

Manual of Publicly Available Telephone Interpretations

S. OTHER EXCHANGE ACT FORMS

1. Form 8-A

A Form 8-A for equity securities may be filed in advance of approval of a charter amendment authorizing the shares to be registered, so that the registration may become effective promptly upon approval. The Form 8-A exhibit that includes a copy of the charter should be amended to include the amended charter prior to effectiveness.

2. Form 8-A

A registrant may use a single Form 8-A to register securities on more than one national securities exchange concurrently under Section 12(b). A registrant, however, cannot amend an already effective Form 8-A to register securities on an additional national securities exchange, it must file a new registration statement.

3. Form 8-A

The requirement for identifying the exchange on which the registered security is traded does not apply to NASDAQ and over-the-counter markets.

4. Form 8-A

No objection would be raised to the filing of a Form 8-A prior to the effective date of a Securities Act registration for the same shares, where the purpose was to facilitate listing on an exchange as soon as the Securities Act registration became effective.

5. Form 8-A

A Canadian company filed a Securities Act registration statement in connection with a proposed merger. The registration statement became effective but was not used. The company desired to register under the Exchange Act and wanted to use Form 8-A. The company was subject to Section 15(d) of the Exchange Act because of the effective registration statement, but it had not made any of the periodic filings required by Section 13(a). Form 8-A is available to register the securities of any issuer that is required to file reports pursuant to Section 15(d). Counsel was informed that the Division staff would not object to the use of the Form 8-A as long as the company first filed all of the delinquent Exchange Act reports.

6. Form 8-A

A company has over 500 shareholders and \$10 million in assets on December 31st, the last day of its fiscal year, and is thus required to file an Exchange Act registration statement within 120 days of December 31. On March 1 of the next year, the company's first Securities Act registration statement becomes effective, and the company becomes subject to Section 15(d) of the Exchange

Act. The company may file its Exchange Act registration statement on Form 8-A because at the time that filing is required, the company will be subject to Section 15(d).

7. Form 8-A

Form 8-A may be used to register American depository shares evidenced by ADRs and the underlying securities of the foreign issuer when there is a simultaneous registration of such underlying securities under the Securities Act.

8. Form 8-A

Use of Form 8-A is conditioned on the fact that the registrant is "required to file reports pursuant to Section 13 or 15(d)." In general, therefore, a company that is voluntarily filing periodic reports would not be permitted to use Form 8-A to register its securities. A company that had been required to file reports pursuant to Section 15(d) continued to file voluntarily all reports required by Section 15(d) after its reporting obligation was suspended pursuant to Section 15(d) and did not file a Form 15. In these circumstances, the company was permitted to use Form 8-A to register its securities pursuant to Section 12(g), despite the language of that form, because (i) the registrant was current in all Section 15(d) reports; and (ii) no additional information would have been made available to the public through requiring a Form 10 to be filed.

9. Form 8-A; Section 10(a)(3)

A company issued units of common stock and warrants, and more than a year has passed since effectiveness of the registration statement. The warrants are now exercisable and the company wants the common stock to be quoted on NASDAQ. As to warrant exercises, post-effective amendments would be required to keep the prospectus current for Section 10(a)(3) purposes. If the company is still subject to Section 15(d), the company may use a Form 8-A to register under the Exchange Act.

10. Form 8-A; Section 15(d)

A company subject to Section 15(d) with respect to a fiscal quarter or fiscal year cannot delay the due date or avoid filing the related quarterly or annual report by filing a Form 8-A at or after the end of the fiscal quarter or fiscal year but prior to the due date of the applicable report. Form 8-A explicitly provides that a company subject to Section 15(d) with respect to a fiscal year cannot do so.

11. Form 8-A; Form 10

An Exchange Act publicly-held company emerging from bankruptcy proposes to issue pursuant to the bankruptcy plan a new class of common stock with a different par value from its other common stock. Since the prior class of common stock was cancelled as part of the bankruptcy proceedings, the company will be permitted to amend its current Exchange Act registration statement to effect registration of the new class of common stock.

12. Form 8-K

Item 2 of Form 8-K, which calls for disclosure of the acquisition or disposition of a significant amount of assets, does not require disclosure of the execution of a contract to acquire or dispose of the assets. Only when an acquisition or disposition is consummated is disclosure specifically

required. Nevertheless, the filing of a Form 8-K reporting the execution of such a contract pursuant to Item 5, the provision for voluntary reporting of other material events, is encouraged. The financial statement requirement of Item 7 is not triggered by Item 5, as it is by Item 2.

13. ** Form 8-K **

The purchase by a reporting company of a minority stock interest in a business from an independent third party (which is accounted for under the cost method) would not require the filing of the financial statements of that business with any Form 8-K filed to report the transaction, so long as that minority position did not result in the reporting company's control of the assets.

14. Form 8-K

General Instruction E to Form 8-K requires that a copy of the report be filed with each exchange where the registrant's securities are listed. The term "exchange" as used in the instruction refers to domestic exchanges and, accordingly, Form 8-K reports need be furnished only to domestic exchanges.

15. Form 8-K

Item 4 of Form 8-K requires an issuer to report a change in its certifying accountant. The item also requires that the issuer request the former accountant to furnish a letter stating whether the former accountant agrees with the issuer's statements concerning the reasons for the change. Where the former accountant declines to provide such a letter, the issuer should indicate that fact in the Form 8-K.

16. Form 8-K

An indefinite closing of a portion of a company's restaurant facilities, coupled with a write-down of its assets in excess of 10%, constitutes an "other disposition" for purposes of Item 2, Instruction 2 of Form 8-K, and thus required the filing of a Form 8-K report.

17. Form 8-K

Counsel inquired whether Instruction 1 to Item 2 of Form 8-K would eliminate the need for filing the Form by a wholly-owned subsidiary which acquired a significant amount of assets from its parent. Both the subsidiary and the parent are reporting companies. The Division staff took the position that the term "any person" found in Instruction 1 refers to the company that has the obligation to file the report. Therefore, while Instruction 1 would not require a filing by the parent, the subsidiary would be required to file the report.

18. ** Form 8-K; Industry Guide 5 **

Item 20.D. of Industry Guide 5 requires, *inter alia*, an undertaking to file every three months post-effective amendments containing financial statements of acquired properties. Even if the automatic 60-day extension of time to file the financial statements for an acquired property is applicable to a Form 8-K, this extension does not apply to the Guide 5 post-effective amendment. Accordingly, the post-effective amendment must be filed when required by Item 20 of Guide 5, and must contain the required financial statements. This is the same position as that taken before the Form 8-K extensions were made automatic.

During the pendency of a 60-day extension applicable to a Form 8-K, Securities Act offerings may not be made except as provided in the Instructions to Item 7(a) of Form 8-K. The Division staff has been asked whether this provision applies to real estate limited partnership offerings, thus prohibiting sales from being made until financial statements for properties acquired during the offering period have been filed (even when the quarterly post-effective amendment is not yet due). The amendment to Form 8-K was not intended to change the procedure established in Item 20.D. of Guide 5. Accordingly, when properties are acquired during the offering period, the registrant may continue sales activities notwithstanding the pendency of an 8-K extension, so long as the quarterly post-effective amendments containing the financial statements are filed when required.

19. Form 8-K

The automatic 60-day extension of time in Item 7 of Form 8-K is only available with respect to acquisitions, not dispositions. The Division's Office of the Chief Accountant will continue dealing with questions regarding dispositions on a case-by-case basis.

20. Form 8-K

Instruction 2 to Item 7 of Form 8-K addresses the status of Securities Act registered securities and Rule 144 sales during the pendency of an extension, but does not address the status of such sales after a denial of a request for waiver of financial statements. This question will be dealt with on a case-by-case basis.

21. ** Form 8-K **

Instruction 2 to Item 7 of Form 8-K states that during the pendency of the 60 day extension of Item 7(a)(4), registration statements will not be declared effective and offerings should not be made pursuant to existing registration statements. A clause in Instruction 2 beginning provided indicates that certain types of offerings are not affected by "this restriction". "This restriction" refers to making offerings pursuant to effective registration statements, but does not refer to making registration statements or post-effective amendments effective.

22. Form 8-K, Item 7; Rule 145(d)

Item 17(b)(7) of Form S-4 states generally that the financial statements of acquired companies not previously public need only be audited to the extent practicable, unless the Form S-4 prospectus is to be used for resales, in which case such financial statements must be audited. The Division staff was asked whether a resale pursuant to Rule 145(d), in lieu of the Form S-4 prospectus, would require the financial statements to be audited. The Division staff noted that Rule 145(d) is not included in Instruction 2 to Item 7 of Form 8-K regarding sales pursuant to Rule 144 during the 60-day extension period for filing financial statements. As the audited financial statements for the acquired company would be required pursuant to Item 7 of Form 8-K, a resale pursuant to Rule 145(d) would not be permitted until they are filed.

23. Form 8-K, Item 8; Rule 15d-10

Exchange Act Release No. 26589, which significantly amended Rule 15d-10, states that "[a] change from a fiscal year ending as of the last day of the month to a 52-53 week fiscal year commencing within seven days of the month end (or from a 52-53 week to a month end) is not deemed a change in fiscal year for purposes of reporting subject to Rule 13a-10 or 15d-10 if the

new fiscal year commences with the end of the old fiscal year. In such cases, a transition report would not be required. Either the old or new fiscal year could, therefore, be as short as 359 days, or as long as 371 days (372 in a leap year)." While a transition report would not be required, a Form 8-K (Item 8) would have to be filed to report the change in fiscal year-end.

24. Form 10

Wholly-owned subsidiaries that meet the requirements set forth in Instruction I. to Form 10-K may omit certain information from their Forms 10-K. The Division staff took the position that they may also rely on that instruction to omit the same information from a Form 10.

25. Form 10

A company otherwise entitled to use Form 8-A is not precluded from using Form 10.

26. Form 10; Form 8-A

An Exchange Act publicly-held company emerging from bankruptcy proposes to issue pursuant to the bankruptcy plan a new class of common stock with a different par value from its other common stock. Since the prior class of common stock was cancelled as part of the bankruptcy proceedings, the company will be permitted to amend its current Exchange Act registration statement to effect registration of the new class of common stock.

27. Form 10-K

An amendment solely to correct the signature page of a Form 10-K by providing the previously erroneously omitted signatures of both the Chief Financial and Chief Accounting Officer does not require new signatures by the directors.

28. Form 10-K

In order to incorporate information from the annual report to shareholders into the Form 10-K, the report must be prepared in time to be submitted with the Form 10-K. Such report may, however, be in printer's proof form when it is filed as an exhibit.

29. Form 10-K

While General Instruction G(3) indicates that information regarding executive officers may be included in Part I of Form 10-K, no objection will be raised if that information is included in Part III of the Form 10-K.

30. Form 10-K

A company's by-laws provide for a 15-person board of directors, but at present there are two vacancies. The signature requirement of a majority of the board is satisfied if a majority (i.e. 7) of the current directors sign the Form 10-K.

31. Form 10-K

Director's signatures may be provided pursuant to powers of attorney.

32. Form 10-K

Where a general partner of a limited partnership is a corporation, the Form 10-K should be signed by a majority of the board of the general partner. If there is more than one general partner, then a majority of the general partners must sign. Where one general partner is managing and others retain no control, only the managing general partner must sign.

33. Form 10-K

General Instruction G(3) to Form 10-K permits an issuer to incorporate certain information into the Form 10-K from its definitive proxy material, if the definitive proxy material is filed within 120 days after the end of the issuer's fiscal year. Where the 120th day falls on a Saturday, Sunday or holiday, the definitive proxy material may be filed on the first business day following. (See Rule 0-3 under the Exchange Act).

34. Form 10-K

An issuer filing a Form 10-K pursuant to Section 15(d) may not incorporate by reference into the Form 10-K information presented in a proxy statement that was not subject to the Commission's requirements at the time it was prepared and delivered, unless such proxy statement is filed as an exhibit to the Form 10-K.

35. Form 10-K

The reference to defaults "not cured within thirty days" found in General Instruction I.(l)(b) of Form 10-K relates to defaults in the payment of principal, interest and sinking fund, as well as any other material defaults.

36. Form 10-K

General Instruction I. to Form 10-K permits the filing of an abbreviated Form 10-K by certain wholly-owned subsidiaries. One of the conditions for the use of the abbreviated form is that all of the registrant's equity securities must be held by a single person. A request to use the abbreviated form was received from a company that had a series of non-voting preferred stock held by 135 persons. All of the common stock was held by a single person. The company was permitted to use the abbreviated 10-K on the condition that the number of holders of the non-voting preferred remained below 500 and therefore did not necessitate registration of that class pursuant to Section 12(g) of the Exchange Act.

37. Form 10-K, General Instruction G.(3)

A company filed its annual report on Form 10-K, intending to incorporate by reference information from its proxy statement to be filed within 120 days, pursuant to General Instruction G.(3) to Form 10-K. Because the proxy statement will not be filed within the 120 day period, the company must amend the Form 10-K prior to the end of the 120-day period to provide the information that was to have been incorporated by reference.

38. Form 10-K; Item 601 of Regulation S-K

For purposes of Form 10-K, Item 601(b)(10)(iii) of Regulation S-K requiring disclosure of remunerative contracts would apply to a deferred compensation plan entered into during the fiscal year, even though the officer/director retired during that fiscal year and no longer was an officer/director.

39. Form 10-K; Section 15(d)

A limited partnership, which offers securities on Form S-11 that goes effective on December 15th, does not commence selling efforts nor does it acquire properties or admit limited partners until after December 31st, the end of its fiscal year. Escrow is not broken until June 30th of its next fiscal year. Regardless of the fact that selling efforts began in the next fiscal year, the partnership should file a Form 10-K for the fiscal year in which the Form S-11 went effective.

40. Form 10-K; Rule 12b-23

An issuer with a pending Securities Act registration statement files its Form 10-K and seeks to incorporate by reference into the Form 10-K information from the pending registration statement. This is permissible, provided two conditions are met: (1) the portion of the registration statement to be incorporated does not include any incorporation by reference to another document (see Item 10(d) of Regulation S-K), and (2) a copy of the incorporated portion of the registration statement is filed as an exhibit to the 10-K, as required by Rule 12b-23(a)(3) under the Exchange Act.

41. Form 10-K; Rule 14a-3(c)

The annual report to shareholders must be filed as an exhibit to Form 10-K only if information contained in the annual report is incorporated by reference in the Form 10-K or the registrant specifically requests that it be treated as part of the proxy soliciting material. Note, only those portions of the annual report incorporated by reference are deemed to be filed as part of the Form 10-K.

42. Form 10-K; Form 10-Q

A calendar year Exchange Act company proposes to file a Form N8A and become an investment company prior to March 30, the normal due date for its Form 10-K. Its first NSAR, which would satisfy both Investment Company Act and Exchange Act obligations, will not be due until the period ending June 30. Although NSAR is ordinarily a semi-annual report, the reporting period commences on the date the company becomes an investment company, i.e., the filing date of the Form N8A. The Division staff advised that the company should file the Form 10-K due March 30, even though the company will be an investment company as of that date, and a Form 10-Q for the period from January 1 through the date the Form N8A is filed.

43. Form 10-KSB

Issuers incorporating information from their proxy statement into Part II of Form 10-K are advised in Instruction G(3) to Form 10-K to look at Instruction 3 to Item 401(b) of Regulation S-K. That instruction advises those issuers that, if the Item 401(b) information is included in the Form 10-K, it need not be repeated in the proxy statement. Neither Instruction E to Form 10-KSB nor Item 401(b) of Regulation S-B contain this instruction. Despite this omission, small business

issuers need not repeat the information in the proxy statement if it is included in the Form 10-KSB.

44. Form 10-KSB; Proxy Rules

A Regulation S-B filer filed a Form 10-KSB indicating that, for the second consecutive year, it failed the same small business issuer eligibility standard. Therefore, it can not use the Regulation S-B reporting system for the following fiscal year. The issuer asked whether its proxy statement could still exclude the executive compensation and other information that a small business issuer may exclude in its Form 10-KSB (which is often incorporated by reference into that annual report by means of the later proxy statement). Yes, for two reasons. First, if the Form 10-KSB had not been completed in reliance upon the later incorporation by reference, that information could have been excluded. Second, during the prior fiscal year the issuer did not know that it would have to prepare that additional information, so it would be inappropriate to retroactively apply the disclosure requirements.

45. Form 10-Q

Item 6(b) of Form 10-Q does not require a synopsis of the matters reported on Form 8-Ks listed thereunder. Any such synopsis is voluntary and therefore may be discontinued at any time.

46. Form 10-Q

Item 4 of Form 10-Q would require disclosure of the results of the vote on all matters voted upon, including shareholder proposals, whether or not included in management's proxy materials.

47. Form 10-Q

A company's initial registration statement under the Securities Act became effective during its quarter ended September 30. Prior to the effective date, but during this quarter, the company submitted matters to a vote of its security holders. Since Form 10-Q applies to the entire quarter, disclosure of Item 4 matters should be provided in the initial Form 10-Q filed pursuant to Section 15(d).

48. Form 10-Q; Form 10-K

A calendar year Exchange Act company proposes to file a Form N8A and become an investment company prior to March 30, the normal due date for its Form 10-K. Its first NSAR, which would satisfy both Investment Company Act and Exchange Act obligations, will not be due until the period ending June 30. Although NSAR is ordinarily a semi-annual report, the reporting period commences on the date the company becomes an investment company, i.e., the filing date of the Form N8A. The Division staff advised that the company should file the Form 10-K due March 30, even though the company will be an investment company as of that date, and a Form 10-Q for the period from January 1 through the date the Form N8A is filed.

49. Form 10-QSB

A small business issuer that files its initial public offering on Form S-1 may transition into the small business disclosure system by filing a Form 10-QSB as its first periodic report. Thus, the decision to use Form S-1 rather than Form SB-2 does not compromise the issuer's ability to use the small business disclosure system for periodic reporting.

50. Form 11-K

A company filed a Form S-8 registration statement to register participations in a profit sharing plan. It has been determined that the participations would, in fact, be exempt from registration under Section 3(a)(2) of the Securities Act. The remaining participations are being deregistered. The company was informed that under the circumstances the Division staff would not require the continued filing of Form 11-K annual reports for the profit sharing plan.

51. Form 11-K

Although the general instructions to Form 11-K state that plans subject to ERISA "shall file the plan financial statements within 180 days after the plan's fiscal year", the Division staff has interpreted this to mean that ERISA plans may file the entire Form 11-K (not only the financial statements) within 180 days after the end of the plan fiscal year. ERISA plans are not required to file the Form 11-K without financial statements within 90 days after the end of the plan fiscal year. See text at Footnote 148, Release No. 33-6867, and note that the Form 11-K now only contains financial statements. Also, Rule 15d-21 has been amended to allow the filing of ERISA plan financial statements as an amendment to the Form 10-K.

52. Form 11-K; Rule 15d-10

A company planned to do an 11-K for a 6-month year period for an ERISA plan. Form 11-K provides that the due date for an ERISA plan 11-K is 180 days after fiscal year end. However, Rule 15d-10 provides that for short years of 6 months or more, an annual report would be due 90 days after the fiscal year end. The Division staff took the position that the short-year 11-K could be filed 180 days after the fiscal year end.

53. Form 11-K; Form S-8, General Instruction A.2.

An issuer that has maintained a 401(k) employee savings plan for several years has decided to add its common stock as an investment option in the plan. Under the Division's Diasonics position (Dec. 29, 1982), both the plan interests and the employer stock will be subject to the Securities Act. Prior to the addition of the employer stock, the plan interests would not be regarded as securities.

General Instruction A.2. to Form S-8 will ordinarily require a plan that had been in existence more than 90 days to file a Form 11-K contemporaneously with the registration of the offering of plan interests and employer securities. Because the interests were not securities before adoption of the amendment adding employer securities, the initial Form 11-K will not be required.

Form S-8 was amended in Release No. 33-6383 to remove the requirement for the filing of a Form 11-K concurrently with the Form S-8 in those situations where the benefit plan being registered is a new plan and there have been no prior investments.

54. Form 15; Rule 15d-6; Rule 12h-3

Section 15(d) of the Exchange Act provides an automatic suspension of the periodic reporting obligation as to any fiscal year (except for the fiscal year in which the registration statement became effective) if an issuer has fewer than 300 security holders of record at the beginning of such fiscal year. Under Rule 15d-6, a Form 15 should be filed to notify the Commission of such suspension, but the suspension is granted by statute and is not contingent on filing the Form 15. In contrast, Rule 12h-3 permits a company to suspend its reporting obligation under Section 15(d) if the requirements of the rule are met at any time during the fiscal year. Because situations

exempted by Rule 12h-3 (e.g. fewer than 300 security holders of record in the middle of a fiscal year) do not meet the literal test of Section 15(d), Rule 12h-3 requires the filing of Form 15 as a condition of the suspension.

55. Form 20-F

For a foreign private issuer which makes aggregate amount compensation disclosure pursuant to Item 11 of Form 20-F, Instruction to Exhibits A.3.(ii)(A) to Form 20-F requires filing of only the contracts a domestic issuer would file pursuant to Item 601(b)(10)(ii)(A) of Regulation S-K, and not the contracts a domestic issuer would file pursuant to Item 601(b)(10)(iii)(A).

56. Form 20-F, Item 8

Any reliable source may be used for rates of exchange as long as the source is identified.

57. Form 25

Pursuant to Rule 12d2-2(a)(4), the effective date of a Form 25, which has the effect of terminating registration under Section 12(b) of the Exchange Act, may not be earlier than 10 days following the date on which such form is filed with the Commission (except in certain successor situations). A Form 15 with respect to securities being de-listed may not be filed prior to the effective date of the Form 25 since Sections 12(g) and 15(d) are suspended during the period in which Section 12(b) applies. See Section 12(g)(2)(A) and Section 15(d).

58. **** Form 40-F; Securities Act Forms F-7, F-8, F-9, F-10,
F-80; Securities Act Rule 402(e); Rule 12b-11(d) ****

Eligible Canadian issuers may rely on Securities Act Rule 402(e) or Exchange Act Rule 12b-11(d) to use typed, duplicated or facsimile versions of manual signatures in connection with Forms F-7, F-8, F-9, F-10, F-80 and 40-F, provided that the issuer complies with the requirements of those rules regarding retention of manual signatures and provision of copies thereof to the Commission or its staff upon request. See Cleary, Gottlieb, Steen & Hamilton (Aug. 13, 1996).