

Form S-8 Considerations: Prospectus Disclosure and Other Delivery Requirements

A Lexis Practice Advisor® Practice Note by
Gillian Emmett Moldowan and Matthew Behrens, Shearman & Sterling LLP



Gillian Emmett Moldowan
Shearman & Sterling LLP



Matthew Behrens
Shearman & Sterling LLP

This practice note discusses the content and delivery requirements of the Section 10(a) prospectus portion of the Form S-8.

For eligible issuers, offers and sales of securities to employees and other service providers are typically registered with the SEC on Form S-8 under the Securities Act of 1933, as amended (Securities Act). Form S-8 consists of two parts, the first of which is a prospectus to be delivered to plan participants but not filed with the Securities and Exchange Commission (SEC), and the second of which is the registration statement, which is filed with the SEC.

For an overview of the availability and requirements of Form S-8 generally, see [Form S-8 Registration Statement Drafting and Filing](#) and [Form S-8 Checklist](#).

Information Required in the Section 10(a) Prospectus

The Form S-8 prospectus consists of document(s) containing the information required by Part I of the Form S-8, together with certain documents containing registrant information and employee benefit plan annual reports (if applicable) that are incorporated by reference.

Item 1 of Part I requires information about the plan and its operations, and Item 2 of Part I requires a statement advising plan participants of the availability, without charge, of (1) certain other documents incorporated by reference into the Form S-8 under Item 3 of Part II of Form S-8 and (2) otherwise required to be delivered to participants pursuant to Securities Act Rule 428 (17 C.F.R. § 230.428). Items 1 and 2 of Part 1, together with the documents incorporated by reference into the Form S-8 under Item 3 of Part II of Form S-8, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act. (15 U.S.C. § 77j).

Item 1 – Plan Information

Item 1 requires issuers to provide each plan participant with material information regarding the plan under which securities are being registered pursuant to the Form S-8 and its operation to enable participants to make an informed decision regarding investment in plan securities. Item 1 is comprised of 10 topics that should be covered, although the list is not meant to be exhaustive. Issuers should include all material information regarding the plan and any unusual risks associated with participation in the plan should be prominently disclosed.

- **General plan information.** The following is general information regarding the plan: title; name of registrant; general nature and purpose; duration, provisions for modification, extension, or early termination of the plan; provisions, if any, subject to the Employee Retirement Income Security Act of 1974 (ERISA); address / telephone number to obtain more information about the plan and its administrators; capacity and function of administrators; name of any person other than the participant employee who can invest plan assets, and description of investment policies; and (if not subject to ERISA) nature of material relationship between administrators and employees, registrant, or affiliates and description of manner in which administrators are selected, their term, and manner in which they may be removed.
 - **Securities to be offered.** The following is information regarding the securities: title and total amount of securities to be offered under the plan; and detailed information concerning the securities, as required by Item 202 of Regulation S-K (17 C.F.R. § 229.202), unless securities to be offered are common stock registered under the Securities Exchange Act of 1934 (Exchange Act).
 - **Employees who may participate in plan.** A description of each group or class of employees entitled to participate and basis of eligibility.
 - **Purchase of securities / payment.** Information regarding the period of time for election; price of securities or basis upon which price is determined; terms regarding amount of securities an employee may purchase; time and manner in which employees pay for securities (including details and percentages of salary if payroll deduction is utilized); amount (or percentage of salary) of required or permitted employee contributions and time and manner in which employee elections may be altered; nature, amount, and timing of contributions by the registrant or employer; nature and frequency of any account/status reports made to employees; and (if not subject to ERISA) whether securities are purchased in the open market and, if not, then from whom, with description of commissions, if any.
 - **Resale restrictions.** A brief description of any restrictions on resale of securities purchased under the plan that may be imposed on the employee.
 - **Tax effects.** The tax effects on both employees (as a result of participation) and registrant, if any, and whether or not the plan is qualified under Section 401(a) of the Internal Revenue Code (26 U.S.C. § 401).
 - **Investment of funds.** If employees can direct plan assets to two or more investment alternatives, a brief description of such alternatives and three years of tabular or other meaningful financial data with respect thereto that appraises employees of material trends and significant changes in performance.
 - **Withdrawal; assignment.** A description of the terms and conditions under which an employee may withdraw from the plan or terminate interest therein or withdraw funds or investments without terminating interest in the plan; and terms and conditions, if any, upon which the plan permits employees to assign plan interests (other than as an effect of a qualified domestic relations order, as defined by ERISA).
 - **Forfeitures and penalties.** A brief description of events that could result in forfeiture or penalties to a participant and the consequences thereof.
 - **Charges, deductions, and liens.** A description of all charges and deductions that may be made against participating employees or fund assets and the identity of those who receive any part thereof, including upon termination of an employee's interest or partial withdrawal from employee's account; and whether pursuant to the plan or any contract, any person has or may create any lien on any plan assets, and if so, the circumstances in respect thereof (other than as an effect of a qualified domestic relations order, as defined by ERISA).
- To the extent there are any material changes with respect to the information required by Item 1, plan participants must receive updated information in a timely manner. This requirement is discussed further under "Duty to Update" in Delivery Requirements.

Item 2 – Registrant Information and Employee Annual Plan Information

The prospectus must include a written statement advising participants of the availability without charge and upon oral or written request, of the documents incorporated by reference into the Form S-8 pursuant to Item 3 of Part II of Form S-8, as well as stating that those documents have been incorporated by reference in the prospectus. In addition, the statement must also indicate the availability, without charge, upon written or oral request, of the documents required to be delivered pursuant to Rule 428(b). These documents are described below under Delivery Requirements. The statement must include the address (giving title or department) and telephone number to which the request is to be directed.

Form and Content

The instructions to Item 1 reference Rule 421 under the Securities Act (17 C.F.R. § 230.421), which requires that information in a prospectus be presented in a clear, concise, and understandable manner. Drafters should use descriptive headings and subheadings and avoid reliance on defined terms and legal and technical business terminology. The SEC has encouraged the use of a question-and-answer format as a means of communicating complex information in a straightforward manner. To further elaborate on its preferred style, the SEC has issued Securities Act Release No. 33-7947 (January 28, 1998), available at <https://www.sec.gov/rules/final/33-7497.txt>, which provides information on “plain English principles.”

A Form S-8 prospectus may be made up of one or several documents. Form S-8 does not require the preparation of a separate prospectus but allows issuers to use one or more existing documents—such as a summary plan description (SPD) required by ERISA—so long as the documents contain all the information required by Part I of Form S-8. All documents that constitute the prospectus must include a prominent legend identifying the document, or the relevant portion of the document, as part of a prospectus covering securities registered under the Securities Act. Notwithstanding this flexibility, issuers should consider certain potential legal consequences of using an ERISA document for securities law purposes. For example, if the SPD incorporates by reference documents filed with the SEC pursuant to the Exchange Act and required to be incorporated into the Form S-8 prospectus, any securities law act violations stemming from those incorporated documents may also lead to an ERISA claim. For more information, see [ERISA and SEC Prospectus Disclosures for Company Stock Fund Investment Options](#).

Delivery Requirements

Materials to Be Delivered

In addition to the information required by Part I of Form S-8, issuers must deliver to employee participants a copy of either (1) the issuer’s annual report to security holders containing the information required by Exchange Act Rule 14a-3(b) (17 C.F.R. § 240.14a-3); (2) the issuer’s annual report on Forms 10-K, 20-F, or 40-F; (3) the latest prospectus filed pursuant to Securities Act Rule 424(b) (17 C.F.R. § 230.424) that provides audited financial statements for the registrant’s latest fiscal year (provided the financials are not incorporated by reference and that the prospectus

contains substantially the same information as required by Exchange Act Rule 14a-3(b) or the registration statement on Forms S-1 or F-1); or (4) the issuer’s most recent effective Exchange Act registration statement on Forms 10, 20-F, or 40-F, containing audited financial statements for the registrant’s latest fiscal year.

Employees must also receive, on request and at no charge, copies of any of the filings incorporated by reference in the Form S-8 registration statement. All materials, such as proxy statements and annual reports, that are distributed to shareholders must also be distributed to participating employees, unless these materials are already provided to those employees because they are shareholders or because they participate in other plans.

Under certain circumstances, a participant’s interest in a plan may itself constitute a separate security known as a “plan interest,” which must also be registered. Plan interests typically arise when a participant’s participation in the plan is both voluntary and contributory, although stock option plans and employee stock purchase plans do not create separate interests in the plan. The most likely situation in which interests in a plan would have to be registered is when a 401(k) plan offers a company stock fund. In that situation, an annual report of the plan, typically provided on Form 11-K (although in certain cases the information may be provided as part of the issuer’s annual report), would have to be filed pursuant to Section 15(d) of the Exchange Act (15 U.S.C. § 78o) within 90 days of the fiscal year’s end, provided that plans subject to ERISA may file the plan’s financial statements within 180 days after the plan’s fiscal year end. When plan interests are registered, the registrant must deliver to each participating employee, upon written or oral request, a copy of the most recent annual report of the plan, whether on Form 11-K or included as part of the registrant’s annual report on Form 10-K.

Recently, because of numerous “stock drop” lawsuits, in which plan participants brought claims against fiduciaries for including company stock as an investment option when the fiduciary allegedly knew that the stock price was going to drop, many companies are freezing or terminating their company stock funds. In such a situation, an 11-K would no longer need to be filed so long as a post-effective amendment to the applicable Form S-8 is filed that deregisters the offer and sale of the remaining securities and a Form 15 is filed terminating the registration of the securities under the Exchange Act.

Finally, in connection with a stock option plan or a plan fund that invests in issuer securities, the issuer must

provide to employees (and to other plan participants on request) copies of all reports, proxy statements, and other communications generally distributed to security holders.

Delivery Mechanics

Although the prospectus need not be filed with the SEC, an issuer must deliver a copy of the prospectus to all employees eligible to participate (or selected by the issuer to participate) in the plan. The SEC requires that delivery occur no later than the time of the offer. The common practice is to deliver the prospectus upon the grant of a compensatory equity award (often through the plan administration system of the issuer), including options, even though this may be well in advance of the date on which the option first becomes exercisable.

In Release Nos. 33-7233 (October 6, 1995), available at <https://www.sec.gov/rules/concept/33-7233.txt>, and 33-7288 (May 9, 1996), available at <https://www.sec.gov/rules/concept/33-7288.txt>, the SEC provided guidance on electronic delivery of the prospectus. The SEC provides that electronic delivery may be utilized “with respect to employees who use the company’s electronic mail system in the course of performing their duties or who are expected to have alternative means made available to receive electronic messages” so long as an email to the employees “announces the availability of the document and provides information as to how to access the document through the local area network.” As an alternative, an email may include the actual document or documents.

Duty to Update

As mentioned above, Rule 428(b) requires that participants be timely updated on any material change to the information required by Item 1 of Form S-8. Although the duty to update does not require a complete restatement of the Section 10(a) prospectus, participants must be provided, upon written or oral request, a copy of all documents containing the information required by Part I of Form S-8 that constitute part of the Section 10(a) prospectus. Further, to the extent any material change obscures the readability of the documents constituting the Section 10(a) prospectus, those documents must be revised.

Maintenance of Internal File

Rule 428 requires that all documents constituting the Section 10(a) prospectus, other than the documents incorporated by reference pursuant to Item 3 of Form S-8, must be maintained by the registrant for five years after it is last used as part of the Section 10(a) prospectus. To the extent only a portion of a document constitutes a part of

the Section 10(a) prospectus, the entire document must be maintained in the file. Upon request, the registrant must furnish to the SEC or its staff a copy of any or all of the documents included in the file.

Resale Prospectuses

Reoffers and resales of certain “restricted securities” and “control securities” may be made on a continuous or delayed basis, pursuant to a registration statement on Form S-8 by means of a separate prospectus that is prepared in accordance with the requirements of Part I of Form S-3 (or, if the registrant is a Foreign Private Issuer (Securities & Capital Markets Glossary), in accordance with Part I of Form F-3), and filed with the registration statement on Form S-8 (or in the case of control securities, with the initial registration statement or as post-effective amendment thereto).

For purposes of Form S-8, control securities are those securities acquired under a registration statement and pursuant to an employee benefit plan that are held by affiliates of the registrant as defined in Securities Act Rule 405 (17 C.F.R. § 230.405). Restricted securities are securities issued under an employee benefit plan that meet the definition of restricted securities in Securities Act Rule 144 (17 C.F.R. § 230.144(a)(3)). Restricted securities may only be included in the reoffer prospectus if they have been acquired by the seller prior to the filing of the registration statement.

Although Form S-8 prospectuses generally do not need to be filed with the SEC, a prospectus prepared for a Form S-8 being used to register the resale of control securities and restricted securities is required to be filed with the SEC. If the registrant, at the time of filing of the prospectus, satisfies the registrant requirements for use of Form S-3 (or, if applicable Form F-3), the control securities and restricted securities may be registered for reoffer and resale without any limitations. If the registrant does not satisfy the requirements for use of Form S-3, the amount of securities sold by each person may not exceed the amounts specified in Rule 144(e) (17 C.F.R. § 230.144(e)).

Potential Future Developments

On July 18, 2018, the SEC issued a concept release (available at <https://www.sec.gov/rules/concept/2018/33-10521.pdf>) soliciting comments on ways it might modernize the rules related to Form S-8 so

as to reduce the complexity and cost of compliance to issuers while retaining appropriate investor protections. The comment period on this concept release closed on September 24, 2018. As the SEC continues to modernize disclosure requirements, Form S-8 prospectus requirements may change.

Gillian Emmett Moldowan, Partner, Shearman & Sterling LLP

Gillian Emmett Moldowan is a partner in the Compensation, Governance & ERISA practice.

She advises companies, boards of directors, executives and investors on compensation and benefit matters, including equity-based incentives, deferred compensation programs and employment, retention and severance arrangements. Her practice focuses in particular on issues that arise at the intersection of human capital management and corporate governance and in securities offerings and mergers and acquisitions transactions. She regularly counsels clients on disclosure, trading rules (including Section 16) and the negotiation of executive employment arrangements. Gillian also advises on the applicability of federal securities law, tax law and general employment-related legal issues.

Matthew Behrens, Associate, Shearman & Sterling LLP

Matthew Behrens is an associate in the Compensation, Governance & ERISA practice.

He focuses on all aspects of compensation and benefits, including corporate, securities, employment and tax laws and ERISA. He advises both U.S. and non-U.S. companies on corporate governance and disclosure matters related to executive compensation and employee issues implicated in mergers and acquisitions. He regularly counsels clients on equity-based incentives, deferred compensation programs and employment, retention and severance arrangements.

Prior to joining Shearman & Sterling LLP, Matt served as counsel to the pension and investment division of the New York State Common Retirement Fund.

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