

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 239, 240 and 249

**[Release Nos. 33-8587; 34-52038; International Series Release No. 1293;
File No. S7-19-04]**

RIN 3235-AH88

USE OF FORM S-8, FORM 8-K, AND FORM 20-F BY SHELL COMPANIES

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting rules and rule amendments relating to filings by reporting shell companies. We are defining a “shell company” as a registrant with no or nominal operations and either no or nominal assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets. The rules and rule amendments prohibit the use of Form S-8 under the Securities Act of 1933 by shell companies. In addition, they require a shell company that is reporting an event that causes it to cease being a shell company to disclose the same type of information that it would be required to provide in registering a class of securities under the Securities Exchange Act of 1934. These provisions are intended to protect investors by deterring fraud and abuse in our securities markets through the use of reporting shell companies.

EFFECTIVE DATE: August 22, 2005, except Item 5.06 of Exchange Act Form 8-K (referenced in § 249.308) will take effect on November 7, 2005.

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SUPPLEMENTARY INFORMATION: We are adopting rules and rule amendments designed to protect investors by deterring fraud and abuse in our securities markets through the use of reporting shell companies.¹ We are amending Form S-8² under the Securities Act of 1933³ to prohibit use of the form by shell companies. We also are amending the requirements of Form 8-K⁴ under the Securities Exchange Act of 1934 as they apply to shell companies. In addition, we are amending Rule 405⁵ under the Securities Act and Rule 12b-2⁶ under the Exchange Act to define the terms “business combination related shell company” and “shell company,” and amending Rule 12b-2 under the Exchange Act to revise the definition of the term “succession.” Further, we are amending Rule 13a-14⁷ and Rule 15d-14⁸ under the Exchange Act, adding new Rule 13a-19⁹ and new Rule 15d-19¹⁰ under the Exchange Act, and amending Form 20-F¹¹ under the Exchange Act to address the reporting obligations of foreign private

¹ In this release, we use the term “reporting shell companies” to refer to shell companies that have an obligation to file reports under Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

² 17 CFR 239.16b.

³ 15 U.S.C. 77a et seq.

⁴ 17 CFR 249.308.

⁵ 17 CFR 230.405.

⁶ 17 CFR 240.12b-2.

⁷ 17 CFR 240.13a-14.

⁸ 17 CFR 240.15d-14.

⁹ 17 CFR 240.13a-19.

¹⁰ 17 CR 240.15d-19.

¹¹ 17 CFR 249.220f.

issuers that are shell companies. Finally, we are amending Form 10-Q,¹² Form 10-QSB,¹³ Form 10-K,¹⁴ Form 10-KSB,¹⁵ and Form 20-F under the Exchange Act to require companies to indicate on the cover page of those forms whether they fall within the definition of “shell company.”

The rules and rule amendments we are adopting today do not address the relative merits of shell companies. We recognize that companies and their professional advisors often use shell companies for many legitimate corporate structuring purposes. Similarly, our definition and use of the term “shell company” is not intended to imply that shell companies are inherently fraudulent. Rather, these rules target regulatory problems that we have identified where shell companies have been used as vehicles to commit fraud and abuse our regulatory processes.

I. INTRODUCTION

On April 15, 2004, we proposed rules and rule amendments related to filings by reporting shell companies.¹⁶ We proposed to define the term “shell company.” We also proposed to prohibit the use of Form S-8 under the Securities Act by shell companies. Additionally, we proposed to amend Form 8-K under the Exchange Act to require a shell company, when reporting an event that causes it to cease being a shell company, to file with the Commission the same type of information that it would be required to file in registering a class of securities under the Exchange Act.

In response to these proposals, we received approximately 30 comment letters from

¹² 17 CFR 249.308a.

¹³ 17 CFR 249.308b.

¹⁴ 17 CFR 249.310.

¹⁵ 17 CFR 249.310b.

¹⁶ Release No. 33-8407, Use of Form S-8 and Form 8-K by Shell Companies (Apr. 15, 2004) [69 FR 21650].

various interested parties, including investors, issuers, accountants, lawyers, and organizations. We have considered all of the comment letters and have incorporated certain of the suggestions in those letters in the final rules.

The provisions we adopt today address the inappropriate use of Form S-8 registration statements by reporting shell companies to circumvent the registration and prospectus delivery requirements of the Securities Act. Because shell companies do not operate businesses and, hence, rarely have employees, we see little legitimate basis for shell companies to use Form S-8. For this reason, and because of the history of abuse of Form S-8 by reporting shell companies, we are prohibiting shell companies from using Form S-8 until 60 days after they cease being shell companies and file required information. We have, however, included limited exceptions to this prohibition for shell companies that are used in certain change of domicile or business combination transactions.

The provisions we adopt today also address the use of Form 8-K to report “reverse merger” and other transactions in which a reporting shell company ceases being a shell company, generally by combining with a formerly private operating business. Through such a transaction, the private operating business, in effect, becomes a reporting company. These transactions generally take one of two forms:

- In the most common type of transaction, a “reverse merger,” the private business merges into the shell company, with the shell company surviving and the former shareholders of the private business controlling the surviving entity.
- In another common type of transaction, a “back door registration,” the shell company merges into the formerly private company, with the formerly private company surviving and the shareholders of the shell company becoming shareholders of the

surviving entity.¹⁷

In these transactions, the reporting company has an obligation to file current reports on Form 8-K to report both the entry into a material non-ordinary course agreement providing for the transaction and the completion of the transaction. Specifically, in both types of transactions, the entry into the agreement would require a report under Item 1.01 of Form 8-K (Entry Into a Material Definitive Agreement) by the shell company. The completion of the transaction would be reportable under either or both of Item 2.01 of Form 8-K (Completion of Acquisition or Disposition of Assets) and Item 5.01 of Form 8-K (Changes in Control of Registrant) by the surviving entity.¹⁸ Audited financial statements and pro forma financial information would be required to be filed under Item 9.01 of Form 8-K (Financial Statements and Exhibits) for transactions reportable under Item 2.01.¹⁹

II. ADOPTED RULES AND RULE AMENDMENTS

We are adopting the rules and rule amendments substantially as proposed. The substantive changes to the proposals, as discussed below, are:

- we have revised the definition of “shell company” to specify the manner in which

¹⁷ This was the type of transaction involved in the Lisa Roberts, Director of NASDAQ Listing Qualifications interpretive letter, which is discussed in footnote 36, below.

¹⁸ In a back door registration transaction where time elapses between the entry into the agreement and the completion of the transaction, the shell company would incur the obligation to file the Item 1.01 Form 8-K at the time of entry into the agreement and either the shell company or the issuer that succeeds to the reporting obligation of the shell company by operation of either Rule 12g-3 (17 CFR 240.12g-3) or Rule 15d-5 (17 CFR 240.15d-5) under the Exchange Act would be obligated to file the Item 2.01 or Item 5.01 (or both) Form 8-K at the time of completion of the transaction. In a back door registration transaction that is simultaneously entered into and completed, or where the shell company has not yet satisfied its Item 1.01 obligation at the time of completion of the transaction, either the shell company or the issuer that succeeds to the reporting obligation of the shell company by operation of either Rule 12g-3 or Rule 15d-5 under the Exchange Act would be required to satisfy the shell company’s obligation to file a Form 8-K under Item 1.01, as well as any other reporting obligations of the shell company (including obligations to file reports on Form 8-K pursuant to other Items of that Form).

¹⁹ Other than new Item 5.06 of Form 8-K, the rule and form amendments adopted today are not intended to impose any new event filing requirements under Form 8-K.

assets are to be determined and to exclude asset-backed issuers;²⁰

- we have added a definition of the term “business combination related shell company” to specify those shell companies that are used to effect certain change in domicile and business combination transactions;
- we have provided limited exceptions to the amendments to Form S-8, Form 8-K, and Form 20-F for business combination related shell companies;
- we have added new Item 5.06 to Form 8-K to require shell companies (other than business combination related shell companies) to report transactions that cause them to cease being shell companies;
- we have added a check box to Form 10-Q, Form 10-QSB, Form 10-K, Form 10-KSB, and Form 20-F to identify shell companies filing those forms; and
- we have adopted rules and rule amendments requiring a foreign private issuer shell company to file a “shell company report” on Form 20-F to report a transaction that causes it to cease being a shell company.²¹

We are adopting the definition of the term “shell company” substantially as proposed.

The adopted definition includes minor modifications, including:

- an exclusion for asset-backed issuers that might inadvertently fall within the definition;
- a clarification that a company would still be a shell company if its assets consist of any amount of cash and cash equivalents, as well as nominal other assets; and

²⁰ “Asset-backed issuer” is defined in Item 1101(b) of Regulation AB [17 CFR 229.1101(b)].

²¹ The term “foreign private issuer” is defined in Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)]. A foreign private issuer is a non-government foreign issuer, except for a company that (1) has more than 50% of its outstanding voting securities directly or indirectly held of record by U.S. residents and (2) has either a majority of its executive officers or directors residing in or being citizens of the United States, more than 50% of its assets located in the United States, or its business principally administered in the United States.

- a clarification that the determination of the company’s assets (including cash and cash equivalents) for purposes of the definition must be limited to the amount of assets that would be reflected on the company’s balance sheet prepared in accordance with U.S. generally accepted accounting principles on the date of that determination.

We have defined the term “business combination related shell company.” We have adopted this definition to identify the subset of shell companies for which certain of the amendments to Form S-8, Form 8-K, and Form 20-F will not apply. We also have revised the definition of “succession” under the Exchange Act, as proposed, to capture certain transactions involving shell companies.

We are adopting amendments to Form S-8 that prohibit shell companies from using that form to register offerings of securities. A former shell company will become eligible to use Form S-8 to register offerings of securities 60 calendar days after it ceases being a shell company and files information equivalent to what it would be required to file if it were registering a class of securities on Form 10,²² Form 10-SB,²³ or Form 20-F under the Exchange Act. We are adopting a limited exception to the Form S-8 prohibition that permits a former business combination related shell company to use Form S-8 immediately after it ceases being a shell company and files the required information.

The amendments to Form 8-K that we are adopting today apply to reporting shell companies, other than those that are foreign private issuers. The amendments require such a company, when reporting on Form 8-K an event that causes it to cease being a shell company, to include in that report the information that it would be required to file to register a class of

²² 17 CFR 249.210.

²³ 17 CFR 249.210b.

securities under Section 12 of the Exchange Act²⁴ using Form 10 or Form 10-SB. The report is required to be filed within the same filing period as generally is required for other Form 8-K reports, which is within four business days after completion of the transaction. Further, the extension of time that otherwise may be permitted to file financial statements and pro forma financial information reflecting the new financial profile of the company following completion of a significant acquisition would be eliminated for shell companies. We are adopting similar reporting requirements for foreign private issuers on Form 20-F.

Finally, we are adding a check box to Form 10-Q, Form 10-QSB, Form 10-K, Form 10-KSB, and Form 20-F to allow market participants and regulators to identify shell companies more easily.

A. Definition of “Shell Company”

1. Discussion of the Proposal

We proposed to define the term “shell company” as a company with no or nominal operations, and with no or nominal assets or assets consisting solely of cash and cash equivalents.²⁵ We proposed that this definition be added to Rule 405 under the Securities Act and Rule 12b-2 under the Exchange Act. We indicated in the proposing release that we intentionally were not proposing to use the term “blank check company” used in Rule 419²⁶ under the Securities Act because we believe the term “shell company” and our proposed definition of the term better describe the type of company involved in the schemes that we are attempting to address, use criteria that are more specific, and would be easier to apply.

²⁴ 15 U.S.C. 78j.

²⁵ As discussed in the proposing release, we intended that a shell company formed solely for the purpose of changing a company’s domicile or completing a business combination transaction with another company would fall within the definition of shell company.

²⁶ 17 CFR 230.419.

2. Comments on the Proposal

Approximately ten commenters expressed their views regarding the proposed definition of “shell company.” Three commenters asked that the terms “nominal operations” and “nominal assets” be defined.²⁷ These commenters sought more guidance as to the meaning of these terms and quantitative thresholds for the term “nominal.” One of these commenters requested an objective test, such as specific quantitative thresholds tied to specific dollar amounts.²⁸

Another commenter suggested that the proposed definition be modified to clarify that nominal assets appearing on a balance sheet prepared other than in accordance with generally accepted accounting principles do not qualify as assets for purposes of avoiding classification as a shell company.²⁹ Two commenters expressed support for a definition based on the term “blank check company” in Securities Act Rule 419 to describe the types of entities that should be subject to the Form S-8 and Form 8-K proposals.³⁰

3. Final Rules

As adopted, Securities Act Rule 405 and Exchange Act Rule 12b-2 define a “shell company” as a company, other than an asset-backed issuer, with:

- no or nominal operations; and
- either:
 - no or nominal assets;
 - assets consisting solely of cash and cash equivalents; or

²⁷ See letters from L. Stephen Albright, North American Securities Administrators Association, Inc., and Stoeklein Law Group.

²⁸ See letter from North American Securities Administrators Association, Inc.

²⁹ See letter from Simon M. Lorne.

³⁰ See letters from David N. Feldman and Conrad C. Lysiak.

- assets consisting of any amount of cash and cash equivalents and nominal other assets.

For purposes of this definition, the determination of a company's assets (including cash and cash equivalents) must be based on the amounts that would be reflected on the company's balance sheet prepared in accordance with U.S. generally accepted accounting principles on the date of that determination. We have added the language "or assets consisting of any amount of cash and cash equivalents and nominal other assets" to further clarify the definition. This clarification is consistent with the intended meaning of the proposed definition.

After considering the comments on our proposed definition of shell company, we continue to believe that the proposed definition best describes the types of companies involved in the schemes we are attempting to address and can be applied with certainty.³¹ We do not believe that the suggestions in the comment letters would result in a significantly improved definition of shell company. Further, we believe that the definition reflects the traditional understanding of the term "shell company" in the area of corporate finance.

We are not defining the term "nominal," as we believe that this term embodies the principle that we seek to apply and is not inappropriately vague or ambiguous.³² We have

³¹ One commenter discussed the application of the proposals to "living dead" companies. See letter from Mike Liles, Jr. As described in this comment letter, a "living dead" company is a former operating company with minimal or limited operations. We believe that a former operating company that meets the assets and operations standards in the definition of shell company would be subject to the rules and rule amendments that we are adopting today.

³² We have become aware of a practice in which a promoter of a company and/or affiliates of the promoter appear to place assets or operations within an entity with the intent of causing that entity to fall outside of the definition of "blank check company" in Securities Act Rule 419. The promoter will then seek a business combination transaction for the company, with the assets or operations being returned to the promoter or affiliate upon the completion of that business combination transaction. It is likely that similar schemes will be undertaken with the intention of evading the definition of shell company that we are adopting today. In our view, where promoters (or their affiliates) of a company that would otherwise be a shell company place assets or operations in that company and those assets or operations are returned to the promoter or its affiliates (or an agreement is made to return those assets or operations to the promoter or its

considered the comment that a quantitative threshold would improve the definition of shell company; however, we believe that quantitative thresholds would, in this context, present a serious potential problem, as they would be more easily circumvented. We believe further specification of the meaning of “nominal” in the definition of “shell company” is unnecessary and would make circumventing the intent of our regulations and the fraudulent misuse of shell companies easier.

4. Definition of “Business Combination Related Shell Company”

The definition of “shell company” includes a shell company that is used to change an entity’s domicile and a shell company that is formed to effect a business combination transaction. As proposed, a shell company formed solely for the purpose of changing the domicile of a non-shell entity would have been permitted to use Form S-8 immediately after it ceased being a shell company and filed required information. In this regard, we received comment expressing the view that public companies formed to effect mergers, acquisitions, and public spin-off transactions also should be permitted to use Form S-8 within that timeframe.³³

We believe that there is a subset of shell companies for which the delay in the use of Form S-8, as well as certain of the reporting requirements under Form 8-K and Form 20-F, as discussed below, are not necessary. Accordingly, we have defined the term “business combination related shell company” to identify those entities that we believe fall within this subset of shell companies. As adopted today, a “business combination related shell company” is:

- a shell company formed by an entity that is not a shell company solely for the purpose

affiliates) before, upon completion of, or shortly after a business combination transaction by that company, those assets or operations would be considered “nominal” for purposes of the definition of shell company.

³³ See letter from Association of the Bar of the City of New York.

- of changing that entity's domicile solely within the United States;³⁴ or
- a shell company formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction among one or more entities other than the shell company, none of which is a shell company.³⁵

B. Definition of “Succession”

We are adopting as proposed the amendment to the definition of the term “succession” in Exchange Act Rule 12b-2 to include a change in control of a shell company that is required to be reported on Form 8-K pursuant to Item 5.01 of that Form or on Form 20-F pursuant to new Exchange Act Rule 13a-19 or 15d-19. This amendment will, in most cases, require a non-public acquiring company to succeed to the reporting obligations of a shell company and become a reporting company.³⁶ For a shell company with securities registered under Section 12 of the Exchange Act, this will occur because Exchange Act Rule 12g-3 will, with limited exceptions, impose Section 12 registration on the securities of the acquiror without the necessity of filing an Exchange Act registration statement. Similarly, for a shell company with a reporting obligation

³⁴ The language in this definition referring to a shell company formed “solely for the purpose of changing that entity's domicile solely within the United States” is intended to have the same meaning as the language “the sole purpose of the transaction is to change an issuer's domicile solely within the United States” in Securities Act Rule 145(a)(2) [17 CFR 230.145(a)(2)].

³⁵ For purposes of this definition, the term “business combination transaction” will have the same meaning as in Securities Act Rule 165(f)(1) [17 CFR 230.165(f)(1)], which defines a “business combination transaction” as any transaction specified in Securities Act Rule 145(a) [17 CFR 230.145(a)] or exchange offer.

³⁶ This definition, along with today's amendments to Form 8-K, supersedes the Lisa Roberts, Director of NASDAQ Listing Qualifications interpretive letter (Apr. 7, 2000). As explained in this interpretive letter, the procedure sometimes called “back door registration” under the Exchange Act did not, in the Commission staff's view at the time, constitute a “succession” of the surviving entity to the rights and obligations of the reporting shell company because the definition of “succession” in Exchange Act Rule 12b-2 requires that the acquiring company acquire a “going business” and a shell company was not considered a “going business.” Nevertheless, the staff permitted non-reporting acquiring companies to file Form 8-K reports and enter our reporting system, so long as specified information was included, rather than requiring these companies to file registration statements under Section 12 of the Act on Form 10 or Form 10-SB to become reporting companies.

under Section 15(d) of the Exchange Act, the acquiror may be deemed to have assumed the reporting obligation of the shell company by operation of Exchange Act Rule 15d-5. Because of the interaction of the revised definition of “succession” and Exchange Act Rules 12g-3 and 15d-5, a private entity that acquires a reporting shell company generally will report the transaction on Form 8-K, which in this case calls for Exchange Act registration-level disclosure, in accordance with the requirements of Form 8-K rather than filing an Exchange Act registration statement.³⁷ We believe this Form 8-K reporting requirement provides the appropriate timing, method, and level of disclosure to investors.

C. Amendments to Securities Act Form S-8

1. Discussion of the Proposal

We proposed amendments to prohibit the use of Form S-8 by any shell company. As proposed, a company that ceased being a shell company would become eligible to use Form S-8 to register offerings of securities 60 calendar days after it filed information equivalent to what it would be required to file if it were registering a class of securities under Section 12 of the Exchange Act through the use of Form 10, Form 10-SB, or Form 20-F, as applicable to that company.³⁸ On most occasions, this would occur upon the completion of a reverse merger or back door registration transaction, and the information would be filed in a current report on Form 8-K reporting the transaction that causes the company to cease being a shell company. In some circumstances the information could be filed in a Form 10, Form 10-SB, or Form 20-F, or in a

³⁷ Foreign private issuers that do not report on domestic issuer forms, such as Form 10-K and Form 10-Q, are not subject to this requirement to report the transaction on Form 8-K. Rather, foreign private issuers will report the transaction on Form 20-F. See the discussion in Section II.E., below, with regard to the Exchange Act reporting requirements for a foreign private issuer that is a shell company and completes a transaction that causes it to cease being a shell company.

³⁸ The amendments to Form S-8 that we are adopting today will apply to foreign private issuers. For a further discussion of the application of the Form S-8 amendments to foreign private issuers, see the discussion in Section II.E., below.

Securities Act registration statement covering the transaction.

A registration statement on Form 10, Form 10-SB, or Form 20-F provides investors with important information about the company in which they are considering investing. The 60-day delay between the filing of that information and the use of Form S-8 was intended to give employees and the markets sufficient time to absorb the information provided by the company in its Form 8-K or other filing. The 60-day period is consistent with the 60-day period between the filing and effectiveness of a company's registration of a class of securities on Form 10, Form 10-SB, or Form 20-F under Section 12(g) of the Exchange Act.³⁹

2. Comments on the Proposal

Most commenters expressed support for our initiative, through the Form S-8 proposal, to deter fraud and abuse in our securities markets by the use of shell companies. Eight commenters expressed the view that shell companies should, at least under certain circumstances, continue to be eligible to use Form S-8 for offering securities to officers, directors, and employees.⁴⁰ Three commenters proposed permitting a shell company to use Form S-8 to register offerings up to a percentage of its outstanding public float.⁴¹ Three commenters agreed that the proposed 60-day waiting period should not be shortened.⁴² Another commenter expressed the view that we should exclude public companies formed to effect mergers, acquisitions, and public spin-off transactions, as it is critical that such companies be able to use Form S-8 to register offerings of

³⁹ 15 U.S.C. 781(g).

⁴⁰ See letters from L. Stephen Albright, American Society of Corporate Secretaries, David N. Feldman, Conrad C. Lysiak, James B. Parsons, John L. Petersen, Jay Sanet, and Michael T. Williams.

⁴¹ See letters from James B. Parson, John L. Petersen, and Michael T. Williams.

⁴² See letters from L. Stephen Albright, Jay Sanet, and Stoecklein Law Group.

securities under employee benefit plans immediately after the closing of such transactions.⁴³ This same commenter stated that the 60-day waiting period in the Form S-8 proposal would be an unnecessary restriction on such a successor company's ability to sell shares in registered offerings pursuant to employee benefit plans.⁴⁴ The commenter proposed that shell companies be permitted to use Form S-8 immediately after their conversion to an operating company, particularly where another filing has been made that meets the disclosure requirements.

3. Final Rule

A registration statement on Form S-8 becomes effective upon filing with the Commission and does not require a prospectus to be filed as part of the registration statement.⁴⁵ Some shell companies seeking to distribute their securities and raise capital inappropriately use Form S-8. As we discussed in the proposing release, we continue to see the misuse of Form S-8 to register the sale of shares to purported employees or other nominees, who often are designated as "consultants" but who often do not provide services for which the company may offer securities in a transaction registered on Form S-8.⁴⁶ These schemes lead to unregistered resales of securities into the public market by these purported "employees" or "consultants," denying the protections of the Securities Act to the real public purchasers of the company's securities.⁴⁷

We are adopting the amendments to Form S-8 essentially as proposed, as we continue to believe that prohibiting the use of Form S-8 by shell companies justifies the burdens or costs that

⁴³ See letter from Association of the Bar of the City of New York.

⁴⁴ See id.

⁴⁵ See Securities Act Rules 462(a) and 428 [17 CFR 230.462(a) and 230.428].

⁴⁶ General Instruction A.1.(a)(1) to Form S-8 states that the form may be used to register securities to be offered and sold to consultants only if they are natural persons who provide bona fide services to the registrant that "are not in connection with the offer or sale of securities in a capital raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities."

⁴⁷ See Release No. 33-7646, Registration of Securities on Form S-8 (Feb. 26, 1999) [64 FR 11103].

might be incurred. Accordingly, an entity may use Form S-8 to register offerings of securities pursuant to employee benefit plans only if:

- immediately before the time of filing the registration statement, the entity is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act;
- the entity has filed all reports and other materials required to be filed by Section 13 or Section 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials);
- the entity is not a shell company and has not been a shell company for at least 60 days before filing the registration statement; and
- if the entity has been a shell company at any time, it has filed current “Form 10 information” with the Commission at least 60 days previously reflecting its status as an entity that is not a shell company.⁴⁸

We have included exceptions to the Form S-8 prohibition to permit its use by certain shell companies that appear to present less potential for abuse. We proposed to permit certain shell companies that were used to change corporate domicile to use Form S-8 immediately after they cease being shell companies and file “Form 10 information.” We are maintaining this provision. In response to comments, we also are permitting certain shell companies that were formed solely to effect business combination transactions to use Form S-8 immediately after they cease being shell companies and file “Form 10 information.” We have taken two steps to accomplish these exceptions. First, we have defined “business combination related shell company,” as discussed previously, to identify the subset of shell companies that qualify for the

⁴⁸ For purposes of Form S-8, we define the term “Form 10 information” to mean the information that is required by Form 10, Form 10-SB, or Form 20-F, as applicable to the registrant, to register under the Exchange Act each class of securities being registered on the Form S-8.

exception. Second, we are providing in Form S-8 that a business combination related shell company may use Form S-8 immediately upon ceasing to be a shell company and filing “Form 10 information.”⁴⁹

We believe the amendments we are adopting today are appropriate, as we continue to see misuse of Form S-8 by shell companies and believe that prohibiting the use of Form S-8 by shell companies will help to deter fraud and abuse. Further, the commenters that indicated that shell companies should be eligible to use Form S-8 for offering securities to officers, directors, and employees provided only limited explanation as to why this practice should continue for all shell companies.

The prohibitions on the use of Form S-8 that we are adopting today will not prevent a shell company from registering offers and sales of securities pursuant to employee benefit plans under the Securities Act; rather, they will require the shell company to register those transactions on a registration statement form other than Form S-8. In addition, the shell company may be able to offer and sell those securities without registration pursuant to an available exemption under the Securities Act. We are aware that a different registration statement form may not provide the same ease of registration as Form S-8 and that the resale of securities originally sold in a transaction that is exempt from Securities Act registration likely would be treated differently under Securities Act Rule 144⁵⁰ than securities sold to employees in a registered transaction. We believe that the benefits of this amendment in preventing misuse of Form S-8, deterring fraud, and protecting investors substantially justify the potential disadvantages for shell companies.

⁴⁹ See new General Instruction A.1.(a)(7) to Form S-8.

⁵⁰ 17 CFR 230.144.

D. Exchange Act Form 8-K

1. Discussion of the Proposal

We proposed amendments to Form 8-K to require a shell company (other than a foreign private issuer) to make a more prompt and detailed filing upon completion of a transaction otherwise required to be reported on that form that causes it to cease being a shell company. Specifically, the shell company would have been required to file a current report on Form 8-K containing the information that would be required in a registration statement on Form 10 or Form 10-SB to register a class of securities under Section 12 of the Exchange Act. We proposed that a company be required to file this report on Form 8-K within four business days after completion of the transaction, consistent with the timeframe for most Form 8-K filings.

We proposed elimination of the additional 71-day “window” for filing required financial information in a Form 8-K report filed pursuant to Item 2.01 of that form.⁵¹ This window is the period of time between the date the registrant files its initial Form 8-K reporting the event and the date when the registrant is required to file financial information about the transaction. We believed that the elimination of the 71-day window would provide investors in operating businesses newly merged with shell companies with a level of information that is equivalent to the information provided to investors in reporting companies that did not originate as shell companies. The purpose for requiring this financial information at the time of the initial filing of the Form 8-K report was to decrease opportunities to engage in fraudulent and manipulative activity during the 71-day window period.

2. Comments on the Proposal

The comments responding to the Form 8-K proposal were varied. Four commenters

⁵¹ See Item 9.01 of Form 8-K.

expressed concern with the difficulty of preparing the required information and completing the filing of the required disclosure on Form 8-K within four days.⁵² Three commenters also expressed concern over the amount of disclosure that was proposed to be included in the Form 8-K.⁵³ Each of those commenters believed that less information than the information equivalent to that required in a Form 10 or Form 10-SB would be adequate. Two of the commenters suggested that a level of information similar to that required under Exchange Act Schedule 14A⁵⁴ would be adequate,⁵⁵ with the other commenter expressing the view that it would be appropriate to require only certain of the Form 10 or Form 10-SB information.⁵⁶ Two commenters suggested that the shell company be permitted to delay filing its required disclosure if there was no trading in its securities.⁵⁷ One of these commenters suggested retaining the 71-day window, but limiting the trading in the shell company's securities by specified persons during that window.⁵⁸

Eight commenters supported the adoption of the Form 8-K proposal to provide information to investors and deter fraud and abuse by shell companies.⁵⁹ The commenters supported the proposed rulemaking as an opportunity for the Commission to provide a disincentive for shell company abuse. Four commenters supported closing the 71-day window,

⁵² See letters from L. Stephen Albright, David N. Feldman, Mike Liles, Jr., and James B. Parsons.

⁵³ See letters from L. Stephen Albright, David N. Feldman, and James M. Schneider.

⁵⁴ 17 CFR 240.14a-101.

⁵⁵ See letters from L. Stephen Albright and James M. Schneider.

⁵⁶ See letter from David N. Feldman.

⁵⁷ See letters from David N. Feldman and Mike Liles, Jr.

⁵⁸ See letter from Mike Liles, Jr.

⁵⁹ See letters from L. Stephen Albright, Nathan Garnett, Simon M. Lorne, North American Securities Administrators Association, Inc., James B. Parsons, John Peterson, Stoecklein Law Group, and Michael T. Williams.

on the grounds that this would deter fraud and abuse.⁶⁰ Two of these commenters suggested that the Commission consider a compromise of between 15 and 45 days.⁶¹ One of these commenters stated that the financial statements are “vital to an understanding” of the transaction and that the closing of the merger transaction should be delayed until such time as the financial statements are properly prepared.⁶²

3. Final Rule

We are adopting the Form 8-K amendments substantially as proposed. The amendments to Form 8-K will require the surviving entity⁶³ in a transaction where a shell company ceases being a shell company to make a more specific and detailed filing upon completion of such a transaction that is required to be reported on that form.⁶⁴ These transactions will fall within the

⁶⁰ See letters from L. Stephen Albright, James B. Parsons, North American Securities Administrators Association, Inc., and Stoecklein Law Group.

⁶¹ See letters from L. Stephen Albright and James B. Parsons.

⁶² See letter from Stoecklein Law Group.

⁶³ If a class of securities of an issuer succeeds, by operation of Exchange Act Rule 12g-3, to the registration under Exchange Act Section 12 of a class of the shell company’s securities, thus causing that successor issuer to succeed to the registrant’s reporting obligation under Exchange Act Section 13, or if an issuer succeeds, by operation of Exchange Act Rule 15d-5, to the shell company’s reporting obligation under Exchange Act Section 15(d), the successor issuer will then succeed to the shell company’s obligation to file the required information in a report on Form 8-K. If neither of the events described in the previous sentence occur, the shell company will be obligated to file the required information in a report on Form 8-K. For ease of discussion in this section, we refer to the entity that is obligated to file the required information in a report on Form 8-K as the “surviving entity.” In the back door registration context, the surviving entity’s securities must meet all of the conditions of Exchange Act Rule 12g-3 for those securities to be deemed registered under the same paragraph of Exchange Act Section 12 under which the shell company’s securities were registered. For example, if the number of record holders of the surviving entity’s securities is less than 300, the securities of the surviving entity will not succeed automatically by operation of Exchange Act Rule 12g-3 to the reporting status of the shell company’s securities. Instead, the surviving entity would be required to file a Form 10 or 10-SB if it wishes to register the securities under Exchange Act Section 12. Similarly, under Exchange Act Rule 15d-5, the surviving entity will be considered the successor issuer by operation of Exchange Act Rule 15d-5 unless the surviving entity is exempt from filing reports or the duty to file reports is suspended under Section 15(d) of the Exchange Act.

⁶⁴ In most cases, this will occur when the shell company acquires or is acquired by an operating business. Under the definition of “shell company” we are adopting today, it also could occur when the shell company acquires more than nominal assets (other than cash or cash equivalents). Requiring prompt and detailed disclosure in a Form 8-K filing will provide investors in operating businesses newly merged with shell

requirements of either or both of Item 2.01 and Item 5.01 of Form 8-K.⁶⁵ Upon completion of this type of transaction, the surviving entity will be required to file a current report on Form 8-K containing the information, including financial information, that would be required in a registration statement on Form 10 or Form 10-SB to register a class of securities under Section 12 of the Exchange Act, with that information reflecting the surviving entity and its securities upon consummation of the transaction.⁶⁶

We are requiring that the surviving entity file its report on Form 8-K within four business days after completion of the transaction that it is required to report. While we understand the concerns of commenters regarding this timeframe, we believe the timeframe is appropriate because shell companies and their counsel control the pace and timing of these transactions. Given the concerns unique to shell company transactions, we believe shell companies should complete a transaction that is required to be reported only when they can timely provide investors with adequate information to make informed investment decisions.⁶⁷ Moreover,

companies with a level of information that is equivalent to the information provided to investors in reporting companies that did not originate as shell companies.

⁶⁵ Where an operating company acquires a shell company and the operating company survives the transaction, the operating company will have acquired control of the shell for purposes of the definition of “succession” under amended Exchange Act Rule 12b-2. The operating company, as the surviving entity, will be required to file a Form 8-K under Item 5.01. The transaction will constitute a change in control of the shell company whether or not shareholders of the operating company before the transaction control the surviving entity following the transaction.

⁶⁶ That Form 8-K need not, however, contain registration-level information if that information previously has been included in an effective registration statement under the Securities Act. In that instance, the Form 8-K could merely reference the Securities Act registration statement that contains the required information. This same principle will apply to information that previously was included in a filing under the Exchange Act. We have amended Form 8-K to make this clear.

⁶⁷ As suggested by commenters, we considered imposing a trading ban on the securities of shell companies that have ceased being shell companies and have not filed the required financial statements, with the trading ban imposed until the converted shell company files its audited financial statements. We have not included such a provision in the final rule, as we believe that the information required in the Form 8-K will have the same effect of informing the market before trading and will not present the practical implementation issues that would be presented by a trading ban.

obtaining audited financial statements for the operating business in such a transaction should not present the difficulties that caused us to provide the extended filing window for business combinations involving reporting companies with operations.⁶⁸

We believe that prompt and proper disclosure of Exchange Act registration-level information at the time of shell company transactions will deter abuse and provide investors with information necessary for their investment decisions. Accordingly, we believe it is appropriate to require Form 10 or Form 10-SB information, as applicable, in the Form 8-K. This level of disclosure will provide investors in operating businesses newly merged with shell companies with prompt and detailed disclosure that is equivalent to the information provided to investors in reporting companies that register under the Exchange Act rather than reaching the same result through a transaction with a reporting shell company.

We are adding new Item 5.06 to Form 8-K.⁶⁹ New Item 5.06 will require a shell company that completes a transaction in which it ceases being a shell company to file a report under that Item reporting the material terms of the transaction. If the shell company is not the surviving entity in the transaction in which it ceases to be a shell company, the surviving entity would succeed to the shell company's obligation to comply with Item 5.06.⁷⁰ New Item 5.06 will allow market participants and regulators to more easily identify Form 8-K filings regarding shell company transactions and to more completely understand the terms of those transactions.

⁶⁸ See Release No. 33-6578, Business Combination Transactions; Adoption of Registration Form (Apr. 23, 1985) [50 FR 18990].

⁶⁹ Foreign private issuers generally are not required to file reports on Form 8-K. See Exchange Act Rule 13a-11(b) [17 CFR 240.13a-11(b)] and Exchange Act Rule 15d-11(b) [17 CFR 240.15d-11(b)]. Accordingly, we have not extended the requirements of Item 5.06 to foreign private issuers. For a discussion of the reporting requirements of foreign private issuers, see Section II.E., below.

⁷⁰ The surviving entity in a transaction where a shell company ceases being a shell company most likely will have to comply with other Items of Form 8-K, as discussed above, in addition to Item 5.06. The registrant could file a single Form 8-K responding to all applicable Items.

Business combination related shell companies will not be subject to the requirements of Item 5.06. We believe this will enhance the use of Item 5.06 as a means by which market participants and regulators may identify filings on Form 8-K relating to shell company transactions that are not change in domicile transactions or business combination transactions among non-shell companies.

We solicited comment as to whether we should take steps to make shell company transactions more easily identifiable. One commenter responded to this request.⁷¹ That commenter supported improved identification of shell company transactions and expressed the view that it would be beneficial to “establish a mechanism that identifies those reporting companies that fall into the definition of shell company ...”⁷² Because companies other than shell companies may file reports on Form 8-K under Item 2.01 or Item 5.01, we believe that it is appropriate to add an Item requirement to Form 8-K that is specific to shell companies other than business combination related shell companies.

E. Shell Companies that Are Foreign Private Issuers

1. Form S-8

Some foreign private issuers that are registered with the Commission may fall within the definition of shell company that we are adopting today. A shell company that is a foreign private issuer is subject to the new rules regarding the use of Form S-8. We proposed that, as with a domestic shell company, a foreign private issuer shell company would be ineligible to file a registration statement on Form S-8 until 60 days after ceasing to be a shell company and filing the “Form 10 information” that the issuer would file if that issuer were registering a class of

⁷¹ See letter from North American Securities Administrators Association, Inc.

⁷² See *id.*

securities under the Exchange Act. For a foreign private issuer, the proposal defined “Form 10 information” to mean the information required by Form 20-F to register the class of securities under the Exchange Act.

We did not receive comments on the proposed amendments to Form S-8 as they relate to foreign private issuers. For purposes of Form S-8, we are adopting the definition of “Form 10 information,” when applicable to foreign private issuers, to mean information required by Form 20-F.⁷³

2. Exchange Act Reporting of Transactions that Cause a Foreign Private Issuer to Cease Being a Shell Company

Unlike domestic issuers, foreign private issuers that are subject to the periodic reporting requirements under the Exchange Act generally are not required to file current reports on Form 8-K.⁷⁴ Instead, these issuers submit material current information on Form 6-K.⁷⁵ In the proposing release, we requested comment on alternative approaches with respect to disclosure requirements for foreign private issuer shell companies, including the appropriate form on which they should disclose a transaction with an operating business. We did not receive comments in response to this request.

While we believe that foreign private issuer shell companies should be subject to the disclosure and timing requirements of the rules relating to shell companies, we believe those issuers should report on Form 20-F rather than Form 8-K. Accordingly, we are adopting new

⁷³ As with domestic issuers, the amendment to Form S-8 makes clear that this “Form 10 information” of the foreign private issuer may be included in any filing with the Commission.

⁷⁴ See Exchange Act Rules 13a-11(b) and 15d-11(b). A foreign private issuer shell company that engages in a transaction that causes it to lose its status as a foreign private issuer at the same time it ceases to be a shell company would have to comply with the requirements of Form 8-K that are applicable to domestic companies.

⁷⁵ 17 CFR 249.306. See Exchange Act Rule 13a-16 [17 CFR 240.13a-16] and Exchange Act Rule 15d-16 [17 CFR 240.15d-16].

