

## Corporate & Financial Weekly Digest

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### **SEC Issues New Interpretations on Form S-3 Eligibility, Incorporation of Proxy Statements in Annual Reports and Foreign Private Issuer Status**

Co-authored by [Jonathan D. Weiner](#)

On August 11, the Securities and Exchange Commission's Division of Corporation Finance issued new Compliance and Disclosure Interpretations (C&DIs) on topics including the availability of Form S-3 for issuers filing shelf registration statements in reliance on General Instruction I.B.6 (limited primary offerings) of that form, the incorporation of information required by Part III of Form 10-K from proxy statements and foreign private issuer status.

The SEC's guidance included the following:

- An issuer with an effective shelf registration statement on Form S-3 filed in reliance on General Instruction I.B.6 may not file a prospectus supplement for a new offering of securities in an amount that exceeds the applicable volume limitation (described below), even if the actual amount sold does not exceed the volume limitation. General Instruction I.B.6 permits certain issuers to use Form S-3 to register securities if the aggregate market value of securities sold by the issuer in reliance on General Instruction I.B.6 during the 12 months immediately prior to, and including, the sale is no more than one-third of the issuer's public float. The new C&DI indicates that the capacity remaining under the one-third limitation is measured immediately prior to the registered takedown, and applies to the amount of securities offered for sale pursuant to the prospectus supplement, not the amount actually sold. When measuring the amount available for a later takedown, only the securities sold are counted against the one-third limit.

Click [here](#) to view the C&DI described above (Question 116.22).

- Although the amount of securities available for a shelf takedown pursuant to General Instruction I.B.6 is generally measured by counting only the securities actually sold during the preceding 12 months, in the case of multiple, concurrent offerings, the securities that continue to be offered in all such concurrent offerings in reliance on General Instruction I.B.6 would count against the one-third limit.

Click [here](#) to view the C&DI described above (Question 116.23).

- Where an issuer intends to incorporate the information required by Part III of Form 10-K by reference from the issuer's proxy statement, the issuer may only incorporate by reference from a *definitive* proxy statement filed within 120 days after the end of the issuer's fiscal year. If an issuer has filed only a *preliminary* proxy statement within the 120-day period, the issuer must file an amendment to the issuer's Form 10-K to include the Part III information within the 120-day period.

Click [here](#) to view the C&DI described above (Question 104.17)

- If a foreign issuer that qualifies as a "foreign private issuer" on the last business day of its most recently completed second fiscal quarter (the determination date for foreign private issuer status) reincorporates in the United States, the issuer no longer qualifies for foreign private issuer status. Although the issuer qualified as a foreign private issuer on the relevant determination date, a U.S. domiciled company can never be a foreign issuer or a foreign private issuer and, as a successor to the foreign issuer's reporting obligations, the U.S. corporation must immediately begin filing Exchange Act reports on domestic issuer forms.

Click [here](#) to view the C&DI described above (Question 110.01)

Katten Muchin Rosenman LLP  
Charlotte Chicago Irving London Los Angeles New York Washington, DC