

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 230, 239, 240 and 249

[Release Nos. 33-8407; 34-49566; File No. S7-19-04]

RIN 3235-AH88

### Use of Form S-8 and Form 8-K by Shell Companies

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission is proposing rule amendments relating to filings by reporting shell companies. We propose to define a "shell company" as a company with no or nominal operations, and with no or nominal assets or assets consisting solely of cash and cash equivalents. We also propose to prohibit the use of Form S-8 under the Securities Act of 1933 by a shell company. In addition, we propose to amend Form 8-K under the Securities Exchange Act of 1934 to require a shell company, when reporting an event that causes it to cease being a shell company, to file with the Commission the same type of information that it would be required to file to register a class of securities under the Exchange Act. These proposals are intended to protect investors by deterring fraud and abuse in our securities markets through the use of reporting shell companies.

**DATES:** Comments should be received on or before June 7, 2004.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic comments:*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-19-04 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

*Paper comments:*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number S7-19-04. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The

Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Gerald J. Laporte, Chief, or Kevin M. O'Neill, Special Counsel, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549-0310, (202) 942-2950.

**SUPPLEMENTARY INFORMATION:** We are requesting public comment on proposals designed to protect investors by deterring fraud and abuse in our securities markets through the use of shell companies. We propose to amend Form S-8<sup>1</sup> under the Securities Act of 1933<sup>2</sup> to prohibit use of the form by reporting shell companies.<sup>3</sup> We also propose to amend the requirements of Form 8-K<sup>4</sup> under the Securities Exchange Act of 1934<sup>5</sup> as they apply to shell companies. The Form 8-K amendments would require a shell company, when reporting an event that causes it to cease being a shell company, to file with the Commission the same type of information that it would be required to file to register a class of securities on Form 10<sup>6</sup> or Form 10-SB<sup>7</sup> under the Exchange Act. In addition, we propose to amend Rule 405<sup>8</sup> under the Securities Act and Rule 12b-2<sup>9</sup> under the Exchange Act to define "shell company" and amend Rule 12b-2 to revise the definition of "succession."

In proposing these rules, we are not addressing the relative merits of shell companies. We recognize that companies and their professional advisors use shell companies, often called "corporate shells" in this context, for many legitimate corporate structuring purposes. Our proposed

<sup>1</sup> 17 CFR 239.16b.

<sup>2</sup> 15 U.S.C. 77a et seq.

<sup>3</sup> Only certain reporting companies are eligible to use Form S-8. In this release, we use the term "reporting companies" to refer to companies that have an obligation to file reports under section 13 (15 U.S.C. 78m) or 15(d) (15 U.S.C. 78o(d)) of the Securities Exchange Act of 1934.

<sup>4</sup> 17 CFR 249.308.

<sup>5</sup> 15 U.S.C. 78a et seq.

<sup>6</sup> 17 CFR 249.210.

<sup>7</sup> 17 CFR 249.210b.

<sup>8</sup> 17 CFR 230.405.

<sup>9</sup> 17 CFR 240.12b-2.

definition of the term "shell company" is not intended to imply that all shell companies are fraudulent. Rather, the proposals in this release target regulatory problems that we have identified where shell companies have been used as vehicles to commit fraud and abuse our regulatory processes.

### I. Background and Summary

Today's proposals represent the Commission's latest effort in its ongoing campaign against fraud and abuse in the market for highly speculative securities, especially securities that trade at low share prices. This campaign dates to our earliest days, when the Commission moved to help clean up the "bucket shops" of New York City remaining from the 1920s.<sup>10</sup> It continued through our efforts to quell speculation in uranium mining stocks in the Cold War years of the 1950s and our attacks on "boiler rooms" of the 1960s and 1970s. In the 1980s and 1990s, we focused on what we called the "penny stock market" and "microcap company fraud."<sup>11</sup> In 1990, Congress passed the Securities Enforcement Remedies and Penny Stock Reform Act,<sup>12</sup> which gave us new authority and tools to protect investors and deter fraud and abuse in this market. We have used this authority to carry out the intent of Congress.<sup>13</sup>

<sup>10</sup> For a discussion of the history of our efforts in this area, see William H. Lash, III, *Loose Change: The Campaign for Penny Stock Reform*, 60 UMKC L. Rev. 1, 1-2 (1991), and the House Committee Report on the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, H.R. Rep. No. 101-617, at 9 (1990), reprinted in 1990 U.S.C.C.A.N. 1408, 1411.

<sup>11</sup> "Penny stock" commonly refers to low-priced, publicly traded securities, generally selling for less than \$5 per share. In 1990, a definition of the term "penny stock" was added to section 3 of the Exchange Act, 15 U.S.C. 78c(a)(51). Pub. L. 101-429 § 503, 104 Stat. 931, 952. In 1995, a definition of the term "penny stock" was added to section 27A of the Securities Act, 15 U.S.C. 77z-2(i)(3). Pub. L. 104-67 § 102(a), 109 Stat. 737, 749.

Examples of microcap company securities fraud schemes can be found on our Web site at <http://www.sec.gov/hot/microcap.htm> and are described in our press releases entitled "SEC Charges 82 Individuals and Companies in Second Nationwide Microcap Fraud Sweep," Press Release 1999-90 (Aug. 3, 1999), and "SEC, U.S. Attorney, and FBI Announce Major Attack Against Microcap Fraud," Press Release 2000-81 (June 14, 2000). SEC press releases are available on our Web site at [www.sec.gov](http://www.sec.gov).

<sup>12</sup> Pub. L. 101-429, 104 Stat. 931 (1990).

<sup>13</sup> For example, we adopted Rule 419 under the Securities Act, 17 CFR 230.419, which is discussed later in this release. We also adopted Rule 15g-8 under the Exchange Act, 17 CFR 240.15g-8, which prevents trading of any securities held in a Rule 419 escrow account. In 1993, we adopted the penny stock disclosure rules, 17 CFR 240.15g-1 through 240.15g-9, which require brokers who buy and sell penny stocks for their customers to provide specific information to the customers. Release No. 33-6932 (Apr. 13, 1992) (57 FR 18037). We recently proposed amendments to the penny stock

Although the fraudulent methods used to manipulate the market for highly speculative securities, especially low-priced securities, have changed over time, many of the basic schemes employed have remained fairly constant. One common practice involves the use of reporting shell companies in “pump-and-dump” schemes. This type of scheme generally involves misleading investors. These schemes typically have many of the following characteristics:

- The shell company has no or nominal assets and operations and a small trading market;
- The shell company promoters issue large amounts of securities to themselves or designated nominees, sometimes using Form S-8;
- The shell company acquires or is merged with a private business that the promoters claim has high growth potential;
- Inadequate information is available to investors regarding the post-transaction company;
- The promoters “pump” up the price of the stock to investors through unduly positive press releases on the company and its prospects, exaggerated tout sheets, or fraudulent messages on the Internet;<sup>14</sup>
- The promoters use high-pressure tactics to get people to invest, and also engage in market manipulation to create artificial demand and artificially high prices for the stock of the company; and
- The promoters “dump” their stock in the company by selling it at the artificially high prices their promotional activities have created, halt those activities and move on, allowing the price of the stock to sink in value in the hands of the investors who have been misled into purchasing it.<sup>15</sup>

Many investors have been victimized in variants of the basic shell company scheme over the years.<sup>16</sup>

disclosure rules designed to address market changes, evolving communications technology and recent legislative developments. Release No. 34-49037 (Jan. 8, 2004) (69 FR 2531).

<sup>14</sup> Examples of schemes involving promotion of shell companies over the Internet can be found in our press release entitled “SEC Charges 33 Companies and Individuals with Fraud for Manipulating Microcap Stocks,” Press Release 2000-124 (Sept. 6, 2000).

<sup>15</sup> Joseph Goldstein, Chairman of the Commission’s internal Penny Stock Staff Task Force, testified before the House Subcommittee on Telecommunications and Finance on August 21, 1989 that “a common method or [sic] perpetrating penny stock fraud is through the marketing of ‘shell’ corporations \* \* \* with no operating history, few employees, few or no discernible assets, and no legitimate likelihood of success in the future.” H.R. Rep. No. 101-617, at 9 (1990), reprinted in 1990 U.S.C.C.A.N. 1408, 1412-13.

<sup>16</sup> For examples of recent enforcement cases involving alleged shell companies, see Melanie A.

The Securities Enforcement Remedies and Penny Stock Reform Act directed us to address one type of scheme using shell companies to defraud investors—the registered “blank check” offering. In this scheme, the promoters seek to engage in a primary offering<sup>17</sup> of securities of a shell company. They ask investors to authorize them to invest the proceeds of the offering in whatever way that the promoters decide, in other words, to give the promoters a “blank check.”<sup>18</sup> In response to the guidance Congress gave us in the Act as to blank check offerings, we adopted Securities Act Rule 419<sup>19</sup> in 1992. Rule 419 sought to combat fraud and abuse in public blank check offerings by requiring the promoters to deposit the proceeds of the offering in escrow until the blank check company identifies a company to acquire.<sup>20</sup> Once a company is located and proposed to the investors, the promoters must give the investors an opportunity to reaffirm their decision to invest in the blank check company before the offering proceeds can be used to acquire the business. We believe that Rule 419 has been successful in deterring fraud and abuse in public blank check offerings.<sup>21</sup>

Chieu, “SEC Charges Four Men with Illegal Stock Sales,” e-Securities 10 (Aug. 2002), and “Stock Manipulation Scheme Involving False Anthrax Claims Subject of SEC Enforcement Action,” Press Release 2003-127 (Sept. 30, 2003).

<sup>17</sup> In this context, the term “primary offering” refers to an offering of securities by the issuer of the securities.

<sup>18</sup> If the sponsors intend to invest the proceeds of the offering in a particular industry or sector, the offering often is called a “blind pool” offering. Neither blind pool offerings nor blank check offerings are inherently fraudulent. Many responsible businesspersons sponsor legitimate blind pool and blank check offerings.

<sup>19</sup> 17 CFR 230.419.

<sup>20</sup> The Securities Enforcement Remedies and Penny Stock Reform Act and Rule 419 refer to the companies subject to the rule as “blank check companies” and define that term. In general, a “blank check company” is defined as a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company. Some market participants, however, have applied the term “blank check company” to a wider group of companies than those making traditional “blank check” offerings. Some have seemingly applied it to all shell companies. We believe that under today’s proposals all blank check companies as defined in Rule 419 would be considered shell companies until they acquire an operating business or more than nominal assets. Not all shell companies, however, would be classified as blank check companies under Rule 419. See Part IIC below for a discussion of the proposed definition of “shell company.”

<sup>21</sup> One commentator has described the rule’s practical effect as “mak[ing] blank check offerings much less popular, as promoters will not have immediate access to proceeds and will not know the eventual amount of proceeds available until after the second stage refund period has passed.” Stuart Cohn, Securities Counseling for New and Developing Companies, § 18:17, at 73-76 (2003).

The rule and form amendments we propose today address two variations of abusive shell company transactions not covered by Rule 419. The first type of transaction involves the use of Form S-8 registration statements by reporting shell companies to circumvent the registration and prospectus delivery requirements of the Securities Act. Form S-8 may be used only to register securities for offer and sale in connection with employee benefit plans.<sup>22</sup> The use of Form S-8 by registrants to raise capital is prohibited. Some shell companies—which rarely have employees—have used Form S-8 registration statements improperly to register sales of securities that, while fashioned as sales under employee benefit plans, in fact are capital-raising transactions. In form, these transactions are sales of securities by the shell company to employees in a transaction that is registered on Form S-8, and then a resale by the purchasers to the public. In substance, the sale by the company is to purported employees who act as underwriters to distribute the securities to the public without the required registration and prospectus delivery.<sup>23</sup>

Because shell companies do not operate businesses and hence rarely have employees, we see no legitimate basis for shell companies to use Form

<sup>22</sup> When we use the term “employee” in this release to refer to persons to whom securities may be issued legally using Form S-8, we intend to refer both to employees and to consultants and advisors to whom securities legally may be issued using Form S-8.

<sup>23</sup> Examples of shell companies and alleged shell companies improperly raising capital using Form S-8 can be found in *SEC v. Cavanaugh*, 1 F. Supp. 2d 377, 344-60 (S.D.N.Y.), *aff’d*, 155 F.3d 129 (2d Cir. 1998) (shell company with no operations, in which only \$24,000 had been invested to set up and initially manage company, filed Form S-8 to issue 100% of its stock to four investors who invested \$6,000 each); *Sky Scientific, Inc.*, 69 SEC Docket 945 (Mar. 5, 1999) (admin. proceeding), *aff’d*, 77 SEC Docket 1926 (May 17, 2002) (company with minimal revenues from operations and nominal assets used Form S-8 to distribute shares to public, eventually filing 107 registration statements on Form S-8 covering approximately 30 million shares); *Investment Technology, Inc.*, Litigation Release No. 18249 (July 24, 2003) (associates of company that, according to its annual report on Form 10-KSB for the fiscal year ended Dec. 31, 2001, had not commenced principal operations and had only \$18,000 in assets, allegedly dumped millions of shares using two Form S-8 registration statements and collectively realized more than \$200,000 in unlawful profits); *Hollywood Trezn, Inc.*, Litigation Release No. 17204 and Accounting and Auditing Enforcement Release No. 1472 (Oct. 25, 2001) (distribution through 16 Form S-8 registration statements of 25 million shares of common stock in a company seeking financing to reverse history of operating losses, including a Form S-8 filed three days after its annual report on Form 10-KSB for the fiscal year ended December 31, 1995 indicating that company had no operations and primary asset consisted of capitalized costs of project that could ultimately be charged to operations).

S-8. For this reason, and because of the history of abuse of this form by reporting shell companies, we propose to prohibit shell companies from using Form S-8.

The second type of reporting shell company transaction we address in the proposed rules involves the use of Form 8-K to report "reverse merger" and other transactions in which a reporting shell company combines with a formerly private operating business, with the surviving entity becoming a reporting company in the business formerly conducted by the private business. The operating business has, in effect, become a reporting company. The conversion generally takes one of two forms:

- In the most common type of transaction, a "reverse merger," the private business merges into the shell company, with the shell company surviving and the former shareholders of the private business controlling the surviving company.
- In another type of shell company conversion, a "back-door registration," the shell company merges into the formerly private company, with the formerly private company surviving and the shareholders of the shell company becoming shareholders of the surviving entity.<sup>24</sup>

The surviving entity in these transactions generally has an obligation to file current reports on Form 8-K to report both the entry into a material non-ordinary course agreement providing for the transaction and the completion of the transaction.<sup>25</sup> In both types of transaction, the entry into the agreement would require a report under Item 1.01 of Form 8-K.<sup>26</sup> In addition, the completion of the transaction also is reportable under either or both of Item 2.01 of Form 8-K—as the acquisition of a business—and Item 5.01 of Form 8-K—as a change-in-control transaction.<sup>27</sup>

<sup>24</sup> This was the type of transaction involved in *Lisa Roberts, Director of NASDAQ Listing Qualifications*, Interpretive Letter (Apr. 7, 2000), which is discussed in footnotes 54 and 57 below.

<sup>25</sup> Our proposals are not intended to impose any new event filing requirements under Form 8-K. If an event was not reportable under Form 8-K previously, it would not become reportable as a result of adoption of these proposals. For example, if the conversion of a shell company into an operating business is not reportable because the company has previously reported substantially the same information, the company need not file an additional report on Form 8-K. See General Instruction B.3 to Form 8-K and footnote 50 below.

<sup>26</sup> Item 1.01 is a new provision of Form 8-K requiring the filing of a current report upon entry into a material definitive agreement. The provision becomes effective on August 23, 2004. See Release No. 33-8400 (Mar. 16, 2004) (69 FR 15594).

<sup>27</sup> We recently adopted amendments that transferred the substance of former Item 2 and Item 1 of Form 8-K to Item 2.01 and Item 5.01 of Form

Audited financial statements would be required to be filed under Item 9.01 of Form 8-K for transactions reportable under Item 2.01.<sup>28</sup>

The existing Form 8-K disclosure requirements, however, are not tailored for shell company conversion transactions. The Item 2.01 requirements focus on describing a newly acquired business and providing financial information for the new business. The Item 5.01 disclosure requirements focus on identifying the persons who acquired control, the consideration used to acquire control, the transaction that resulted in the change in control, and the beneficial ownership of the company after the change in control. These reporting requirements do not address the reality that a shell company conversion transaction introduces a reporting company with a new operating business to investors and the marketplace for the first time.

The existing Form 8-K disclosure requirements have resulted in an uneven level of disclosure in the reporting of such transactions, and a lack of information available to investors. Some companies attempting to "go public" in a shell company conversion transaction file reports on Form 8-K containing information similar to the information that they would file to "go public" under the Securities Act by means of a registration statement on Form S-1 or Form SB-2<sup>29</sup> or to register a class of securities under the Exchange Act on Form 10 or Form 10-SB. Many companies completing shell company conversion transactions, however, make the sparsest of filings on Form 8-K. These filings often do not contain much of the information useful to investors in making informed decisions about investing in the company, such as the information contained in Management's Discussion and Analysis of the Financial Condition and Results of Operations required by

8-K, respectively. We are using the new item numbers in this release. The amendments are effective on August 23, 2004. *Id.*

<sup>28</sup> Item 9.01 requires the filing of financial statements only for "significant" acquisitions. The significance test states that an acquisition or disposition is deemed significant if (1) the company's and its other subsidiaries' equity in the net book value of the assets or the amount paid or received for the assets exceeded 10% of the total assets of the company and its consolidated subsidiaries, or (2) the transaction involved a business that is significant under Regulation S-X. The acquisition of any business by a shell company would undoubtedly be significant under this test. The substance of Item 9.01 of Form 8-K formerly was contained in Item 7 of Form 8-K. *Id.*

<sup>29</sup> 17 CFR 239.11 or 17 CFR 239.10, respectively.

Item 303 of Regulation S-K and Regulation S-B.<sup>30</sup>

Further, some of the information required by Form 8-K may be filed on a delayed basis. Existing rules permit companies acquiring new businesses to wait up to 71 days after the initial filing on Form 8-K reporting completion of the acquisition to file audited financial statements and pro forma financial information reflecting the new financial profile of the company. Both shell and non-shell companies are entitled to this "71-day window" delayed filing deadline.<sup>31</sup>

We developed the "window" provision in 1976 to alleviate the difficulties operating companies could encounter if audited financial statements of businesses acquired were required to be filed in a report on Form 8-K within a few days after the acquisition.<sup>32</sup> We recognized that some

<sup>30</sup> 17 CFR 229.303 and 17 CFR 228.303. Currently, investors in some cases may not receive information about the nature of a new business until the company files an annual report on Form 10-K or Form 10-KSB, which may be as late as a year or more after completion of the acquisition. For instance, if a reverse merger occurs in the first month of its fiscal year, the company would not be required to file its annual report on Form 10-K or Form 10-KSB until up to 90 days after the end of the current fiscal year, more than 14 months later.

<sup>31</sup> The "window" provision is contained in Item 9.01 of Form 8-K. The window period recently was modified slightly, effective on August 23, 2004. See Release No. 33-8400 (Mar. 16, 2004). The 71 days are calendar days. When added to the four business days that a reporting company has to file its initial report on Form 8-K reporting the completion of the transaction under the newly amended Form 8-K requirements, the amount of time available approximates 75 calendar days, the amount of time available before the recent amendment. Previously, Form 8-K required the initial report of the completion of the transaction to be filed within 15 calendar days. If the company's required audited financial statements and pro forma information was not available, the company was allowed to file them within another 60 calendar days.

In the "back-door registration" type of transaction, which is reported as a change in control rather than as an acquisition, the staff has indicated that the entire Form 8-K report, including audited financial statements, is due at the time of filing of the report on completion of the transaction. No delayed filing or "window period" is permitted. See *Lisa Roberts, Director of NASDAQ Listing Qualifications*, Interpretive Letter (Apr. 7, 2000).

<sup>32</sup> Release No. 34-12619 (July 12, 1976) [41 FR 29784]. At first, the extension period was 60 days, was not automatic, and had to be approved by staff of the Division of Corporation Finance after an informal request expressing a need for an extension. The Commission at the time believed that the need for an extension would be infrequent and would only occur in the most complex types of transactions. By the early 1980s, however, the volume was larger than expected and could no longer be administered on a case-by-case basis. In 1985, the Commission amended Form 8-K in Release No. 34-6578 (Apr. 23, 1985) to allow for an automatic 60-day extension if the registrant stated, in the initial Form 8-K filing, that filing of the financial statements with the initial Form 8-K report would be impracticable and that it would file them as soon as possible within the 60-day period.

business combinations involving companies with operations are complex, so that it may not be possible to prepare audited financial statements within a few days. This is especially true in a typical business combination involving the acquisition of an operating business, where the reporting company is not in control of the business to be acquired until the acquisition occurs, and often cannot dictate the timing of audits of the financial statements.

While legitimate reasons exist for providing additional time for the filing of certain financial information involving operating businesses, these reasons do not apply with regard to transactions involving shell companies. The shareholders of the operating business about which investors need more extensive information usually control the surviving entity.

Moreover, the promoters of shell company schemes can take advantage of the lack of adequate financial and other information in the Form 8-K filing during the window period to promote the company and sell their shares at artificially high prices. During this time, the market may have difficulty pricing the securities because of the lack of adequate information.<sup>33</sup> Investors who purchased the securities at artificially high prices while adequate information is unavailable typically lose money when specific and reliable information becomes available, the promotional activities stop, and prices drop. In some cases the financial statements never are filed.<sup>34</sup> The abuses we have witnessed in this area confirm the advisability of requiring the Form 8-K to contain information equivalent to that required in a Form 10 or Form 10-SB under the Exchange Act reflecting the new assets and operations of the company, including audited financial statements of the operating business for the periods specified by Regulation S-X<sup>35</sup> or Item 310 of Regulation S-B,<sup>36</sup> as applicable.

<sup>33</sup> An example of allegedly fraudulent promotional activities between the time of filing the report on completion of the transaction and filing of financial statements can be found in the case that was the subject of the press release entitled "Stock Manipulation Scheme Involving False Anthrax Claims Subject of SEC Enforcement Action," Press Release No. 2003-127 (Sept. 30, 2003). There, a company filed its initial Form 8-K report on July 2, 2001, the promoters conducted an allegedly fraudulent promotional campaign and realized approximately \$1.6 million between July 17 and August 16, 2001, and the company filed an amendment to its initial filing on Form 8-K containing audited financial statements on September 4, 2001.

<sup>34</sup> The required financial statements sometimes are not filed because proper disclosure of the true nature of the transaction presumably would end the fraudulent scheme.

<sup>35</sup> 17 CFR 210.1-01 through 210.12-29.

<sup>36</sup> 17 CFR 228.310.

Our proposed amendments to Form 8-K would require a shell company, when reporting an event that causes it to cease being a shell company,<sup>37</sup> to include the same type of information that it would be required to file to register a class of securities under section 12 of the Exchange Act.<sup>38</sup> We would require the report on Form 8-K to be filed within the same filing period as generally is required for other Form 8-K reports, which is within four business days after completion of the transaction, effective August 23, 2004.<sup>39</sup> The window provision for the filing of financial statements and pro forma financial information would be eliminated for shell companies.

We propose to define "shell company" as a company with no or nominal operations, and with no or nominal assets or assets consisting solely of cash and cash equivalents.<sup>40</sup> We believe that this definition generally reflects the ordinary understanding of the term "shell company" in the area of corporate finance and defines those companies where the likelihood of abuse is greatest. Finally, as discussed below, we propose to revise the definition of "succession" to capture certain transactions involving shell companies.

## II. Discussion of Proposals

### A. Securities Act Form S-8 Proposal

The proposed amendments to Form S-8 would prohibit the use of that form by a shell company. A company that ceases to be a shell company would become eligible to use Form S-8 to register securities 60 calendar days after it has filed information equivalent to what it would be required to file if it were registering a class of securities on Form 10 or Form 10-SB under the Exchange Act. Ordinarily, that information would be filed in a current report on Form 8-K reporting completion of the transaction that causes it to cease being a shell company. In other cases, the information may be filed in a Form 10 or Form 10-SB, or in a registration statement on Form S-4.<sup>41</sup>

<sup>37</sup> In most cases, this occurs when the shell company acquires or is acquired by an operating business. Under the proposed definition of "shell company," it also could occur when the shell company acquires more than nominal assets (except for cash and cash equivalents).

<sup>38</sup> 15 U.S.C. 78l. See Part II.D below for a discussion of the treatment of foreign private issuers that are shell companies.

<sup>39</sup> As discussed in footnote 31 above, we recently shortened the time for reporting such transactions on Form 8-K to four business days. Release 33-8400 (Mar. 16, 2004).

<sup>40</sup> Proposed amendments to 17 CFR 230.405 and 17 CFR 240.12b-2. See Part II.C below.

<sup>41</sup> 17 CFR 239.25.

covering the transaction. Form 10 provides investors with important and valuable information. The 60-day delay would give employees and the market time to absorb the information provided by the company in its Form 8-K or other filing.<sup>42</sup> In this regard, the 60-day period is consistent with the 60-day period that passes before a company's registration of a class of securities on Form 10 or Form 10-SB becomes effective under section 12(g) of the Exchange Act.<sup>43</sup>

The appropriateness of this proposal is supported by the nature of shell companies and the purpose of Form S-8. It is unlikely that use of Form S-8 by a shell company is appropriate or necessary. Shell companies do not have substantial operations with employees to compensate. Further, Form S-8 may not be used to raise capital or to compensate consultants or advisors for providing services in connection with the offer or sale of securities in a capital-raising transaction or services that promote or maintain a market in the issuing company's securities.<sup>44</sup> To the extent a shell company would have any employees, their activities usually involve capital-raising and similar activities. We do not believe a shell company's employees should be able to be compensated for these activities with securities registered on Form S-8 any more than its consultants and advisors.

The amendments proposed today would not prevent a shell company from registering offers and sales of securities pursuant to employee compensation plans under the Securities Act. Rather, the proposals would require the shell company to register that transaction on a form other than Form S-8.<sup>45</sup> Alternatively, the shell company may be able to offer and sell those securities without Securities Act registration pursuant to an available

<sup>42</sup> By "investors," we mean both the employees and other permitted persons to whom the company may sell employee benefit plan securities in transactions registered on Form S-8 and persons who may purchase those securities when resold. Securities sold in transactions registered on Form S-8 are not restricted securities within the meaning of Securities Act rules. See 17 CFR 230.144(a)(3). As discussed above, Form S-8 abuses often involve almost immediate distribution of securities that are allegedly not restricted into the open market by purported employees and consultants who are in fact underwriters engaging in a distribution to the public without the required registration.

<sup>43</sup> 15 U.S.C. 78l(g).

<sup>44</sup> General Instruction A.1(a)(1) to Form S-8 specifically states that the form may be used to issue securities to consultants only for bona fide services that "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."

<sup>45</sup> Form S-1, and perhaps Form SB-2, would be available to register such transactions. See 17 CFR 239.11 and 17 CFR 239.10, respectively.

exemption from registration. We are aware that a different registration form may not provide the same ease of registration as Form S-8 and that the securities sold in an exempt transaction likely would be treated differently under Securities Act Rule 144 than securities sold to employees in a registered transaction.<sup>46</sup> These potential disadvantages for shell companies would be more than offset, however, by the likelihood that use of Form S-8 by a shell company would be inappropriate and would pose significant risks to the market for the securities sold in the transactions purported to be registered on that form.

We have seen numerous examples of shell companies using Securities Act Form S-8 to distribute their securities and raise capital in an improper manner. Companies seeking to use these types of schemes prefer Form S-8 because it becomes effective upon filing with the Commission and does not require a prospectus to be filed in the registration statement.<sup>47</sup> Many of the abusive schemes we have seen involve multiple filings of registration statements on Form S-8.<sup>48</sup> Some registration statements involving these schemes cover a very large percentage, even a majority, of the company's outstanding securities. Some involve multiple employee compensation plans for companies that typically have no apparent need for numerous employee plans. Some involve using Form S-8 improperly to register the sale of shares to purported employees or other nominees, who are designated as "consultants" and "advisors" but who often do not provide any services for which the company may pay compensation with securities registered on Form S-8. The later, unregistered sales of these securities into the market by purported employees deny the protections of the Securities Act to investors in the company's securities.

Our current proposal to prohibit use of Form S-8 by shell companies is similar to another proposal we issued in 1999 but did not adopt. That proposal would have prohibited shell companies from using Form S-8 until they filed an annual report on Exchange Act Form

10-K or 10-KSB containing audited financial statements reflecting a transaction that provided the company with more than "nominal" assets.<sup>49</sup> Today's proposal differs from the 1999 proposal in two respects. Under the 1999 proposal, a shell company would have had to wait possibly up to a year before being able to use Securities Act Form S-8. Under our current proposal, a former shell company that promptly files a required report on Form 8-K could be eligible to use Form S-8 in 60 days. In addition, in 1999 we did not propose to define the term "shell company" or any similar term, as we do today, but applied the proposal to companies "with nominal assets."

We request specific comment on the following questions:

- Would adoption of the Form S-8 proposal effectively deter fraudulent and abusive use of Form S-8?
- Would prohibiting shell companies from using Form S-8 unduly hinder legitimate shell companies from offering securities to employees?
- Should any shell companies, or companies that have been shell companies within 60 days, be permitted to use Form S-8? If so, under what specific circumstances?
- Is the proposed 60-day waiting period too long? Should it be shorter, such as 30 days?
- Is the proposed 60-day waiting period too short? Should it be longer, such as 90 days?
- Is the waiting period proposed in 1999 preferable?
- Should the waiting period be tied to some event other than filing of Form 10-equivalent information? For instance, should we provide that a shell company may use Form S-8 once a specific period of time has elapsed since completion of the transaction in which it ceases being a shell company, or a specified number of days after it files a periodic report on Form 10-K, Form 10-Q, Form 10-KSB or Form 10-QSB?
- Can you suggest a different waiting period or other alternative condition to Form S-8 availability that would adequately protect the markets and investors without adversely affecting the new business of the company?
- Instead of prohibiting use of Form S-8 by shell companies, could we more effectively deter fraudulent and abusive conduct by shell companies by

restricting the use of Form S-8 in other ways?

#### B. Exchange Act Form 8-K Proposal

The amendments to Form 8-K that we propose today would require a shell company to make a more specific and detailed filing on Form 8-K upon completion of a transaction that causes it to cease being a shell company.<sup>50</sup> Following completion of the transaction, the shell company would need to file a current report on Form 8-K containing the information that would be required in a registration statement on Form 10 or Form 10-SB to register a class of securities under section 12 of the Exchange Act. The company would be required to file its report on Form 8-K within four business days after completion of the transaction. As a result of these amendments, shell companies would no longer have a window for filing financial information about the company. Requiring prompt and detailed disclosure in Form 8-K filings would provide investors in operating businesses newly merged with shell companies with a level of information that is equivalent to the information provided to investors in reporting companies that did not originate as shell companies. The filing of this Form 8-K report would decrease significantly the opportunity to engage in fraudulent and manipulative activity.

#### 1. Acquisitions

Currently, reporting shell companies that cease being shell companies because they complete a significant acquisition of a new business are required to report the event under Item 2.01 of Form 8-K as a significant acquisition of assets.<sup>51</sup> Item 2.01

<sup>50</sup> Under General Instruction B.3 to Form 8-K, a reporting company is not required to file a report on the form if the information required by the form previously has been filed. A shell company that became an operating business as a result of a merger registered on Form S-4 under the Securities Act, for instance, would have no obligation to file a Form 8-K report containing information on completion of the merger if all the information required by Form 8-K to report completion of the merger has previously been included in an effective registration statement on Form S-4. Because of this, our Form 8-K proposal would not require the filing of additional Form 8-K reports or the reporting of any additional events, although the proposal would require provision of additional information in Form 8-K reports already required to be filed.

<sup>51</sup> Reporting shell companies are not subject to different treatment in this regard. All reporting companies that complete significant acquisitions of assets not in the ordinary course of business are required to file a current report on Form 8-K covering the transaction. In addition, reporting companies also may be required to disclose material information in a Form 8-K filed at the time of entering into the transaction under Item 1.01 of Form 8-K. See also Regulation FD, 17 CFR 243.100 through 243.103.

<sup>46</sup> Securities Act Rule 144 (17 CFR 230.144) addresses the issue of when a person is deemed to be an underwriter. Rule 144 "permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons controlling, controlled by or under common control with the issuer and by persons who have acquired restricted securities of the issuer." See Preliminary Note to Rule 144.

<sup>47</sup> See 17 CFR 230.462(a).

<sup>48</sup> See footnote for examples of shell companies filing multiple Form S-8 registration statements to distribute shares into the public marketplace.

<sup>49</sup> Release No. 33-7647 (Feb. 25, 1999) (64 FR 1118). Only two commenters addressed the proposal to prohibit shell companies from using Form S-8. One stated that it did not have a strong reaction to the proposal, while the second supported the proposal but wanted a definition of the term "nominal assets."

requires the company to furnish information about the date and manner of the acquisition and a "brief description" of the assets. Form 8-K does not require specifically that the company disclose the information that would be required to register a class of securities under section 12 of the Exchange Act. Item 9.01 of Form 8-K, however, requires that the filing contain audited financial statements of the business acquired.<sup>52</sup> Currently, reporting companies may file the financial statements with the initial Exchange Act Form 8-K filing; however, they also have the option to file the financial statements not later than 71 days after the due date of the initial filing.<sup>53</sup>

We propose to close the 71-day window for shell companies to file financial information reflecting significant acquisitions for several reasons. First, the operating business that constitutes all or substantially all of the company's operations and assets has no publicly disclosed financial information. Consequently, prompt access to the operating business's Form 10-equivalent information should be useful to investors. Under our current rules, if the former shell company or its successor chooses to file the audited financial statements later than the due date for the Form 8-K filing reporting completion of the transaction, the securities trade in the markets without vital information about the significant acquisition being available.

Second, obtaining audited financial statements for the operating business does not present the difficulties that caused us to provide the 71-day window for business combinations involving reporting companies with operations. In a shell company conversion transaction, management of the continuing operating business is in control of the transaction and has the power to control the timing and preparation of the required financial and other information. The 71-day extension should not be necessary to produce audited financial statements in the shell company situation.

<sup>52</sup> Item 9.01 until recently was numbered Item 7 of Form 8-K. See Release No. 33-8400 (Mar. 16, 2004). It requires inclusion in the filing of financial statements of a significant business acquired for the periods specified in 17 CFR 210.3.05(b), prepared in accordance with the requirements of Regulation S-X, 17 CFR 210.1-01 through 210.12-29. It also requires *pro forma* financial information in accordance with Article 11 of Regulation S-X with respect to a business acquired.

<sup>53</sup> Most offerings of securities must be delayed until the financial statements are filed, although ordinary trading and market transactions by persons who are not underwriters, issuers or dealers in securities may occur. See Instruction to Item 9.01 of Form 8-K.

## 2. Changes in Control

Currently, reporting shell companies that cease being shell companies because they are acquired by an operating business in a "back-door registration" transaction are required to report the completion of the event under Item 5.01 of Form 8-K as a "change in control" of the company. The line-item disclosures currently required by Item 5.01 focus on identifying the persons who acquired control, the amount and source of consideration used to acquire control, the transaction that resulted in the change in control, and the beneficial ownership of the company after the change in control. In addition, the Commission's staff has expressed its view that a Form 8-K report filed by a shell company that ceases being a shell company in this type of transaction should include as additional information the information required in a Form 10 or Form 10-SB for a company registering a class of securities under section 12 of the Exchange Act or, at a minimum, "complete audited and *pro forma* financial statements required by these forms."<sup>54</sup> This information is to be filed with the report on Form 8-K reporting completion of the acquisition.<sup>55</sup>

We propose to revise the definition of "succession" in Exchange Act Rule 12b-2 to include a change in control of a shell company.<sup>56</sup> This would codify the "back-door registration" procedure permitted by the Commission staff.<sup>57</sup> As a result of the revision, the nonpublic acquirer would succeed to the reporting obligations of the shell company and become a reporting company. For public shell companies with securities registered under section 12 of the Exchange Act,<sup>58</sup> this would occur because Exchange Act Rule 12g-3<sup>59</sup> would impose section 12 regulation on

<sup>54</sup> See Lisa Roberts, Director of NASDAQ Listing Qualifications, Interpretive Letter (Apr. 7, 2000). As explained in this interpretive letter, the procedure sometimes called "back-door registration" under the Exchange Act did not, in the Commission staff's view at the time, constitute a "succession" of the surviving entity to the rights and obligations of the reporting shell company because the definition of "succession" in Exchange Act Rule 12b-2 requires that the acquiring company acquire a "going business" and a shell company was not considered a "going business." Nevertheless, the staff permitted nonreporting acquiring companies to file Form 8-K reports and enter our reporting system, so long as specified information was included, rather than requiring these companies to file registration statements under section 12 of the Act to become reporting companies.

<sup>55</sup> *Id.*

<sup>56</sup> Proposed revision of Rule 12b-2.

<sup>57</sup> If this rule is adopted, it will supersede the Lisa Roberts, Director of NASDAQ Listing Qualifications interpretive letter discussed in footnote 54 above.

<sup>58</sup> 15 U.S.C. 78l.

<sup>59</sup> 17 CFR 240.12g-3.

the acquirer without the necessity of filing an Exchange Act registration statement. Similarly, public shell companies with reporting obligations under section 15(d) of the Exchange Act<sup>60</sup> would be deemed to have assumed the reporting obligations of the shell company by operation of Exchange Act Rule 15d-5.<sup>61</sup> Due to the interaction of this proposed definition of "succession" and Rules 12g-3 and 15d-5, a private entity that acquires a public shell company would be required to report the transaction on Form 8-K rather than filing an Exchange Act registration statement.<sup>62</sup>

## 3. Request for Comment

We request specific comment on the following questions:

- Will requiring former shell companies to make more complete and detailed filings on Form 8-K when they cease being shell companies help investors in making informed investment decisions and deter fraud and abuse by shell companies?

- Will closing the 71-day window for filing the financial statements of businesses acquired by shell companies in significant acquisitions deter fraud and abuse by shell companies?

- Is the non-financial information that is proposed to be required in the Form 8-K necessary? Alternatively, should we require the historical audited annual and unaudited interim financial statements only, or some intermediate level of information, such as historical audited annual and unaudited interim financial statements, required *pro forma* financial information and the information containing Management's Discussion and Analysis of the Financial Condition and Results of Operations of the new business pursuant to Item 303 of Regulation S-K or Regulation S-B?<sup>63</sup>

- Because of the manner in which we propose to define "shell company," a company could cease to be a shell company by acquiring substantial assets, even if it has neither acquired nor been acquired by an operating business. Should the proposed Form 8-

<sup>60</sup> 15 U.S.C. 78o.

<sup>61</sup> 17 CFR 240.15d-5.

<sup>62</sup> If a company is filing a registration statement under section 12(g) of the Exchange Act to register a class of securities because it has total assets of more than \$10 million and a class of equity securities held by more than 500 record holders, it has 120 days after the last day of the fiscal year on which it first met those thresholds to file the registration statement with the Commission. The registration statement becomes effective automatically 60 days after filing, unless the staff accelerates effectiveness pursuant to delegated authority upon request of the company.

<sup>63</sup> 17 CFR 228.303 or 17 CFR 229.303.

K disclosure requirements be modified for this type of transaction?

- Would the proposed amendments to Form 8-K unduly increase costs for smaller public companies?

- Would adoption of the Form 8-K proposal have any unwarranted or unforeseen adverse consequences, including adverse consequences for the preparation and auditing of financial statements reflecting significant acquisitions of businesses by shell companies? Would it create unnecessary obstacles to legitimate transactions?

- Should certain shell companies be exempted from the Form 8-K proposal? If so, what specific circumstances would warrant exemption?

- Is the proposed revision of the definition of "succession" appropriate? Does it have any consequences other than requiring the filing of a report on Form 8-K when a private entity acquires a public shell company? Should we instead make these companies file an Exchange Act registration statement, perhaps within an accelerated time frame?

- Should we amend the definition of the term "succession" in Rule 12b-2 to delete the reference to "a going business," so that it would mean the act or right of taking over a predecessor entity's rights, obligations and property despite changes in ownership or management?

- Should we amend Rule 12g-3 and Rule 15d-5 under the Exchange Act to provide that a change in control of a shell company constitutes a "succession" for purposes of those rules rather than, or in addition to, amending the definition of the term "succession" in Rule 12b-2 to achieve the same result? Is there a different and better way to achieve the desired result?

- Should we try to make reports on Form 8-K reporting the shell company transactions discussed in this release easier to identify in the Commission's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system,<sup>64</sup> such as by creating a special Form 8-K item for them or a special EDGAR tag?<sup>65</sup>

### C. Definition of "Shell Company"

We propose to add a definition of the term "shell company" to Rule 405 under the Securities Act and Rule 12b-2 under the Exchange Act. The definition would state that the term "shell company" means a registrant with no or nominal

operations, and with no or nominal assets or assets consisting solely of cash and cash equivalents.

We believe this definition generally reflects the ordinary understanding of the term "shell company" in the area of corporate finance.<sup>66</sup> It has been used in this area for many years.<sup>67</sup> It predates the definition of the term "blank check company" in Section 7(b)(3) of the Securities Act and Rule 419. It does not include many of the concepts used in those definitions, such as "development stage company," company with "no specific business plan or purpose," and company that "has indicated that its business plan or purpose is to merge with an unidentified company."<sup>68</sup> We believe the proposed definition of "shell company" is more appropriate for the purposes of today's proposals, as it better describes the type of company involved in the schemes we are attempting to address, uses more objective criteria, and would be easier to apply.<sup>69</sup>

The proposed definition of "shell company" would include reporting companies whose assets consist solely of cash and cash equivalents. We have included cash-only shell companies because these types of shell companies could also engage in the types of schemes addressed in the Form S-8 and Form 8-K proposals. We seek

<sup>66</sup> *Barron's Finance & Investment Handbook* 593 (5th ed. 1998), a commonly used reference work on corporate finance terminology, defines the term "shell corporation" as follows:

SHELL CORPORATION company that is incorporated but has no significant assets or operations. Such corporations may be formed to obtain financing prior to starting operations, in which case an investment in them is highly risky. The term is also used of corporations set up by fraudulent operators as fronts to conceal tax evasion schemes.

<sup>67</sup> A popular handbook of investment terms published in 1983 defined the term "shell company" as follows:

SHELL COMPANY Jargon for a corporation, usually without assets or a valid business operation, whose shares are offered for sale. Although such sales are not necessarily fraudulent, the value of the shares is questionable and are always high risk.

Allan H. Pessin & Joseph A. Ross, *Words of Wall Street, 2,000 Investment Terms Defined* 229 (1983).

<sup>68</sup> 15 U.S.C. 77g(b)(3). These concepts also are present in Rules 251, 419 and 504 under the Securities Act. See 17 CFR 230.251(a)(3), 230.419(a)(2)(i) and 230.504(a)(3). Our staff also has used the term "blank check company" in interpretive letters to describe what appear to be shell companies. See *Ken Worm, NASD Regulation, Inc.*, Interpretive Letter (Jan. 21, 2000) and *Lisa Roberts, Director of NASDAQ Listing Qualifications*, Interpretive Letter (Apr. 7, 2000).

<sup>69</sup> Because the definition of "blank check company" requires that the company have "no specific business plan," many companies seek to circumvent Rule 419 promulgated under Section 7(b) by arguing that they have a specific business plan when they do not have a business plan that would attract investment by a reasonable investor seeking a reasonable balance of risk and return.

comments, however, on the appropriateness of including cash-only shell companies in the definition of the term "shell company."

The proposed definition of "shell company" does not exclude two types of shell companies commonly used for corporate structuring purposes—shell companies used to change corporate domicile and shell companies formed to effect merger and acquisition transactions (the latter of which are commonly referred to as "merger subs"). As to shell companies used to change corporate domicile, we have excluded them from application of the portion of the Form S-8 proposal that suspends the ability of a former shell company to use Form S-8 for 60 days after it files Form 10 information reflecting its conversion from a shell company into an operating business. We see no reason to suspend the ability of such shell companies to use Form S-8 after completion of the change-in-domicile transaction. We also see no reason to exclude shell companies used to change corporate domicile from the applicability of the Form 8-K proposal. A change in corporate domicile ordinarily would not be reportable as either an acquisition of assets or a change in control, the only types of transactions to which the Form 8-K proposal is applicable.

As to merger subs, we see no reason to exclude them from the definition of "shell company" or from application of either the Form S-8 proposal or the Form 8-K proposal. We do not envision any unreasonable burdens or problems in applying the proposals to merger subs. In most instances, merger subs do not survive business combinations as reporting companies. In those situations where that may happen, the merger sub should have previously filed its Form 10 information with the Commission and have no difficulty complying with the Form 8-K proposal. We are seeking comment, however, on these preliminary determinations regarding shell companies used merely to change corporate domicile and shell companies used as merger subs.

We request specific comment on the following questions:

- Is our proposed definition of the term "shell company" too broad or too narrow? If so, how should the definition be tailored to achieve our objectives?

- Should the first "and" in the proposed definition be an "or," so that the definition would encompass a company that has (1) no or nominal operations, (2) no or nominal assets, or (3) assets consisting solely of cash and cash equivalents?

<sup>64</sup> EDGAR is the computer system maintained by the Commission for the receipt, acceptance, review and dissemination of disclosure documents submitted to the Commission in electronic format.

<sup>65</sup> An EDGAR tag is an identifier that highlights specific information in a document filed through EDGAR.

- Should our definition of the term “shell company” have quantitative thresholds defining the term “nominal”? For example, if a shell company has a specific level of non-cash assets or operations, should we exclude it from the definition?<sup>70</sup>

- If the definition had quantitative thresholds, how could we prevent companies from circumventing them to defeat the intent of the Form 8-K proposal?

- Should we define the term “shell company” in a different way? For example should the definition reflect concepts from the definition of “blank check company,” such as “development stage company,” company with “no specific business plan or purpose,” or company that “has indicated that its business plan or purpose is to merge with an unidentified company”?

- Should the definition of the term “shell company” include companies whose assets consist solely of cash, as proposed, and thereby subject such companies to the Form S-8 and Form 8-K proposals? If not, under what circumstance should such companies be excluded?

- Should the definition of “shell company” include companies with substantial assets, so long as they have no or nominal operations? If shell companies were defined only in terms of operations, would this be overly inclusive? On the other hand, can companies with substantial assets but no operations be used to combine with operating businesses in a manner that implicates the policy concerns discussed in this release?

- Should the definition of “shell company” exclude shell companies formed solely to change corporate domicile or shell companies formed solely to effect merger and acquisition transactions?

#### *D. Effect on Shell Companies That Are Foreign Private Issuers*

Some foreign private issuers<sup>71</sup> that are registered with the Commission

<sup>70</sup> Examples of such thresholds can be found in Rule 3a51-1 under the Exchange Act, 17 CFR 240.3a51-1, which exclude from being classified as penny stock companies certain issuers with net tangible assets of \$2 million (if in continuous operation for at least 3 years) or \$5 million (if in continuous operation for less than three years) or average revenue of \$6 million for three years.

<sup>71</sup> The term “foreign private issuer” is defined in Exchange Act Rule 3b-4(c), 17 CFR 240.3b-4(c). A foreign private issuer is a non-government foreign issuer, except for a company that (1) has more than 50% of its outstanding voting securities owned by U.S. investors and (2) has either a majority of its officers and directors residing in or being citizens of the United States, a majority of its assets located in the United States, or its business principally administered in the United States.

would come within the proposed definition of “shell company.” Shell companies that are foreign private issuers would be subject to the proposed rules regarding use of Form S-8.

Accordingly, as with a domestic shell company, a foreign private issuer shell company would not be eligible to file a registration statement on Form S-8 until 60 days after it files the information that it would be required to file if it were registering a class of securities under the Exchange Act. For foreign private issuers, the requisite information would be the equivalent of information required in a registration statement on Form 20-F,<sup>72</sup> rather than on Form 10 or Form 10-SB.<sup>73</sup>

If a foreign private issuer shell company engaged in a transaction with a domestic operating business that resulted in the shell company’s loss of foreign private issuer status upon completion of the transaction, the surviving entity would have to file a Form 8-K upon completion of the transaction. That Form 8-K report would contain the same information that would be required in the appropriate initial registration statement used to register securities under the Exchange Act, as would be the case for a similar transaction involving a U.S. shell company under the proposed rules. As in transactions involving U.S. shell companies, the filing on Form 8-K would need to be filed within four business days after the completion of the transaction.

Foreign private issuers that are subject to the periodic reporting requirements under the Exchange Act generally are not required to file current reports on Form 8-K.<sup>74</sup> Rather, many of the disclosures required of foreign private issuers are made on Form 20-F, which is an integrated form used both as a registration statement for purposes of registering securities of qualified foreign private issuers under section 12 of the Exchange Act<sup>75</sup> or as an annual report under section 13(a)<sup>76</sup> or 15(d)<sup>77</sup> of the Exchange Act.

Because the proposed rules relating to shell companies would apply to foreign private issuers, we believe that foreign

<sup>72</sup> 17 CFR 249.220f

<sup>73</sup> Generally, foreign private issuers may elect to register under the Exchange Act on Form 10 or Form 10-SB, as eligible, rather than on Form 20-F. Foreign private issuers that have chosen to report on domestic forms should comply with the same Form 8-K requirements as domestic companies, providing information equivalent to that required in a Form 10 or 10-SB.

<sup>74</sup> See Exchange Act Rules 13a-11(b) and 15d-11(b), 17 CFR 240.13a-11(b) and 240.15d-11(b).

<sup>75</sup> 15 U.S.C. 781.

<sup>76</sup> 15 U.S.C. 78m(a).

<sup>77</sup> 15 U.S.C. 78o(d).

private issuer shell companies should have the same disclosure requirements as those proposed for domestic shell companies. To avoid the use of foreign private issuer shell companies to circumvent the proposed new disclosure and timing requirements, we are considering the appropriate form on which foreign companies should file information equivalent to that contained in an Exchange Act registration statement even if they do not lose their foreign private issuer status following completion of the transaction with the operating business. We believe that whichever form is used, it would be appropriate to require foreign private issuer shell companies to follow the same timing as would apply to a U.S. shell company under the proposed rule, *i.e.*, four business days after completion of the transaction.

We request specific comment on the following questions relating to alternative approaches that we are considering with respect to disclosure requirements applicable to foreign private issuer shell companies:

- What factors would be most significant to a foreign shell company when structuring a transaction with an operating business? In what circumstances would an operating business seek to enter into a transaction with a foreign shell company rather than a domestic shell company?

- Should foreign private issuer shell companies file registration statement-equivalent information as an amendment to their annual report on Form 20-F? Should it be a separate report on Form 20-F, as would be the case with a transition report? We note that under current rules, any annual report, transition report or amendment on Form 20-F would include the certifications required by Exchange Act Rule 13a-14<sup>78</sup> and section 906 of the Sarbanes-Oxley Act of 2002.<sup>79</sup>

- Would there be additional consequences to requiring that the disclosure be made on Form 20-F? Would this type of disclosure place undue burdens on foreign companies?

- Would it be more appropriate to require foreign private issuer shell companies to file a report on Form 8-K or Form 6-K containing the level of information required in a Form 20-F registration statement when it ceases to be a shell company? Should the Commission create a separate disclosure form (similar to Form 8-K) for those reports by foreign private issuers? What are the advantages or disadvantages of these approaches compared to filing the

<sup>78</sup> 17 CFR 240.13a-14.

<sup>79</sup> Pub. L. 107-204, 116 Stat. 745 (2002).

information in an amendment to an annual report on Form 20-F?

- Should the timing requirements for filings made by foreign private issuers differ from the timing requirement for filing Form 8-K that applies to domestic issuers? If so, what timing would be appropriate?

### III. Request for Comments

We request and encourage any interested person to submit comments regarding:

- The proposals that are the subject of this release;
- Additional or different changes relating to shell companies; and
- Other matters that may have an effect on the proposals contained in this release.

Comment is solicited from the point of view of both issuers and investors, as well as facilitators of capital formation, such as underwriters and placement agents, and other regulatory bodies, such as state securities regulators. We also solicit comments from accounting firms that regularly audit the types of transactions covered by the proposals.

### IV. Paperwork Reduction Act

The proposed amendments affect Securities Act Form S-8, Exchange Act Form 8-K, Form SB-2, and Form S-1, which contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.<sup>80</sup> We are submitting a request for approval of the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles of the affected collections of information are Form S-8 (OMB Control No. 3235-0066), Form 8-K (OMB Control No. 3235-0060), Form SB-2 (OMB Control No. 3235-0418), and Form S-1 (OMB Control No. 3235-0065). 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.

These amendments are intended to protect investors by deterring fraud and abuse in our public securities markets through the use of shell companies. Compliance with the proposed disclosure requirements would be mandatory. There would be no mandatory retention period for the information disclosed and responses to the disclosure requirements would not be kept confidential. It is difficult to quantify whether the collection of

information will increase for foreign private issuers.<sup>81</sup>

#### Form S-8

The new proposal to prohibit shell companies from using Securities Act Form S-8 may require some companies to use a less streamlined form, such as Form SB-2 or Form S-1, to register offerings that otherwise would have been registered on Form S-8. A company that ceases to be a shell company would be eligible to file a Form S-8 registration statement 60 days after it has filed information equivalent to what it would be required to file if it were registering a class of securities under the Exchange Act. We estimate that this may reduce the number of registration statements filed on Form S-8 by approximately 5%, and may increase the number of registration statements filed on Form SB-2 and Form S-1 by a corresponding amount. We estimate that approximately 4,050 Form S-8 registration statements were filed in the Commission's last fiscal year, resulting in a total annual compliance burden of 97,200 hours (12 hours per response  $\times$  4,050 filings) and an annual cost of \$14,580,000 (12 hours  $\times$  4,050 filings  $\times$  \$300). We also estimate that approximately 650 Form SB-2 registration statements were filed in the last fiscal year, resulting in a total annual compliance burden of 385,450 hours and an annual cost of \$86,726,000. We further estimate that approximately 433 Form S-1 registration statements were filed in the last fiscal year, resulting in a total annual compliance burden of 189,329 hours and an annual cost of \$170,396,000.

With respect to Form S-8, we estimate that 50% of the burden of preparing the form is borne by the company's internal staff and that 50% represents work performed by outside securities counsel retained by the company at an average the rate of \$300 per hour. With respect to Form SB-2 and Form S-1, we estimate that 25% of the burden of preparing the form is borne by the company's internal staff and that 75% of the burden represents work performed by outside securities counsel at the rate of \$300 per hour.

We do not expect that shell companies that are prohibited from using Form S-8 will file other registration statements, but if they did they could use Form SB-2 or Form S-

1. At the maximum, we estimate the number of Form S-8 registration statements filed on other forms would be 5% of the Form S-8 registration statements filed in fiscal year 2003 would no longer be filed ( $4,050 \times .05 = 203$ ). We also expect that the overwhelming majority of companies (95%) that chose to file another registration statement in lieu of Form S-8 would file them on Form SB-2, thereby increasing the number of Form SB-2 filings by 193 (203 filings  $\times$  .95) and the number of Form S-1 registration statements by 10 (203 filings  $\times$  .05). As a result, the Form S-8 reporting burden would decrease by 2,436 hours (203 filings  $\times$  12 hours) and the annual cost would decrease by \$730,800 (203 filings  $\times$  12 hours  $\times$  \$300). The Form SB-2 reporting burden would increase by 28,612 hours ( $385,450 \text{ hours} \div \text{by } 650 \text{ filings} = 593 \text{ hours per filing} \times 193 \text{ filings} \times .25$ ) with an annual cost increase of \$25,751,025 (593 hours  $\times$  193 filings  $\times$  \$300 per hour  $\times$  .75). Finally, the Form S-1 reporting burden would increase by 4,373 hours ( $757,317 \text{ hours} \div \text{by } 433 \text{ filings} = 1,749 \text{ hours per response} \times 10 \text{ filings} \times .25$ ) with an annual cost increase of \$393,525 (1,749 hours  $\times$  \$300 per hour  $\times$  .75).

#### Form 8-K

Form 8-K (OMB Control No. 3235-0060) prescribes information about important corporate events that a company must disclose on a current basis. Form 8-K also may be used, at a company's option, to report any events that the company deems to be of importance to its shareholders. In addition, companies may use the form to report the nonpublic information required to be disclosed by Regulation FD.

We currently estimate that Form 8-K results in a total annual compliance burden of 513,007 hours and an annual cost of \$41,040,000. We estimate the number of Form 8-K filers to be 13,200, based on the actual number of Form 10-K and Form 10-KSB filers during the Commission's 2003 fiscal year. For purposes of this analysis, we estimate that the number of reports on Form 8-K filed annually is 154,007. We estimate that each entity currently spends, on average, approximately five hours completing the form. We estimate that 75% of the burden is borne by the company and that 25% of the burden is borne by outside securities counsel retained by the company at an average cost of \$300 per hour. Our estimates of the average number of hours each entity spends completing the form, and the average hourly rate for outside securities counsel, were obtained by contacting a

<sup>81</sup> We believe that a foreign private issuer shell company merging with a domestic operating business would rarely be able to keep its foreign private issuer status. We would not expect the number of these transactions to have any effect on the estimates used in this section.

<sup>80</sup> 44 U.S.C. 3501 *et seq.*

number of law firms and other persons regularly involved in completing the forms.

Under the proposal, a shell company would be required to make a more specific and detailed filing on Form 8-K when it reports a transaction that causes it to cease being a shell company. The shell company would need to file a Form 8-K that contains the information that would be required in an initial registration statement on Form 10 or Form 10-SB to register a class of securities under section 12 of the Exchange Act. The company would be required to file the Form 8-K within four business days after the closing of the transaction. This amendment would eliminate the 71-day window during which the financial information currently can be filed.

This proposal would not increase the number of Form 8-K filings but would increase the amount of information that a former shell company must include in the form. In 2003, companies that categorized themselves as "blank check companies" under the SEC Standard Industrial Classification (SIC) Code for that category disclosed 63 transactions under Item 2 of Form 8-K. We believe that the additional information we are requiring is analogous to the information required to complete a Form 10-SB. Currently, we estimate that it takes 133 hours to complete a Form 10-SB. We estimate that it would take a shell company 133 hours to prepare the information that we are proposing to require the company to provide in a Form 8-K report. We estimate that the company bears 75% of the burden and that 25% of the burden is borne by outside securities counsel retained by the company at an average rate of \$300 per hour. We estimate that it will take a former shell company 133 hours to complete the Form 8-K when it reports a transaction that causes it to cease being a shell company. The burden in this type of Form 8-K filing would increase to 8,379 hours (133 hours  $\times$  63 shell companies). Therefore, the Form 8-K reporting burden would increase by 6,284 hours (8,379 hours  $\times$  .75). The cost burden would increase by approximately \$628,425 (.25  $\times$  8,379 hours  $\times$  \$300).

In accordance with 44 U.S.C. 3506(c)(2)(B), we solicit comment on the following:

- The appropriateness of the proposed changes in the collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

- The accuracy of our estimate of the burden of the proposed collection of information;

- Ways to enhance the quality, utility and clarity of the information to be collected;

- Ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and

- Any effects of the proposals on any other collections of information not previously identified.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy of Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609, with reference to File No. S7-19-04.

Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-19-04, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

#### V. Cost-Benefit Analysis

Shell companies have been used for fraudulent and manipulative purposes. These proposals will disqualify shell companies from using Form S-8. These proposals will also require a shell company making a filing on Form 8-K to report completion of a transaction that causes it to become an operating business and cease being a shell company to include information of the kind it would be required to include in a long-form filing to register a class of its securities under the Exchange Act. These new proposals would make it more difficult for shell companies to be used for fraudulent purposes.

These proposals are consistent with the notion that the federal securities regulations should promote full disclosure. We solicit comment specifically on the costs to shell companies of losing eligibility to use Form S-8. A shell company will continue to be eligible to use Form S-

1 or Form SB-2 to offer securities in connection with its employee benefit plan. A shell company may also be entitled to rely on certain exemptions from the registration and prospectus delivery requirements of the Securities Act. Shell companies would thus still be able to issue securities to employees and consultants; but they could not use a streamlined form with automatic effectiveness, and the securities may be subject to restrictions on resale. This may impose costs on companies that issue securities as compensation. This cost is difficult to quantify. The benefit of this proposal is the increased protection of investors.

The proposals also would require the filing of a report on Form 8-K containing information of the type that is required in an initial registration statement on Form 10 or Form 10-SB when registering a class of securities under section 12 of the Exchange Act. For purposes of the Paperwork Reduction Act, we estimate the cost of preparing this report is 133 hours. Most of this time would be spent by internal company personnel, but we estimate that 25% would involve outside professionals. Assuming an hourly rate of \$300, this would result in an estimated average out-of-pocket cost of \$9,975 (133 hours  $\times$  .25  $\times$  300). Further, we estimate that approximately 105 shell companies a year would be required to prepare and file this information. In calendar year 2003, there were 63 reverse merger transactions involving blank check companies and 41 "back door" registration transactions.

The proposal to amend Form 8-K will require additional disclosure to be filed with the Form 8-K reporting completion of the transaction within four business days instead of within 71 calendar days after the initial filing due date. The additional disclosure will increase costs for shell companies that file a Form 8-K following the completion of the transaction that causes them to cease being shell companies. The benefit of this amendment to Form 8-K would be the protection of investors and increased integrity of the markets for the securities of smaller companies. To assist in a full evaluation of the costs and benefits of the proposals, we seek the views of and other data from the public.

## VI. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act<sup>82</sup> requires us to consider the anti-competitive effects of any rules that we adopt under the Exchange Act. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, section 2(b) of the Securities Act<sup>83</sup> and section 3(f) of the Exchange Act<sup>84</sup> require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition and capital formation.

The purpose of these proposed amendments is to deter fraud and reduce abuse of Form S-8 in unlawful capital-raising transactions through the use of shell companies and to enhance our reporting requirements with respect to transactions involving shell companies. We anticipate that these proposals would improve the proper functioning of the capital markets. We believe the proposals will enhance investor confidence in the securities markets and promote efficiency and capital formation. We do not expect that the proposals will have any anti-competitive effects.

We solicit comment on these matters with respect to the proposed rules. Would adoption of the proposals have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Securities Act or the Exchange Act? Would the proposed amendments, if adopted, promote efficiency, competition and capital formation? Commenters are requested to provide empirical data and other factual support for their views, if possible.

## VII. Initial Regulatory Flexibility Analysis

We have prepared an Initial Regulatory Flexibility Analysis, in accordance with 5 U.S.C. 603 concerning the rules proposed today.

### A. Reasons for and Objectives of the Proposed Amendments

The purpose of these proposed amendments is to protect investors in shell companies and to deter fraud and

abuse in our public securities markets through the use of shell companies.

### B. Legal Basis

The amendment proposed for Securities Act Form S-8 and adding the definition of shell company to Rule 405 under the Securities Act would be adopted pursuant to sections 6, 7, 8, 10, 19, and 28 of the Securities Act. The amendment to Exchange Act Form 8-K and adding the definition of shell company to Rule 12b-2 under the Exchange Act would be adopted pursuant to sections 3, 12, 13, 15, and 23(a) of the Exchange Act.

### C. Small Entities Subject to the Proposed Amendment

The proposed amendments would affect companies that are small entities. Exchange Act Rule 0-10(a)<sup>85</sup> defines an issuer, other than an investment company, to be a "small business" or "small organization" if it had total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there were approximately 2,500 issuers, other than investment companies, that may be considered small entities. The proposed amendments would prohibit the use of Securities Act Form S-8 by shell companies and require them to have specific and detailed information on file before being permitted to use Form S-8 when they become an operating business and cease being a shell company. We believe only a small percentage of the 2,500 issuers that are small entities are shell companies. The proposed amendments would affect only shell companies but they all would be "small entities."

### D. Reporting, Record Keeping, and Other Compliance Requirements

The proposed amendments would impose additional disclosure requirements on shell companies by requiring them to provide certain business disclosure in addition to currently required audited financial statements. No other new reporting, record keeping or compliance requirements would be imposed. The proposed amendments would prohibit shell companies from using Form S-8 and require a shell company to include additional information in any report on Form 8-K that it files to report completion of a transaction in which it ceases being a shell company and becomes an operating business. Other than the additional disclosure requirements, the primary impact of

these proposals relates to the timing of the filing.

### E. Overlapping or Conflicting Federal Rules

We do not believe any current federal rules duplicate, overlap or conflict with the proposed amendments.

### F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small businesses. We considered the following types of alternatives:

(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) The clarification, consolidation or simplification of compliance and reporting requirements under the rule for such small entities;

(3) The use of performance rather than design standards; and

(4) An exemption from coverage of the rule, or any part thereof, for small entities.

With respect to alternative (1), the proposed amendment to Form S-8 will prohibit shell companies from using the form. The proposed amendments to Form 8-K will shorten the time within which shell companies must file their required financial disclosures from 71 calendar days after the initial Form 8-K filing to four business days after completion of the conversion transaction. It would be inappropriate to establish a more liberal compliance standard for small businesses since the current standard applies to all public companies; it is the current delay in the filing of the required financial statements that permits abuse by shell companies. The proposed amendments will increase costs only to shell companies, not to all to small businesses, by requiring former shell companies to file a report on Form 8-K containing the information that would be required in an initial registration statement on Form 10 or Form 10-SB to register a class of its securities under Section 12 of the Exchange Act upon making a significant acquisition and 60 days before using Form S-8. Form S-8 is a registration statement used for employee compensation plans and shell companies typically have few, if any, employees. Accordingly, the proposal does not impose any burdens on small businesses.

With regard to Alternative 2, the proposed amendments are clear and concise. We however seek comment on the definition of "shell company" to

<sup>82</sup> 15 U.S.C. 78w(a)(2).

<sup>83</sup> 15 U.S.C. 77b(b).

<sup>84</sup> 15 U.S.C. 78c(f).

<sup>85</sup> 17 CFR 240.0-10(a).

appropriately tailor the rule. Prohibiting the use of Securities Act Form S-8 by shell companies does not increase the disclosure required unless a shell company wants to compensate employees with securities. If the shell company had employees and wanted to compensate them with securities it would substantially increase the disclosure required for the shell company to file a Form SB-2 or S-1. We believe that most shell companies will wait until they cease being a shell company before compensating employees with securities. The proposed amendment to Form S-8 will require a former shell company to wait 60 days after filing the required disclosure before being eligible to use Form S-8. Due to the nature of the entity, full and fair disclosure by the operating company supports the trading market in the shares of the new entity. The proposed amendment to Form 8-K requiring filing additional information within four business days does not necessarily increase disclosure significantly but rather accelerates it. We propose to require that certain information, which is not specifically required in the current Form 8-K report, be included for shell companies. We solicit comment on these specific issues.

Alternatives (3) and (4) are not viable because the purpose of the amendments is to deter fraud. It would be difficult under Alternative (3) to design performance standards that would carry out the Commission's statutory mandate to ensure adequate disclosure about shell companies and companies formed by merger with a shell company and disclose significant acquisitions promptly. Alternative (4) is inappropriate since the rule only applies to small entities. An exemption for small entities would not achieve the desired result.

#### G. Solicitation of Comments

We encourage the submission of written comments with respect to any aspect of this initial regulatory flexibility analysis, especially empirical data on the impact on small businesses. In particular, we request comment on: (1) The number of small entities that would be affected by the proposed amendments of Forms S-8 and 8-K; and (2) whether these amendments would increase the reporting, record keeping and other compliance requirements for small businesses. Such written comments will be considered in the preparation of the final regulatory flexibility analysis, if the proposed amendments are adopted.

### VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996<sup>86</sup> a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on (1) the potential effect on the U.S. economy on an annual basis; (2) any potential increase in costs or prices for consumers or individual industries; and (3) any potential effect on competition, investment or innovation.

### IX. Statutory Basis and Text of Proposal

The amendments to Form S-8 and Rule 405 under the Securities Act are proposed pursuant to sections 6, 7, 8, 10, 19 and 28 of the Securities Act.

The amendments to Form 8-K and Rule 12b-2 under the Exchange Act are proposed pursuant to sections 3, 12, 13, 15 and 23(a) of the Exchange Act.

#### List of Subjects in 17 CFR Parts 230, 239, 240 and 249

Reporting and record keeping requirements, Securities.

#### Text of Proposed Amendments

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

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

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

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 79t, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

2. Amend § 230.405 to add the following definition in alphabetical order to read as follows:

#### § 230.405 Definitions of terms.

\* \* \* \* \*

*Shell company.* The term *shell company* means a registrant with no or nominal operations and with:

- (1) No or nominal assets; or

(2) Assets consisting solely of cash and cash equivalents.

\* \* \* \* \*

### PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

3. 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, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll(d), 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a-8, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

4. Amend § 239.16b to revise the introductory text of paragraph (a) 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) Any registrant that, immediately before the time of filing a registration statement on this form, is subject to the requirement to file reports pursuant to section 13 (15 U.S.C. 78m) or 15(d) (15 U.S.C. 78o(d)) of the Securities Exchange Act of 1934; has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials); is not a shell company (as defined in § 230.405 of this chapter); and, if it has been a shell company at any time during the preceding 12 months, has filed current Form 10 information (as defined in Instruction A.1(a)(6) to Form S-8) with the Commission at least 60 days previously, may use this form for registration under the Securities Act of 1933 (the Act) (15 U.S.C. 77a *et seq.*) of the following securities:

\* \* \* \* \*

5. Amend Form S-8 (referenced in § 239.16b) by revising the introductory text to General Instruction A.1 and adding paragraphs (a)(6) and (a)(7) to General Instruction A. 1, 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. Any registrant that, immediately before the time of filing a registration statement on this form, is subject to the requirement to file reports pursuant to section 13 (15 U.S.C. 78m) or 15(d) (15 U.S.C. 78o(d)) of the

<sup>86</sup> Pub. L. 104-121 tit. II, 110 Stat. 857 (1996).

Securities Exchange Act of 1934; has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials); is not a shell company (as defined in § 230.405 of this Chapter); and, if it has been a shell company at any time during the preceding 12 months, has filed current Form 10 information with the Commission at least 60 days previously, may use this form for registration under the Securities Act of 1933 (the Act) (15 U.S.C. 77a et seq.) of the following securities:

(a) \* \* \*

(6) The term "Form 10 information" means the information that is required by Form 10, Form 10-SB or Form 20-F (17 CFR 249.210, 17 CFR 249.210b or 17 CFR 249.220f), as applicable, under the Securities Exchange Act of 1934 to register the class of securities being registered using this form. The information may be provided in Form 8-K (17 CFR 249.308) or another Commission filing with respect to the registrant.

(7) Notwithstanding the last clause of the first paragraph of this Instruction A.1, a shell company in existence solely for purposes of changing the corporate domicile of another entity may use this form immediately upon ceasing to be a shell company and without waiting 60 days after it has filed current Form 10 information with the Commission.

\* \* \* \* \*

**PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

6. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

7. Amend § 240.12b-2 to add the following definition of *Shell company* in alphabetical order and revise the definition of *Succession* to read as follows:

**§ 240.12b-2 Definitions.**

\* \* \* \* \*

*Shell company:* The term *shell company* means a registrant with no or

nominal operations and with: (1) No or nominal assets; or (2) Assets consisting solely of cash and cash equivalents.

\* \* \* \* \*

*Succession.* The term *succession* means the direct acquisition of the assets comprising a going business, whether by merger, consolidation, purchase, or other direct transfer; or the acquisition of control of a shell company in a transaction required to be reported on Form 8-K (17 CFR 249.308) in compliance with Item 5.01 of that Form. Except for an acquisition of control of a shell company, the term does not include the acquisition of control of a business unless followed by the direct acquisition of its assets. The terms *succeed* and *successor* have meanings correlative to the foregoing.

\* \* \* \* \*

**PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934**

8. The authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

9. Amend Form 8-K under the caption "Information to Be Included in the Report" (referenced in § 249.308) by:

- a. Removing the word "and" at the end of Item 2.01(d);
- b. Removing the period at the end of Item 2.01(e)(2) and in its place adding "; and";
- c. Adding paragraph (f) to Item 2.01;
- d. Removing the word "and" at the end of Item 5.01(a)(6);
- e. Removing the period at the end of Item 5.01(a)(7) and in its place adding "; and";
- f. Adding paragraph (a)(8) to Item 5.01;
- g. Redesignating paragraph (c) of Item 9.01 as paragraph (d); and
- h. Adding new paragraph (c) to Item 9.01.

The additions read as follows:

**Note**—The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

**Form 8-K—Current Report**

\* \* \* \* \*

Information To Be Included in the Report

\* \* \* \* \*

**Item 2.01. Completion of Acquisition or Disposition of Assets**

\* \* \* \* \*

(f) if the registrant was a shell company immediately before the transaction, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 or Form 10-SB (17 CFR 249.210 or 17 CFR 249.210b), as applicable, under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of section 13 (15 U.S.C. 78m) or section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction.

\* \* \* \* \*

**Item 5.01. Changes in Control of Registrant**

(a) \* \* \*

(8) if the registrant was a shell company immediately before the change in control, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 or Form 10-SB (17 CFR 249.210 or 17 CFR 249.210b), as applicable, under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of sections 13 (15 U.S.C. 78m) or section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the change in control.

\* \* \* \* \*

**Item 9.01. Financial Statements and Exhibits**

\* \* \* \* \*

(a) \* \* \*

(c) *Shell company transactions.* A registrant that was a shell company immediately before a transaction required to be described in Item 2.01 or Item 5.01 of this form must file the financial statements required by those items in the initial report.

\* \* \* \* \*

Dated: April 15, 2004.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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**BILLING CODE 8010-01-p**