requirements of the Act or an exemption from those requirements.

(3) Ninety days after the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), securities issued under this section may be resold by persons who are not affiliates (as defined in § 230.144) in reliance on § 230.144, without compliance with paragraphs (c), (d), (e) and (h) of § 230.144, and by affiliates without compliance with paragraph (d) of § 230.144.

Dated: February 25, 1999.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–5296 Filed 3–5–99; 8:45 am]

BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230 and 239

[Release No. 33–7646, 34–41109; File No. S7–2–98]

RIN 3235–AG94

Registration of Securities on Form S–8

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''we'' or ''Commission'') is adopting amendments to Form S–8, related rules under the Securities Act, and Regulations S–K and S–B. Some of the amendments restrict the use of Form S–8 for the offer and sale of securities to consultants and advisors. Other amendments allow the use of Form S–8 for the exercise of stock options by family members of employee optionees.

DATES: *Effective Date:* The amendments are effective April 7, 1999. *Compliance Date:* Currently effective registration statements on Form S–8 need not comply with amended § 230.405 and amended General Instruction A.1.(a)(1) to Form S–8 (referenced in § 239.16b) until May 10, 1999.

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

SUPPLEMENTARY INFORMATION: We are adopting 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

Today we adopt rule amendments that address two separate concerns involving the use of Form S–8 to register the offer and sale of employee benefit plan securities.

- First, we adopt amendments designed to restrict the availability of streamlined registration on Form S–8 in order to deter abuse of the form. In particular, the form has been misused to sell securities to the general public through employees and nominal ''consultants and advisors,'' and to register securities issued to stock promoters. We are adopting these amendments as part of our comprehensive agenda to deter registration and trading abuses, including microcap fraud.[7]
- Second, we are expanding Form S–8 to cover stock option exercises by employees' family members, so that the rules governing use of the form do not impede legitimate intra-family transfers of options by employees. These amendments will facilitate transfers for estate planning purposes and transfers under domestic relations orders.

Form S–8 is available to register the offer and sale of securities to the issuer's employees [8] in a compensatory or incentive context. In 1990, we adopted substantial revisions to Form S–8,[9] including making the form effective immediately upon filing and abbreviating the disclosure format. We permitted the delivery of regularly prepared materials advising employees about benefit plans to satisfy Securities Act prospectus delivery requirements, eliminating the need to file and deliver a separate prospectus that duplicates this information. This treatment reflected a distinction we traditionally have drawn between offerings to employees primarily for compensatory and incentive purposes and offerings for capital-raising purposes. The compensatory purpose of the offering and employees' familiarity with the issuer's business through the employment relationship justify the use of abbreviated disclosure that would not be adequate in a capital-raising transaction.[10]

The 1990 revisions also made Form S–8 available for offers and sales of securities to consultants and advisors. To be eligible, a consultant must provide the issuer *bona fide* services *not* in connection with the offer or sale of securities in a capital-raising transaction. There did not appear to be a reason to distinguish between transactions with regular employees and transactions with consultants or advisors, as long as securities are issued for compensatory rather than capital-raising purposes.

A. Abuses of Form S–8

Since the 1990 revisions, some issuers and promoters have misused Form S–8 as a means to distribute securities to the public without the protections of registration under Section 5 of the Securities Act. For example, the issuer registers on Form S–8 securities nominally offered and sold to employees or, more commonly, to so-called ''consultants.'' These persons then resell the securities in the public markets, at the direction of the issuer or a promoter. In some cases, the consultants or employees perform limited or no additional services for the issuer. The consultants or employees then either remit to the issuer the proceeds from these resales, or apply those proceeds to pay expenses of the issuer that are not related to any service provided by the consultants or employees.[11]

Registration of the shares on Form S–8 does not accomplish Section 5 registration of these public sales. The

[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 also Securities Act Release No. 7505 (Feb. 17, 1998) [63 FR 9632], adopting amendments to Regulation S [17 CFR 230.901 *et seq.*]; Release No. 39670 (Feb. 17, 1998) [63 FR 9661] 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]; Securities Act Release No. 7541 (May 21, 1998) [63 FR 29168], proposing amendments to Rule 504 [17 CFR 230.504]; Securities Act Release No. 7644 (Feb. 25, 1999), adopting amendments to Rule 504; and Exchange Act Release No. 41110 (Feb. 25, 1999), reproposing amendments to Rule 15c2–11.

[8] For this purpose, ''employees'' also includes 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 permits incorporation by reference of the registrant's Exchange Act reports without regard to the length of the issuer's reporting history or the aggregate market value of its securities held by the nonaffiliated public (the issuer's ''public float''). Incorporation by reference from Exchange Act reports into a Securities Act registration statement is not otherwise available unless the issuer satisfies the eligibility requirements for Form S–2 [17 CFR 239.12], Form S–3, Form F–2 [17 CFR 239.32] or Form F–3 [17 CFR 239.33].

[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); *SEC* v. *Hollywood Trenz, Inc.* (''*Hollywood Trenz*''), Litigation Release No. 15730, Accounting and Auditing Enforcement Release No. 1032 (May 4, 1998).

transaction that takes place (a capital-raising transaction with the public) is a different transaction from the transaction registered on Form S–8 (a compensatory transaction with employees, including consultants). Although the issuer purports to sell securities to employees, the securities instead are sold to the public. The ''employees'' act as conduits by selling the securities to the public and distributing the proceeds (or their economic benefit) to the issuer. This public sale of securities by the issuer has not been registered, although the Securities Act requires registration. The failure to register this sale of securities deprives public investors of the protections afforded by the Securities Act.

Form S–8 also has been misused to register securities issued to compensate ''consultants'' and ''advisors'' for promoting the issuer's securities.[12] This practice facilitates securities fraud by providing compensation as incentive to persons who hype the issuer's stock, and may result in these persons conditioning the market for resales of the issuer's securities.

Today we are adopting some of the amendments that we proposed in February 1998 which are designed to prevent these abuses.[13] The amendments will:

- Clarify that Form S–8 is not available for consultants and advisors who directly or indirectly promote or maintain a market for the issuer's securities; and
- Provide that certain registration statements and post-effective amendments that automatically become effective upon filing will not be presumed filed on the proper form if the Commission does not object to the form before the effective date.

We are not adopting today the 1998 proposal to require disclosure in Part II of Form S–8 of the names of, number of securities to be received by, and specific services to be provided by consultants and advisors (the ''Part II disclosure proposal''), nor are we taking any action on the other matters on which we solicited comment. Many commenters viewed these means of addressing consultant abuses as overly broad and burdensome to legitimate compensatory securities offerings.

Instead, in a companion release we have issued a new proposal that is targeted to prevent abuse of Form S–8 by the types of issuers who have shown the greatest inclination to abuse the form while, to the extent possible, keeping the form available to register legitimate compensatory transactions.[14] In the companion release, we also have extended the comment period on the Part II disclosure proposal and various requests for comment that were included in the Proposing Release (together, the ''remaining proposals'')[15] for the duration of the comment period on the new proposal.

We may adopt any combination of the remaining proposals, the new proposal and new solicitations of comment set forth in the companion release. We no longer are considering our 1998 request for comment whether each consulting or advisory agreement should be filed as an exhibit to the Form S–8, and do not intend to adopt an amendment based on this request for comment.

B. Option Exercises by Family Member Transferees; Executive Compensation Disclosure

Currently, Form S–8 is available for the exercise of employee benefit plan stock options only if the option is exercised by the employee/optionee. If an issuer wants to permit an employee's family member transferee to exercise an employee benefit plan option, it must register the sale of the underlying securities upon exercise on a separate, less streamlined registration statement.[16]

An employee may obtain significant estate tax savings under current tax law if the employee, during his or her lifetime, transfers a vested option to a family member, who then exercises it. From a tax standpoint, exercise of the option by the employee, with the underlying security later passing to a family member through the employee's taxable estate, is more costly. Our 1996 amendments to the rules under Exchange Act Section 16[17] facilitated employees' transfers of options and other derivative securities to their immediate family members (and trusts and partnerships for their benefit) for estate planning purposes.

In the Proposing Release, we proposed amendments that would make Form S–8 available for registration of employee benefit plan stock options exercised by an employee's family member. Today, we adopt amendments that will:

- 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. For this purpose, ''family member'' will include nieces and nephews, a former spouse, any person sharing the employee's household (other than a tenant or employee), and specified family-related trusts, foundations and other entities, as well as the relatives listed in the definition as originally proposed;
- 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.

We also adopt amendments to Form S–3 to make that form equally available for the offer and sale of securities underlying both warrants and options, in each case whether or not the securities are transferable.

II. Abuses of Form S–8

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

1. General

To prevent further abuse of Form S–8 as a vehicle to make unregistered securities distributions to the general public and to register securities issued to stock promoters, we are amending the instructions to Form S–8[18] and the Securities Act definition of ''employee benefit plan.''[19] Currently, the instructions to Form S–8 allow the form to be used only to register the offer and sale of an issuer's securities to the issuer's employees (or employees of its parents or subsidiaries) under an employee benefit plan. The Form S–8 definition of ''employee'' and the Securities Act definition of ''employee benefit plan'' both permit participation by a consultant or advisor who provides *bona fide* services to the issuer other than in connection with the offer or sale of securities in a capital-raising transaction. In response to telephone

[12] See, *e.g.*, *SEC* v. *Softpoint*, Litigation Release No. 14480, Accounting and Auditing Release No. 666 (Apr. 27, 1995).

[13] Securities Act Release No. 7506 (Feb. 17, 1998) [63 FR 9648] (''Proposing Release''). We received 17 comment letters on the Proposing Release. These comment letters and a Comment Summary are available for inspection and copying in the Commission's Public Reference Room under file number S7–2–98. Comments that were submitted electronically are available on the Commission's website (http://www.sec.gov).

[14] Securities Act Release No. 7647 (Feb. 25, 1999).

[15] The remaining proposals are described in greater detail in Section II.C, below.

[16] See *Use of Form S–3 for Transferred Options* (Aug. 7, 1997), which allows options transferred by gift from employees to their immediate family members to be treated like ''transferable warrants'' for purposes of registration on Securities Act Form S–3.

[17] 15 U.S.C. 78p. The Section 16 amendments are discussed in greater detail in Section III.A.1, below.

[18] General Instruction A.1(a).

[19] Securities Act Rule 405.

inquiries, the staff has interpreted these standards to preclude the issuance of securities on Form S–8 to consultants or advisors either:

- As compensation for any service that directly or indirectly promotes or maintains a market for the issuer's securities; or
- As conduits for distributing securities to the general public.

The staff also has stated that a consultant or advisor must be a natural person, the consulting contract must be between the issuer and this natural person, and the issuer must issue the securities directly to this natural person.[20]

Despite these express limitations, some issuers improperly have taken advantage of the abbreviated disclosure requirements and automatic effectiveness of Form S–8[21] (and the related absence of staff review) to register securities that are issued in capital-raising transactions. In these cases, a company issues shares registered on Form S–8 to purported employees or other nominees, designated as ''consultants'' or ''advisors,'' who often do not provide any services to the company that properly may be compensated with securities registered on Form S–8. By prearrangement, these nominees resell the shares on an unregistered basis, remitting the proceeds to the company or its affiliates, or using them to pay the company's expenses. These unregistered resales deprive the real public purchasers of the protections of Securities Act registration. Some companies have repeated this process through a series of Forms S–8, distributing a significant percentage—if not most—of the company's outstanding shares in this manner.[22]

In distributing securities to the public on the issuer's behalf, these consultants or employees act as ''underwriters.''[23] The Form S–8 registration statement registers only offers and sales of securities to the company's employees and consultants or advisors. But the securities issued to these people do not come to rest. Instead, these people act as conduits for unregistered offers and sales of securities to the public for which no exemption is available.[24] In these circumstances, we have charged both issuers and consultants acting as nominees with violating Sections 5(a) and 5(c) of the Securities Act.[25] We also have charged violations of the antifraud provisions of the Securities Act and the Exchange Act[26] for misrepresentations in the Form S–8 that the securities are issued as compensation for consulting services rather than to raise capital for the issuer.[27]

Issuers also have misused Form S–8 to register securities issued to consultants and advisors as compensation for their services as stock promoters. Public investors who purchase these securities in effect compensate promoters for their services to the issuer, which sometimes include the dissemination of material fraudulent information. These transactions are outside the scope of transactions permitted to be registered on Form S–8.

To deter these abuses of Form S–8, we proposed to include in the Form S–8 instruction regarding consultant and advisor eligibility further restrictions on compensable consulting services. We proposed to require a consultant or advisor to provide the registrant *bona fide* services that do not directly or indirectly promote or maintain a market for the registrant's securities. This would be in addition to the existing limitation that consultant services may not be in connection with the offer and sale of securities in a capital-raising transaction. To preclude the use of consultant entities as underwriters, we also proposed to codify the requirement that a consultant or advisor must be a natural person who contracts directly with the registrant. We proposed parallel amendments to the Securities Act definition of ''employee benefit plan,'' so that the standards for consultant participation would be uniform. We are adopting these proposals, modified slightly as described below.[28]

While commenters agreed that these proposed amendments could help deter the abusive use of Form S–8, they asked us to provide interpretive guidance to assist issuers in determining what consultant services properly may be compensated with securities registered on Form S–8. Commenters were particularly concerned that a broad range of legitimate financial consultants whose services do not involve underwriting, market making or stock promotion would be precluded from using Form S–8. In this release we provide interpretive guidance to issuers, and also rewrite the current requirements to put them in plain English.

We agree with commenters that it should not matter if the consulting contract is with an entity or a natural person, as long as the securities registered are issued to the natural persons working for the consulting entity who provide *bona fide* services to the issuer. Where the securities are issued to these persons, contracting with a consulting entity would not abuse Form S–8. We have revised the amendments to eliminate the proposed requirement that issuers contract only with natural persons, while retaining the requirement that the securities must be issued to natural persons.[29]

As adopted, the amended Form S–8 instruction and the parallel amendment to the Rule 405 definition of ''employee benefit plan'' permit consultants and advisors to be treated like employees only if:

- The consultants and advisors are natural persons;

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

[21] Under Rule Securities Act 462(a) [17 CFR 230.462(a)], a Form S–8 registration statement becomes effective as soon as it is filed with the Commission. Under Rule 464(a) [17 CFR 230.464 (a)], a post-effective amendment filed on Form S–8 also becomes effective upon filing.

[22] See, *e.g., 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 by misusing 106 registration statements and post-effective amendments on Form S–8, distributing approximately 30 million shares of common stock.

[23] ''Underwriter'' is defined in Section 2(a)(11) of the Securities Act [15 U.S.C. 77b(a)(11)] to include ''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. . . .''

[24] In particular, the ''resale'' exemption of Securities Act Section 4(1) [15 U.S.C. 77d(1)] for ''any person other than an issuer, underwriter or dealer'' is not available because these nominees act as underwriters, as explained above.

[25] See, *e.g., Sky Scientific*, cited at n. 22 above; *Spectrum*, cited at n. 11 above; and *Hollywood Trenz*, cited at n. 11 above. *See also SEC v. Charles O. Huttoe, et al.* (''*Huttoe*''), Litigation Release No. 15153 (Nov. 7, 1996).

[26] Section 17(a) of the Securities Act [15 U.S.C. 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and Rule 10b–5 thereunder [17 CFR 240.10b–5].

[27] See, *e.g., SEC v. Softpoint, Inc.*, cited at n. 12 above; and *Hollywood Trenz*, cited at n. 11 above.

[28] Today we also adopt a similar amendment to Securities Act Rule 701 [17 CFR 230.701], the Securities Act exemption for offers and sales of securities by non-reporting companies as employee compensation.

[29] However, in the limited circumstance where a consultant or advisor performs services for the issuer through a wholly-owned corporate alter ego, we will continue to permit issuers to register on Form S–8 securities issued as compensation to that corporate entity. *See Aaron Spelling Productions*, cited at n. 20 above.

- The consultants and advisors provide *bona fide* services to the registrant; and
- The services provided by the consultants and advisors 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.

2. Interpretive Guidance

Following adoption of these amendments, we will continue to take the view that Form S–8 is not available to register offers and sales of securities to either traditional employees *or* consultants and advisors where:

- By prearrangement or otherwise, the issuer or a promoter controls or directs the resale of the securities in the public market; [30] or
- The issuer or its affiliates directly or indirectly receive a percentage of the proceeds from such resales.[31]

In other circumstances, Form S–8 will remain available to register securities issued as compensation for the services of traditional employees, without regard to the specific character of the service. However, as to consultants and advisors, the character of the service provided will determine whether Form S–8 is available, as described below. Brokers, dealers and persons who find investors will be excluded from receiving securities registered on Form S–8 because their services, as securities industry professionals, are inherently capital-raising. Consultants who provide investor relations or shareholder communications services also will be excluded, because of the promotional nature of their services.

We also will interpret the amendments to prohibit the issuance of securities registered on Form S–8 to persons who arrange or effect mergers that take private companies public. For example, a merger into a thinly capitalized ''shell'' company with a class of securities registered under the Exchange Act, or a subsidiary of such a company, will fall into this category. These mergers commonly are used to develop a market for the merged entity's securities, often as part of a scheme to ''pump and dump'' those securities. Persons who arrange ''put together'' mergers, in which the consolidation of numerous businesses is conditioned on the combined entity's going public, also will be precluded from being compensated with securities registered on Form S–8.

The prohibition relating to services that directly or indirectly promote or maintain a market for securities is aimed at services that may reasonably be expected to raise (or sustain) the market price of the registrant's securities. For example, persons who hype the issuer's securities in an Internet newsletter, or otherwise publish or disseminate information that reasonably may be expected to influence the price of the issuer's securities, must not be compensated with Form S–8 registered securities, whether or not receipt of compensation from the issuer is disclosed.[32]

Consultants who publish legitimate scientific or medical research in publications generally circulated only within the scientific or medical community typically will not run afoul of this prohibition. However, consultants who circulate this kind of research to a broader audience in a manner reasonably expected to raise or sustain the market price of the registrant's securities may not be compensated with Form S–8 registered securities. Similarly, consultants who provide product or corporate image advertising usually will be able to receive Form S–8 registered securities. However, whether activities that nominally promote the issuer's products or image have the purpose or effect of promoting or maintaining a market for the issuer's securities would depend on the facts and circumstances. The more the services reflect traditional advertising practices, the more likely they are to be viewed as product-oriented.

The revised instruction will not prevent *all* financial consultants from being compensated with securities registered on Form S–8. Instead, eligibility will depend on the specific character of the services provided. For example, business development consultants retained to identify another company as a potential partner for technology development may be compensated with securities registered on the form. A consultant who advises the issuer on business strategy or compensation policies also will be eligible. A consultant who arranges a bank credit line for the issuer similarly will be eligible. In contrast, a consultant who arranges a financing that involves any securities issuance—whether equity or debt—will not be eligible.

Whether a consultant retained to perform management functions traditionally performed by an employee, such as a consultant chief financial officer, is eligible will not be determined based on the person's title. Instead, eligibility will depend on the primary character of the services provided. Where the services are primarily capital-raising or promotional, Form S–8 will not be available to register securities issued as compensation.

The independence requirements of generally accepted auditing standards (''GAAS'') effectively prohibit accountants who audit the issuer's financial statements from receiving the issuer's securities as compensation for their services.[33]

Attorneys [34] who represent an issuer in matters that are not related to its securities, such as litigation defense, securing U.S. Food and Drug Administration approval of a drug, or obtaining a patent, will be eligible. Attorneys who prepare the issuer's Exchange Act reports and proxy statement will be eligible whether or not these documents are incorporated into a Securities Act registration statement. However, any consultant or advisor, including an attorney, who prepares or circulates an Exchange Act report or proxy statement that is part of a promotional scheme that violates federal securities laws will not be eligible.

Attorneys serving as counsel to the issuer, its underwriters or any participating broker-dealer in a securities offering will not be eligible. Attorneys and other consultants who assist an issuer in identifying acquisition targets, or in structuring mergers or other acquisitions in which securities are issued as consideration, will be eligible, unless the acquisition takes a private company public, as described above.

3. Harmonization With Rule 701

Consultants and advisors also may be issued securities under Rule 701, the Securities Act exemption for offers and

[30] This test focuses on the issuer's power to make a resale happen, or to make it happen at a particular time. This test is not directed at, and is not intended to foreclose, an issuer's ability to prevent resales from happening for a specified period of time, such as through traditional restrictive legends.

[31] This test will be satisfied where the issuer or its affiliates receive an economic benefit from the resale proceeds, such as when the proceeds are used to pay the issuer's operating expenses or are paid to the issuer's control persons.

[32] Section 17(b) of the Securities Act [15 U.S.C. 77q(b)] makes it unlawful to publish any communication describing a security (whether or not the publication offers the security) where the publishing party receives payment from the issuer, an underwriter or dealer, without fully disclosing that such payment has been (or will be) received and the amount paid.

[33] Rule 2–01 of Regulation S–X [17 CFR 210.2–01], and AICPA Interpretation 101–1 of Statement of Auditing Standards No. 1.

[34] The discussion of attorneys in this section refers to attorneys in law firms engaged by the issuer, not to ''in-house counsel,'' who would be employees of the issuer.

sales of securities by non-reporting companies as employee compensation. In the Proposing Release, we stated that we were considering interpreting ''consultants and advisors'' for Rule 701 purposes in the narrower manner we traditionally have interpreted these terms for Form S–8 eligibility, and requested comment about interpreting the terms consistently for both purposes. As stated in today's release adopting amendments to Rule 701,[35] we are concerned that Rule 701 also may become subject to abuse once Form S–8 is amended.[36] Accordingly, the amended Form S–8 instructions and the interpretations described above will apply equally for purposes of both regulations.[37] However, issuers may continue to use securities registered on Form S–8, or issued under Rule 701, to compensate persons who have a *de facto* employment relationship with them. Such a relationship may exist where a person not employed by a company provides the company with *bona fide* services [38] 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.[39]

4. Insurance Agents

We also asked in the Proposing Release if Form S–8 eligibility for insurance agents should continue to be limited to exclusive agents, or if non-exclusive insurance agents also should be permitted to use the form. We are persuaded that any insurance agent who derives more than 50% of his or her annual income from the issuer should be permitted to receive securities issued under Form S–8, whether or not the agency relationship is exclusive.[40] Agents who depend on the issuer for this percentage of their income are likely to possess sufficient information about the issuer whose insurance products they sell to justify reliance on the abbreviated disclosure of Form S–8. We have amended Form S–8 accordingly.[41]

B. Requirement as to Proper Securities Act Form

Securities Act Rule 401(g) provides that any registration statement or amendment is deemed filed on the proper form unless the Commission objects to the use of the form before the effective date. The rule requires the Commission and the registrant to resolve whether a filing is on the appropriate form before effectiveness. Use of the proper form is important because the disclosure requirements of different forms are tailored for the particular transactions that we designed the forms to register. 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.

Because we have no opportunity to object in a timely manner to the improper use of Form S–8 and other forms that become effective immediately upon filing,[42] we proposed to amend Rule 401(g) so that all registration statements and post-effective amendments that become effective automatically upon filing would be excluded from its scope.[43] Although significant abuses in this area appear to have been limited to Form S–8, we did not limit the proposed amendment to Form S–8, in order to deter abuse involving other automatically effective forms.

We are adopting the amendment to Rule 401(g) as proposed. As a result, issuers will bear the risk of assuring that automatically effective registration statements are filed on the proper form. Where a form that is available solely for a specified purpose is used for a different type of transaction, the registration may not be valid. Where a registration statement is filed on a form that is available only for the offer and sale of securities to a class of persons other than the persons to whom the securities are actually offered and/or sold, we will, in appropriate cases, continue to assert that the securities are offered and sold in violation of Section 5.[44]

C. Remaining Proposals and Requests for Comment

To prevent the use of consultants and advisors as conduits for unregistered public offerings, we proposed to amend Part II of Form S–8 to require an issuer to name any consultants or advisors to whom securities will be sold under the registration statement, specify the number of securities to be issued to each of these persons, and describe specifically the services that each of these persons will provide to the issuer. As proposed, this information would need to be filed by post-effective amendment before the securities are sold to the consultants or advisors if the information was not available when the Form S–8 originally was filed. This proposal was designed to discourage the use of Form S–8 as a vehicle for making unregistered distributions and to permit objective verification that the services are *bona fide*, non-capital-raising and non-promotional services that legitimately may be compensated with securities registered on Form S–8.

In addition to (or as alternatives to) this proposed Part II disclosure, we requested comment:

- Whether issuers should be required to disclose Form S–8 issuances of securities to consultants in their

[35] Securities Act Release No. 33–7645 (Feb. 25, 1999) (''Rule 701 Adopting Release'').

[36] Securities issued under Rule 701 are ''restricted securities,'' as defined in Securities Act Rule 144(a)(3) [17 CFR 230.144(a)(3)]. However, 90 days after a Rule 701 issuer becomes subject to the reporting requirements of the Exchange Act, Rule 701(c)(3) lifts the Rule 144 current public information, holding period, volume and notice restrictions for non-affiliates—and the holding period restriction for affiliates—who wish to resell the securities.

[37] See Section II.D of the Rule 701 Adopting Release.

[38] These services must not be in connection with the offer or sale of securities in a capital-raising transaction, and must not directly or indirectly promote or maintain a market for the issuer's securities.

[39] See *Foundation Health Corporation* (Jul. 12, 1993), which permitted registration on Form S–8 of stock underlying 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.

[40] Whether an insurance agent satisfies this income test can be determined by reference to the agent's most recent income tax return.

[41] See General Instruction A.1(a)(2) to Form S–8, as revised. We also have amended Rule 701 in the same manner.

[42] 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) Rule 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).

[43] Securities Act Rules 485(b) [17 CFR 230.485(b)] and 486(b) [17 CFR 230.486(b)] make investment company registration statements and post effective amendments effective immediately upon filing. These registration statements and post-effective amendments are not affected by the amendment to Rule 401(g).

[44] See, *e.g.*, *Sky Scientific*, cited at n. 22 above; *Spectrum*, cited at n. 11 above; *Hollywood Trenz*, cited at n. 11 above; and *Huttoe*, cited at n. 25 above.

Exchange Act reports—either in Forms 10–K and 10–Q, or on Form 8–K;[45] and

- Whether issuers should be required to file consulting and advisory contracts as exhibits to Form S–8.

We also requested comment on whether the proposed Part II disclosure would effectively combat the problem, and whether this disclosure would be unduly burdensome.

Commenters divided in their assessment of the potential effectiveness of the proposed Part II (and/or Exchange Act) disclosure proposal. While some agreed that it would have a chilling effect on the use of consultants as underwriters, others expressed skepticism that violators who are not deterred by the existing requirements would be deterred by the proposed disclosure requirements.

Most commenters suggested that the proposed disclosure could cause potential competitive harm to legitimate registrants that would outweigh the proposal's prospects for preventing abuse of Form S–8. In particular, the proposals to disclose the identity of consultants and the specific services they provide could require issuers to reveal to competitors critical information concerning their business strategy. Commenters also stated that the proposal to disclose the number of securities issued could cause issuers competitive harm by permitting competitors who seek the named consultants' services to design more attractive incentive packages.[46]

Further, commenters stated that the proposal would impose excessive burdens and costs, particularly for issuers who conduct a significant portion of their business through legitimate consultants and use securities to pay for their services, because these issuers would continually be filing post-effective amendments to make the required disclosure. Commenters opposed a requirement to file consulting contracts as exhibits because of confidentiality concerns, noting that the Commission can obtain these contracts as supplemental information upon request under Securities Act Rule 418.[47]

We do not adopt today, but instead defer for further consideration, the Part II disclosure proposal and the related comment request regarding Exchange Act disclosure of Form S–8 issuances to consultants and advisors. However, we have decided not to adopt a requirement to file all consulting and advisory contracts as exhibits to Form S–8. In announcing this decision, we remind issuers that, in the absence of an exhibit requirement, issuers remain obligated to furnish these agreements as supplemental information to the Commission staff promptly upon request under Securities Act Rule 418.[48]

Other potential amendments that we did not propose, but requested comment on, were:

- Whether the aggregate percentage of securities that may be sold to consultants and advisors on Form S–8 during the registrant's fiscal year should be limited to a particular percentage of the number of securities of the same class outstanding;
- Whether the existing requirement that the registrant certify ''that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S–8'' should be expanded also to require certification that any consultant or advisor who receives securities registered on the form is not hired for capital-raising or promotional activities; and
- Whether the Form S–8 cover page should include a box that the registrant would be required to check if any of the securities registered will be offered and sold to consultants and advisors.

Commenters were divided in their assessment of these other potential amendments. Commenters representing high technology companies expressed particular concern that any ''cap'' on the amount of securities that may be issued to consultants and advisors on Form S–8 would arbitrarily interfere with companies' ability to conduct their business in the most economically efficient manner. While some commenters endorsed an expanded certification as a means of reminding issuers of their responsibility for compliance, others questioned whether it would be more effective than the existing certification requirement. Although most commenters did not object to checking a box, some questioned its usefulness. They pointed out that many plans are drafted broadly to permit issuances to consultants, but securities may not actually be issued to consultants immediately, if at all.

In the companion release issued today, we have extended the comment period on these items. We will continue to consider them while we request comment on the new proposal and new solicitations of comment set forth in the companion release. We may adopt any combination of the Part II (and/or Exchange Act) disclosure proposal, the other potential amendments described in the Proposing Release (other than a requirement to file consulting and advisory contracts as an exhibit to Form S–8), the new proposal and the new comment solicitations.

III. Transferable Options and Proxy Reporting

A. Form S–8 Availability for Family Member Transferees

1. General

We are adopting amendments to Form S–8 to make it available for the exercise of employee benefit plan stock options by an employee's family member who acquires the options from the employee through a gift or a domestic relations order. The amendments reflect the view that streamlined registration on Form S–8 should be available for these transactions, as well as transactions with employees, because of their compensatory character and access to information about the issuer flowing from the employment relationship. The eligibility standard that an issuer may use Form S–8 only if it is required to file Exchange Act reports provides a further safeguard.

These amendments also are consistent with the 1996 amendments to the rules under Section 16 of the Exchange Act.[49] In particular, the Section 16 amendments eliminated the requirement of former Rule 16b–3 that a derivative security issued under an employee benefit plan be non-transferable.[50] Another amendment simplified transfers of securities to a former spouse in divorce proceedings.[51] These changes have made the issuance of transferable options more attractive and more common.

For purposes of defining transferees eligible to exercise options on Form S–8, we proposed to define ''family member'' the same way as Exchange Act Rule 16a-1(e)[52] defines ''immediate

[45] 17 CFR 249.310, 17 CFR 249.308a, and 17 CFR 249.308, respectively.

[46] Commenters also objected that disclosure of the number of securities issued would violate legitimate consultants' privacy.

[47] 17 CFR 230.418.

[48] See Proposing Release at n. 37. Companies also must consider whether they are required to file these contracts as ''material contract'' exhibits to other filings, as required by Item 601(b)(10) of Regulations S–B and S–K. [17 CFR 228.601(b)(10) and 229.601(b)(10)].

[49] These amendments were adopted in Exchange Act Release No. 37260 (May 31, 1996) [61 FR 30376].

[50] Former Exchange Act Rule 16b–3(a)(2) provided that the exemption was not available for derivative securities that were transferable, except for transfers (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.

[51] Exchange Act Rule 16a–12 [17 CFR 240.16a–12] makes the acquisition or disposition of equity securities through a domestic relations order exempt from both the reporting requirements of Section 16(a) and the short-swing profit recovery requirements of Section 16(b).

[52] 17 CFR 240.16a–1(e).

family.'' [53] This definition 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. In addition, the Form S–8 definition of ''family member'' as proposed included trusts for the exclusive benefit of these persons, and any other entity owned solely by these persons.[54]

As described in greater detail below, we are adopting our proposal with some modifications to expand Form S–8 availability to an employee's family members for the exercise of transferable employee benefit plan options.[55] In doing so, however, we want to emphasize that this rule change does not require any issuer to permit options to be transferred in this manner. Any decision whether to permit option transfers remains entirely at the discretion of each individual issuer.[56] We also have restated the amended instruction in plain English, so that it is easier to understand.

2. Permissible Transferees

We asked commenters whether any other relatives, such as nieces and nephews, should be added to the Form S–8 definition of ''family member,'' particularly to facilitate estate planning transactions. If so, we asked whether the same relatives should be added to the Rule 16a–1(e) ''immediate family'' definition. Amending Rule 16a–1(e) this way would result in a Section 16 insider being deemed to have an indirect pecuniary interest in securities held by these relatives if the relatives share the insider's household.[57]

Commenters responded that nieces and nephews are frequent and appropriate beneficiaries of testamentary bequests and other gifts for whom Form S–8 should be available. In contrast, commenters divided as to whether nieces and nephews should be included within ''immediate family'' for Section 16 purposes.

We are persuaded that the family relationship to an employee and the compensatory character of the transaction makes the abbreviated disclosure format of Form S–8 suitable for option exercises by nieces and nephews, as well as the other persons included in the proposed definition of ''family member.'' Accordingly, we have included nieces and nephews in the definition of ''family member'' as adopted. However, we are not persuaded that the likelihood of abusive transactions in which insiders realize indirect gains is sufficiently high to include nieces and nephews within the Rule 16a–1(e) definition of ''immediate family.'' As a result, we have not amended Rule 16a–1(e).

Commenters also expressed concern that former spouses should be included within the ''family member'' definition, particularly because a transfer under a domestic relations order typically is to a former spouse, rather than to a current spouse. We have revised the definition of ''family member'' as adopted to include former spouses. As a result, Form S–8 will be available for exercises of options transferred to a former spouse pursuant to a domestic relations order, or by gift.

Some commenters expressed other concerns that the proposed definition of ''family member'' was too narrow because it would exclude unrelated persons who are the object of the employee's generosity. Specifically, some commenters argued that no family limitation is necessary in the absence of consideration for the option's transfer. Other commenters suggested that each issuer should be permitted to craft its own definition of ''family members'' for whom Form S–8 would be available to exercise options transferred by gift.

We are not persuaded that either of these formulations is acceptable, given the history of Form S–8 abuse and the need for objective definitions of permissible offerees to deter future abuse. However, we believe that there is a legitimate need for increased flexibility to facilitate donative transfers of options to persons who are not ''family members'' as proposed. Option exercises by these persons are consistent with the compensatory, non-capital raising purposes of Form S–8. To this end, we have included ''any person sharing the employee's household (other than a tenant or employee)'' in the ''family member'' definition as adopted. Of course, it is up to the issuer to determine whether it wishes to permit transfers to these persons.

We believe that sharing the employee's household generally will provide the transferee with access to information about the issuer that flows from the employee/optionee's employment relationship. Moreover, the shared household suggests a sufficiently close relationship between the transferee and optionee to presume that the transfer is a *bona fide* gift,[58] and not effected as a ruse to evade the registration requirements of the Securities Act.

As proposed, Form S–8 would be available to the ''family member'' of any person who satisfies the Form S–8 definition of ''employee,'' including consultants and advisors. We are persuaded that consultants and advisors should be treated the same as traditional employees for this purpose, as they are for other purposes under Form S–8. In particular, the amendments directed at deterring consultant abuses that we adopt and propose today should relieve concerns that equal treatment for family members of consultants or advisors is not appropriate.

We requested comment whether trusts that are primarily—rather than solely—for the benefit of family members, and entities that are primarily—rather than solely—owned by family members should be included within the Form S–8 ''family member'' definition. Commenters responded that the wide range of possible estate planning structures providing for remote or contingent interests requires a more flexible standard than exclusive benefit or sole ownership.

We are persuaded that entities in which family members (or the employee) own more than 50 percent of the voting interests and trusts in which family members have a more than 50 percent beneficial interest should be included within the ''family member'' definition. Where more than 50 percent of an entity's voting interests are owned by family members or the employee, the employee's family retains control over the entity's assets. Where family members have a more than 50 percent beneficial interest in a trust, the donative purpose of the trust is

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[53] Rule 16a–1(a)(2)(ii)(A) [17 CFR 240.16a–1(a)(2)(ii)(A)] provides that a Section 16 insider has an indirect pecuniary interest in securities held by members of the insider's immediate family (as defined in Rule 16a–1(e)) sharing the same household.

[54] Rule 16a–1(e) does not include these entities. Instead, 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) [17 CFR 240.16a–8(b)] and 16a–1(a)(2), respectively.

[55] Because option exercises by an employee's family member transferees will be permitted on Form S–8, these exercises also will be allowed on a ''cashless exercise'' basis pursuant to Federal Reserve System Regulation T. *See* 12 CFR 220.3(e)(4).

[56] In making this decision, we believe that issuers will consider, among other things, Rev. Rul. 98–21, which states that the transfer of an unvested option is not a completed gift for gift tax purposes until vesting has occurred. 1998–18 I.R.B. 7 (May 4, 1998). Typically, this means that the gift will not be complete until the employee has performed additional service for the issuer. Issuers also may consider Rev. Proc. 98–34, which provides a safe harbor for valuing options. 1998–18 I.R.B. 15 (May 4, 1998).

[57] Rule 16a–1(a)(2)(ii)(A).

[58] In addition, when the transferee exercises the option, the employee/optionee will recognize taxable income equal to the excess of the fair market value of the underlying stock over the exercise price. Treas. Reg. 1.83–7(a). At that time, the employer will be entitled to deduct the same amount. Treas. Reg. 1.83–6(a).

primarily for the benefit of the employee's family. The theories of compensatory purpose and access to information make Form S–8 equally appropriate for option exercises by these entities and trusts.

Regarding the entity standard, we are not specifying any particular type of entity, such as a general partnership, that must be used. Any type of entity will qualify as long as it meets the more than 50 percent of the voting interests ownership test. This approach should foster flexibility in estate planning. For example, this standard will permit Form S–8 to be used by family-controlled partnerships, corporations and limited liability corporations. Of course, sales by these entities of the securities received upon exercising the options must qualify for an exemption or be registered under the Securities Act.[59]

We have provided a separate test for foundations, which usually are organized either as corporations or trusts, because anomalous attributes of foundations make the general tests for trusts and other entities not suitable. Because the corporate form generally used by foundations involves a ''membership'' structure rather than a stock structure, the entity test will not be available. Foundations organized as trusts typically will not satisfy the trust test because the beneficial interest will be primarily charitable. Nevertheless, family control of the assets held by foundations, whether formed as trusts or corporations, justifies making Form S–8 equally available for option exercises by these entities. Accordingly, we have included in the definition of ''family member'' a foundation in which family members (or the employee) control the management of assets.[60]

In contrast, theories relying on primary family ownership, control or benefit do not support expanding Form S–8 availability for option exercises by other entities, such as Section 501(c)(3)[61] charities. Some commenters requested that Form S–8 be made available for exercises of employee benefit plan options transferred by gift to charities. These commenters believed that facilitating transfers to charities would be consistent with the purposes of Form S–8 because option exercises by charities would not raise concerns about use of the form for capital-raising.

We are not persuaded by this argument. Although an option exercise by a Section 501(c)(3) charity, for example, may not abuse Form S–8 for capital-raising purposes, the charity is not likely to have a pre-existing relationship with the issuer that would justify use of the abbreviated Form S–8 disclosure. While we seek to facilitate employees' estate planning through the amendments we adopt today, we must keep in mind that investor protection is our primary objective. To permit entities that are not controlled by, or for the primary benefit of, an employee's family members to exercise options on Form S–8 would suggest that the abbreviated Form S–8 disclosure is adequate for the offer and sale of securities to non-employees generally. As discussed above,[62] we remain firmly persuaded of the contrary view.

3. Permissible Transfers

As proposed, Form S–8 would be available only if the option is transferred by gift or under a domestic relations order. We believe it is not consistent with the purpose of Form S–8 to allow the form to be used for option exercises when the option is sold by the employee to another party. Accordingly, we have provided that Form S–8 will not be available for the exercise of employee benefit options transferred for value.

We have modified the amendment as adopted to clarify that:

- Form S–8 is not available for the exercise of options transferred for value;
- A transfer under a domestic relations order in settlement of marital property rights is not a prohibited transfer for value; and
- A transfer to an entity more than fifty percent owned by the optionee's family members in exchange for an interest (such as a limited partnership interest) in that entity is not a prohibited transfer for value.

As proposed, a family member transferee would not be required to receive the option directly from the employee for Form S–8 to be available. Instead, a subsequent transferee who is a ''family member'' would be able to exercise the option on Form S–8, if he or she received the option by gift or through a domestic relations order from another ''family member'' of the employee.

Commenters responded favorably to this proposal, noting that it would facilitate estate planning by the direct transferee family member, as well as the employee/optionee. Commenters also stated that issuers should be able to decide for themselves whether the recordkeeping requirements that would flow from permitting subsequent transfers are too burdensome.

We believe that Form S–8 should be equally available to indirect family member transferees, as long as each transfer of the option is from another family member of the employee/optionee, and either by gift or pursuant to a domestic relations order. Whether the transfer is a direct one from the employee/optionee, or indirect through another ''family member,'' the family member transferee will have a sufficient preexisting relationship with the issuer to justify reliance on the abbreviated Form S–8 disclosure. Of course, by making Form S–8 available to these indirect transferees, we are not in any way requiring issuers to permit indirect option transfers. This decision, like the decision to permit any option transfers, remains entirely at the discretion of each issuer.

We requested comment whether Form S–8 should be available for ''reload'' options[63] issued directly to family members, following their exercise of transferred employee benefit plan options. Commenters stated that although option plans typically permit the award of options only to employees, consultants and advisors, situations may arise where an issuer decides to authorize the issuance of reload options directly to transferees. Commenters supported Form S–8 availability to family member transferees for reload options issued directly to the transferees.

We believe that the preexisting relationship with the issuer, by virtue of the transferee's membership in the employee/optionee's family, that justifies the adequacy of abbreviated Form S–8 disclosure for the transferee's exercise of the original option applies equally to a reload option. As a result, the amendment will permit the use of Form S–8 for the exercise by family member transferees of reload options that the issuer issues directly to those transferees.

4. Permitted Transactions by Transferees

Under the amendment, family member transferees will be treated like employees for all purposes under Form S–8. We have expanded General Instruction A.1(a)(5) to specify resale of the securities underlying transferred

[59] As discussed in Section II.A.1 above, the resale exemption of Securities Act Section 4(1) is not available for any person who acts as an underwriter by taking securities from the issuer with a view to their distribution. You also will need to consider whether a ''family member'' is an ''affiliate,'' as defined in Securities Act Rule 144(a)(1) [17 CFR 230.144(a)(1)].

[60] We presume that persons who control the foundation's assets would decide whether and when an option is exercised.

[61] 26 U.S.C. 501(c)(3).

[62] See Section II.A.1, above.

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

options as a transaction for which Form S–8 will be available to an employee's ''family member.'' This revision clarifies our intent that under General Instruction C to Form S–8, the Form S–3 resale prospectus [64] will be available for:

- The resale by a ''family member'' who is an affiliate of the issuer of securities that were registered on the Form S–8; and
- 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 leaves the company before or after the option transfer, Form S–8 will remain available to the ''family member'' for option exercises to the same extent as the form is available to a former employee, including a former consultant.

Consistent with current staff interpretive positions, registration of shares underlying employee benefit plan options will continue to be permitted at any time before the option is exercised, without regard to when the option becomes exercisable.[65] This position is a departure from the general requirement that a registration statement must be filed before an option becomes exercisable—the time at which an offer of the underlying security is deemed made—if the exercise will be registered. We have historically based this exception from the general requirement on a policy determination that transactions registered on Form S–8 should be allowed more flexibility because of the unique character of the employee/employer relationship and the compensatory purpose involved.

5. Prospectus Delivery and Disclosure of Tax Effects

The Proposing Release did not address prospectus delivery standards that should apply to option exercises by employees' family members, or whether the Form S–8 prospectus materials should disclose material estate and gift tax consequences of option transfers. However, commenters requested that we provide guidance on these issues. We agree that the applicable requirements should be made clear.

As to prospectus [66] delivery generally, we want to clarify that:

- An employee transferor will not be required to provide a prospectus to the family member transferee in connection with a transfer by gift or pursuant to a domestic relations order; but
- Existing prospectus delivery requirements that apply to employee optionees will apply equally to family member transferees. Accordingly, the issuer will be required to deliver a prospectus, updated to reflect material changes, to the family member transferee at or before the transferee's exercise of the option.

Commenters also requested guidance as to on-going requirements to deliver updated prospectus materials to transferees. The same standards would apply as for an employee/optionee:

- The information delivered as a Form S–8 prospectus must be updated in writing in a timely manner to reflect any material changes during any period in which offers or sales are being made.[67]
- For plan participants, including option transferees, who already received a prospectus from the issuer, the issuer needs to furnish only the updating material.
- However, the issuer must deliver the basic prospectus as well as all updates to new plan participants, including option transferees. For option transferees, the issuer will provide the basic prospectus at the time of the update rather than the time the employee transfers the option.

Regarding shareholder communications, an issuer must furnish to all employees participating in a stock option plan (and their transferees) who do not otherwise receive this information all shareholder communications and other reports furnished to shareholders on a continuing basis.[68]

As to the tax consequences of an option transfer, the Form S–8 prospectus materials must describe ''the tax effects that may accrue to employees as a result of plan participation.'' [69] If the Form S–8 registers options issued under an employee benefit plan [70] that permits the options to be transferred, this discussion should address the material estate and gift tax consequences to an employee/optionee of an option transfer.

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

To permit family member transferees to exercise employee benefit plan options, Form S–8 must be available for the registration of shares to be issued upon exercise of *transferable* options. Current General Instruction A.1(a) to Form S–8 makes the form available to former employees, and guardians and executors of both current and former employees (collectively, ''former employees''),[71] for the exercise of *non-transferable* employee benefit plan stock options and the subsequent sale of the underlying securities, if these exercises and sales are not prohibited under the plan.[72]

We proposed to eliminate this non-transferability restriction in its entirety, but requested comment whether the restriction should be lifted only for options that may be transferred to ''family members'' by gift or through a domestic relations order.

In the interest of providing issuers flexibility and simplifying option plan administration, we are adopting this amendment as proposed. As a result, employee benefit plan options that are transferable to anyone may be registered on Form S–8, but may be exercised on Form S–8 only by employees and their

[64] As part of the Securities Act Reform Release (Securities Act Release No. 7606A (Nov. 13, 1998) [63 FR 67174]), we have proposed a new approach to the registration of resale transactions that would eliminate Form S–3 resale prospectuses entirely, including the Form S–3 resale prospectus provided by General Instruction C to Form S–8. However, the Securities Act Reform Release requests comment whether there are compelling reasons to retain a different resale treatment for employee benefit plan securities that would not apply in other resale contexts. That release does not propose to rescind Form S–8. *See* Securities Act Reform Release at Section V.A.2.h.

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

[66] Instead of disseminating a customary prospectus included in a registration statement, Form S–8 issuers fulfill prospectus delivery obligations by providing plan participants: (1) document(s) containing the plan information required by the form (updated as necessary); and (2) a written statement listing the documents incorporated by reference and advising participants of their availability upon request. Under Securities Act Rule 428(a)(1) [17 CFR 230.428(a)(1)], the delivered documents and the documents incorporated by reference constitute a prospectus meeting the requirements of Securities Act Section 10(a) [15 U.S.C. 77j(a)].

[67] Rule 428(b)(1)(i). Company information is updated through incorporation by reference to the company's Exchange Act reports and other documents, which the company must make available without charge. *See* Part I, Item 2 of Form S–8.

[68] Rule 428(b)(5).

[69] Part I, Item 1(f) of Form S–8.

[70] As defined in Securities Act Rule 405, ''employee benefit plan'' includes written compensation contracts in addition to traditional plans.

[71] Instruction A.1(a) also makes Form S–8 available to former employees for the acquisition of registrant securities through intra-plan transfers among plan funds, to the extent permitted by the specific plan.

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

family members, as defined in the form.[73]

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

General Instruction I.B.4 to Form S–3 allows issuers to register on Form S–3 the offer and sale of securities to be received upon the exercise of outstanding transferable warrants issued by the same issuer.[74] As a condition to Form S–3 availability, the Instruction requires that the issuer have sent, within the twelve calendar months before the Form S–3 is filed, specified annual report information to all record holders of the transferable warrants.[75]

By interpretation, the staff of the Division of Corporation Finance expressed the view that employee benefit plan options transferred by gift from employees to their immediate family members would be considered ''transferable warrants'' for purposes of Instruction I.B.4.[76] Upon effectiveness of the amendments adopted today to permit employees' family members to exercise employee benefit plan options on Form S–8, there will be no further need to rely on this interpretation.[77]

However, upon considering this interpretation, we proposed 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. Commenters were asked to address whether transferability, or differences between an issuer's relationships with option holders and warrant holders, would justify different treatment of the underlying securities for purposes of Form S–3 availability. This issue generated virtually no comment.

Securities offered pursuant to options, like securities offered pursuant to rights, convertible securities and warrants, are all offered to existing security holders of the issuer, who are presumed to ''follow'' the issuer through corporate communications and Exchange Act filings.[78] This presumption appears to apply equally to options as well as warrants, in each case without regard to transferability. Accordingly, we are adopting the amendment in the form proposed.

D. Executive Compensation Disclosure of Transferred Options

The Proposing Release proposed amendments to (and solicited comment on other potential amendments to) the executive compensation disclosure requirements of Item 402 of Regulations S–K and S–B[79] to address the reporting treatment of transferred (or transferable) employee benefit plan stock options. These issues arose under the summary compensation table,[80] the option/SAR grants table,[81] and the aggregated option/SAR exercises and fiscal year-end option/SAR value table.[82] The amendments adopted today reflect the staff's view 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''). We proposed to amend this item 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 were transferred by the named executive officer.

Commenters considered this proposal appropriate, noting that the compensatory character of the securities reported is not changed if the named executive officer subsequently transfers them. We are adopting this amendment without modification.[83]

Consistent with the theory that an option retains its compensatory character following transfer, the staff of the Division of Corporation Finance is of the view that reload options issued directly to transferees also should be reported in Item 402 disclosure as new grants, both in the summary compensation table and the option/SAR grants table.

2. Option/SAR Grants Table

Among other things, this table must show the number of options granted during the most recent fiscal year to the named executive officers. The table also must provide footnote disclosure of the material terms of those options. We proposed to amend this item 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 were transferred.

Consistent with their reaction to the parallel amendment to the summary compensation table, commenters also considered this amendment appropriate. We are adopting this amendment in the form proposed.[84]

In the Proposing Release, we expressed our view that transferability is an option term that should be disclosed in a footnote to this table. While we did not propose a specific amendment to codify this position, we solicited comment whether the item should be amended to include transferability among the material terms requiring footnote disclosure.[85] Commenters generally did not agree that

[73] Issuers no longer will 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, if such options had not been transferred by the original grantees.

[74] Instruction I.B.4 also makes Form S–3 available to register securities offered upon exercise of outstanding rights granted by the same issuer, under 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 issuer satisfies the $75 million public float test applicable to primary offerings under Instruction I.B.1 to Form S–3.

[75] The Instruction refers to the information required by Exchange Act Rule 14a–3(b) 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).

[76] *Use of Form S–3 for Transferred Options* (Aug. 7, 1997). This interpretation applied the definition of ''immediate family'' set forth in Exchange Act Rule 16a–1(e).

[77] However, registrants may continue to rely on a related letter, *Ropes & Gray* (Oct. 30, 1997), which distinguishes procedures for fee transfers in other circumstances. This letter provides generally that a post-effective amendment to the original registration statement (other than a Form S–8) is not necessary to deregister the unsold shares for which the transferred fee originally was paid.

[78] *See* Securities Act Release No. 6331 (Aug. 6, 1981). *See also* the proposed treatment of offerings to existing security holders, including option holders, in Section V.A.2.c of the Securities Act Reform Release.

[79] 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 [17 CFR 239.18] and SB–2 [17 CFR 239.10]. 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].

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

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

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

[83] Revised Item 402(b)(2)(iv)(B).

[84] Revised Item 402(c)(1).

[85] Instruction 3 to Item 402(c) lists the material terms requiring footnote disclosure.

transferability is a material option term that should require footnote disclosure in the option/SAR grant table. In particular, commenters expressed the view that, over time, transferability may become a standard feature of options granted to executives.

We believe that transferability should continue to be disclosed in a footnote to this table, since it is not currently a feature of most options, and may be viewed as a special benefit to the employee receiving the option. We are not, however, amending this item to codify a requirement to disclose option transferability in a footnote, since in the future transferability may become a standard option feature.

We also requested comment whether footnote disclosure should be required to specify the date of any transfer of an option or SAR that has occurred. While some commenters supported this disclosure (and parallel footnote disclosure in the summary compensation table), they did not believe that naming the transferee would provide material information to investors. While some commenters favored disclosing the transferee's status, such as ''immediate family member'' or ''unaffiliated charity,'' others objected to this disclosure, noting that named executive officers are not required to disclose transfers of other elements of their compensation, such as cash or stock.

We have concluded that the summary compensation table and option/SAR grants table should not be amended to require footnote disclosure of subsequent transfers, although such disclosure may be included on a voluntary basis. The purpose of these tables is to disclose the compensation awarded to the named executive officers. While clarification that an award must be reported even if subsequently transferred furthers this purpose, disclosure of an award's subsequent transfer does not. This is because the gain on the exercise of the transferred options, as discussed below, continues to be imputed to the named executive officer for Item 402 disclosure purposes.

3. Aggregated Option/SAR Exercises and Fiscal Year-End Option/SAR 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 them at fiscal year end. This 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.

Without proposing a specific amendment, we solicited comment whether it is necessary to amend this table so that it includes all option and SAR compensation from which the named executive officer's family members continue to derive benefits. We wanted to know whether such an amendment is needed to ensure that investors continue to receive meaningful disclosure of all option and SAR compensation awarded by the issuer, especially if option and SAR transfers to family members become more common following adoption of our amendments to Form S–8.

We do not adopt any amendment to this table today. We intend to conduct a general review of the Item 402 disclosure scheme for purposes of evaluating the need for further amendments, and will consider further the comments responsive to the Proposing Release concerning this table in connection with that review.

In the meantime, the staff of the Division of Corporation Finance continues to answer interpretive questions concerning this table. In the staff's view, a named executive officer is presumed to continue to have a compensatory interest in an option or SAR following its transfer. As a result, an issuer should continue to report in this table options and SARs held or exercised by transferees of named executive officers. Issuers may, but are not required to, include a footnote indicating that the option or SAR is held or was exercised by a transferee.

IV. Transition

The amendments adopted today become effective April 7, 1999 (the ''effective date''), except that currently effective registration statements will be required to comply with certain amendments as of May 10, 1999, as discussed below.

The amendment to Rule 401(g) will apply to all Forms S–8 and other automatically effective registration statements filed on or after the effective date, and all post-effective amendments to those registration statements (including Securities Act Section 10(a)(3)[86] updates accomplished through incorporation by reference of the registrant's Form 10–K) filed on or after the effective date.[87]

The amendments to Form S–8 and Rule 405 restricting permissible consultants will apply to Forms S–8 filed initially on or after the effective date. However, currently effective registration statements on Form S–8 will be required to comply with these amendments as of May 10, 1999. As a result, any securities issuance on or after May 10, 1999 under any currently effective Form S–8 must comply with these amendments.

The amendments that allow Form S–8 to be used by employees' family members for the exercise of employee benefit plan options transferred by gift or pursuant to a domestic relations order will apply automatically, as of the effective date, to any Form S–8 registering shares underlying employee benefit plan options, even if the Form S–8 became effective before the effective date. It will not be necessary to post-effectively amend these forms for this amendment to apply.

The amendments to Form S–3 apply to registration statements filed initially on or after the effective date, and to pre-effective amendments filed on or after that date.

The amendments to Item 402 of Regulations S–K and S–B apply to all Securities Act and Exchange Act documents that include this disclosure filed initially on or after the effective date. Amendments to documents that initially were filed before the effective date need not include the new required disclosure. For example, if preliminary proxy material containing Item 402 disclosure was filed before the effective date, definitive material filed after the effective date need not comply.

V. Cost-Benefit Analysis

As an aid to evaluate the costs and benefits of our proposals, we requested the views of the public and other supporting information. We received no comments in response to these requests. We have concluded that the amendments will not result in an increase in costs or prices for consumers or individual industries, or significant adverse effects on competition, employment, investment, productivity, innovation or small business.

Some of the amendments are designed to deter the use of Form S–8 to register transactions in which consultants or employees act as conduits to distribute securities to the public, or transactions in which consultants are compensated for other capital-raising or promotional services. This will discourage filers from misusing the form to register transactions for which it is not available. We believe that the elimination of this misuse will benefit investors and enhance their confidence in the integrity of the securities markets.

[86] 15 U.S.C. 77j(a)(3).

[87] Securities Act Rule 401(b) [17 CFR 230.401(b)] generally requires an amendment filed for purposes of satisfying Section 10(a)(3) to conform to the applicable rules and forms in effect on the amendment's filing date.

Other forms remain available to register securities for these purposes. The forms most likely to be used are Forms S–1, SB–2, S–2 and S–3. The estimated burden hours for using Form S–8 are 12 hours.[88] The estimated burden hours[89] for the other forms are:
Form SB–2—138
Form S–3—398
Form S–2—470
Form S–1—1290

Because none of these forms becomes effective automatically upon filing, unlike Form S–8, additional costs may be incurred due to the resultant delay. However, we believe that any additional costs of using these other forms are justified in order to provide adequate information to investors.

Our records indicate that approximately 5600 Forms S–8 were filed during the fiscal year ending September 30, 1998.[90] We do not have data to determine how many of these filings would have been precluded if the amendments had been in effect. Therefore, we cannot quantify the impact. However, we believe that the rule change will only impact transactions that were not intended to be registered on the form.

The amendment to make Form S–8 available for employee benefit plan option exercises and the subsequent resale of the underlying securities by an employee's family members will reduce costs by eliminating the need to file a different, less streamlined registration form for these transactions. 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 intrafamily transfers is not reported and option transferability is a relatively new and limited practice, we do not have data upon which to quantify costs that will be saved by the amendments.

The amendment 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 will reduce costs by making this streamlined registration form available for a broader group of transactions. However, we do not have data for quantifying this effect. The amendments to Item 402 of Regulation S–B and S–K also will not increase costs because they will not require the reporting of any compensatory transactions that are not already required to be reported.

VI. Summary of Final Regulatory Flexibility Analysis

In accordance with 5 U.S.C. 604, we have prepared a final Regulatory Flexibility Analysis (''FRFA'') regarding the proposed amendments.

The analysis notes that the amendments to Form S–8 and Rules 401 and 405 are designed 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. These uses are contrary to the express purposes of the form. Other amendments to Form S–8 and 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 view that shares underlying options should be treated the same as shares underlying warrants for purposes of form availability. We believe that the 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 FRFA describes, the staff is aware of approximately 815 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 157 of the Securities Act.[91] Overall, 13,577 companies are Exchange Act reporting companies. Based on a random sample of the Forms S–8 filed during fiscal 1998, the Commission estimates that approximately 380 of the 5600 Forms S–8 filed during 1998 were filed by small business issuers, and that consultants or advisors were the sole recipients of securities registered on approximately 185 of the Forms S–8.

The amendments will not impose any new reporting, recordkeeping or compliance burdens. The amendments designed to deter the abuse of Form S–8 may require some small businesses to use less streamlined forms to register securities offerings that otherwise would have been registered on Form S–8. In most cases, however, these will be offerings for which Form S–8 was not in fact previously available.

The amendment to make Form S–8 available for employee benefit plan option exercises and the subsequent resale of the underlying securities by an employee's family members should reduce recordkeeping and compliance burdens for smaller businesses by eliminating the need to file a different, less streamlined registration form for these transactions. While we cannot quantify the number of small businesses that would be affected, the average reporting and recordkeeping burden that will be avoided by eliminating the need to file a different form could be substantially reduced.[92]

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

As discussed more fully in the FRFA, we considered several possible significant alternatives to the amendments, to minimize effects on small entities. These included: (a) the establishment of different compliance or reporting timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules and forms for small entities; (c) the use of performance rather than design standards; and (d) a partial or complete exemption from coverage of the rules and forms for small entities.

We invited written comments on any aspect of the Initial Regulatory Flexibility Analysis, but received no specific comments in response to our request. In particular, we sought comment on: (1) the number of small entities that would be affected by the proposed rule amendments; and (2) the determination that the proposed rule

[88] The burden hour estimates discussed in this section were developed for purposes of the Paperwork Reduction Act.

[89] The estimated burden hours for Form S–8 and Form SB–2 assume that only 25% of the total hours spent to prepare the form will be spent by company employees. These estimates assume that the remaining 75% of the total hours will be spent by hired professionals, such as attorneys or accountants. These estimates therefore do not include within the burden hours the remaining 75% of total hours, but instead account for that time as costs. The estimated burden hours for Form S–2 and S–3 do not follow this convention, but instead account for all estimated hours as burden hours.

[90] During the same period, 745 post-effective amendments were filed on Form S–8.

[91] 17 CFR 230.157.

[92] See the Paperwork Reduction Act Analysis at Section VII, below.

amendments would reduce reporting, recordkeeping and other compliance requirements for small entities. We received no comments in response to these requests. A copy of the Final 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, NW, Washington, DC 20549.

VII. Paperwork Reduction Act Analysis

Our staff consulted with the Office of Management and Budget (''OMB'') and submitted the amendments as proposed for review in accordance with the Paperwork Reduction Act of 1995 (''PRA'').[93] The title to the affected information collection is: ''Form S–8.'' 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 amendments designed to deter the abuse of Form S–8 may require some companies to use less streamlined forms to register securities offerings that otherwise would have been registered on Form S–8. In most cases, however, these will be offerings for which Form S–8 was not in fact previously available. We estimate that this may reduce the number of registration statements filed on Form S–8 by approximately one percent.

The amendments to Form S–8 will permit the form to be used for the exercise of employee benefit plan options and the resale of the underlying securities by family members of employee optionees. By eliminating the need to file different, less streamlined registration statements for these transactions, the amendments may encourage registrants to permit intra-family transfers of employee benefit plan stock options. We believe 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. 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 3827 Forms S–3 filed during the fiscal year ending September 30, 1998. 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 amendments should make transferability substantially more attractive. We estimate that this will reduce the number of registration statements filed on Form S–3 by a minimal percentage, but that this reduction will be offset by an increased number of filings on Form S–3 resulting from the amendment to General Instruction I.B.4 to Form S–3.

This amendment will make Form S–3 available for the registration of shares underlying options as well as warrants, in each case without regard to transferability. This will allow the registration of additional transactions on Form S–3, a relatively streamlined registration form. While we do not know the number of Forms S–3 filed during fiscal 1998 that were filed in reliance on this instruction, we estimate that it also was a relatively small percentage of the 3827 Forms S–3 filed.

The OMB received no comments in response to our request for comment regarding the information collection obligation.

VIII. Statutory Basis and Text of Amendments

The amendments to Securities Act Forms S–8 and S–3 and Rules 401(g) and 405 are adopted pursuant to the authority set forth in Sections 6, 7, 8, 10 and 19 of the Securities Act. The amendments to Item 402 of Regulations S–B and S–K also are adopted 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.

Text of the Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is 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, 78*l*, 78m, 78n, 78o 78u–5, 78w, 78*ll*, 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) * * *

(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 as follows:

* * * * *

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) * * *

(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

* * * * *

[93] 44 U.S.C. 3501 *et seq.*

(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 as follows:

* * * * *

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, 77r, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–24, 80a–28, 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 Definitions 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, consultants or advisors may participate in an employee benefit plan only if:

(1) They are natural persons;

(2) They provide *bona fide* services to the registrant; and

(3) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

* * * * *

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–24, 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 § 240.14a–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) (§ 240.14a–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 the registrant to be offered to its employees or employees of its subsidiaries or parents under any employee benefit plan. The form also is available for the exercise of employee benefit plan options by an employee's family member (as defined in General Instruction A.1(a)(5) to Form S–8) 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 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 the registrant to be offered under 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 consultants or advisors only if:

(i) They are natural persons;

(ii) They provide *bona fide* services to the registrant; and

(iii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

(2) In addition, the term ''employee'' includes insurance agents who are exclusive agents of the registrant, its subsidiaries or parents, or derive more than 50% of their annual income from those entities.

(3) The term *employee*s 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 and the subsequent resale of the underlying securities by an employee's 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, former spouse, sibling, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships, any person sharing the employee's household (other than a tenant or employee), a trust in which these persons have more than fifty percent of the beneficial interest, a foundation in which these persons (or the employee) control the management of assets, and any other entity in which these persons (or the employee) own more than fifty percent of the voting interests. Form S–8 is not available for the exercise of options transferred for value. The following transactions are not prohibited transfers for value:

(i) A transfer under a domestic relations order in settlement of marital property rights; and

(ii) A transfer to an entity in which more than fifty percent of the voting interests are owned by family members (or the employee) in exchange for an interest in that entity.

* * * * *

Dated: February 25, 1999.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–5297 Filed 3–5–99; 8:45 am]

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