SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230 and 239

[Release No. 33–7506, 34–39669; File No S7–2–98]

RIN 3235–AG94

Registration of Securities on Form S–8

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is publishing for comment proposed amendments to Form S–8 and related rules under the Securities Act and Regulations S–K and S–B to restrict the use of the form for the sale of securities to consultants and advisors, and to allow the use of the form for the exercise of stock options by family members of employee optionees. The first set of proposals is intended to eliminate the abuse of Form S–8 purportedly to register offerings to consultants and advisors who then act as statutory underwriters to sell the securities to the general public, and to register securities issued as compensation to consultants who promote the registrant's securities. The second set of proposals is intended to facilitate legitimate employee estate planning transactions and other intra-family transfers.

DATES: Comments should be submitted on or before April 27, 1998.

ADDRESSES: All comments concerning the proposed amendments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6–9, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7–2–98; this file number should be included on the subject line if e-mail is used. Comment letters will be available for inspection and copying in the public reference room at the same address. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Anne M. Krauskopf, Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 942–2900.

SUPPLEMENTARY INFORMATION: The Commission today proposes amendments to Rules 401 [1] and 405 [2] under the Securities Act of 1933 (''Securities Act''),[3] Item 402 [4] of Regulations S–B and S–K, and Securities Act Forms S–3 [5] and S–8.[6]

I. Executive Summary and Background

The Commission today proposes rule amendments to address two separate problems associated with the use of Form S–8 to register employee benefit plan securities. First, the Commission proposes to restrict the availability of streamlined registration on Form S–8 to deter abuse of the form to make sales to the general public through so-called ''consultants and advisors,'' and to eliminate registration on the form of securities issued to stock promoters. These amendments are proposed as part of the Commission's comprehensive agenda to deter registration and trading abuses, particularly by small capitalization issuers.[7] Second, the Commission proposes to expand Form S–8 to facilitate option exercises by employees' family members, so that the rules governing use of the form do not impede legitimate intra-family transfers by employees, such as transfers for estate planning purposes or transfers pursuant to domestic relations orders.

Form S–8 is used to register securities for offer and sale to employees [8] of the issuer in a compensatory or incentive context. In 1990, the Commission adopted substantial revisions to Form S–8, including an abbreviated disclosure format that eliminated the need to file a separate prospectus that duplicated information otherwise provided to plan participants.[9] The delivery of regularly prepared materials to advise employees about benefit plans was permitted to satisfy prospectus delivery requirements. This revision reflected a distinction the Commission traditionally has recognized between offerings made to employees primarily for compensatory and incentive purposes and offerings made by registrants for capital-raising purposes. Specifically, employees' familiarity with the business of the issuer through the employment relationship and the compensatory purpose of the offering justify the use of abbreviated disclosure that would not be adequate in the context of a capital-raising offer of securities to the non-employee public.[10]

The 1990 revisions also made Form S–8 available for offers and sales of securities to consultants and advisors who render *bona fide* services to the registrant, provided that such services are not rendered in connection with the offer or sale of securities in a capital-raising transaction. Where securities are issued for compensatory rather than capital-raising purposes, there appeared to be no meaningful basis for distinguishing between transactions with regular employees and those with consultants and advisors retained by the registrant. As a result of the 1990 revisions, for example, a physician on the faculty of a medical school who advises a company regarding a pharmaceutical product in development could be compensated for this service with company securities registered on Form S–8.

A. ''Consultant'' Abuses

Since the adoption of the 1990 revisions, some issuers have used Form S–8 improperly as a means to distribute securities to the public without the protections to investors of registration under Section 5 of the Securities Act. In a typical pattern, an issuer registers on Form S–8 securities underlying options issued nominally to so-called ''consultants'' where, by prearrangement, the issuer directs the consultants' exercise of the options and resale of the underlying securities by the consultants in the public markets. In some cases, these consultants perform little or no other service for the issuer. The consultants then either remit to the issuer the proceeds from the sale of the underlying shares, or apply the proceeds to pay debts of the issuer that are not related to any service provided by the consultants.[11]

The registration of the underlying shares on Form S–8 does *not* register these public sales under Section 5 of the

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[1] 17 CFR 230.401.

[2] 17 CFR 230.405.

[3] 15 U.S.C. 77a *et seq.*

[4] 17 CFR 228.402 and 17 CFR 229.402.

[5] 17 CFR 239.13.

[6] 17 CFR 239.16b.

[7] See Securities Act Release No. 7505, adopting amendments to Regulation S [17 CFR 230.901 *et seq.*], and Release No. 39670 under the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78a *et seq.*], proposing amendments to Exchange Act Rule 15c2–11 [17 CFR 240.15c2–11].

[8] For this purpose, ''employees'' includes also the employees of the issuer's subsidiaries or parents. See General Instruction A.1(a) to Form S–8.

[9] Securities Act Release No. 6867 (June 6, 1990) [55 FR 23909].

[10] Form S–8 also provides for incorporation by reference of the registrant's reports filed under the Exchange Act regardless of the length of the registrant's reporting history or the size of its public float. Incorporation by reference from Exchange Act reports into a Securities Act registration statement is not otherwise available unless the eligibility requirements for Form S–2 [17 CFR 239.12] or Form S–3 are satisfied.

[11] See, *e.g.*, In the Matter of Spectrum Information Technologies, Inc. (''Spectrum''), Securities Act Release No. 7426, Exchange Act Release No. 38774, Accounting and Auditing Enforcement Release No. 930 (June 25, 1997). For additional discussion, see Section II.A below.

Securities Act. The transaction that actually takes place (a capital-raising transaction with the public) is not the transaction that is registered (a compensatory transaction with consultants). Form S–8 is available solely to register compensatory sales of securities to ''employees,'' including certain consultants and advisors.[12] While the issuer purports to sell the securities to employees, the actual public sale of securities is not made to employees. Instead, the ''employees'' act as conduits by selling the securities to the public and remitting the proceeds (or their economic benefit) to the issuer. This public sale of securities by the issuer has not been registered, as is required by the Securities Act. Public investors accordingly are deprived of the accountability and disclosure that the liability provisions of the Securities Act and the opportunity for Commission staff review of the registration statement provide in registered public distributions.

The form also has been misused to register securities issued to compensate ''consultants'' whose service to the issuer is the promotion of the issuer's securities. This practice facilitates securities fraud by providing inexpensive compensation to persons who hype the issuer's stock, and expands the market for the issuer's securities through resales by these persons.

The Commission seeks to prevent future abuse of Form S–8 while, to the extent possible, preserving the original goal of making Form S–8 available for the registration of compensatory transactions between the registrant and consultants and advisors who render *bona fide* services outside the capital-raising context, as well as traditional employees. To this end, the Commission today issues proposals that would:

- Clarify that Form S–8 is not available for sales to consultants and advisors who directly or indirectly promote or maintain a market for the company's securities;
- Exclude certain registration statements and post-effective amendments that automatically become effective upon filing from the general rule that a registration statement or amendment is deemed filed on the proper form unless the Commission objects to the form before the effective date; and
- Require disclosure in Part II of Form S–8 of the names of any consultants or advisors to whom the registrant will issue securities under the registration statement, the number of securities to be issued to each of these persons, and the specific services that each will provide to the registrant.

In addition, the Commission solicits comment on a number of other approaches to the problem, such as limiting the percentage of the total number of the registrant's securities outstanding that may be registered on Form S–8 for issuance to consultants and advisors. The Commission also solicits comment as to whether specific certification as to the *bona fide* nature of consultants' or advisors' services should be required; whether each consulting or advisory agreement under which securities are proposed to be issued should be filed as an exhibit to the Form S–8; and whether disclosure of sales to consultants and advisors should be required on Forms 8–K or 10–Q.

B. Option Exercises by Family Transferees; Executive Compensation Disclosure

Currently, Form S–8 is available for the exercise of employee benefit plan options only if the option is exercised by the employee/optionee. The form is unavailable to non-employee option transferees, such as an adult son or daughter of an employee. If a company wishes to permit a family member transferee to exercise an employee benefit plan option, it must register the sale of the underlying securities on a separate, less streamlined registration statement.

In the 1996 amendments to the rules under Section 16[13] of the Securities Exchange Act of 1934 (''Exchange Act''),[14] the Commission revised Rule 16b–3[15] to provide a broader, simplified exemption from short-swing profit recovery for transactions between an issuer and its directors or officers, whether or not in the context of an employee benefit plan. Among other things, the amendments eliminated the requirement of former Rule 16b–3 that a derivative security issued under an employee benefit plan be non-transferable.[16]

Under current tax law, significant estate tax savings may be obtained if an employee, during his or her lifetime, transfers a vested option to a family member, who then exercises it. In comparison, the exercise of the option by the employee with the underlying security later passing to the family member through the employee's taxable estate is more costly from a tax standpoint. The Rule 16b–3 revisions simplified the transfer of options and other derivative securities by employees to their immediate family members, and to trusts and partnerships established for the benefit of immediate family members, for estate planning purposes. Other aspects of the 1996 Amendments facilitated the transfer of securities to a former spouse in divorce proceedings.[17] For the first time, many companies are issuing transferable options to their officers and directors.

The Commission believes that making Form S–8 available for registration of employee benefit plan option exercises by an employee's family members may be appropriate. Because of the family relationship to an employee and the compensatory—rather than capital-raising—character of the transaction, the abbreviated disclosure format of Form S–8 may be suitable for these transactions. The fact that only companies that are required to file Exchange Act reports are eligible to use Form S–8 supports this approach.

The proposals issued today would:

- Make Form S–8 available for the exercise of employee benefit plan options by an employee's family member who has acquired the options from the employee through a gift or domestic relations order;
- Make Form S–8 available to former employees for the exercise of transferable, as well as non-transferable, options; and
- Revise executive compensation disclosure requirements to clarify how options and stock appreciation rights (''SARs'') that have been transferred should be reported.

In addition, the Commission proposes to make Form S–3 equally available for the offer and sale of securities underlying both warrants and options, without regard to whether either class of securities is transferable.

II. Consultant Abuses

A. Consultants and Advisors Eligible for Form S–8 Transactions

[12] ''Employee'' is defined in General Instruction A.1.(a) of the form to include consultants and advisors who render *bona fide* services not in connection with the offer or sale of securities in a capital-raising transaction, exclusive insurance agents of the registrant and, in certain circumstances, former employees and the estates of employees or former employees.

[13] 15 U.S.C. 78p.

[14] 15 U.S.C. 78a *et seq.*

[15] 17 CFR 240.16b–3. See Exchange Act Release No. 37260 (May 31, 1996).

[16] Former Rule 16b–3(a)(2) prohibited transfers except (i) by will or the laws of descent and distribution, or (ii) pursuant to a qualified domestic relations order as defined by the Internal Revenue Code.

[17] Rule 16a–12 [17 CFR 240.16a–12] exempts from both the reporting requirements of Section 16(a) and the short-swing profit recovery requirements of Section 16(b) the acquisition or disposition of equity securities pursuant to a domestic relations order.

General Instruction A.1(a) to Form S–8 restricts the form's availability to the offer and sale of the registrant's securities to its employees, or employees of its subsidiaries or parents, pursuant to any employee benefit plan. For this purpose, ''employee'' is defined to include a consultant or advisor who provides *bona fide* services to the registrant other than in connection with the offer or sale of securities in a capital-raising transaction. Like a traditional employee, a consultant or advisor must be a natural person, and privity must exist between the registrant and the consultant or advisor both as to the consulting contract and the issuance of the securities registered on Form S–8.[18] In response to telephone inquiries, the Division of Corporation Finance staff has interpreted the phrase ''in connection with the offer or sale of securities in a capital-raising transaction'' to preclude the issuance of securities on Form S–8 to consultants either (i) as compensation for any service that directly or indirectly promotes or maintains a market for the registrant's securities, or (ii) as conduits for a distribution to the general public.

Despite express limitations set forth in Form S–8 and related staff interpretations, some companies have taken advantage of the automatic effectiveness—and resultant absence of staff review—applicable to Form S–8 to register securities for issuance in capital-raising transactions.[19] In the typical fact pattern, a company issues shares registered on Form S–8 to purported employees or other nominees designated as ''consultants'' or ''advisors,'' who frequently do not provide any *bona fide* services to the company. At the direction of the company, these nominees then resell the shares on an unregistered basis and remit all or part of the proceeds back to the company. These distributions deprive the ultimate public purchasers of the disclosure and liability benefits of Securities Act registration. In some cases, a series of Forms S–8 is used to effect the distributions, so that the aggregate number of shares distributed constitutes a significant percentage—if not the preponderance—of the company's shares outstanding.[20]

In distributing the shares to the public on behalf of the company, these consultants or employees act as ''underwriters,'' as defined in Section 2(a)(11) of the Securities Act.[21] The company's registration statement on Form S–8 registers only offers and sales of stock to employees and consultants or advisors. However, the company's distribution of securities does not come to rest with these persons. Instead, the company uses these nominal ''consultants'' as conduits for unregistered offers and sales of securities to the public for which no exemption is available. In these circumstances, the Commission has charged companies with violations of Sections 5(a) and 5(c) of the Securities Act.[22] Consultants acting as nominees have been charged with violating Section 5 as underwriters.[23]

In other circumstances, companies have misused Form S–8 by using it to register securities issued to consultants or advisors as compensation for their services as stock promoters. Public investors who repurchase these securities in effect pay the salaries of individuals whose services for the issuer may result in the dissemination of material fraudulent information. These transactions are outside the scope of transactions that currently are permitted to be registered on Form S–8, whether or not they result in unregistered sales of securities to the public in violation of Section 5.

The Commission believes that one means to deter these abuses of Form S–8 is to restrict further the definition of consultants and advisors who may be compensated with securities registered on the form. The Commission proposes to amend General Instruction A.1(a) to Form S–8 to clarify that the consultant or advisor must provide to the registrant *bona fide* services that do not directly or indirectly promote or maintain a market for the registrant's securities.[24] This limitation would be in addition to the existing provision that these services may not be in connection with the offer or sale of securities in a capital-raising transaction. The amended instruction also would codify the existing requirement that the consultant or advisor be a natural person who has contracted directly with the registrant. The Commission proposes similarly to amend the definition of ''employee benefit plan'' contained in Securities Act Rule 405, so that a consultant or advisor may participate in an employee benefit plan only if the same conditions are met.

Under the proposed amendment to Form S–8, issuers could not use the form to register securities as compensation for the services of financial consultants who advise the company regarding a potential capital restructuring because this service is a predicate to capital-raising and market maintenance. In contrast, issuers would be able to register on Form S–8 securities issued as compensation for the services of financial consultants who assist the company in structuring its compensation scheme, or attorneys who defend the company in litigation, because these activities do not have a capital-raising connection.

Commenters are asked to address whether, in the context of the other proposals set forth in this Release, the proposed restriction regarding consultant promotional services effectively will deter or prevent the use of ''consultants'' as underwriters. Commenters also should address whether this proposed restriction would unduly hinder the use of Form S–8 to register securities as compensation to consultants for legitimate purposes. If so, how should the restriction otherwise be crafted to distinguish activities that do not promote or maintain securities markets—and thus assist capital-raising—from those that do? Alternatively, should the Commission simply amend Form S–8 so that it is no longer available at all for the issuance of securities to consultants and advisors?

In light of the proposal to deter the Form S–8 abuse described above, and consistent with the Commission's broader goal of harmonizing its regulations, the Commission is considering whether to limit the categories of people who are permitted to participate, as ''consultants and

[18] See *Image Entertainment* (Mar. 6, 1992). However, where the consultant or advisor performs services for the registrant through a wholly-owned corporate alter ego, the registrant may contract with and register securities on Form S–8 as compensation to that corporate entity. See *Aaron Spelling Productions, Inc.* (July 1, 1987).

[19] Rule 462(a) provides that a registration statement on Form S–8 becomes effective upon filing with the Commission. Rule 464(a) provides that a post-effective amendment filed on Form S–8 also becomes effective upon filing with the Commission.

[20] See In the Matter of Sky Scientific, Inc. (''Sky Scientific''), Securities Act Release No. 7372, Exchange Act Release No. 38049, Accounting and Auditing Enforcement Release No. 863 (Dec. 16, 1996), in which the company conducted an unregistered distribution to the public through 106 registration statements and post-effective amendments filed on Form S–8, covering a total of approximately 30 million shares of common stock.

[21] 15 U.S.C. 77b(a)(11), which states, in pertinent part: ''The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking [* * *].''

[22] See, *e.g.*, Spectrum, cited at n. 11 above.

[23] In addition to Spectrum, see Sky Scientific, cited at n. 20 above.

[24] Whether activities that otherwise promote the registrant would indirectly promote the registrant's securities would depend upon the facts and circumstances.

advisors,'' in private companies' compensatory transactions exempted from Securities Act registration under Rule 701.[25] Specifically, the Commission is considering interpreting ''consultants and advisors'' for Rule 701 purposes in the narrower manner it has interpreted these terms for Form S–8 eligibility purposes.

Under current staff interpretation of Rule 701, ''consultants and advisors'' is construed more broadly than under Form S–8. For example, staff interpretive letters have permitted Rule 701 offers and sales to be made to:

- Independent sales representatives who distribute the company's products;[26]
- Franchisees;[27]
- Physicians who contract to provide medical services pursuant to various managed care arrangements;[28] and
- Golf pros who serve as independent agents for the distribution of golf products through their pro shops.[29]

In contrast, companies are not currently permitted to register on Form S–8 securities issued to compensate these persons, unless there is a *de facto* employment relationship between the person and the company. Such a relationship may exist where a person not employed by a company provides services to the company that traditionally are performed by an employee, and the compensation paid by the company for those services is the primary source of the person's earned income.[30]

These differences in interpretation have caused some confusion because the terms ''consultants and advisors'' appear in both rules, and both rules relate to compensation involving securities. It is not clear why a broader interpretation should be appropriate for exempt sales by a private company, as compared to registered sales by a public company, although it should be noted that securities issued in a Rule 701 plan are ''restricted securities''[31] for resale purposes.

Should the availability of Rule 701 to compensate consultants and advisors be interpreted consistently with the availability of Form S–8? Would a consistent interpretation further the Commission's goal of preventing the use of ''consultants'' as underwriters in the Form S–8 context? On the other hand, is there good reason to interpret ''consultant or advisor'' more narrowly for purposes of Form S–8, because it results in the issuance of freely-tradeable registered securities, whereas Rule 701 results in the issuance of restricted securities?

Alternatively, would it be more appropriate to change the interpretations under Form S–8 to conform with the less restrictive approach in Rule 701? If so, should Form S–8 be amended to remove the specific requirement that insurance agents be ''exclusive,'' given that independent insurance agents are eligible participants in a Rule 701 plan?[32] If this approach were adopted, should independent insurance agents and other independent sales representatives be required to derive a specified minimum percentage of income from the company—such as 10, 20 or 50 percent—in order to qualify for both Rule 701 and Form S–8?

Employee benefit plans also are addressed in Regulation S, the exemptive rule for offshore offers and sales, using language similar to the current wording of Form S–8 and Rule 405.[33] No parallel amendment to Regulation S is proposed in this Release, in light of the other changes to the regulatory structure of Regulation S proposed today in a companion release.[34] However, the Commission is considering whether such an amendment should be adopted, and solicits comment on whether this would be necessary.

B. Requirement as to Proper Securities Act Form

Securities Act Rule 401(g) currently states that any registration statement or amendment is deemed to be filed on the proper form unless the Commission objects to the form before the effective date. This rule requires the Commission and the registrant to resolve any dispute as to whether a filing is on the appropriate form before effectiveness. Because the disclosure requirements of different forms are tailored for the transactions for which they are prescribed, in some cases registration on a form other than the form prescribed for the specific transaction may deprive public investors of the disclosure benefits of Securities Act registration.

Of course, for registration statements filed on Form S–8 and other forms that become effective immediately upon filing,[35] the Commission has no opportunity to object to the form in a timely manner. The Commission proposes to remedy this situation by amending Rule 401(g) so that all registration statements and post-effective amendments that become effective automatically upon filing under Securities Act Rules 462 and 464 would be excluded from its scope.[36] Accordingly, there no longer would be a presumption that any Securities Act filing that is automatically effective under these rules is on the proper form.

The proposed amendment would clarify that the Commission, by failing to object in the absence of an opportunity for pre-effective review, does not concede that the proper form has been used. Where a form that is solely available for a specified purpose

[25] 17 CFR 230.701.

[26] Herff Jones, Inc. (Nov. 13, 1990), Microchip Technology, Inc. (Nov. 4, 1992) and Optika Imaging Systems, Inc. (Oct. 1, 1996).

[27] USWeb Corporation (Nov. 7, 1996).

[28] The Morgan Health Group, Inc. (Dec. 18, 1995), Princeton Medical Management Resources, Inc. (Sept. 12, 1997), PHM Management, Inc. (Sept. 16, 1997) and Talbert Medical Management Corporation (Sept. 16, 1997).

[29] Golfpro, Inc. (Oct. 3, 1989).

[30] See Foundation Health Corporation (July 12, 1993), which permitted registration on Form S–8 of stock underlying employee benefit plan options granted to physicians employed by an affiliated professional corporation to provide medical services at the registrant's HMO, where the company had the right to require the physicians to provide medical services exclusively at the HMO.

[31] As defined in Rule 144(a)(3)(ii) [17 CFR 230.144(a)(3)(ii)].

[32] Agents who serve as independent sales representatives for an affiliate of an insurance company are considered ''consultants or advisors'' under Rule 701. See Exceptional Producers Holding Company (Aug. 17, 1989). In contrast, General Instruction A.1(a) to Form S–8 currently requires an insurance agent to be an exclusive agent of the registrant to be considered an ''employee.'' See First Centennial Corporation (Feb. 25, 1992).

[33] Securities Act Rule 903(c)(1)(iv)(A) [17 CFR 230.903(c)(1)(iv)(A)], which requires securities offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan administered under the laws of a foreign country to be issued in compensation for *bona fide* services not rendered in connection with the offer and sale of securities in a capital raising transaction.

[34] Securities Act Release No. 7505.

[35] Securities Act Rule 462 [17 CFR 230.462] makes the following registration statements effective immediately upon filing: (a) Rule 462(a) covers Forms S–3 and F–3 for dividend and interest reinvestment plans, and Form S–8; (b) Rule 462(b) covers registration statements filed in specified limited circumstances to increase by no more than 20% the number of shares of the same class previously registered for the same offering, and post-effective amendments to those registration statements; (c) Rule 462(c) covers post-effective amendments filed in specified limited circumstances to provide only price-related information omitted from the registration statement in reliance on Rule 430A; and (d) 462(d) covers post-effective amendments filed solely to add exhibits. Where the issuer continues to meet the requirements for filing on the appropriate form, Rule 464 [17 CFR 230.464] makes effective upon filing post-effective amendments on Form S–8; Forms S–3, F–2 and F–3 relating to dividend or interest reinvestment plans; and Form S–4 [17 CFR 239.25] (if filed in reliance on General Instruction G to that form).

[36] Investment company registration statements and post-effective amendments that become effective immediately upon filing under Securities Act Rules 485(b) [17 CFR 230.485(b)] and 486(b) [17 CFR 230.486(b)] would not be affected by the amendment proposed today.

is used for a different type of transaction, the registration may not be valid. Where a registration statement is filed on a Securities Act registration form available only for the offer and sale of securities to a different class of persons than the persons to whom the securities are in fact offered and/or sold, the Commission staff will, in appropriate cases, assert that the securities are offered and sold in violation of Section 5.

Although, to date, significant abuses in this area have been limited primarily to Form S–8, the Commission proposes to exclude from Rule 401(g) all registration statements and post-effective amendments that become effective immediately upon filing under Rules 462 and 464 in order to preclude abuses involving the other automatically effective forms. Commenters should address whether this approach is appropriate, or, alternatively, whether the proposed amendment should be limited to registration statements and post-effective amendments on Form S–8.

It is noted that Rule 464 requires the issuer to continue to meet the requirements of the specified forms as a condition for automatic effectiveness of post-effective amendments. In light of this specific condition, should post-effective amendments to Forms S–4 filed pursuant to General Instruction G (applicable to bank or savings and loan holding company formations) and dividend reinvestment plan registration statements on Forms S–3, F–2 and F–3 be excluded from the proposed amendment to Rule 401(g)?

C. Information About Consultants and Advisors

Today's proposals would amend Part II of Form S–8 to require the company to name any consultants or advisors to whom securities will be sold under the registration statement, to specify the number of securities to be issued to each of these persons, and to describe specifically the services that each of these persons will provide to the company. If this information is not available at the time the Form S–8 is filed, the company would be required to file it by post-effective amendment before the securities are sold to the consultants or advisors. The failure to provide any part of this information in the Form S–8 would result in a disclosure violation.

The requirement to name these persons in the registration statement is designed to have a chilling effect on their use as conduits for unregistered public offerings. Further, this requirement would facilitate objective verification that the consultant or advisor is a natural person. The requirement to specify the number of securities to be issued to each person would discourage the use of Form S–8 as a vehicle to distribute significant quantities of securities into the public markets. Finally, the requirement to specify the services to be provided by consultants and advisors would permit an objective determination whether these services are *bona fide,* non-capital-raising and non-promotional services that legitimately may be compensated with securities registered on Form S–8. Generic disclosure, such as ''consulting services,'' would result in a disclosure violation.

Commenters are asked to address whether these proposals would reduce the likelihood of securities being sold on Form S–8 to ''consultants'' who act as statutory underwriters, or otherwise promote or maintain a market for the registrant's securities. Are there any specific circumstances under which these disclosures would not be warranted, or would create difficulty? For example, would these amendments unduly burden companies in industries—such as computer technology—that routinely conduct their businesses through numerous consultants, who are compensated with securities registered on Form S–8? If so, would any specific compensatory practices be impeded? How should the proposal be tailored to alleviate any inappropriate burdens while retaining its prophylactic effect?

Would other potential amendments to Form S–8—either in addition to, or substitution for, those proposed today—more effectively promote this goal? For example, in addition to the proposed amendments, should the Form S–8 cover page include a box that a registrant would be required to check if any of the securities registered are to be offered and sold to consultants or advisors? If so, in order to facilitate the location of this information in the EDGAR database, should filers also be required to include an electronic ''tag'' in the header of their EDGAR filings or other electronic means of identifying this information? In addition to—or as an alternative to—the proposed Part II disclosure of consultant services, should registrants be required to file consulting and advisory contracts as exhibits to Form S–8?[37]

The signature requirements to Form S–8 require the registrant to certify ''that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S–8[.]''[38] A registrant cannot in good faith make this certification, in its current form, for a Form S–8 under which securities are issued to consultants and advisors who act as underwriters or otherwise promote the registrant's securities. Should this certification be expanded to require the registrant, or an officer of the registrant, to certify specifically that any consultant or advisor who will receive securities under the registration statement is not hired for capital-raising or promotional activities?

In addition to, or substitution for the proposed amendments to Part II of Form S–8, should companies be required to disclose issuances of securities to consultants and advisors that occurred during the most recently completed fiscal quarter in their Exchange Act annual and quarterly reports? If so, should the names of the recipients and amounts of securities be included? Are these issuances of sufficient market significance that their disclosure instead should be required in a Form 8–K? Should either form of Exchange Act disclosure be mandated only in particular circumstances, for example where the securities issued equal or exceed one percent of the issuer's total securities outstanding, or where the issuer's total market capitalization does not exceed a specified dollar amount, such as $200 million, $250 million or $300 million? Would it be appropriate to require Exchange Act disclosure by registrants that do not satisfy the ''float test'' for registrant eligibility to make a primary offering on Form S–3 (aggregate market value of voting and non-voting common equity held by non-affiliates of $75 million or more)?[39] Alternatively, should the proposed amendments to Part II of Form S–8 apply only to issuers that meet one or more of these criteria?

D. Percentage of Securities Registrable on Form S–8

As noted above, in some cases issuers have used Form S–8 to distribute to the public a significant percentage of the total number of securities outstanding.[40] One means to eliminate this abusive practice would be to limit the aggregate percentage of securities that may be sold

[37] In the absence of an exhibit requirement, companies would remain obligated to furnish these agreements, as supplemental information, to the Commission staff promptly upon request under Securities Act Rule 418 [17 CFR 230.418].

[38] Similar registrant certification provisions are included in the signature requirements to Securities Act Forms S–2, S–3, S–11 [17 CFR 239.18], S–20 [17 CFR 239.20], SB–1 [17 CFR 239.9], SB–2 [17 CFR 239.10], F–1 [17 CFR 239.31], F–2 [17 CFR 239.32], F–3 [17 CFR 239.33], F–6 [17 CFR 239.36], F–7 [17 CFR 239.37], F–8 [17 CFR 239.38], F–9 [17 CFR 239.39], F–10 [17 CFR 239.40], and F–80 [17 CFR 239.41].

[39] General Instruction I.B.1 to Form S–3.

[40] See Sky Scientific, discussed at n. 20 above.

to consultants or advisors pursuant to Form S–8 during the registrant's fiscal year. For example, these securities could be limited to ten percent of the number of securities of the same class outstanding, computed based on the registrant's most recent balance sheet.

While no specific rule proposal is included among the amendments proposed today, the Commission is considering this approach. Comment is solicited as to whether such an annual limitation is a necessary or desirable means to prevent the abuse of Form S–8 to conduct unregistered public offerings. If such a limitation were adopted, should the annual percentage limit be set higher (for example, at 15 percent) or lower (such as at five percent) to achieve this goal? Would a ten percent limitation leave an adequate pool of securities available to compensate consultants for legitimate purposes? Finally, should a different standard apply to companies in industries (such as computer technology) that rely extensively on the services of consultants in the ordinary conduct of their business?

III. Transferable Options and Proxy Reporting

A. Form S–8 Availability for Family Member Transferees

The past decade has witnessed the increased use of options by corporations as a component of the employee compensation package. As executives and other employees receive an increasing proportion of their compensation—and thereby accumulate an increasing proportion of their wealth—in the form of options,[41] these instruments assume greater significance in the context of estate planning transactions and other intra-family transfers, such as property settlements in connection with divorce. Particularly in the estate planning context, an option transfer to a family member during the employee's lifetime can confer significant tax advantages.[42]

Because Form S–8 is available only for the offer and sale of employee benefit plan securities to employees (including consultants and advisors) of the registrant and its subsidiaries or parents, family member transferees have not been allowed to exercise options on Form S–8.[43] However, because of the family relationship to an employee and the compensatory—rather than capital-raising—character of the transaction, the abbreviated disclosure format of Form S–8 may be suitable for these transactions, particularly in light of the fact that companies eligible to use Form S–8 must file Exchange Act reports. The theories of compensatory purpose and access to information about the company/employer that justify streamlined registration on Form S–8 for transactions with employees also appear to encompass option exercises by family members.

Consistent with the 1996 amendments to the Section 16 rules that facilitated intra-family option transfers, discussed above,[44] the Commission today proposes to amend Form S–8 so that it is available for the exercise of employee benefit plan options by an employee's family member who has acquired the options from the employee through a gift or a domestic relations order.[45] For this purpose, ''family member'' would be defined as in the Exchange Act Rule 16a–1(e) definition of ''immediate family'' to include any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships. In addition, unlike Rule 16a-1(e), for Form S–8 purposes ''family member'' would include trusts for the exclusive benefit of these persons, and any other entity owned solely by these persons.[46]

Commenters are asked to address whether other relatives, such as nieces and nephews, should be added to the Form S–8 definition of ''family member,'' particularly to facilitate estate planning transfers to these people. In the interest of harmonizing regulations, should these relatives also be added to the Rule 16a–1(e) definition of ''immediate family,'' so that a Section 16 insider would be deemed to have an indirect pecuniary interest in securities that are held by these persons if they share the insider's household? Or do the differences in purposes between Form S–8 eligibility and pecuniary interest under Section 16 justify different treatment of these or any other people?

Assuming this amendment is adopted, it is contemplated that ''family members'' would be treated like employees for all purposes under Form S–8. For example, under General Instruction C, the Form S–3 resale prospectus would be available for (i) the resale by a ''family member'' who is an affiliate of the issuer of securities that were registered on the Form S–8; and (ii) the resale by a ''family member'' of restricted securities acquired upon the exercise of transferred employee benefit plan options before the Form S–8 was filed. Similarly, if the employee/optionee left the company following the option transfer, Form S–8 would remain available to the ''family member'' for the option exercise to the same extent it would be available to a former employee.

Moreover, consistent with current practice, registration of shares underlying employee benefit plan options would continue to be permitted at any time before the option is exercised, without regard to when the option becomes exercisable. This departure from the general requirement that a registration statement must be on file before an option becomes exercisable (*i.e.*, before an offering of the underlying security is deemed to be made) if the exercise will be registered is based on a policy determination that transactions registered on Form S–8 should be afforded more flexibility because of the unique character of the employer/employee relationship and the compensatory purpose involved.[47]

As drafted, the proposal would make the form available to ''family members'' of any person who satisfies the Form S–

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[41] The total value of shares set aside for option grants in the United States during 1996 has been estimated as $600 billion, as compared to approximately $59 billion in 1985. See estimates calculated by Sanford C. Bernstein & Co., as cited in J. Fox, ''The Next Best Thing to Free Money,'' Fortune (July 7, 1997).

[42] For example, if an employee makes a lifetime gift of a vested option to a family member, the gift will be subject to federal gift tax at the time of the gift, based on the option's then fair market value. If the employee instead exercises the option and retains the underlying stock, the fair market value of that stock at the date of the employee's death will be included in his or her taxable estate. A donor is subject to gift taxes to the extent the value of a gift exceeds the $10,000 annual exclusion and the $600,000 unified estate and gift tax credit (as indexed for inflation pursuant to Section 501 of the Taxpayer Relief Act of 1997). Assuming that the option's fair market value at the time of gift is substantially lower than the fair market value of the underlying stock at the time it would be transferred to the family member from the employee's taxable estate, the earlier lifetime transfer would exclude the difference from estate and gift taxation (or from reducing any remaining available annual exclusion or unified credit).

[43] Currently, shares underlying options transferred to certain family members may be registered on Form S–3, in reliance on Instruction I.B.4 to that form. See Use of Form S–3 for Transferred Options (Aug. 7, 1997), discussed in Section III.C, below.

[44] See Section I.B above.

[45] Of course, making Form S–8 available for these transactions would not compel companies to permit employees to transfer options to family members. The decision whether to allow this practice would remain with the company.

[46] Rule 16a–1(a)(2)(ii)(A) provides that a Section 16 insider has an indirect pecuniary interest in securities held by members of a person's immediate family (as defined in Rule 16a–1(e)) sharing the same household. Whether an insider has a pecuniary interest in securities held by a trust or other entity is determined by reference to Rules 16a–8(b) and 16a–1(a)(2), respectively.

[47] See Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July, 1997), at Section G (Securities Act Forms), Interpretation No. 61.

8 definition of ''employee,'' including consultants and advisors. Commenters should address whether this aspect of the proposal is too broad, given that consultants and advisors have more remote connections to the registrant than do traditional employees. Moreover, do the consultant abuses discussed above justify limiting the proposal to ''family members'' of traditional employees?

As proposed, the form would be available only for options transferred through a gift or domestic relations order. Other than options transferred pursuant to domestic relations orders, should Form S–8 be available for the exercise of any option transferred for value to a ''family member''? In addition to trusts for the exclusive benefit of family members, should Form S–8 be made available to any other entity solely owned by ''family members,'' as proposed, or should only entities other than trusts that are used for estate planning purposes, such as limited partnerships, specifically be permitted? Alternatively, is the limitation to entities solely owned by ''family members'' too restrictive for legitimate estate planning purposes? For example, should Form S–8 be available for the exercise of options transferred by gift by the employee (and/or a ''family member'' transferee) to a charity? Would extending Form S–8 to any entity not solely owned by ''family members'' exceed the boundaries of the employment connection that justifies the abbreviated disclosure format of Form S–8?

As proposed, the ''family member'' transferee would not be required to have received the option directly from the employee for Form S–8 to be available to the transferee. Instead, the form would be available to a subsequent transferee, provided that he or she is a ''family member'' of the employee, and receives the option either by gift or through a domestic relations order from another ''family member'' of the employee. Is it more consistent with the theory of compensatory purpose to require the ''family member'' to receive the option directly from the employee? Would making the form available for options transferred indirectly from employees impose burdensome recordkeeping obligations on issuers? [48]

As for ''reload'' options,[49] it is assumed that following the exercise of the original employee benefit plan option by a ''family member,'' the reload option would be issued to the employee/optionee, who would decide whether to exercise or transfer it. Should the form be made available for reload options issued directly to the immediate family member transferee? In this regard, would a gift be completed for tax purposes if the donor received the reload option?

B. Technical Change to Form S–8 to Allow Registration of Shares Underlying Transferable Options

To implement the proposal to permit family member transferees to exercise employee benefit plan options on Form S–8, the form must be available to the issuer for the registration of shares underlying transferable options. Current General Instruction A.1(a) to Form S–8 provides that the form is available to former employees, and guardians and executors of both current and former employees, for the exercise of non-transferable employee benefit plan stock options and the subsequent sale of the underlying securities,[50] if such exercises and sales are not prohibited under the plan. The proposed amendment would eliminate this non-transferability restriction.[51] As a result, an issuer always would be able to register shares underlying any employee benefit plan option on Form S–8, whether or not the option is transferable.[52]

Commenters are asked to address whether unlimited transferability is appropriate for option shares registered on Form S–8. Alternatively, should the existing restriction be lifted only for options that may be transferred to ''family members'' by gift or pursuant to a domestic relations order, consistent with the proposed amendment to expand the scope of offerees who may exercise options registered on Form S–8?

C. Registration on Form S–3 of Shares Underlying Transferable Warrants or Options

Currently, General Instruction I.B.4 to Form S–3 allows registration on Form S–3 of the offer and sale of securities to be received upon the exercise of outstanding transferable warrants issued by the same issuer.[53] The Instruction requires, as a condition to Form S–3 availability, that the issuer have sent, within twelve calendar months immediately before the Form S–3 is filed, specified annual report information [54] to all record holders of the transferable warrants.

By interpretation, the staff of the Division of Corporation Finance has expressed the view that employee benefit plan options transferred by gift from employees to their immediate family members [55] would be considered ''transferable warrants'' for purposes of this Instruction.[56] If Form S–8 is amended as proposed to permit family members to exercise employee benefit plan options on Form S–8, there should be no further need for this interpretation because the proposed amendments will provide more favorable relief.

However, in considering this interpretation, the staff concluded that it may be appropriate generally to treat options (including options not issued under employee benefit plans) the same as warrants for purposes of Form S–3 availability, in each case without regard to transferability. Securities offered pursuant to options, like securities offered pursuant to rights, convertible securities and warrants, are offered to existing security holders of the issuer, who are presumed to ''follow'' the issuer through corporate communications and Exchange Act filings.[57]

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[48] Issuers would not, of course, have to permit these transfers.

[49] ''Reload'' options generally are replacement options granted upon the exercise of an earlier-granted option.

[50] Instruction A.1(a) also makes Form S–8 available to the issuer's former employees, and guardians and executors of both current and former employees, for the acquisition of registrant securities pursuant to intra-plan transfers among plan funds, to the extent permitted by the specific plan.

[51] By its terms, this restriction applies only to the exercise of options by former employees. However, issuers often apply it to all Form S–8 optionees because of practical difficulties in replacing options when current employees become former employees.

[52] If this amendment is adopted as proposed, issuers no longer would need to rely on the staff's interpretive position in Merrill Lynch & Co., Inc. (May 16, 1996), which permitted former employees to exercise on Form S–8 options transferable only to children, step-children, grandchildren or trusts established for their exclusive benefit, provided such options had never been transferred previously.

[53] Instruction I.B.4 also makes Form S–3 available for securities offered upon exercise of outstanding rights granted by the same issuer, pursuant to dividend or interest reinvestment plans, or upon the conversion of outstanding convertible securities. In each case, these securities may be registered on Form S–3 whether or not the $75 million public float test is satisfied.

[54] The Instruction specifically refers to material containing the information required by Rule 14a–3(b) under the Exchange Act and Regulation S–K Items 401 (Directors, Executive Officers, Promoters and Control Persons), 402 (Executive Compensation) and 403 (Security Ownership of Certain Beneficial Owners and Management).

[55] For purposes of this interpretation, the definition of ''immediate family'' in Exchange Act Rule 16a–1(e) applies.

[56] Use of Form S–3 for Transferred Options (Aug. 7, 1997). The letter addresses the procedures (including fee transfer) for transferring such shares underlying a transferred option from a Form S–8 to a Form S–3. (Fee transfers in other circumstances are distinguished in Ropes & Gray (Oct. 30, 1997).)

[57] See Release 33–6331 (Aug. 6, 1981).

Accordingly, the Commission proposes to amend General Instruction I.B.4 to Form S–3 so that the form will be available equally for securities underlying options and warrants in a broader context outside the employee benefit area. The proposed amendment also re-writes the Instruction so that it is more clear.

Commenters should address whether any differences between an issuer's relationships with option holders and warrant holders justify different treatment of the underlying securities for purposes of Form S–3 availability. Do any similar distinctions arise based on whether the instrument is transferable? For example, is it more likely that a warrant holder would have purchased the warrant, whereas an option holder would have been granted it under a plan or received it as a gift? If so, does that make any difference in determining whether the holder would have knowledge about the company for purposes of making Form S–3 available? If transferability makes a difference, should instruments with limited transferability be treated the same for S–3 purposes as fully transferable instruments?

D. Executive Compensation Disclosure of Transferred Options

The growing practice of transferring employee benefit plan stock options raises questions on how transferred (or transferable) options should be reported under the executive compensation disclosure requirements of Item 402 of Regulations S–K and S–B.[58] These issues arise under the summary compensation table,[59] the option/SAR grants table,[60] and the aggregated option/SAR exercises and fiscal year-end option/SAR value table.[61] Today's proposals and requests for comment reflect the staff's current interpretation [62] that the transfer of an option by an executive does not negate the option's status as compensation that should be reported.

1. Summary Compensation Table

The summary compensation table prescribed by Item 402(b) requires a three year reporting history of compensation, including the number of securities for which options were granted, for each person serving as the issuer's chief executive officer (the ''CEO'') during the last fiscal year and the four other most highly compensated executive officers serving at the end of that year (together with the CEO, the ''named executive officers''). Item 402(b)(2)(iv)(B) would be amended so that the sum of the number of securities underlying stock options granted required to be reported in column (g) of the table would include options that subsequently have been transferred by the officer. This amendment would codify the staff's current interpretation of this disclosure Item. Commenters should address whether this codification is necessary or desirable.

2. Option/SAR Grants Table

This table must show, among other things, the number of options granted during the most recent fiscal year to the named executive officers, together with footnote disclosure of the material terms of those options. Consistent with current staff interpretation, Item 402(c)(1) would be amended so that the information required by the table would apply to all options and SARs granted during the year, including options and SARs that subsequently have been transferred.

Although the staff is of the view that transferability is an option term that should be disclosed in a footnote to this table, no rule proposal codifying this position is included among the amendments proposed today. However, comment is solicited whether Instruction 3 to Item 402(c) should be amended to include transferability among the material terms requiring footnote disclosure. If so, should the instructions to the table also be amended to require footnote disclosure that specifies the date of any transfer of an option or SAR that has occurred? Should such a footnote require that a transfer be characterized as ''donative'' or ''for value received?''

Should the footnote name a family member—or any other—transferee? Alternatively, would generic disclosure of the transferee's status, such as an ''immediate family member'' or ''unaffiliated charity'' be sufficient? Should a similar footnote description of transfers also be required in the summary compensation table, so that disclosure will be required of transfers that take place in the two years following the year in which an option is granted?

3. Aggregated Option/SAR Exercises and Fiscal Year-End Option/SAR Value Table (''Option Exercises and Year-End Value Table'')

This table must present, among other things, both the option exercises by the named executive officers during the last fiscal year and the value of options held by the named executive officers at fiscal year end. That value is computed based on the difference between the exercise price of the options and the year-end fair market value of the covered shares.

The proposed amendments to the summary compensation and the option/SAR grants tables are designed to ensure that executive compensation disclosure continues to provide investors meaningful information as to all option and SAR compensation awarded by the issuer. In order to make executive compensation disclosure complete, is it necessary to amend the option exercises and year-end value table to include all option and SAR compensation from which the named executive officer's family members continue to derive benefits?

Such an instruction has not been included among the rule proposals published today. However, comment is solicited whether a new instruction should be added to Item 402(d)(2) to require that options and SARs exercised or held by a ''family member'' (as defined in the proposed amended Instructions to Form S–8) of the named executive officer be included in the table. If so, should the family member be named in a footnote to the table? Where the transferee is controlled by the named executive officer's family, such as a charitable foundation, should the option or SAR be included in the option exercises and year-end value table? Should the result depend on whether the named executive officer's family continues to benefit financially from securities held by the entity?

IV. General Request for Comment

Any interested person is invited to submit written comments on the proposed rule and form amendments, or to suggest additional changes or comments on other matters that might have an impact on the proposals set forth in this release. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

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[58] An issuer must include, or incorporate by reference, this disclosure in Securities Act registration statements filed on Forms S–1 [17 CFR 239.11], S–2, S–3, S–4, S–8, S–11 and SB–2. An issuer also must include this disclosure in its Exchange Act registration statement on Form 10 or Form 10–SB [together, 17 CFR 249.210], and its proxy or information statement (if action is to be taken as to the election of directors or the approval of specified director or executive compensation, as provided in Item 8 of Schedule 14A [17 CFR 240.14a–101]). Finally, an issuer must include, or incorporate by reference from its definitive proxy or information statement, this disclosure in its annual report on Form 10–K [17 CFR 249.310] or Form 10–KSB [17 CFR 249.310b].

[59] Item 402(b) of Regulations S–B and S–K.

[60] Item 402(c) of Regulations S–B and S–K.

[61] Item 402(d) of Regulations S–B and S–K.

[62] This interpretation and the other interpretations referenced in this section have been given by the staff in response to telephone inquiries.

Comment is requested as to the impact of the proposals from the point of view of the public, as well as public companies and their employees affected by the proposed rule and form amendments. Comments on this inquiry will be considered by the Commission in complying with its responsibilities under Section 19(a) of the Securities Act.[63]

Comment letters should refer to File No. S7–2–98. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted to the Commission's Internet Web site (http://www.sec.gov).

V. Cost-Benefit Analysis

The proposed rule and form changes have two objectives. The changes pertaining to the sale of shares to consultants and advisers are intended to eliminate misuses of Form S–8 and thus enhance investor protection. The changes pertaining to interfamily transfers are intended to facilitate such transfers and, thereby, provide significant benefits to issuers and their employees. The costs and benefits of these changes are discussed below. The Commission requests comment on this analysis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

A. Shares Issued to Consultants and Advisers

Currently, some issuers are using Form S–8 inappropriately to make distributions of their securities to the general public, or to compensate consultants for services that promote or maintain the market for their securities. The proposal is intended to preclude the use of Form S–8 to register transactions in which consultants act as conduits to distribute securities to the public, or transactions in which consultants are compensated for other capital-raising services. This will discourage filers from misusing the form to register transactions for which it currently is not available. The Commission believes this will provide a substantial investor protection benefit. Other forms remain available to register securities for these purposes.

The Commission's records indicate that 5340 Forms S–8 were filed during the fiscal year ending September 30, 1997.[64] The Commission does not have the data to determine how many of those filings would have been precluded if the proposed amendments to Form S–8 had been in effect. To the extent any reduction is due to the fact that the transaction was not eligible for Form S–8, however, the Commission believes this effect is a benefit rather than a cost. Commenters are requested to provide data that would enable the Commission to quantify this effect.

The proposals also would require disclosure of: (a) The identity of consultants and advisors who will be compensated with securities registered on Form S–8, (b) the services they provide to the issuer, and (c) the number of securities to be issued to each. This may require registrants to incur some additional costs. However, these costs should not be significant since they will primarily involve the transmission of information that is readily available. Where the information must be provided by post-effective amendment, the additional burden should not be significant because the post-effective amendment filing procedure does not require registrants to refile materials that previously were filed in the original Form S–8. The Commission estimates the total reporting and recordkeeping burden that will result from the collection of this additional information to be one hour per form.

Currently, issuers are not required to indicate whether Form S–8 is being used to compensate a consultant or advisor; therefore, the Commission cannot estimate the number of Forms S–8 under which securities were issued to consultants and advisors. For purposes of cost estimation, the Commission is assuming that one tenth of the Forms S–8 registered securities for issuance to consultants and advisors, and that the average number of consultants and advisors is two. The Commission further assumes that future filings will reflect the same proportions. Based on these assumptions, the additional annual aggregate cost of reporting and recordkeeping is estimated to be approximately $110,000 (1,100 hours × $100/hour). Commenters are asked to provide data that would help the Commission ensure that this estimate of burden hours and cost is as accurate as possible.

B. Facilitating Intra-Family Transfers

The exercise of employee benefit plan options by family members of the employee optionees is not currently permitted on Form S–8. Form S–3 currently is not available for the exercise of outstanding nontransferable warrants or outstanding options (whether or not transferable) without regard to the ''float test'' applicable to primary offerings by the issuer, except under limited circumstances based on staff interpretation. The proposal to make Form S–8 available for option exercises by an employee's family members should reduce recordkeeping and compliance burdens by eliminating the need to file a different, less streamlined registration form for these option exercises. By reducing these costs for issuers, option transferability may become more widespread, allowing families to incur estate tax savings as a result. Because information on interfamily transfers is not reported, the Commission does not have any data upon which to estimate these savings. The Commission estimates that issuers could save an average of four hours by using Form S–8 rather than one of the more detailed registration forms.

The proposal to make Form S–3 available for the exercise of options to the same extent as it is available for the exercise of warrants also should reduce recordkeeping and compliance burdens by making this streamlined registration form available for a broader group of transactions. The Commission does not have a basis for quantifying this effect. Commenters are requested to provide data on how many additional Forms S–3 would be filed if the proposed amendment is adopted, and quantify cost savings where possible.

The proposed amendments to Item 402 of Regulations S–B and S–K should not increase recordkeeping and compliance burdens because they will not require the reporting of any compensatory transactions that are not already required to be reported. Commenters recommending changes that have not been proposed but for which comment is requested, such as reporting of options exercised or held by an executive officer's family members, should estimate any additional recordkeeping burden, and quantify costs where possible.

Comment is requested on whether the proposed rule amendments would be a ''major rule'' for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission preliminarily believes that the proposed rule amendments would not result in a major increase in costs or prices for consumers or individual industries, or significant adverse effects on competition, employment, investment, productivity, innovation or small business. The Commission believes that persons affected by the proposed amendments will not have significantly increased costs for providing information. Comments are requested

[63] 15 U.S.C. 77s(a).

[64] During the same period, 684 post-effective amendments were filed on Form S–8.

on whether the proposed rule amendments are likely to have a $100 million or greater annual effect on the economy. Commenters are requested to provide empirical data to support their views.

VI. Initial Regulatory Flexibility Analysis

The Commission has prepared an initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603 regarding the proposed amendments.

As noted in the analysis, the amendments to Form S–8, Rules 401 and 405 are proposed to deter abusive practices in which Form S–8 is used to make capital-raising distributions of securities to the general public, or to compensate consultants and advisors for promotional and other capital-raising activities, in contravention of the express purposes of the form. Other amendments to Form S–8 and the amendments to Item 402 of Regulations S–B and S–K result from concerns expressed by representatives of industry that the current limited scope of persons permitted to exercise options under Form S–8 has a chilling effect on intra-family transfers for estate planning and other purposes. The amendments to Form S–3 result from the staff's analysis that shares underlying options should be treated the same as shares underlying warrants for purposes of form availability. The Commission believes that the proposed amendments will not result in any impairment of protection for the investing public, and should result in improved protection by assuring that capital-raising offerings are registered on the forms prescribed for those offerings.

As the IRFA describes, the staff is aware of approximately 1100 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 157 of the Securities Act. Overall, 13,226 companies are Exchange Act reporting companies. However, the Commission has no empirical data upon which it may quantify the effects of the proposed changes on small businesses. The IRFA states that the proposals will not significantly increase reporting, recordkeeping or compliance burdens, and in some cases may reduce those burdens for smaller businesses.

The proposals to require disclosure of the identity of consultants and advisors who will be compensated with securities registered on Form S–8, to specify the services that will be provided to the issuer, and to quantify the number of securities to be issued to each consultant or advisor may require registrants to incur some additional costs. However, these costs should not be significant, since they will be limited to the transmission of limited additional information in the Securities Act registration statement. Where the information must be provided by post-effective amendment, the additional burden should not be significant because post-effective amendment filing procedure does not require registrants to refile materials that previously were filed in the original Form S–8.

The Commission estimates the total reporting and recordkeeping burden that will result from the collection of this additional information to be one hour per form. The Commission's records indicate that 5340 Forms S–8 were filed during the fiscal year ended September 30, 1997. However, the Commission cannot estimate with certainty either the number of those filings that were made by small business issuers or the number under which securities were issued to consultants and advisors. For purposes of the analysis, the Commission assumes that one-tenth of the Forms S–8 filed during fiscal 1997 registered securities for issuance to two consultants apiece, and that small issuers accounted for one-twelfth of all such filings.[65] Based on these assumptions, 45 small issuers would have an annual aggregate reporting and recordkeeping cost of approximately $9,000 (90 hours × $100/hour).

The proposal to make Form S–8 available for option exercises by an employee's family members should reduce recordkeeping and compliance burdens by eliminating the need to file a different, less streamlined registration form for these option exercises. While the Commission cannot quantify the number of small businesses that would be affected, the Commission estimates the average reporting and recordkeeping burden that would be avoided by eliminating the need to file a different form rather than Form S–8 as approximately four hours. Thus, even if there were only 26 Forms S–8 filed by small businesses per year, the savings to small businesses would exceed the costs of providing the new disclosures about consultants and advisors.

The proposal to make Form S–3 available for the exercise of options to the same extent as it is available for the exercise of warrants will further reduce recordkeeping and compliance burdens by making this streamlined registration form available for a broader group of transactions.

The proposed amendments to Item 402 of Regulations S–B should not increase recordkeeping and compliance burdens because they will not require the reporting of any compensatory transactions that are not already required to be reported. Regulation S–K does not generally apply to small issuers.

The Commission invites written comments on any aspect of the IRFA. In particular, the Commission requests comment on: (i) The number of small entities that would be affected by the proposed rule amendments; and (ii) the determination that the proposed rule amendments would reduce reporting, recordkeeping and other compliance requirements for small entities. Commenters should address whether the proposed amendments to Forms S–3 and S–8 will increase the number of registration statements filed on these forms, increase the dollar amount of securities sales on these forms, or make the forms generally more available to small entities. Commenters should address how much time and money may be saved by making more streamlined forms available for more transactions.

Any commenter who believes that the proposals will significantly impact a substantial number of small entities should describe the nature of the impact and estimate the extent of the impact. For purposes of making determinations required by the Small Business Regulatory Enforcement Act of 1996, the Commission also requests data regarding the potential impact of the proposed amendments on the economy on an annual basis. All comments will be considered in the preparation of the Final Regulatory Flexibility Act Analysis if the proposed amendments are adopted. A copy of the Initial Regulatory Flexibility Act Analysis may be obtained from Anne M. Krauskopf, Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

VII. Paperwork Reduction Act

Certain provisions of the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*). The Commission staff has submitted the proposals for review by the Office of Management and Budget (''OMB'') in accordance with the PRA . An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. This collection of information has been assigned OMB Control No. 3235–0066. The title to the affected information collection is: ''Form S–8.''

[65] Small issuers account for approximately one-twelfth of all reporting issuers.

The proposed amendments, if adopted, will require registrants filing Form S–8 for the issuance of securities to consultants and advisors to disclose the identity of these persons in the form, to specify the services that they will provide to the issuer, and to specify the number of securities to be issued to each consultant and advisor. As discussed above, the Commission estimates the total reporting and recordkeeping burden that will result from the collection of this additional information to be one hour per form. Of the 5340 Forms S–8 filed during the fiscal year ended September 30, 1997, the Commission cannot estimate with certainty the number of Forms S–8 under which securities were issued to consultants and advisors. Assuming that one-tenth of these filings registered securities for issuance to two consultants apiece,[66] the additional annual aggregate reporting and recordkeeping burden should be approximately 1100 hours. Commenters should address whether these assumptions are accurate.

The proposed amendments to Form S–8, if adopted, also would permit the form to be used for the exercise of employee benefit plan options by family members of employee optionees. By eliminating the need to file different, less streamlined registration statements for these transactions, the proposed amendments may encourage registrants to permit intra-family transfers of employee benefit plan options. The Commission believes that, to the extent registrants have filed separate registration statements for option exercises by family member transferees, the form most often used was Form S–3.[67] The Commission is unable to estimate with certainty the number of Forms S–3 that have been filed for this purpose, but believes it to be a negligible percentage of the 3137 Forms S–3 filed during the fiscal year ending September 30, 1997.[68] Because option transferability is a relatively new and limited practice, it is difficult to quantify burden hours that will be saved by the proposed amendments. However, by permitting family members' option exercises to be registered on the least burdensome registration form, the proposed amendments, like prior rule amendments and staff interpretations,[69] should make transferability substantially more attractive. The Commission estimates that an average of four burden hours per Form S–8 will be saved by this proposal.

The proposed amendment to General Instruction I.B.4 Form S–3 to make the form available for the registration of shares underlying options as well as warrants, in each case without regard to transferability, would allow the registration of additional transactions on Form S–3, a relatively streamlined registration form. While the Commission cannot state with certainty the number of Forms S–3 filed during fiscal 1997 that were filed in reliance on General Instruction I.B.4, the Commission estimates that it was a relatively small percentage of the 3137 Forms S–3 filed. Commenters are asked to estimate, to the extent possible, the number of additional Forms S–3 that would be filed and the number of burden hours that would be saved if this amendment were adopted. Even if only 275 additional Forms S–3 are filed per year, the savings due to the use of Form S–3 will exceed the costs described above.

In accordance with 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment on the following: Whether the proposed changes in the collection of information is necessary; the accuracy of the estimated burden of the proposed changes to the collection of information; the quality, utility and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Persons desiring to submit comments on the collection of information requirement should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20549, with reference to File No. S7–2–98. The Office of Management and Budget (''OMB'') is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VIII. Effects on Efficiency, Competition, and Capital Formation

Sections 2(b) of the Securities Act[70] and 3(f) of the Exchange Act[71] require the Commission, when engaged in rulemaking, to consider in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.[72] In addition, section 23(a)(2) of the Exchange Act[73] requires the Commission, in adopting rules under the Exchange Act, to consider the impact any rule would have on competition and not to adopt rules that would impose a burden on competition not necessary or appropriate in the public interest. Several of the proposed amendments are intended to prevent issuers from abusing Form S–8 by registering their stock sold to so-called consultants and advisors who act as promoters and statutory underwriters; other proposed amendments provide a simplified form to facilitate certain intra-family transfers of stock options.

The Commission's preliminary view is that the proposed amendments would not have any anticompetitive effects that are not necessary or appropriate. Because Form S–8 was never intended for capital-raising transactions, but solely for purposes of compensating employees, the proposed amendments should have no effect on legitimate capital-raising. To the extent the proposed amendments make it easier for reporting companies to compensate their employees, the Commission believes the amendments would promote efficiency.

The Commission requests comments on the competitive benefits that may result from the proposals and any anticompetitive effects that may result if the Rule is adopted as proposed. The Commission requests data and analysis on what effect the proposed changes may have on efficiency and capital formation.

IX. Statutory Basis and Text of Amendments

The amendments to Securities Act Forms S–8 and S–3 and Rules 401(g) and 405 are being proposed pursuant to the authority set forth in Sections 6, 7, 8, 10 and 19 of the Securities Act of 1933. The proposed amendments to Item 402 of Regulations S–B and S–K also are being proposed pursuant to Exchange Act Sections 12, 13, 14, 15 and 23.

List of Subjects in 17 CFR Parts 228, 229, 230 and 239

Reporting and recordkeeping requirements, Securities.

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[66] See Cost-Benefit Analysis at Section V, above.

[67] See Use of Form S–3 for Transferred Options (Aug. 7, 1997), discussed at n. 43 and n. 56 above.

[68] This number does not include Forms S–3 filed to register dividend or interest reinvestment plans, or to register additional securities pursuant to Rule 462(b).

[69] See Sections I.B, III.A and III.C, above.

[70] 15 U.S.C. 77b(b).

[71] 15 U.S.C. 78c(f).

[72] 15 U.S.C. 77b(b) and 78c(f).

[73] 15 U.S.C. 78w(a)(2).

Text of the Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o 78u–5, 78w, 78ll, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

2. In § 228.402, paragraph (b)(2)(iv) introductory text is republished and paragraphs (b)(2)(iv)(B) and (c)(1) introductory text are revised to read as follows:

§ 228.402 (Item 402) Executive compensation.

* * * * *

(b) *Summary compensation table*—(1) *General* * * *

(2) * * *

(iv) Long-term compensation (columns (f), (g) and (h)), including:

(A) * * *

(B) The sum of the number of securities underlying stock options granted (including options that subsequently have been transferred), with or without tandem SARs, and the number of freestanding SARs (column (g)); and

* * * * *

(c) *Option/SAR grants table.*—(1) The information specified in paragraph (c)(2) of this item, concerning individual grants of stock options (whether or not in tandem with SARs) and freestanding SARs (including options and SARs that subsequently have been transferred) made during the last completed fiscal year to each of the named executive officers shall be provided in the tabular format specified below:

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

3. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

4. In § 229.402, paragraph (b)(2)(iv) introductory text is republished and paragraphs (b)(2)(iv)(B) and (c)(1) introductory text are revised to read as follows:

§ 229.402 (Item 402) Executive compensation.

* * * * *

(b) *Summary Compensation Table.*

(1) *General.* * * *

(2) * * *

(iv) Long-term compensation (columns (f), (g) and (h)), including:

(A) * * *

(B) The sum of the number of securities underlying stock options granted (including options that subsequently have been transferred), with or without tandem SARs, and the number of freestanding SARs (column (g)); and

* * * * *

(c) *Option/SAR Grants Table.* (1) The information specified in paragraph (c)(2) of this item, concerning individual grants of stock options (whether or not in tandem with SARs) and freestanding SARs (including options and SARs that subsequently have been transferred) made during the last completed fiscal year to each of the named executive officers shall be provided in the tabular format specified below:

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

5. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

6. By amending § 230.401 to revise paragraph (g) to read as follows:

§ 230.401 Requirements as to proper form.

* * * * *

(g) Except for registration statements and post-effective amendments that become effective automatically pursuant to §§ 230.462 and 230.464, a registration statement or any amendment thereto is deemed filed on the proper form unless the Commission objects to the form before the effective date.

7. By amending § 230.405 to revise the definition of ''Employee benefit plan'' to read as follows:

§ 230.405 Definition of terms.

* * * * *

Employee benefit plan. The term *employee benefit plan* means 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. However, a consultant or advisor may participate in an employee benefit plan only if:

(1) The consultant or advisor renders *bona fide* services to the registrant;

(2) The services rendered by the consultant or advisor 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; and

(3) The consultant or advisor is a natural person who has contracted directly with the registrant to render those services.

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

8. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

9. By amending § 239.13 to revise paragraph (b)(4) to read as follows:

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(b) *Transaction requirements.*

* * *

(4) *Rights offerings, dividend or interest reinvestment plans, and conversions, warrants and options.* (i) Securities to be offered:

(A) Upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted on a *pro rata* basis to all existing security holders of the class of securities to which the rights attach;

(B) Under a dividend or interest reinvestment plan; or

(C) Upon the conversion of outstanding convertible securities or the exercise of outstanding warrants or options issued by the issuer of the securities to be offered, or an affiliate of that issuer.

(ii) However, Form S–3 is available for registering these securities only if the issuer has sent, within the twelve

calendar months immediately before the registration statement is filed, material containing the information required by § 249.14a–3(b) of this chapter under the Exchange Act to:

(A) All record holders of the rights;

(B) All participants in the plans; or

(C) All record holders of the convertible securities, warrants or options, respectively.

(iii) The issuer also must have provided, within the twelve calendar months immediately before the Form S–3 registration statement is filed, the information required by Items 401, 402 and 403 of Regulation S–K (§§ 229.401 through 229.403 of this chapter) to:

(A) Holders of rights exercisable for common stock;

(B) Holders of securities convertible into common stock; and

(C) Participants in plans that may invest in common stock, securities convertible into common stock, or warrants or options exercisable for common stock, respectively.

* * * * *

10. By amending Form S–3 (referenced in § 239.13) by revising paragraph B.4 of General Instruction I to read as follows:

[**Note**—The text of Form S–3 does not, and this amendment will not, appear in the Code of Federal Regulations.]

Form S–3 Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form S–3

* * * * *

B. Transaction Requirements. * * *

4. *Rights Offerings, Dividend or Interest Reinvestment Plans, and Conversions, Warrants and Options.*

(a) Securities to be offered (1) upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted on a *pro rata* basis to all existing security holders of the class of securities to which the rights attach, (2) under a dividend or interest reinvestment plan, or (3) upon the conversion of outstanding convertible securities or the exercise of outstanding warrants or options issued by the issuer of the securities to be offered, or an affiliate of that issuer.

(b) However, Form S–3 is available for registering these securities only if the issuer has sent, within the twelve calendar months immediately before the registration statement is filed, material containing the information required by Rule 14a–3(b) (§ 249.14a–3(b) of this chapter) under the Exchange Act to:

(1) All record holders of the rights,

(2) All participants in the plans, or

(3) All record holders of the convertible securities, warrants or options, respectively.

(c) The issuer also must have provided, within the twelve calendar months immediately before the Form S–3 registration statement is filed, the information required by Items 401, 402 and 403 of Regulation S–K (§§ 229.401–229.403 of this chapter) to:

(1) Holders of rights exercisable for common stock,

(2) Holders of securities convertible into common stock, and

(3) Participants in plans that may invest in common stock, securities convertible into common stock, or warrants or options exercisable for common stock, respectively.

* * * * *

11. By amending § 239.16b to revise paragraph (a)(1) to read as follows:

§ 239.16b Form S–8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans.

(a) * * *

(1) Securities of such registrant to be offered to its employees or employees of its subsidiaries or parents pursuant to any employee benefit plan. The form also is available for the exercise of employee benefit plan options by an employee's family member who has acquired the options from the employee through a gift or a domestic relations order.

* * * * *

12. By amending Form S–8 (referenced in § 239.16b) by revising paragraph 1.(a) of General Instruction A; by amending Part II by redesignating Items 8 and 9 as Items 9 and 10, respectively; and by adding Item 8 to read as follows:

[**Note**—The text of Form S–8 does not, and this amendment will not, appear in the Code of Federal Regulations.]

Form S–8 Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

A. Rule as to Use of Form S–8.

1. * * *

(a) Securities of such registrant to be offered pursuant to any employee benefit plan to its employees or employees of its subsidiaries or parents. For purposes of this form, the term ''employee benefit plan'' is defined in Rule 405 of Regulation C (§ 230.405).

(1) For purposes of this form, the term ''employee'' is defined 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 the issuance of securities to a consultant or advisor only if:

(i) The consultant or advisor renders *bona fide* services to the registrant;

(ii) The services rendered by the consultant or advisor 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; and

(iii) The consultant or advisor is a natural person who has contracted directly with the registrant to render those services.

(2) In addition, the term ''employee'' includes insurance agents who are exclusive agents of the registrant, its subsidiaries or parents.

(3) The term ''employee'' also includes former employees as well as executors, administrators or beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees, or similar persons duly authorized by law to administer the estate or assets of former employees. The inclusion of all individuals described in the preceding sentence in the term ''employee'' is only to permit registration on Form S–8 of:

(i) The exercise of employee benefit plan stock options and the subsequent sale of the securities, if these exercises and sales are permitted under the terms of the plan; and

(ii) The acquisition of registrant securities pursuant to intra-plan transfers among plan funds, if these transfers are permitted under the terms of the plan.

(4) The term ''registrant'' as used in this Form means the company whose securities are to be offered pursuant to the plan, and also may mean the plan itself.

(5) The form also is available for the exercise of employee benefit plan options by an employee's immediate family member who has acquired the options from the employee through a gift or a domestic relations order. For purposes of this form, ''family member'' includes any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships, trusts for the exclusive benefit of these persons, and any other entity owned solely by these persons.

* * * * *

Part II

Information Required in the Registration Statement

* * * * *

Item 8. Consultants and Advisors

Disclose the names of any consultants or advisors to whom securities will be issued pursuant to the registration statement. Specify the number of securities that will be issued to each of these persons pursuant to this registration statement. Describe the specific services provided to the registrant by each consultant or advisor that are compensated by securities registered on this registration statement.

* * * * *

Dated: February 17, 1998.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–4459 Filed 2–24–98; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–39670; File No. S7–3–98]

RIN 3235–AH40

Publication or Submission of Quotations Without Specified Information

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is publishing for public comment proposed amendments to Rule 15c2–11 (''Rule'') under the Securities Exchange Act of 1934 (''Exchange Act''). The Commission is publishing these proposals in response to increasing incidents of fraud and manipulation in the over-the-counter securities market involving thinly traded securities of thinly-capitalized issuers (*i.e.*, ''microcap securities''). Rule 15c2–11 governs the publication of quotations for securities that are traded in a quotation medium other than a national securities exchange or Nasdaq. The proposals would require all broker-dealers to review information about the issuer when they first publish or resume publishing a quotation for a security subject to the Rule, document that review, annually update the information if they publish priced quotations, and make the information available to other persons upon request. In addition, the proposals would enhance the Rule's information requirements for quotations for the securities of non-reporting issuers and ease the Rule's recordkeeping requirements when broker-dealers have electronic access to information about reporting issuers. The Commission also is proposing a number of textual and structural changes in an effort to simplify and streamline the Rule. Finally, the Commission is proposing an amendment to Rule 17a–4 under the Exchange Act that would incorporate the record retention requirements currently contained in Rule 15c2–11.

DATES: Comments must be received on or before April 27, 1998.

ADDRESSES: Persons wishing to submit written comments should send three copies to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Mail Stop 6–9, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–3–98; this file number should be included on the subject line if E-mail is used. Comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Any of the following attorneys in the Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, at (202) 942–0772: Nancy J. Sanow, Alan Reed, Irene Halpin, Florence Harmon, Denise Landers, or Chester McPherson.

SUPPLEMENTARY INFORMATION: The Commission is proposing for comment amendments to Rule 15c2–11 [1] and Rule 17a–4 [2] under the Securities Exchange Act of 1934 (''Exchange Act'').[3]

I. Executive Summary and Background

A. Executive Summary

Incidents involving fraud and manipulation of microcap securities that trade in the over-the-counter (''OTC'') securities market appear to be rising.[4] This trend has been the subject of Congressional hearings,[5] state hearings [6] and numerous media reports.[7] These developments have caused the Commission to reexamine Exchange Act Rule 15c2–11, its rule governing the publication of quotations in the non-Nasdaq OTC market. As a result, the Commission is proposing comprehensive amendments to Rule 15c2–11 that address abuses involving microcap securities and more generally would enhance the integrity of quotations for securities in this market sector. The proposed amendments also would reorganize and simplify the Rule's provisions.

Microcap securities [8] generally are characterized by low share prices and little or no analyst coverage. The issuers of microcap securities typically are thinly capitalized and often are not required to file periodic reports with the Commission. Securities of microcap companies usually are quoted on the OTC Bulletin Board (''Bulletin Board'') operated by the National Association of Securities Dealers, Inc. (''NASD'') or in the Pink Sheets published by the National Quotation Bureau (''NQB''), but they are not exclusive to these

[1] 17 CFR 240.15c2–11.

[2] 17 CFR 240.17a–4.

[3] 15 U.S.C. 78a *et seq.*

[4] See, *e.g., M. Rimson & Co., Inc.,* 1997 WL 93628 (February 25, 1997) (Initial Decision); (Securities Exchange Act Release No. 38489 (April 9, 1997) (Finality Order)); *See also, SEC* v. *Jeffrey Szur,* No. 97 Civ. 9305 (S.D.N.Y. December 18, 1997); *SEC* v. *George Badger,* No. 97 CV 963K (D. Utah December 18, 1997); *SEC* v. *Andrew Scudiero,* No. 97 Civ. 9304 (S.D.N.Y. December 18, 1997); *SEC* v. *Leonard Alexander Ruge,* No. 97 Civ. 9306 (S.D.N.Y. December 18, 1997); *SEC* v. *Joseph Pignatiello,* No. 97 Civ. 9303 (S.D.N.Y. December 18, 1997). For a summary of the SEC's allegations in these cases, see Litigation Release No. 15595 (December 18, 1997), 1997 SEC LEXIS 2602.

[5] See United States Senate Committee on Governmental Affairs Permanent Subcommittee on Investigations, Hearing on Fraud in the Micro Capital Market (September 22, 1997) (testimony of Arthur Levitt, Chairman of the U.S. Securities and Exchange Commission) (''Senate Testimony on Microcap Fraud'').

[6] N.Y. Attorney General, REPORT ON MICRO-CAP FRAUD (December 1997).

[7] See, *e.g.,* Weiss, ''Investors Beware—Chop Stocks Are on the Rise,'' Business Week, December 15, 1997, at 112–128; Lohse and Emshwiller, ''Bulletin Board Likely to Remain Wild West of Wall Street,'' The Wall Street Journal, December 15, 1997, at C1; Schroeder, ''Despite Reforms, Penny-Stock Fraud is Roaring Back,'' The Wall Street Journal, September 4, 1997, at A12; Byrne, ''The Real OTC Market: The Spectacular Success of Pink Sheet and Bulletin Board Trading: Why the NASD is Toughening Standards,'' Traders, September 1997, at 36–39; Lohse, ''Fraud by Small-Stock Operators Flourishes in Long Bull Market,'' The Wall Street Journal, July 31, 1997, at C1.

[8] The term ''microcap securities'' is not defined under the federal securities laws or regulations. The use of the term ''microcap securities'' in this release, however, should be distinguished from its use in the mutual fund context. For example, Lipper Analytical Services, a mutual fund rating organization, generally categorizes microcap companies as companies with market capitalization of less than $300 million. Lipper-Directors' Analytical Data, Investment Objective Key, 2d ed. 1997.