

SEC Division of Corporation Finance Issues Revised and Additional C&DIs Relating to Form S-8

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On November 9, the Division of Corporation Finance of the Securities and Exchange Commission issued two revised and two new Compliance and Disclosure Interpretations (C&DIs) with respect to (1) Form S-8, which is used by publicly traded companies to register securities that will be offered pursuant to employee plans, and (2) the transfer of registration fees from a previously filed Form S-8 or other registration statement to a new registration statement. These C&DIs include the following interpretive guidance:

- **Revised C&DI 126.06** provides that an issuer may register securities to be issued pursuant to two plans on a single registration statement by (1) listing the full title of each plan on the registration statement cover, (2) delivering Form S-8, Part I information with respect to each plan pursuant to Rule 428 of the Securities Act of 1933, as amended (Securities Act), and (3) to the extent that any Form S-8, Part II information relates to a particular plan, making that relationship clear.
- **Revised C&DI 126.42** clarifies that, to the extent an issuer has a Form S-8 on file that registers shares of common stock in excess of the shares needed for issuance upon the exercise of outstanding options, such issuer may *not* transfer filing fees associated with securities registered pursuant to such Form S-8 to a new registration statement. Rule 457(p) of the Securities Act permits the transfer of filing fees only *after* the registered offering has been completed or terminated or the registration statement has been withdrawn.
- **New C&DI 126.43** offers two possible approaches in the event that an issuer (1) has an effective Form S-8 that registers shares of common stock issued under an earlier equity compensation plan and (2) desires to roll over to a new equity compensation plan shares from such earlier plan that are (a) not covered by any award thereunder or (b) expected to expire or terminate (the “existing excess shares”).

One approach is that such issuer may register the existing excess shares on the new Form S-8 to be filed to cover shares issuable pursuant to the new plan. However, because the offering covered by

the earlier Form S-8 is not yet complete, such issuer may not transfer filing fees associated with such earlier Form S-8 to the new Form S-8.

A second approach would be for such issuer to file a post-effective amendment to the earlier Form S-8 to indicate that such Form S-8 will *also* cover the issuance of the existing excess shares under the new plan once such existing excess shares are no longer issuable pursuant to the existing plan. No new filing fee would be due upon the filing of such post-effective amendment. However, in accordance with Rule 413(a) of the Securities Act, because additional shares may not be added to a registration statement by means of a post-effective amendment, such issuer would still be required to file a new Form S-8 in respect of any newly authorized shares to be made available pursuant to the new plan.

New C&DI 126.44 provides that, when an issuer desires to use fees paid on a previously file registration statement to offset fees due on a subsequent registration statement pursuant to Rule 457(p) of the Securities Act, such registrant (1) is required to include a note to the Calculation of Registration Fee table stating the (a) name of the registrant, (b) file number and initial filing date of the earlier registration statement from which such offset is claimed, and (c) dollar amount of such offset; and (2) should (x) quantify the amount of unsold securities from the prior registration statement associated with such claimed offset and (y) disclose either that (a) the prior registration statement has been withdrawn or (b) any offering that included such unsold securities has been terminated or completed, which in the case of a Form S-8 offering, is only when no additional securities will be issued pursuant to the plan covered by such Form S-8 (including through the exercise of any outstanding awards under such plan).

The original text of the C&DIs can be found [here](#).

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