

SEC Compliance and Disclosure Interpretations, Section 240. Rule 457—Computation of Fee, Securities and Exchange Commission

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¶1250 [Price Changes]

Question 240.01

Question: After the initial filing of a registration statement, must a company pay an additional filing fee if its per share offering price changes?

Answer: When registering pursuant to [Rule 457\(a\)](#), the company registers the number of securities offered, not the dollar amount. Therefore, no additional fee need be paid if the per share price rises. If the per share price falls, however, the company cannot increase the number of shares it offers without registration of additional shares and payment of an additional registration fee. Under [Rule 457\(o\)](#), a company registers the dollar amount of securities being offered. Consequently, if the per share price increases so that the maximum aggregate offering price would be greater than the maximum aggregate offering amount listed in the calculation of registration fee table, the company would be required to register an additional dollar amount and pay an additional registration fee, or reduce the number of shares it offers. If the per share price decreases, additional shares could be offered without further registration so long as the amount of shares offered times the per share price does not exceed the maximum aggregate offering amount listed in the calculation of registration fee table.

Reference: [Rule 457](#)

History: Issued July 1997; modified January 26, 2009.

¶1251 [Original Issue Discount]

Question 240.02

Question: How does one calculate the filing fee under [Section 6\(b\)](#) for debt securities sold with original issue discount?

Answer: The public offering price for a security is always the basis for calculating the filing fee under [Section 6\(b\)](#). As a result, the principal amount for debt securities sold with original issue discount will not be the amount on which the fee is calculated. Instead, the substantially smaller amount to be paid by purchasers in the public offering will determine the fee.

Reference: [Rule 457](#); [Securities Act Section 6\(b\)](#)

History: Issued March 1999; modified November 26, 2008.

¶1252 [Spin-Offs]

Question 240.03

Question: How should a company compute the filing fee for a registered spin-off?

Answer: The registrant should look to [Rule 457\(f\)](#) for guidance. Although the rule does not specifically mention spin-offs, it does contain provisions, such as [Rule 457\(f\)\(1\)](#) and (2), that may be helpful in determining the proper fee. Consistent with [Rule 457\(f\)\(1\)](#), the filing fee is based on the market value of the securities to be spun off. When there has been no market for the shares being spun off, consistent with [Rule 457\(f\)\(2\)](#), the filing fee may be based on the book value of the assets of the spun-off subsidiary.

Reference: [Rule 457](#)

History: Issued July 1997; modified January 26, 2009.

¶1253 [Business Combinations]

Question 240.04

Question: In a [Form S-4](#) registration statement registering both the securities offered in a business combination transaction and the resale of those securities by affiliates, must a filing fee be paid with respect to both the securities offered in the business combination transaction and the subsequent resale of those securities?

Answer: No. Under [Rule 457\(f\)\(5\)](#), if a filing fee is paid with respect to the securities offered in the business combination transaction, no separate filing fee is assessed for the registration of resale transactions.

Reference: [Rule 457](#)

History: Issued January 26, 2009.

¶1254 [Common Stocks and Warrants]

Question 240.05

Question: When an issuer is registering units composed of common stock, common stock purchase warrants, and the common stock underlying the warrants, how is the registration fee calculated?

Answer: The registration fee is based on the offer price of the units and the exercise price of the warrants.

Reference: [Rule 457](#)

History: Issued July 1997; modified January 26, 2009.

¶1255 [Sale Price v. Exercise Price]

Question 240.06

Question: How should an issuer calculate the fee payable in connection with the simultaneous registration of warrants and the common stock underlying the warrants?

Answer: The fee payable is based on the offer price plus the exercise price of the warrants. This is analogous to [Rule 457\(i\)](#) which provides that the registration fee for the simultaneous registration of a convertible security and the underlying security is the proposed offering price of the convertible security plus any additional conversion consideration. The entire fee is allocated to the common stock, and no separate fee is recorded for the warrants.

Reference: [Rule 457](#)

History: Issued July 1997; modified January 26, 2009.

¶1256 [401(k) Plans]

Question 240.07

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: [Rule 457](#)

History: Issued July 1997; modified January 26, 2009.

¶1257 [Same Class Securities]

Question 240.08

Question: [Rule 457](#)(h) states that if the exercise price of the options is not known in the case of an employee stock option plan, the fee should be based upon the price of the securities of the “same class.” What does “same class” refer to?

Answer: [Securities Act Release No. 6867](#) (June 6, 1990) clarifies that “same class” refers to those securities underlying the options that are being registered.

Reference: [Rule 457](#)

History: Issued July 1997; modified January 26, 2009.

¶1258 [Resale Prospectus]

Question 240.09

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: Pursuant to [Rule 457](#)(h)(3), no additional fee need be paid for resales when a fee has been paid in connection with the registration of such securities for sale to the employees.

Reference: [Rule 457](#)

History: Issued January 26, 2009.

¶1259 [Deregistration]

Question 240.10

Question: After selling securities off of a registration statement, an issuer filed a post-effective amendment to deregister the remaining unsold securities, and that post-effective amendment became effective. May the issuer transfer the fee associated with those unsold securities to a registration statement that it plans to file in the future?

Answer: No. As stated in [Securities Act Release No. 7943](#) (Jan. 26, 2001), at footnote 68, fee transfers are not available from unsold shares that were deregistered before the new registration statement is filed. When a post-effective amendment to deregister becomes effective, filing fee transfer from the deregistered securities becomes unavailable.

Reference: [Rule 457](#)

History: Issued January 26, 2009.

¶1260 [Options]

Question 240.11

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. Because [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, the issuer may not transfer the fees associated with the securities that it believes it will not need to issue until the issuer completes or terminates the offering registered on [Form S-8](#).

Reference: [Rule 457](#); [Form S-8](#)

History: Issued January 26, 2009.

¶1261 [Automatic Shelf Registration Statement]

Question 240.12

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 [Form S-3](#) or [Form F-3](#). 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 are designated separately from other registration statements on [Form S-3](#) or [Form F-3](#) to enable them to become effective immediately.

Reference: [Rule 457](#); [Form S-3](#); [Form F-3](#)

History: Issued January 26, 2009.

¶1262 [Continuous Offering]

Question 240.13

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 in the manner provided in [Rule 415\(a\)\(6\)](#). Alternatively, it may carry forward the filing fees paid for any unsold securities under [Rule 457](#) if the automatic shelf registration statement is filed within five years of the initial filing date of the effective registration statement.

Reference: [Rule 457](#)

History: Issued January 26, 2009.

¶1263 [Automatic Shelf Registration Fee]

Question 240.14

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.

Reference: [Rule 457](#)

History: Issued January 26, 2009.