Manual of Publicly Available Telephone Interpretations

G. SECURITIES ACT FORMS

1. Securities Act Forms - WAIVERS

Requests for waivers of form requirements, which are only granted under very limited circumstances, are handled solely by (and should be directed to) the Division's Office of Chief Counsel.

F- Series Forms

2. Form F-6

Where ADSs presently registered on Form S-12 (the predecessor to current Form F-6) were subject to a stock split, a Form F-6 should be filed to amend the registration. Previously, an amended Form S-12 would have been filed. In the future, all amendments to Form S-12 should be made on Form F-6.

3. Form F-6; Rules 101(a) and 901(a) of Regulation S-T

Form F-6, which is used for Securities Act registration for depositary shares evidenced by American Depositary Receipts, does not need to be filed electronically even if the depositary is a mandated electronic filer.

4. **** Forms F-7, F-8, F-9, F-10, F-80; Exchange Act Rule 12b-11(d); Exchange Act Form 40-F; Rule 402(e) ****

Eligible Canadian issuers may rely on Securities Act Rule 402(e) or Exchange Act Rule 12b-11(d) to use typed, duplicated or facsimile versions of manual signatures in connection with Forms F-7, F-8, F-9, F-10, F-80 and 40-F, provided that the issuer complies with the requirements of those rules regarding retention of manual signatures and provision of copies thereof to the Commission or its staff upon request. See Cleary, Gottlieb, Steen & Hamilton (Aug. 13, 1996).

Form S-1

5. Form S-1

An issuer filed a registration statement on Form S-1. Immediately thereafter, a new chief financial officer was appointed by the issuer. Even though that individual had been employed by the issuer for only one week, the new CFO would be required to sign any amendments to the registration statement in the capacity as chief financial officer. See also Rule 471 of Regulation C.

6. Form S-1

A Form S-1 is proposed to be filed by a limited partnership. The general partner ("GP") consists of a general partnership comprised of two partners: one corporation and another general partnership. Pursuant to a management agreement, the corporation has the power to bind GP. For purposes of the issuer's signature requirement, GP must sign, and giving effect to GP's management agreement, an appropriate official of GP's corporate partner may sign for GP.

7. Form S-1; Rule 411

An issuer filing a post-effective amendment on Form S-1 for purposes of complying with Section 10(a)(3) may not provide the required financial statements by incorporation by reference to its Form 10-K. That procedure is not authorized by either Form S-1 or Rule 411.

8. Form S-1; Rule 411

A registrant filing a Form S-1 is including some information about a Form S-3 company in its prospectus, and proposes to incorporate this information by reference. This procedure is not authorized by Form S-1 or Rule 411, and there can be no incorporation by reference into a Form S-1 prospectus. If the information about the other company is material, it must be set forth in the prospectus in full.

9. Form S-1; Form S-2; Rule 415

Where Form S-1 or Form S-2 is used for a continuous offering under Rule 415, a post-effective amendment is necessary to meet the requirements of Section 10(a)(3), to reflect fundamental changes, or to disclose material changes in the plan of distribution. Other changes may be made by sticker. A post-effective amendment is required for updating because neither Form S-1 nor Form S-2 provides for incorporation by reference of Exchange Act reports after the effective date.

10. Form S-1; Form S-11

A registrant that controls and operates a resort (hotel, golf course and spa) is in a service industry rather than the real estate business. Accordingly, Form S-1 and not S-11 would be appropriate for its offering.

Form S-2

11. Form S-2

A registrant sought to register shares to be issued to shareholders of a company being liquidated in partial payment for certain assets of the company. Although the asset acquisition resembled a business combination in some respects, the shareholders of the company being liquidated had no decision to make other than to determine whether to take cash or securities from the registrant. Form S-2, which is not available for business combinations, could be used, since there was no business combination decision to be made by the security holders of the company being liquidated.

12. Form S-2

A savings association proposes to form a holding company. The savings association is subject to Section 12(i) of the Exchange Act and has filed reports with the Office of Thrift Supervision for over 36 months. Immediately upon formation of the holding company, the savings association plans a public offering of its debentures, convertible into common stock of the new holding company. Section 3(a)(5) will exempt the debentures from registration, but not the underlying common stock since the issuer of the common stock is not a savings association. The holding company wished to register the common stock on Form S-2 even though it had not been a reporting company for 36 months, as required by the form, contending that it was the successor to an issuer that met that requirement. Technically, however, the holding company would not become a successor issuer until the merger was effected, the same day that the offering was to begin. The holding company was informed that Form S-2 could be used, conditioned upon representations that the filing would be withdrawn if the merger was not consummated, and that no use would be made of the registration statement or prospectus until the merger became effective.

13. Form S-2

Issuers need not, but may, include a capitalization table in the prospectus for a registration statement on Form S-2.

14. Form S-2; Form S-1; Rule 415

Where Form S-1 or Form S-2 is used for a continuous offering under Rule 415, a post-effective amendment is necessary to meet the requirements of Section 10(a)(3), to reflect fundamental changes, or to disclose material changes in the plan of distribution. Other changes may be made by sticker. A post-effective amendment is required for updating because neither Form S-1 nor Form S-2 provides for incorporation by reference of Exchange Act reports after the effective date.

15. Form S-2, General Instruction I.

Form S-2 may be used for an exchange offer with the security holders of the issuer. The General Instructions to the form, however, prohibit its use for an exchange offer for securities of "another person."

16. Form S-2, General Instruction I.

An issuer held 60% of the common stock of another issuer. It intended to make an exchange offer for the remaining 40%. Form S-2 would not be available for such an offer.

17. Form S-2, General Instruction I.

Form S-2, which may be used for the registration of securities in any transaction other than an exchange offer, may not be used for registration in connection with a merger, other business combination or other transaction which in substance, if not in form, is equivalent to an exchange offer.

18. Form S-2, General Instruction I.F.

General Instruction I.F. to Form S-2 indicates, in part, that a successor issuer will be deemed to have met certain of the eligibility requirements for the use of Form S-2 if all of its predecessors met those conditions at the time of succession and the registrant has continued to do so since the succession. A prospective registrant was a corporation that was the successor to a real estate investment trust. At the time of succession, the trust was in default on certain indebtedness. Because this default had occurred since the end of the trust's most recent fiscal year, the trust would not have met General Instruction I.D. for the use of Form S-2. Since the predecessor at the time of succession would not have been eligible to use Form S-2, the conditions of General Instruction I.F. are not deemed to have been met and the successor issuer is not eligible to use Form S-2.

19. Form S-2, General Instruction I.F.

Two S-2 eligible companies are going to become subsidiaries of a holding company newly formed for that purpose. The new holding company will also be eligible to use Form S-2.

20. Form S-2, Item 11

The annual report delivery option of Item 11(a) may be used even if the issuer's annual report to security holders for purposes of Rule 14a-3 was a "10-K wrap around", i.e., consisted of a glossy cover and president's letter wrapped around the 10-K.

21. Form S-2, Item 11

A calendar year company files a registration statement on Form S-2, which will become effective in January. The registrant has elected to satisfy Item 11 of Form S-2 by complying with paragraph (a), which contemplates the delivery of recent annual and quarterly reports to security holders. For a calendar year company whose Form S-2 filing becomes effective in January, the appropriate annual report would be that for December 31st of the year before the fiscal year just completed (assuming that the annual report has not been filed for the fiscal year just completed); the appropriate Form 10-Q would be that for the quarter ended September 30 of the fiscal year ended just before the Form S-2 was declared effective.

22. Form S-2, Items 11 & 12

A registrant on Form S-2 proposed to deliver its annual report to recipients of its prospectus, but not to incorporate by reference all of the items specified by Item 12(a)(3) of Form S-2. With respect to those required items not incorporated by reference, the registrant proposed to set them forth in the body of the prospectus itself. Provided that the information set forth in the prospectus in lieu of incorporation by reference does not materially differ from the information set forth in the annual report (either in how up to date it is or the content), and the manner in which the division between incorporated information and information set forth is made does not create confusion for readers of the prospectus, the registrant may choose to incorporate some items specified in Item 12(a)(3) and set forth others.

23. Form S-2, Item 12; Rule 412

Certain issuers using Form S-2, who intend to deliver their annual report to shareholders along with the Form S-2 prospectus, wish to upgrade the description of business required by Item 12(a)(3) of the form. Where the annual report is delivered along with the Form S-2, the issuer

must incorporate the description of business from such report. An issuer that wishes to upgrade that description can include the new revised description in the Form S-2 prospectus, and rely on Rule 412 to supersede the description incorporated from the earlier annual report. Pursuant to Rule 412(b), the description in the Form S-2 prospectus may, but need not, state that it modifies or supersedes the statements in the incorporated description of business section.

24. Form S-2; Rule 415

If Form S-2 is used for a continuous offering, it must be updated by means of post-effective amendments since, unlike Form S-3, the form does not provide for incorporation by reference of subsequent periodic reports. For example, in an offering subject to Rule 415, an S-2 registrant proposed that in lieu of following the procedures for updating described in the undertakings of Item 512(a) of Regulation S-K, it be permitted to incorporate by reference future Exchange Act reports and to provide such reports to users of the prospectus. The Division staff informed counsel that since the registrant is an S-2 company, rather than an S-3, it is not permitted to utilize this procedure. Instead the issuer would be required to file a post-effective amendment each year to satisfy its Section 10(a)(3) updating requirement (See Item 512(a)(1)(i) of Regulation S-K). The quarterly results set forth in Form 10-Q could be included in the registration statement by sticker rather than post-effective amendment, so long as such information does not constitute a fundamental change in the information set forth or included in the registration statement.

Form S-2/Form S-3

25. Form S-2; Form S-3

Form S-2, in General Instruction I.C., requires that the registrant have filed all required material "... for a period of at least thirty-six calendar months preceding the filing of a registration statement on this Form ..." (underlining added). It also requires that the registrant "... has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement..." (underlining added). Similarly, Form S-3, in General Instruction I.A.3., requires that the registrant have "... filed all material required to be filed... for a period of at least twelve calendar months immediately preceding the filing of the registration statement on this Form; and ... filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement..." (underlining added).

For purposes of these eligibility requirements, a "calendar month" is a month beginning on the first day of the month and ending on the last day of that month. Hence, if a registrant were not timely on a Form 10-Q due on September 15, 1995, but was timely thereafter, it would first be eligible to use Form S-2 or Form S-3 on October 1, 1996.

26. Form S-2; Form S-3; Form S-4

Form S-2 and Form S-3 may be used for spin-offs if the companies qualify. (It should be noted, however, that most companies that are spun off are not reporting companies and, therefore, would not be eligible to use Form S-2 or Form S-3). The spin-off of shares of a reporting company does not constitute a business combination. (Although, if the spin-off is being voted on, a combined proxy statement/registration statement on Form S-4 may be used.) The Division staff does not interpret the "for cash" requirement of Form S-3 (General Instruction I.B.1.) as precluding the use of that Form, even though there will be no cash paid for the spun-off shares.

27. Form S-2, General Instruction I; Form S-3, General Instruction I.B.1.; Rule 415(a)(1)(viii)

Securities to be issued in connection with business combinations may be registered on a shelf filing pursuant to Rule 415(a)(l)(viii). While this section does not limit the Securities Act registration form used, not all forms are available for business combinations. In particular, Forms S-2 and S-3 are not available for business combinations of any kind - exchange offers, Rule 145(a) transactions, etc. General Instruction I. to Form S-2 states that the Form may be used for offerings of securities "in any transaction other than an exchange offer for securities of another person." This instruction is interpreted as prohibiting the use of the form not only for third party exchange offers but also for any other business combination, however structured. The "for cash" proviso in General Instruction I.B.1. of Form S-3 has a similar effect. See Note 14 to Release No. 33-6534 (May 9, 1984). Form S-2 or S-3 may be used for a secondary offering of shares which were originally received from the issuer in connection with a business combination, assuming it is a genuine secondary offering.

28. Form S-2, General Instruction I.C.; Form S-3, General Instruction I.A.3.

No waivers of the 36-month and 12-month reporting obligation for the availability of Form S-2 and Form S-3, respectively, will be granted. This position is taken even when the proposed registrant is only a few weeks short of the required period.

29. Form S-2, General Instruction I.C.; Form S-3, General Instruction I.A.3.

A registrant was an investment company listed on the Amex and filing Exchange Act reports as a Investment Company Act company. The registrant subsequently changed its business and became exempt from the Investment Company Act, although its securities continued to be listed on the Amex. The company sought to use Form S-2 or Form S-3. Because of important differences in the disclosure requirements for periodic reports of investment companies and non-investment companies, including the accounting presentation, the registrant's reporting history under the Investment Company Act could not be used in determining its eligibility to use Form S-2 and Form S-3.

30. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

A default by a subsidiary which occurred and was cured prior to the time it became a subsidiary would not disqualify the parent from using Form S-2 or Form S-3.

31. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

The materiality criterion in this eligibility requirement applies to defaults on indebtedness and on long-term lease rentals. It does not apply to failure to declare dividends or make sinking fund installments on preferred stock. (See Releases 33-6235 and 33-6331).

32. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

The omission to declare a dividend on non-cumulative preferred stock is not a payment failure disqualifying an issuer for use of Form S-2 or Form S-3 because no liability to pay the dividend arises under the terms of the non-cumulative preferred. This omission cannot be equated to a payment default on a debt instrument or capital lease. A declared but unpaid dividend on preferred stock, however, would disqualify the issuer for Form S-2 and Form S-3 use, as would the existence of accrued and unpaid dividends on cumulative preferred stock.

33. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

A default on a covenant not involving an "installment on indebtedness" does not disqualify a company from using Form S-2 or Form S-3. A default will only be disqualifying if it involves failure to pay principal or interest on a sinking fund installment.

34. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

Where a company and its creditors are having a dispute about whether there is a disqualifying default, the company must determine whether as a legal matter there is a default. Caution should be exercised in making such a determination because by filing the form the company is certifying that there is no such default.

35. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

If an installment has been missed, but the terms of the debt do not define a missed payment as a default until the creditors take some action, the form may be used if the company makes a determination that there is no default as a legal matter.

36. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

If a prospective default never occurs because the lenders have waived payment in advance of the due date, the form may be used.

37. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

If a disqualifying default occurs in one fiscal year and continues into the next, such continuing default does not prevent the form from being available after the year-end audit, assuming there is no new default.

38. Form S-2, General Instruction I.D.; Form S-3, General Instruction I.A.5.

A registrant inquired whether a waiver would be granted where there had been a default during the period, but the holders of the securities subsequently had waived the default. The Division staff indicated that, regardless of the fact that a disqualifying default is either cured or waived after it occurs, the form may not be used between the date of the default and the audit at the end of the fiscal year in which such default occurred.

39. Form S-3, General Instruction I.A.3.; Form S-2 General Instruction I.C.

For purposes of qualifying for the use of Form S-3 or Form S-2, the 12-month period or 36-month period for which a registrant must have been subject to the requirements of Sections 12 or 15(d), and filed certain required materials under Sections 13, 14 or 15(d), relates to the effective date of the registrant's Securities Act or Exchange Act registration statement that gave rise to the filing obligation. Thus, the date on which the registration statement was initially filed is not taken into consideration in computing the 12-month or 36-month period.

[FORM S-3 INTERPRETATIONS ARE SET FORTH IN SECTION H. BELOW.]

Form S-4

40. Form S-4

A bank holding company formation is not for the sole purpose of forming a bank holding company when the holding company proposes an acquisition of another bank immediately following the formation. SAB 50 would not be available and financial statements of both banks must be provided.

41. Form S-4

The annual report to shareholders delivered pursuant to Item 12(a) of Form S-4 must comply in all respects with the disclosure requirements set forth in Rule 14a-3 or Rule 14c-3. Waivers will not be given with respect to annual reports which may not fully comply with the specific requirements of Rule 14a-3 and 14c-3.

42. Form S-4

Form S-4 can be used to register securities to be issued in a merger transaction where the sole purpose of the transaction is to change the issuer's state of incorporation, and thus would not require registration under Rule 145. In this case the registrant, which was required to solicit proxies pursuant to Regulation 14A in any event, wished to use Form S-4 in order to issue registered shares to non-affiliate holders of restricted shares of the original corporation.

43. Form S-4

A company registers on Form S-4 shares to be issued in a Rule 145(a) transaction, together with shares to fund a successor employee benefit plan. A post-effective amendment to the Form S-4 is to be filed on Form S-8 containing a complete description of the plan. The registrant will also be allowed to file, as part of that amendment, a reoffer prospectus prepared in accordance with Part I of Form S-3 to be used by affiliates making sales of securities acquired under the employee benefit plan.

44. Form S-4

A domestic registrant on Form S-4 wished to present information about its foreign target pursuant to Item 15 of Form S-4 (i.e., as if the foreign issuer were Form S-3 eligible). The foreign issuer is not a foreign private issuer as defined in Rule 405 and thus is not eligible for the F- series of forms; since it is not incorporated in the U.S., it is not eligible for Form S-2 or Form S-3. The Division staff noted that the foreign issuer has been filing Exchange Act reports under the Form 10-K system for over 5 years, that it meets all Form S-3 eligibility requirements for domestic registrants except Instruction I.A.1., and that it would meet the requirements of Instruction I.A.5., but for the fact the it is not technically a foreign private issuer. Accordingly, the Division staff determined, for purposed of interpreting Item 15 of Form S-4 to waive General Instruction I.A.1. to Form S-3 for the foreign target.

45. Form S-4

In a merger transaction, holders of both the common stock and preferred stock of the company to be acquired will be required to vote on the transaction, but only the holders of the common stock will be issued securities of the acquiring company as a result of the merger. The acquiring

company, however, wishes to provide preferred shareholders an opportunity to exchange their preferred stock for securities of the acquiring company. Technically, this second stage exchange offer is not permitted on Form S-4 because it is not a Rule 145(a) transaction. Nevertheless, in light of the fact that both classes of security holders will be required to vote and the fact that Form S-4 appears to provide disclosure appropriate for such a transaction and that to require a second registration statement would have required delivery of essentially duplicative disclosure to the preferred stockholders, it was decided not to raise an objection in this case to the use of a single S-4 registration statement covering both parts of the offering. Had the preferred stock been registered under Section 12 of the Exchange Act, compliance with Regulations 14D and 14E would have been required.

46. Form S-4

A registrant included in its Form S-4 registration statement securities to be issued subsequent to the merger, in connection with a dividend reinvestment plan and an employee benefit plan. After the merger, the registrant wishes to amend the registration statement for use by the two plans, providing a separate prospectus for each. The registrant was advised that it could file a post-effective amendment to the Form S-4 (on Form S-8) for the employee benefit plan, and a second post-effective amendment to the Form S-4 (on Form S-3) to cover the dividend reinvestment plan.

47. Form S-4

A registrant filing a Form S-4 registration statement in connection with an acquisition sought to include shares which had previously been issued pursuant to Section 4(2) to certain officers and directors of the company to be acquired. The purpose was to facilitate resales by such persons. The Division staff advised that those shares could not be registered on Form S-4, because they were not to be issued in connection with the Rule 145 transaction.

48. Form S-4

An issuer intends to use Form S-4 to register common stock to be issued in a merger transaction. The merger agreement has a contingency clause, which may require the payment of additional consideration in the form of notes to the shareholders of the acquired company two years after the merger, if the price of the issuer's stock should decline. The contingent notes should be included in the Form S-4, inasmuch as they are also being offered at the time of the merger vote.

49. Form S-4

Where the number of shares to be issued in a merger transaction are based upon a formula that will not be applied until the closing date for the transaction, the issuer should register sufficient shares to cover the maximum number (or a dollar amount sufficient to cover the maximum dollar amount) that could be issued under the formula.

50. Form S-4; Form S-11; Industry Guide 5

The Division staff was asked whether a real estate limited partnership filing an acquisition shelf on Form S-4 for the purpose of acquiring properties could rely on Undertaking 20.D. in Industry Guide 5. It was decided that: (1) no objection would be made to the use of Form S-4, although the acquisition of properties rather than securities is not explicitly provided for in the form; (2) whether Form S-4 or Form S-11 is used, the 20.D. undertaking is inappropriate and the procedure

set forth for reflecting acquisitions should not be used. The undertaking is only applicable to "blind pool" offerings for cash.

51. Form S-4, General Instruction A.2.(1)

The requirement that the prospectus be sent to security holders 20 business days in advance of the vote if incorporation by reference is used applies to both the acquired company and the acquiring company. In most cases, only the acquired company's security holders will be voting, but if both companies are subjecting the transaction to a vote, each company's security holders must receive the prospectus at least 20 business days in advance of that company's meeting.

52. Form S-4, General Instruction G

General Instruction G to Form S-4, permitting automatic effectiveness of certain bank holding company formation filings, is limited by the terms of Instruction G.l. to the issuance of common stock of the holding company in exchange for common stock of the bank. Nevertheless, Instruction G will also be available when common and preferred stock are being issued, on a share for share basis, to holders of existing common and preferred stock of the bank. Like SAB 50, General Instruction G is intended to be available when the holding company formation does not involve a change to the existing capital structure.

53. Form S-4, General Instruction J.

Securities Act Rule 457(o) may be used to register securities by aggregate dollar amount on Form S-4 even if the securities registered are all of a single class of securities. General Instruction J. is not intended to limit the application of Rule 457(o) to Form S-4 only where securities of more than one class are being registered.

54. Form S-4; Rule 145

A registration statement on Form S-4 is filed to register stock to be issued in the acquisition of a non-reporting company by a reporting company. Only the non-reporting company will solicit proxies. Although this solicitation is not subject to Regulation 14A, it nevertheless will involve a "sale" under Rule 145, which cannot be consummated without an effective registration statement. Accordingly, a proxy card can be sent only with the Rule 424(b) prospectus, not with the red herring.

55. Form S-4; Rule 414

A Form S-4 registration statement will be filed to convert an existing corporation into a real estate investment trust that will have the same assets and management as its predecessor. Because of certain provisions of the tax law applicable to REITs, the new trust will not be created until after the Form S-4 has become effective. The company sought advice as to who would be the registrant for the Form S-4 and who should sign the registration statement. Using Rule 414 as a model, the Division staff suggested that the existing company execute and file the registration statement. At the time the trust is formed, it should file a post-effective amendment adopting the registration statement.

56. ** Form S-4; Rule 14a-6 **

A registrant can use its S-4 proxy statement/prospectus as a red herring. Since 1992, registrants have been able to solicit immediately upon filing of a preliminary proxy statement (absent invocation of confidential treatment under Rule 14a-6(e)(2)) rather than waiting 10 days pursuant to Rule 14a-6(a), so long as the proxy card (whether in preliminary or definitive form) is not circulated. Because a vote on the transaction described would amount to an investment decision with respect to the securities being registered, no proxy card could be sent until after the registration statement became effective and the final prospectus was furnished.

57. ** Form S-4; Rule 14a-6 **

An issuer filed a registration statement on Form S-4 that contained its proxy material. After the effective date of the registration statement, the issuer decided to mail an additional letter to shareholders in connection with the transaction. This letter is filed as additional soliciting material pursuant to Rule 14a-6 upon first use.

58. Form S-4; Item 404 of Regulation S-K

Form S-4 permits the incorporation by reference of Item 404 information from the Form 10-K of a company meeting the requirements for use of Form S-2 or Form S-3 (see Items 17(b), 18(c)). If such information is incorporated by reference, it is not necessary to furnish the three years of information that would ordinarily be required in a Securities Act registration statement (Instruction 2 to Item 404). This is consistent with Form S-2 and Form S-3, which also permit the furnishing of Item 404 information by incorporation by reference from Form 10-K, and therefore only include such information for the latest fiscal year.

59. Form S-4; Item 601 of Regulation S-K

Two companies propose a joint Form S-4 registration statement for a stock-for-assets acquisition. Although the company to be acquired is not the registrant, it should file as exhibits any contracts or other documents that would be material to the new entity.

60. Form S-4; Form S-2; Form S-3

Form S-2 and Form S-3 may be used for spin-offs if the companies qualify. (It should be noted, however, that most companies that are spun off are not reporting companies and, therefore, would not be eligible to use Form S-2 or Form S-3). The spin-off of shares of a reporting company does not constitute a business combination. (Although, if the spin-off is being voted on, a combined proxy statement/registration statement on Form S-4 may be used.) The Division staff does not interpret the "for cash" requirement of Form S-3 (General Instruction I.B.1.) as precluding the use of that Form, even though there will be no cash paid for the spun-off shares.

Form S-8

61. Form S-8

As a general matter, once an option becomes exercisable, an offer is made pursuant to Section 5. Further, if an option becomes exercisable within one year, it is deemed to be immediately exercisable. Therefore, a registration statement must be on file before the option is exercisable for the entire transaction to be a public offering. A later filing of the registration statement would

convert a private offering into a public offering, which is inconsistent with Section 5. The only exception to this position is with respect to Form S-8, where shares underlying the options are permitted to be registered at any time before the option is exercised, without regard to when the option became exercisable. This departure from the analysis set forth above is based solely on a policy determination to treat Form S-8 issuances more liberally, based on the employer/employee relationship.

62. Form S-8

A cash settlement only of SARs is not subject to Form S-8. However, when an option and an SAR are granted in tandem and the holder must choose between either exercising the option or the SAR, registration of the shares underlying the option is required.

63. Form S-8

Documents constituting the existing Section 10(a)(3) prospectus should be delivered concurrently to new plan participants. For example, if the information to be provided pursuant to Items 1 and 2 of the Form S-8 is contained in more than one document, those documents should be delivered concurrently to new plan participants.

64. Form S-8

Pursuant to Rule 428(b)(1)(iii), all documents constituting part of the prospectus must be legended. However, the Division staff views the legending requirement to apply only to those portions of the prospectus providing Item 1 and Item 2 information, not Item 3 information. Therefore, the company's Form 10-K would not be required to be legended.

65. Form S-8

If a plan currently intends to acquire all shares to be distributed pursuant to the Form S-8 through open market purchases and subsequently decides to purchase shares directly from the company, the Form S-8 may be amended at that subsequent time to include an opinion of counsel.

66. Form S-8

A company may register two plans on the same registration statement. The company would file the registration statement with a cover page identifying both plans and the amount of securities going to each. Parts I and II should be written to present clearly the required information.

67. Form S-8

Item 512(a) undertakings are meant to apply only to those portions of the prospectus actually contained in the registration statement. This would consist only of Item 3 information.

68. ** Form S-8 **

If only plan interests are being registered, an indeterminate amount may be registered pursuant to Rule 416(c) and there would be no filing fee.

69. Form S-8

All Rule 428(b) documents do not need to be described pursuant to Item 2 of the Form S-8. However, the disclosure pursuant to Item 2 should be as clear as possible.

70. Form S-8

The Boulevard Bancorp letter (Oct. 6, 1987) is no longer applicable for warrants that were transferable based on the changes to General Instruction A to Form S-8 clarifying that the form may be used, in certain circumstances, only for non-transferable securities.

71. Form S-8

A rescission offer could not be conducted on Form S-8 since this kind of offer is outside the scope of the form. The company would have to use a form otherwise available.

72. Form S-8

Founders of a company intended to issue options on the common stock they hold. The transaction would be structured as part of an employee benefit plan. The Board would authorize the issuance of the options and the founders would make assurances that they would not otherwise pledge or encumber the underlying common shares. Form S-8 would not be the appropriate form for registration because issuance of the shares underlying the options would involve a secondary offering by the founders.

73. Form S-8

The Division staff was asked whether Form S-8 would be available for the registration of shares underlying options to be issued to independent distributors of pharmaceutical products. Counsel represented that the individual distributors would be doing this kind of work only for the issuer and that the issuer would keep them informed through distribution of Exchange Act reports. However, the nature of the services provided to the issuer would be Amway-style pyramid "network distribution," which would not necessarily be the full-time employment of the distributors. On these facts, use of Form S-8 was not permitted.

74. Form S-8

A stock option plan registered on Form S-8 involved the issuance of transferable options. The registration statement covered only the issuance of the common stock on the exercise of the options. It was asked whether a non-employee, who had acquired an option from an employee, could exercise that option under the Form S-8 registration statement. The issuer was advised that while the plan could continue to be registered on Form S-8, non-employees could not exercise options under that registration statement, since the form is available only for offerings to employees. Similarly, former employees would not be able to exercise transferable options under the Form S-8. But see Merrill Lynch & Co., Inc. (May 16, 1996) (allowing use of Form S-8 in limited circumstances for the exercise of certain transferable stock options that had never been transferred).

75. **** Form S-8; Form S-3 ****

Although Form S-8 is not available for the exercise of transferable options by non-employee transferees, issuers that qualify to register a primary offering on Form S-3 may file a Form S-3 registration statement for that purpose. Issuers that do not qualify to register a primary offering on Form S-3 but qualify to register secondary offerings on Form S-3 may register to cover resales by such transferees that have exercised. The names of existing transferees should be set forth in the initial Form S-3 at the time of effectiveness, along with a generic description of the selling shareholder group. Each subsequent transferee would be required to be named as a selling shareholder, but the names of family member and family entity transferees may be added post-effectively through filing a prospectus supplement.

76. Form S-8, General Instruction A.1.

The general requirements of Form S-8 only require that all reports required to be filed with the Commission during the preceding 12 months have been filed, not that such reports have been timely filed.

77. Form S-8, General Instruction A.1.(a)

Notwithstanding the definition of employee in Rule 405, a director is considered to be an employee for purposes of Form S-8. See the definition of "employee benefit plan" in Rule 405.

78. Form S-8, General Instruction A.2.; Form 11-K

An issuer that has maintained a 401(k) employee savings plan for several years has decided to add its common stock as an investment option in the plan. Under the Division's Diasonics position (Dec. 29, 1982), both the plan interests and the employer stock will be subject to the Securities Act. Prior to the addition of the employer stock, the plan interests would not be regarded as securities.

General Instruction A.2. to Form S-8 will ordinarily require a plan that had been in existence more than 90 days to file a Form 11-K contemporaneously with the registration of the offering of plan interests and employer securities. Because the interests were not securities before adoption of the amendment adding employer securities, the initial Form 11-K will not be required.

Form S-8 was amended in Release No. 33-6383 to remove the requirement for the filing of a Form 11-K concurrently with the Form S-8 in those situations where the benefit plan being registered is a new plan and there have been no prior investments.

79. Form S-8

Deregistration of an employee benefit plan registered on Form S-8 requires nothing more than a cover page, a one paragraph statement indicating the number of shares deregistered and the reason for deregistration, and a signature page.

80. Form S-8

A recently acquired company had a Form S-8 for an open market stock purchase plan under which company contributions were used to purchase company stock for the participants. The new parent company wishes to continue the plan. The Division staff took the position that since the acquired company has become the subsidiary of another issuer, the new parent must file a

new Form S-8 registration statement covering its own shares of stock which will now be purchased under the plan.

81. Form S-8

Item 3-19(d) of Regulation S-X requires foreign private issuers to provide a balance sheet as of an interim date within 10 months of the effective date. Item 3-19(e) extends this period to one year for certain offerings such as rights offerings and dividend reinvestment plans. The Division staff expressed the view that the extension provided for in 3-19(e) also would be available with respect to offerings by foreign private issuers on Form S-8.

82. Form S-8

Pursuant to Item 602 of Regulation S-K, specimen copies of forms relating to the rights of employee benefit plan participants as participants (rather than as security holders) are not required to be filed as exhibits to a Form S-8 registration statement.

83. Form S-8

Where the shares of Company A and Company B are paired for trading and issuance, A and B may file a registration statement for B's stock option plan on Form S-8 which will be signed by both A and B and will contain information about both companies.

84. Form S-8

A Form S-8 registration statement is being filed for an employee benefit plan that is available only to Canadian employees. Under the circumstances, the Division staff determined that the discussion and legal opinion relating to U.S. tax aspects of the plan would not be required, but that an opinion of Canadian counsel on the Canadian tax treatment should be provided.

85. Form S-8

When a Form S-8 registration statement contains a resale prospectus prepared in accordance with Part I of Form S-3, the registration statement is, nonetheless, simply a registration statement on Form S-8 with a separate reoffer prospectus. Accordingly, if a registrant must update such a Form S-8 to furnish the Item 512 of Regulation S-K undertakings, that updating may be accomplished through the procedures applicable to Form S-8 registration statements.

86. Form S-8

A resale prospectus prepared in accordance with Part I of Form S-3 may not be incorporated by reference into the Form S-8, it must be physically present.

87. Form S-8

An issuer is preparing to register additional shares of employer stock for its employee thrift plan. The plan trustee, an affiliate, participates in the issuer's dividend reinvestment plan which is registered on Form S-3. In calculating the number of shares remaining available under the S-8, the issuer need not subtract the number of shares distributed through the registered DRIP. This

position is based on the view that the DRIP shares were taken on behalf of thrift plan participants, so that the trustee's distribution of such shares should not require further registration.

88. Form S-8

A company's 401(k) plan provided for an automatic company contribution of 1% of the employee's salary ("automatic contribution"), employee contributions up to 10% of the employee's salary ("employee contribution") and a matching contribution by the company of the employee contribution up to 5% of the employee's salary ("matching contribution"). The investment options for the 401(k) plan were such that Securities Act registration was required. The employer would not have to pay a fee for the automatic contribution since it was made without regard to employee contributions. A fee would be paid with respect to the employee contributions and the matching contributions.

89. Form S-8

Company A wishes to register a new employee benefit plan on Form S-8. Company A, however, wishes to use the filing fee paid on the remaining unsold shares of common stock that were registered under its old employee benefit plan on a previously filed Form S-8. While Rule 429 normally would be available for carrying forward a filing fee, it is unavailable for use with a Form S-8 since no prospectus is filed (see Release 33-6867). Instruction E to Form S-8, however, allows a company to increase the number of shares available under an existing plan. In this case, Company A should post-effectively amend the old Form S-8 to discuss the change in plans and file a new Form S-8 for the new plan with a note under instruction E stating the number of shares being carried forward from the old plan and the associated filing fee paid with the registration of those shares.

90. Form S-8

Company A has two employee benefit plans registered under two separate Forms S-8. Plan A applies to officers and directors and Plan B applies to salary and hourly employees. Company A wishes to remove the salary employees from Plan B and add them to Plan A. Plan A then would apply to officers, directors and salary employees, while Plan B would apply only to hourly employees. The number of shares originally registered for Plan A would be insufficient for the additional salary employees and the number of shares registered for Plan B would exceed the number needed of hourly employees. Company A wishes to move some of the shares from Plan B to Plan A. Company A should file a new Form S-8 under instruction E of S-8 for Plan A. That new Form S-8 should register at least one share, and in a footnote to the fee table Company A should disclose the number of shares it is moving from the Plan B Form S-8 and the previously paid filing fee associated with the registration of those shares. Company A also should file a post-effective amendment to the Plan B Form S-8 noting the removal of salary employees from Plan B and the number of shares moved to the newly filed Form S-8.

91. Form S-8, General Instruction C.

This instruction provides for preparation of a reoffer prospectus in accordance with the requirements of Part I of Form S-3. Since Form S-8 may be used by any registrant that, immediately prior to the time of filing a registration statement, is subject to the requirement to file reports pursuant to Section 13 or 15(d) of the Exchange Act, a registrant may not have filed its first annual report on Form 10-K at the time the Form S-8 is filed. With respect to its reoffer prospectus, the Division staff concluded that such a registrant may incorporate by reference to its Securities Act registration statement to satisfy the information requirements of Form S-3 (otherwise required to be incorporated from Exchange Act reports). Such a registrant must,

however, separately evaluate whether or not the information so incorporated meets the requirements of Section 10(a) (e.g. whether it is current, meets the financial requirements, etc.).

92. Form S-8, General Instruction C

This instruction provides that if the registrant, at the time of filing, does not satisfy the registrant requirements for use of Form S-3 or Form F-3, the amount of both control and restricted securities to be reoffered by means of the reoffer prospectus by each person, and any other person with whom such person is acting in concert for the purpose of selling securities of the registrant, shall be limited during any three-month period to the amount specified in Rule 144(e). This limitation is strictly a limitation on the number of securities to be resold pursuant to the registration statement, and does not require aggregation of such securities with securities to be sold by the same person pursuant to Rule 144.

93. Form S-8, General Instruction C.2.(b)

The amount of securities registered for resale by individual officers and directors of an issuer may exceed the three-month volume limitation specified in Rule 144(e), provided that resales are monitored so that actual sales by such individuals during a three-month period do not exceed such volume limitations.

94. Form S-8, General Instruction C.

Shares issued in reliance upon Rule 701 constitute shares issuable under a plan for purposes of determining securities that can be included in a resale prospectus.

95. Form S-8, General Instruction C.

The provisions of General Instruction C of Form S-8 applicable to resale prospectuses do not require that affiliates have a present intention to sell the securities acquired under the Form S-8 in order to have them included in the resale prospectus.

96. Form S-8, General Instruction C.; Rule 429

A resale prospectus filed under cover of Form S-8 registers "restricted" or "control" shares. Rule 429 may be used to update that prospectus if a new Form S-8 is filed solely for the purpose of registering additional shares for resale pursuant to the reoffer prospectus with regard to the same plan.

97. Form S-8, General Instruction E

A company with a plan registered prior to July 13, 1990 that wants to register additional shares for that plan would follow General Instruction E and do one of the following in the new registration statement: (1) incorporate the entire prior registration statement by reference; (2) incorporate the entire registration statement by reference with the exception of certain specified portions; or (3) incorporate only specified portions of the prior registration statement.

98. Form S-8, Item 3

An issuer that wishes to incorporate by reference financial statements from Form 10-K may include the accountant's consent to such incorporation either in the Form 10-K or in the registration statement.

99. Form S-8, Item 3(c); Form S-3, Item 12

These forms require incorporation by reference of the description of securities of Section 12 companies that is contained in a registration statement filed under the Exchange Act. Where it is no longer deemed desirable or possible to incorporate that registration statement (because of the length of time that has passed or other events that have occurred since it was filed), a Form 8-K should be filed containing the description, and that Form 8-K should be incorporated by reference.

100. Form S-8, Item 8(b)

Item 8(b) permits registrants, in lieu of filing an opinion of counsel concerning compliance with the requirements of ERISA or a determination letter with the IRS that the plan is qualified under Section 401 of the IRC (see Item 601(b)(5)(ii) and (iii) of Regulation S-K), to undertake to submit a plan or amendment to the IRS in a timely manner and make all changes required by the IRS in order to qualify the plan.

Prior to seeking a determination letter, and in order to avoid certain sanctions for plan "defects" under the IRC, a registrant wished to voluntarily contact the IRS under its "Closing Agreement Program" ("CAP," and when done voluntarily, a "Walk-in CAP") to resolve the "defects."

The registrant inquired as to whether they would be in compliance with the requirement for timely submission of the plan or amendment to the IRS if they filed the Form S-8 but participated in the Walk-in Cap (estimated to take 3-6 months) prior to seeking the IRS determination letter. The staff concluded, in part on the recognition in Securities Act Rel. 6867 of delays inherent in the determination letter process, that as long as the registrant was diligently and in good faith participating in this Walk-in CAP program, that such participation prior to the submission of the plan or amendment for a determination letter would not render the submission "untimely" for purposes of Item 8(b) of Form S-8.

101. **** Form S-8, Instruction 1 Following Signature Section ****

Securities Act Release Number 6360 (June 1989) provides guidance as to who is an "authorized representative" of a foreign person. A shell corporation may not serve as the authorized representative.

102. Form S-8; Rule 415; Item 512 of Regulation S-K

A registration statement on Form S-8, covered by Rule 415, must include all applicable undertakings in Item 512 of Regulation S-K, including specifically those in Items 512(a), (b) and (h).

103. Form S-8; Rule 428

Rule 428(b)(2) requires the registrant to deliver, along with the documents constituting the Rule 428 prospectus, one of: the latest Rule 14a-3(b) annual report, the latest 10-K, or the latest Rule

424(b) prospectus. An issuer that changed its fiscal year filed a six-month transition report on Form 10-K subsequent to its latest annual report on Form 10-K. Where such issuer is relying on the Rule 428(b) 10-K delivery alternative, it must deliver both the latest annual report on Form 10-K and the transition report on Form 10-K in order to satisfy the Rule 428(b) requirement.

104. Form S-8; Rule 436

A registrant filing on Form S-8 incorporated a Form 10-K that contained its 1995 financial statements certified by one accounting firm, and its 1993 and 1994 financial statements certified by a different accounting firm. Rule 436 would require the filing of the consents of both accounting firms for purposes of the Form S-8 registration statement.

105. Form S-8; Rule 457(h)

Rule 457(h) states that if the exercise price of the options is not known in the case of a stock option plan, the fee should be based upon the price of the securities of the same class. Release No. 33-6867 clarifies that this refers to securities of the same class as those securities being registered.

106. Form S-8; Rule 457(h)(3)

A registrant wishing to add a resale prospectus with respect to control securities that were previously registered on Form S-8 may do so by post-effective amendment. No calculation of registration fee table would be included since securities are not being registered by post-effective amendment and, pursuant to Rule 457(h)(3), no fee need be paid for resales where a fee is paid in connection with the registration of such securities for sale to the employees.

107. Form S-8

In its effective Form S-8, a company registered 500,000 shares for sale by the company pursuant to an option plan, and 1,000 previously unregistered shares for resale on a resale prospectus pursuant to General Instruction C to Form S-8. The company may not rely on General Instruction C.3.(a) (which applies only to control securities and allows the addition of persons to the resale prospectus list of selling shareholders by means of a post-effective amendment or Rule 424(b) prospectus supplement) to shift any of the 500,000 shares registered on the primary portion to the resale prospectus since to do so would amount to registering additional securities by means of a post-effective amendment.

108. Form S-8; Form S-3

Because of the wording contained both in Form S-8 and Form S-3 with regard to incorporation by reference of the company's registration statement under Section 12 of the Exchange Act, it is not clear whether any amendment filed for the purpose of updating such registration would automatically be incorporated perpetually into the Form S-8. Because of this, a Form 8-K containing the updated information should be filed as well, thereby ensuring its incorporation into the Form S-8.

109. Form S-8; Form S-3

While the Skadden letter (Re: Registration of Rights Issuable Pursuant to Stockholder Rights Plans (January 7, 1987)) provides that the existence of shareholder right plans may be reflected in Rule 424(c) prospectus supplements to effective registration statements on Form S-3 and Form S-8 pursuant to which sales are still being made, if a company has an existing rights plan and is registering shares on a new registration statement, the rights should be registered on the new registration statement as a separate security.

110. Form S-8; Form S-3

A registrant with an obligation to make matching cash contributions to its profit sharing/401(k) plan sought to contribute shares of its common stock to the plan and then register those shares for resale by the plan's trustee. The proceeds from the sale of the shares were to be used to fund the registrant's obligations under the plan. The registrant asked whether the trustee's resales could be registered on either Form S-3 or S-8. The Division staff advised that use of the Form S-8 was inappropriate because the offering was not for compensatory purposes but rather to satisfy the registrant's own contractual obligations under the plan. Since the offering appeared to be one on behalf of the registrant, and the registrant was not eligible to use Form S-3 for primary offerings, use of that form was inappropriate as well.

Form S-11

111. Form S-11

A real estate company that normally would file on Form S-11 may use Form S-2 or Form S-3 if it meets the issuer requirements for those forms. However, the Division staff, as always, reserves the right to require additional disclosure (of the Form S-11 variety), where appropriate.

112. Form S-11; Rule 415

The registrant filed a registration statement on Form S-11 relating to a "shelf" offering of mortgage backed bonds to be issued in series. The registrant was informed that it would not be necessary to file post-effective amendments and supplemental indentures each time a new series of bonds was to be issued. The response was conditioned upon two factors:

1. A basic form of supplemental indenture including everything but the collateral for a particular series is filed and reviewed at the time the registration is declared effective and the basic indenture is qualified; and

2. The registrant files a prospectus supplement in sticker form describing the issuance of the series and the collateral therefore.

This position is consistent with Instruction 1 to Item 601(a) of Regulation S-K. Where a registrant does not satisfy these conditions, supplemental indentures and amended underwriting agreements may only be filed by post-effective amendment and not as exhibits to a Form 8-K. The reason is that Form S-11 does not permit incorporation by reference to subsequently filed Exchange Act reports, such as a Form 8-K.

113. Form S-11; Form S-1

A registrant that controls and operates a resort (hotel, golf course and spa) is in a service industry rather than the real estate business. Accordingly, Form S-1 and not S-11 would be appropriate for its offering.

114. Form S-11; Form S-3

Where the parent of the issuer of securities to be registered on Form S-11 is also the guarantor of certain obligations on those securities, and the parent meets the eligibility requirements for Form S-3, the information concerning the guaranteeing parent in the Form S-11 registration statement may be provided in accordance with the disclosure requirements of Form S-3.

115. Form S-11; Form S-4; Industry Guide 5

The Division staff was asked whether a real estate limited partnership filing an acquisition shelf on Form S-4 for the purpose of acquiring properties could rely on Undertaking 20.D. in Industry Guide 5. It was decided that: (1) no objection would be made to the use of Form S-4, although the acquisition of properties rather than securities is not explicitly provided for in the form; (2) whether Form S-4 or Form S-11 is used, the 20.D. undertaking is inappropriate and the procedure set forth for reflecting acquisitions should not be used. The undertaking is only applicable to "blind pool" offerings for cash.

Form 144

116. ** Form 144; Rule 144(h) **

A distributee from a partnership who is required to aggregate its sales with those of other distributees for a one-year period need not file a Form 144 if such distributee sells no more than 500 shares or shares with a market value not exceeding $10,000 in any three-month period, notwithstanding sales made by other distributees.

117. Form 144; Rule 144(h)

If a person who has filed a Form 144 does not sell the securities referred to therein, no amendment reflecting this fact need be filed.

118. Form 144; Rule 144(h)

A subsidiary bank, acting in its fiduciary capacity, sells unrestricted shares of its holding company parent for an unaffiliated trust account. Form 144 need not be filed solely because of the bank's involvement, because the bank is not making a sale for its own account.

119. Form 144; Rule 144(h)

A Form 144 need not be amended to reflect (1) a company's listing on the New York Stock Exchange or (2) a stock split.

120. Form 144; Rule 144(h)

A Form 144, filed on behalf of a selling security holder by an attorney in fact, should be accompanied by a signed copy of the power of attorney.

121. Form 144; Rule 144(h)

The holder of restricted securities proposes to make Rule 144 sales of both common stock and securities convertible into common stock. For purposes of determining whether the 500 unit or $10,000 condition to filing Form 144 has been met, the convertible securities should be regarded as having been converted into the common stock in the same manner as provided by Rule 144(e)(3)(i).

122. Form 144; Rule 144(h)

After a seller's filing on Form 144, the issuer declares a stock split. No new filing is required within the three-month period to sell the entire number of shares on a post-split basis the shares for which the seller had originally filed.

123. Form 144; Rule 144(h)

Amending Form 144 to reflect a change in the broker does not require the calculation of a new volume limitation based on trading.

124. Form 144; Rule 144(h)

A person who files a Form 144 indicating that it may sell shares through either of two brokers need not allocate a specific number of shares to each broker on the form.

125. Form 144; Rule 144(h)

A holder of restricted securities files a notice on Form 144 reporting the proposed sale of less than the full amount of securities that could be sold under the volume tests of Rule 144(e). During the same three-month period, the holder determines to make further Rule 144 sales in an amount that, taken together with the original sales, would not exceed the maximum number of securities that could have been sold at the time of the notice. By filing an amendment to the Form 144, the holder can proceed with the additional sales.

126. Form 144; Rule 144(h)

In a situation where sales under Rule 144 are required to be aggregated for purposes of Paragraph (e) of the rule, the de minimis exemption of Paragraph (h) (for filing Form 144) nonetheless applies to each individual seller.

127. Form 144; Rule 144(h)

When Rule 144(h) requires a person to file Form 144, no waiting period is required between the time the person places an order with a broker and the broker executes so long as the person concurrently with giving the order transmits the form to the Commission and the principal exchange on which the securities are admitted.

Small Business Issuer Forms

128. Form SB-2

On the registration fee box on the cover of Form SB-2, the box which says "Dollar Amount to be Registered" should say "Number of Units/Shares to be Registered."

129. Form SB-2

Items 15 and 19 of Form SB-2 both ask for Item 404 of Regulation S-B information. Issuers need only provide the information required by Item 404(d) of Regulation S-B in connection with Item 15.

130. Form SB-2

Consistent with the interpretation for purposes of Form S-3, the "for cash" limitation in Form SB-2 should not be read literally, but should be read to prohibit exchange transactions and business combination transactions. As such, Form SB-2 is available, e.g., for the registration of securities underlying warrants.

131. Form SB-2

Form SB-2 may be used to register the offer and sale of securities pursuant to a dividend reinvestment plan.

132. Form SB-2

Form SB-2 may be used for rescission offers, notwithstanding the "for cash" limitation on the availability of the form. [Note: Form S-18 was used for rescission offers prior to its repeal, even though it was also "for cash" limited.]

133. Form SB-2; Rule 415

Form SB-2 is available for Rule 415 offerings. The omission of the Rule 415 box on the cover page of the form does not mean that Rule 415 is not available. Rather, the issuer should add a box to its form.

Form SR

134. Form SR

The reporting of use of proceeds on Form SR requires the reporting of actual expenditures of the funds. Merely earmarking funds for future use should not be reported.

135. Form SR

If the only warrants in an offering were issued to underwriters as compensation, and if the proceeds from the exercise of the warrants will be de minimis with respect to the overall proceeds,

the Division staff may deem the Form SR filing obligations to be complete. Ordinarily, however, when purchase warrants remain outstanding, an offering is ongoing for purposes of filing from Form SRs.

136. Form SR; Rule 463

If a registrant's first filing under the Securities Act is a secondary offering, no Form SR need be filed since there is no use of proceeds. However, such a secondary offering would not constitute "the first registration statement filed under the Act by an issuer" for purposes of Rule 463. Accordingly, the first primary Securities Act offering by that registrant would necessitate a Form SR.

137. Form SR; Rule 463

Form SR is required to be filed within 10 days of the end of the three-month period following the effective date even if the registration statement covered a best-efforts offering that has not closed on the due date for the form.

138. Form SR; Rule 463(d)(3)

On the same registration statement, in its initial public offering, a company registered X shares for sale to the public and Y shares for issuance pursuant to employee benefit plans. The Division staff agreed with the company's analysis that it need file Form SR only for the shares sold to the public, and could omit Form SRs relating to the employee benefit plan shares in reliance on 463(d)(3). The Division staff's response was premised on the representation that the employee benefit plan shares were originally registered for that purpose; had it been a matter of converting shares originally registered for sale to the public that remained unsold to the employee benefit purpose, this position would not apply.