately at the time of the contemplated offering.

For example, consider a calendar year-end Emerging Growth Company that submits a draft registration statement in November 2017 and reasonably believes it will commence its offering in April 2018 when annual financial information for 2017 will be required. This issuer may omit from its draft registration statements its 2015 annual financial information and interim financial information related to 2016 and 2017. Assuming that this issuer were to first publicly file in April 2018 when its annual information for 2017 is required, it would not need to separately prepare or present interim information for 2016 and 2017. If this issuer were to file publicly in January 2018, it may omit its 2015 annual financial information, but it must include its 2016 and 2017 interim financial information in that January filing because that interim information relates to historical periods that will be included at the time of the public offering. [Aug. 17, 2017]

Question 101.05

Question: What financial information may an issuer that is not an Emerging Growth Company omit from its draft and publicly filed registration statements?

Answer: The relief provided by Section 71003 of the FAST Act is not available to issuers other than Emerging Growth Companies. However, under staff policy, an issuer that is not an Emerging Growth Company may omit from its draft registration statements interim and annual financial information that it reasonably believes it will not be required to present separately at the time it files its registration statement publicly. The issuer may not omit any required financial information from its filed registration statements.

For example, consider a calendar year-end issuer that is not an Emerging Growth Company that submits a draft registration statement in November 2017 and reasonably believes it will first publicly file in April 2018 when annual financial information for 2017 will be required. This issuer may omit from its draft registration statements its 2014 annual financial information

and interim financial information related to 2016 and 2017 because this information would not be required at the time of its first public filing in April 2018. [Aug. 17, 2017]

Section 102. F-Series Forms Generally

Question 102.01

Question: The F-Series registration statements require the signature of the registrant's authorized U.S. representative. Who is qualified to sign as an authorized U.S. representative?

Answer: The term "authorized U.S. representative" is discussed in Securities Act Release No. 6360 (Nov. 20, 1981). The release states that "the Commission generally accepts the signature of an individual who is an employee of the registrant or an affiliate, or who is the registrant's counsel or underwriter in the United States for the offering, because the signature clearly identifies an individual that is connected with the offering as subject to the liability provisions of the Securities Act. By similar reasoning, the Commission generally has refused to accept the appointment of a newly formed or shell corporation in the United States as the authorized representative."

In the case of registrants with dual governing boards, the registration statement should be signed by whichever board has the authority to bind the company and performs functions most similar to those of a U.S. company's board of directors. In some cases, this may require the signatures of the members of both governing boards. The registration statement disclosure requirements relating to the registrant's board of directors generally would apply to members of both governing boards. [Feb. 27, 2009]

Question 102.02

Question: Item 2 of Forms F-7, F-8, F-9 and F-80 and Item 3 of Form F-10 specify certain legends that should be included, to the extent applicable, on the outside front cover page of the prospectus. May a Canadian issuer substitute plain English versions of these legends? If so, is there required language that should be used in the plain English versions?

Answer: Issuers eligible to use these forms may substitute the following plain English versions of the first four legends required by these items of the forms, in place of the versions currently set forth in the forms:

"We are permitted to prepare this prospectus in accordance with Canadian disclosure requirements, which are different from those of the United States. We prepare our financial statements in accordance with Canadian generally accepted accounting practices, and they may be subject to Canadian auditing and auditor independence standards. They may not be comparable to financial statements of United States companies."

"Owning the [securities] may subject you to tax consequences both in the United States and Canada. This prospectus or any applicable prospectus supplement may not describe these tax consequences fully. You should read the tax discussion in any applicable prospectus supplement."

"Your ability to enforce civil liabilities under the United States federal securities laws may be affected adversely because we are incorporated in [province/Canada], [some/all] of our officers and directors and [some/all] of the experts named in this prospectus are Canadian residents, and [many/all] of our assets are located in Canada."

"Neither the Securities and Exchange Commission nor any state securities regulator has approved or disapproved these securities, or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense."

In addition, the legend required by Item 2 of Form F-9 and Item 3 of Form F-10 for prospectuses used before the effective date of the registration statement may be presented in the following plain English version:

"The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted." [Feb. 27, 2009]

Question 102.03

Question: When a foreign private issuer guarantees securities of a subsidiary that is not a foreign private issuer, may the parent company-guarantor and subsidiary-issuer of guaranteed securities use an F- series registration statement to register an offering of the securities under the Securities Act and use Form 20-F with respect to any reporting obligations?

Answer: Yes, if certain requirements are satisfied. Rule 3-10 of Regulation S-X permits modified reporting by subsidiary issuers of guaranteed securities and subsidiary guarantors. Separate financial statements need not be filed for subsidiaries if any of Rules 3-10(b) through 3-10(d) apply and all applicable conditions of the rule relied upon are met in the parent company's filings. If the parent and issuer are eligible to present condensed consolidated financial information in the parent company's filings and the parent qualifies as a foreign private issuer, the parent company and its subsidiaries may use an F-series registration statement to register an offering of guarantees and guaranteed securities that are issued by a domestic or foreign subsidiary that does not qualify as a foreign private issuer and use Form 20-F with respect to any reporting obligations associated with such registration statement. The same would apply if the parent and subsidiaries are eligible to present narrative disclosure in lieu of condensed consolidating financial information under Rule 3-10. [December 8, 2016]

Question 102.04

Question: When a parent foreign private issuer issues securities that are guaranteed or co-issued by one or more subsidiaries that do not themselves qualify as a foreign private issuer, may the parent company-issuer and subsidiary-guarantor(s) or co-issuers use an F- series registration statement to register an offering of the securities under the Securities Act and use Form 20-F with respect to any reporting obligations?

Answer: Yes, if certain requirements are satisfied. In this situation, separate financial statements need not be filed for subsidiaries if either Rule 3-10(e) or 3-10(f) applies and all applicable conditions of the rule relied upon are met in the parent company's filings. As described in the last two sentences of Securities Act Forms CDI 102.03 / Exchange Act Forms CDI 110.03, when a parent foreign private issuer issues securities guaranteed or co-issued by one or more subsidiaries that do not themselves qualify as a foreign private issuer, the parent and subsidiary may use an F- series registration statement when they are eligible to present condensed consolidating financial information or narrative disclosure. [December 8, 2016]

Section 103. Form F-1

Question 103.01

Question: May a foreign issuer register only part of a worldwide equity or debt offering with the Commission?

Answer: Yes. Foreign issuers may register only a portion of a worldwide equity or debt offering so long as the amount registered with the Commission covers the securities sold in the U.S. and any possible flow-back of securities into the U.S. [Feb. 27, 2009]

Question 103.02

Question: May a foreign issuer use a U.K.-style or other foreign-style document as a prospectus in the U.S.?

Answer: Yes. A foreign issuer may use a U.K-style or other foreign-style document as a prospectus in the U.S., so long as the information required under the Commission's rules is included in the document. Some modification of the presentation and placement of information may be necessary in order to reflect the Commission's "plain English" requirements, such as the requirements for presentation of risk factors. [Feb. 27, 2009]

Question 103.03

Question: Must a foreign issuer include a risk factor addressing possible illiquidity of its offered securities in the U.S. when making its U.S. equity initial public offering if the issuer has an existing, established trading market for its equity securities outside the U.S.?

Answer: No. Although risk factors disclosure is generally required for all initial public offerings, a foreign issuer that is making its U.S. equity initial public offering and has an existing and established trading market for its equity securities outside the U.S. generally is not required to include a risk factor addressing possible illiquidity of the offered securities in the U.S. [Feb. 27, 2009]

Section 104. Form F-4 [Reserved]

Section 105. Form F-6

Question 105.01

Question: May Form F-6 be used for the registration of installment receipts?

Answer: Yes. Form F-6 may be used to register installment receipts even though the form, by its terms, is not available in cases where the underlying shares are not withdrawable. [Feb. 27, 2009]

Question 105.02

Question: May Form F-6 be used to register American Depositary Shares ("ADS") when local government law prohibits the withdrawal and holding of underlying shares by U.S. and other foreign persons?

Answer: Yes. Form F-6 may be used to register ADS even though local government law prohibits the withdrawal and holding of underlying shares by U.S. and other foreign persons. For example, certificates of participation issued by a master trust established with respect to the securities of

Mexican companies should be registered on Form F-6, even though the form, by its terms, is not available in cases where the underlying shares are not withdrawable. [Feb. 27, 2009]

Question 105.03

Question: Does a change in the depositary of an American Depositary Receipt ("ADR") program require the filing of a new registration statement on Form F-6?

Answer: Yes. A new registration statement on Form F-6 must be filed if the depositary for an ADR program changes. [Feb. 27, 2009]

Question 105.04

Question: When establishing a company-sponsored ADR program, what steps must the depositary and company take regarding an existing unsponsored ADR program for the company's securities?

Answer: When a registration statement on Form F-6 is filed in connection with the establishment of a company-sponsored ADR program, the depositary and the company will be required to provide a representation that arrangements are in place to terminate any existing unsponsored ADR programs for the company's securities in a prompt and orderly fashion. Written confirmation from the depositaries of the unsponsored programs as to their concurrence with such arrangements may be required. [Feb. 27, 2009]

Section 106. Form F-7

Question 106.01

Question: May the U.S./Canadian Multijurisdictional Disclosure System ("MJDS"), and in particular, Form F-7, be used for rights offers exempt from Canadian registration requirements, notwithstanding the general prohibition on the use of the system for exempt offerings?

Answer: Yes. The MJDS, and in particular, Form F-7, may be used for rights offers exempt from Canadian registration requirements, notwithstanding the general prohibition on the use of the system for exempt offerings. The offering circular and any other material used to make the offers constitute the "prospectus" for purposes of Form F-7. [Feb. 27, 2009]

Section 107. Form F-8

Question 107.01

Question: Under what circumstances may a Form F-8 filer modify the required legend regarding the securities not being approved or disapproved by the Commission?

Answer: The required legend with respect to the securities not being approved or disapproved by the Commission may be modified to add a reference to the fact that state regulators have not approved or disapproved such securities. [Feb. 27, 2009]

Question 107.02

Question: May Form F-8 or Form F-80 be used for a statutory share exchange, which only requires the vote of the shareholders of the company

being acquired?

Answer: Yes. Although Forms F-8 and F-80 refer to business combinations requiring the vote of the shareholders of the companies that are the parties to the combination, either form may be used in the case of a statutory share exchange, which only requires the vote of the shareholders of the company being acquired. [Feb. 27, 2009]

Section 108. Form F-9

Question 108.01

Question: May Form F-9 be used to register Form F-9-eligible securities that are convertible after one year into another class of the issuer's securities?

Answer: Yes. Form F-9-eligible securities which are convertible after one year into another class of the issuer's securities may be registered on Form F-9, but the securities into which they are convertible also must be F-9-eligible securities, independent of the convertible securities. [Feb. 27, 2009]

Question 108.02

Question: When an issuer files a registration statement on Form F-9 or Form F-10 in connection with a shelf offering in Canada and updates that shelf registration in Canada, must the issuer also file a post-effective amendment to its registration statement on Form F-9 or Form F-10?

Answer: Yes. When updating its shelf registration in Canada, an issuer must also file a post-effective amendment to its registration statement on Form F-9 or Form F-10 relating to its shelf registration in Canada. [Feb. 27, 2009]

Section 109. Form F-10

Question 109.01

Question: Item 2 of Form F-10 requires that financial statements included in the home jurisdiction document must be reconciled to U.S. GAAP as required by Item 18 of Form 20-F. Does this reconciliation requirement apply to all financial statements filed under cover of Form F-10, including interim financial statements?

Answer: The reconciliation requirement in Item 2 of Form F-10 applies to the issuer's annual financial statements and year-to-date financial statements (including comparative periods) and does not require that any other interim financial statements be reconciled to U.S. GAAP. This interpretation is consistent with the reconciliation requirements of Form F-1. Reconciliation of annual and year-to-date financial statements is required regardless of whether they are included directly or incorporated by reference. However, the reconciliation requirement does not apply to year-to-date financial statements included under cover of Form F-10 if Item 8.A.5 of Form 20-F would not require a Form F-1 registrant to provide interim financial statements for the same period. [Feb. 27, 2009]

Question 109.02

Question: May an issuer use Form F-10 if it satisfies the eligibility requirements of the form at the time of filing, but will not satisfy such requirements upon the closing of the offering?

Answer: Yes. Under Securities Act Rule 401(a), form eligibility is established at the time of the initial filing. [Feb. 27, 2009]

Question 109.03

Question: May Form F-10 be used for secondary offerings?

Answer: Yes. [Feb. 27, 2009]

Question 109.04

Question: May a Canadian issuer use Form F-10 for a dividend reinvestment plan ("DRIP") even though there is a Canadian exemption from registration that is available for DRIPs?

Answer: Yes. If a MJDS-eligible issuer wants to use Form F-10 for a DRIP and is willing to voluntarily file a registration statement in Canada despite the Canadian registration exemption that is available for DRIPs, the issuer may file on Form F-10. In doing so, however, the Canadian issuer is, in effect, waiving the benefit of this exemption and should consider itself subject to Canadian requirements applicable to offerings generally (including, if applicable, the requirement that the prospectus be circulated to Canadian shareholders). [Feb. 27, 2009]

Question 109.05

Question: May an issuer use Form F-10 to register a rights offering that is not eligible for registration on Form F-7, even though the issuer is exempt from the requirement to file a prospectus with the Canadian authorities?

Answer: Yes. The Commission revised General Instruction I.J of Form F-10 in Securities Act Release No. 6902A (Mar. 23, 1992) to clarify that a Form F-10 registrant may file a rights offering circular prepared pursuant to Canadian requirements in lieu of a prospectus. In such case, the registrant must include in the Form F-10 a reconciliation to U.S. GAAP for those financial statements that are required to accompany a rights offering circular filed with the Canadian authorities. [Feb. 27, 2009]

Question 109.06

Question: May MJDS-eligible registrants use Form F-10 to register so-called "A/B" or "Exxon Capital" exchange offers?

Answer: Yes. MJDS-eligible registrants may use Form F-10 to register so-called "A/B" or "Exxon Capital" exchange offers that would otherwise be eligible for registration on Form F-1 or Form F-4, if appropriate procedures are followed. [Feb. 27, 2009]

Question 109.07

Question: When an issuer files a registration statement on Form F-9 or Form F-10 in connection with a shelf offering in Canada and updates that shelf registration in Canada, must the issuer also file a post-effective amendment to its registration statement on Form F-9 or Form F-10?

Answer: Yes. When updating its shelf registration in Canada, an issuer must also file a post-effective amendment to its registration statement on Form F-9 or Form F-10 relating to its shelf registration in Canada. [Feb. 27, 2009]

Section 110. Form F-80

Question 110.01

Question: May Form F-8 or Form F-80 be used for a statutory share exchange, which only requires the vote of the shareholders of the company being acquired?

Answer: Yes. Although Forms F-8 and F-80 refer to business combinations requiring the vote of the shareholders of the companies that are the parties to the combination, either form may be used in the case of a statutory share exchange, which only requires the vote of the shareholders of the company being acquired. [Feb. 27, 2009]

Section 111. Form F-X [Reserved]

Section 112. Form F-N [Reserved]

Section 113. Form S-1

Question 113.01

Question: If a continuous offering under Securities Act Rule 415 is registered on Form S-1, is a post-effective amendment required to be filed in order to satisfy the requirements of Securities Act Section 10(a)(3), to reflect fundamental changes or to disclose material changes in the plan of distribution?

Answer: Yes. A post-effective amendment is required in these circumstances pursuant to the issuer's Item 512(a) undertakings. Form S-1 does not provide for forward incorporation by reference of Exchange Act reports filed after the effective date of the registration statement. Other changes to the information in the prospectus contained in the registration statement generally may be made by filing a prospectus supplement. [Feb. 27, 2009]

Question 113.02

Question: How should a registrant conducting a continuous offering on Form S-1 update the prospectus to reflect the information in its subsequently filed Exchange Act reports?

Answer: If Form S-1 is used for a continuous offering, the prospectus may have to be revised periodically to reflect new information since, unlike Form S-3, the form does not provide for incorporation by reference of subsequent periodic reports. For example, in a continuous offering on a Form S-1 pursuant to Rule 415(a)(1)(ix), a registrant wants to update the prospectus to include Exchange Act reports filed after the effective date of the Form S-1. Item 512(a)(1) of Regulation S-K requires certain changes, including a Section 10(a)(3) update, to be reflected in a post-effective amendment. Other changes may be made in a prospectus supplement filed pursuant to Rule 424(b). If the registrant files a post-effective amendment, it could incorporate by reference previously filed Exchange Act reports if it satisfied the conditions in Form S-1 allowing incorporation by reference. [Jan. 26, 2009]

Question 113.03

Question: Is a registrant that operates a resort (hotel, golf course and spa) in a service industry or the real estate business? The registrant is unsure whether Form S-1 or Form S-11 would be the appropriate registration statement for an offering.

Answer: A registrant that operates a resort (hotel, golf course and spa) is in a service industry. Accordingly, Form S-1, and not Form S-11, would be appropriate for its offering. [Feb. 27, 2009]

Question 113.04

Question: The ability to incorporate by reference previously filed Exchange Act reports and other materials in Form S-1 is conditioned on the issuer making its incorporated Exchange Act reports and other materials readily accessible on a web site maintained by or for the issuer. May an issuer link to the Commission's EDGAR system to satisfy this requirement?

Answer: An issuer may satisfy this requirement by including on the web site maintained by or for the issuer hyperlinks directly to the issuer's reports or other materials filed on EDGAR. It also may link directly to the issuer's EDGAR filing page. However, linking to the Commission's EDGAR system generally, or to a page where an investor would be required to select the issuer or input the issuer's name, will not satisfy this requirement. [Feb. 27, 2009]

Question 113.05

Question: Form S-1 allows eligible registrants to elect "backwards" incorporation by reference of previously filed Exchange Act reports and other materials. At effectiveness, must the prospectus filed as part of the Form S-1 registration statement identify all previously filed Exchange Act reports and materials that are incorporated by reference?

Answer: Yes. If the registrant elects to incorporate by reference pursuant to General Instruction VII and Item 12 of Form S-1, then it must incorporate by reference, in their entirety, all Exchange Act reports and other materials required by Item 12. If a registrant wants to incorporate by reference an Exchange Act report that the registrant files after the filing date of a Form S-1 or an amendment thereto but prior to effectiveness, the registrant must file a pre-effective amendment to include a specific reference to such report in the prospectus filed as part of the registration statement. [Feb. 27, 2009]

Question 113.06

Question: If the issuer's annual report on Form 10-K and other periodic reports filed since the end of the fiscal year for which the annual report was filed provide only a portion of the information required by any Form S-1 line item requirement, can the issuer incorporate the periodic reports by reference and supplement or update that information with additional information included directly in the Form S-1 in order to satisfy the line item requirements of the form?

Answer: Yes. [Feb. 27, 2009]

Question 113.07

Question: May a registrant filing a Form S-1 include information about a Form S-3 company in its prospectus through incorporation by reference?

Answer: No. This procedure is not authorized by Form S-1 or Rule 411. If the information about the other company is material, it must be set forth in the prospectus in full. [Jan. 26, 2009]

Question 113.08

Question: May a Form S-1 be post-effectively amended at the time of the required Section 10(a)(3) update to incorporate by reference the issuer's new Form 10-K?

Answer: Yes, provided that the post-effective amendment is filed only after the issuer has filed its new Form 10-K and the issuer meets all of the requirements for incorporation by reference into Form S-1 at the time of the post-effective amendment. As Form S-1 does not provide for forward incorporation by reference, a post-effective amendment filed after the issuer files its new Form 10-K would meet the requirements of Form S-1 at the date of filing, and the effective date of the post-effective amendment would be a new effective date of the registration statement for purposes of Securities Act Sections 10(a)(3) and 11. [Feb. 27, 2009]

Section 114. Form S-3 — General

Question 114.01

Question: May an issuer file a new Form S-3 notwithstanding its inability to satisfy General Instruction I.A.3(b) of the form?

Answer: No. However, an issuer can request relief from the timeliness requirements of General Instruction I.A.3(b). Relief is granted only in very limited circumstances. Issuers should contact the Division's Office of Chief Counsel for additional information on how to make such a request. [Feb. 27, 2009]

Question 114.02

Question: At the time of an update of the registration statement under Securities Act Section 10(a)(3), the market value of the registrant's common equity held by non-affiliates does not meet the minimum required by General Instruction I.B.1. May the registrant continue to use Form S-3 to conduct primary offerings pursuant to that instruction?

Answer: No. A registrant must be eligible to use Form S-3 each time it updates the registration statement under Section 10(a)(3). In this case, because the registrant no longer meets the transactional requirements of General Instruction I.B.1, it must amend its registration statement onto the form it is then eligible to use for a primary offering. If the registrant has a class of common equity securities listed and registered on a national securities exchange, it should consider whether it is eligible to use Form S-3 pursuant to General Instruction I.B.6. [Feb. 27, 2009]

Question 114.03

Question: How should the issuer complete the calculation of registration fee table on the face of an automatic shelf registration statement?

Answer: The calculation of registration fee table should list each type of security being registered and either state whether a filing fee is being paid with the filing (in which case the dollar amount of the fee should be set forth, as in the case of an unallocated shelf registration statement today), or indicate "$0" in the filing fee table and state that the filing fee will be paid subsequently in advance or on a pay-as-you-go basis. [Jan. 26, 2009]

Question 114.04

Question: Must a registrant evaluate its eligibility to use Form S-3 at the time it files a Form 10-K?

Answer: Yes. For purposes of Rule 401(b), the updating of a Form S-3 registration statement through the incorporation of a Form 10-K is the equivalent of filing a post-effective amendment to update the registration statement pursuant to Section 10(a)(3). This means that if the registrant is not eligible to use Form S-3 at the time of such updating, it would be required to file a post-effective amendment on whatever other form would be available at the time. [Feb. 27, 2009]

Question 114.05

Question: May an issuer file or use an automatic shelf registration statement on Form S-3 after the issuer has filed its Form 10-K but prior to filing the Part III information that will be incorporated by reference into the Form 10-K?

Answer: Yes. However, issuers are responsible for ensuring that any prospectus used in connection with a registered offering contains the information required to be included therein by Securities Act Section 10(a) and Schedule A. [Jan. 26, 2009]

Question 114.06

Question: If an issuer has a resale registration statement on Form S-3 or Form F-3 that became effective prior to December 1, 2005, may it rely on Rule 430B to use prospectus supplements for the purpose of making material amendments to the plan of distribution or replacing selling security holders due to transfers or adding new selling security holders?

Answer: Yes. An issuer with an effective resale registration statement may rely on Rule 430B and file prospectus supplements pursuant to Rule 424(b) to make material amendments to the plan of distribution or to add or replace selling security holders, provided that in the case of adding or replacing selling security holders, the other conditions in Rule 430B regarding naming selling security holders by prospectus supplement are satisfied. [Feb. 27, 2009]

Question 114.07

Question: May a well-known seasoned issuer file an automatic shelf registration statement while it has a pending confidential treatment request on an exhibit to a periodic or current report?

Answer: Yes. Well-known seasoned issuers are not required to delay filing an automatic shelf registration statement until pending confidential treatment applications are acted upon. However, the well-known seasoned issuer must assure that any prospectus used in an offering contains the information required to be included by Securities Act Section 10(a) and applicable rules thereunder. [Feb. 27, 2009]

Section 115. Form S-3 — General Instructions I.A.1 to I.A.8 — Registrant Requirements

Question 115.01

Question: Will the delinquent filing of a Form 11-K by an issuer's employee benefit plan disqualify the issuer from using Form S-3?

Answer: No. While General Instruction I.A.3 of Form S-3 requires an issuer to have timely filed all periodic reports during the preceding twelve months, the Form 11-K filing obligation is the plan's obligation, not the issuer's.

Hence, a late filing of a Form 11-K is not considered in determining the issuer's eligibility for Form S-3. [Feb. 27, 2009]

Question 115.02

Question: In annual reports for fiscal years ending on or after December 15, 2007 but before December 15, 2009, non-accelerated filers are required to provide management's report on internal control over financial reporting pursuant to Item 308T of Regulation S-K. The report is deemed not to be "filed" for purposes of Section 18 of the Exchange Act, unless the company specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. Does a non-accelerated filer's failure to provide management's report in its Form 10-K under Item 308T(a) affect its form eligibility or the ability to use Rule 144?

Answer: It is the Division's view that the failure to provide this management report renders the annual report materially deficient. As a result, if management did not complete the evaluation and provide the report as required by Item 308T(a), the company would not be timely or current in its Exchange Act reporting. This would result in the company not being eligible to file new Form S-3 or Form S-8 registration statements and the loss of the availability of Rule 144. Because the filing of the Form 10-K constitutes the Section 10(a)(3) update for any effective Forms S-3 or S-8, the company also would be required to suspend any sales under already effective registration statements.

However, if the company subsequently amends its Form 10-K to provide management's report on whether or not internal control is effective, the company can file new Forms S-8 and resume making sales under already effective Forms S-8, and shareholders can avail themselves of Rule 144 (assuming all other conditions to use of the form or rule are satisfied). This would be the case regardless of whether management reached an effective or ineffective conclusion about its internal control. Although amending the Form 10-K to provide management's report may result in the company becoming current, it would remain untimely and would not be eligible to file new Forms S-3. [July 3, 2008]

Question 115.03

Question: An issuer otherwise eligible to use Form S-3 failed to file a current report on Form 8-K fourteen months before the proposed filing of the Form S-3. Is Form S-3 available to the registrant?

Answer: Yes. Form S-3 is available because the condition to have filed all required Exchange Act reports and on a timely basis applies only to reports required to be filed in the preceding twelve months. [Feb. 27, 2009]

Question 115.04

Question: General Instruction I.A.3 to Form S-3 requires that the registrant have timely filed all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement. What reports are covered by this Instruction?

Answer: In determining eligibility for use of Form S-3, the requirement that the registrant has filed in a timely manner all reports required to be filed during the past twelve calendar months refers only to Section 13(a) or 15(d) reports and Section 14(a) and 14(c) materials. [Feb. 27, 2009]

Question 115.05

Question: May a domestic company that succeeds to the reporting obligations of a foreign private issuer, and is otherwise eligible to file a Form S-3, incorporate by reference the predecessor's annual report on Form 20-F to satisfy the disclosure requirements of Form S-3?

Answer: No. Either the issuer would have to include audited financial statements and other disclosures satisfying the requirements of Form S-3 or it could wait until it has filed its first annual report on Form 10-K to incorporate by reference the Form 10-K into the Form S-3. [Feb. 27, 2009]

Question 115.06

Question: General Instruction I.A.3 of Form S-3 requires that the registrant have filed all material required to be filed for a period of at least twelve calendar months immediately preceding the filing of the registration statement. The instruction also requires that the registrant have filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement. How is calendar month calculated?

Answer: For purposes of these eligibility requirements, a calendar month begins on the first day of the month and ends on the last day of that month. Hence, if a registrant were not timely on a Form 10-Q due on September 15, 2008, but was timely thereafter, it would first be eligible to use Form S-3 on October 1, 2009. [Feb. 27, 2009]

Question 115.07

Question: A company failed to furnish an Item 2.02 Form 8-K. As a result, does the company lose its eligibility to file a registration statement on Form S-3?

Answer: General Instruction I.A.3(b) to Form S-3 requires that all reports required to be filed with the Commission during the preceding 12 months have been filed. Because an Item 2.02 Form 8-K is furnished, rather than filed, this failure to furnish does not adversely affect the company's eligibility to use Form S-3. [Feb. 27, 2009]

Question 115.08

Question: What does the reference to "material" in General Instruction I.A.5 of Form S-3 apply to?

Answer: The reference to materiality applies to defaults on indebtedness and on long-term lease rentals. It does not apply to the failure to declare dividends or make sinking fund installments on preferred stock. [Feb. 27, 2009]

Question 115.09

Question: Is the omission to declare a dividend on non-cumulative preferred stock a payment failure disqualifying an issuer from using Form S-3?

Answer: No, because there is no liability to pay the dividend that arises under the terms of the non-cumulative preferred. This omission cannot be equated to a payment default on a debt instrument or capital lease. A declared but unpaid dividend on preferred stock, however, would disqualify

the issuer from using Form S-3, as would the existence of accrued and unpaid dividends on cumulative preferred stock. [Feb. 27, 2009]

Question 115.10

Question: Does a default on a covenant not involving an "installment on indebtedness" disqualify a company from using Form S-3?

Answer: No. A default will be disqualifying only if it involves failure to pay principal or interest on indebtedness and is material to the financial position of the registrant and its subsidiaries, taken as a whole. [Feb. 27, 2009]

Question 115.11

Question: In the event an installment payment on indebtedness has been missed, but the terms of the debt do not define a missed payment as a default until the creditors take some action, can an issuer satisfy General Instruction I.A.5 of Form S-3?

Answer: Yes, if the company makes a determination that there is no default as a legal matter. [Feb. 27, 2009]

Question 115.12

Question: An issuer committed a material default on indebtedness but the holders of the securities subsequently waived the default. Can an issuer satisfy General Instruction I.A.5 of Form S-3?

Answer: No. Regardless of the fact that a disqualifying default is either cured or waived after it occurs, the form may not be used between the date of the default and the audit at the end of the fiscal year in which such material default occurred. [Feb. 27, 2009]

Question 115.13

Question: In the event a prospective default never occurs because the lenders have waived payment in advance of the due date, can an issuer satisfy General Instruction I.A.5 of Form S-3?

Answer: Yes. [Feb. 27, 2009]

Question 115.14

Question: From which date should an issuer measure the twelve-month period in General Instruction I.A.3 to Form S-3?

Answer: The twelve-month period for which a registrant must have been subject to the requirements of Section 12 or 15(d) of the Exchange Act, and filed certain required materials under Section 13, 14 or 15(d) of the Exchange Act, relates to the effective date of the registrant's Securities Act or Exchange Act registration statement that gave rise to the filing obligation. Thus, the date on which the registration statement was initially filed is not taken into consideration in computing the twelve-month period. [Feb. 27, 2009]

Question 115.15

Question: Would an issuer that timely filed its Exchange Act reports during the past twelve months, but was not required to file reports under the

Exchange Act for a portion of that period, be able to satisfy Instruction I.A.3 of Form S-3?

Answer: In order to be eligible to use Form S-3, an issuer must have been subject to the requirements of Exchange Act Section 12 or 15(d) for a period of at least twelve months. An issuer that timely filed its Exchange Act reports during the past twelve months, but was not subject to Section 12 or 15(d) for a portion of that period (and therefore was reporting on a voluntary basis during that portion), would be eligible to use Form S-3 only under the conditions specified in the *Lamar Advertising Co.* no-action letter (Nov. 18, 1996) issued by the Division. [Aug. 14, 2009]

Question 115.16

Question: If a company defaults on indebtedness, which default is material to the company as a whole, or fails to pay a dividend on preferred stock, can the company satisfy the eligibility requirement in Instruction I.A.5 of Form S-3 in the following fiscal year even if the default has not been cured, or the dividends have not been paid?

Answer: Yes, provided that the company has filed a Form 10-K including audited financial statements covering the period in which the material event of default or failure to pay preferred dividends occurred. If, after the end of the fiscal year, the company has a new material event of default or a new failure to pay dividends on preferred stock, then the company would not be eligible to use Form S-3 until the filing of its next Form 10-K. *See* Securities Act Release No. 6331 (Aug. 6, 1981). [June 4, 2010]

Question 115.17

Question: If a company declares bankruptcy and subsequently fails to make interest or principal payments on indebtedness as required pursuant to the terms of the indebtedness, can the company nonetheless satisfy the eligibility requirement in Instruction I.A.5 of Form S-3 since the filing of bankruptcy results in an automatic stay of creditors' rights with respect to the company's indebtedness?

Answer: No. [June 4, 2010]

Section 116. Form S-3 — General Instructions I.B.1 to I.B.6 — Transaction Requirements

Question 116.01

Question: May a registrant use Form S-3 for the registration of securities issued under an employee benefit plan?

Answer: Yes, so long as the sponsoring company, as issuer of the securities, meets all of the requirements for use of the form, including those set forth in General Instruction I.B.1 for primary offerings. The information concerning the plan required by Form S-8 would have to be included in the Form S-3 prospectus. Plan interests, however, may not be registered on Form S-3 because the plan, as issuer, typically will not satisfy Form S-3 eligibility standards. When plan interests are being registered, the plan will be subject to S-1 level disclosure (regardless of whether the sponsoring company registers its securities on Form S-1 or Form S-3), including Section 10(a)(3) updating requirements. [Feb. 27, 2009]

Question 116.02

Question: A registrant meets the registrant requirements for Form S-3, but does not meet the transaction requirements for a primary offering. The registrant has two majority-owned subsidiaries. Would Form S-3 be available for secondary offerings of its securities by the two subsidiaries?

Answer: No. In these circumstances, the offerings of the registrant's securities by its majority-owned subsidiaries would be treated as if they were primary offerings by the registrant, since the subsidiaries are considered alter egos of the registrant. Accordingly, since the registrant is not eligible to use Form S-3 for a primary offering, the offering of the registrant's securities by its subsidiaries likewise may not be registered on Form S-3. [Feb. 27, 2009]

Question 116.03

Question: Is Form S-3 available to an issuer that meets the form's registrant requirements to register offers and sales pursuant to customer stock purchase plans?

Answer: Form S-3 is not available to register offers and sales pursuant to customer stock purchase plans unless the issuer meets the form's registrant requirements as well as the transaction requirements for primary offerings set forth in General Instruction I.B.1 of Form S-3. [Feb. 27, 2009]

Question 116.04

Question: Is Form S-3 available to register shares underlying options whose exercise consideration can be cash or, in the alternative, shares of the same class as those underlying the options?

Answer: Yes. [Feb. 27, 2009]

Question 116.05

Question: In reliance on Securities Act Section 4(2), a merger transaction will not be registered. May resales of earnout shares to be issued in connection with the merger be registered on Form S-3 pursuant to General Instruction I.B.3 after the consummation of the merger, even though the shares have not been earned and are not outstanding at the time the registration statement is filed?

Answer: Yes. [Feb. 27, 2009]

Question 116.06

Question: For purposes of computing the "float" under General Instruction I.B.1, what day should be used in determining the number of shares held by non-affiliates?

Answer: General Instruction I.B.1 to Form S-3 provides, in part, that the form may be used for a primary offering when the aggregate market value of the outstanding voting and non-voting common equity held by non-affiliates of the registrant is $75 million or more. As the instruction indicates, the aggregate market value may be computed by taking the average of the bid and asked prices of such common equity, as of a date within 60 days prior to the date of filing, and multiplying that price by the number of shares of such common equity held by non-affiliates. In making this computation, it is not necessary to calculate the number of shares held by non-affiliates for the same day on which the average price of the stock is determined. For example, the number of shares outstanding on the date of

filing might be used, together with the average price of stock for any day within the 60-day period. [Feb. 27, 2009]

Question 116.07

Question: When a registrant reassesses Form S-3 eligibility in connection with a Section 10(a)(3) update, for purposes of computing the "float" under General Instruction I.B.1, what day should be used in determining the number of shares held by non-affiliates?

Answer: The registrant can use any day during the 60-day "look back" period from the filing date of the Form 10-K in determining the number of shares held by non-affiliates. [Feb. 27, 2009]

Question 116.08

Question: General Instruction I.B.I requires that the aggregate market value of the voting and non-voting common equity held by non-affiliates be at least $75 million. In order to calculate whether this condition has been met, must the common equity be traded on a public market, such as an exchange, the OTC Bulletin Board, or the Pink Sheets?

Answer: Yes. [Feb. 27, 2009]

Question 116.09

Question: What is the meaning of the "for cash" requirement in General Instruction I.B.1 of Form S-3?

Answer: The "for cash" reference was intended only to make clear that Form S-3 is not available for exchange offers or other business combination transactions. Accordingly, Form S-3 would be available, for example, for transactions in which the consideration for the securities consists of promissory notes or services performed for the issuer by the recipient of the securities. [Feb. 27, 2009]

Question 116.10

Question: May a company use Form S-3 to register the offer and sale of both an immediately convertible security and the underlying security?

Answer: Yes. A company meeting the float test of General Instruction I.B.1 of Form S-3 may use that form to register the offer and sale of both an immediately convertible security and the underlying security. The fact that subsequent conversions may occur at a time when the company does not meet the transaction requirement of General Instruction I.B.4 of Form S-3, which is available for conversions, would not affect the initial registration of the offer of such underlying securities. If it becomes necessary to update the registration statement in accordance with Section 10(a)(3), the company may accomplish such update by incorporation by reference or post-effective amendment on Form S-3 only if it meets the conditions for the use of the form at that time. [Feb. 27, 2009]

Question 116.11

Question: In order to use General Instruction I.B.3 of Form S-3 for the secondary offering of a convertible or exercisable security, such as a common stock purchase warrant, is it necessary that the warrants themselves be listed on an exchange or quoted on an automated quotation system of a national securities association?

Answer: No. The fact that the underlying common stock is listed or quoted is sufficient to satisfy the requirements of the instruction. [Feb. 27, 2009]

Question 116.12

Question: For purposes of General Instruction I.B.3 of Form S-3, does "quoted on the automated quotation system of a national securities association" include securities quoted on the OTC Bulletin Board or the Pink Sheets?

Answer: No. [Feb. 27, 2009]

Question 116.13

Question: Are securities to be issued in an exchange exempt under Securities Act Section 3(a)(9) deemed outstanding for purposes of General Instruction I.B.3 of Form S-3?

Answer: Yes. [Feb. 27, 2009]

Question 116.14

Question: If an issuer meets the float test in General Instruction I.B.1 of Form S-3, may it use Form S-3 for secondary offerings, even though the securities to be issued are not listed on a national securities exchange or quoted on an automated quotation system of a national securities association, as required by General Instruction I.B.3?

Answer: Yes. [Feb. 27, 2009]

Question 116.15

Question: May parents, subsidiaries or affiliates of the issuer rely on Rule 415(a)(1)(i) to register secondary offerings?

Answer: Rule 415(a)(1)(i) excludes from the concept of secondary offerings sales by parents or subsidiaries of the issuer. Form S-3 does not specifically so state; however, as a practical matter, parents and most subsidiaries of an issuer would have enough of an identity of interest with the issuer so as not to be able to make "secondary" offerings of the issuer's securities. Aside from parents and subsidiaries, affiliates of issuers are not necessarily treated as being the alter egos of the issuers. Under appropriate circumstances, affiliates may make offerings that are deemed to be genuine secondaries. [Jan. 26, 2009]

Question 116.16

Question: The *Skadden Arps/Registration of Rights Issuable Pursuant to Stockholder Rights Plans* no-action letter (Jan. 7, 1987) issued by the Division relates to registration requirements in connection with rights plans. As described in the no-action letter, a prospectus to a previously effective Form S-3, pursuant to which sales are still being made, may be revised to reflect the rights plan by filing a Rule 424(c) prospectus supplement. For a Form S-8, Rule 428 would apply instead of Rule 424(c). However, if a company has an existing rights plan and is filing any new Securities Act registration statement for shares of the class of security to which the rights relate, should the rights be registered on the new registration statement as a separate security?

Answer: Yes. [Feb. 27, 2009]

Question 116.17

Question: Securities to be issued in connection with business combinations may be registered on a shelf filing pursuant to Rule 415(a)(l)(viii). May Form S-3 be used for these purposes?

Answer: No. Form S-3 is not available for business combinations. Form S-3 may be used for a secondary offering of shares which were originally received from the issuer in connection with a business combination, assuming it is a genuine secondary offering. [Feb. 27, 2009]

Question 116.18

Question: A company privately placed convertible securities in reliance on the exemption provided by Section 4(2). The company agreed to file a registration statement within two months after the private placement closing to register the resale of the common stock issuable on conversion of the convertible securities. The securities were convertible into common stock using a conversion ratio based on the company's common stock trading price at the time of conversion. Can the company use Form S-3 to register the resale of the common stock prior to conversion? Can the company use Rule 416 to register for resale an indeterminate number of shares that it may issue due to the operation of the conversion formula?

Answer: If the company satisfies the Form S-3 registrant eligibility requirements and the offering satisfies the Form's secondary offering requirements, the company may use Form S-3 to register, prior to the conversion, the resale of the common stock issuable upon conversion of the outstanding convertible securities. The company may not use Rule 416 to register for resale an indeterminate number of shares resulting from operation of the conversion formula. Rule 416 does not apply by its terms in these circumstances, because the floating conversion rate is not "similar" to an anti-dilution provision. Instead, the company must make a good-faith estimate of the maximum number of shares that it may issue on conversion to determine the number of shares to register for resale. If the number of registered shares is less than the actual number issued, the company must file a new registration statement to register the additional shares, assuming the selling securityholder desires to sell those additional shares. It may use Rule 462(b), if available, for this purpose.

The selling securityholder information in the registration statement, at the time of effectiveness, must include the total number of shares of common stock that each selling securityholder intends to sell (based on current market price if there is a floating conversion rate tied to market price), regardless of any contractual or other restriction on the number of securities a particular selling securityholder may own at any point in time. As the selling securityholders resell shares of common stock following conversion, the company must file prospectus supplements, as necessary, to update the disclosure of the number of shares that each selling securityholder intends to sell, reflecting prior resales. The plan of distribution in the prospectus filed as part of the registration statement must specify, in compliance with Item 508 of Regulation S-K, how each selling securityholder intends to dispose of the securities it receives on conversion. [Nov. 26, 2008]

Question 116.19

Question: A company privately placed convertible securities in reliance on the exemption provided by Section 4(2), but has not yet issued some or all of the convertible securities. The company agreed to file a registration statement within two months after the private placement closing to register

the resale of the common stock issuable on conversion of the convertible securities. The securities were convertible into common stock using a conversion ratio based on the company's common stock trading price at the time of conversion. Can the company use Form S-3 to register the resale of the common stock prior to conversion?

Answer: Unless the transaction involving the issuance of the convertible security meets the conditions under which a company may file a registration statement for resale of privately placed securities before their actual issuance (commonly known as a "PIPE," or private-investment, public-equity transaction, as discussed below), the registration for resale of the common stock underlying the unissued convertible security would not be viewed as a valid secondary offering. Instead, the transaction would be treated as an indirect offering by the issuer, and thus a primary offering, with the investor being identified in the registration statement as an "underwriter." In such circumstances, the registration statement may not use the phrase "may be an underwriter." Instead, the disclosure in the registration statement must state that the investor "is an underwriter." As a result, the company may register on Form S-3 the resale of the underlying common stock, or the convertible security itself, only if the company is eligible to use that Form for a primary offering. In addition, if the company continues to sell privately additional convertible securities after it has filed the registration statement for the securities underlying the previously sold convertible securities, the continuation of the same offering may call into question the Section 4(2) exemption generally claimed for the entire convertible securities offering.

In a PIPE transaction, a company will be permitted to register the resale of securities prior to their issuance if the company has completed a Section 4(2)-exempt sale of the securities (or in the case of convertible securities, of the convertible security itself) to the investor, and the investor is at market risk at the time of filing of the resale registration statement. The investor must be irrevocably bound to purchase a set number of securities for a set purchase price that is not based on market price or a fluctuating ratio, either at the time of effectiveness of the resale registration statement or at any subsequent date. When a company attempts to register for resale shares of common stock underlying unissued, convertible securities, the PIPE analysis applies to the convertible security, not to the underlying common stock. There can be no conditions to closing that are within an investor's control or that an investor can cause not to be satisfied. For example, closing conditions in capital formation transactions relating to the market price of the company's securities or the investor's satisfactory completion of its due diligence on the company are unacceptable conditions. The closing of the private placement of the unissued securities must occur within a short time after the effectiveness of the resale registration statement. [Nov. 26, 2008]

Question 116.20

Question: An issuer intended to grant rights to subscribe to shares of common stock (on a pro rata basis to all shareholders) after it filed a registration statement on Form S-3. The issuer was not eligible to rely on General Instruction I.B.1 of Form S-3 because it did not have the requisite public float, and the aggregate amount of securities that the issuer intended to register exceeded the amount permitted pursuant to General Instruction I.B.6. Can the issuer rely on General Instruction I.B.4 to file a Form S-3 registration statement to cover the issuance of the shares on exercise of the rights prior to the time that the issuer granted the rights and without complying with the information provision requirements of that instruction?

Answer: No, the issuer could not rely on General Instruction I.B.4 to file the Form S-3 registration statement because the rights are not outstanding at the time of the filing of the registration statement, and the issuer would not be able to satisfy the requirement that an annual report and other disclosures be provided to the holders of the rights prior to the filing of the registration statement. Similarly, an issuer could not conduct a takedown of the securities off an effective unallocated shelf registration statement in reliance on General Instruction I.B.4 if the rights are not outstanding at the time of the takedown. The issuer could file a Form S-1 to register the rights offering if the offering would be made on a continuous basis in reliance on Rule 415(a)(1)(ix).

In addition, although General Instruction I.B.4 of Form F-3 does not have the same requirement to provide specified information to the holders of the rights, Form F-3 does require that the rights are outstanding at the time the registration statement is filed. Therefore, similar to Form S-3, foreign private issuers could not rely on General Instruction I.B.4 of Form F-3 to conduct such offerings. [Aug. 14, 2009]

Question 116.21

Question: How does a company register, as a primary offering (rather than as a "resale" registration in a private equity line financing), the issuance of the put securities under an equity line?

Answer: An equity line financing done as a primary offering in which the put price is based on or at a discount to the underlying stock's market price at the time of the put exercise is an "at the market" offering under Rule 415(a)(4) and must comply with the requirements of that rule. Further, to register the primary offering, the company must be eligible to register primary offerings on Form S-3 in reliance on General Instruction I.B.1 or General Instruction I.B.6 of such form or on Form F-3 in reliance on General Instruction I.B.1 or General Instruction I.B.5 of such form. In addition, if a company is relying on General Instruction I.B.6 of Form S-3 or on General Instruction I.B.5 of Form F-3, the total amount of securities issuable under the equity line agreement may represent no more than one-third of the company's public float at the time of execution of the equity line agreement. [Nov. 26, 2008]

Question 116.22

Question: May a company with an effective shelf registration statement on Form S-3, in reliance on General Instruction I.B.6, file a prospectus supplement for a new offering of an amount of securities that exceeds the 1/3 limit of the instruction, so long as the actual amount sold does not exceed the limit?

Answer: No. The capacity remaining under the 1/3 limit in General Instruction I.B.6 is measured immediately prior to the registered takedown and applies to the amount of securities offered for sale pursuant to the prospectus supplement, not the amount actually sold. The concept of rolling measurement dates is limited to different takedowns, not individual sales within a takedown. When measuring the amount available for a later takedown, only those securities actually sold are counted against the 1/3 limit. [Aug. 11, 2010]

Question 116.23

Question: A company is able to sell up to $10 million in securities using its effective shelf registration statement on Form S-3, in reliance on General Instruction I.B.6. On Monday, June 7, the company files a prospectus

supplement to offer and sell up to $5 million of securities in a continuous offering. The company promptly begins its offering and has sold $2.5 million of securities to date. The company intends to file a prospectus supplement for another continuous offering on the following Monday, June 14. What is the maximum amount of securities that can be offered by the June 14 prospectus supplement, assuming the 1/3 limit in General Instruction I.B.6 continues to be $10 million?

Answer: The general rule is that, when measuring the amount available for a later takedown, only those securities actually sold are counted against the 1/3 limit. See Question 116.22. In the context of multiple, concurrent continuous offerings, however, any securities that continue to be offered in other continuous offerings in reliance on General Instruction I.B.6 would also count against the 1/3 limit. In this example, the company has sold $2.5 million of securities to date and therefore, as of June 14, can offer and sell up to $7.5 million of securities pursuant to General Instruction I.B.6. Because the company continues to offer up to $2.5 million of securities with the June 7 prospectus, it can only offer and sell up to $5 million of securities with the June 14 prospectus. To permit otherwise would allow a company to do in two or more transactions what it cannot do in one transaction. [Aug. 11, 2010]

Question 116.24

Question: In calculating whether the size of an offering consisting of common stock and warrants exceeds the one-third cap in General Instruction I.B.6(a) of Form S-3, is an issuer required to follow Instruction 2 to General Instruction I.B.6 when the warrants are not exercisable for common stock within 12 calendar months?

Answer: Yes. Instruction 2 to General Instruction I.B.6 applies to calculating the market value of warrants for purposes of the one-third cap, even when the warrants are not exercisable for common stock within 12 months. [May 16, 2013]

Question 116.25

Question: An issuer with less than $75 million in public float is eligible to use Form S-3 for a primary offering in reliance on Instruction I.B.6, which permits it to sell no more than one-third of its public float within a 12-month period. May it sell securities to the same investor(s), with a portion coming from a takedown from its shelf registration statement for which it is relying on Instruction I.B.6 and a portion coming from a separate private placement that it concurrently registers for resale on a separate Form S-3 in reliance on Instruction I.B.3, if the aggregate number of shares sold exceeds the Instruction I.B.6 limitation that would be available to the issuer at that time?

Answer: No. Because we believe that this offering structure evades the offering size limitations of Instruction I.B.6, the securities registered for resale on Form S-3 should be counted against the issuer's available capacity under Instruction I.B.6. Accordingly, an issuer may not rely on Instruction I.B.3 to register the resale of the balance of the securities on Form S-3 unless it has sufficient capacity under Instruction I.B.6 to issue that amount of securities at the time of filing the resale registration statement. If it does not, it would need to either register the resale on Form S-1 or wait until it has sufficient capacity under that instruction to register the resale on Form S-3. [November 2, 2016]

Section 117. Form S-3 — General Instructions I.C.1 to I.C.5 — Majority-Owned Subsidiaries

Question 117.01

Question: May a majority-owned subsidiary of a parent that meets the registrant requirements of Form S-3 rely on General Instruction I.C.2 to use Form S-3 to register the offer and sale of investment grade debt if the subsidiary is not registered under the Exchange Act?

Answer: No. The subsidiary may use Form S-3 only after it voluntarily registers under the Exchange Act pursuant to an effective Form 10. The Form 10 must be filed prior to the filing of the Form S-3 and may be incorporated by reference pursuant to Form S-3, Item 12(a)(l) in substitution for the Form 10-K. The security that must be registered on the Form 10 is the registrant-subsidiary's common stock, and not the debt security registered on Form S-3. [Feb. 27, 2009]

Section 118. Form S-3 — General Instructions I.D.1 to I.D.5 — Automatic Shelf Offerings by Well-Known Seasoned Issuers

Question 118.01

Question: In Part II of an automatic shelf registration statement, what information should be included under "Other Expenses of Issuance and Distribution"?

Answer: As with unallocated shelf registration statements, the information included under "Other Expenses of Issuance and Distribution" should include only the information that is known at the time of filing the registration statement. [Feb. 27, 2009]

Question 118.02

Question: If an automatic shelf registration statement initially registers one or more classes of securities and a new class of securities is subsequently added to that automatic shelf registration statement by post-effective amendment, when must the Exhibit 5 legality opinion for the new class of securities be filed? More generally, when must the Exhibit 5 legality opinion for the specific securities sold in a particular offering be filed?

Answer: An Exhibit 5 legality opinion must be filed at the time a class of securities is first included in an automatic shelf registration statement, whether as part of the initial registration statement or in a post-effective amendment to the registration statement. The signed opinion covering the specific securities sold in a particular offering must be filed as part of the registration statement or incorporated by reference into the registration statement no later than the closing date of the offering of such securities. This position is limited to opinions of counsel regarding the legality of the securities being offered, which are required to be filed in connection with shelf takedowns. [Aug. 14, 2009]

Question 118.03

Question: If a well-known seasoned issuer files an automatic shelf registration statement and during that year, before its Section 10(a)(3) update is due, the issuer loses its status as a well-known seasoned issuer, what is the impact on the effectiveness and use of that automatic shelf registration statement?

Answer: An issuer's loss of eligibility to use a registration form after effectiveness and before its Section 10(a)(3) update will not affect its ability to use that registration statement until the time of its Section 10(a)(3) update. If the issuer is no longer eligible as a well-known seasoned issuer

at the time of its Section 10(a)(3) update, the rules would require the issuer to amend its automatic shelf registration statement onto the form it is then eligible to use to sell the securities. [Feb. 27, 2009]

Question 118.04

Question: How does Rule 3-10(g)(1)(ii) of Regulation S-X (which refers to the principal amount of securities being registered) apply in the context of an automatic shelf registration statement for an unspecified amount of securities?

Answer: As with a Form S-3 or Form F-3 unallocated shelf registration statement that includes subsidiary issuers or subsidiary guarantors, in the context of an automatic shelf registration statement, the determination of the principal amount of securities being registered for purposes of Rule 3-10(g)(1)(ii) of Regulation S-X would be based on the principal amount of the guaranteed securities being sold in the particular offering. [Feb. 27, 2009]

Question 118.05

Question: If a well-known seasoned issuer has an effective Form S-3 or Form F-3 registration statement, can it change that registration statement to an automatic shelf registration statement by filing a post-effective amendment?

Answer: No. If the issuer has an effective Form S-3 or Form F-3 that was not an automatic shelf registration statement when it became effective, it cannot amend that registration statement to become an automatic shelf registration statement. Instead, the issuer must file a new registration statement on Form S-3 or Form F-3 designated as an automatic shelf registration statement. When permitted by Rule 415(a)(6), the issuer may include on the new registration statement any unsold securities covered by the effective registration statement. Alternatively, the issuer may rely on Rule 457(p) to carry forward unused filing fees for unsold securities from the effective registration statement if the automatic shelf registration statement is filed within five years of the initial filing date of the effective registration statement. This approach is necessary because automatic shelf registration statements filed on Form S-3 or Form F-3 and post-effective amendments to automatic shelf registration statements will be designated separately, for EDGAR purposes, from other registration statements on Form S-3 or Form F-3 to enable them to become effective immediately. [Feb. 27, 2009]

Question 118.06

Question: Can a continuous offering registered on an effective Form S-3 (such as a dividend reinvestment program, including a program with a direct stock purchase plan) be transitioned to an automatic shelf registration statement?

Answer: Yes. When an issuer files an automatic shelf registration statement, it can register any primary offerings for cash, including continuous offerings that were previously registered on a shelf registration statement. This would include, without limitation, unallocated shelf offerings, dividend reinvestment programs with direct stock purchase plans, and offerings of securities by selling security holders. The issuer cannot include business combination transactions, such as acquisition shelf registration statements, on the automatic shelf registration statement.

When an issuer includes an ongoing offering that was registered on an

effective shelf registration on a subsequently filed automatic shelf registration statement, it may include on the new registration statement any unsold securities covered by the effective registration statement when permitted by Rule 415(a)(6). Alternatively, it may carry forward the filing fees paid for any unsold securities under Rule 457(p) if the automatic shelf registration statement is filed within five years of the initial filing date of the effective registration statement. [Feb. 27, 2009]

Question 118.07

Question: May a majority-owned subsidiary of a well-known seasoned issuer parent use the parent's automatic shelf registration statement to register the subsidiary's guarantee of the parent's registered debt securities that are convertible into equity securities of the parent and not any other securities of the subsidiary, provided that the parent is eligible to register any of its securities on an automatic shelf registration statement?

Answer: Yes. General Instruction I.D of Form S-3 and General Instruction I.C of Form F-3 refer to guarantees of non-convertible securities, other than common stock, of the parent. However, each security would be analyzed separately and the form may be used to register the subsidiary's guarantee of the parent's registered debt securities that are convertible into equity securities of the parent and not any other securities of the subsidiary when the parent is primarily eligible as a well-known seasoned issuer to register any of its securities on the automatic shelf registration statement (and is not limited to registering only debt securities). [Feb. 27, 2009]

Question 118.08

Question: If a spun-off subsidiary meets the conditions discussed in Questions 8 and 9 of Staff Legal Bulletin No. 4, including the 12-month segment financial reporting requirement, that permit a subsidiary to consider the parent's reporting history when determining whether the subsidiary is eligible to use Form S-3, may the subsidiary rely on the parent's pre-spin-off reporting history for purposes of evaluating whether the subsidiary is a well-known seasoned issuer and eligible to file a Form S-3ASR?

Answer: Yes. The spun-off subsidiary also would need to independently meet all other requirements for well-known seasoned issuer status. It should be noted that if a spun-off entity relies on its parent's reporting history for purposes of filing a Form S-3 or a Form S-3ASR, it would need to comply with Items 308(a) and 308(b) of Regulation S-K in the first annual report that it files, to the extent its parent is required to do so. *See* Securities Act Release No. 8760 (Dec. 15, 2006), at fn. 76. [Jan. 26, 2009]

Question 118.09

Question: Must an issuer test its well-known seasoned issuer status when it adds a new class of securities to an existing automatic shelf registration statement on Form S-3 via post-effective amendment pursuant to Rule 413(b)?

Answer: No. When a well-known seasoned issuer adds a new class of securities to an existing automatic shelf registration statement on Form S-3 by filing a post-effective amendment pursuant to Rule 413(b), that filing is not itself an event requiring testing of well-known seasoned issuer status unless it also serves as a Section 10(a)(3) update. [Feb. 27, 2009]

Section 119. Form S-3 — General Instructions II.A to II.G — Application of General Rules and Regulations

Question 119.01

Question: Must a Form S-3 include a table of contents?

Answer: No. General Instruction II.B of Form S-3 expressly states that no table of contents is required to be included in the prospectus or in the registration statement prepared on the form, Part I, Item 2 of the form notwithstanding. [Feb. 27, 2009]

Question 119.02

Question: Rule 3-01 of Regulation S-X specifies certain time periods (depending on the registrant's accelerated filer status) in which a "filing," other than on Form 10-K or Form 10, may be made without the balance sheet for the most recent fiscal year end. The rule is conditioned on (1) the registrant's reasonable and good faith expectation that it will report income for the most recently completed fiscal year and (2) the registrant having reported income for at least one of the last two fiscal years. May a registrant sell securities from an effective Form S-3 registration statement during the relevant time period and file a prospectus supplement under Rule 424 to reflect the take-down, if the balance sheet for the most recent fiscal year end has not been filed and the registrant does not have a reasonable and good faith expectation that it will report income for the most recently completed fiscal year?

Answer: Yes. Rule 3-01 does not prevent the shelf take-down from occurring and would not apply to the prospectus supplement as it is not for the purpose of updating the prospectus under Section 10(a)(3). [Jan. 26, 2009]

Question 119.03

Question: May a company continue to use a registration statement that is predicated on timely filed reports (such as Form S-3) *during* the Rule 12b-25 extension period for a periodic report?

Answer: Rule 12b-25(d) provides that, during the extension period, a company "will not be eligible to use any registration statement form under the Securities Act the use of which is predicated on timely filed reports until the subject report is actually filed." The staff interprets the term "use" contained in the rule to mean that a company would not be eligible to file a new registration statement on Form S-3 until the subject report is filed within the extension period. The staff does not interpret the term to mean that the company cannot continue to use an already effective Form S-3 to make offers and sales during the extension period. Rather, the company's ability to continue to make such offers or sales will depend on whether it determines that the prospectus included in the Form S-3 is a valid Section 10(a) prospectus and there are no Section 12(a)(2) or anti-fraud concerns with the prospectus. If the company determines that it does not have a valid Section 10(a) prospectus, it should cease making any offers or sales under the registration statement that includes that prospectus. [September 30, 2008]

Section 120. Form S-3 — General Instruction III — Dividend or Interest Reinvestment Plans: Filing and Effectiveness of Registration Statement; Requests for Confidential Treatment

Question 120.01

Question: May a dividend reinvestment plan prospectus, which will not be distributed on a preliminary basis, bear the anticipated effective date of the

registration statement to permit savings in printing costs?

Answer: Yes. [Feb. 27, 2009]

Question 120.02

Question: Does the language in General Instruction III to Form S-3 relating to advance processing of confidential treatment requests and reduced numbers of extra copies to be filed apply to all offerings?

Answer: No. The language in General Instruction III applies only to offerings made for dividend or interest reinvestment plans. [Feb. 27, 2009]

Section 121. Form S-3 — General Instructions IV.A to IV.B — Registration of Additional Securities and Additional Classes of Securities [Reserved]

Section 122. Form S-3 — General Instructions V.A to V.B — Offerings of Asset-Backed Securities [Reserved]

Section 123. Form S-3 — Part I — Information Required in Prospectus

Question 123.01

Question: A registrant intends to file a non-automatic shelf registration statement on Form S-3 on April 10, hoping to become effective by April 25. The registrant intends to incorporate its most recent Form 10-K which will be filed on March 31. Certain information required in the Form S-3 concerning officers and directors is not intended to be furnished in the 10-K, but will be incorporated by reference from the registrant's definitive proxy statement which will be filed on April 30. What must the registrant do in order to become effective by April 25?

Answer: In order to have a complete Section 10(a) prospectus, the registrant must either file the definitive proxy statement before the Form S-3 is declared effective or include the officer and director information in the Form 10-K. [Feb. 27, 2009]

Question 123.02

Question: May a wholly-owned subsidiary that files a reduced disclosure Form 10-K pursuant to General Instruction I of that form still use Form S-3 if otherwise eligible to do so?

Answer: Yes. [Feb. 27, 2009]

Question 123.03

Question: Company A, a wholly-owned subsidiary of Company B, intends to file a registration statement on Form S-3 for the sale of its debt securities. May Company A include information concerning Company B in the registration statement by incorporating Company B's Exchange Act reports by reference even though Company B is not guaranteeing the debt obligation?

Answer: Item 12 of Form S-3 refers only to the incorporation by reference of certain reports and information of the registrant, and makes no provision for incorporation by reference of reports of the registrant's parent (unless the parent was guaranteeing the obligation or was otherwise also a registrant). Nevertheless, Company A may incorporate Company B's

Exchange Act reports by reference so long as all the applicable consents are filed and assuming Company B also meets the eligibility requirements of Form S-3. [Feb. 27, 2009]

Question 123.04

Question: May the description of securities registered on Form S-3 be set forth in a different "core" prospectus for each particular class of securities so that, for example, offerings of preferred stock and senior notes off the shelf could use different "core" prospectuses?

Answer: Yes. The use of multiple "core" prospectuses is consistent with the requirements of the form and Securities Act Rule 430B. [Feb. 27, 2009]

Question 123.05

Question: Item 12(a) of Form S-3 requires a registrant to specifically incorporate its latest Form 10-K and any other Section 13(a) or 15(d) reports filed since the end of the fiscal year covered by the Form 10-K. Item 12(b) states that all documents subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus. If a Form 10-Q is filed before a registration statement becomes effective, must it be specifically incorporated (thereby requiring a pre-effective amendment) or would it be considered to be "subsequently filed" and therefore deemed to be incorporated by reference.

Answer: A registrant need not file a pre-effective amendment solely to incorporate an Exchange Act report filed prior to effectiveness, provided that the registrant includes a statement in its initial registration statement (in addition to the statement regarding incorporation after the date of the prospectus) to the effect that all filings filed by the registrant pursuant to the Exchange Act after "the date of the initial registration statement and prior to effectiveness of the registration statement" shall be deemed to be incorporated by reference into the prospectus. In the first prospectus used after effectiveness, a copy of which is required to be filed under Rule 424(b), the registrant should identify all Exchange Act reports filed prior to effectiveness (by type, date and Commission file number). If the registration statement does not specifically incorporate reports filed during the waiting period, a pre-effective amendment would be required in order to incorporate the Form 10-Q. [Feb. 27, 2009]

Question 123.06

Question: Issuers filing automatic shelf registration statements do not request acceleration of effectiveness. Do these well-known seasoned issuers nonetheless need to include the Item 512(h) undertaking in these registration statements?

Answer: Yes. An automatic shelf registration statement on Form S-3, other than one relating solely to securities offered pursuant to a dividend or interest reinvestment plan, should include the Item 512(h) undertaking rather than the indemnification disclosure required by Item 510 of Regulation S-K even though the issuer will not request acceleration of effectiveness. Automatic shelf registration statements relating solely to securities offered pursuant to a dividend or interest reinvestment plan should include the disclosure under Item 510 of Regulation S-K. [Feb. 27, 2009]

Question 123.07

Question: Item 12(a)(3) of Form S-3 requires incorporation by reference of the description of securities of companies with a class of securities registered pursuant to Section 12 of the Exchange Act that is contained in a registration statement filed under Section 12 of the Exchange Act. How is this done when it is no longer deemed desirable or possible to incorporate that registration statement (because of the length of time that has passed or other events that have occurred since it was filed)?

Answer: A Form 8-K should be filed containing the description, and that Form 8-K should be incorporated by reference. [Feb. 27, 2009]

Section 124. Form S-3 — Part II — Information Not Required in Prospectus [Reserved]

Section 125. Form S-4

Question 125.01

Question: Must the annual report to shareholders delivered pursuant to Item 12(a) of Form S-4 comply in all respects with the disclosure requirements set forth in Exchange Act Rules 14a-3 or 14c-3?

Answer: Yes. Waivers will not be given with respect to annual reports that do not fully comply with the specific requirements of Rule 14a-3 or Rule 14c-3. In certain limited circumstances, however, when a registrant is compelled to hold a meeting of security holders as a result of a security holder demand under state law and is unable to furnish audited financial statements, the Director of the Division of Corporation Finance may grant exemptive relief from the requirement to furnish an annual report to security holders that contains audited financial statements as required by Rule 14a-3 or Rule 14c-3. See Exchange Act Release No. 57262 (Feb. 4, 2008). [Feb. 27, 2009]

Question 125.02

Question: A registrant included in its Form S-4 registration statement securities to be issued subsequent to the merger, in connection with a dividend reinvestment plan and an employee benefit plan. After the merger, can the registrant amend the registration statement for use by the two plans, providing a separate prospectus for each?

Answer: Yes, the registrant could file a post-effective amendment to the Form S-4 (on Form S-8) for the employee benefit plan, and a second post-effective amendment to the Form S-4 (on Form S-3) to cover the dividend reinvestment plan. [Feb. 27, 2009]

Question 125.03

Question: An issuer intends to use Form S-4 to register common stock to be issued in a merger transaction. The merger agreement has a contingency clause, which may require the payment of additional consideration in the form of notes or other securities to the shareholders of the acquired company two years after the merger, if the price of the issuer's stock should decline. Should the contingent notes be registered in the Form S-4?

Answer: Yes. The contingent notes should be included in the Form S-4, inasmuch as they are also being offered at the time of the merger vote. [Feb. 27, 2009]

Question 125.04

Question: Where the number of shares to be issued in a merger transaction is based upon a formula that will not be applied until the closing date for the transaction, how should the issuer determine the appropriate number of shares to register?

Answer: The issuer should register sufficient shares to cover the maximum number (or a dollar amount sufficient to cover the maximum dollar amount) that could be issued under the formula. [Feb. 27, 2009]

Question 125.05

Question: Is General Instruction J intended to limit the application of Rule 457(o) to Form S-4 only where securities of more than one class are being registered?

Answer: No. Securities Act Rule 457(o) may be used to register securities by aggregate dollar amount on Form S-4 even if the securities registered are all of a single class of securities. [Feb. 27, 2009]

Question 125.06

Question: A registration statement on Form S-4 is filed to register stock to be issued in the acquisition of a non-reporting company by a reporting company. Only the non-reporting company will solicit proxies. Can a proxy card be sent with the red herring prospectus?

Answer: No. Although this solicitation is not subject to Regulation 14A, it nevertheless will involve a "sale" under Rule 145, which cannot be consummated without an effective registration statement. Accordingly, a proxy card can be sent only with the Rule 424(b) prospectus, not with the red herring. [Jan. 26, 2009]

Question 125.07

Question: A registrant can use its Form S-4 proxy statement/prospectus as a red herring. May a registrant include a proxy card in the red herring?

Answer: No. Registrants may solicit before and after the filing of a registration statement or proxy statement provided that the registrant files all written communications on the date of first use and does not furnish a form of proxy. Because a vote on the transaction would amount to an investment decision with respect to the securities being registered, no proxy card could be sent until after the registration statement became effective and the final prospectus was delivered. [Feb. 27, 2009]

Question 125.08

Question: An issuer filed a registration statement on Form S-4 that contained its proxy statement. After the effective date of the registration statement and the delivery of the final prospectus, the issuer decided to mail an additional letter to shareholders in connection with the transaction. How should the issuer file the additional letter?

Answer: The issuer should file the letter as additional soliciting material pursuant to Exchange Act Rule 14a-6(b) upon first use. If the issuer files the letter in connection with a registered offering under Rule 425, the letter will be deemed to be filed under Rule 14a-6(b). [Feb. 27, 2009]

Question 125.09

Question: Does the "for cash" requirement contained in General Instruction I.B.1 of Form S-3 preclude the use of that Form for a spin-off because no cash will be paid for the spun-off shares?

Answer: No. Form S-3 may be used for a spin-off if a company is eligible to use the form for a primary offering. It should be noted, however, that absent compliance with Staff Legal Bulletin No. 4, most companies that are spun-off are not reporting companies and, therefore, would not be eligible to use Form S-3. Additionally, while the spin-off of shares of a reporting company does not constitute a business combination, a company may use a combined proxy statement/registration statement on Form S-4 to register the shares being distributed if the spin-off is being voted on. [Feb. 27, 2009]

Question 125.10

Question: A company filed a combined proxy statement/prospectus and incorporated by reference information about both the acquired company and the acquiring company. The shareholders of both companies are voting on the transaction. Must the combined proxy statement/prospectus be sent to each company's security holders 20 business days in advance of the vote?

Answer: Yes. The requirement that the combined proxy statement/prospectus be sent to security holders 20 business days in advance of the vote if incorporation by reference is used applies both to the acquired company and the acquiring company. [Feb. 27, 2009]

Question 125.11

Question: An issuer intends to use Form S-4 to register common stock to be issued in a merger transaction. The target company, although not a public company, satisfies the definition of a "smaller reporting company" under Item 10(f)(1) of Regulation S-K. May the issuer present information regarding the target company in accordance with the scaled disclosure provisions in Regulations S-X and S-K that are available to smaller reporting companies?

Answer: Yes. However, the financial statements of the target company included in a subsequent Form 8-K reporting the consummation of the business acquisition must comply with the Regulation S-X provisions applicable to the combined company. Additionally, a smaller reporting company filing a Form S-4 to acquire a target that would not qualify as a smaller reporting company would not be able to present the target's information using the scaled disclosure provisions available to smaller reporting companies. [Feb. 27, 2009]

Question 125.12

Question: If a registrant "meets the requirements for use of Form S-3," as set forth in General Instruction B of Form S-4, and incorporates by reference registrant information into the Form S-4 pursuant to General Instruction B and either Item 11 or 13 of Form S-4, may the registrant incorporate the risk factors from its latest Form 10-K in response to Item 3 of Form S-4?

Answer: Yes. Although Item 3 does not expressly contemplate incorporation by reference, a registrant may incorporate by reference into the Form S-4 the risk factors that it disclosed in its most recent Form 10-K. The offering-specific risks, however, would be required to be disclosed in the Form S-4 itself. [May 16, 2013]

Question 125.13

Question: As a condition to not objecting to a registration statement for a so-called "Exxon Capital" exchange offer, the staff will ask the issuer to make representations about the absence of a distribution of the securities received in the exchange. Is there a particular form that these representations must take?

Answer: In a series of letters beginning with *Exxon Capital Holdings Corporation* (April 13, 1988), the staff expressed its view that when an issuer that has privately sold non-convertible debt or certain other securities to large, sophisticated investors, the issuer may subsequently register the exchange of those securities for substantially similar securities (an "Exchange Offer"), and the new securities (the "Exchange Securities") may then be resold by most holders without further registration and without the delivery of a prospectus. A premise upon which this so-called "Exxon Capital" or "A/B" exchange is based is that the participants will not be engaged in a distribution of the registered securities, lest they be underwriters. As a condition to it not objecting to the registration of these offerings, the staff has requested that issuers make certain representations. *See Morgan Stanley & Co., Inc.* (June 5, 1991) and *Shearman & Sterling* (July 2, 1993). Over time, the staff has observed some variation in representations that are being provided. These representations need not follow any particular form so long as they address the following essential matters:

- The issuer has not entered into any arrangement or understanding with any person who will receive Exchange securities in the Exchange Offer to distribute those securities following completion of the Offer. The issuer is not aware of any person that will participate in the Exchange Offer with a view to distribute the Exchange Securities.

- The issuer will disclose to each person participating in the Exchange Offer that if such participant acquires the Exchange Securities for the purpose of distributing them, such person:

    - Cannot rely on the staff's interpretive position expressed in the Exxon Capital line of no-action letters, and

    - Must comply with the registration and prospectus delivery requirements of the Securities Act in order to resell Exchange Securities, and be identified as an underwriter in the prospectus.

- The issuer will include in the transmittal letter an acknowledgement to be executed by each person participating in the Exchange Offer that such participant does not intend to engage in a distribution of the Exchange Securities. In addition, the issuer will include in the transmittal letter an acknowledgement for each person that is a broker-dealer exchanging securities it acquired for its own account as a result of market-making activities or other trading activities that such broker-dealer will satisfy any prospectus delivery requirements in connection with any resale of Exchange Securities received pursuant to the Exchange Offer. The transmittal letter may also include a statement to the effect that by so acknowledging and by delivering a prospectus, a broker-dealer will not be deemed to admit that it is an "underwriter" within the meaning of the Securities Act.

In the *Shearman & Sterling* letter, the staff's views were conditioned on the issuer making each person participating in the Exchange Offer aware that any broker-dealer acquiring Exchange Securities in exchange for securities

it acquired for its own account as a result of market-making activities or other trading activities may be a statutory underwriter. If the representations clearly state the essential matters outlined above, the staff does not believe that this additional disclosure is necessary. Any person acquiring Exchange Securities with a view to distributing them must be identified as an underwriter in the prospectus and must comply with all applicable requirements. In addition, a broker-dealer acquiring Exchange Securities may be required to deliver a prospectus in connection with resales if it is relying on the exemption in Section 4(a)(3) of the Securities Act.

The staff believes that the representations may be provided either in the prospectus or in correspondence submitted in connection with the filing. [July 11, 2016]

Section 126. Form S-8

Question 126.01

Question: May a company that files reports under Sections 13 or 15(d) of the Exchange Act, but is not statutorily required to do so, use Form S-8?

Answer: No. [Feb. 27, 2009]

Question 126.02

Question: As a general matter, once an option becomes exercisable, an offer is made pursuant to Section 5. Further, if an option becomes exercisable within one year, it is deemed to be immediately exercisable. Therefore, a registration statement must be on file before the option is exercisable for the entire transaction to be a public offering. A later filing of the registration statement would convert a private offering into a public offering, which is inconsistent with Section 5. Is there an exception to this position with respect to Form S-8?

Answer: Yes. The only exception to this position is with respect to Form S-8, in which shares underlying the options are permitted to be registered at any time before the option is exercised, without regard to when the option became exercisable. This departure from the general analysis set forth above is based solely on a "policy determination that transactions registered on Form S-8 should be allowed more flexibility because of the unique character of the employee/employer relationship and the compensatory purpose involved." See Securities Act Release No. 7646 (Feb. 25, 1999), text preceding fn. 65. [Feb. 27, 2009]

Question 126.03

Question: At the time that its Form S-8 registration statement was required to be updated under Section 10(a)(3), a company was no longer eligible to use Form S-8 because the company was not current in its reporting obligations and therefore did not satisfy General Instruction A to Form S-8. May the company permit options underlying shares registered on the Form S-8 to be exercised pursuant to an exemption from registration?

Answer: No. The company must cease using the Form S-8 registration statement at the time it is required to update the Form S-8 registration statement to satisfy Section 10(a)(3). The company may file a new registration statement on the form it is eligible to use for a primary offering to register the exercise of the outstanding options. Use of the Form S-8 may resume once the company becomes current in its reporting obligations and satisfies General Instruction A. [Feb. 27, 2009]

Question 126.04

Question: Under what circumstances must the exercise of shares underlying a stock appreciation right (SAR) be registered?

Answer: If an SAR can be settled only in cash, then such exercise need not be registered. Shares issuable on exercise of an SAR that may be settled in stock must be registered. When a stock option and a cash-only SAR are granted in tandem and the holder must choose between either exercising the option or the SAR, registration of the shares underlying the option is required. [Feb. 27, 2009]

Question 126.05

Question: Notwithstanding the definition of employee in Rule 405, is a director considered to be an employee for purposes of Form S-8?

Answer: Yes. See the definition of "employee benefit plan" in Rule 405. [Feb. 27, 2009]

Question 126.06

Question: May a company register securities to be issued pursuant to two plans on the same registration statement? If so, how is this done?

Answer: Yes. The full title of each plan should be listed on the face of the registration statement on the appropriate line. The Part I information delivered pursuant to Rule 428 with respect to each plan should be specific to that plan. If any Part II information relates specifically to one plan, the disclosure should make that relationship clear. [Nov. 9, 2016]

Question 126.07

Question: May a rescission offer be conducted on Form S-8?

Answer: No, because this kind of offer is outside the scope of the form. The company would have to use a form otherwise available. [Feb. 27, 2009]

Question 126.08

Question: Founders of a company intended to issue options on the common stock they hold. The transaction would be structured as part of an employee benefit plan. The Board would authorize the issuance of the options and the founders would make assurances that they would not otherwise pledge or encumber the underlying common shares. Is Form S-8 available to register the underlying shares?

Answer: No. Form S-8 would not be the appropriate form for registration because issuance of the shares underlying the options would involve a secondary or resale offering by the founders. The only situation in which Form S-8 is available for an employee option plan structured as a secondary offering is where the laws of a foreign jurisdiction prohibit a foreign issuer from directly issuing the shares underlying compensatory options. In this limited circumstance, Form S-8 is available for the offer and sale of the underlying shares by a special purpose trust or other entity established to comply with such foreign law. [Feb. 27, 2009]

Question 126.09

Question: The *Skadden Arps/Registration of Rights Issuable Pursuant to Stockholder Rights Plans* no-action letter (Jan. 7, 1987) issued by the Division relates to registration requirements in connection with rights plans. As described in the no-action letter, a prospectus to a previously effective Form S-3, pursuant to which sales are still being made, may be revised to reflect the rights plan by filing a Rule 424(c) prospectus supplement. For a Form S-8, Rule 428 would apply instead of Rule 424(c). However, if a company has an existing rights plan and is filing any new Securities Act registration statement for shares of the class of security to which the rights relate, should the rights be registered on the new registration statement as a separate security?

Answer: Yes. [Feb. 27, 2009]

Question 126.10

Question: Do the general requirements of Form S-8 require only that all reports required to be filed with the Commission during the preceding 12 months have been filed, or do they also require that such reports have been timely filed?

Answer: General Instruction A.1 to Form S-8 requires that all reports required to be filed with the Commission during the preceding 12 months have been filed, but does not require such reports to have been timely filed. [Feb. 27, 2009]

Question 126.11

Question: May an issuer file or use a registration statement on Form S-8 after the issuer has filed its Form 10-K but prior to filing the Part III information that will be incorporated by reference into the Form 10-K?

Answer: Yes. However, issuers are responsible for ensuring that any prospectus used in connection with a registered offering contains the information required to be included therein by Securities Act Section 10(a) and Schedule A. [Feb. 27, 2009]

Question 126.12

Question: A company failed to furnish an Item 2.02 Form 8-K. As a result, does the company lose its eligibility to file a registration statement on Form S-8?

Answer: General Instruction A.1 to Form S-8 requires that all reports required to be filed with the Commission during the preceding 12 months have been filed. Because an Item 2.02 Form 8-K is furnished, rather than filed, this failure to furnish does not adversely affect the company's eligibility to use Form S-8. [Feb. 27, 2009]

Question 126.13

Question: In annual reports for fiscal years ending on or after December 15, 2007 but before December 15, 2009, non-accelerated filers are required to provide management's report on internal control over financial reporting pursuant to Item 308T of Regulation S-K. The report is deemed not to be "filed" for purposes of Section 18 of the Exchange Act, unless the company specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. Does a non-accelerated filer's failure to provide management's report in its Form 10-K under Item 308T(a) affect its form eligibility or the ability to use Rule 144?

Answer: It is the Division's view that the failure to provide this management report renders the annual report materially deficient. As a result, if management did not complete the evaluation and provide the report as required by Item 308T(a), the company would not be timely or current in its Exchange Act reporting. This would result in the company not being eligible to file new Form S-3 or Form S-8 registration statements and the loss of the availability of Rule 144. Because the filing of the Form 10-K constitutes the Section 10(a)(3) update for any effective Forms S-3 or S-8, the company also would be required to suspend any sales under already effective registration statements.

However, if the company subsequently amends its Form 10-K to provide management's report on whether or not internal control is effective, the company can file new Forms S-8 and resume making sales under already effective Forms S-8, and shareholders can avail themselves of Rule 144 (assuming all other conditions to use of the form or rule are satisfied). This would be the case regardless of whether management reached an effective or ineffective conclusion about its internal control. Although amending the Form 10-K to provide management's report may result in the company becoming current, it would remain untimely and would not be eligible to file new Forms S-3. [July 3, 2008]

Question 126.14

Question: Company A acquires Company B and, in connection with the acquisition, assumes outstanding Company B options held by current and former employees of Company B. May Company A register on Form S-8 Company A shares to be sold to former employees of Company B upon the exercise of the assumed options?

Answer: Based on these facts, Form S-8 could not be used. Under General Instruction A.1(a)(3) to Form S-8, a person who is a former employee of the issuer may use Form S-8 to exercise options only if the options were granted to that person while employed by the issuer. Here, Company A may register the exercise of the options by former employees of Company B on a registration form that the company is eligible to use. [Feb. 27, 2009]

Question 126.15

Question: Are securities analysts excluded from receiving securities issued under Rule 701 or registered on Form S-8 as "consultants" or "advisors" because their services, as securities industry professionals, are inherently capital-raising or promote or maintain a market for the issuer's securities?

Answer: Yes. [Jan. 26, 2009]

Question 126.16

Question: The Rule 405 definition of "employee benefit plan" states that consultants or advisors may participate in an employee benefit plan only if (1) they are natural persons, (2) they provide bona fide services to the registrant, and (3) the services are not in connection with the offer or sale of securities in a capital-raising transaction and do not directly or indirectly promote or maintain a market for the registrant's securities. Can securities issuable under a plan that permits consultants to be compensated for capital-raising services, as well as services that qualify under Rule 405, be registered on Form S-8?

Answer: No. The plan does not satisfy the Rule 405 definition of "employee benefit plan," and therefore, no securities issuable under the plan can be registered on Form S-8. [Jan. 26, 2009]

Question 126.17

Question: A stock option plan registered on Form S-8 permits the issuance of transferable options. The registration statement covers only the issuance of the common stock on the exercise of the options. Can a non-employee, who acquires an option from an employee, exercise that option under the Form S-8 registration statement?

Answer: No. While securities issuable under the plan can continue to be registered on Form S-8, a non-employee (other than an employee's family member who acquires an option from an employee through a gift or domestic relations order) cannot exercise options under the Form S-8 registration statement. In addition, when the issuer sponsors a program or otherwise actively arranges for employees to sell employee benefit plan options or otherwise transfer employee benefit plan options to persons who are not family members, the plan no longer would be "solely for employees" and the other persons specified in the Rule 405 definition of "employee benefit plan." In this situation, securities issuable under the plan could not continue to be registered on Form S-8 unless a plan amendment removes the transferred options and the securities underlying them from the plan, so that the plan would continue to satisfy the Rule 405 definition of "employee benefit plan." [Jan. 26, 2009]

Question 126.18

Question: An issuer that has maintained a 401(k) employee savings plan for several years has decided to add its common stock as an investment option in the plan. As a result, both the plan interests and the employer stock will be subject to Securities Act registration. Prior to the addition of the employer stock, the plan interests would not be regarded as securities. General Instruction A.2 to Form S-8 will ordinarily require a plan that has been in existence more than 90 days to file a Form 11-K contemporaneously with the registration of the offering of plan interests and employer securities. Does this Instruction require a Form 11-K to be filed contemporaneously with the Form S-8 in this situation?

Answer: No. Because the plan interests were not securities before adoption of the amendment adding employer securities, the initial Form 11-K will not be required. [Feb. 27, 2009]

Question 126.19

Question: A company's 401(k) plan provides for an automatic company contribution of 1% of the employee's salary, employee contributions up to 10% of the employee's salary and a matching contribution by the company of the employee contributions up to 5% of the employee's salary. The investment options for the 401(k) plan are such that Securities Act registration is required. For which of these contributions would the company need to pay a registration fee?

Answer: The company would not have to pay a fee for the automatic contribution since it is made without regard to employee contributions. A fee would be paid with respect to the employee contributions and the matching contributions. [Jan. 26, 2009]

Question 126.20

Question: Part II, Item 8(a) of Form S-8 provides that an opinion of counsel as to the legality of the securities being registered is required only with respect to the issuance of securities by the issuer. If a plan currently

intends to acquire all shares to be distributed pursuant to the Form S-8 through open market purchases and subsequently decides to purchase newly-issued shares directly from the company, may the Form S-8 be amended at that subsequent time to include an opinion of counsel?

Answer: Yes. [Feb. 27, 2009]

Question 126.21

Question: Must a registration statement on Form S-8, covered by Rule 415, include all applicable undertakings in Item 512 of Regulation S-K, including specifically those in Items 512(a), (b) and (h)?

Answer: Yes. However, the Form S-8 does not have to include the undertakings contained in Items 512(a)(5)(i), 512(a)(5)(ii), and 512(a)(6). [July 3, 2008]

Question 126.22

Question: In its Form S-8, an issuer will incorporate by reference financial statements from its Form 10-K. How must the issuer file the accountant's consent to use of the accountant's report?

Answer: The issuer may include the accountant's consent to use of the accountant's report either directly in the registration statement as an exhibit or via incorporation by reference to a consent filed with the Form 10-K. [Feb. 27, 2009]

Question 126.23

Question: Item 3(c) of Form S-8 requires incorporation by reference of the description of securities of companies with a class of securities registered pursuant to Section 12 of the Exchange Act that is contained in a registration statement filed under Section 12 of the Exchange Act. How is this done when it is no longer deemed desirable or possible to incorporate that registration statement (because of the length of time that has passed or other events that have occurred since it was filed)?

Answer: A Form 8-K should be filed containing the description, and that Form 8-K should be incorporated by reference. [Feb. 27, 2009]

Question 126.24

Question: Should documents constituting the current Form S-8 prospectus, as updated for Section 10(a)(3) purposes, be delivered concurrently to new plan participants?

Answer: Yes. For example, if the information to be provided pursuant to Items 1 and 2 of the Form S-8 is contained in more than one document, those documents should be delivered concurrently to new plan participants. [Jan. 26, 2009]

Question 126.25

Question: Item 2 of Form S-8 requires a statement indicating the availability without charge, upon written or oral request, of documents required to be delivered to employees pursuant to Rule 428(b). Do all Rule 428(b) documents need to be described pursuant to Item 2 of the Form S-8?

Answer: No. [Feb. 27, 2009]

Question 126.26

Question: Does the Rule 428(b)(5) obligation to deliver company proxy statements and reports to employees participating in a stock option plan or plan fund that invests in the company's securities extend to former employees, within the scope of General Instruction A.1(a)(3) to Form S-8, who participate in a stock option plan or plan fund that invests in the company's securities?

Answer: Yes. [Jan. 26, 2009]

Question 126.27

Question: Do the procedures applicable to Form S-8 apply to updating a reoffer prospectus filed with a Form S-8?

Answer: Yes. When a Form S-8 registration statement contains a reoffer prospectus prepared in accordance with Part I of Form S-3, the registration statement is, nonetheless, simply a registration statement on Form S-8 with a separate reoffer prospectus. Accordingly, if a registrant must update such a Form S-8 in accordance with the undertakings of Item 512 of Regulation S-K, that updating may be accomplished through the procedures applicable to Form S-8 registration statements. [Feb. 27, 2009]

Question 126.28

Question: May a reoffer prospectus prepared in accordance with Part I of Form S-3 be incorporated by reference into the Form S-8?

Answer: No, it must be filed in the Form S-8. [Feb. 27, 2009]

Question 126.29

Question: General Instruction C.1 permits a reoffer prospectus, prepared in accordance with the requirements of Part I of Form S-3 or F-3 (as applicable), to be filed with the registration statement on Form S-8. Does the use of "with" in this Instruction indicate that a General Instruction C reoffer prospectus must be filed as part of a Form S-8 that otherwise registers securities to be offered to employees under an employee benefit plan, and not as a stand-alone resale offering wrapped under the cover of Form S-8?

Answer: Yes. [Feb. 27, 2009]

Question 126.30

Question: General Instruction C to Form S-8 provides for preparation of a reoffer prospectus in accordance with the requirements of Part I of Form S-3. A company eligible to use Form S-8 may not yet have filed its first annual report on Form 10-K at the time the Form S-8 is filed. With respect to its reoffer prospectus, may this company incorporate by reference to its Securities Act registration statement to satisfy the information requirements of Form S-3 (otherwise required to be incorporated from Exchange Act reports)?

Answer: Yes. The company must, however, separately evaluate whether or not the information so incorporated meets the requirements of Section 10(a) (e.g., whether it is current, meets the financial requirements, etc.). [Feb. 27, 2009]

Question 126.31

Question: In determining the amount of securities that an individual may sell pursuant to General Instruction C.2(b) of Form S-8, does the individual need to aggregate the amount of securities that the individual has sold pursuant to Rule 144?

Answer: No. General Instruction C.2(b) to Form S-8 provides that if the registrant, at the time of filing, does not satisfy the registrant requirements for use of Form S-3 or Form F-3, the amount of both control and restricted securities to be reoffered by means of the reoffer prospectus by each person, and any other person with whom such person is acting in concert for the purpose of selling securities of the registrant, shall be limited during any three-month period to the amount specified in Rule 144(e). This limitation is strictly a limitation on the number of securities to be resold pursuant to the registration statement, and does not require aggregation of such securities with securities to be sold by the same person pursuant to Rule 144. The application of this instruction is reassessed each time the Form S-8 is updated pursuant to Securities Act Section 10(a)(3). [Jan. 26, 2009]

Question 126.32

Question: May the amount of securities registered for resale by individual officers and directors of an issuer pursuant to General Instruction C.2(b) of Form S-8 exceed the three-month volume limitation specified in Rule 144(e), provided that resales are monitored so that actual sales by such individuals during a three-month period do not exceed such volume limitations?

Answer: Yes. [Feb. 27, 2009]

Question 126.33

Question: Do shares issued in reliance upon Rule 701 constitute shares issuable under a plan for purposes of determining securities that can be included in a reoffer prospectus under General Instruction C to Form S-8?

Answer: Yes. [Feb. 27, 2009]

Question 126.34

Question: Do the provisions of General Instruction C of Form S-8 applicable to reoffer prospectuses require that affiliates have a present intention to sell the securities acquired under the Form S-8 in order to have them included in the reoffer prospectus?

Answer: No. [Feb. 27, 2009]

Question 126.35

Question: If a registrant adds by post-effective amendment a resale prospectus with respect to control securities that were previously registered on Form S-8, must a filing fee be paid for the resale of such control securities?

Answer: As such securities are not being registered by post-effective amendment, pursuant to Rule 457(h)(3), no fee need be paid for resales when a fee is paid in connection with the registration of such securities for sale to the employees. [Feb. 27, 2009]

Question 126.36

Question: Under General Instruction E to Form S-8, can a post-effective amendment be used to register additional securities for the employee benefit plan covered by the Form S-8?

Answer: No. A new registration statement must be filed under General Instruction E. Rule 413 does not permit the registration of additional securities by means of a post-effective amendment to Form S-8. [Feb. 27, 2009]

Question 126.37

Question: A Form S-8 for a 401(k) plan registered a number of shares of company stock and an indeterminate number of plan interests. When filing a new Form S-8 under General Instruction E to register additional shares of company stock authorized for issuance under the plan, is it necessary also to register additional plan interests?

Answer: No, it is not necessary to register additional plan interests if an indeterminate number of plan interests previously were registered on the plan's Form S-8. [Feb. 27, 2009]

Question 126.38

Question: What must be included in a post-effective amendment to Form S-8 that will be filed to deregister the unsold securities for that employee benefit plan?

Answer: Deregistration of an employee benefit plan registered on Form S-8 requires nothing more than a cover page, a one-paragraph statement indicating the number of shares deregistered and the reason for deregistration, and a signature page. [Feb. 27, 2009]

Question 126.39

Question: A recently acquired company had a Form S-8 for its 401(k) plan. The new parent company wishes to continue the plan. Must the new parent file a new Form S-8 registration statement registering shares of its own stock, which will now be offered and sold under the plan to employees of its new subsidiary, and plan interests?

Answer: Yes. In addition, the Form S-8 filed by the acquired company must be post-effectively amended to deregister all unsold securities. [Feb. 27, 2009]

Question 126.40

Question: After its Form 10-K is filed, a registrant has a change in accounting principles (or changes in segment presentation or discontinued operations), which will cause the financial presentation in its subsequent Form 10-Qs to differ from that in its most recent Form 10-K. In this situation, Item 11(b)(ii) of Form S-3 would require the annual audited financial statements filed in the Form 10-K to be restated to reflect the change in accounting principles (or changes in segment presentation or discontinued operations). Would General Instruction G.2 of Form S-8, which requires that "material changes in the registrant's affairs" be disclosed in the registration statement, also require such restatement?

Answer: Not necessarily. Form S-8 does not contain express language similar to Item 11(b)(ii) of Form S-3, requiring the restatement of financial statements to reflect specified events. The fact that financial statements eventually will be retroactively restated does not necessarily mean that

there are "material changes in the registrant's affairs," thereby requiring the financial statements to be restated for inclusion, or incorporation by reference, in a Form S-8. In other words, financial statements for which Item 11(b)(ii) of Form S-3 would require restatement may not necessarily need to be restated for incorporation by reference in a Form S-8. The registrant is responsible for determining if there has been a material change and, if so, the related information that is required to be disclosed in a Form S-8. Correspondingly, it is the auditor's responsibility to determine if it will issue a consent to use of its report in a Form S-8 if there has been a change in the financial statements in a subsequent Form 10-Q and the financial statements in the Form 10-K have not been retroactively restated. [Aug. 14, 2009]

Question 126.41

Q: A company sponsors a 401(k) plan that does not offer an employer securities fund in which employee contributions may be invested. The 401(k) plan permits both employer and employee contributions to be invested through a self-directed "brokerage window." If the 401(k) plan does not prohibit employee contributions to be invested in employer securities through the "brokerage window," would this involve an offer of employer securities requiring Securities Act registration?

A: It depends on the extent of the employer company's involvement. In Release 33-4790, the Commission discussed whether registration is required for employer securities offered to employees through a stock purchase plan. That release framed the question as whether there is an "attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value" within the meaning of Securities Act Section 2(a)(3). The Commission said that a determination of whether registration is required turns on the degree and type of participation by issuers or their affiliates in the particular program. In the context of an open market stock purchase plan, the Commission said that registration would not be required if all communications of a soliciting character are furnished by or in the name of a broker, and the issuer or affiliate does no more than: 1) announces the existence of the plan; 2) makes payroll deductions; 3) makes names of employees available to the broker; and 4) pays no more than its expense of payroll deductions and reasonable fees and expenses for commissions, bookkeeping and custodial services.

In the context of providing a self-directed "brokerage window" in which plan participants could trade in employer securities with employee contributions, where the employer company and the 401(k) plan do no more than describe the self-directed "brokerage window" as part of the investment alternatives under the 401(k) plan, make payroll deductions, and pay administrative expenses not in any way tied to particular investments selected by employees and take no action to draw employees' attention to the possibility of investing in employer securities through the "brokerage window," the staff would not consider the employer company to be offering its securities to its employees for purposes of Securities Act registration. [September 22, 2016]

Question 126.42

Question: An issuer has a Form S-8 on file that registers shares of common stock to be issued upon the exercise of outstanding options. The issuer has decided to stop granting stock options and believes that it has more shares registered on the Form S-8 than it will need to cover the exercise of the outstanding options. May the issuer transfer to a new registration statement the filing fees associated with the securities that the

issuer believes it will not need to issue, and continue to use the Form S-8 to cover the exercise of the outstanding options?

Answer: No. Rule 457(p) permits filing fees to be transferred only after the registered offering has been completed or terminated or the registration statement has been withdrawn. As a result, the issuer may not transfer the fees associated with the excess securities until it completes or terminates the offering registered on Form S-8. However, as provided in Securities Act Forms CDI 126.43, if the excess securities are or may become authorized for issuance under another issuer plan, the issuer may file a post-effective amendment to the Form S-8 to disclose that these securities will be sold under the other plan. The Part I information delivered pursuant to Rule 428 with respect to each plan should be specific to that plan. [Nov. 9, 2016]

Question 126.43

Question: An issuer has an effective Form S-8 that registers shares of common stock to be issued under the issuer's 2006 equity compensation plan, and has recently adopted a new 2016 equity compensation plan. The 2006 plan authorized the issuer to grant awards for up to 20 million shares, and to date the issuer has granted options (all of which remain outstanding) exercisable for 15 million shares. Upon effectiveness of the 2016 plan, no further awards may be granted pursuant to the 2006 plan and the 5 million shares not covered by any award under the 2006 plan become authorized for issuance under the 2016 plan. The terms of the 2016 plan provide that the 15 million shares underlying outstanding options granted pursuant to the 2006 plan will also become authorized for issuance under the 2016 plan when the outstanding options under the 2006 plan expire or are terminated or canceled. The issuer plans to file a new Form S-8 to register 10 million shares that are newly authorized for issuance under the 2016 plan. May it also include on that registration statement the 5 million shares and an estimated number of shares that will become available upon the cancellation or termination of awards, all of which were previously authorized for issuance pursuant to the 2006 plan and that will roll over to the 2016 plan? Alternatively, is there another way the issuer can offer and sell under the 2016 plan the 5 million shares that are not subject to outstanding options under the 2006 plan and any shares that become authorized under the 2016 plan upon the cancellation or termination of options under the 2006 plan without paying a new registration fee?

Answer: Yes, the issuer may register on the new Form S-8 the 5 million shares that have become authorized for issuance under the 2016 plan, an estimated number of shares that will become authorized for issuance under the 2016 plan upon cancellation or termination of awards granted under the 2006 plan, and the newly authorized 10 million shares. Because the offering is not yet completed under the 2006 plan, however, Rule 457(p) does not permit the registrant to claim the registration fee associated with the shares from the 2006 plan as an offset against the registration fee due for the new registration statement. See Securities Act Rules CDI 240.11.

Alternatively, the issuer can file a post-effective amendment to the earlier Form S-8 for the 2006 plan to indicate that the registration statement will also cover the issuance of those shares under the 2016 plan once they are no longer issuable pursuant to the 2006 plan and instead become authorized for issuance under the 2016 plan. The post-effective amendment, which would be required under Item 512(a)(1)(iii) of Regulation S-K to disclose a material change in the plan of distribution, should identify both the 2006 plan and the 2016 plan on the cover page, and describe how shares that will not be issued under the 2006 plan have or may become authorized for issuance under the 2016 plan. No new filing

fee would be due upon the filing of the post-effective amendment. Because additional securities may not be added to a registration statement by means of a post-effective amendment (see Securities Act Rule 413(a)), the newly authorized 10 million shares must be registered on a separate registration statement. This alternative applies only with respect to Form S-8. [Nov. 9, 2016]

Question 126.44

Question: When filing fees paid in connection with a prior registration statement are used to offset fees due on a subsequent registration statement pursuant to Rule 457(p), what information pertaining to the offset should the issuer include in a note to the Calculation of Registration Fee table?

Answer: Rule 457(p) requires a note to the table to state the name of the registrant, the file number and initial filing date of the earlier registration statement from which the offset is claimed and the dollar amount of the offset. In addition, to assist the staff in assessing the registrant's eligibility for offset, the registrant should quantify the amount of unsold securities from the prior registration statement associated with the claimed offset and disclose either that the prior registration statement has been withdrawn or that any offering that included the unsold securities has been terminated or completed. An offering registered on Form S-8 is only completed or terminated when no additional securities will be issued pursuant to the plan covered by the Form S-8, including through the exercise of any outstanding awards. [Nov. 9, 2016]

Section 127. Form S-11

Note: The Form S-1 interpretations are generally applicable to Form S-11.

Question 127.01

Question: May a real estate company that typically would file on Form S-11 use Form S-3 if it meets the issuer requirements of that form?

Answer: Yes, however, the company must disclose the information required by Items 13-16 of Form S-11, where appropriate. [Feb. 27, 2009]

Question 127.02

Question: Is a registrant that operates a resort (hotel, golf course and spa) in a service industry or the real estate business? The registrant is unsure whether Form S-1 or Form S-11 would be the appropriate registration statement for an offering.

Answer: A registrant that operates a resort (hotel, golf course and spa) is in a service industry. Accordingly, Form S-1, and not Form S-11, would be appropriate for its offering. [Feb. 27, 2009]

Section 128. Form 1-A

Question 128.01

[withdrawn, June 23, 2015]

Question 128.02

Question: Does the SEC impose a filing fee for filing an offering statement on Form 1-A?

Answer: No. [Apr. 24, 2009]

Question 128.03

[withdrawn, June 23, 2015]

Question 128.04

Question: Does a company incur Exchange Act reporting obligations after its Form 1-A offering statement is qualified?

Answer: No. Because offers and sales under Regulation A are exempt transactions under the Securities Act, the offering does not subject the issuer to reporting obligations under Section 15(d) of the Exchange Act. [Apr. 24, 2009]

Question 128.05 [Reserved]

Question 128.06 [Reserved]

Question 128.07 [Reserved]

Section 129. [Reserved]

Section 130. Form D

Question 130.01

Question: In an offering involving multiple issuers, can a single Form D be filed for the offering?

Answer: Yes. A single Form D may be used for an offering made in reliance on Regulation D that involves multiple issuers, assuming the offers and sales by the issuers are part of the same Regulation D offering as provided in Rule 502(a). For example, in a master fund offering conducted through feeder funds created for the sole purpose of investing their proceeds in the master fund, where all of the offers and sales of the funds are part of the same offering under Rule 502(a), the aggregate offers and sales of the Regulation D offering should be reflected on a single Form D. Offers and sales that are not part of the same Regulation D offering must be reflected in a separate Form D filing. [Feb. 27, 2009]

Question 130.02

Question: If multiple issuers make a combined Form D filing, how do they determine which is the "primary issuer" in the Form D filing?

Answer: The "primary issuer" is the most important issuer in the offering. For example, the primary obligor in a debt offering with multiple guarantors would likely be identified as the primary issuer. In an offering that includes real estate limited partnerships as multiple issuers, the primary issuer would likely be the partnership expected to receive the largest share of the proceeds. Customary usage in identifying important co-issuers on the cover page of Securities Act registration statements and prospectuses may provide helpful guidance. [Feb. 27, 2009]

Question 130.03

Question: When completing "Item 11—Minimum Investment" of Form D what is the appropriate response when an issuer may waive any required

minimum investment amount from an outside investor?

Answer: When an issuer may waive any required minimum investment amount from an outside investor, the appropriate response to Item 11 of Form D is zero, since there is, in effect, no minimum investment amount. [Feb. 27, 2009]

Question 130.04

Question: How does an issuer determine the minimum investment amount from an outside investor in Item 11 of Form D when an outside investor provides only non-cash consideration, such as in a share exchange?

Answer: The issuer should enter an amount based on its good faith valuation of the consideration. In valuing the consideration, the issuer may follow the method of determining "aggregate offering price" in Rule 501(c) of Regulation D, which provides that, to determine the value of non-cash consideration, issuers should use bona fide sales of the consideration made within a reasonable time or, in the absence of sales, an accepted fair value standard. [Feb. 27, 2009]

Question 130.05

Question: In completing Item 11 of Form D, are immediate family members of inside investors, as well as trusts and affiliates controlled by inside investors, also deemed to be inside investors and therefore excluded from the definition of "outside investor"?

Answer: Yes. Immediate family members, and trusts or affiliates whose investment decisions are controlled by or for the benefit of any persons otherwise considered inside investors (including immediate family members), are deemed to be inside investors and are excluded from the definition of "outside investor." For this purpose, the phrase "immediate family member" includes spouses, spousal equivalents and dependents, as in Rule 2-01(f)(13) of Regulation S-X. [Feb. 27, 2009]

Question 130.06

Question: "Item 14—Investors" of Form D instructs the issuer to enter the total number of investors who already have invested in the offering. Does this mean the historic total number of purchasers to date or the number of purchasers still holding at the date of the filing?

Answer: Item 14 of Form D requires that an issuer enter the historic total number of purchasers to date, regardless of whether such purchasers continue to hold the issuer's shares at the date of filing or how long the offering has been ongoing. [Feb. 27, 2009]

Question 130.07

Question: In entering offering and sales amounts, sales commissions and use of proceeds for related party payments in Form D filings, does the issuer enter the aggregate historic amounts from the beginning of the offering, or just the amounts since the last Form D filing?

Answer: Form D requires that the issuer provide the aggregate historic amounts since the beginning of the offering. [Feb. 27, 2009]

Question 130.08

Question: Under "Item 15—Sales Commissions and Finders' Fees Expenses" of Form D, are issuers required to provide only the amount of sales commissions and finders' fees that are paid directly or indirectly out of the offering proceeds?

Answer: No. The requirement is to provide the amounts of sales commissions and finders' fees. There is no limitation to commissions and fees paid out of the offering proceeds. [Feb. 27, 2009]

Question 130.09

Question: On what basis would an issuer completing "Item 15—Sales Commissions and Finders' Fees Expenses" of Form D provide an amount that is paid other than in cash?

Answer: The issuer should base its submission on the instructions to "Item 13—Offering and Sales Amounts" of Form D, which provides that the amount should be based on the issuer's good faith valuation of the payment. The issuer may use the clarification box that accompanies Item 15 if a further explanation of its response is necessary. [Feb. 27, 2009]

Question 130.10

Question: How does an issuer provide financial information in foreign currency amounts in Form D, such as if the issuer derives its revenues principally from outside of the U.S. and in a foreign currency?

Answer: Issuers should translate foreign currency amounts into U.S. dollar amounts at a currency exchange rate in effect on or about the date of the Form D filing. Subsequent changes in exchange rates do not necessitate an amended Form D, and in the event an amended Form D is otherwise required, foreign currency calculations in prior Form D filings need not be recalculated to reflect current exchange rates. [Feb. 27, 2009]

Question 130.11

Question: Do the changes to Form D that are effective as of March 16, 2009 require issuers to amend any Form Ds filed on earlier versions of the form?

Answer: No. The fact that the version of Form D in effect on a later date may contain information requirements different from those applicable to a prior filing will not, in and of itself, trigger an obligation to amend a prior Form D filing. [Feb. 27, 2009]

Question 130.12

Question: If a sale occurs after an issuer has submitted a Form D filing that indicates that a sale has yet to occur in its response to "Item 7—Type of Filing," must the issuer file an amendment solely because of that first sale?

Answer: No. An issuer is not required to file an amendment to a previously filed notice solely to reflect the first sale because an issuer is not required under the Form D amendment rules to file an amendment merely to reflect a change to the amount of securities sold in the offering. [Feb. 27, 2009]

Question 130.13

Question: If an issuer changes its entity type after submitting a Form D notice, must that issuer amend that prior filing solely because of its new

entity type status while the offering is ongoing?

Answer: Yes. If, after submitting a Form D notice, an issuer organizes or reorganizes as a different type of entity than the type indicated in "Item 1—Issuer's Identity," the issuer should file an amendment to reflect the change. [Feb. 27, 2009]

Question 130.14

Question: The Item-by-Item instructions for Item 7 of Form D indicate that an issuer must enter the date of the first sale of securities in the offering if the issuer is filing a "new notice." If an issuer is filing an amendment to a Form D filing, must the issuer provide current information about the date of first sale in the amendment?

Answer: Yes. Rule 503(a)(4) provides that an issuer that files an amendment must provide current information in response to all requirements of the form, regardless of why the amendment is filed. For example, if, in the original Form D, the issuer indicated that the first sale has "Yet to Occur" and if, by the time of the amendment, the date of first sale is known, then the issuer must disclose the actual date of first sale in the amendment. [Aug. 14, 2009]

Question 130.15

Question: How should an issuer address Item 12 “Sales Compensation” of Form D if the information requested by this item is not applicable to its Regulation D offering?

Answer: When the information solicited by Item 12 of Form D is not applicable to an issuer’s Regulation D offering because the issuer has not or does not expect to pay directly or indirectly any commission or other similar compensation in connection with the sale of its securities in a Regulation D offering, the issuer should not enter any information in any of the fields under Item 12 of Form D and should proceed directly to Item 13. [August 6, 2015]

Section 131. Form 144

Question 131.01

Question: Does an amendment to Form 144 need to be filed in the event that a person does not sell the securities referred to in the Form?

Answer: No. If a person who has filed a Form 144 does not sell the securities referred to therein, no amendment reflecting this fact need be filed. [Jan. 26, 2009]

Question 131.02

Question: Does an amended Form 144 need to be filed to reflect a company's listing on a national securities exchange or a stock split?

Answer: No. A Form 144 need not be amended to reflect: (1) a company's listing on a national securities exchange; or (2) a stock split. [Jan. 26, 2009]

Question 131.03

Question: If a person intends to use two brokers, must the person allocate a specific number of shares to each broker on the Form 144?

Answer: A person who files a Form 144 indicating that it may sell shares through either of two brokers need not allocate a specific number of shares to each broker on the form. [Jan. 26, 2009]

Question 131.04

Question: Does the de minimis exemption of Rule 144(h) apply to each individual seller who is required to file a Form 144 when sales are required to be aggregated under Rule 144(e)?

Answer: Yes. In a situation in which sales under Rule 144 are required to be aggregated for purposes of Rule 144(e), the de minimis exemption of Rule 144(h) (for filing Form 144), nonetheless, applies to each individual seller who is required to file a Form 144. [Jan. 26, 2009]

Question 131.05

Question: When a Form 144 is required to be filed, is a waiting period required between the time the person places an order with a broker and the time the broker executes the order?

Answer: When a person is required to file a Form 144, no waiting period is required between the time the person places an order with a broker and the time the broker executes the order so long as the person concurrently, with giving the order, transmits the form to the Commission and the principal exchange on which the securities are listed. [Jan. 26, 2009]

Question 131.06

Question: Should a Form 144 be amended to reflect a change in broker?

Answer: Yes. A Form 144 should be amended to reflect a change in broker. However, amending Form 144 to reflect a change in the broker does not permit the calculation of a new volume limitation based on trading. [Jan. 26, 2009]

Question 131.07

Question: What is the effect of an amended Form 144 that is filed to correct inaccuracies?

Answer: An amended Form 144 may be filed to correct inaccuracies in the original Form 144 at the time of, or subsequent to, its filing. However, the filing of an amended Form 144 does not cure any deficiencies with regard to sales made after filing the initial Form 144 and prior to the filing of the amended Form 144. [Jan. 26, 2009]

Question 131.08

Question: Under what circumstances does a sell order that is placed with a broker at above the current market price contravene the requirement in Rule 144(h) that the person filing a Form 144 have a bona fide intention to sell the securities referred to in the Form 144 within a reasonable time?

Answer: The fact that a sell order is placed with a broker at a price above the current market price does not contravene this requirement in Rule 144(h), unless the price reflected in the sell order was not consistent with a bona fide intention to sell within a reasonable time. [Jan. 26, 2009]

INTERPRETIVE RESPONSES REGARDING PARTICULAR SITUATIONS

Section 201. Securities Act Forms Generally [Reserved]

Section 202. F-Series Forms Generally [Reserved]

Section 203. Form F-1

203.01 If a foreign issuer is conducting a worldwide offering of securities in a currency other than U.S. dollars and there is appropriate cover page prospectus disclosure, the issuer may require U.S. persons to pay U.S. dollars in an amount equal to up to 110% of the U.S. dollar value of the other currency (based on the most recently available exchange rate as of the pricing date) and subsequently refund to U.S. persons any amounts over, or charge U.S. persons any deficiency with respect to, such U.S. dollar value based on the exchange rate on the closing date. [Feb. 27, 2009]

Section 204. Form F-4 [Reserved]

Section 205. Form F-6 [Reserved]

Section 206. Form F-7 [Reserved]

Section 207. Form F-8 [Reserved]

Section 208. Form F-9 [Reserved]

Section 209. Form F-10 [Reserved]

Section 210. Form F-80 [Reserved]

Section 211. Form F-X [Reserved]

Section 212. Form F-N [Reserved]

Section 213. Form S-1

213.01 A Form S-1 is proposed to be filed by a limited partnership. The general partner ("GP") consists of a general partnership comprised of two partners: one corporation and another general partnership. Pursuant to a management agreement, the corporation has the power to bind the GP. For purposes of the issuer's signature requirement, the GP must sign, and giving effect to GP's management agreement, an appropriate official of GP's corporate partner may sign for GP. [Feb. 27, 2009]

Section 214. Form S-3 — General

214.01 A registrant has an effective Form S-3 for a secondary offering. At the time of filing, all requirements for use of the form were met. Three months later, a dividend payment on certain preferred stock was missed. The registrant may continue to use the effective Form S-3 so long as there is no need to update the registration statement for the purposes of Section 10(a)(3). At the time that updating is necessary, Rule 401 would require the use of whatever form is available to the registrant at that time. [Feb. 27, 2009]

214.02 It is important to identify whether a purported secondary offering is really a primary offering, i.e., the selling shareholders are actually underwriters selling on behalf of an issuer. Underwriter status may involve additional disclosure, including an acknowledgment of the seller's prospectus delivery requirements. In an offering involving Rule 415 or Form S-3, if the offering is deemed to be on behalf of the issuer, the Rule and Form in some cases will be unavailable (e.g., because of the Form S-3 "public float" test for a primary offering, or because Rule 415(a)(1)(i) is available for secondary offerings, but primary offerings must meet the

requirements of one of the other subsections of Rule 415). The question of whether an offering styled a secondary one is really on behalf of the issuer is a difficult factual one, not merely a question of who receives the proceeds. Consideration should be given to how long the selling shareholders have held the shares, the circumstances under which they received them, their relationship to the issuer, the amount of shares involved, whether the sellers are in the business of underwriting securities, and finally, whether under all the circumstances it appears that the seller is acting as a conduit for the issuer. [Jan. 26, 2009]

214.03 A registrant was an investment company listed on a national securities exchange and filing Exchange Act reports as a Investment Company Act company. The registrant subsequently changed its business and became exempt from the Investment Company Act, although its securities continued to be listed on the national securities exchange. The company sought to use Form S-3. Because of important differences in the disclosure requirements for periodic reports of investment companies and non-investment companies, including the accounting presentation, the registrant's reporting history under the Investment Company Act could not be used in determining its eligibility to use Form S-3. [Feb. 27, 2009]

Section 215. Form S-3 — General Instructions I.A.1 to I.A.8 — Registrant Requirements

215.01 The registration of a corporation's guarantee of exempt industrial development bonds to be issued by a governmental authority may be made on Form S-3, provided the corporation meets the registrant requirements of the form. For purposes of the transaction requirements of the form, the issuance of the guarantee is deemed to be non-convertible debt offered for cash. [Feb. 27, 2009]

215.02 A company that failed to make a required principal payment on indebtedness was denied a waiver from General Instruction I.A.5 of Form S-3. The company had sought the waiver on the premise that Form S-3 is based on the "efficient market" theory, and the company had already conformed to that theory by announcing in a previous annual report that it would not pay the principal of outstanding debt when it became due. [Feb. 27, 2009]

215.03 General Instruction I.A.5 of Form S-3 provides that to satisfy the registrant eligibility requirements of the form, the registrant may not have failed to pay any required dividend on preferred stock. This requirement will not be waived even when the registrant has a history of cumulating such dividends for three quarters before paying them at the end of each year. [Feb. 27, 2009]

215.04 [withdrawn, June 4, 2010]

215.05 A registrant had failed to make interest payments on its revolving bank credit agreement and outstanding debentures for the first quarter of the fiscal year. These defaults were cured shortly before a Form S-3 registration statement was to be filed. The registrant sought a waiver of General Instruction I.A.5. The waiver request was denied since the defaults had not been exposed to at least one audit, and such defaults in the aggregate are material to the financial position of the registrant and its subsidiaries, taken as a whole. [Feb. 27, 2009]

215.06 General Instruction I.A.7 to Form S-3 provides that a successor issuer will be deemed to have met the registrant requirements in Instructions I.A.1, I.A.2, I.A.3 and I.A.5 of Form S-3 if its predecessor and it taken together have met those conditions. In the case of a bank holding company, the requirement in General Instruction I.A.3(a) of Form S-3 will

be satisfied if: the predecessor bank has securities registered under Section 12(i) of the Exchange Act; the bank has filed periodic reports with one of the banking agencies for at least one year; and the reports met Commission requirements. [Feb. 27, 2009]

215.07 A domestic issuer satisfied all Form S-3 requirements other than the General Instruction I.A.1 registrant requirement that the issuer's principal business operations occur in the U.S. or its territories. The issuer could use Form S-3 based on General Instruction I.A.6, which permits a foreign issuer that satisfies all Form S-3 requirements other than the provisions in I.A.1 relating to organization and principal business operations to use Form S-3. [Feb. 27, 2009]

215.08 A default by a subsidiary which occurred and was cured prior to the time it became a subsidiary would not disqualify the parent from using Form S-3. [Feb. 27, 2009]

215.09 When a company and its creditors are having a dispute about whether there is a disqualifying default, the company must determine whether, as a legal matter, there is a default. Caution should be exercised in making such a determination because by filing the form, the company is certifying that there is no such default. [Feb. 27, 2009]

215.10 A company engages in a trust preferred financing whereby the company issues a subordinated note to a special purpose subsidiary, and the special purpose subsidiary issues to investors cumulative preferred shares with financial terms that generally mirror the note, except that the preferred shares are convertible into common stock of the company. The subsidiary exists only to hold the note and issue the preferred shares; the interest and principal payments on the note are the sole source of cash for the subsidiary to pay dividends and the liquidation preference on the preferred shares. The note permits the company to defer interest payments for a specific time period, and such deferral is not a default. If interest payments on the note are deferred, the subsidiary may defer the payment of quarterly dividends on the preferred shares, and the unpaid dividends will accrue and accumulate. Finally, the trust preferred financing is treated as company indebtedness for GAAP financial reporting and rating agency purposes. On these facts, for purposes of determining whether the company satisfies the requirements of Instruction I.A.5 of Form S-3 if a company defers interest payments on the subordinated note and its subsidiary correspondingly defers payment of quarterly dividends on the trust preferred shares, the trust preferred financing should be treated as company indebtedness. Since there was no default on the note, there is no violation of Instruction I.A.5. [Apr. 24, 2009]

Section 216. Form S-3 — General Instructions I.B.1 to I.B.6 — Transaction Requirements

216.01 A company intends to register a stock option plan. Since certain participants in the plan are persons that do not meet the definition of "employee" under General Instruction A.1(a) of Form S-8, Form S-8 is not available for the plan. The registrant, however, meets the primary offering requirements of Form S-3, and the plan may be registered on that form as a primary offering. If the plan is registered on Form S-3, the information concerning the plan required by S-8 would have to be included in the Form S-3 prospectus. [Feb. 27, 2009]

216.02 Form S-3 is not available for the dividend reinvestment plan of a newly formed bank holding company because the annual report to shareholders of the predecessor bank contained only two years of audited financial statements. In this regard, General Instruction I.B.4 of Form S-3 requires that the registrant provide an annual report which meets the

requirements of Rule 14a-3(b). That rule requires an annual report with three years of audited financial statements. [Feb. 27, 2009]

216.03 A long-term holder of convertible debentures and warrants to purchase common stock proposed to sell the debentures and the warrants to an underwriter who would exercise the warrants, convert the debentures and make an underwritten public offering of the common stock. Because the proposed distribution appeared to be a primary offering by the issuer, it therefore could not be registered on Form S-3 in reliance on General Instruction I.B.3 as a secondary offering. [Feb. 27, 2009]

216.04 A registrant with an obligation to make matching cash contributions to its profit sharing/401(k) plan sought to contribute shares of its common stock to the plan and then register those shares for resale by the plan's trustee. The proceeds from the sale of the shares were to be used to fund the registrant's obligations under the plan. The use of Form S-8 was inappropriate for trustee's resales because the offering was not for compensatory purposes but rather to satisfy the registrant's own contractual obligations under the plan. Since the offering was on behalf of the registrant and the registrant was not eligible to use Form S-3 for primary offerings, the use of that form was also inappropriate. [Feb. 27, 2009]

216.05 General Instruction I.B.1 of Form S-3 requires an issuer to have $75 million of voting and non-voting common equity held by non-affiliates. The instruction indicates that the $75 million public float requirement may be computed on the basis of the last price at which the issuer's common equity was sold as of a date within 60 days prior to the date of filing. An interim daily price may not be used instead of a closing daily price. In addition, an issuer may not include shares in the public float computation until they are actually issued. [Feb. 27, 2009]

216.06 A registrant wished to use Form S-3 for a combination primary offering by the registrant and secondary offering by an affiliate, but did not meet the $75 million float test of General Instruction I.B.1 to the form. The registrant asked for a waiver, contending that the securities to be sold in the secondary portion of the offering should be included in the float computation, and that the addition of such securities would permit the registrant to meet the float test. The waiver request was denied. [Feb. 27, 2009]

216.07 A waiver request for the use of Form S-3 for a primary offering by an issuer was denied when the aggregate market value of the issuer's voting and non-voting common equity held by non-affiliates was inadequate under General Instruction I.B.1 of Form S-3. The staff does not grant requests for waivers of the "float" tests set forth in General Instruction I.B.1. [Feb. 27, 2009]

216.08 General Instruction I.B.3 of Form S-3 permits the use of the form for secondary offerings if securities of the same class are listed on a national securities exchange or quoted on the automated quotation system of a national securities association. A prospective registrant desired to use Form S-3 for a secondary offering of preferred stock. Although one series of the company's preferred stock was listed on the NYSE, the stock proposed to be registered was a different series with different terms, most notably, a different dividend rate. Under the circumstances, Form S-3 was not available. [Feb. 27, 2009]

216.09 Pursuant to a private placement, securities were to be issued into an escrow account upon partial payment equal to the securities' par value. The issuer contemplated that the securities would be released from escrow upon payment of the remainder of the market price, simultaneously with

effectiveness of a Form S-3 for resale of the securities. Although the securities would be considered outstanding under Delaware law at the time of issuance into escrow, they would not be "outstanding" for purposes of General Instruction I.B.3. In addition, the use of the escrow arrangement and the de minimis down payment suggests that the offering was in substance a "primary offering" for purposes of Form S-3 eligibility. [Feb. 27, 2009]

216.10 An issuer contemplating a rights offering believed that the offering would not be fully subscribed. In such event, the issuer contemplated offering the unsubscribed securities to its employees. Form S-3 would not be available because General Instruction I.B.4 contemplates rights offerings only to existing shareholders and not to employees. [Feb. 27, 2009]

216.11 A twelve-month reporting company wishes to use Form S-3 for a rights offering to its security holders and a standby offering to the public of any unsubscribed securities. Although the rights offering may be made on Form S-3, the standby offering can be included on the same form only if the issuer is eligible to make primary offerings under General Instruction I.B.1 to the form. The reference to eligible standby arrangements in General Instruction I.B.3 is limited to those done in connection with certain calls or redemptions. [Feb. 27, 2009]

216.12 General Instruction I.B.4 is intended to assure that issuers who are subject only to the periodic reporting obligations of Section 15(d) have provided annual report and proxy type information to persons who will be purchasing securities registered on Form S-3. Most issuers include the disclosure concerning executive officers required by Item 401(b) of Regulation S-K in the Form 10-K rather than in the proxy statement. As a result, that information often is not regularly delivered to shareholders. A separate distribution of that information would not be required in order for Form S-3 to be available to such issuers. [Feb. 27, 2009]

216.13 A company relied on General Instruction I.B.1 to file a Form S-3 that is now effective. When it files its next Form 10-K, the company will not meet the $75 million float requirement in General Instruction I.B.1, but it will meet the requirements of General Instruction I.B.6. Assuming a post-effective amendment is not needed for any other reason, the company does not need to file a post-effective amendment solely to include the information required by Instruction 7 to General Instruction I.B.6; this information may be included on the outside front cover of the prospectus via a prospectus supplement. [Feb. 27, 2009]

216.14 Secondary sales by affiliates may be made under General Instruction I.B.3 to Form S-3, even in cases where the affiliate owns more than 50% of the issuer's securities, unless the facts and circumstances indicate that the affiliate is acting as an underwriter or by or on behalf of the issuer. See Question 116.15. [Feb. 27, 2009]

216.15 A finance company, which is wholly-owned by an issuer that meets the eligibility requirements for Form S-3, proposed to issue a letter of credit guaranteeing certain lease payments on an exempt industrial revenue bond. Form S-3 was available for the registration of the letter of credit since it was considered investment grade debt by virtue of its AAA rating by one of the nationally recognized statistical rating organizations. See General Instructions I.B.2 and I.C.1 of Form S-3. [Feb. 27, 2009]

216.16 An issuer that proposes to register debt on Form S-3 is attempting to meet the "investment grade securities" test of General Instruction I.B.2 of the form. The rating of the issuer's securities by a nationally recognized statistical rating organization ("NRSRO") will not be completed by the date the issuer hopes to become effective. The NRSRO, however, will have

assigned a preliminary rating indicating investment grade. General Instruction I.B.2 of Form S-3 allows such a Form S-3 to become effective with a preliminary rating. See also Instruction 3 to the Signatures section of Form S-3. [Feb. 27, 2009]

216.17 A registrant eligible to use Form S-3 only to register investment grade securities must amend that registration statement prior to sale — by filing an amendment on a form it is then eligible to use — if the securities receive a final rating which is below the four highest rating categories specified by General Instruction I.B.2 of Form S-3. The amendment should be filed pre-effectively if the rating is received prior to the effective date. [Feb. 27, 2009]

216.18 A domestic non-reporting subsidiary of a foreign private issuer that is eligible to file on Form F-3 seeks to register the issuance of investment grade debt that is not guaranteed by the parent. The domestic issuer is permitted to register this offering on Form F-3 under General Instruction I.A.5(ii), and would be permitted to register the offering on Form S-3 pursuant to General Instruction I.C.2 (as a subsidiary of the parent) were it not for the requirement that the parent meet the registrant requirements of Form S-3. (The parent does not file its Exchange Act reports on domestic forms.) Because registering the offering on Form S-3 would result in more information being provided to investors, the domestic subsidiary may register its offering of investment grade debt on Form S-3 rather than Form F-3, assuming that it filed, and went effective on, a Form 10 with full Form 10-K information and incorporated by reference the Form 10 into the Form S-3. The parent must meet the requirements for filing on Form F-3 at the time the subsidiary files the Form S-3. [Feb. 27, 2009]

Section 217. Form S-3 — General Instructions I.C.1 to I.C.5 — Majority-Owned Subsidiaries

217.01 A Form S-3-eligible issuer has a majority-owned subsidiary that has a wholly-owned non-reporting subsidiary. The second-tier subsidiary proposes to sell its own debt publicly. The debt will be guaranteed by the second-tier subsidiary's non-reporting parent. This guarantee will, in turn, be guaranteed by the Form S-3-eligible parent. The Form S-3-eligible parent's guarantee will extend to the benefit of holders of the second-tier subsidiary's debt instrument. The offering may be registered on Form S-3 in reliance on General Instruction I.C.3 of the form. [Feb. 27, 2009]

217.02 A wholly-owned limited purpose subsidiary of a Form S-3 eligible parent company sought to use Form S-3 for an offering of debt securities which were fully and unconditionally guaranteed by the parent. The debt securities were convertible into common stock of the parent and would not be convertible into any other securities of the subsidiary. Although General Instruction I.C.3 of Form S-3 refers to non-convertible securities of a registrant-subsidiary guaranteed by its parent, we analyzed each security separately and did not object to the use of the form because: (1) the parent was primarily eligible to offer its common stock under General Instruction I.B.1.; and (2) the subsidiary's debt securities being guaranteed by its Form S-3 eligible parent could be registered on Form S-3. [Feb. 27, 2009]

217.03 A foreign issuer proposed to register on Form S-3 debt securities guaranteed by its parent, a Delaware corporation that met the applicable registrant and transaction requirements of Form S-3. Notwithstanding the requirement of General Instruction I.A.1 that a registrant be organized under the laws of the U.S. or any State or Territory or the District of Columbia and have its principal business operations in the United States or its territories, the foreign subsidiary would be permitted to use Form S-3

pursuant to General Instruction I.C.3 because the guaranteeing parent satisfies this requirement. [Feb. 27, 2009]

217.04 A subsidiary of a Form S-3-eligible company filed a voluntary Form 10 in order to be able to issue investment grade debt on Form S-3, as permitted by General Instruction I.C.2 of Form S-3. The following year, the subsidiary filed another Form S-3 for investment grade debt, but by this time the subsidiary was delinquent in its own reporting obligations, not having filed any Form 10-Qs. In order to use the Form S-3, the subsidiary must file the delinquent Form 10-Qs; otherwise, the Form S-3, which incorporates by reference the reports filed by the subsidiary, would be deficient. However, once the subsidiary files the missing reports, Form S-3 may be used. The reports of the subsidiary are used for the informational purposes of the Form S-3, rather than form eligibility. Eligibility for the subsidiary to use the form is based on General Instruction I.C.2, which provides form eligibility for the subsidiary based on the parent's satisfaction of the eligibility requirements. When the subsidiary is relying on General Instruction I.C.2 for form eligibility, the timeliness requirement of General Instruction I.A.3. relates to the reports of the parent, not the subsidiary. [Feb. 27, 2009]

Section 218. Form S-3 — General Instructions I.D.1 to I.D.5 — Automatic Shelf Offerings by Well-Known Seasoned Issuers

218.01 A master limited partnership cannot register limited partnership interests for resale on an automatic shelf registration statement and would not be a well-known seasoned issuer because the offering would not be on a firm commitment basis, and therefore, the limited partnership would be an ineligible issuer. [Feb. 27, 2009]

Section 219. Form S-3 — General Instructions II.A to II.G — Application of General Rules and Regulations [Reserved]

Section 220. Form S-3 — General Instruction III — Dividend or Interest Reinvestment Plans: Filing and Effectiveness of Registration Statement; Requests for Confidential Treatment [Reserved]

Section 221. Form S-3 — General Instructions IV.A to IV.B — Registration of Additional Securities and Additional Classes of Securities [Reserved]

Section 222. Form S-3 — General Instructions V.A to V.B — Offerings of Asset-Backed Securities [Reserved]

Section 223. Form S-3 — Part I — Information Required in Prospectus

223.01 Despite the fact that Form S-3 does not specifically refer to the requirements of Regulation S-X, the provisions of Rule 3-12 of Regulation S-X (Age of Financial Statements) are applicable to Form S-3. Under Rule 3-12(b), if a Form S-3 registration statement will become effective within the first 90 days of the fiscal year for non-accelerated filers, the first 75 days for accelerated filers, or the first 60 days for large accelerated filers, the filing need not include financial statements more current than as of the end of the third quarter of the most recently completed fiscal year (with incorporation by reference of the third quarter Form 10-Q), unless (1) the audited financial statements for such fiscal year are available; or (2) the anticipated effective date will be more than 45 days subsequent to the end of the fiscal year and the registrant does not meet the conditions prescribed under paragraph (c) of Section 210.3-01 of Regulation S-X. The interpretation of the first qualification to Rule 3-12(b) requires a factual

determination as to whether or not audited financial statements are "available." [Feb. 27, 2009]

223.02 When the parent of the issuer of securities to be registered on Form S-11 is also the guarantor of certain obligations on those securities, and the parent meets the eligibility requirements for Form S-3, the information concerning the guaranteeing parent in the Form S-11 registration statement may be provided in accordance with the disclosure requirements of Form S-3. [Feb. 27, 2009]

223.03 A registrant proposing to file on Form S-3 requested relief from Item 12(b) of Form S-3, insofar as it related to a Schedule TO to be filed with respect to a tender offer for the equity securities of a subsidiary pursuant to Section 14(d) of the Exchange Act. Item 12(b) requires that the prospectus state that all documents subsequently filed by the issuer, pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, are incorporated by reference. The issuer contended that a literal application of Item 12(b) would result in describing the tender offer in the prospectus, and draw unwarranted attention to an immaterial transaction not related to the offering. The registrant was advised that it must comply with the incorporation by reference requirement for the Schedule TO. [Feb. 27, 2009]

Section 224. Form S-3 — Part II — Information Not Required in Prospectus [Reserved]

Section 225. Form S-4

225.01 A bank holding company formation is not for the sole purpose of forming a bank holding company when the holding company proposes an acquisition of another bank immediately following the formation. Staff Accounting Bulletin No. 50 would not be available and financial statements of both banks must be provided. [Feb. 27, 2009]

225.02 A company registers on Form S-4 shares to be issued in a Rule 145(a) transaction, together with shares to fund a successor employee benefit plan. A post-effective amendment to the Form S-4 is to be filed on Form S-8 containing a complete description of the plan. The registrant is also allowed to file, as part of that amendment, a reoffer prospectus prepared in accordance with Part I of Form S-3 to be used by affiliates making sales of securities acquired under the employee benefit plan. [Feb. 27, 2009]

225.03 A registrant filing a Form S-4 registration statement in connection with an acquisition sought to include shares which had previously been issued pursuant to Section 4(2) to certain officers and directors of the company to be acquired. The purpose was to facilitate resales by such persons. Those shares were not permitted to be registered on Form S-4 because they were not issued in connection with the Rule 145 transaction. [Feb. 27, 2009]

225.04 A real estate limited partnership filing an acquisition shelf registration statement for the purpose of acquiring properties may use Form S-4 even though the acquisition of properties rather than securities is not explicitly provided for in the form. However, the 20.D. undertaking of Industry Guide 5 is inappropriate and the procedure set forth for updating the registration statement to reflect acquisitions may not be used. The undertaking is applicable only to offerings for cash. [Feb. 27, 2009]

225.05 General Instruction G to Form S-4, permitting automatic effectiveness of certain bank holding company formation filings, is limited by the terms of Instruction G.l. to the issuance of common stock of the

holding company in exchange for common stock of the bank. Nevertheless, Instruction G will also be available when common and preferred stock are being issued, on a share for share basis, to holders of existing common and preferred stock of the bank. Like Staff Accounting Bulletin No. 50, General Instruction G is intended to be available when the holding company formation does not involve a change to the existing capital structure. [Feb. 27, 2009]

225.06 A Form S-4 registration statement will be filed to convert an existing corporation into a trust that will have the same assets and management as its predecessor. Because of applicable tax law or state law provisions, the new trust will not be created until after the Form S-4 has become effective. Using Rule 414 as a model, the existing corporation may execute and file the original registration statement. At the time the trust is formed, it should file a post-effective amendment adopting the registration statement. [Feb. 27, 2009]

225.07 Two companies propose a joint Form S-4 registration statement for a stock-for-assets acquisition. Although the company to be acquired is not the registrant, it should file as exhibits any contracts or other documents that would be material to the new entity. [July 3, 2008]

225.08 A parent, which is eligible to use Form S-3, and its wholly owned subsidiary both have outstanding debt securities. From time to time and on an individual basis, the parent intends to offer the debt holders newly issued common stock in exchange for their debt securities. Prior to entering into any negotiations, the parent may file a shelf registration statement on Form S-4 for the purpose of registering these individually negotiated transactions and the parent's registration statement would be kept current through forward incorporation by reference. The parent will need to consider the applicability of the tender offer rules. [Feb. 27, 2009]

225.09 Instruction F to Form S-4, which allows a U.S. acquirer to include F-4 type financial disclosure with respect to a target that is a foreign private issuer, is not applicable to the domestication of a non-U.S. entity as a Delaware corporation pursuant to Delaware General Corporation Law Section 388. [Feb. 27, 2009]

225.10 An acquiring company may seek a commitment from management and principal security holders of a target company to vote in favor of a business combination transaction, frequently referred to as a "lock-up agreement." The execution of a lock-up agreement may constitute an investment decision under the Securities Act. If so, the offer and sale of the acquiror's securities would be made to persons who entered into those agreements before the business combination is presented to non-affiliated security holders for their vote.

Recognizing the legitimate business reasons for seeking lock-up agreements in the course of business combination transactions, the staff has not objected to the registration of offers and sales where lock-up agreements have been signed in the following circumstances:

- the lock-up agreements involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting equity securities of the company being acquired;
- the persons signing the lock-up agreements collectively own less than 100% of the voting equity of the target; and
- votes will be solicited from shareholders of the company being acquired who have not signed the agreements and would be ineligible to purchase in a private offering.

Where, however, the persons entering into the lock-up agreements also deliver written consents approving the business combination transaction, the staff has objected to the subsequent registration of the exchange on Form S-4 for any of the shareholders because offers and sales have already been made and completed privately, and once begun privately, the transaction must end privately. [Nov. 26, 2008]

Section 226. Form S-8

226.01 Plan interests were inadvertently omitted from the Form S-8 registering company securities to be offered under the employee benefit plan. In this situation the company may register an indeterminate amount of plan interests pursuant to Rule 416(c), and there would be no filing fee. [Feb. 27, 2009]

226.02 A company issues options to independent distributors of pharmaceutical products. The company considered the individual distributors to be de facto employees of the issuer because they would be doing this kind of work only for the issuer, and the issuer would keep them informed through the distribution of Exchange Act reports. Based on these facts and considering that the nature of the services provided to the issuer would be Amway-style pyramid "network distribution," which would not necessarily be the primary source of the distributors' earned income, the use of Form S-8 was not permitted. [Feb. 27, 2009]

226.03 Item 8.A.5 of Form 20-F requires foreign private issuers to provide interim financial statements as of an interim date within nine months of the effective date. The undertaking in Item 512(a)(4) of Regulation S-K generally requires a foreign private issuer to update its financial statements in a registration statement, as required by Item 8.A of Form 20-F, during continuous offerings under Rule 415. However, for offerings on Form S-8, pursuant to Note 2 to Item 9 of that form, foreign private issuers are not required to provide the Regulation S-K Item 512(a)(4) undertaking and thus are not subject to this updating requirement. [Feb. 27, 2009]

226.04 A Form S-8 registration statement is being filed for an employee benefit plan that is available only to Canadian employees. Under these circumstances, the discussion and legal opinion relating to U.S. tax aspects of the plan are not required, but an opinion of Canadian counsel on the Canadian tax treatment is required. [Feb. 27, 2009]

226.05 An issuer is preparing to register additional shares of employer stock for its employee thrift plan. The plan trustee, which is an affiliate, participates in the issuer's dividend reinvestment plan (DRIP), which is registered on Form S-3. In calculating the number of shares remaining available under the Form S-8, the issuer need not subtract the number of shares distributed through the registered DRIP. This position is based on the view that the DRIP shares were taken on behalf of thrift plan participants, so that the trustee's distribution of such shares should not require further registration. [Feb. 27, 2009]

226.06 Item 8(b) of Form S-8 permits registrants, in lieu of filing an opinion of counsel concerning compliance with the requirements of ERISA or a determination letter with the IRS that the plan is qualified under Section 401 of the IRC (see Item 601(b)(5)(ii) and (iii) of Regulation S-K), to undertake to submit a plan or amendment to the IRS in a timely manner and make all changes required by the IRS in order to qualify the plan.

Prior to seeking a determination letter, and in order to avoid certain sanctions for plan "defects" under the IRC, a registrant wished to voluntarily contact the IRS under its "Closing Agreement Program" ("CAP," and when done voluntarily, a "Walk-in CAP") to resolve the "defects." If a

registrant filed a Form S-8, but participated in the Walk-in Cap (estimated to take 3-6 months) prior to seeking the IRS determination letter, such participation prior to the submission of the plan or amendment for a determination letter would not render the submission "untimely" for purposes of Item 8(b) of Form S-8, as long as the registrant was diligently and in good faith participating in this Walk-in CAP program. This is based in part on the recognition in Securities Act Release No. 6867 (June 6, 1990) of delays inherent in the determination letter process. [Feb. 27, 2009]

226.07 Rule 428(b)(2) requires the registrant to deliver, along with the documents containing the information required by Part I of Form S-8, one of: the latest Rule 14a-3(b) annual report, the latest Form 10-K, the latest Rule 424(b) prospectus, or an effective Form 10. An issuer that changed its fiscal year filed a six-month transition report on Form 10-K subsequent to its latest annual report on Form 10-K. When such issuer is relying on the Rule 428(b) Form 10-K delivery alternative, it must deliver both the latest annual report on Form 10-K and the transition report on Form 10-K in order to satisfy the Rule 428(b) requirement. [Jan. 26, 2009]

226.08 A registrant filing on Form S-8 incorporated a Form 10-K that contained its 2007 financial statements certified by one accounting firm, and its 2005 and 2006 financial statements certified by a different accounting firm. Rule 436 would require the filing of the consents of both accounting firms for purposes of the Form S-8 registration statement. [Jan. 26, 2009]

226.09 In its effective Form S-8, a company registered 500,000 shares for sale by the company pursuant to an option plan, and 1,000 previously unregistered shares for resale on a resale prospectus pursuant to General Instruction C to Form S-8. The company may not rely on General Instruction C.3.(a) (which applies only to control securities and allows the addition of persons to the resale prospectus list of selling shareholders by means of a post-effective amendment or Rule 424(b) prospectus supplement) to shift any of the 500,000 shares registered on the primary portion to the resale prospectus since to do so would amount to registering additional securities by means of a post-effective amendment in contravention of Rule 413. [Jan. 26, 2009]

226.10 A registrant with an obligation to make matching cash contributions to its profit sharing/401(k) plan sought to contribute shares of its common stock to the plan and then register those shares for resale by the plan's trustee. The proceeds from the sale of the shares were to be used to fund the registrant's obligations under the plan. The use of Form S-8 for trustee's resales was inappropriate because the offering was not for compensatory purposes, but rather to satisfy the registrant's own contractual obligations under the plan. Since the offering was on behalf of the registrant and the registrant was not eligible to use Form S-3 for primary offerings, the use of that form was also inappropriate. [Feb. 27, 2009]

226.11 A company was registering shares issuable on exercise of stock options. At the time of filing, the company had not yet issued options so that there was no option exercise price. The company only had public debt outstanding and there was no market for its common stock. The company had a negative book value. The company was advised to calculate the filing fee, for purposes of Rule 457(h), based on a good faith estimate of the value of the securities underlying the options. [Jan. 26, 2009]

226.12 A limited liability company sought to issue to its employees the stock of its financing member, which has the sole purpose of issuing stock to the public and investing the proceeds thereof in the LLC's securities. Because of this relationship, Rule 140 requires the LLC to register as co-

issuer on any Securities Act registration statement filed by the financing member for the sale of the financing member's stock. Accordingly, the LLC would be included as a registrant on any Form S-8 filed by the financing member. It is therefore not necessary to analyze whether the financing member is a "subsidiary" of the LLC for purposes of determining whether the finance member may register its stock on Form S-8 for sale to employees of its "parent." [Jan. 26, 2009]

226.13 The Pension Protection Act of 2006 conditions IRC Section 401 tax qualification for defined contribution plans on providing employees the opportunity to diversify out of company stock. Related regulations require the opportunity to reinvest the diversified funds in company stock. In some circumstances, the reinvestment of diversified funds in company stock may require a plan that otherwise did not require registration to file a Form S-8. If a plan was completely noncontributory (i.e., no employee money can be contributed to any investment under the plan), there would be no requirement to register. If the plan permits employee contributions, but only to investments other than company stock (so that Securities Act Section 3(a)(2) exempts the plan from registration), registration would be required if the plan commingles the diversified funds with employee contribution funds. This is because employee contributions could possibly be invested in company stock, making the Section 3(a)(2) exemption unavailable. If, however, diversified funds that originated from non-employee contributions are segregated from employee contribution funds, the non-employee funds could be reinvested in company stock without losing the Section 3(a)(2) exemption. [Feb. 27, 2009]

226.14 If securities being registered are issued under a plan and the plan is subject to the requirements of ERISA, Item 601(b)(5)(ii) requires the filing of either: (1) an opinion of counsel confirming compliance with certain requirements of ERISA; or (2) a copy of the IRS determination letter indicating the plan is qualified under Section 401 of the Internal Revenue Code. A Puerto Rican plan is not subject to the IRS, but rather to a Puerto Rican governmental authority. Because Puerto Rico is a United States territory, a Puerto Rican plan may file a letter akin to the IRS determination letter that is issued by the Puerto Rican governmental authority. [Feb. 27, 2009]

226.15

withdrawn [Sep. 22, 2016; see 126.41]

226.16 When the shares of Company A and Company B are paired for trading and issuance, A and B may file a registration statement for B's stock option plan on Form S-8 which will be signed by both A and B and will contain information about both companies. [Feb. 27, 2009]

Section 227. Form S-11

227.01 The registrant filed a registration statement on Form S-11 relating to a "shelf" offering of mortgage backed bonds to be issued in series. The registrant was informed that it would not be necessary to file post-effective amendments and supplemental indentures each time a new series of bonds was to be issued. The response was conditioned upon two factors:

1. A basic form of supplemental indenture including everything but the collateral for a particular series is filed at the time the registration is declared effective and the basic indenture is qualified; and

2. The registrant files a prospectus supplement describing the issuance of the series and the collateral therefor.

This position is consistent with Instruction 1 to Item 601(a) of Regulation S-K. When a registrant does not satisfy these conditions, supplemental indentures and amended underwriting agreements may be filed only by post-effective amendment and not as exhibits to a Form 8-K. The reason is that Form S-11 does not permit incorporation by reference to subsequently filed Exchange Act reports, such as a Form 8-K. [Jan. 26, 2009]

227.02 When the parent of the issuer of securities to be registered on Form S-11 is also the guarantor of certain obligations on those securities, and the parent meets the eligibility requirements for Form S-3, the information concerning the guaranteeing parent in the Form S-11 registration statement may be provided in accordance with the disclosure requirements of Form S-3. [Feb. 27, 2009]

Section 228. Form 1-A

228.01 Issuer is conducting a Regulation A offering of units consisting of common stock and warrants to purchase common stock. The warrants will not be exercisable until at least one year from the completion of the Regulation A offering, and the issuer intends to register the exercise of the warrants on a registration statement when they become exercisable. Because the warrants are not exercisable for at least one year, the issuer is not deemed to be offering the common shares underlying the warrants in the Regulation A offering. Hence, the exercise price of the warrants will not be included in calculating the aggregate offering price under Securities Act Rule 251(b), although the warrant value as part of the unit will be included. The registration statement covering the exercise of the warrants can be filed and declared effective before the expiration of one year so long as the warrants by their terms cannot be exercisable before one year from the completion of the Regulation A offering. [Apr. 24, 2009]

Section 229. Form 2-A [Reserved]

Section 230. Form D [Reserved]

Section 231. Form 144

231.01 An affiliate distributee from a partnership who is required to aggregate its sales with those of other affiliate distributees need not file a Form 144 if such affiliate distributee sells no more than 5,000 shares or shares with a market value not exceeding $50,000 in any three-month period, notwithstanding sales made by other distributees. [Jan. 26, 2009]

231.02 A subsidiary bank, acting in its fiduciary capacity, sells unrestricted shares of its holding company parent for an unaffiliated trust account. Form 144 need not be filed solely because of the bank's involvement, because the bank is not making a sale for its own account. [Jan. 26, 2009]

231.03 An affiliate of the issuer files a notice on Form 144 reporting the proposed sale of less than the full amount of securities that could be sold under the volume tests of Rule 144(e). During the same three-month period, the affiliate wishes to make additional Rule 144 sales in an amount that, taken together with the original sales, would not exceed the maximum number of securities that could have been sold at the time of the notice. The affiliate may not file an amended Form 144 to accomplish additional sales because a Form 144 must represent the affiliate's intent at the time of its filing. The affiliate may file a new Form 144 to sell additional securities, so long as these new sales satisfy the volume limitations existing when the new Form 144 is filed. [Jan. 26, 2009]

231.04 A Form 144, filed on behalf of an affiliate of the issuer by an attorney in fact, should be accompanied by a signed copy of the power of

attorney. After such power of attorney is attached to the Form 144, it does not have to be re-filed as an attachment to subsequently filed Forms 144 while it remains in effect. [Jan. 26, 2009]

231.05 An affiliate of the issuer proposes to make Rule 144 sales of both common stock and securities convertible into common stock. For purposes of determining whether the 5,000 shares or $50,000 condition to filing Form 144 has been met, the convertible securities should be regarded as having been converted into the common stock in the same manner as provided by Rule 144(e)(3)(i). [Jan. 26, 2009]

231.06 After an affiliate files a Form 144, the issuer declares a stock split. No new filing is required within the three-month period to sell the entire number of shares, on a post-split basis, for which the seller had originally filed. [Jan. 26, 2009]

http://www.sec.gov/divisions/corpfin/guidance/safinterp.htm
