2pp. 1

714-433 2900 Alimento

# TAX MANAGEMENT COMPENSATION PLANNING JOURNAL



Vol. 23, No. 3 March 3, 1995

**ARTICLE**



TAX MANAGEMENT INC.
WASHINGTON, D.C.

ARTICLE

# Registering Sales of Employer Stock Under an Employee Benefit Plan Using a Form S-8 *

*by Kirk F. Maldonado, Esq.*
*Riordan & McKinzie*
*Costa Mesa, California*

## I. Introduction

When a corporation sells its stock, both the offer and the sale must be registered under the Securities Act of 1933 (1933 Act), or there must be an applicable exemption from the registration requirements.[1] There are a number of statutory and regulatory exemptions from the registration requirements.[2] Offers and sales under an employee benefit plan maintained by an employer whose stock is publicly traded, is typically accomplished by using Form S-8, promulgated by the Securities and Exchange Commission (SEC). The Form S-8 requires less disclosure than the other SEC registration forms, based upon the belief that employees are typically more familiar with their employer than outside investors.[3]

The Form S-8 rules affect which employers and plans may utilize it, specify the items of information that must be provided, and specify the mandatory availability of certain other documents. All of these rules are discussed below.

## II. Availability of the Form S-8

### A. Registrants

*1. Employer*

Form S-8 can only be used by employers who, immediately before the filing of the registration statement:

(a) Are subject to the periodic reporting requirements of the Securities Exchange Act of 1934 (1934 Act), specifically Section 13 (relating to employers who have registered their stock under the 1934 Act) or Section 15(d) (relating to employers who have registered their stock under the 1933 Act).[4] However, employers need not have been subject to those reporting requirements for any specified period of time before the filing of the Form S-8; [5] and

(b) Have filed all required reports during the preceding 12 months (or such shorter period as the employer was required to file).[6]

*2. Plan*

Where employees make contributions to the plan, a separate security in the plan is created, called a "participation interest," much like the security created when a party purchases shares of stock in a corporation. If employee contributions can be used to purchase employer stock, those participation interests must be registered.[7] In such a case, different rules apply, depending on whether the participation interests in the plan were previously registered. One situation where the participation interests may have been previously registered is where all of the Employer Stock that was previously registered has been sold.[8]

*a. Prior Registration*

If the participation interests were previously registered, the plan must have filed all such reports during the preceding 12 months (or such shorter period that the plan was required to file); [9] or

*b. Initial Registration*

If the plan was not previously subject to the requirements of Section 15(d) of the 1934 Act (relating to issuers of securities who have registered the securities under the 1933 Act), concurrently with the filing of the registration statement, the plan must file an annual report for its latest fiscal year (Plan Year).[10]

If the plan has not yet completed its first fiscal year, then the annual report must be for a period ending not more than 90 days before the filing of the registration statement.[11] However, if the plan has not been in existence for at least 90 days before the filing date for the registration statement, no annual report for the plan need be filed concurrently with the registration statement.[12]

**Comment:** Because the data needed for a retirement plan to complete its annual report typically is not available until several months after the end of its Plan Year, this requirement would literally preclude an employer from filing a Form S-8 with respect to the initial registration of the participation interests in the plan for several months following the end of the Plan Year. The Staff of the SEC has informally indicated that an annual report for the plan need *not* be filed concurrently with the Form S-8 if the participation interests in the plan were not previously required to be registered (*e.g.*, where an existing plan is revised to allow participants to invest their contributions in Employer Stock).

0747-8607/95/$0+.1.00

*3. Qualifying Plans*

The Form S-8 can only be used in connection with an "employee benefit plan," which is defined as:

> [A]ny written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors, provided that bona fide services shall be rendered by consultants or advisors and such services must not be in connection with the offer or sale of securities in a capital-raising transaction.[13]

*4. Qualifying Participants*

*a. Employing Entity*

The Form S-8 can be used in connection with an employee benefit plan which covers employees of the employer maintaining the plan, and/or the employees of its parent and subsidiary corporations.[14] A "parent" corporation is an affiliate controlling the employer directly, or indirectly through one or more intermediaries.[15] A "subsidiary" corporation is an affiliate controlled by the employer directly, or indirectly through one or more intermediaries.[16] By way of contrast, Internal Revenue Code §414(b) [17] uses a bright-line test of 80% common ownership for purposes of the controlled group of corporation rules relating to tax-qualified retirement plans.

*b. Categories of Individuals*

For purposes of the Form S-8 rules, the term "employee" means:

1. Employee;
2. Director;
3. General partner;
4. Trustee (where the employer is a business trust);
5. Officer;
6. Consultant;
7. Advisor;
8. Insurance agents who are exclusive agents of the employer, or of its subsidiary or parent corporations;
9. Former employees;
10. Executors, administrators, or beneficiaries of the estates of deceased employees; [18]
11. Guardians or members of a committee for incompetent former employees; or
12. Other similar persons duly authorized by law to administer the estate or assets of former employees.[19]

**Comment:** Note that persons entitled to benefits under the plan pursuant to a Qualified Domestic Relations Order (QDRO) are not listed above.[20]

*c. Limitations*

The Form S-8 includes persons in categories 9 through 12, above, *only* for purposes of registering:

1. The exercise of stock options that are non-transferable (except under the laws of descent and distribution); [21]
2. The resales of the stock; and
3. The acquisition of Employer Stock pursuant to intra-plan transfers of amounts among the different investment funds of the plan; [22]

provided that such actions are not prohibited by the terms of the plan.[23]

*5. Registration of Interests*

The Form S-8 can be used to register not only the shares of Employer Stock to be acquired under the plan, but also the participation interests in the plan.[24] Although the number of shares of Employer Stock to be registered must be specified in the registration statement, if the participation interests in the plan are also to be registered, the registration statement will be deemed to register an indeterminate amount of participation interests in the plan.[25]

**B. Component Parts**

The Form S-8 consists of a prospectus and a registration statement. The requirements relating to each part are discussed below.

*1. Prospectus*

*a. Documents Constituting Prospectus*

*(1) General Rule*

For purposes of the Form S-8, the prospectus consists of the following documents:

(A) The documents containing the information required by Item 1 of the Form S-8; [26]

(B) The statement of the availability of employer information, plan annual reports and the other items of information required by Item 2 of the Form S-8; [27] and

(C) The documents containing the employer information and employee benefit plan annual reports (if the participation interests in the plan are being registered) that are incorporated by reference into the registration statement pursuant to Item 3 of the Form S-8.[28]



0747-8607/95/$0+.1.00

*(2) Multiple Documents*

The prospectus may consist of one or more documents, provided that the information is presented in a clear, concise and understandable manner.[29] The employer may designate an entire document or only a portion of a document as constituting part of the prospectus.[30] However, if not all of the document is intended to be part of the prospectus, the parts that are or are not part of the prospectus must be clearly designated.[31] If the designations are not sufficiently clear, the entire document will be deemed to be part of the prospectus.[32]

**Comment:** Employers desire to limit the scope of documents that constitute the prospectus to minimize the exposure to liability under Section 12 of the 1933 Act for the inclusion of an untrue statement or the omission of a material fact necessary in order to make statements included in the prospectus not misleading.

*(3) Legend*

All documents that are part of the prospectus must be dated and contain the following statement in a conspicuous place:

> "This document [or specifically designated portions of this document] constitutes [or constitute] part of a prospectus covering securities that have been registered under the Securities Act of 1933." [33]

*(4) Use of SPD*

The summary plan description (SPD) of an employee benefit plan subject to ERISA can function as part or all of the prospectus.[34] The use of the SPD as part of the prospectus is efficient because much of the same information must be contained in both documents.[35] DOL Regs. §2520.102-3 specifies the items of information that must be contained in the SPD. However, if the SPD is part of the prospectus, special rules apply regarding the timing of the initial delivery of the SPD and of subsequent updates.

*(5) Timing of Delivery*

*(a) Initial Delivery*

*(i) ERISA*

*A. Existing Plan*

If an existing retirement plan is amended to allow participant contributions to be invested in Employer Stock, participants must be informed of this change by the distribution of a summary of material modifications (SMM) or a revised SPD. The document need not be distributed, however, until 210 days after the end of the Plan Year in which the amendment is adopted.[36] This timing rule applies even if the amendment does not become effective until a subsequent plan year (*i.e.*, the amendment has a delayed effective date).[37] The SMM or revised SPD must be filed with the Department of Labor at the same time it is distributed to participants.[38]

*B. New Plan*

In the case of the establishment of a new plan, the SPD need not be delivered to an individual until 90 days after the individual becomes a participant in the plan.[39] The SPD must also be filed with the Department of Labor at the same time that it is distributed to participants.[40]

*(ii) Securities Law*

If the SPD is part of the prospectus, it must be delivered no later than the date on which the offer to sell Employer Stock is made to the participant.[41] Problems may arise with respect to the timing of the delivery of the prospectus where employees can use an interactive phone system to effect investment decisions under the plan, unless all participants are automatically provided a prospectus before becoming eligible to invest their contributions in Employer Stock.

**Comment:** Under DOL Regs. §2550.404c-1(b)(2)(i)(B)(*1*)(*viii*), the prospectus need not be delivered until after the participant has invested funds in a vehicle subject to the registration requirements of the 1933 Act. However, this rule is solely for purposes of ERISA, and should have no effect upon the registration requirements under the 1933 Act.

*(b) Updating*

*(i) ERISA*

Either an updated SPD or a SMM must be distributed to participants no later than 210 days after the end of the Plan Year in which a material change to the plan is adopted.[42] The SMM or revised SPD must also be filed with the Department of Labor at the same time it is distributed to participants.[43]

*(ii) Securities Laws*

*(A) When Required*

The prospectus must be updated in writing in a timely fashion to reflect any material changes during the period in which offers or sales of Employer Stock are being made.[44]

**Comment:** It is unclear exactly what "timely" means. If the purchases are funded through payroll withholding on a continuous basis and participants can commence or terminate their contributions at any time, assumedly this means that any material changes should be disclosed to participants as soon as possible.

*(B) Previously Furnished Documents*

When updating is being done, documents previously furnished need not be redelivered.[45] However, the employer must furnish without charge, upon written or oral request, a copy of all documents required by Part I of Form S-8 that then constitute part of the prospectus.[46]

*b. Required Information*

The employer is required to deliver (or cause to be delivered) to each participant sufficient information to enable the participant to make an informed decision regarding investing in the plan.[47] Any unusual risks must be prominently disclosed.[48] In particular, the prospectus must contain the following specific items of information:

(1) The name of the plan and of the employer whose stock is to be sold under the plan.[49]

(2) The nature and purpose of the plan, its duration, and any provisions for its modification, early termination, or extension.[50]

(3) Whether or not the plan is subject to ERISA, and if so, the general nature of the provisions to which it is subject.[51]

(4) An address and phone number which participants can use to obtain additional information regarding the plan.[52]

(5) The capacity in which the plan administrators act (*e.g.*, as trustees) and their functions.[53]

(6) If anyone *other than* a participant has discretion regarding the investment of the assets of the plan, that person must be named, as well as the policies to be followed with respect to investments.[54]

**Comment:** Logically, even if the individual with the investment discretion with respect to the assets of the plan is a participant in the plan, disclosure of his or her name and policies should be required if the person can affect the manner in which the assets attributable to *other* participants are invested. Also, in the case of a plan that allows participants to invest the amounts in their accounts in several pre-selected investment options (*e.g.*, various options in a family of mutual funds), the person that selects the various investment options that are to be available to participants and his or her investment policies should be disclosed.

(7) If the plan is *not* subject to ERISA, there must be a description of the following two items:

(A) The nature of any material relationship between (I) the administrators and (II) the employees, the employer and the affiliates. An "Affiliate" is "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, an employer;" [55] and

(B) The manner in which the administrators are selected, their term of office and the manner in which they may be removed from office.[56]

(8) The title and total amount of Employer Stock to be offered under the plan.[57] Participation interests in the plan need not be described, though.[58] Similarly, stock that is registered under Section 12 of the 1934 Act need not be described.[59]

**Comment:** In virtually all cases, the Employer Stock being sold under the plan will have been previously registered under Section 12 of the 1934 Act, so that no description of the securities will be necessary.

(9) The classes or groups of employees that may participate in the plan and the basis upon which eligibility to participate is determined.[60]

**Comment:** In the case of a plan sponsored by a parent corporation that allows participation by its subsidiary corporations, this requirement can be satisfied either by specifically listing those corporations whose employees may participate in the plan, or by stating (if applicable) that all subsidiaries participate in the plan.

(10) The period of time within which employees may elect to participate in the plan, the price at which the Employer Stock may be purchased or the basis upon which such price is to be determined, and any terms regarding the amount of Employer Stock that a participant may purchase.[61]

(11) The time and manner in which participants are to pay for the Employer Stock they purchase pursuant to the plan. If the payment is to be made by payroll deductions or other installment payments, the percentage of compensation (or other basis for computing such payments), and the time and manner in which a participant may alter the amount of his or her payments.[62]

(12) Whether participants are required or permitted to make contributions to the plan (*e.g.*, as a fixed dollar amount or as a percentage of compensation).[63]

(13) If any employer is to make any payments under the plan, the following four items must be disclosed:

(A) The name of the specific employer making contributions to the plan (*e.g.*, in the case of a plan maintained by two or more members of a controlled group of corporations);

(B) When those employer contributions are to be made;

(C) The nature and amount of the employer contributions; and

(D) If the employer contributions are not a fixed amount, the basis for computing those contributions.[64]



0747-8607/95/$0+.1.00

**Comment:** Note that this does not expressly require a description of how the employer contributions are allocated among the participants (*e.g.*, as a percentage of compensation or in proportion to the contributions made by each participant). However, that topic is subsumed by the requirement that each participant must receive sufficient information to make an informed decision regarding investing in the plan.[65]

(14) The nature and frequency of any reports to participants regarding the amount and status of their accounts in the plan.[66]

**Comment:** In the case of a plan subject to ERISA, participants must receive a summary of the plan's annual report on Form 5500[67] within nine months after the end of the Plan Year,[68] and a benefit statement must be furnished upon a request by the participant, but it need not be furnished more frequently than annually.[69] Note that there is no requirement that the request for a benefit statement must be in writing.

(15) If the plan is *not* subject to ERISA, the following items:

(A) Whether the Employer Stock is to be purchased on the open market or otherwise; [70]

(B) If the Employer Stock is *not* purchased on the open market, from whom the shares are to be purchased, as well as the fees, commissions, or other charges paid; [71] and

(C) If the employer or any of its affiliates, or any person having a material relationship with the employer or its affiliates,[72] directly or indirectly, receives any part of the aggregate purchase price paid for the Employer Stock, the basis for that compensation.[73]

(16) The restrictions (*e.g.*, Rule 144, 17 CFR §230.144) upon the ability of participants to resell Employer Stock that is distributed to them from the plan.[74]

(17) The tax effects to the participants and to the employer.[75] Whether or not the plan qualifies under §401(a).[76]

If the plan is *not* a tax-qualified retirement plan, consideration should be given to the applicability of the Investment Company Act of 1940.[77] Tax-qualified retirement plans are excluded from the definition of investment company.[78]

(18) If participants can direct the investment of their accounts in the plan, the following items:

(A) A brief description of the provisions of the plan with respect to investment selection (*e.g.*, how frequently participants may change their investment decisions, and any investment concentration limitations).

(B) Tabular or other meaningful presentation of financial data (*e.g.*, rates of return) for each of the past three fiscal years (or such lesser period for which data is available for a specific investment). Information for additional years may be required if necessary to prevent the information from being misleading, but in no event is more than five years' of data required to be presented.[79] Thus, this information must be updated annually.

**Comment:** Note that there is no explicit requirement that the investment policy of each of the different investment funds available under the plan be described. However, that is subsumed by the requirement that each participant must receive sufficient information to make an informed decision regarding investing in the plan.[80] Also, in the case of a retirement plan that allows participants to direct the investment of the amounts in their accounts, special disclosure obligations apply if the fiduciaries of the plan desire the protection from fiduciary liability afforded by ERISA §404(c).[81]

(19) The provisions (if any) for participants to withdraw amounts from the plan.[82] An example of such a withdrawal would be one permitted under a §401(k) plan by a participant who has incurred a financial hardship.[83]

(20) Whether or not participants can assign or hypothecate their interests in the plan.[84] ERISA precludes participants from alienating their benefits under a pension plan.[85] However, no discussion need be provided of the effect of a QDRO.[86]

(21) Events causing a forfeiture or penalty upon participants (*e.g.*, termination of employment before full vesting).[87] The vesting requirements for retirement plans are located in §411 and ERISA §203. Presumably this does *not* include the imposition of the 10% penalty tax upon most distributions received from tax-qualified retirement plans before age 59½.[88]

(22) All charges and deductions (other than for the payment of Employer Stock or taxes), such as those incident to withdrawals from the plan.[89] This might include the plan bearing its own administrative costs.[90]

(23) Whether or not any persons may create a lien upon the assets of the plan.[91] The assets of a tax-qualified retirement plan are not subject to the claims of the employer's creditors. Also, ERISA precludes participants from alienating their benefits.[92] However, no discussion need be provided of the effect of a QDRO.[93]

(24) A statement that, upon written or oral request, participants may receive without charge the documents incorporated by reference in Item 3 of Part II of the registration statement.[94] This

statement must also mention that those documents are incorporated by reference into the prospectus.[95] Furthermore, participants must be furnished with the address (giving title or department) and the phone number to which the request for those documents is to be directed.[96]

Note that under ERISA, certain documents must be made available to participants (*e.g.*, copies of the plan document).[97] However, the plan can charge up to $.25 per page for copying those documents.[98]

*c. Retention of Documents*

The documents constituting the prospectus must be retained by the employer for five years after they are last used as part of the prospectus.[99] Under ERISA, the plan must generally maintain the supporting documentation for six years after the filing date of a document (*e.g.*, the plan's annual return on the Form 5500).[100] The retention requirement under securities laws does *not* apply to the documents that are required to be incorporated by reference into the prospectus pursuant to Item 3 of Part II of the Form S-8 (*e.g.*, the employer's latest annual report).[101]

*2. Registration Statement*

The registration statement must include the items discussed below.[102]

*a. Facing Page*

The registration statement must have a facing page that contains certain items of information (*e.g.*, the name of the plan and the name of the employer).

*b. Incorporation by Reference*

The employer and the plan (if the participation interests in the plan are being registered) must state that the documents listed below are incorporated by reference into the registration statement.[103]

(1) All documents subsequently filed by the employer or the plan pursuant to Sections 13(a), 13(c), 14 and 15(d) of the 1934 Act before the filing of a post-effective amendment that: (1) indicates that all securities offered under the registration statement have been sold; or (2) deregisters all securities then remaining unsold.[104]

(2) Where the participation interests in the plan are being registered, the plan's latest annual report filed pursuant to Section 13(a) or 15(d) of the 1934 Act.[105]

(3) One of the following three documents:

(a) The employer's latest annual report;

(b) The latest prospectus filed pursuant to Rule 424(b)[106] that contains audited financial statements for the employer's latest fiscal year for which such statements have been filed; or

(c) The employer's effective registration statement on Form 10 or Form 20-F containing audited financial statements for the employer's latest fiscal year.[107]

(4) All other reports filed pursuant to Section 13(a) (relating to employers whose stock is registered under the 1933 Act) or Section 15(d) (relating to employers whose stock is registered under the 1934 Act) of the 1934 Act since the end of the fiscal year referred to in the documents in II, B, 2, b, (3), above.[108]

(5) If the Employer Stock is registered under Section 12 of the 1934 Act (*e.g.*, relating to employers with assets of more than $1,000,000 and 500 or more shareholders), the description of such class of stock contained in a registration statement, including any amendment or report filed for the purpose of updating such description.[109]

*c. Description of Securities*

If the Employer Stock being offered is *not* registered under Section 12 of the 1934 Act, the information required by Item 202 of Regulation 5-K[110] must be provided.[111] However, even if the participation interests in the plan are being registered, they need not be described.[112] The participation interests in the plan do not need to be registered under the 1934 Act.[113]

*d. Interests of Named Experts and Counsel*

If:

(1) Any expert named in the registration statement as having prepared or certified any part thereof; or

(2) Counsel for the employer, underwriter, or selling stockholders named in the prospectus as having given an opinion on the validity of the securities being registered or upon other legal matters in connection with the registration or offering of such securities;

was employed on a contingent basis or has a substantial interest in the employer or in its parent or subsidiary corporation, a brief statement as to the nature of the contingent basis, interest, or connection must be furnished.[114] In general, an interest will not be deemed to be substantial (and therefore need not be disclosed) if it does not exceed $50,000.[115]

*e. Indemnity*

There must be a discussion of the general effect of any statute, by-laws, contract or other arrangement under which any controlling person, director, or offi-



0747-8607/95/$0+.1.00

cer of the employer is insured or indemnified in any manner against liability which he or she may incur in his or her capacity as such.[116]

**Comment:** ERISA imposes certain limitations upon the extent to which fiduciaries may be indemnified for liabilities they incur under ERISA with respect to their duties relating to the plan.[117]

*f. Exemption*

With respect to Restricted Securities [118] being reoffered or resold pursuant to the registration statement, the section of the 1933 Act or rule of the SEC under which exemption from registration was claimed with respect to the (original) acquisition of the Employer Stock as well as a brief description of the facts relied upon to make the exemption applicable.[119]

*g. Exhibits*

The following exhibits, which are enumerated as set forth in Item 601 [120] must be furnished.[121] Other exhibits may also apply in unusual circumstances.[122]

(4) Instruments defining the rights of stockholders.[123]

(5) Opinion regarding the legality of the Employer Stock being registered.[124]

However, this opinion is only required as to original issuance securities (*i.e.*, those purchased directly from the employer).[125] Also, if the plan is subject to ERISA, one of the three following alternatives must be furnished:

(A) An opinion of counsel that the plan complies with ERISA; [126]

(B) A copy of the IRS determination letter that the plan qualifies under §401(a); [127] or

(C) An undertaking that the employer will submit the plan to the IRS in a timely manner and will make all changes required by the IRS in order to qualify the plan.[128]

**Comment:** This rule assumes that the requirements of the Code are identical to those of ERISA. While many requirements are common to both, there are significant differences between them. For example, the nondiscrimination requirements of the Code only apply to tax-qualified retirement plans.[129] On the other hand, because ERISA applies to both tax-qualified and non-qualified retirement plans, it generally does not contain any nondiscrimination rules.

(23) Written consents of experts and counsel to the use of their opinions in the registration statement.[130]

(24) Power of attorney (if any name is signed to the registration statement or to a report pursuant to a power of attorney).[131]

*h. Undertakings*

The following undertakings must be set forth in the registration statement.

*i. Rule 415 Offering*

Most registration statements on Form S-8 involve the continuous offering and sale of Employer Stock (as opposed to a single transaction) under Rule 415.[132] Accordingly, the following undertakings must be set forth in the document.

"The registrant hereby undertakes

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by §10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represents a fundamental change in the information set forth in the registration statement;

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement.

Provided, however, that paragraph (1)(i) and (1)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed by the registrant pursuant to Section 13 (relating to employers which have registered stock under the 1934 Act) or 15(d) (relating to employers which have registered stock under the 1933 Act) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement.

(2) That, for purposes of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any securities which remain unsold at the termination of the offering." [133]

*(2) Subsequent Documents*

Because 1934 Act filings made after the effective date of the registration statements are incorporated by reference into the registration statement,[134] the

following statement must be part of the registration statement:

> The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report filed pursuant to Section 13(a) (relating to employers which have registered stock under the 1934 Act) or 15(d) (relating to employers which have registered stock under the 1933 Act) of the Securities Exchange Act of 1934 (and where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.[135]

*(3) Indemnification*

If a director, officer, or controlling person of the employer is to be indemnified against liability under the 1933 Act, the following statement must be contained in the registration statement:

> Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers, and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment of expenses incurred or paid by a director, officer, or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.[136]

*i. Signatures*

The registration statement must be executed.

*(1) Employer*

The registration statement must be signed by all of the following parties:

(A) The employer;

(B) Its principal executive officer;

(C) Its principal financial officer;

(D) Its controller or principal accounting officer; and

(E) At least a majority of its board of directors.[137]

*(2) Plan*

Where the participation interests in the plan are being registered, the registration statement must be signed by the plan.[138]

**Comment:** In the case of a plan subject to ERISA, the signature on behalf of the plan could be made by the trustee(s) or by the member(s) of the plan's administrative committee. Additionally, if more than one individual serves on the plan's administrative committee, or more than one individual is a trustee of the plan, one individual can sign on behalf of all of the members of the committee (or on behalf of all of the trustees, whichever is applicable).

**C. Availability of Documents**

*1. Mandatory Disclosure*

Each participant must receive the following documents:

*a. Annual Report*

A copy of one of the following documents:

(1) The annual report to security holders containing the information required by Rule 14a-3(b) [139] (relating to financial statements required by the proxy rules) for the latest fiscal year of the employer;

(2) The employer's annual report on Form 10-K for its latest fiscal year;

(3) The latest prospectus filed pursuant to Rule 424(b) [140] that contains audited financial statements for the employer's latest fiscal year; or

(4) The employer's effective registration statement on Form 10 or Form 20-F containing audited financial statements for the employer's latest fiscal year.[141]

However, if the employer's latest fiscal year ended within 120 days before the delivery of the prospectus, the employer may deliver a document containing financial statements for its *preceding* fiscal year, if before the 120-day period expires, a document containing financial statements for the *latest* fiscal year is furnished to each participant.[142]

*b. Stockholder Communications*

All reports, proxy statements, and other communications distributed to (other) stockholders must be delivered to the participants in the plan who have



0747-8607/95/$0+.1.00