

Vested Interests: SEC Staff Streamlines Form S-8, Rule 701, and Section 16 Guidance

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On October 15, 2026, the staff of the U.S. Securities and Exchange Commission's (SEC) Division of Corporation Finance (the Staff) released a series of new and revised Corporation Finance Interpretations (CFIs, formerly known as Compliance and Disclosure Interpretations, or C&DIs) addressing Rule 701 under the Securities Act of 1933 (the Securities Act), Form S-8 and the related registration fee rules, as well as a Form 4 filing timing question under Section 16 of the Securities Exchange Act of 1934 (the Exchange Act).¹ Most of the guidance is new, although the Staff also revised two longstanding Form S-8 interpretations, including one that reverses the Staff's prior position on assumed awards held by former employees of an acquired company.

Taken together, the new CFIs largely resolve in companies' favor several questions that practitioners have long treated as unclear, and in a number of respects place restricted stock and restricted stock units (RSUs) on the same footing that stock options have historically enjoyed. Below, we summarize the new guidance and highlight related existing guidance that continues to apply.

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¹ [SEC, Corporation Finance Interpretations Update: October 15, 2026.](#)
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Assumed Awards Held by Former Employees of an Acquired Company

Two related CFIs give public and eligible private acquirers flexibility with respect to equity awards held by former employees of the target that are assumed in an acquisition.

Form S-8 for Public Company Acquirers. In a welcome development, the Staff revised Question 126.14 to provide that it will not object if a public company registers on Form S-8 the shares associated with compensatory equity awards—including stock options, restricted stock, and RSUs—held by former employees of the target that it assumes in an acquisition.² This reverses the Staff’s 2009 position that Form S-8 was not available for awards held by former target employees, because they were never employed by the acquiring company.³ Under the prior position, in public mergers acquirers typically cashed out the awards held by former target employees or registered those awards on Form S-4 or, where available, Form S-3.

Rule 701 for Eligible Private Company Acquirers. In a companion interpretation, new Question 271.29, the Staff confirmed that a private acquiring company may rely on Rule 701 for restricted stock and the securities underlying stock options and RSUs held by persons whose employment or service with the target ended before the acquisition, so long as the awards are assumed in the transaction and the acquiring company is itself eligible to use Rule 701.⁴

As a practical matter, the new guidance gives both public and private acquirers meaningful flexibility in how they treat equity awards held by former target personnel. Companies should keep in mind, however, that the relief is limited to awards assumed in the transaction, and that for public acquirers relying on Form S-8, revised Question 126.14 extends only to former employees of the target, rather than to former

service providers more broadly, such as consultants and non-employee directors. For assumed awards held by those non-employee service providers, acquirers will generally need to continue to rely on Form S-4, Form S-3 (where available), or a cash-out approach. Acquirers relying on Form S-8 for these awards should also remember to add former target employees to their prospectus and annual report delivery processes. Private acquirers relying on Rule 701 should continue to monitor the rule’s volume limitations, which the assumed awards will count against, as well as the enhanced disclosure obligations that apply if sales in a 12-month period exceed \$10 million.

Newly Public Companies: Moving Pre-IPO Awards Onto Form S-8

The Staff clarified how companies completing an IPO can transition their outstanding pre-IPO equity awards onto Form S-8. New Question 271.28 confirms that once a company that granted compensatory awards in reliance on an exemption (such as Rule 701) becomes eligible to file a Form S-8, the Staff will not object if it “moves the offering onto Form S-8” by registering the shares to be issued upon vesting of restricted stock and the shares underlying outstanding stock options and RSUs previously granted to eligible recipients.⁵ Practitioners have long taken comfort that pre-IPO options could be registered on Form S-8 before exercise; the new CFI extends that treatment to restricted stock and RSUs.

In practice, newly public companies can now cover their full outstanding pre-IPO equity awards, including restricted stock and RSUs, on Form S-8 once eligible, rather than continuing to rely on an exemption for those awards. The interpretation does not, however, address shares that were already issued before the Form S-8 is filed, and companies going public should continue to separately consider how those shares may be resold in connection with their IPO planning.

² Corporation Finance Interpretations, Securities Act Forms Question 126.14 (revised) (Oct. 15, 2026).

³ Corporation Finance Interpretations, Securities Act Forms Question 126.14 (Feb. 27, 2009) (superseded).

⁴ Corporation Finance Interpretations, Securities Act Rules Question 271.29 (Oct. 15, 2026).

⁵ Corporation Finance Interpretations, Securities Act Rules Question 271.28 (Oct. 15, 2026).

Form S-8 Timing and Filing Fees for Restricted Stock and RSUs

Two of the new CFIs give companies additional flexibility in registering shares issued under restricted stock and RSU awards, addressing both when a Form S-8 must be on file and what happens to fees paid on shares that are never issued.

Registration by Vesting Date. New Question 126.47 provides that the Staff will not object if a reporting company registers on Form S-8 the offer and sale of common stock issued upon settlement of restricted stock or RSUs (which we would interpret to include performance-based stock units (PSUs) by the vesting date rather than the grant date, as long as the company was also eligible to use Form S-8 on the date of grant.⁶ In practice, that condition means the company must have been an Exchange Act reporting company current in its reporting as of the grant date, so the relief does not reach pre-IPO awards granted before the company became an Exchange Act reporting company; newly public companies should instead move those awards onto Form S-8 under Question 271.28, discussed above. Before this guidance, the timing question was unsettled. Many practitioners took the cautious approach of advising that a Form S-8 should be on file before granting RSUs, reflecting the view that an RSU may be “sold” when it is granted, informed in part by the Staff’s Rule 701 guidance.⁷ The new CFI parallels the long-standing, similarly policy-based treatment of stock options, the shares underlying which may be registered at any time before exercise.⁸

In practice, the new guidance will give companies more time and flexibility in filing the Form S-8. However, companies taking advantage of this relief should ensure that the Form S-8 is in fact on file before the awards vest, taking into account any provisions that could accelerate vesting, such as upon

retirement eligibility, death or disability, or certain terminations or transactions. Additionally, companies should still ensure they are eligible to use Form S-8 at the time of grant, including that they are current in their Exchange Act reporting.⁹ A related benefit of the new guidance is that awards that are granted but forfeited before vesting presumably would not need to be covered by a Form S-8 at all, which may help companies conserve registered shares and avoid paying fees on shares that are never issued.

Fees for Forfeited RSUs. Under new Question 126.46, the Staff confirms that it will not object if a company applies Form S-8 filing fees associated with securities underlying compensatory equity awards that never vested and were forfeited to future Form S-8 registrations of securities underlying awards, including securities that become available for reissuance under the plan.¹⁰

Notably, although the Staff’s answer specifically references RSUs, the question is framed to cover compensatory awards with vesting conditions generally, and the same analysis should apply to restricted stock, PSUs, and other similar awards. Read together with Question 126.47, Question 126.46 is most useful as backward-looking relief—for fees already paid at grant on awards that have since been forfeited—and for companies that, going forward, continue to register at grant (for example, because of acceleration-of-vesting concerns or because they prefer to keep the Form S-8 on file well in advance). Question 126.46 does not address whether shares underlying forfeited awards remain available under the original Form S-8, but read with Question 126.47, there is a reasonable basis to conclude that shares underlying awards that never vested were never “used” under the original registration statement. For companies that have historically counted these shares against their Form S-8 at grant, or that file a new Form

⁶ Corporation Finance Interpretations, Securities Act Forms Question 126.47 (Oct. 15, 2026).

⁷ See Corporation Finance Interpretations, Securities Act Rules Question 271.24 (revised) (Mar. 6, 2026).

⁸ Corporation Finance Interpretations, Securities Act Forms Question 126.02 (Feb. 27, 2009).

⁹ See Corporation Finance Interpretations, Securities Act Forms Question 126.03 (Feb. 27, 2009).

¹⁰ Corporation Finance Interpretations, Securities Act Forms Question 126.46 (Oct. 15, 2026).

S-8 covering recycled shares, Question 126.46 permits the fees previously paid on the forfeited shares to be applied to that filing. Companies with share recycling provisions should continue to track registered share usage carefully against plan reserve capacity.

Registration Fees for 401(k) and Other Defined Contribution Plans

The Staff provided two updates relevant to plan sponsors calculating registration fees for 401(k) and other defined contribution plans, an area that has long been administratively challenging.

New Question 240.19 confirms that companies may rely on Rule 457(o), which permits fees to be calculated on the maximum aggregate offering price rather than a number of shares, to calculate the registration fee for an offering pursuant to a defined contribution plan (such as a 401(k) plan).¹¹ Given the difficulty of share counting for 401(k) plans, which lack a finite share pool, this may offer a simpler approach for some plan sponsors. However, the CFI only addresses how the fee is calculated; the question of whether registration is required continues to turn on whether participation is voluntary and contributory.

The Staff also revised Question 126.19, which addresses a 401(k) plan with an automatic company contribution, employee contributions, and a company match. The answer is substantively unchanged—no fee is required for the automatic contribution and a fee is required for employee and matching contributions—but the Staff clarified that the fee applies to employee and matching contributions only “to the extent those contributions are invested in employer’s securities.”¹² In addition, registration is required for an indeterminate amount of plan interests, which are securities of the plan itself, although no separate fee is required for those plan interests.

Section 16: Form 4 Deadlines for Transactions on Foreign Exchanges

As Section 16 reporting persons increasingly transact on exchanges outside the United States, questions about how to apply the Form 4 filing deadline to those trades have become more common. New Question 135.05 addresses one of these questions: how to calculate the Form 4 deadline under Exchange Act Rule 16a-3(g)(1), which requires filing before the end of the second business day following the transaction date, when a reporting person transacts on a foreign exchange. The new CFI clarifies that the deadline is calculated beginning with the date in the time zone where the transaction was executed. In the Staff’s example, a sale executed at 9:00 a.m. local time on August 25, 2026 (when it is still August 24 in U.S. Eastern time) must be reported by 10:00 p.m. U.S. Eastern time on August 27, 2026, the EDGAR filing deadline.¹³

As the example illustrates, for trades executed in time zones well ahead of U.S. Eastern time—most notably in Asia-Pacific markets, and in Europe depending on the time of execution—this approach can provide insiders with an additional day to file where the local transaction date falls a day after the U.S. Eastern date. Companies with insiders who trade on non-U.S. exchanges should confirm that their Section 16 compliance procedures and filing agents apply this approach.

Takeaways

- Acquirers should revisit their approach to assumed equity awards held by former target employees, as Form S-8 (or, for private acquirers, Rule 701) may now be available where a Form S-4, Form S-3, or cash-out was previously used, keeping in mind that the Form S-8 relief extends only to former

¹¹ Corporation Finance Interpretations, Securities Act Rules Question 240.19 (Oct. 15, 2026).

¹² Corporation Finance Interpretations, Securities Act Forms Question 126.19 (revised) (Oct. 15, 2026). See also Securities Act Rules 416(c) and 457(h)(2).

¹³ Corporation Finance Interpretations, Exchange Act Section 16 and Related Rules and Forms Question 135.05 (Oct. 15, 2026).

employees (as opposed to non-employee award holders).

- Newly public companies should consider moving outstanding pre-IPO restricted stock, RSU, and option awards onto Form S-8 once eligible to file that form.
- Companies that have historically filed Form S-8s before granting RSUs may revisit that practice going forward, bearing in mind the grant-date eligibility condition and the need to have a Form S-8 on file before any accelerated vesting.
- Companies with plans that recycle forfeited award shares should evaluate whether those shares remain available under their existing Form S-8 and, where a new registration statement is filed, whether previously paid fees can be applied to it.
- Sponsors of 401(k) plans with employer stock funds may wish to consider whether calculating fees under Rule 457(o) would simplify compliance.
- Section 16 compliance procedures, particularly for foreign private issuers, should reflect the Staff's approach to transactions executed on foreign exchanges.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any member of the Executive Compensation, Employee Benefits, and ERISA group.

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