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HIGHLIGHTS AND PITFALLS

Form S-8: Share Counting, Fee Calculations and Other Tricks of the Trade

One of the most confusing areas that securities lawyers face is figuring out the amount of offers and sales of securities to register on a Form S-8 and how to determine the amount of the filing fee to be paid. This is partly because there are a myriad of different types of benefit plans—and mainly because the Staff has not provided a great deal of guidance about how to do so. This challenge includes figuring out how to count grants made over time against the plan offers that are registered and how much, if any, of previously paid filing fees can be used to offset the fee due for a new Form S-8. [Note we use the term "offers" rather than "securities" even though technically there is a "no sale" theory for option grants.]

We believe it is best to be conservative both in counting offers and using prior filing fee payments to offset new filing fees due. Mistakes in either area can result in unregistered sales of securities that are both costly and embarrassing to fix.

Deciding Whether Plan Offers Must Be Registered or Are Exempt

Unless an exemption is available, issuers are required to register securities offered under an employee benefit plan on a 1933 Act registration statement, and are permitted to register such securities on Form S-8. Non-reporting companies can use the Rule 701 exemption, as well as Regulation D or Section 3(a)(2) (which relates to interests in certain plans), for securities offered under an employee benefit plan, to avoid registration. Reporting issuers are not permitted to use Rule 701, but can rely on Regulation D, as well as Section 4(a)(2) or Section 3(a)(2), to exempt their plan offers in limited circumstances.

Companies typically file registration statements on Form S-8 for incentive stock plans, certain types of 401(k) plans, deferred compensation plans and employee stock purchase plans. We occasionally see a Form S-8 filed for a one-off employment contract—such as an employment inducement award—although issuers may decide to rely on an exemption under Regulation D or Section 4(a)(2) in those circumstances. Note that an issuer could register employee benefit plan securities on Form S-1 or S-3, but issuers prefer to register them on Form S-8 due to its short-form nature (see our September-October 2007 issue at pg 5). As discussed below, General Instruction A.1 to Form S-8 indicates that issuers "may use this Form for registration" of "securities of the registrant to be offered under any employee benefit plan…"

Eligibility to Use Form S-8

Issuer Eligibility

To be eligible to use Form S-8, an issuer must be subject to the requirement to file reports under 1934 Act Sections 13(a) or 15(d), and must have filed all reports and other materials required to be filed during the preceding twelve-month period (or for such shorter time that the issuer was required to file such reports and materials), with further restrictions applying in the case of shell companies or former shell companies. As noted in Securities Act Forms CDI Question 126.01, an issuer that filed reports under Sections 13(a) or 15(d) but is not statutorily required to do so is not eligible to use Form S-8, so the form is not available for "voluntary filers." The eligibility requirements only go to whether the issuer

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is current, so unlike in the case of Form S-3 eligibility, the issuer's filings need not be both timely and current (see Securities Act Forms CDI Question 126.10).

If an issuer loses its Form S-8 eligibility because, *e.g.*, at the time of its 1933 Act Section 10(a)(3) update it was not current in its 1934 Act filings obligations, then the issuer would have to cease using the Form S-8 and file using a form that it is eligible to use for the primary offering of securities, which in most cases would presumably be Form S-1. As noted in Securities Act Forms CDI Question 126.03, however, the Staff would permit the issuer to begin using the same Form S-8 again once the issuer becomes current in its reporting obligations and satisfies the requirements in General Instruction A to Form S-8 (see also Securities Act Forms CDI Question 126.13).

There is no analogous "F-" form for foreign private issuers to use, so they also register offers and sales under employee benefit plans using Form S-8.

Plan Eligibility

In situations where plan interests are being registered (discussed below), and the plan's latest annual report filed pursuant to Section 15(d) is being incorporated by reference, the plan itself may utilize Form S-8 if (i) the plan has been subject to the requirement to file reports under Section 15(d) and has filed all such required reports during the preceding twelve months (or such shorter period that the plan was required to file such reports), or (ii) the plan was not previously subject to the reporting requirements and, concurrently with the filing of the Form S-8, the plan files an annual report for the latest fiscal year (or if the plan has not completed its first fiscal year, then the period ending not more than 90 days prior to the filing of the registration statement), provided that if the plan has not been in existence for at least 90 days prior to the filing date, the requirement to concurrently file an annual report does not apply.

Limited to Employee Plans

Form S-8 can be used only for registration of (i) securities to be offered pursuant to employee benefit plans to the issuer's employees or employees of its subsidiaries or parents; (ii) interests in such plans, if such interests constitute securities; and (iii) certain reoffers and resales of the foregoing. For this purpose, Rule 405 defines the term "employee benefit plan" as "any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors . . . ."

The term "employee" is defined in General Instruction A.1.(a) to Form S-8 as "any employee, director, general partner, trustee (where the registrant is a business trust), officer, or consultant or advisor . . . ." Form S-8 is available for consultants and advisors only if they are natural persons who render *bona fide* services to the issuer not in connection with the offer or sale of securities in a capital-raising transaction, and which do not directly or indirectly promote or maintain a market for the issuer's securities. The term "employee" for purposes of the form also includes certain insurance agents, and, with respect to limited transactions (*e.g.*, option exercises and intra-plan transfers), former employees, executors, administrators and beneficiaries of deceased employees, guardians or members of a committee for incompetent former employees, or similar persons authorized to administer the estate or assets of former employees.

Automatic Effectiveness

Pursuant to 1933 Act Rule 462, a Form S-8, as well as a post-effective amendment to Form S-8, becomes effective automatically upon filing, and as such a Form S-8 is typically not subject to Staff review.

In Securities Act Forms CDI Question 126.11, the Staff notes that an issuer may file and use a Form S-8 after the issuer has filed its Form 10-K, but before filing the Part III information that is forward incorporated by reference from the proxy statement (or included in a subsequently filed post-effective amendment). The Staff notes, however, that the issuer is responsible for ensuring that any prospectus used in connection with a registered offering contains the information required by Section 10(a) and 1933 Act Schedule A.

A Single Form S-8 Can Be Used to Register More Than One Plan's Securities

The Staff notes in Securities Act Forms CDI Question 126.06 that if there are shares to be issued under more than one plan, an issuer can register the securities for more than one plan on a single Form S-8. In this case, both plans are listed on the cover of the Form S-8 and the calculation of registration fee table should identify each of those plans and the amount of securities registered for each plan, as in the following example:

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered (1)	Proposed maximum offering price per share (2)	Proposed maximum aggregate offering price (2)	Amount of registration fee (2)
Common Stock ($0.01 par value $.001 per share	8,725,000 (3)	$11.25	$98,156,250	$11,393

(1) This Registration Statement includes any additional shares of the registrant's Common Stock that may be issued pursuant to anti-dilution provisions contained in the plan.

(2) Pursuant to Rule 457(h), the registration fee was computed on the basis of the average of the high and low prices of the registrant's Common Stock on the New York Stock Exchange on January 21, 2015.

(3) The number of shares to be registered under the respective plans are as follows: Stock Option Plan—3,300,000; Inc. Omnibus Plan—4,925,000.

The Plan Itself is Not Registered; Just Securities Offered Under Plan

Remember that although the name of an issuer's plan appears on the cover page of a Form S-8, the registration statement registers the offer and sale of securities under the plan—not the plan itself. There is no such thing as registering a plan under the 1933 Act.

Shares Underlying Options Permitted to be Registered Before Option Exercise

In a departure from the SEC's usual analysis regarding warrants, options, etc., shares underlying options to be issued under a plan are permitted to be registered at any time before the option is exercised, without regard to when the option was granted or will become exercisable. The Staff articulates this position in Securities Act Forms CDI Question 126.02, which cites to Rel. No. 33-7646 (1999), text preceding fn. 65. As a result, it is permissible to file a Form S-8 to register the issuance of shares that are subject to options that have already been granted or that are assumed in acquisitions, as long as such options are not yet exercised.

Don't Forget Listing Applications for NYSE-Listed Issuers

For an issuer listed on the NYSE, a supplemental listing application is required to be filed with the NYSE if the issuer files a Form S-8, unless the issuer does not plan to use any newly issued shares for that Form S-8. Nasdaq-listed issuers are not required to make any filing unless they are making awards under a plan that has not been approved by shareholders.

The Need to Register "Plan Interests"

One confusing concept that trips up some practitioners is that, in certain instances, interests of participants in a compensatory plan may be deemed to involve a separate security that must also be registered (see our May-June 2011 issue at pg 9). These are known as "plan interests" (or sometimes "participation interests").

The analysis of whether a plan interest is a security is analyzed under the *Howey* investment contract test and ensuing SEC guidance. While this is a very complex issue, the upshot of this guidance is that the SEC believes a participation interest is a security if participation in the plan by the employee and the employer's contribution are voluntary (e.g., certain 401(k) plans). When plan interests are registered, the plan itself is a registrant and therefore incurs a Section 15(d) obligation, which is usually satisfied by filing a Form 11-K.

No Filing Fee Required for Plan Interests

No separate fee is required for any plan interests that are registered under Rule 457(h)(3). That being said, the cover of the Form S-8 still must list the plan interests in addition to the other securities being registered. This is done by adding a row in the calculation of registration fee table on the cover, as shown in the sample below:

CALCULATION OF REGISTRATION FEE

Title of Securities to be Registered	Amount to be Registered [1]	Proposed Maximum Offering Price Per Share	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee
Participation Interests	(1)	—	—	(2)

(1) Pursuant to Rule 416(c) under the Securities Act of 1933, this registration statement covers an indeterminate amount of interests to be offered or sold pursuant to the employee benefit plan described herein.

(2) Pursuant to Rule 457(h)(3) no registration fee is required to be paid.

When an issuer has inadvertently omitted plan interests from the Form S-8 registering the issuer securities to be offered under the plan, the Staff notes in Securities Act Forms CDI Interpretation 226.01 that the issuer may register an indeterminate number of plan interests pursuant to Rule 416(c) in a new Form S-8 and need not pay a filing fee.

The Need to Register Deferred Compensation Plan Obligations

A Form S-8 may need to be used to register obligations under deferred compensation plans, particularly if the returns are tied to different investment alternatives. In Securities Act Sections CDI Interpretation 239.03, the Staff notes that the debt owing to plan participants under a deferred compensation plan is analogous to investment notes, which typically are viewed as debt securities. However, the Staff has not stated affirmatively that all interest-only deferred compensation plans involve securities, instead leaving that question for counsel's analysis of the facts and circumstances. If interests in a non-qualified deferred compensation plan are securities, registration is required unless an exemption (e.g., Section 4(a)(2)) is available. The Staff notes that because the deferred compensation obligations are obligations of the issuer/employer and not interests in the plan itself, the registration of the deferred compensation obligations does not lead to a requirement that a deferred compensation plan file a Form 11-K, as is the case of registered plan interests. Further, the Staff has said that compliance with the Trust Indenture Act of 1939 is not required with respect to the deferred compensation obligations.

When deferred compensation obligations are registered, a dollar amount of the obligations should be registered, and the filing fee should be based on the amount of compensation being deferred rather than the ultimate investment return. This can be a confusing area for practitioners, and it caused problems in the 1990s when many issuers were not registering the deferred compensation obligations when there was no underlying stock being issued (notwithstanding the SEC's position to the contrary). An example of a calculation of registration fee table for a deferred compensation plan is as follows:

CALCULATION OF REGISTRATION FEE

Title of Securities to be Registered	Amount to be Registered [1]	Proposed Maximum Offering Price Per Share	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee
Deferred Compensation Obligations [2]	$10,000,000	100%	$10,000,000 [3]	$1,163.00

(1) The Deferred Compensation Obligations include general, unsecured obligations of the Company to pay up to $10,000,000 of deferred compensation from time to time in the future in accordance with the terms of the Company's Executives' Deferred Compensation Plan (the "Plan").

(2) Solely for purposes of calculating the registration fee pursuant to Rule 457(h) under the Securities Act of 1933, the amount of deferred compensation obligations registered is based on an estimate of the amount of compensation participants may defer under the Plan.

There are no clear rules for determining how much should be registered on the Form S-8. Amounts to be registered are frequently derived from budget estimates or projections that are based on the terms of the deferred compensation plan, the current and expected compensation levels and experience with deferral rates. Sometimes these amounts can be quite large, particularly for plans that cover a large number of employees and when the issuer wants the registration statement to cover transactions well into the future. Issuers should monitor the deferrals to ensure that the registered amount is not exceeded. Also, issuers should consider registering enough deferred compensation obligations to sufficiently cover deferral of future compensation amounts over a defined period in order to avoid an inadvertent Section 5 violation if the issuer loses track of the amount of the issuer's obligations under the plan.

Calculating Filing Fees

Under Rule 457(h), fees paid for securities offered pursuant to an employee benefit plan on a Form S-8 can be calculated like any other offering—the fee is based on the aggregate offering price using the maximum number of the securities issuable under the plan covered by the registration statement based on recent market prices for the issuer's stock. For stock options, the fee is based upon the weighted-average exercise price at which the options may be exercised for options already granted, and based on the market price (calculated under Rule 457(c)) for shares reserved but not yet subject to outstanding options.

In addition to Rule 457(h), Rule 457(c) may be applicable because a Form S-8 is often like a mini-shelf offering. Rule 457(c) states: "Where securities are to be offered at prices computed upon the basis of fluctuating market prices, the registration fee is to be calculated upon the basis of the price of securities of the same class, as follows: either the average of the high and low prices reported in the consolidated reporting system (for exchange traded securities and last sale reported over-the-counter securities) or the average of the bid and asked price (for other over-the-counter securities) as of a specified date within 5 business days prior to the date of filing the registration statement."

For a resale prospectus that is added by post-effective amendment, the Staff noted in Securities Act Forms CDI Question 126.35 that no fee is necessary in accordance with Rule 457(h)(3), but only if the resale relates to the same shares being registered on a primary basis, or previously registered shares.

Fee Offset When a New Form S-8 for a New Plan is Filed

One very difficult area to navigate today is transferring a filing fee from a previously filed Form S-8, particularly if the new Form S-8 involves a new plan. This problematic area is underscored by a memo authored by Joe Alley of Kmall Golden Gregory—posted in the "Form S-8" Practice Area on TheCorporateCounsel.net—entitled "Pay Up! (Are Issuers Shortchanging the SEC by Underpaying S-8 Registration Fees?)" In the memo, Alley notes:

> A quick survey of Forms S-8 filed in the last four years on the SEC's EDGAR system turns up something surprising – dozens of issuers appear to be underpaying the required registration fees for shares to be issued pursuant to employee benefit plans. Shortchanging the SEC out of potentially millions of dollars. In fact, a large number of these issuers are even calling attention to their underpayments by citing as support for their fee calculations an SEC telephone interpretation that was withdrawn many years ago. These underpayments appear to stem in large part from issuers' and their counsels' misunderstanding of the current rules and interpretations that allow issuers to utilize the filing fees paid with respect to previously filed Forms S-8.

If eligible, an issuer can offset the amount of a new fee due for a new Form S-8 by the amount of the fee transferred from a previously filed Form S-8. If the transferred fee is not enough to completely offset the new fee, the balance must be paid to the SEC when filing the new Form S-8.

Note that issuers are not allowed to carry forward the shares themselves from the previously filed Form S-8 to the new Form S-8—they can carry over an unused fee amount only as an offset to the filing fee for the new Form S-8. In other words, newly registered shares must be registered with a fee based on the issuer's current (possibly higher) market price, and the available unused fee can be used to reduce the filing fee that is now due upon filing a new Form S-8.

Rule 457(p) governs filing fee offsets and provides that where all or a portion of the securities offered under a registration statement remain unsold *after the offering's completion or termination*, or withdrawal of the registration statement, the aggregate total dollar amount associated with those unsold securities may be offset against the total filing fee due for a subsequent registration statement *filed within five years of the initial filing date* of the earlier registration statement.

5-Year Limit on Fee Offsets Even When Plans Have 10-Year Terms

An issuer can offset a fee through successive registration statements on Form S-8—subject to Rule 457(p)'s limit of 5 years. This ability to offset fees through many registration statements means that the period of time that unused fees might be applied could be considerable and stretch over many registration statements.

Securities Act Rules CDI Question 240.11 describes how to apply Rule 457(p) in the context of a Form S-8, particularly a Form S-8 that registers shares to be issued upon the exercise of options:

> **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. [Jan. 26, 2009]

The 5-year limit can cause issuers problems, as many plans have terms of 7-to-10 years, and having to pay a registration fee more than once for the same shares—as could be required pursuant to CDI 240.11—is counterintuitive.

As Joe Alley notes in his memo, CDI 240.11 is much less favorable than Corp Fin's prior—and now withdrawn—telephone interpretations. Under this CDI, if an issuer files a new Form S-8 for a new plan, it is unable to transfer the portion of the filing fee that relates to unsold shares under a previous Form S-8, pursuant to a predecessor plan, if there are currently unexercised options outstanding under that predecessor plan.

For the many issuers that grant options with terms of 7 to 10 years, they are unable to transfer any portion of the fees paid for prior registration statements on Form S-8 due to CDI 240.11, because the earlier offering cannot be terminated. In other words, if an issuer issues options on a Form S-8 with seven-year terms, unless *all* of those options are exercised or forfeited early, there will always be an unexercised option outstanding long past the 5-year cut-off—and as a result, no unused fee could ever be used as an offset to a Form S-8 for a separate plan.

Here are two practice pointers from Joe Alley to avoid this problem:

- *If possible, amend or restate your existing plan rather than adopt a new plan.* This should allow you to use General Instruction E to Form S-8 and simply register any new shares and continue to use any previously registered shares without the need to re-register or transfer fees.
- *If you must adopt a new plan and need to transfer fees under Rule 457(p), don't commit the cardinal mistake of filing a post-effective amendment to deregister the old shares before you transfer the fees.* If you deregister the shares before you have transferred the fees, you are out of luck and are not entitled to any fee offset.

Filing a New Form S-8 to Register Additional Securities for an Existing Plan

If an issuer is running low on the number of securities available to be issued under an existing Form S-8, it will need to file a new Form S-8 to register additional securities. As noted in Securities Act Forms CDI Question 126.36, an issuer may not file a post-effective amendment to the original Form S-8 to register additional securities, because Rule 413 does not permit the registration of additional securities by means of a post-effective amendment.

In this scenario, General Instruction E to Form S-8 provides that, for the registration of additional securities of the same class covered by an existing Form S-8 relating to an employee benefit plan, the issuer may file an abbreviated registration statement containing only a cover page, a statement that the contents of the earlier registration statement identified by file number are incorporated by reference, the signature page, any required opinions and consents, and any information required in the new registration statement that is not in the earlier registration statement. In this case, the issuer will also need to wire fees to the SEC with the new abbreviated Form S-8, which goes effective automatically as with any other Form S-8. Note that this abbreviated Form S-8 is not available when registering securities for new plans.

General Instruction E is available not only when an issuer is running low on the number of registered securities, but also if the number of shares under a plan is increased by an amendment, or pursuant to "evergreen" provisions under which shares are automatically added to the plan on an annual or other basis. A new Form S-8 must be filed (along with the filing fee) to cover these additional securities under any of these circumstances.

Under No Circumstances May Shares be Added by Post-Effective Amendment

Some issuers erroneously try to add securities via a post-effective amendment, which violates Rule 413's prohibition. An issuer may not use a post-effective amendment to register additional securities regardless of whether the new Form S-8 is for an old plan or a new plan using offset fees from an old plan. Also note that deregistering shares by post-effective amendment is not synonymous with completing or terminating an offering.

"Share Counting": Determining How Many Shares to Register

The Form S-8 registers a finite number of shares to be offered. As noted on a recent CompensationStandards.com webcast, we like to think of it as a license to offer a certain number of shares, and once an issuer has sold all of those shares, the issuer needs a new license. Because the Form S-8 registers a finite number of shares, it is important for the issuer to track share usage. That task is typically easier to do with stock incentive plans, because they have a finite pool of securities; however, with 401(k) plans, for example, there is generally not a finite pool, making it more difficult to track the usage. Because the Staff has declined to give much guidance in the area of share counting, practice tends to vary.

Share Counting for 401(k) Plans

Registration statements on Form S-8 are required for 401(k) plans only if the plan has an issuer stock fund and employee participation is voluntary and contributory (e.g., even if an issuer has a stock fund, if employees receive an automatic match or profit share, then a Form S-8 is not required).

Share counting under a 401(k) plan that must be registered on Form S-8 is important because, while there is no finite amount of shares available under the plan, there is a finite number of shares that can be offered. So issuers need to keep track of what is issued on a payroll-by-payroll basis. As shares are issued each payroll, they are counted against the registered pool.

Be aware that there are numerous counting methodologies out there for these plans. This is an issue that the ABA discussed with the Staff several years ago, until both sides agreed to disagree. As a result, there is no consensus view and issuers continue to use various methodologies.

Here is an example of one methodology: Assume a trustee holds 100 shares for plan participants. One day, one participant gets out of the issuer stock fund, giving up ten shares—but another participant adds money to the same fund and gets those 10 shares. The trustee does not buy or sell shares; rather,

it just notes the new owner on its books. We advise counting 10 shares against the Form S-8 in this situation—this is the approach of counting re-allocations of existing plan holdings.

Automatic employer contributions (as opposed to *matching* contributions) would not need to be counted under Securities Act Forms CDI Question 126.43, which states:

> **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.

There are other methodologies in use and we believe the key is to be consistent with whatever methodology is chosen, document that logic for choosing that particular methodology and stay on top of share counting.

Fungible Shares: Registering Less Than the Maximum

ISS statistics show that there are around 40% of large issuers that have recently adopted new plans—or had new shares approved by shareholders—which use a two-for-one ratio as they count out of the plan's share reserve, or some other sort of fungible share ratio.

For example, a plan may make available 2 million shares (and the issuer registers 2 million shares); however, some of the grants are counted as 2:1. As a result, the issuer likely will never use up all of the shares registered, because it would count against the amount of shares registered on the Form S-8 only the shares that actually go out the door. The issuer would still have to keep track of the shares, because the issuer would almost always end up registering more shares than it would ever use. So, down the road, the issuer might be deregistering the unused shares.

The issue becomes whether an issuer that has a plan utilizing these types of ratios should register the full amount upfront. Rule 457(h)(1) states that the filing fee should be computed based on the maximum number of the registrant's securities issuable under the plan *that are covered by the registration statement*. Since you can always add more to a registration statement, it is acceptable to register a more realistic amount. This will be sufficient as long as the issuer is confident in its share counting capabilities.

Forfeitures and Recycling Features

If a plan provides for forfeitures or has a recycling feature, an issuer must make sure to add back those shares when determining plan usage.

A recommended approach for dealing with forfeited shares is to treat the original restricted stock grant and the subsequent re-grant as two separate issuances for purposes of counting the amount of shares remaining on the Form S-8. Just be aware that when counting shares this way an issuer can deplete shares registered on Form S-8 faster than it depletes its plan capacity shares, so the issuer should keep a separate ledger for both the Form S-8 and the plan share counting. Also note that this approach might be overly conservative for some practitioners who do not believe that the issuer needs to count the forfeited shares as having been issued against the total, particularly with respect to options. There is also a concern that this approach can lead to problems in determining the real share reserve for other purposes, such as for accounting purposes.

Another item to consider is that options and stock-settled SARs should be counted when exercised for the full gross amount exercised (*i.e.*, unreduced for any net exercise or withholding), while stock awards should be counted when granted. For performance stock awards, the conservative approach is that they should be counted at grant for the target number of shares—with any shares actually issued in excess of target counted at the time of issuance.

Deciding Whether to Count Voluntary Dividend Reinvestments

For counting voluntary dividend reinvestments, the conservative approach is to count such amounts against the amount registered.

Deregister Unused Shares by Post-Effective Amendment

Issuers often forget to file a post-effective amendment to deregister any unused shares. This scenario often arises after a plan expires, or after an acquisition of an issuer whose plans are now no longer in force. As noted in Securities Act Forms CDI Question 101.03, the post-effective amendment is simple to prepare, as it is comprised of a cover page and then a paragraph in Part II above the signatures that looks like this example:

> On ___, 2019, the Company filed Registration Statements on Form S-8 (Registration Statement Nos. 333-___ and 333-____) (the "Forms S-8") registering 20,000,000 shares (on a post-split basis) of the Company's Common Stock, $0.10 par value ("Shares"), to be issued to participants under the Company Stock Option Plan (the "Plan"). The Company is no longer issuing securities under the Plan. This Post-Effective Amendment No. 1 to the Registration Statements on Form S-8 is being filed in order to deregister all Shares that were registered under the Forms S-8 and remain unissued under the Plan.

A failure to timely deregister shares could have implications in situations where an issuer is seeking to deregister its securities under the 1934 Act (see our March-April 2009 issue at pg 6).

The SEC May Audit You!

Recently, one of our readers received an email from someone claiming to be an "SEC Contractor." The email said:

> You are receiving this message as you are listed as the person of contact for the above company. As part of a routine audit, we came across a filing we need additional clarification for. The filing in question is accession number ____-__-______, an S-8 filed on [date]. Basically, we need you to provide us with a greater understanding as to what exactly your company is trying to do in this filing, as well as additional information on the shares you are registering and the offsets you are claiming. Please reply by [date].

While we initially treated this email with skepticism, it turned out to be legitimate. Over the years, we have seen a number of Form S-8 fee audits conducted by the SEC, including one that claimed an issuer owed additional fees from over a decade ago. Sometimes, fee inquiries will come in the form of a letter from the SEC's Office of Financial Management (often stating that a fee was unpaid or underpaid), with no further explanation); and sometimes they come from a third-party contractor, such as the example cited above.

If you receive an ambiguous inquiry like the one above, we recommend that you respond by phone rather than reply to the email to ensure that the inquiry is authentic, and ask for evidence that the person is authorized to act on behalf of the SEC, including the number of someone at the SEC that you could contact to confirm.

Regularly Audit (Using This Spreadsheet)

The consequences of exceeding the amounts registered on a Form S-8 can be serious. To avoid running afoul of the registration requirements, issuers should implement a process for continual review of the issuer's compliance. The best way to do this is to prepare a spreadsheet of all plans, list out information about the shareholder approval requirements and securities registration analysis, and include an addendum that describes the issuer's share counting rules applicable to each plan.

We recommend a semi-annual review to determine whether/when each plan needs to be resubmitted for shareholder approval and/or more shares need to be registered. The semi-annual review is very important. An issuer needs to be confident that it does not have a lingering problem when it comes time to seek shareholder approval. And, even more importantly, an issuer does not want to suddenly find itself in a situation in which it does not have enough shares to grant equity awards. This problem is more likely to arise at, *e.g.*, issuers whose stock price has gone down, as they deplete their shares faster to deliver the same compensatory value to employees.

Below is an example of a spreadsheet (consider expanding the spreadsheet to also cover how plan trustees are likely to vote the shares in each plan):

Plan	Securities Registration	Shareholder Approval	NYSE Listing Application	Corporate Law Considerations
[Name of plan]	Reg No. _____ Shares Registered: [# of shares]---[date] Remaining: [# of shares]---[date] Date of Plan Prospectus: [date] Applicable Sharing Counting Rules:	Obtained [date] (Basis for seeking approval, such as required for NYSE or Section 162(m)) (Must be re-approved every 5 years) Applicable Share Counting Rules:	SLAP filed for [# of shares]---[date]	Plan approved by Compensation Committee and Board authorized [# of shares]---[date] Committee delegated authority to CEO (in capacity as a director acting as a committee of one pursuant to applicable law) to grant awards of stock options covering [#] of shares to non-Section 16 employees ---[date]

Issuers should consider whether to add a column that relates to whether there are any share limitations in the plans for Section 162(m) or other purposes.

Reporting to the Compensation Committee as a Tool

Some issuers provide a report about plan share usage to their compensation committee on a quarterly basis. This report shows the total number of shares authorized under the plan. The report can aggregate the grants by year and subtract those out; then subtract out any exercises or cancellations (or add back any forfeits). That data can be aggregated by year as well.

The end number can show the remaining number of shares available for future grants of awards under the plan, as well as the percentage of the remaining reserve shares reserved for issuance under outstanding awards, plus shares available for future grants. This type of quarterly report can not only help keep the issuer on track, it is also useful for the committee in exercising its oversight of compensation plans.

Corrective Mechanisms Can Be Costly and Messy

If an issuer accidentally issues shares in excess of the amount registered, it is not able to register shares after-the-fact in order to solve the problem. If this occurs, an issuer should first determine if any exemption is available for the offer and issuance of each award. As Joe Alley's memo notes, integration issues and the concurrent conduct of a registered and private offering pursuant to the same employee benefit plan may present challenges for this analysis. Some issuers may alternatively be able to utilize a "stock bonus" position (basically claiming that registration is not required because the awards were given to employees without any consideration being given on the employee's part, and thus do not involve offers or sales). This position is not available, however, if an employee does provide consideration, such as execution of a non-compete agreement. In some cases, there may also be state "blue sky" law issues.

Without federal and state law exemptions, an issuer may be faced with imposing transfer restrictions on grants already made to employees and filing resale registration statements. In the worst case scenario, an issuer may need to conduct a rescission offer and "buy" resale trades. If someone purchases shares in an unregistered offering, they may have rescission rights, and could force the issuer to return their money plus interest. Issuers have conducted these rescission offers on Form S-3 or S-1 registration statements, because the SEC notes in Securities Act Forms CDI Question 126.07 that a rescission offer may not be conducted using Form S-8, as that kind of offer is outside of the scope of the form.

Another problem that can arise is the board may grant shares that are beyond the number approved by the shareholders. For a number of reasons, issuers should not register more shares than are available under the plan (e.g., the issuer would not be able to provide an Exhibit 5.1 legality opinion to cover the shares in excess of those reserved). Some practitioners might be tempted to register more shares to avoid a miscount, but this tactic should be avoided because the issuer cannot issue the additional shares since they have not been approved by the shareholders.

So prevention is the best cure. Keep track of share usage to gauge how many registered shares were offered, as well as how many shares approved by shareholders were awarded.

Thanks to Goodwin Procter's John Newell, Davis Polk's Kyoko Takahashi Lin, Kaye Scholer's Jeff London, Cooley's Cydney Posner, K&L Gates' David Lee and Gibson Dunn's Krista Hanvey for their feedback!

NEW DEVELOPMENTS

An Uptick in Mini-Tender Offers?

We have been increasingly fielding calls from issuers who have become aware that a third party is conducting a "mini-tender offer" for their common stock, and the issuers are looking for guidance on how to respond. A mini-tender offer is structured so that it would result in the bidder owning less than 5% of the class of securities that is the subject of the offer, which results in the tender offer being regulated under the general anti-fraud provisions of 1934 Act Section 14(e) and Regulation 14E, rather than the more robust regulation of third party tender offers found in 1934 Act Section 14(d) and Regulation 14D. Under Regulation 14E, the applicable procedural protections are: (i) the tender offer must be open for 20 business days; (ii) the offer must remain open for ten business days following a change in the offering price or the percentage of securities being sought; (iii) the bidder must promptly pay for or return securities when the tender offer expires; (iv) the target must state its position about the offer within ten business days after the offer is commenced; and (v) in tender offers for equity securities, the bidder is restricted from purchasing the subject securities outside of the tender offer. Tender offers subject to Section 14(e) and Regulation 14E are not required to be filed with the SEC, so the Staff does not get any opportunity to review the tender offer documents. Mini-tender offers have presented persistent regulatory concerns for the SEC, and it appears that larger issuers are increasingly being targeted by mini-tender offer bidders.

A Checkered Past

Mini-tender offers caught the SEC's attention back in the 1990s, when the Staff noticed that mini-tender offer bidders were launching these offers in order to mislead target shareholders into tendering their shares when the offer price was below the current market price for the subject securities. The SEC launched several enforcement actions and eventually issued Rel. No. 34-43069 (2000), which provided the SEC's interpretive views on disclosure, dissemination and prompt payment practices in connection with mini-tender offers. For a detailed discussion of the SEC's guidance, see the July-August 2010 issue of *Deal Lawyers* (at pg 7).

A Resurgence

We have recently noticed an upswing in mini-tender offer activity, particularly focused on large, liquid issuers. The bidder in these mini-tender offers is usually TRC Capital Corporation, a private Canadian investment company and a long-time player in this realm. TRC typically bids for a very small proportion of the issuer's stock (e.g., less than one-fifth of one percent of outstanding shares) and the offer price is usually less than the current market price (e.g., 4% to 5% below the current market price). If TRC gets any takers for the mini-tender offer, presumably it then would turn around and sell the tendered shares for a profit at the higher market price. Interestingly enough, there is nothing in the tender offer rules that protects shareholders from themselves when faced with this sort of below-market offer. It appears that TRC follows a "shotgun" approach, launching many mini-tender offers for the stock of multiple issuers with the hope that some shareholders may accidentally choose to tender their securities.

What Can an Issuer Do?

Issuers often ask whether there is any way to prevent these mini-tender offers, and unfortunately there is no real defense. The number of shares involved is very small and there is obviously no takeover risk associated with the tender offer, so traditional anti-takeover measures designed to fend off third party tender offers are not useful. Further, issuers tend to not want to do anything that would unduly draw attention to these offers and give TRC or other bidders any advantage, so trying to explain the issue to shareholders ahead of one of these offers is probably not the best strategy.

Once the issuer does become aware of the mini-tender offer, it is obligated pursuant to 14D-9 of Rule 14e-2 to make a statement of whether the issuer recommends acceptance or rejection, no opinion (neutral), or is unable to take a position with respect to the offer. The response must be disseminated within ten business days of the commencement of the tender offer, but if the issuer learns about the tender offer after the tenth business day, it should respond within a reasonable amount of time. We believe that it would be very difficult for an issuer to remain neutral or be unable to take a position with respect to this type of offer, given the prospect of shareholders being asked to tender their shares at a below-market price. Therefore, issuers facing a mini-tender offer typically issue a press release recommending rejection of the mini-tender offer. This press release will usually also: (i) state the existence of the offer, including the bidder's identity, the number of shares sought and the price at which the shares would be purchased, as well as the issuer's current market price; (ii) the lack of affiliation between the issuer and the bidder; (iii) the track record of the bidder with mini-tender offers; a description of what constitutes a mini-tender offer and a description of the SEC's expressed concerns with mini-tender offers; (iv) a reference to the SEC's investor alert regarding mini-tender offers, including a link to that alert; (v) a statement urging the shareholders to consult their own financial advisors and to exercise caution with respect to the offer; (vi) a statement that shareholders who have already tendered should consider the advisability of withdrawing their shares (if permitted under the offering documents); (vii) a statement concerning when the offering documents indicate that the offer will expire; and (viii) a request that a copy of the issuer's press release be included with all distributions of materials relating to the mini-tender offer.

Early Bird! Our Pair of Executive Pay Conferences

We just posted the registration information for our essential conferences—"Tackling Your 2016 Compensation Disclosures" & "12th Annual Executive Compensation Conference: Say-on-Pay Workshop"—to be held October 27-28th in San Diego and via Live Nationwide Video Webcast on TheCorporateCounsel.net. Act now via the enclosed flyer or by registering on CompensationStandards.com for the early bird discount—which expires April 24th—to get as much as 33% off!

2015 Edition of Romanek's "Proxy Season Disclosure Treatise"

Broc Romanek has wrapped up the 2015 Edition of the definitive guidance on the proxy season—Romanek's "Proxy Season Disclosure Treatise & Reporting Guide." With over 1450 pages—spanning 32 chapters—you will need this practical guidance for the challenges ahead. Order on TheCorporateCounsel.net.

1st Edition of Morrison & Romanek's "The Corporate Governance Treatise"

Wrapping up a project that Randi Morrison & Broc Romanek feverishly commenced two years ago, we are happy to say the inaugural edition of Morrison & Romanek's "The Corporate Governance Treatise" is complete. With over 900 pages—including 212 checklists—this tome is the definition of being practical. You can return it any time within the first year and get a full refund if you don't find it of value. Order on TheCorporateCounsel.net.

Upcoming Webcasts

Here are critical webcasts coming up soon:

- CompensationStandards.com's webcast—"The Top Compensation Consultants Speak" (3/10)
- TheCorporateCounsel.net's webcast—"Proxy Access: The Halftime Show" (3/24)
- TheCorporateCounsel.net's webcast—"Form S-8: Share Counting, Fee Calculations & Other Tricks of the Trade" (5/5)
- TheCorporateCounsel.net's webcast—"Escheatment Soup to Nuts: Handling Unclaimed Property Audits & More" (6/2)
- DealLawyers.com's webcast—"Selling the Public Company: Methods, Structures, Process, Negotiating, Terms & Director Duties" (6/11)
- CompensationStandards.com's webcast—"Proxy Season Post-Mortem: The Latest Compensation Disclosures" (6/16)

Renewal Time

As all subscriptions expired at the end 2014, renewal time is upon us. Please return the enclosed renewal form to ensure that your subscription does not lapse.

—BR, DL, MD

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