

SEC Regulations Committee
April 17, 2007 - Joint Meeting with SEC Staff
SEC Offices – Washington DC

Discussion Document K

Topic: Determining Accelerated Filer Status for a Company that was Recently Spun-off from an SEC Registrant-Parent (Update to Discussion Document C from the June 2004 Joint Meeting)

Issue: Should a parent company's accelerated filer status be "pushed down" to its subsidiary in connection with a spin-off of that subsidiary?

Background: At the June 2004 Joint meeting, the Committee and the staff discussed an issue regarding the determination of accelerated filer status by a company that was previously the subsidiary of an SEC registrant. This discussion was summarized in Discussion Document C. Specifically relating to a spin-off, the Committee and the staff agreed that a spinee should make its own assessment of its accelerated filer status based on the criteria set forth in Exchange Act Rule 12b-2. The "Committee Recommendation" section of Discussion Document C included the following statement:

Although the committee recognizes that [the prior parent's] '34 Act reporting history might (under certain circumstances described in Staff Legal Bulletin #4) be considered by [the spinee] in determining its eligibility to use Form S-3, the committee does not believe that this accommodation should be considered when determining whether or not [the spinee] meets the definition of an accelerated filer.

[Note: The terms in brackets have been substituted in place of the names of companies used in the example provided in the original discussion document.]

In December 2006, the Commission adopted Release 33-8760 (*Final Rule: Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies*). This release included the following footnote (on page 25):

²⁶ Instruction 1 to Item 308 of Regulations S-B and S-K, Item 15 of Form 20-F, and General Instruction B(6) of Form 40-F, and Exchange Act Rules 13a-15(a), (c) and (d) and 15d-15(a), (c) and (d). The definition of an accelerated filer was based, in part, on the requirements for registration of primary offerings for cash on Form S-3. See Section II.B.3 in Release No. 33-8128 (Sept. 5, 2002)[67 FR 58480] and Section I in Release No. 33-8644 (Dec. 21, 2005)[70 FR 76626]. In some situations, a newly formed public company may seek to use another entity's reporting history for purposes of using Form S-3. For example, a spun-off entity may attempt to use its parent's reporting history or a newly formed holding company may seek to use its predecessor's reporting history. Because of the inter-relationship between Form S-3 eligibility and accelerated filer status, we believe that, to the extent a newly formed public company seeks to use and is deemed eligible to use Form S-3 on the basis of another entity's reporting history, that company would also be an accelerated filer and therefore required to comply with Items 308(a) and 308(b) of Regulation S-K in the first annual report that it files.

The Committee believes Discussion Document C from the June 2004 joint meeting should be updated as described in the attached (which is marked for changes from the previously published Discussion Document C)

C. Determining accelerated filer status for companies that were previously subsidiaries of an SEC registrant [Updated April 2007 for Release 33-8760]

Facts: Company X is an SEC registrant with common stock traded on the New York Stock Exchange. Company X is an accelerated filer under Rule 12b-2. Company X owns 100% of the equity of Spinco. Spinco has never made any filings with the SEC on a stand-alone basis. In June 2004/2007, Company X completed the pro-rata distribution (a spin-off) of 100% of its investment in Spinco to its shareholders. Concurrent with the spin-off, Spinco registered its stock (which is also traded on the New York Stock Exchange) under the '34 Act on Form 10. At June 30, 2004/2007, the aggregate market value of Spinco's voting and non-voting common equity held by non-affiliates was \$1 billion.

Question: Should Company X's status as an accelerated filer be "pushed down" to Spinco?

View A: No. Spinco should make its own assessment of its status as an accelerated filer based on the criteria set forth in Exchange Act Rule 12b-2.

View B: Yes. All companies within a consolidated group should have the same accelerated filer status and therefore Spinco would retain accelerated filer status after its spin-off (unless it was eligible to use small business issuer forms).

View C: Maybe. In some situations, a spun-off entity may attempt to use its parent's reporting history to meet the eligibility requirements of Form S-3. Refer to Staff Legal Bulletin 4. Because of the inter-relationship between Form S-3 eligibility and accelerated filer status, if Spinco seeks to use and is deemed eligible to use Form S-3 on the basis of Company X's reporting history, Spinco would also be deemed an accelerated filer. This means Spinco would be required to comply with Items 308(a) and 308(b) of Regulation S-K (i.e., Sarbanes-Oxley Section 404 reporting) in its 2007 annual report (even though that report is its first annual report). If, however, Spinco did not seek to use Company X's prior reporting history for purposes of meeting the eligibility requirements of Form S-3, then Spinco should evaluate its status as an accelerated filer (and a newly public company) based on the criteria set forth in Exchange Act Rule 12b-2 and Release 33-8760.

Committee Recommendation: The Committee believes View C is consistent with the guidance provided by the Commission in footnote 76 to Release 33-8760. The committee supports View A. Although the committee recognizes that Company X's '34 Act reporting history might (under certain circumstances described in Staff Legal Bulletin #4) be considered by Spinco in determining its eligibility to use Form S-3, the committee does not believe that this accommodation should be considered when determining whether or not Spinco meets the definition of an accelerated filer. As of December 31, 2004, Spinco (as a stand-alone entity) had not been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for 12 months and Spinco had not filed an annual report pursuant to Section 13(a) or 15(d) of the [Exchange] Act. The absence of either of these criteria means that Spinco does not meet the definition of an accelerated filer. Accordingly, the committee believes that Spinco should not be considered an accelerated filer as of December 31, 2004 and its 2004 10-K would not need to comply with the requirements of Items 308(a) and (b) of Regulation S-K.

The committee also supports View A in the case of a separation transaction effected in the form of an offering of Spinco's stock for cash by either Company X or Spinco (registered on Form S-1).

SEC Staff Response: The staff supports View C.

