

THE ASSOCIATION OF THE BAR
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SPECIAL COMMITTEE ON
MERGERS, ACQUISITIONS AND CORPORATE CONTROL CONTESTS

June 11, 2004

Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549
Attn: Jonathan G. Katz, Secretary

Via e-mail: rule-comments@sec.gov

Re: Proposed Rule: Use of Form S-8 and Form 8-K by Shell Companies
(Release Nos. 33-8407; 34-49566; File No. S7-19-04; RIN 3235-AH88)

Ladies and Gentlemen:

This letter is submitted on behalf of the Association of the Bar of the City of New York's Special Committee on Mergers, Acquisitions and Corporate Control Contests (the "Committee") in response to the Commission's request for comments regarding the use of Registration Statement on Form S-8 by shell companies.

We very much appreciate the opportunity to comment on the proposed rule. We understand that the Commission is concerned about the use of Form S-8 by shell companies seeking to circumvent the registration and prospectus delivery requirements of the Securities Act. However, we are concerned that the proposed rules would have the unintended effect of restricting liquidity for shareholders in connection with bona-fide merger and spin-off transactions, and therefore propose that shell companies established in connection with such transactions be exempt from the proposed rules.

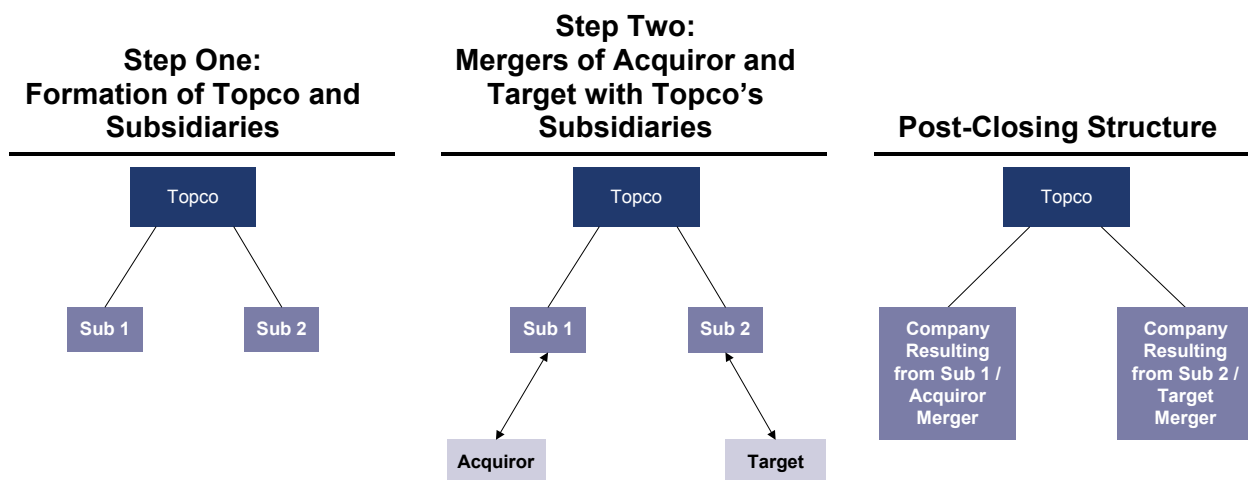
Mergers

In public company M&A transactions, one of the companies involved in the transaction (the "Continuing Entity") typically will file a Registration Statement on Form S-8 to register shares of common stock that may become issuable pursuant to employee benefit plans of the other company involved in the transaction (the "Target Entity").

The Form S-8 is typically filed prior to the closing of the transaction. In fact, the Form S-8 is often filed shortly after the Continuing Entity completes its Form S-4 registration process (to register the shares of the Continuing Entity that will be issued to shareholders of the Target Entity in the merger). In those circumstances, the Form S-8 can be filed as a post-effective amendment to that Form S-4.

It is critical that the Continuing Entity's Form S-8 be effective at the time of closing of the transaction; otherwise, the Continuing Entity may not be able to deliver registered securities to employees from the Target Entity who exercise options shortly after the closing.

The proposed rules would not prevent the pre-closing filing of a Form S-8 as described above if the Continuing Entity is not a shell company (which it is not in most cases). Nevertheless, a bona-fide merger structure could involve the creation of a shell company that will be the Continuing Entity following the merger, in which case the proposed rules would create an unnecessary bar to filing the S-8 needed for post-closing option exercises. One example is the "double dummy", "top hat" or "double wing" merger. The double dummy merger involves the formation of (a) a new holding company, which will be the parent of the two combining companies upon completion of the transaction ("Topco"), and (b) two new subsidiaries of Topco. One of the new subsidiaries is merged with the putative target and the other new subsidiary is merged with the putative acquiror so that, upon completion of the transaction, the two entities that result from these two mergers become wholly owned subsidiaries of Topco. The chart below illustrates the steps entailed in a double dummy merger structure.



Shareholders of the acquiror and the target may receive cash and/or stock in Topco in the transaction, although acquiror shareholders typically receive solely Topco stock and target shareholders typically receive a combination of cash and Topco stock. This structure is

designed to achieve certain tax treatment under Section 351 of the Internal Revenue Code of 1986, as amended. Although the double dummy structure is somewhat unusual due to the time and expense involved in setting up Topco as a new registrant, it has been used to effect a number of notable transactions including Disney's acquisition of Capital Cities/ABC, Time Warner's acquisition of Turner Broadcasting and MarketWatch.com's acquisition of Pinnacor.

In a double dummy merger, Topco would be a shell company and would not cease to be a shell company until consummation of the transaction. It would appear that, under the proposed rules, Form S-8 would not be available to Topco until consummation of the transaction (and perhaps for a period after consummation depending on when Form 10 information for Topco is filed). This result does not seem logical as Topco is, in effect, the successor to the acquiror.

In the above-described transaction, Topco will have filed a Registration Statement on Form S-4 and delivered prospectuses to the acquiror and target prior to consummation of the double dummy transaction. Accordingly, Topco also should be able to file a Registration Statement on Form S-8 to ensure that registered Topco shares can be issued pursuant to Topco's employee benefit plans upon closing of the deal.

Spin-offs

A second area where the proposed rules should not apply to shell companies is in the context of "spin-offs" and similar transactions. In a spin-off, the shares of a subsidiary ("Spinco") are distributed to the shareholders of a parent company. The parent may not contribute the assets of the business to be held by the Spinco entity until immediately prior to the spin-off. Under the proposed rules, Spinco would be deemed to be a shell company until such contribution occurs.

If the proposed rules were applied to Spinco in these circumstances, it would prohibit Spinco from filing a Form S-8 covering its employee benefit plans prior to the parent company's contribution of a business to Spinco. We believe that this would be an unintended result, as Spinco's are able to file Form S-8 as "shell companies" prior to such a contribution under the current regulatory regime. This result is acceptable because the Form 10 filed by Spinco in connection with the spin-off ensures that shareholders receiving Spinco shares registered pursuant to the Form S-8 will have sufficient information upon which to make an investment decision.

Similar issues are raised in a spinoff-merger. These transactions involve the distribution of the shares of a subsidiary ("Spinco") of a parent company to the parent's shareholders, promptly followed by a transaction pursuant to which Spinco is combined with another company ("Mergerco"). Depending on how the merger is structured, Spinco could be the public company that survives the merger transaction and, as a result, would likely need to have registered shares to issue pursuant to its employee benefit plans promptly after the closing. But if Spinco

Securities and Exchange Commission
June 14, 2004
Page Four

is a shell company until the time of consummation of the spinoff-merger, it would appear to be covered by the prohibitions set forth in the proposed rules. Such a result would not permit Spinco to file a Form S-8 prior to closing of the transaction, which would not achieve the goals of the proposed rules.

Accordingly, we would suggest that the proposed prohibitions on the use of Form S-8 should not apply to Spinco's in these types of bona-fide spin-off transactions.

Summary

Shell companies will continue to be used as vehicles to effectuate bona fide corporate transactions. Whenever a shell company will be a public registrant following consummation of such a transaction, the proposed rules could act as an unnecessary restriction on that company's ability to issue registered shares pursuant to employee benefit plans.

We have identified a number of common transactions where the proposed rules would have such an impact. As deal professionals design transaction structures to achieve business goals, we are confident that other structures now exist or will exist in the future where the proposed rules will needlessly restrict companies from using Form S-8.¹ As a result, we would propose that the shell company restrictions on the use of Form S-8 not apply to bona fide transactions, particularly where a Form S-4, Form 10 or other filing has been made that provides sufficient information about the issuer filing the Form S-8 (even though the issuer is a shell company at the time it files the S-8).

Respectfully submitted,

SPECIAL COMMITTEE ON MERGERS, ACQUISITIONS
AND CORPORATE CONTROL CONTESTS

Erica H. Steinberger, Chair

¹ Another example would be the creation of a holding company structure where a public operating company becomes a subsidiary of a newly-formed holding company.