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Memorandum

More Flexibility on Form S-8: Key Takeaways From Recent SEC Staff Guidance

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On October 15, 2026, the staff (the "Staff") of the Division of Corporation Finance of the Securities and Exchange Commission (the "SEC") released new and revised Corporation Finance Interpretations ("CFIs") addressing the ability of public companies to register compensatory equity awards under the Securities Act of 1933, as amended (the "Securities Act").[1]

The CFIs reflect the Staff's practical approach to SEC reporting and compliance. The CFIs enhance flexibility, reduce costs and broaden the range of securities that may be registered on Form S-8.[2] Notably, the Staff's guidance supports the registration of already-granted but not yet vested restricted stock and restricted stock units ("RSUs") on Form S-8 and reverses the Staff's 2009 position that Form S-8 was unavailable for registering awards assumed in M&A transactions and held by former employees of an acquired company.

The New and Revised CFIs

TIMING OF REGISTRATION EXTENDED

- *Registration of outstanding pre-IPO awards (New Question 271.28).* A company that granted awards under an exemption from registration (such as Rule 701) before going public may, once it becomes eligible to use Form S-8, register on Form S-8, the shares underlying then-outstanding options, RSUs and restricted stock prior to vesting (or exercise, in the case of options, and settlement, in the case of RSUs) of the outstanding equity award.
- *Registration by the vesting date (New Question 126.47).* The Staff will not object if a reporting company under the Securities Exchange Act of 1934, as amended, registers on Form S-8 the offer and sale of common stock issued upon settlement of restricted stock or RSUs before the award vested, rather than before the award was granted, if the company was eligible to use Form S-8 on the date of grant.

[1] SEC Staff, Corporation Finance Interpretations Update: October 15, 2026, available here.

[2] As a general matter, the offering of compensatory equity awards must be registered under the Securities Act on a registration statement filed with the SEC, such as Form S-8, or issued in reliance upon an exemption from registration, such as Rule 701 under the Securities Act ("Rule 701"). In the absence of registration, the resale of securities received pursuant to equity awards is subject to restrictions under the federal securities laws.

ELIGIBILITY OF FORMER EMPLOYEES OF ACQUIRED COMPANIES EXPANDED

- *Form S-8 eligibility (Revised Question 126.14).* A public acquirer may use Form S-8 to register the shares underlying compensatory awards, including stock options, restricted stock and RSUs, that it assumes in an acquisition and that are held by former employees of the target company (meaning those who ceased providing services to the target company prior to the closing of the transaction). Previously, the Staff took the view that Form S-8 was unavailable for such former employees because General Instruction A.1(a)(3) to Form S-8 indicates that former employees are only considered "employees" for purposes of Form S-8 eligibility if the applicable award (specifically options in the instruction) was granted while the former employee was employed by (or providing services to) the issuer.[3]
- *Rule 701 eligibility (New Question 271.29).* An acquiring company eligible to use Rule 701 may rely on Rule 701 to exempt the registration of awards assumed in an acquisition and held by persons whose service with the target company ended before the applicable acquisition closed.

ADDITIONAL REGISTRATION FEE RECYCLING

- *Recycling fees for forfeited awards (New Question 126.46).* If an issuer paid fees to register on Form S-8 securities underlying awards with vesting conditions (such as RSUs) that are later forfeited and become available for reissuance under the applicable plan, the Staff will not object if the issuer applies those fees to future registrations on Form S-8.
- *Fees for 401(k) plan contributions (Revised Question 126.19).* No fee is required for the registration of automatic company contributions to a 401(k) plan offering employer securities. The Staff also reiterated that no fee is required for the registration of an indeterminate amount of plan interests. A fee is required for employee contributions and employer matching contributions, but only to the extent those contributions are invested in employer securities.
- *Calculation of fees for defined contribution plans (New Question 240.19).* Companies may rely on Rule 457(o) under the Securities Act, which bases the registration fee on the maximum aggregate offering price rather than the number of shares, to calculate the registration fees for offerings under a defined contribution plan, such as a 401(k) plan.

Practical Considerations for Companies

The CFIs reflect a pragmatic, issuer-friendly approach that should reduce the cost and administrative burden of registering securities granted as part of compensation programs.

IPO READINESS

- The Staff has now confirmed its acceptance of the registration on Form S-8 of outstanding pre-IPO equity awards, including unvested restricted stock and unsettled RSUs. Note that the CFI does not allow the

[3] SEC Staff, Securities Act Forms Question 126.14 (Feb. 27, 2009) (superseded), available here.

registration on Form S-8 of shares with respect to already-vested restricted stock, already-settled RSUs or already-exercised options, which will still require resale planning under Rule 144 or Rule 701(g).

LESS URGENCY FOR REPORTING COMPANIES GRANTING RESTRICTED STOCK AND RSUS

- The CFIs put restricted stock and RSUs on similar footing to options by allowing reporting companies to register the underlying shares before the applicable award vests rather than requiring registration in advance of grant, easing timing pressure and costs, particularly for inducement or transaction-related awards that require off-cycle consents and a plan prospectus. Companies should nevertheless (i) confirm Form S-8 eligibility at grant, and (ii) ensure the Form S-8 is on file before vesting (which may precede settlement), taking into account provisions that could accelerate vesting, such as retirement eligibility, death or disability, or certain terminations or transactions. As with options, companies should register shares underlying awards promptly, even though registration now need not occur prior to grant.

MORE M&A OPTIONALITY

- *Public company acquirers:* The Staff's guidance makes it easier to assume awards held by former target company employees, which public acquirers previously tended to cash out or register on Form S-4, or, where available, Form S-3. Acquirers may now include these awards on Form S-8, broadening the acquisition structures available, preserving cash and simplifying compliance. The CFI is limited, however, to awards held by former employees that are assumed in the transaction, and careful attention is needed to ensure that the awards were originally granted under a valid registration statement or exemption from registration.
- *Private company acquirers:* The Staff's guidance also expands the alternatives available to private acquirers by enabling them to assume, under Rule 701, awards held by individuals whose employment or service with the target ended before the applicable acquisition closed rather than cashing them out or finding another registration exemption. Private acquirers should, however, monitor the volume limitations of Rule 701, against which the assumed awards count, and the enhanced disclosure required if offers under Rule 701 in a 12-month period exceed $10 million.

FEWER FILING FEES

- Consistent with the Staff's practical approach, the CFIs reduce registration costs and ease compliance burdens by allowing companies to apply fees previously paid for forfeited RSUs and restricted stock that can be recycled under the applicable plans to future registration statements on Form S-8.
- Companies now have assurance that they need not pay fees on automatic company contributions under 401(k) plans. Fees are still owed, however, on the employee contributions and employer matching contributions invested in employer stock. The Staff also reiterated that companies need not pay fees for plan interests registered for a 401(k) plan. Calculating fees based on the maximum aggregate offering price under Rule 457(o) may also simplify compliance, because employer stock funds generally lack a finite share pool and share usage can be difficult to track.

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We welcome the opportunity to discuss the application of these developments to your company's equity plan.

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