Manual of Publicly Available Telephone Interpretations

H. Form S-3

1. Form S-3

Where a Form S-3 eligible registrant is required to include financial statements of a significant mortgagee or lessee pursuant to SAB 71, the Division staff takes the position that the required financial information may be incorporated by reference from the mortgagee's or lessee's periodic reports if the mortgagee or lessee is eligible to use Form S-3 for primary offerings. However, where a significant lessee which was not Form S-3 primary eligible ("Lessee A") was merged into another lessee of the registrant which was Form S-3 primary eligible ("Lessee B"), the registrant was allowed to incorporate information from Lessee A's pre-merger Form 10-K as long as it also incorporated financial information from Lessee B's most recent Form 10-Q giving effect to the merger.

2. Form S-3

A dividend reinvestment plan prospectus, which will not be distributed on a preliminary basis, may bear the anticipated effective date of the registration statement to permit savings in printing costs.

3. ** Form S-3 **

Donees of selling shareholders under a Form S-3 registration statement can use that registration statement for sales of the donated securities if they are specifically named as selling shareholders in the registration statement. If the selling shareholders made the gift after the effective date of the registration statement, a post-effective amendment to name the donee as a selling shareholder is not required (provided the registration statement expressly covered sales by subsequent donees). If the sales by a donee that received the securities after the effective date could exceed 500 shares (or other units), the donee must be named as a selling shareholder in a prospectus supplement.

4. Form S-3

A company intends to register a stock option plan. Certain participants in the plan are independent contractors not employed by the registrant and, accordingly, Form S-8 is not available for the shares to be issued to such participants. The registrant, however, meets the primary offering requirements of Form S-3, and the plan may be registered on that form as a primary offering. Of course, if the plan is registered on S-3, the information concerning the plan required by S-8 would have to be included in the S-3 prospectus.

5. ** Form S-3 **

Form S-3 may be used for the registration of securities issued under an employee benefit plan, so long as the sponsoring company, as issuer of the securities, meets all of the requirements for use of the form, including those set forth in General Instruction I.B.1. for primary offerings. Additional disclosures regarding the plan of the type required by Form S-8 generally will be

necessary in order to inform employee offerees adequately. Plan interests, however, may not be registered on Form S-3 because the plan, as issuer, typically will not satisfy S-3 eligibility standards. Where plan interests are being registered, the plan will be subject to S-1 level disclosure (whether the sponsoring company registers its securities on Form S-1 or S-3), including Section 10(a)(3) updating requirements.

6. Form S-3

A registrant intends to file a Form S-3 on April 10, hoping to become effective by April 25. The registrant intends to incorporate its most recent Form 10-K which will be filed on March 31. Certain information required in the Form S-3 concerning officers and directors is not intended to be furnished in the 10-K, but will be incorporated by reference from the registrant's definitive proxy statement which will be filed on April 30. The registrant was advised that either it must file the definitive proxy statement before the Form S-3 becomes effective, or include the officer and director information in the Form 10-K.

7. Form S-3

A registrant meets the registrant requirements for Form S-3, but does not meet the transaction requirements for a primary offering. The registrant has two majority-owned subsidiaries. The registrant asked whether Form S-3 would be available for secondary offerings of its securities by the two subsidiaries. The Division staff advised that in these circumstances, the offerings would be treated as if they were primary offerings by the registrant, since the subsidiaries are considered alter egos of the registrant. Accordingly, since the registrant could not use Form S-3 for a primary offering, the subsidiaries likewise may not use it to accomplish the same purpose.

8. Form S-3

Despite the fact that Form S-3 does not specifically refer to the requirements of Regulation S-X, the provisions of Rule 3-12 of Regulation S-X (Age of Financial Statements) are applicable to Form S-3. Under Rule 3-12(b), if a Form S-3 registration statement will become effective within the first 90 days of the fiscal year, the filing need not include financial statements more current than as of the end of the third quarter of the most recently completed fiscal year (with incorporation by reference of the third quarter Form 10-Q), unless (1) the audited financial statements for such fiscal year are available; or (2) the anticipated effective date will more than 45 days subsequent to the end of the fiscal year and the registrant does not meet the conditions prescribed under paragraph (c) of Section 210.3-01 of Regulation S-X. The interpretation of the first qualification to Rule 3-12(b) requires a factual determination as to whether or not audited financial statements are "available." If, in fact, such statements are available, the registrant must delay the filing of the Form S-3 until its latest Form 10-K can be filed and incorporated by reference into the Form S-3. If the second qualification is applicable, the Form S-3 must contain audited financial statements for the registrant's most recent fiscal year.

9. Form S-3

Small business issuers using the Regulation S-B reporting system that use Form S-3 should include the undertaking required by 512(b) of Regulation S-K, even though it was not included in Regulation S-B because the small business issuer forms do not permit forward incorporation by reference.

10. Form S-3

A finance company, which is wholly-owned by an issuer that meets the eligibility requirements for Form S-3, proposed to issue a letter of credit guaranteeing certain lease payments on an exempt industrial revenue bond. It was determined that Form S-3 would be available for the registration of the letter of credit, since it was considered investment grade debt by virtue of its AAA rating by one of the nationally recognized statistical rating organizations. See General Instructions I.B.2. and I.C.1. of Form S-3.

11. Form S-3

Form S-3 was deemed not available for the dividend reinvestment plan of a newly formed bank holding company because the annual report to shareholders of the predecessor bank contained only two years of certified financial statements. In this regard, General Instruction I.B.4. of Form S-3 requires that the registrant provide an annual report which meets the requirements of Rule 14a-3(b). That rule requires an annual report with three years of audited financial statements.

12. Form S-3

An underwriter who engages in a debt-equity swap with an issuer and intends to distribute the equity securities received in the swap to the public may consider the distribution of those securities to be a secondary offering within the meaning of General Instruction I.B.3. to Form S-3.

13. Form S-3

A wholly-owned subsidiary that files a reduced disclosure Form 10-K pursuant to General Instruction I of that Form may still use Form S-3 if otherwise eligible to do so.

14. Form S-3

Form S-3 is not available to issuers meeting the form's registrant requirements who wish to register customer stock purchase plans unless the issuer meets the transaction requirements for primary offerings set forth in General Instruction I.B.1. of Form S-3.

15. Form S-3

The registration of a corporation's guarantee of exempt industrial development bonds to be issued by a governmental authority may be made on Form S-3, provided the corporation meets the registrant requirements of the form. For purposes of the transaction requirements of the form, the issuance of the guarantee is deemed to be non-convertible debt offered for cash.

16. **** Form S-3 ****

Form S-3 is available to register shares underlying options whose exercise consideration can be cash or, in the alternative, shares of the same class as those underlying the options.

17. Form S-3

The delinquent filing of a Form 11-K by an issuer's employee benefit plan will not disqualify the issuer from utilizing Form S-3. General Instruction I.A.3. of Form S-3 requires an issuer to have

timely filed all periodic reports during the preceding 12 months, but since the Form 11-K filing obligation rests on the plan rather than the issuer, the late filing of such a form is not considered in determine the issuer's eligibility for Form S-3.

18. Form S-3

A single Form S-3 registration statement may be used to register both equity and debt securities for the shelf.

19. Form S-3

Corporation A, a wholly-owned subsidiary of Corporation B, intends to file a registration statement on Form S-3 for the sale of its debt securities. A wants to include information concerning B in the registration statement by incorporating B's Exchange Act reports by reference even though B is not guaranteeing the debt obligation. Item 12 of Form S-3 refers only to the incorporation by reference of certain reports and information of the registrant, and makes no provision for incorporation by reference of reports of the registrant's parent (unless the parent was guaranteeing the obligation or was otherwise also a registrant.) Nevertheless, B was advised that the Division staff would not object to the incorporation of B's Exchange Act reports by reference so long as all the applicable consents were filed. One of the considerations underlying this position was that B also meets the eligibility requirements of Form S-3.

20. Form S-3

A number of persons have asked whether Form S-3 is available for secondary offerings to be made by affiliates of the issuer. The concern was that because the seller was an affiliate, the Division staff might consider the secondary offering a sale on behalf of the issuer and, in reality, a primary offering requiring the affiliate-registrant to meet the more stringent Form S-3 standards applicable to primary offerings by issuers. The Division staff had indicated, however, that secondary sales by affiliates may be made under General Instruction I.B.3. to Form S-3 relating to secondary offerings, even in cases where the affiliate owns more than 50% of the issuer's securities, unless the facts clearly indicate that the affiliate is acting as an underwriter on behalf of the issuer. However, if the percentage is too high, it must be examined on a case-by-case basis.

21. Form S-3; Rule 415(a)(1)(i)

Rule 415(a)(1)(i) excludes from the concept of secondary offerings sales by parents or subsidiaries of the issuer. Form S-3 does not specifically so state; however, as a practical matter, parents and most subsidiaries of an issuer would have enough of an identity of interest with the issuer so as not to be able to make "secondary" offerings of the issuer's securities. Aside from parents and subsidiaries, affiliates of issuers are not necessarily treated as being the alter egos of the issuers. Under appropriate circumstances, affiliates may make offerings which are deemed to be genuine secondaries.

22. Form S-3

Resales of earnout shares to be issued in connection with a merger, which transaction will not be registered in reliance upon the Section 4(2) exemption, may be registered on Form S-3 pursuant to General Instruction I.B.3. even though they are not outstanding at the time the registration statement is filed.

23. Form S-3

A registrant asked whether the description of securities registered in Form S-3 could be set forth in a different "core" prospectus for each particular class of securities, so that, for example, offerings of preferred stock and senior notes off the shelf could use different "core" prospectuses. Upon reconsideration, it is the Division staff's view that the use of multiple "core" prospectuses is consistent with the requirements of the form. If the equity prospectus does not describe the terms of the debt securities, or vice versa, the issuer should undertake to supplement the applicable prospectus with disclosure of any debt/equity terms that investors of the other securities would deem material (e.g., debt terms triggered by change-in-control may be material to equity holders).

24. Form S-3

A long-term holder of convertible debentures and warrants to purchase common stock proposed to sell the debentures and the warrants to an underwriter who would exercise the warrants, convert the debentures and make an underwritten public offering of the common stock. The Division staff was asked whether the offering could be registered as a secondary offering on Form S-3 pursuant to Instruction I.B.3. to that form. The Division staff took the position that the proposed distribution appeared to be a primary offering by the issuer and therefore could not be registered on Form S-3 in reliance on Instruction I.B.3. as a secondary offering.

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

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.

26. Form S-3; Form S-8

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.

27. Form S-3; Form S-8

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.

28. Form S-3; Form S-8

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 under General Instruction I.B.1., use of that form was inappropriate as well.

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

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.

30. Form S-3; Form S-11

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.

31. **** Form S-3, General Instruction I.A.3. ****

In order to be eligible to use Form S-3, an issuer must have been subject to the requirements of Exchange Act Section 12 or 15(d) for a period of at least 12 months. An issuer that filed periodic reports during the past 12 months, but was not subject to one of those Sections for a portion of that period, would be eligible to use Form S-3 only under the conditions specified in Lamar Advertising Co. (Nov. 18, 1996).

32. Form S-3, General Instruction I.A.3.

An issuer otherwise eligible to use Form S-3 failed to file a current report on Form 8-K fourteen months before the proposed filing of the Form S-3. Because the requirement of current and timely filings as a condition to use of the form only applies to periodic reports in the preceding twelve months, Form S-3 is available.

33. Form S-3, General Instructions I.A.3. and I.C.2.

A subsidiary of a Form S-3 - eligible company filed a voluntary Form 10 in order to be able to issue investment grade debt on Form S-3, as permitted by General Instruction I.C.2. of Form S-3. The following year, the subsidiary filed another Form S-3 for investment grade debt, but by this time the subsidiary was delinquent in its own reporting obligations, not having filed any Form 10-Qs. A question was raised as to whether the subsidiary was eligible to use Form S-3. It was determined that the subsidiary must file the missing Form 10-Qs; otherwise the Form S-3, which incorporates by reference the reports filed by the subsidiary, would be deficient. However, once

the subsidiary files the missing reports, Form S-3 may be used. The basis for this position is that the reports of the subsidiary are used for the informational purposes of the Form S-3, rather than form eligibility. Eligibility for the subsidiary to use the form is based on General Instruction I.C.2., which provides form eligibility for the subsidiary based on the parent's satisfaction of the eligibility requirements. Accordingly, when the subsidiary is relying on General Instruction I.C.2. for form eligibility, the timeliness requirement of General Instruction I.A.3. relates to the reports of the parent, not the subsidiary.

34. Form S-3, General Instruction I.A.3.(b)

In determining eligibility for use of Form S-3, the requirement that the registrant has filed in a timely manner all reports required to be filed during the past twelve calendar months should be interpreted to refer only to Section 13(a) or 15(d) reports and Sections 14(a) and 14(c) materials.

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

A registrant was advised that General Instruction I.A.5. of Form S-3 would not be waived even though the registrant had a history of cumulating such dividends for three quarters before paying them at the end of each year.

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

A company sought a waiver from General Instruction I.A.5. of Form S-3 on the ground that S-3 is based on the "efficient market" theory, and the company had already conformed to that theory by announcing in a previous annual report that it would not pay the principal of outstanding debt when it became due. The Division staff denied the company's waiver request.

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

Defaults in periods prior to the end of the last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to Section 13(a) of the Exchange Act would not bar use of the form. (See Release No. 33-6331).

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

A registrant sought a waiver of General Instruction I.A.5. in the following situation. The company had failed to make interest payments on its revolving bank credit agreement and outstanding debentures for the first quarter of the fiscal year. These defaults were cured shortly before the registration statement was to be filed. The Division staff declined the waiver request since the defaults had not been exposed to at least one audit.

39. Form S-3, General Instruction I.A.5.

A subsidiary of an issuer otherwise eligible to use Form S-3 is in bankruptcy. The bankruptcy filing was reflected in the issuer's most recent report on Form 10-K. Under the bankruptcy court's protection, the subsidiary has made no subsequent payments of interest called for by instruments governing its indebtedness. Interest payment failures by the subsidiary after the filing of bankruptcy would not constitute new defaults for purposes of General Instruction I.A.5. and by themselves would not make Form S-3 unavailable.

40. Form S-3, General Instruction I.A.7.

General Instruction I.A.7. to Form S-3 provides that a successor issuer will be deemed to have met the registrant requirements in Instructions I.A.1., I.A.2, I.A.3. and I.A.4. of Form S-3 if its predecessor and it taken together have met those conditions. In the case of a bank holding company, the Division staff has taken the position that the requirement in General Instruction I.A.3.(a) of Form S-3 will be satisfied if the predecessor bank was registered under Section 12(i) of the Exchange Act, the bank has filed periodic reports with one of the banking agencies for at least one year, and the reports met Commission requirements.

41. ** Form S-3, General Instruction I.B.1. **

General Instruction I.B.1 to Form S-3 provides, in part, that the form may be used for a primary offering where the aggregate market value of the outstanding voting and non-voting common equity held by non-affiliates of the registrant is $75 million or more. As the instruction indicates, the aggregate market value may be computed by taking the average of the bid and asked prices of such common equity, as of a date within 60 days prior to the date of filing, and multiplying that price by the number of shares of such common equity held by non-affiliates. In making this computation, it is not necessary to calculate the number of shares held by non-affiliates for the same day on which the average price of the stock is determined. For example, the number of shares outstanding on the date of filing might be used, together with the average price of stock for any day within the 60-day period.

42. Form S-3, General Instruction I.B.1.

The "for cash" requirement in General Instruction I.B.1. of Form S-3 should not be read literally. That language was intended only to make it clear that Form S-3 was not available for exchange offers or other business combination transactions. Accordingly, Form S-3 would be available, for example, for transactions in which promissory notes of the person buying the securities are used as consideration, or in situations where the consideration used for the purchase of the securities involves services performed for the issuer by the recipient of the securities.

43. ** Form S-3, General Instruction I.B.1. **

An issuer wished to make a primary offering on Form S-3. The question raised was whether the company had $75 million of voting and non-voting common equity held by non-affiliates, as required by General Instruction I.B.1. of Form S-3. The instruction indicates that the $75 million float requirement may be computed on the basis of the last price at which the issuer's common equity was sold as of a date within 60 days prior to the date of filing. Based on closing prices, the company could not meet the $75 million standard on any day during the 60-day period, although the use of other than last sale prices in the same computation would have yielded an amount in excess of the standard. The issuer was advised that only the last sale price could be used and that as a result, Form S-3 would not be available. The issuer noted that it had recently declared a stock dividend that would be distributed one week after the registration statement was filed. If the dividend shares were included in the computation, the $75 million test would be met. The issuer was told that it could not include such shares in the float computation until they were actually issued.

44. Form S-3, General Instruction I.B.1.

A registrant wished to use Form S-3 for a combination primary offering by the registrant and secondary offering by an affiliate, but did not meet the $75 million float test of General Instruction I.B.1. to the form. The registrant asked for a waiver, contending that the securities to

be sold in the secondary portion of the offering should be included in the float computation, and that the addition of such securities would permit the registrant to meet the float test. The waiver request was denied.

45. ** Form S-3, General Instruction I.B.1. **

A waiver request for the use of Form S-3 for a primary offering by an issuer was denied where the aggregate market value of the issuer's voting and non-voting common equity held by non-affiliates was inadequate under General Instruction I.B.1. of Form S-3. There have been no waivers of the "float" tests set forth in General Instruction I.B.1.

46. Form S-3, General Instructions I.B.1. and I.B.4.

A company meeting the float test of General Instruction I.B.1. of Form S-3 may use that form to register both an immediately convertible security and the underlying security. The fact that subsequent conversions may occur at a time when the company does not meet the transaction requirement of General Instruction I.B.4. relating to conversions would not affect the initial registration. Of course, if the ongoing offering through the conversion is required to be registered and it becomes necessary to file a post-effective amendment for Section 10(a)(3) purposes, the company may utilize Form S-3 for such post-effective amendment only if it meets the conditions for the use of the form at that time. See Rule 401.

47. ** Form S-3, General Instruction I.B.2. **

An issuer that proposes to register debt on Form S-3 is attempting to meet the "investment grade securities" test of General Instruction I.B.2. of the form. The rating of the issuer's securities by a nationally recognized statistical rating organization ("NRSRO") will not be completed by the date the issuer hopes to become effective. The NRSRO, however, will have assigned a preliminary rating indicating investment grade. General Instruction I.B.2. of Form S-3 allows such a Form S-3 to become effective with a preliminary rating. See also Instruction 3 to the Signatures section of Form S-3.

48. ** Form S-3, General Instruction I.B.2. **

A registrant eligible to use Form S-3 only to register investment grade securities must amend that registration statement prior to sale by filing an amendment on Form S-1 or S-2 if the securities receive a final rating which is below the four highest rating categories specified by General Instruction I.B.2. of Form S-3. The amendment should be filed pre-effectively if the rating is received prior to the effective date.

49. Form S-3, General Instruction I.B.3.

Transaction requirement I.B.3. of Form S-3 permits the use of the form for secondary offerings if securities of the same class are listed on a national securities exchange or quoted on NASDAQ. A prospective registrant desired to use Form S-3 for a secondary offering of preferred stock. Although one series of the company's preferred stock was listed on the NYSE, the stock proposed to be registered was a different series with different terms, most notably, a different dividend rate. Under the circumstances, the registrant was told that Form S-3 was not available.

50. Form S-3, General Instruction I.B.3.

In order to use General Instruction I.B.3. of Form S-3 for the secondary offering of a convertible or exercisable security, such as a common stock purchase warrant, it is not necessary that the warrants themselves must be listed on an exchange or quoted on NASDAQ. The fact that the underlying common stock is listed or quoted is sufficient to satisfy the requirements of the Instruction.

51. Form S-3, General Instruction I.B.3.

Securities to be issued in an exchange exempt under Section 3(a)(9) are deemed outstanding for purposes of General Instruction I.B.3. of Form S-3.

52. Form S-3, General Instruction I.B.3.

A second-tier subsidiary of a Form S-3 - eligible issuer proposes to sell its own debt publicly. The debt will be guaranteed by the issuer's non-reporting parent. This guarantee will, in turn, be guaranteed by the Form S-3 - eligible issuer. The Form S-3 - eligible issuer's guarantee will extend to the benefit of holders of the second-tier subsidiary's debt instrument. The offering may be registered on Form S-3 in reliance on General Instruction I.B.3. of the form.

53. Form S-3, General Instruction I.B.3.

An issuer proposed to register on Form S-3 a secondary offering on behalf of unaffiliated foreign institutions that had acquired warrants and convertible preferred stock in private placements, as well as the common stock underlying these securities. The institutions had held the warrants and preferred stock for 1.5 years, and are not affiliates of the issuer. Because the institutions did not plan to exercise their rights to acquire the common stock prior to the effective date of the registration statement, this stock would not be outstanding before the effective date of the registration statement. The Division staff took the position that Form S-3 could be used in these circumstances, notwithstanding that the common stock to be resold thereunder was not outstanding within the meaning of General Instruction I.B.3. of this form when the Form S-3 was filed, since the length of the holding period of the warrants and preferred stock minimized the possibility that the transaction in question was a sham secondary.

54. Form S-3, General Instruction I.B.3.

For purposes of General Instruction I.B.3. of Form S-3, "quoted on the automated quotations system of a national securities association" includes listing on the NASDAQ small cap market and listing on the NASDAQ National Market System, but does not include listing on the NASDAQ electronic bulletin board.

55. Form S-3, General Instruction I.B.3.

Pursuant to a private placement, securities were to be issued into an escrow account upon partial payment equal to the securities' par value. The issuer contemplated that the securities would be released from escrow upon payment of the remainder of the market price, simultaneously with effectiveness of a Form S-3 for resale of the securities. Although the securities would be considered outstanding under Delaware law at the time of issuance into escrow, the Division staff took the position that they would not be "outstanding" for purposes of the eligibility instruction for secondary offerings. Because of the use of the escrow arrangement and the de minimis down

payment, the Division staff treated the offering as a "primary offering" for purposes of Form S-3 eligibility.

56. Form S-3, General Instructions I.B.3. and I.B.1.

Issuers meeting the float test in General Instruction I.B.1 of Form S-3 may make secondary offerings on Form S-3, even though the securities to be issued are not listed on a national securities exchange or quoted on an automated quotation system of a national securities association, as required by General Instruction I.B.3.

57. Form S-3, General Instruction I.B.4.

A bank holding company has an effective Form S-3 covering its dividend reinvestment plan. The plan permits optional cash purchases of stock in addition to purchases through reinvestment. Because of non-performing energy loans, the company has omitted the quarterly dividend on its common stock and may not resume such dividends in the foreseeable future. The company is not eligible to make primary equity offerings on Form S-3. During the period that dividends are suspended, the company cannot use the Form S-3 for cash sales under the optional provisions because such sales would be tantamount to a primary equity offering. The company need not deregister the plan securities, and may continue to use the Form S-3 when dividends are resumed.

58. Form S-3, General Instruction I.B.4.

The Division staff declined to waive General Instruction I.B.4. in a situation where the convertible securities were issued in bearer form and, thus, the required distribution of information could not be made. However, Form S-3 may be used for the registration of securities underlying convertible bearer securities owned by non-U.S. shareholders and expected to be converted overseas. Form S-3 may be used despite the failure to deliver such information because, technically, the registration statement is not being filed because of the conversions, which take place overseas and are presumably eligible for the safe harbor provisions of Regulation S. Instead, the securities are being registered because of the possible "flowback" to the U.S. securities markets. Without the flowback registration statement, dealers would not be able to perfect the exemption from registration provided by Section 4(3) and could not effect transactions in the United States until forty days after the first bona fide public offer to the public. Accordingly, in this instance the requirements of I.B.4. are not relevant.

59. Form S-3, General Instruction I.B.4.

An issuer contemplating a rights offering believed that the offering would not be fully subscribed. In such event, the issuer contemplated offering the unsubscribed shares to its employees. The position was expressed that Form S-3 would not be available because General Instruction I.B.4. contemplated only rights offerings to existing shareholders and not employees.

60. Form S-3, General Instruction I.B.4.

A 12-month reporting company wishes to use Form S-3 for a rights offering to its security holders and a standby offering to the public of any unsubscribed securities. Although the rights offering may be made on Form S-3, the standby offering can be included on the same form only if the issuer is eligible to make primary offerings under General Instruction I.B.l. to the form. The reference to eligible standby arrangements in General Instruction I.B.3. is limited to those done in connection with certain calls or redemptions.

61. Form S-3, General Instruction I.B.4.

General Instruction I.B.4. is intended to assure that issuers who are subject only to the periodic reporting obligations of Section 15(d) have provided annual report and proxy type information to persons who will be purchasing securities registered on Form S-3. Most issuers include the disclosure concerning executive officers required by Item 401(b) of Regulation S-K in the Form 10-K rather than in the proxy statement. As a result that information often is not regularly delivered to shareholders. Recognizing this fact, the Division staff has taken the position that a separate distribution of that information would not be required in order for Form S-3 to be available to such issuers.

62. ** Form S-3, General Instruction I.B.5. **

Securitizing Outstanding Securities

The pooling and securitization of outstanding corporate debt securities of other issuers may be registered on Form S-3 if the requirements of the Form for asset-backed securities offerings are met, provided that the depositor would be free to publicly resell the securities without registration. Thus, a depositor cannot include restricted securities, i.e., private-placed securities where the Rule 144(k) holding period has not run.

On the subject of asset concentration, where 20% or more of the pool consists of the securities of a single issuer, the Division staff requires audited financial statements of such issuer to be included in the prospectus. However, if the underlying issuer is eligible to use Form S-3 for a primary common stock offering and the depositor's transaction in the securities is purely secondary (e.g., there is no tie to the issuer or the issuers's distribution), the Division staff would accept a reference in the prospectus to the issuer's periodic reports on file with the Commission. Of course, the prospectus must include a description of the material terms of the pooled securities. In addition, the Division staff generally requires the depositor to undertake to provide financial and other information relating to such underlying issuer directly in its reports in the event such underlying issuer terminates reporting after the pooling transaction. No such undertaking is required, however, if, at the time of the pooling transaction, the underlying issuer has a class of common equity registered under the Exchange Act.

Securitization of outstanding asset-backed securities is treated similarly if the underlying trust has outstanding voting and non-voting common equity held by non-affiliates in excess of $75 million and files periodic reports with the Commission. The securities of government-sponsored enterprises ("GSE") which have a comparable market float and which make information publicly available comparable to that of Exchange Act reporting entities are treated similarly.

The offering of asset-backed securities supported by pools of municipal bonds where asset concentration exists, in general, requires that financial statements and other information relating to the underlying municipal issuer be provided. This information must be included directly in the prospectus, must be current, and must otherwise satisfy fully the disclosure requirements under the federal securities regulations. While the Official Statement ("OS") utilized in connection with the initial distribution of the municipal securities may be attached to or delivered with the prospectus, the OS may not serve as a surrogate for a complete prospectus.

While there may be instances where financial statements of the municipal issuer are not material to the investor in the asset-backed security, such instances would appear to be rare and the Division staff will require appropriate legal opinions and other documentation necessary to support the conclusion that financial and other information relating to the municipal issuer is not material to investors.

63. Form S-3, General Instruction I.B.5.

Asset Concentration -- Commercial Mortgages

For securitization of commercial mortgages and leases, where the mortgage loan is a non-recourse obligation of the mortgagor, disclosure related to the operating property(ies) will be required where concentration exists. The Division staff applies the standards described in SAB 71/71A. That SAB generally employs a 20% asset concentration test to determine whether audited property financial statements are required. At concentration levels between 10-20%, financial and other information regarding the underlying properties is required. In determining whether these concentration thresholds are crossed, loans to the same obligor, group of related obligors, or loans on related properties may be aggregated. In addition, where a mortgage loan or loans of a single obligor, or group of related obligors, accounts for more than 45% of the pool assets, one or more co-issuers may exist.

64. Form S-3, General Instruction I.C.2. and Item 12(a)(1)

Form S-3 is available to majority-owned subsidiaries if the parent meets the Registrant Requirements and the securities to be sold are investment grade debt. Some such subsidiaries that meet the eligibility test of Form S-3 are not registered under the Exchange Act and thus have no Exchange Act reports to incorporate in a Form S-3. Such subsidiaries are able to use Form S-3 after they voluntarily register under the Exchange Act and the Form 10 has become effective. The Form 10 must be filed prior to the filing of the Form S-3 and may be incorporated by reference pursuant to Item 12(a)(l) in substitute for the Form 10-K. The security that must be registered on the Form 10 is the registrant-subsidiary's common stock, and not the debt security registered on Form S-3.

65. Form S-3, General Instruction I.C.3.

A wholly-owned limited purpose subsidiary of a Form S-3 eligible parent company sought to use Form S-3 for an offering of debt securities which were fully and unconditionally guaranteed by the parent. The debt securities were exchangeable for common stock of the parent and would not be convertible into any other securities of the subsidiary. Although General Instruction I.C.3. of Form S-3 refers to non-convertible securities of a registrant-subsidiary guaranteed by its parent, the Division staff analyzed each security separately and did not object to the use of the form because: (1) the parent was primarily eligible to offer its common stock under General Instruction I.B.1.; and (2) the subsidiary's debt securities being guaranteed by its Form S-3 eligible parent could be registered on Form S-3.

66. Form S-3, General Instruction I.C.3. and I.A.1.

A foreign issuer proposed to register on Form S-3 debt securities guaranteed by its parent, a Delaware corporation that met the applicable registrant and transaction requirements of Form S-3. The foreign subsidiary would be permitted to use Form S-3 pursuant to General Instruction I.C.3., notwithstanding the requirement of General Instruction I.A.1. that a registrant be organized under the laws of the U.S. or any State or Territory or the District of Columbia and have its principal business operations in the United States or its territories.

67. Form S-3, General Instruction II.B. and Item 2

General Instruction II.B. of Form S-3 overrides the requirement of Item 2 of the form that a Table of Contents be provided. Pursuant to the General Instruction, this item need not be furnished by registrants using Form S-3.

68. Form S-3, General Instruction III.

The language in General Instruction III. to Form S-3 relating to advance processing of confidential treatment requests and reduced numbers of extra copies to be filed, applies only to dividend and interest reinvestment plans.

69. Form S-3, Item 12(a)

Item 12(a) of Form S-3 requires a registrant to specifically incorporate its latest Form 10-K and any other Section 13(a) or 15(d) reports filed since the end of the fiscal year covered by the Form 10-K. Item 12(b) states that all documents subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus. The question has been raised whether a Form 10-Q filed before a registration statement becomes effective must be specifically incorporated (thereby requiring a pre-effective amendment) or would be considered to be "subsequently filed" and therefore deemed to be incorporated by reference.

Historically, the staff has taken the position that a pre-effective amendment was required for two reasons: (1) the registration statement provided that all filings after "the date of this prospectus" were deemed to be incorporated by reference, and the staff determined that "the date of this prospectus" referred to the final prospectus; and (2) to the extent known, a registrant should provide a "roadmap" of the Exchange Act reports incorporated by reference by specifically listing them by character, date and Commission file number.

However, the staff has determined that a registrant need not file a pre-effective amendment solely to incorporate an Exchange Act report filed prior to effectiveness, provided that the registrant: (1) includes a statement in its initial registration statement (in addition to the statement regarding incorporation after the date of the prospectus) to the effect that all filings filed by the registrant pursuant to the Exchange Act after "the date of the initial registration statement and prior to effectiveness of the registration statement" shall be deemed to be incorporated by reference into the prospectus; and (2) in the first prospectus used after effectiveness, a copy of which is required to be filed under Rule 424(b), identifies all Exchange Act reports filed prior to effectiveness (by character, date and Commission file number) and deletes the new sentence referred to in (1), above (which relates only to the time period between filing of the registration statement and effectiveness).

This position is available only provided that the registrant is not otherwise required to amend pre-effectively the registration statement and provided that there is no effect on any disclosure or other obligation of the registrant.

70. Form S-3, Item 12(b)

A registrant proposing to file on Form S-3 requested relief from Item 12(b) of Form S-3, insofar as it related to a Schedule 14D to be filed with respect to a tender offer for the securities of a subsidiary. Item 12(b) requires that the prospectus state that all documents subsequently filed by the issuer, pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, are incorporated by reference. The issuer contended that a literal application of Item 12(b) would result in describing the tender offer in the prospectus, and draw unwarranted attention to an immaterial transaction not related to the offering. The registrant was advised that it must comply with the incorporation by reference requirement for the Schedule 14D.

71. Form S-3; Section 11(a)

For purposes of Form S-3, the accountant's liability under Section 11(a) is determined as of the effective date of the registration statement, not as of the filing date of a previously filed Form 10-K incorporated by reference, nor the filing date of the registration statement.

72. Form S-3; Rule 401

A registrant has an effective Form S-3 for a secondary offering. At the time of filing, all requirements for use of the form were met. Now, three months later, it appears that a dividend payment on certain preferred stock may be missed. Counsel inquired as to what effect this might have on the Form S-3. The Division staff advised that the registrant may continue to use the effective Form S-3 so long as there is no need to update the registration statement for the purposes of Section 10(a)(3). At the time that updating is necessary, Rule 401 would require the use of whatever form is available to the registrant at that time.

73. Form S-3; Section 10(a)(3); Rule 401(b)

For purposes of Rule 401(b), the updating of a Form S-3 registration statement through the incorporation of a Form 10-K is the equivalent of filing a post-effective amendment pursuant to Section 10(a)(3). This means that if the registrant were not eligible to use Form S-3 at the time of such updating, it would be required to file a post-effective amendment on whatever other Form would be available at the time.

74. Form S-3; Rule 401(g)

Pursuant to Instruction 3 to the signature requirements for Form S-3, a corporation may sign and file a registration statement on Form S-3 for an offering of non-convertible debt or preferred securities if it has a reasonable basis to believe that the investment rating of such securities at the time of sale will permit use of the form. If an investment grade rating is not received, a post-effective amendment would be required where the issuer cannot satisfy Form S-3 eligibility requirements without such a rating.

75. Form S-3; Rule 415

Where a shelf registration statement is filed on Form S-3 for offerings of securities on a delayed basis under Rule 415(a)(1)(x), and the plan of distribution includes underwritings on a firm commitment basis, it is permissible for the registrant to name the underwriter in a prospectus supplement (so long as it is not an equity offering "at the market" under Rule 415(a)(4)) and to file the underwriting agreement as an exhibit under cover of Form 8-K.

76. Form S-3; Rule 415

It is important to identify whether a purported secondary offering is really a primary offering, i.e., the selling shareholders are actually underwriters selling on behalf of an issuer. Underwriter status may involve additional disclosure, including an acknowledgment of the seller's prospectus delivery requirements. In an offering involving Rule 415 or Form S-3, if the offering is deemed to be on behalf of the issuer, the Rule and Form in some cases will be unavailable (e.g., because of the Form S-3 "public float" test for a primary offering, or because Rule 415 (a)(l)(i) is available for secondary offerings, but primary offerings must meet the requirements of one of the other subsections of Rule 415). The question of whether an offering styled a secondary one is really on behalf of the issuer is a difficult factual one, not merely a question of who receives the proceeds.

Consideration should be given to how long the selling shareholders have held the shares, the circumstances under which they received them, their relationship to the issuer, the amount of shares involved, whether the sellers are in the business of underwriting securities, and finally, whether under all the circumstances it appears that the seller is acting as a conduit for the issuer.

77. Form S-3; Rule 415(a)(1)(x)

The Division staff permits issuers to register on a single shelf registration statement asset-backed securities supported by more than one category of underlying assets without specifying the amount of each type to be offered. The Division staff requires, however, that the registration statement specifically identify the various asset categories and include a separate core prospectus for each such category. In considering whether a separate core prospectus is required, the Division staff will consider whether the assets described are intended to be pooled together or securitized separately. If the latter, separate core prospectuses ordinarily would be required.

78. Form S-3; Rule 415; Rule 424

Rule 3-01 of Regulation S-X contains a 45 to 90-day window period in which a "filing," other than on Form 10-K or Form 10, may be made without the current fiscal year-end balance sheet. The rule, however, is conditioned upon the registrant's reasonable and good faith expectation that it will report income during the current fiscal year. A registrant wished to sell securities from an effective Form S-3 registration statement during the window period and file a prospectus supplement under Rule 424 to reflect the take-down. The Division staff took the position that Rule 3-01 did not prevent the shelf take-down and would not apply to the prospectus supplement as it was not for the purpose of updating the prospectus under Section 10(a)(3).

79. Form S-3; Item 512(a) of Regulation S-K

Item 512(a) of Regulation S-K, which is applicable to Rule 415 offerings, sets forth three circumstances requiring a post-effective amendment: Section 10(a)(3) updating, fundamental changes, and changes to the plan of distribution. (Form S-3 issuers may accomplish the first two of these by incorporation by reference from Exchange Act reports, if the reports contain the required information.) A Rule 424(b) supplement should not be used for these purposes.

80. Form S-3; Rule 12b-25(d)

During the pendency of the 15-day extension for filing Form 10-K pursuant to Rule 12b-25, ongoing secondary offerings utilizing a previously effective Form S-3 may continue. Of course, should the Form 10-K not be filed after the Rule 12b-25 extension is over, this use also would have to discontinue.