Certain Shelf Registration Statements Set to Expire: SEC Issues Guidance

After November 30, 2008, certain shelf registration statements will begin to expire. Under a provision of the SEC's 2005 Securities Offering Reform rules, shelf registration statements that became effective before December 1, 2005, will expire on November 30, 2008, and shelf registration statements that became effective on or after December 1, 2005, will expire three years from their effective date.[1] Due to recent market turmoil, this date may be particularly important to issuers that were able to take advantage of their well-known seasoned-issuer (or "WKSI") status by filing an automatic shelf registration statement three years ago but whose non-affiliated common equity float has declined, or is at risk of declining, below the $700 million threshold that is one of the criteria for WKSI status. On November 21, 2008, the SEC Division of Corporation Finance published guidance that addresses some of the registration issues faced by such issuers.[2]

I. Background

Securities Act Rule 415(a), which was amended as part of Securities Offering Reform, sets a three-year expiration date for certain types of shelf registration statements.[3] New registration statements must be filed by the end of that term for shelf registration statements pertaining to offerings of the following types of securities:

- Securities registered on an automatic shelf registration statement (available only to WKSIs);
- Securities registered for offerings that will be commenced promptly, will be made on a continuous basis and may continue to be offered for more than 30 days after the date of initial effectiveness;
- Securities registered (or qualified to be registered) on Form S-3 or Form F-3 which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority-owned subsidiary of the registrant or a person of which the registrant is a majority-owned subsidiary; and
- Mortgage-related securities, including such securities as mortgage-backed debt and mortgage participation or pass through certificates.[4]

The Securities Offering Reform rules also created a category of issuers, WKSIs, who can immediately access the capital markets through shelf registration statements that become automatically effective upon filing, without review by the SEC. WKSI status can be determined on any date within 60 days of the filing date of an automatic shelf registration statement.[5] To qualify, an issuer must be eligible, on that date, to file using Form S-3 or Form F-3 (including having timely filed its Exchange Act reports for the preceding 12 months) and must have either:

- $700 million or more of common stock held by nonaffiliates; or

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1 *See* Securities Offering Reform, Release Nos. 33-8591; 34-52056 (July 19, 2005).

2 *See* SEC, Division of Corporation Finance, *Filing Guidance for Companies Replacing Expiring Shelf Registration Statements in Accordance with Securities Act Rule 415(a)(6)* (November 21, 2008) *available at* http://www.sec.gov/divisions/corpfin/guidance/415a5guidance6.htm. ("SEC Guidance")

3 *See* Rule 415(a)(5).

4 *Id.*

5 *See* Rule 405.

- $1 billion or more in aggregate principal amount of nonconvertible securities (other than common equity) issued for cash in primary registered offerings during the last three years.[6] (An issuer relying on this test can only register non-convertible securities, other than common equity, unless it also meets a $75 million public float requirement.)

After an issuer has filed an automatic shelf registration statement, it must re-assess its WKSI status (taking into account the 60-day look-back provision discussed above) on an approximately annual basis on the dates it files its next annual reports on Form 10-K.[7]

II. Timing Considerations for a New Shelf Registration Statement

SEC rules provide a grace period for issuers using shelf registration statements to ensure that there is no gap in their ongoing registered offerings between the three-year expiration date of their original shelf registration statement and the effective date of a new registration statement. As long as a new registration statement is filed by the third anniversary of the original registration statement's effective date, an issuer may continue to offer and sell securities covered by the original registration statement until the earlier of the new registration statement's effective date, or 180 days after the third anniversary of the original registration statement's effective date.[8] The issuer may proceed with continuous offerings that began during the three-year period for the original registration statement, until the new registration statement becomes effective.[9]

For new automatic shelf registration statements, there will be no gap in ongoing registered offerings for issuers who re-file before the expiration date. While this is helpful for purposes of the November 30th deadline, companies in danger of losing their WKSI status may need to take additional steps to ensure that they have an effective shelf registration statement in place. Issuers whose market capitalization has only recently fallen below $700 million may be able to find a day within the 60 days prior to the filing of a new registration statement to use for purposes of determining their WKSI status. Once an automatic shelf registration statement is effective, loss of WKSI status will not affect an issuer's ability to use the registration statement until the next filing of the issuer's annual report on Form 10-K.[10] An issuer that is then unable to qualify for WKSI status will have to amend its automatic shelf registration statement on a form it is eligible to use. At that time, an issuer that remained eligible to use Form S-3 (for example, if the issuer has $75 million or more of common stock held by nonaffiliates), but which did not have an effective non-automatic shelf registration statement, would then face a "blackout" period during which an effective shelf registration statement would not be available until the SEC declares a new Form S-3 effective. One approach to address this blackout period would be to file both a WKSI Form S-3 automatic shelf registration statement and a non-WKSI Form S-3 at a time when the issuer qualifies for WKSI status.[11] The automatic shelf registration statement would be usable for takedowns because it would be automatically effective upon filing and the non-automatic shelf registration statement would be usable after the SEC declares it effective. Both Forms would be tested for Form eligibility on an approximately annual basis on the date that the issuer's

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6 *Id.*

7 *Id.*

8 *See* Rule 415(a)(5)(ii)(A).

9 *See* Rule 415(a)(5)(ii)(B).

10 *See* Rule 405.

11 The filing of a non-automatic Form S-3 at a time when the issuer does not qualify for WKSI status *solely* for purposes of availing the issuer of the grace period provisions does not trigger a reassessment of the issuer's WKSI status allowing it to continue to use the automatic shelf registration statement during the grace period until WKSI status is otherwise reassessed, *e.g*. upon filing of a Form 10-K. See SEC Guidance Questions 6 and 7.

Form 10-K is filed. If the issuer ceased to qualify as a WKSI on the relevant determination date by virtue of its inability to satisfy the $700 million test, it would have available the non-automatic shelf, provided it was still able to meet the $75 million threshold. Filing the non-automatic S-3 would require up-front payment of SEC filing fees and the possibility of SEC review in connection with declaring the S-3 effective.

III. Next Steps for Issuers

With the third anniversary of the adoption of the Securities Offering Reform rules fast approaching, companies should determine the date on which their existing shelf registration statement will expire, and consider filing a replacement registration statement in advance of the expiration date. Acting promptly will allow some issuers to time the filing in order to take advantage of the 60-day look-back period for determining WKSI status. As discussed, those issuers that may no longer qualify as WKSIs may make a filing prior to the expiration of the three-year period applicable to them to take advantage of the 180-day grace period during which they can continue to use their existing automatic shelf registration statement as provided in the SEC's rules.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at 212.701.3100 or jmark@cahill.com; Dan Zimmerman at 212.701.3777 or dzimmerman@cahill.com; or Jennifer Patt at 212.701.3667 or jpatt@cahill.com.