SEC Compliance and Disclosure Interpretations, Section 126. Form S-8, Securities and Exchange Commission

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¶5520 [Voluntary Reporting]

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.

Reference: Form S-8

History: Issued February 2009.

¶5521 [Options Exercise]

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.

Reference: Form S-8; Securities Act Section 5

History: Issued July 1997; modified February 2009.

¶5522 [Eligibility]

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.

Reference: Form S-8

History: Issued February 2009.

¶5523 [Option and SAR]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5524 [Employee Status]

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.

Reference: Form S-8; Rule 405

History: Issued July 1997; modified February 2009.

¶5525 [Two Plans]

Question 126.06

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

Answer: Yes. For purposes of administrative convenience, a company may file the registration statement with a fee table identifying both plans and the amount of securities registered for each. The Part I information delivered pursuant to Rule 428 with respect to each plan should be specific to that plan. Part II should be written to present clearly the required information.

Reference: Form S-8; Rule 428

History: Issued July 1997; modified February 2009.

¶5526 [Rescission Offer]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5527 [Options on Founders' Stock]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5528 [Rights Plan]

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.

Reference: Form S-8; Rule 424(c) and Rule 428

History: Issued July 1997; modified February 2009.

¶5529 [Report Filing]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5530 [Incorporation by Reference]

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.

Reference: Form S-8; Form 10-K

History: Issued February 2009.

¶5531 [Failure to Furnish 8-K]

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.

Reference: Form S-8; Form 8-K

History: Issued July 1997; modified February 2009.

¶5532 [Internal Control Reports]

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.

Reference: Form S-3; Form S-8; Form 10-K; Rule 144; Item 308T of Regulation S-K and Exchange Act Section 18

History: Issued July 2008.

¶5533 [Non-Employee Options]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5534 [Analysts]

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.

Reference: Form S-8; Rule 701

History: Issued July 1997; modified February 2009.

¶5535 [Employee Benefit Plan]

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.

Reference: Form S-8; Rule 405

History: Issued July 1997; modified February 2009.

¶5536 [Non-Employee Options]

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."

Reference: Form S-8; Rule 405

History: Issued July 1997; modified February 2009.

¶5537 [Employer Securities]

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.

Reference: Form S-8; Form 11-K

History: Issued July 1997; modified February 2009.

¶5538 [Investment Options]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5539 [Direct Purchase]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5540 [Undertakings]

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 Item 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).

Reference: Form S-8; Rule 415 and Item 512 of Regulation S-K

History: Issued July 1997; modified February 2009.

¶5541 [Accountant's Consent]

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.

Reference: Form S-8; Form 10-K

History: Issued July 1997; modified February 2009.

¶5542 [Description of Securities]

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.

Reference: Form S-8; Form 8-K

History: Issued July 1997; modified February 2009.

¶5543 [New Plan Participants]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5544 [Availability of Documents]

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.

Reference: Form S-8; Rule 428(b)

History: Issued February 2009.

¶5545 [Document Delivery]

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.

Reference: Form S-8

History: Issued January 2009.

¶5546 [Re-Offer Prospectus]

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.

Reference: Form S-8; Item 512 of Regulation S-K

History: Issued July 1997; modified February 2009.

¶5547 [Resale Prospectus]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5548 [Restricted Securities]

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.

Reference: Form S-3; Form S-8 and F-3

History: Issued July 1997; modified February 2009.

¶5549 [First Annual Report]

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.).

Reference: Form S-3; Form S-8 and Form 10-K

History: Issued July 1997; modified February 2009.

¶5550 [Restricted Securities]

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).

Reference: Form S-3; Form S-8; F-3 and Rule 144

History: Issued July 1997; modified January 2009.

¶5551 [Volume Limitations]

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.

Reference: Form S-8; Rule 144

History: Issued July 1997; modified February 2009.

¶5552 [Shares Under Plan]

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.

Reference: Form S-8; Rule 701

History: Issued July 1997; modified February 2009.

¶5553 [Affiliate Intentions]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5554 [Fee For Resales]

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.

Reference: Form S-8; Rule 457(h)(3)

History: Issued July 1997; modified February 2009.

¶5555 [Prior Registration]

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.

Reference: Form S-8; Rule 413

History: Issued July 1997; modified February 2009.

¶5556 [Plan Interests]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5557 [Deregistration]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5558 [Acquired Company]

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.

Reference: Form S-8

History: Issued July 1997; modified February 2009.

¶5559 [Accounting Changes]

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.

Reference: Form S-8

History: Issued August 2009.

¶5559A [Self-Directed "Brokerage Window"]

Question 126.41

Question: 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?

> **Answer:** 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.

Reference: Securities Act Section 2(a)(3)

History: Issued September 22, 2016.