



AMERICAN BENEFITS COUNCIL

September 24, 2018

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Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090.

Re: Comments on Concept Release on Compensatory Offerings and Sales; File Number S7-18-18

Dear Secretary Fields,

On behalf of the American Benefits Council (the "Council"), we are writing in response to your request for comments regarding the Securities and Exchange Commission's ("SEC's") Form S-8, the registration statement for compensatory offerings by reporting companies.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans. The Council appreciates the opportunity to provide comments on actions that the SEC could take to simplify the requirements of Form S-8 and reduce the complexity and cost of compliance for issuers (employer plan sponsors) for securities issued to eligible employee benefit plan participants.

As you know, the Form S-8 is a simplified form for the registration of securities to be issued to employees pursuant to employee benefit plans. Many of the Council's members periodically register shares with Form S-8 for shares to be sold through their benefit plans and are currently required to file separate S-8 forms for each employee benefit plan. The Council appreciates the actions the SEC has taken in the past seeking to reduce the costs and burdens incident to registration of securities issued through employee benefit plans and urges the SEC to seriously consider additional actions to ease the administrative burden.

Following are specific recommendations for additional action which would help alleviate the administrative burden for issuers who sponsor employee benefit plans that offer employer stock. It should be noted that the SEC asked for input on whether it should take some of these actions in the SEC's Concept Release.

1. Form S-8 should allow an issuer to register on a single form the offers and sales pursuant to all employee benefit plans that it sponsors. Although supplements could later be filed when shares are authorized for issuance by a specific plan as suggested in footnote 95 of the SEC's Concept Release, the SEC should consider allowing the inclusion of supplements for all employee benefit plans in the initial filing.
2. In order to simplify ongoing administration, this single registration statement should not specify the specific number of shares registered or, if specified, should allow issuers to add securities to the existing Form S-8 by an automatically effective post-effective amendment. In either event, fees should be paid on a "pay-as-you-go" basis (see discussion below).
3. Further clarification on the number of shares that should be registered for benefit plans would also be helpful. For example, large 401(k) plans that offer employer stock as an investment option will have both share purchases and sales on any given day. The sales will actually reduce the number of new shares needed to purchase and some days may have net sales. Guidance from the SEC should clarify how these sales and purchases should be tracked and how any netting of shares affects the amount of shares that should be registered.
4. We recommend that the SEC adopt a "pay-as-you-go" fee structure for Form S-8 similar to the system currently used for well-known seasoned issuers with off the shelf registration statements. This would allow issuers eligible to use Form S-8 to, at their option, pay filing fees on Form S-8 on an as needed basis rather than when the form is initially filed. If this system is adopted, it would also be helpful to adopt a "cure" rule that allows issuers to pay filing fees after the original payment due date if the issuer makes a good faith effort to pay the fee timely and then pays the fee within four business days of the original fee due date.
5. We recommend that the SEC eliminate the requirement pursuant to Item 8 of Form S-8 and Item 601(b)(5) of Regulation S-K to include for a qualified retirement plan either a determination letter from the Internal Revenue Service or, alternatively, an opinion of counsel that "confirms compliance of the provisions of the written documents constituting the plan with the requirements of ERISA pertaining to such provisions." In 2016, the IRS modified its determination letter program, as described in IRS Revenue Procedure 2016-37, and under the new program, a sponsor of an individually designed qualified plan may only apply for a determination letter upon formation or termination of the plan. Thus,

determination letters of ongoing plans will become increasingly out of date since qualified plans may no longer seek periodic determination letters from the IRS. Accordingly, requiring an issuer to provide a determination letter, or alternatively an opinion of counsel, is overly burdensome on issuers, and is unnecessary since the IRS no longer deems it necessary for plan sponsors to seek regular determination letters.

6. We recommend that the SEC permit the sponsor of an employee benefit plan whose interests are being registered to sign the Form S-8 on behalf of the plan. Currently the instructions require the plan trustee to sign the Form S-8. Current widespread market practice is for trustees of qualified employee benefit plans to be directed trustees who do not make investment decisions on behalf of the plan. It is administratively burdensome and unnecessary for plan sponsors to have to seek a trustee signature for the purpose of filing a Form S-8.

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Thank you in advance for your consideration of our recommendations. Please let us know if further information would be helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson", with a long, sweeping horizontal line extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council