**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 239**

**[Release No. 33–7647; File No. S7–2–98]**

**RIN 3235–AG94**

## Registration of Securities on Form S–8

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule; Extension of comment period and further request for comment.

**SUMMARY:** In connection with the proposals issued on February 17, 1998, Release No. 33–7506 [63 FR 9648] (the ''Proposing Release''), the Securities and Exchange Commission (''we'' or ''Commission'') is issuing a new proposal to amend Form S–8. The new proposal is targeted to prevent the abuse of Form S–8 to register offerings to consultants and advisors who act as statutory underwriters, or to register securities issued as compensation to consultants or advisors who promote the registrant's securities. In addition, we are extending the comment period until May 7, 1999 for the proposals and requests for comment in the Proposing Release that we continue to consider.

**DATES:** We must receive your comments on or before May 7, 1999.

**ADDRESSES:** Please submit three copies of your comments to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6–9, 450 Fifth Street, NW, Washington, DC 20549. You also may submit comments electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7–2–98; include this file number on the subject line if you use e-mail. You may inspect and copy comment letters in the public reference room at the same address. We will post electronically submitted comment letters on the Commission's Internet Web site (http://www.sec.gov).

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

**SUPPLEMENTARY INFORMATION:** Today we propose further amendments to Form S–8 [1] under the Securities Act of 1933 (''Securities Act'').[2]

### I. Executive Summary and Background

In 1998, as part of our comprehensive agenda to deter registration and trading abuses, including microcap fraud,[3] we proposed various amendments to Form S–8.[4] In particular, Form S–8 has been misused to issue securities to nominal ''consultants and advisors'' who act as statutory underwriters [5] to sell the securities to the general public, and to register securities issued to stock promoters.[6]

Today, in a companion release we adopt some of the 1998 proposals that were designed to deter further misuse of the form.[7] We also propose a different amendment (the ''new proposal'') that would amend the instructions to Form S–8 to impose new qualification requirements for companies using the form. The new proposal would require, before filing a registration statement on Form S–8, that:

- Any company be timely in its Exchange Act reports [8] during the 12 calendar months and any portion of a month before the Form S–8 is filed; and
- A company formed by merger of a nonpublic company into an Exchange Act reporting company with only nominal assets at the time of the merger wait until it has filed an annual report on Form 10–K [9] or Form 10–KSB [10] containing audited financial statements reflecting the merger.

In issuing the new proposal, our specific goal is to make Form S–8 less susceptible to abuse, without imposing undue burdens on companies more likely to be operating legitimate employee benefit plans. We believe that the new proposal may be better targeted toward deterring potentially abusive situations.

We also solicit comment on whether other potential amendments, such as Exchange Act disclosure of aggregate Form S–8 sales to both consultants and employees, may prevent further abuse of Form S–8 (the ''new comment solicitations'').[11]

Finally, we extend the comment period on one of the proposals and some of the requests for comment that we issued in the 1998 proposal (together, the ''remaining proposals'').[12] We may adopt any combination of the new proposal, the remaining proposals and the new comment solicitations.

### II. Registrant Eligibility Proposal

Our investigation of the misuse of Form S–8 shows that the companies involved frequently share one or more of the following characteristics:

- Failure to file Exchange Act reports, or failure to file them on a timely basis;
- ''Going public'' by means of a merger into a public ''shell'' corporation with only nominal assets; and
- Stopping Exchange Act reporting not long after using Form S–8 to make an unregistered distribution to the general public, whether or not the company is eligible to suspend or terminate its Exchange Act reporting.

We believe that tightening the eligibility standards of Form S–8 may be needed in order to deter abuse. In cases involving companies formed by merger of a non-reporting company into a public ''shell,'' a Form S–8 instruction requiring post-merger public information would have prevented misuse.[13] In other cases, a Form S–8 instruction requiring the issuer to have filed Exchange Act reports on a timely basis would have prevented misuse.[14]

Form S–8 currently permits use of the form by any company that:

- Immediately before the time of filing is subject to the requirement to

[1] 17 CFR 239.16b.

[2] 15 U.S.C. 77a *et seq.*

[3] See Securities Act Release No. 7505 (Feb. 17, 1998) [63 FR 9632], adopting amendments to Regulation S [17 CFR 230.901 *et seq.*]; Release No. 39670 (Feb. 17, 1998) [63 FR 9661] under the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78a *et seq.*], proposing amendments to Exchange Act Rule 15c2–11 [17 CFR 240.15c2–11]; Securities Act Release No. 7541 (May 21, 1998) [63 FR 29168], proposing amendments to Securities Act Rule 504 [17 CFR 230.504]; Securities Act Release No. 7644 (Feb. 25, 1999), adopting amendments to Securities Act Rule 504; and Exchange Act Release No. 41110 (Feb. 25, 1999), reproposing amendments to Rule 15c2–11.

[4] See Securities Act Release 7506 (Feb. 17, 1998) [63 FR 9648] (the ''Proposing Release'').

[5] An ''underwriter'' is defined in Section 2(a)(11) of the Securities Act [15 U.S.C. 77b(a)(11)] to include ''any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking * * *.''

[6] For a detailed discussion of Form S–8 abuses, see Securities Act Release No. 7646 (Feb. 25, 1999) (the ''Adopting Release''), at Sections I.A and II.

[7] See Adopting Release at Sections II.A and II.B. We also adopt amendments that allow Form S–8 to be used for the exercise of employee benefit plan stock options by the employee's family members who receive the options from the employee by gift or through a domestic relations order, and clarify executive compensation disclosure requirements that apply to transferred options. See Adopting Release at Section III.

[8] These reports are required by Sections 13(a) and 15(d) of the Exchange Act [15 U.S.C. 78m(a) and 15 U.S.C. 78o(d)].

[9] 17 CFR 249.310.

[10] 17 CFR 249.310b.

[11] See Section III, below.

[12] See Section IV, below.

[13] See, *e.g., In the Matter of Sky Scientific, Inc.* (''*Sky Scientific*''), Securities Act Release No. 7372, Exchange Act Release No. 38049, Accounting and Auditing Enforcement Release No. 863 (Dec. 16, 1996); and *SEC* v. *Hollywood Trenz, Inc.*, Litigation Release No. 15730, Accounting and Auditing Enforcement Release No. 1032 (May 4, 1998).

[14] See, *e.g., SEC* v. *Charles O Huttoe, et al.*, Litigation Release No. 15153 (Nov. 7, 1996); and *SEC* v. *Softpoint*, Litigation Release No. 14480, Accounting and Auditing Release No. 666 (Apr. 27, 1995).

file reports under Section 13[15] or 15(d) of the Exchange Act; and

• Has filed all reports and other materials so required during the preceding 12 months (or such shorter period as the registrant was required to file under the Exchange Act).

Under the new proposal, more stringent eligibility standards would apply to all companies. Any company filing a Form S–8 would be required to have filed its most recent Exchange Act reports on a timely basis (the ''proposed timeliness standard''), and companies formed by a merger of a non-reporting company into a public ''shell'' no longer would be able to file a Form S–8 immediately.

Under the proposed timeliness standard, in order to file a Form S–8, any company would need to:

• Be subject to the Exchange Act reporting requirements;

• Have filed all Exchange Act Section 13(a) or 15(d) reports and all other materials required to be filed during the immediately preceding 12 months (or such shorter time as the company was subject to the Exchange Act reporting requirements); and

• Have timely filed all Exchange Act Section 13(a) or 15(d) reports required to be filed during the 12 calendar months and any portion of a month immediately preceding the Form S–8 filing (or such shorter time as the company was subject to those requirements).

The first two requirements would be the same as the existing Form S–8 eligibility standard.[16] The third requirement would apply the timeliness standards of Securities Act Forms S–2 [17] and S–3 [18] to Form S–8. As with Forms S–2 and S–3, a company that uses Rule 12b–25 [19] to extend the due date for all or part of an Exchange Act report would be considered timely if the company actually filed the material within the time prescribed by that rule. Because Form S–8, like Forms S–2 and S–3, provides disclosure through incorporation by reference of Exchange Act reports, requiring those reports to be filed on a timely basis as a form eligibility condition would be appropriate.

The proposed timeliness standard would apply to certain post-effective amendments as well as new filings. When a registration statement is post-effectively amended to satisfy the updating standards of Securities Act Section 10(a)(3),[20] the form and contents of the amendment must conform to the applicable rules and forms in effect on the date it is filed.[21] With Form S–8, like Form S–3, incorporation by reference of the company's subsequently filed annual report on Form 10–K or Form 10–KSB is deemed to amend the registration statement for Section 10(a)(3) updating purposes. Accordingly, for an effective Form S–8, the proposed timeliness standard also would be triggered when an Exchange Act annual report is due, for purposes of determining whether the company may continue to use that Form S–8 to make compensatory offers and sales of securities. If the company does not timely file its Form 10–K or Form 10–KSB under the standards of the new proposal, that Form S–8 no longer would be available for purposes of making subsequent offers and sales of securities.

A stricter standard would apply to a company formed by a merger between an entity that was not subject to the Exchange Act reporting requirements at the time of the merger and an entity subject to the Exchange Act reporting requirements that had only nominal assets at the time of the merger. This type of company would not be allowed to file any registration statement on Form S–8 until it had filed an annual report on Form 10–K or Form 10–KSB containing audited financial statements reflecting the merger, even if its other Exchange Act reports were timely filed.

Because a company that ''goes public'' through a ''shell'' merger does not file a Form 10 or Form 10–SB,[22] the merged entity does not file audited financial statements until it files an Exchange Act annual report. The period before the first Exchange Act annual report is filed appears to be the most likely period for using Form S–8 to make an improper public offering, because the discipline of an audit has not yet been applied to the financial statements of the merged entity.[23] Prohibiting ''shell'' companies from using Form S–8 until such an annual report is filed will make Form S–8 unavailable during this critical period. Once the Form 10–K or 10–KSB is filed within 12 months after the formation/merger, the company would be subject to the proposed timeliness standard.

Commenters are requested to address whether the new proposal would be an effective deterrent to Form S–8 abuse. In particular, would the proposed timeliness standard deter misuse by the companies most likely to abuse Form S–8 without imposing undue burdens on companies that sponsor legitimate employee benefit plans? Many companies that file Forms S–8 also file (or are establishing eligibility to file) registration statements on Forms S–2 and S–3.[24] We do not believe that it will be difficult for these companies to satisfy the same timeliness standards for purposes of Form S–8. We also believe that imposing these timeliness standards on other companies will make the form less susceptible to abuse. However, we request your comment on whether the proposed timeliness standard would be equally effective and less burdensome if it required timely filing only of the company's annual report on Form 10–K or Form 10–KSB, rather than all Exchange Act reports.

We also are considering whether the proposed timeliness standard should apply only to some subset of public companies. Can this requirement be tailored so that it does not apply to the companies least likely to abuse Form S–8? For example, should the standard apply only to companies that do not have securities listed on a national securities exchange or admitted to trading on the NASDAQ National

[15] 15 U.S.C. 78m.

[16] The proposed language would clarify that the existing standard's reference to ''other materials required to be filed'' means the materials required by Exchange Act Sections 14(a) or 14(c) [15 U.S.C. 78n(a) and 78n(c)].

[17] See General Instruction I.C(2) to Form S–2 [17 CFR 239.12].

[18] See General Instruction I.A.3(b) to Form S–3 [17 CFR 239.13].

[19] 17 CFR 240.12b–25.

[20] 15 U.S.C. 77j(a)(3). This section states that if a registration statement is used more than nine months following its effective date, the information it contains may be no more than 16 months old.

[21] Securities Act Rule 401(b) [17 CFR 230.401(b)].

[22] 17 CFR 249.210 and 249.210b. These are the long form Exchange Act registration statements, which contain extensive business and financial information.

[23] In this regard, note that Item 3(a) of Form S–8 requires a registrant to incorporate by reference into its Form S–8 the registrant's latest annual report filed under Section 13(a) or 15(d) of the Exchange Act, or either: (1) the latest prospectus filed under Rule 424(b) [17 CFR 230.424(b)]; or (2) the registrant's effective registration statement on Form 10, 10–SB, 20–F or 40–F [17 CFR 249.210, 249.220f and 249.240f]. One of these documents (or the company's annual report under Exchange Act Rule 14a–3(b) [17 CFR 240.14a–3(b)]) also must be delivered to plan participants to satisfy Form S–8 prospectus delivery materials requirements under Rule 428(b)(2) [17 CFR 230.428(b)(2)]. These standards are designed to require incorporation by reference and delivery of a document containing audited financial statements for the registrant's latest fiscal year. The new proposal would assure that a company that ''goes public'' through a ''shell'' merger satisfies these requirements with respect to the merged entity, rather than the premerger ''shell.''

[24] Although General Instruction I.B.1 requires the aggregate market value of a company's voting and non-voting common equity held by non-affiliates to be at least $75 million for Form S–3 to be available for a primary offering, this condition need not be met in order to use Form S–3 for any other transaction for which it is available, such as secondary offerings.

Market System?[25] Alternatively, should the standard apply only to companies that do not have securities listed on the New York Stock Exchange or the American Stock Exchange, or admitted to trading on the NASDAQ National Market System? In either case, are there any particular listing requirements that would form an appropriate basis for distinguishing among different markets for this purpose?

If we impose the proposed timeliness standard on a limited basis, should its application be based on the company's size rather than the market on which the company's securities are traded? If so, should a size test be based on assets or revenues? For example, would it be appropriate to apply the proposed timeliness standard only to companies with annual revenues below $10 million? Should a revenue test be lower, such as $5 million, or higher, such as $20 or $25 million? If instead the test is based on assets, should the standard apply only to companies with assets below $50 million? Would a lower limit, such as $25 million, or a higher limit, such as $100 million, be more appropriate? Should an asset test be based on total assets, or only net tangible assets, whose value is more readily determinable and realizable?

Should a size test be based instead on the aggregate market value of the voting and non-voting common equity held by non-affiliates (the ''public float''), as reported in the company's most recently filed Form 10–K or Form 10–KSB? If so, should the proposed timeliness standard apply only to companies with a public float less than $75 million?

Would the new proposal be more effective if it required newly reporting companies, as well as companies formed by ''shell'' mergers, to postpone filing a Form S–8 for a specified period of time after becoming subject to the Exchange Act in order to establish a reporting history? For example, should we reinstate a 90-day waiting period before a newly reporting company is allowed to file a Form S–8?[26] Would a different waiting period be appropriate, either shorter (30 or 60 days or some other number) or longer (120 or 180 days or some other number)?

With respect to companies formed by ''shell'' mergers, should the new proposal instead prohibit them from using Form S–8 for a longer period of time, such as 18 months, two years, or three years? Does the ''nominal assets'' standard provide sufficient guidance? If not, should an objective benchmark be provided? What level of assets would be appropriate for this purpose? For example, should assets of $200,000 or less be considered ''nominal''? Should the ''nominal'' character of the public shell's assets be measured on an absolute basis (such as $100,000, $200,000, $500,000 or some other number), or by reference to the assets of the private company that is acquired (such as five, ten, or 25 percent of the combined assets, or some other percentage)?

Should all assets be considered for purposes of this test, or only net tangible assets? In addition—or as an alternative—should the test address whether the public shell has had continuous operations for a specified period of time? For example, Exchange Act Rule 3a51–1[27] excludes from the definition of ''penny stock'' a security of an issuer having net tangible assets in excess of $2 million, if the issuer has been in continuous operation for at least 3 years, or $5 million, if the issuer has been in continuous operation for less than three years.

Should the eligibility test for companies formed through ''shell'' mergers be measured by reference to the ''shell's'' assets at all, or only with respect to whether the ''shell'' has a business plan other than to merge with the private company? For example, Securities Act Rule 419[28] defines a ''blank check company,'' in part, as a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge with an unidentified company or companies.[29] Should the same test apply for Form S–8 eligibility purposes, whether or not a merger candidate is identified? If we use this test, should we eliminate the ''development stage'' provision?

The standards of the new proposal would apply to a company whether or not the company is a ''small business issuer.''[30] However, we request comment on whether the new proposal would have a disproportionate adverse effect on small business issuers. Would the new proposal discourage these issuers from going public, so that they could continue to issue securities to employees under Securities Act Rule 701?[31]

Finally, would the new proposal be more effective and less burdensome than any of the remaining proposals?[32] In particular, would the new proposal be more effective and impose fewer burdens on legitimate employee benefit plans than the proposed Form S–8 Part II disclosure of the number of securities issued to consultants, their names and the services they provide (or disclosure of the same information in the company's Exchange Act reports)? Is the new proposal better targeted at the specific problem than a limitation on the percentage of a class of securities outstanding that may be sold to consultants and advisors during the company's fiscal year?

## III. Other Potential Amendments

Although we do not propose any other specific amendment today, we ask commenters to address whether any approaches other than the new proposal and the remaining proposals would help to deter Form S–8 abuse. For example, should we consider other forms of certification? As described below, one of the remaining proposals is to expand the existing Form S–8 certification to

[25] In this case, we anticipate that the proposed timeliness standard would apply to companies with securities traded in or quoted on markets such as the Pink Sheets, the OTC Bulletin Board, and the Nasdaq Small Cap market, as well as companies whose securities trade other than in an organized market, such as securities that are traded exclusively on the internet.

[26] Previously, the Form S–8 instructions required the registrant to have been subject to the Exchange Act reporting requirements for 90 days before filing a Form S–8. This requirement was eliminated in the 1990 revisions to Form S–8. See Securities Act Release No. 6867 (Jun. 6, 1990) [55 FR 23909]. In proposing this change, the Commission noted that ''[r]etention of the requirement that Form S–8 registrants be subject to Exchange Act reporting obligations would provide for current public information. Information in an effective Securities Act or Exchange Act registration statement would be available to the marketplace and the registrant would be subject to the continuous reporting system under the Exchange Act. As a result, the business and financial information regarding the registrant would be available to employees.'' Securities Act Release No. 6836 (Jun. 12, 1989) [54 FR 25936].

[27] 17 CFR 240.3a51–1.

[28] 17 CFR 230.419.

[29] Securities Act Rule 251(a)(3) [17 CFR 230.251(a)(3)] makes the Regulation A [17 CFR 230.251 *et seq.*] exemption from Securities Act registration unavailable to these companies. Similarly, Rule 504(a)(3) [17 CFR 230.504(a)(3)] makes the Rule 504 [17 CFR 230.504] exemption of Regulation D [17 CFR 230.501 *et seq.*] unavailable to these companies.

[30] This term currently is defined as a company that: (i) has revenues of less than $25,000,000; (ii) is a U.S. or Canadian issuer; (iii) is not an investment company; (iv) if a majority owned subsidiary, the parent corporation is also a small business issuer; and (v) the public float (aggregate market value of outstanding voting and non-voting common stock held by non-affiliates) does not exceed $25,000,000. See Item 10 of Regulation S–B [17 CFR 228.10] and Securities Act Rule 405 [17 CFR 230.405]. In the Securities Act Reform Release (Securities Act Release No. 7606A (Nov. 13, 1998) [63 FR 67171]), we proposed to amend the definition of ''small business issuer'' to raise the revenue threshold to $50,000,000, and to eliminate the public float test. See Securities Act Reform Release at Section V.E.2.

[31] 17 CFR 230.701. The Commission adopted amendments to Rule 701 in Securities Act Release No. 7645 (Feb. 25, 1999).

[32] The remaining proposals are described in Section IV, below.

require the company to certify that any consultant or advisor who receives securities registered on the form is not hired for capital-raising or promotional activities.

Instead, each time a company issues securities to consultants, should it be required to post-effectively amend its Form S–8 to certify that the consultants receiving the securities will not engage in these activities? Alternatively, should we require consultants and advisors who receive securities registered on Form S–8 to provide the company with certifications that they have not and will not engage in capital-raising, promotional or market maintenance activities? If this requirement is imposed, companies would be required to retain the certification for a period of time and provide it to the Commission or the staff upon request.[33] Would a three- or five-year retention period [34] be appropriate for this purpose? If not, for what period of time should this information be retained?

Instead of certification, another possibility would be to require companies to make a statement in Part II of the Form S–8 registration statement that the securities will be issued for compensatory, not capital-raising, purposes. Would this approach be an effective deterrent to abuse?

In some cases, companies have improperly filed a series of Forms S–8 to make unregistered offerings of securities to the public, distributing a significant percentage—if not most—of the company's securities in this manner.[35] One of the remaining proposals would require companies to disclose, in their Exchange Act reports, Form S–8 sales of securities to consultants and advisors.

Instead, should we require companies to provide disclosure in their quarterly and annual Exchange Act reports when aggregate issuances on Form S–8 (to both consultants *and* traditional employees) during the preceding 12 month period have exceeded a specified percentage of the number of securities of the same class outstanding? In particular, would Exchange Act disclosure of aggregate issuances to traditional employees, as well as consultants, be necessary to identify companies misusing Form S–8 to make public offerings?

If so, would ten, 15, 20 percent, or some other percentage, of outstanding securities of the same class be an appropriate threshold for requiring this disclosure? In particular, would the 15 percent of outstanding securities of the class or 15 percent of the issuer's total assets test used in Rule 701 be an appropriate threshold? Should this disclosure identify both the aggregate number of securities and options issued, and the aggregate number of employees and consultants who received them? Should issuances to employees be segregated from issuances to consultants for this purpose? If we require Exchange Act disclosure only of aggregate issuances to consultants, would one percent of the outstanding securities of the class during the preceding 12 month period be an appropriate disclosure threshold?

If an aggregate disclosure requirement is adopted, should companies be required to identify individual issuances if they exceed a particular threshold, such as one percent of the outstanding securities of the class? Should information identifying the recipients of the securities be required? Finally, do the companies that abuse Form S–8 continue to file Exchange Act reports long enough for this kind of disclosure to be meaningful?

## IV. Continuing Request for Comment

During the comment period, we are extending our request for comment on the remaining proposals.[36] These are:

*Proposal:* Disclosure in Part II of Form S–8 of the names of any consultants or advisors who will receive securities under the registration statement, the number of securities to be issued to each of them, and the specific services that each will provide the company.

*Requests for comment:*

- Whether companies should be required to disclose Form S–8 sales of securities to consultants or advisors in their Exchange Act reports—either in Form 10–K and Form 10–Q,[37] or on Form 8–K; [38]
- Whether the aggregate percentage of securities that may be sold to consultants and advisors on Form S–8 during the company's fiscal year should be limited to a specified percentage of the number of securities of the same class outstanding;
- Whether the existing requirement that the company certify ''that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S–8'' should be expanded also to require the company to certify that any consultant or advisor who receives securities registered on the form does not, and will not, engage in capital-raising or promotional activities; and
- Whether the Form S–8 cover page should include a box that the company would be required to check if any securities registered on the form are offered and sold to consultants and advisors.

In particular, we are considering carefully whether, to what extent and in what form, there should be additional disclosure requirements about consultants and advisors. We solicit your comment on this issue.

With respect to limiting the aggregate percentage of securities that may be sold to consultants and advisors on Form S–8 during the company's fiscal year, we previously solicited comment whether annual percentage limitations of five, ten or 15 percent of the number of securities of the same class outstanding, computed based on the company's most recent balance sheet, would be appropriate.[39] Would a higher percentage, such as 30 percent, be appropriate for this purpose? Would the 15 percent of the issuer's total assets test used in Rule 701 be an appropriate cap? Instead, should a higher percentage, such as 30, 40 or 50 percent, be applied to limit annual aggregate Form S–8 sales to employees, as well as to consultants and advisors?

We may adopt any combination of the new proposal, the remaining proposals and the new comment solicitations.

## V. General Request for Comment

We request your written comment on all aspects of the new proposal, the new comment solicitations and the remaining proposals. You should address whether the new proposal, as drafted, is easy to understand and implement. In particular, would the new proposal and the new comment solicitations be less burdensome and

[33] Securities Act Rule 418 [17 CFR 230.418] requires companies to furnish information supplementally to the Commission or the staff upon request.

[34] Securities Act Rule 428(a)(2) [17 CFR 230.428(a)(2)] requires a company to keep documents that are used as part of the Form S–8 Section 10(a) prospectus (other than documents incorporated by reference) for five years after they are last used as part of that prospectus.

[35] See, *e.g., Sky Scientific,* cited at n. 13 above, in which the company conducted an unregistered distribution to the public by misusing 106 registration statements and post-effective amendments on Form S–8, distributing approximately 30 million shares of common stock.

[36] We have not republished in this release the text of the rules previously published in the Proposing Release. Please refer to Sections II.C and II.D of the Proposing Release for a full discussion of the remaining proposals. See Section II.C of the Adopting Release for a brief discussion of the comments we have received to date on the remaining proposals. A Comment Summary with respect to the Proposing Release also is available for inspection and copying in the Commission's Public Reference Room under file number S7–2–98. Comments that were submitted electronically are available on the Commission's website (http://www.sec.gov).

[37] 17 CFR 249.308a.

[38] 17 CFR 249.308.

[39] See Section II.D of the Proposing Release.

more effective in deterring Form S–8 abuse than the remaining proposals?

## VI. Cost-Benefit Analysis

The new proposal is intended to eliminate misuse of Form S–8 and thus enhance investor protection. The costs and benefits of the new proposal are discussed below.[40] We request your written comment on this analysis as an aid to further evaluate the costs and benefits of the new proposal. Please provide empirical data and other factual support for your views to the extent possible.

The new proposal is designed to deter the use of Form S–8 to register transactions in which consultants or employees act as conduits to distribute securities to the public, or transactions in which consultants are compensated for other capital-raising or promotional services. We believe that this will benefit investors by permitting registration and sale of securities only when current information is available, which should inhibit fraudulent promotional schemes and will enhance investor confidence in the integrity of the securities markets. Other forms remain available to register securities for capital-raising purposes. The additional costs of using these other forms are justified in order to provide adequate information to non-employee investors.

Our records indicate that approximately 5600 Forms S–8 were filed during the fiscal year ending September 30, 1998.[41] We do not have data to determine how many of these filings would have been precluded if the amendments had been in effect. Therefore, we cannot quantify the impact. However, we believe that the rule change will impact primarily transactions that were not intended to use the form.

The new proposal will require:

- Any company using Form S–8 to be timely in its Exchange Act reports during the 12 calendar months and any portion of a month before the Form S–8 is filed; and
- A company formed by merger of a nonpublic company into an Exchange Act reporting company with only nominal assets at the time of the merger to wait until it has filed an annual report on Form 10–K or Form 10–KSB containing audited financial statements reflecting the merger before filing a registration statement on Form S–8.

Some companies may face increased costs as a result of the rule change because, for limited periods of time, Form S–8 may not be available to them to register compensatory employee benefit plan securities offerings. This could reduce the flexibility of these companies' compensation arrangements. Commenters should consider whether the new proposal would make an affected company more likely to use cash for compensation purposes. If so, would this result in cash flow concerns or constrain reinvestment in the company's business?

For all companies, the proposed timeliness standard would condition Form S–8 availability on the company's timely satisfaction of its Exchange Act reporting requirements. Form S–8 would be available if the company does no more than what it otherwise is required to do. Accordingly, the proposed timeliness standard will not require a company to incur additional costs. The proposed timeliness standard will provide investor protection benefits by giving companies an additional incentive to file their Exchange Act reports on a timely basis.

For a company formed by a ''shell'' merger, the proposed standard will make Form S–8 unavailable until the company has filed a Form 10–K or Form 10–KSB that includes audited financial statements for the merged entity. This will provide investor protection benefits by ensuring that the audited financial statements of the merged entity, rather than merely the ''shell,'' are incorporated by reference into the Form S–8. However, during the limited period that the proposed standard will apply, such a company would be required to use a less streamlined registration statement to register securities offered under a compensatory employee benefit plan. The most likely registration statement forms to be used for this purpose are Forms S–1, SB–2, S–2 and S–3. The estimated burden hours for purposes of the Paperwork Reduction Act for using Form S–8 are 12 hours. The estimated burden hours[42] for the other forms are:

Form SB–2—138
Form S–3—398
Form S–2—470
Form S–1—1290

Because none of these alternative forms becomes automatically effective upon filing, there may be additional costs due to potential delay in implementing the employee benefit plan. However, once the company files the required Form 10–K or Form 10–KSB, the company would be able to post-effectively amend the less streamlined registration statement to convert it to a Form S–8,[43] assuming the proposed general timeliness standard also is satisfied, thereby regaining the benefits of the abbreviated form.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[44] we request data and analysis on whether the new proposal would result in a major increase in costs or prices for consumers or individual industries, or significant adverse effects on competition, employment, investment, productivity, innovation or small business. Would the new proposal be likely to have a $100 million or greater annual effect on the economy? Commenters are requested to provide empirical data to support their views.

## VII. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (''IRFA'') in accordance with 5 U.S.C. 603 regarding the new proposal.

As noted in the analysis, the new proposal is designed to deter abusive practices in which Form S–8 is used to make capital-raising distributions of securities to the general public, or to compensate consultants and advisors for promotional and other capital-raising activities. These uses are contrary to the express purposes of the form. We believe that the new proposal will not result in any impairment of protection for the investing public, and should result in improved protection by assuring that capital-raising offerings are registered on the forms prescribed for those offerings.

As the IRFA describes, the staff is aware of approximately 815 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 157 of the Securities Act.[45] Overall, 13,577 companies are Exchange Act reporting companies. Based on a random sample

[40] For a discussion of the costs and benefits of the remaining proposals, see Section V of the Proposing Release. We invite additional comments on that cost-benefits analysis also.

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

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

[43] See Securities Act Rule 401(e) [17 CFR 230.401(e)].

[44] Pub. L. No. 104–121, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601).

[45] 17 CFR 230.157.

of the Forms S–8 filed during fiscal 1998, the Commission estimates that approximately 380 of those Forms S–8 were filed by small business issuers, and that consultants or advisors were the sole recipients of securities registered on approximately 185 of the Forms S–8.

The new proposal will not impose any new reporting, recordkeeping or compliance burdens for most small issuers. However, the new proposal may require some small businesses to use less streamlined forms to register securities offerings that otherwise would have been registered on Form S–8. We believe that in many cases, however, these will be offerings for which Form S–8 was not in fact previously available. This may reduce the flexibility of the compensation arrangements for some small businesses that merge with ''shells.'' We do not have the data to estimate this effect, but note that the effect would be only for the limited time until the combined entity files a Form 10–KSB with audited financial statements that reflect the merger.

We invite your written comments on any aspect of the IRFA. In particular, we seek your comment on: (1) the number of small entities that would be affected by the proposed rule amendments; and (2) the determination that the proposed rule amendments would not significantly increase reporting, recordkeeping and other compliance requirements for small entities. Commenters should address whether the proposed amendments to Form S–8 will affect the number of registration statements filed on this form, affect the dollar amount of securities sales on this form, or affect the form's availability to small entities.

Any commenter who believes that the new proposal will significantly impact a substantial number of small entities should describe the nature of the impact and estimate the extent of the impact. For purposes of making determinations required by SBREFA, we also request data regarding the potential impact of the proposed amendments on the economy on an annual basis. All comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the new proposal is adopted. Please refer to the Proposing Release for a summary of the separate Initial Regulatory Flexibility Analysis with respect to the remaining proposals.[46] A copy of either Initial Regulatory Flexibility Analysis may be obtained from Anne M. Krauskopf, Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549.

## VIII. Paperwork Reduction Act Analysis

Parts of the new proposal contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[47] Our staff has submitted the new proposal for review by the Office of Management and Budget (''OMB'') in accordance with the PRA. The title to the affected information collection is: ''Form S–8.'' An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The new proposal may require some companies to use less streamlined forms to register securities offerings that otherwise would have been registered on Form S–8. We estimate that this may reduce the number of registration statements filed on Form S–8 by approximately not more than five percent, and may increase the number of registration statements filed on different forms by a corresponding amount. In many cases, however, these will be offerings for which Form S–8 was not in fact previously available. We believe that this will provide a substantial investor protection benefit that justifies any additional costs to filers.

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

- Whether the proposed changes in the collection of information are necessary to the agency's function, including practical utility;
- The accuracy of the estimated burden of the proposed changes to the collection of information;
- Whether there are ways to enhance the quality, utility and clarity of the information to be collected; and
- Whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

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

Please refer to the Proposing Release for a separate Paperwork Reduction Act Analysis of the remaining proposals.[48]

## IX. Statutory Basis and Text of Proposed Amendments

The new amendment to Securities Act Form S–8 is proposed under the authority set forth in Sections 6, 7, 8, 10 and 19 of the Securities Act of 1933.

### List of Subjects in 17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

### Text of the 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 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

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

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

2. By amending § 239.16b to redesignate paragraph (b) as paragraph (c); redesignate paragraphs (a)(1) and (a)(2) as new paragraphs (b)(1) and (b)(2); revise paragraph (a); and add new paragraph (b) introductory text 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) A registrant may use this form for registration under the Securities Act of 1933 (''the Act'') of the securities listed in paragraph (b) of this section if the registrant satisfies the requirements of paragraph (a)(1) and (a)(2) of this section:

(1) A registrant may not file a registration statement on this form unless, immediately before filing the registration statement, the registrant:

(i) Is subject to the reporting requirements of sections 13(a) or 15(d) of the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78m(a) or 78o(d));

(ii) Has filed all reports required by Section 13(a) or 15(d) of the Exchange

[46] Section VI of the Proposing Release.

[47] 44 U.S.C. 3501 *et seq.*

[48] Section VII of the Proposing Release.

Act and all materials required by section 14(a) or 14(c) of the Exchange Act (15 U.S.C. 78n(a) or 78n(c)) required to be filed during the 12 months immediately before filing a registration statement on this form (or for such shorter period that the registrant was required to file such reports and materials); and

(iii) Has filed on a timely basis all reports required by section 13(a) or 15(d) of the Exchange Act during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement (or for such shorter period that the registrant was required to file such reports). If during that time the registrant has used § 240.12b–25 of this chapter with respect to a report or a part of a report, that material must have been filed within the time prescribed by that section.

(2) If the registrant is an entity formed by the merger between:

(i) An entity subject to the Exchange Act reporting requirements that had only nominal assets at the time of the merger; and

(ii) An entity that was not subject to the Exchange Act reporting requirements at the time of the merger, the registrant may not file a registration statement on this form until it has filed an annual report on Form 10–K or Form 10–KSB (§ 249.310 or § 249.310b of this chapter) containing audited financial statements for a fiscal year ending after consummation of the merger.

(b) A registrant may use this form for registration under the Act of the following securities:

* * * * *

3. By amending Form S–8 (referenced in § 239.16b) in General Instruction A to redesignate paragraphs 1.(a) and 1.(b) as paragraphs 1.(d) and 1.(e); revise the introductory text of paragraph 1.; and add new paragraphs 1.(a) and 1.(b) to read as follows:

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

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

* * * * *

*General Instructions*

A. Rule as to Use of Form S–8

1. A registrant may use this form for registration under the Securities Act of 1933 of the securities listed in paragraph 1.(d) and 1.(e) of this section if the registrant satisfies the requirements of paragraph 1.(a) and 1.(b) of this section:

(a) A registrant may not file a registration statement on this form unless, immediately before filing the registration statement, the registrant:

(i) Is subject to the reporting requirements of Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78m(a) or 78o(d));

(ii) Has filed all reports required by Section 13(a) or 15(d) of the Exchange Act and all materials required by Section 14(a) or 14(c) of the Exchange Act (15 U.S.C. 78n(a) or 78n(c)) required to be filed during the 12 months immediately before filing a registration statement on this form (or for such shorter period that the registrant was required to file such reports and materials); and

(iii) Has filed on a timely basis all reports required by Section 13(a) or 15(d) of the Exchange Act during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement (or for such shorter period that the registrant was required to file such reports). If during that time the registrant has used Rule 12b–25 (§ 240.12b–25 of this chapter) under the Exchange Act with respect to a report or a part of a report, that material must have been filed within the time prescribed by that rule.

(b) If the registrant is an entity formed by the merger between:

(i) An entity subject to the Exchange Act reporting requirements that had only nominal assets at the time of the merger; and

(ii) An entity that was not subject to the Exchange Act reporting requirements at the time of the merger, the registrant may not file a registration statement on this form until it has filed an annual report on Form 10–K or Form 10–KSB (§ 249.310 or § 249.310b of this chapter) containing audited financial statements for a fiscal year ending after consummation of the merger.

* * * * *

Dated: February 25, 1999.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99–5298 Filed 3–5–99; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Part 240

## Release No. 34–41110; File No. S7–5–99

**RIN 3235–AH40**

## Publication or Submission of Quotations Without Specified Information

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Reproposed rule.

**SUMMARY:** The Securities and Exchange Commission is reproposing for comment amendments to Rule 15c2–11 under the Securities Exchange Act of 1934 (Exchange Act). Rule 15c2–11 governs the publication of quotations for securities in a quotation medium other than a national securities exchange or Nasdaq. Also, we are reproposing a companion amendment to relocate in Rule 17a–4 under the Exchange Act the record retention requirement currently contained in Rule 15c2–11. The original proposal was issued in February 1998 in response to concerns about increased incidents of fraud and manipulation in over-the-counter (OTC) securities, which typically involve thinly-traded securities of thinly-capitalized issuers (*i.e.*, microcap securities).

The reproposed amendments are more limited than the initial proposal and focus the Rule on those securities the Commission believes are more likely to be prone to fraud and manipulation. The reproposal is part of the Commission's continuing efforts in regulatory, inspections, enforcement, and investor education areas that are key to deterring microcap fraud.

In addition, the reproposal will increase the information that broker-dealers must review before publishing quotations for non-reporting issuers' securities, and will ease the Rule's recordkeeping requirements when broker-dealers have electronic access to information about reporting issuers. Finally, we are giving guidance to broker-dealers on the scope of the review required by the Rule and providing examples of ''red flags'' that they should look for when reviewing issuer information.

**DATES:** Comments must be received on or before April 7, 1999.

**ADDRESSES:** Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Mail Stop 6–9, Washington, DC 20549. Comments may also be submitted