



## SEC Staff Issues C&DI on Form S-3 Transaction Requirements

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The Form S-3 instructions set forth certain transaction requirements that must be met in order for an issuer to use Form S-3. If these are not met, the issuer would instead have to use Form S-1 to register its securities, which, for a variety of reasons, is more burdensome for an issuer than Form S-3. One of these transaction requirements is found in Instruction I.B.6, which permits an issuer to use Form S-3 in primary offerings—even if the issuer has less than \$75 million in public float—so long as no more than one-third of the issuer's public float is sold within a 12-month period. Another transaction requirement is found in Instruction I.B.3, which permits an issuer to use Form S-3 in secondary offerings, which are offerings where an issuer's outstanding securities are offered for the account of any person other than the issuer.

In C&DI 116.25, the Staff describes a scenario where an issuer with less than \$75 million in public float has registered its securities for a primary offering by putting up a shelf registration statement on Form S-3 in reliance on Instruction I.B.6. When relying on Instruction I.B.6, an issuer is restricted from selling more than one-third of its public float within a 12-month period. The issuer wants to offer securities to certain investor(s). A portion of these securities would be sold to the investor(s) by taking down the securities registered on the shelf registration statement on Form S-3 in reliance on Instruction I.B.6. Another portion of the securities would be offered in a separate private placement to the same investor(s) with the private placement securities being concurrently registered for resale on a separate Form S-3 in reliance on Instruction I.B.3. According to C&DI 116.25, the Staff takes the position that, if the aggregate number of securities sold by the issuer exceeds the Instruction I.B.6 limitation that would be available to the issuer at the time the resale registration statement on Form S-3 is filed—one-third of the issuer's public float during a 12-month period—then the issuer could

not rely on Instruction I.B.3 to register the resale of the balance of the securities on Form S-3. The securities registered for resale on Form S-3 should, according to the Staff, be counted against the issuer's available capacity under Instruction I.B.6 because, otherwise, utilizing such an offering structure would evade the offering size limitations of Instruction I.B.6. In other words, the Staff does not believe that an issuer may rely on Instruction I.B.3 to register the resale of the balance of the securities on Form S-3, unless it has sufficient capacity under Instruction I.B.6 to issue that amount of securities at the time of filing the resale registration statement. When there is not sufficient capacity, the issuer must, under the Staff's interpretation, either register the resale on Form S-1 or wait until the issuer has sufficient capacity under Instruction I.B.6 to register the resale on Form S-3.

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