

CAPITAL MARKETS UPDATE

How Much Shelf Life Does Your Registration Statement Still Have?

August 29, 2008

Prior to its 2005 Securities Offering Reform initiative, the SEC's rules limited the amount of securities that could be registered under certain shelf registration statements to an amount that, at the time the registration statement became effective, was reasonably expected to be offered and sold within two years from the initial effective date of the registration statement. As part of its Securities Offering Reform Initiative, the SEC amended Rule 415 to eliminate this limitation in many instances. However, at the same time, the SEC provided that certain shelf registration statements can only be used for three years after the initial effective date of the registration statement. For purposes of the three-year test, shelf registration statements that became effective prior to December 1, 2005, the effective date of the SEC's Securities Offering Reform rules, are treated as having an initial effective date of December 1, 2005.

The SEC provided rules for issuers that are not "well-known seasoned issuers" (WKSIs) eligible to file automatically effective registration statements. These rules allow these issuers to continue to use expiring shelf registration statements without having a gap between the expiring and replacement registration

statements if the replacement registration statement is filed before the expiration of the old registration statement and is declared effective within 180 days of the expiration date of the expiring registration statement. Thus, knowing when a registration statement is due to expire and planning in advance for this event is extremely important. Even for WKSIs that can file automatically effective registration statements, advanced planning is important to ensure uninterrupted access to the capital markets.

Registration Statements Subject to the Three-Year Limit

Under the SEC's rules, only the following types of registration statements are subject to the three-year limit:

Securities Registered on Automatic Shelf Registration Statements. Automatic shelf registration statements (generally referred to as "WKSI Shelves") filed on or shortly after the effective date of the SEC's Securities Offering Reform rules will expire on or shortly after December 1, 2008. Even if a post-effective amendment to the shelf registration statement was filed, the three-year period is still calculated from the initial effective date of the registration statement.

Securities Registered on Form S-3 or Form F-3 and Offered on a Delayed or Continuous Basis. Registration statements on Form S-3 or Form F-3 that register securities to be offered on an immediate, delayed or continuous basis, typically referred to as “shelf offerings,” by the registrant or certain of its affiliates. This is the type of registration statement typically used for a “universal” shelf registration statement registering various types of securities. As noted above, if the registration statement became effective prior to December 1, 2005, it will expire on December 1, 2008.

Securities Offered on a Continuous Basis. Registration statements that register securities whose offering will commence promptly upon the effectiveness of the registration statement will be made on a continuous basis and may continue for a period in excess of 30 days from the initial date of the effectiveness of the registration statement. This includes combined dividend reinvestment/direct stock purchase plans that are open to new investors (i.e., purchasers who were not previously security holders of the company) as well as extended offerings on a best efforts basis by issuers that are not eligible to use Form S-3 or Form F-3.

Mortgage Related Securities. Registration statements registering offerings of mortgage-related securities, including such securities as mortgage backed debt and mortgage participation or pass through certificates.

Registration Statements Not Subject to the Three-Year Limit

The three-year limit does not apply to shelf registration statements other than those specified above. Thus, registration statements, in each case other than automatically effective

registration statements, registering the following types of securities are not subject to the three-year limit:

- Securities that are to be offered and sold solely by selling security holders;
- Securities that are to be offered and sold pursuant to dividend or interest reinvestment plans and that do not allow participation by persons who are not existing security holders of the company;
- Securities that are to be offered and sold pursuant to employee benefit plans (typically registered on Form S-8);
- Securities that are to be issued upon the exercise of outstanding options, warrants or rights or upon conversion of other outstanding securities;
- Securities that are pledged as collateral;
- Securities that are registered on Form F-6 (i.e., American Depositary Receipts);
- Securities that are to be issued in connection with business combination transactions (typically registered on Form S-4); and
- Shares of common stock that are to be offered and sold by or on behalf of certain registered closed-end management investment companies or business development companies.

Calculating the Three-Year Limit

In a series of frequently asked questions regarding its Securities Offering Reform rules, the SEC explained that the three-year period would begin on December 1, 2005, and expire on or after November 30, 2008, without regard to how long the registration statement had been effective before that date, for shelf registration statements for delayed or continuous offerings by the

registrant or certain affiliates, offerings commencing promptly after effectiveness on a continuous basis for a period in excess of 30 days and offerings of mortgage related securities that were effective before December 1, 2005. For shelf registration statements with effective dates on or after December 1, 2005, the three-year period would begin on the initial effective date of the registration statement, without regard to any subsequently filed post-effective amendments.

What to Do About Expiring Shelf Registration Statements

The first thing a company should do is identify all of its registration statements in order to determine which, if any, are subject to expiration, and any applicable expiration dates. Once these dates are known, the company can then prepare a timeline for replacing the expiring registration statement. While the preparation of the registration statement itself may not take very long, the timeline should reflect the various issues that may have long lead times, including obtaining board and other corporate approvals, gathering necessary signatures and consents, updating selling security holder information, if applicable, and providing time for various interested parties to review the filing. A sample timetable for replacing a “universal” shelf registration with an automatically effective WKSI shelf is attached as Exhibit A.

An expiring registration statement may be replaced either by an automatically effective registration statement or by a registration statement that must be declared effective by the SEC. An automatically effective registration statement can be filed at any time. While some companies have waited until the

morning that an offering commences to file an automatically effective registration statement, waiting until such time can limit a company’s flexibility due to the lead time in obtaining certain consents and we strongly recommend that companies that are considering an offering not wait until the last minute to file an automatically effective registration statement.

If the replacement registration statement is not an automatically effective registration statement, the company may continue to offer and sell securities covered by the expiring registration statement until the earlier of:

- 180 days after the expiration of the three-year period for the expiring registration statement; and
- The time the “replacement” registration statement becomes effective.

In the case of a continuous offering of securities that began within three years of the initial effective date of the expiring registration statement, the company may continue that offering until the effective date of the replacement registration statement, if such offering is permitted under the replacement registration statement.

The ability to use a registration statement after the three-year limit, whether for a continuous offering or otherwise, is subject to the condition that the replacement registration statement has been filed before the end of the three-year period for the expiring registration statement.

If you have any questions about expiring shelf registration statements, please contact the author of this Capital Markets Update,

Edward Best at ebest@mayerbrown.com, any of our other attorneys listed below or any member of our Corporate & Securities practice.

Edward S. Best

+1 312 701 7100
ebest@mayerbrown.com

Michael T. Blair

+1 312 701 7832
mblair@mayerbrown.com

James B. Carlson

+1 212 506 2515
jcarlson@mayerbrown.com

Robert E. Curley

+1 312 701 7306
rcurley@mayerbrown.com

Paul C. de Bernier

+44 20 7782 8232
pdebernier@mayerbrown.com

Sterling M. Dorish

+1 212 506 2587
sdorish@mayerbrown.com

Eric J. Finseth

+1 650 331 2066
efinseth@mayerbrown.com

Marc H. Folladori

+1 713 238 2696
mfolladori@mayerbrown.com

Ricardo M. Gonzalez

+1 213 229 5166
ricardo.gonzalez@mayerbrown.com

Robert F. Gray

+1 713 546 0522
rgray@mayerbrown.com

Lawrence R. Hamilton

+1 312 701 7055
lhilton@mayerbrown.com

Robert A. Helman

+1 312 701 7020
rhelman@mayerbrown.com

Michael L. Hermsen

+1 312 701 7960
mhermsen@mayerbrown.com

Philip J. Niehoff

+1 312 701 7843
pniehoff@mayerbrown.com

Elizabeth A. Raymond

+1 312 701 7322
eraymond@mayerbrown.com

Laura D. Richman

+1 312 701 7304
lrchman@mayerbrown.com

David A. Schuette

+1 312 701 7363
dschuette@mayerbrown.com

Jodi A. Simala

+1 312 701 7920
jsimala@mayerbrown.com

Frederick B. Thomas

+1 312 701 7035
fthomas@mayerbrown.com

Mark R. Uhryuk

+44 207 246 6217
muhryuk@mayerbrown.com

James R. Walther

+1 213 229 9597
jwalther@mayerbrown.com

Exhibit A

Acme Widget Company
Shelf Registration

INDICATIVE 2008 TIMETABLE

SEPTEMBER						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

OCTOBER						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

NOVEMBER						
S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

1

PARTY			
C	Acme Widget Company	CC	Company Counsel
A	Company's Auditors	UC	Designated Underwriters' Counsel

WEEK OF	ACTIVITY	RESPONSIBLE PARTY
Sept. 8	Proposed timetable circulated and timing and responsibilities agreed	All parties
	Determine expiring registration statements	C/CC
Sept. 15	Circulate list of expiring registration statements	C/CC
	Determine what registration statements will be filed, what securities will be registered and what issuers will be included	C
	Determine if prior forms of underwriting agreement or indenture need updating	UC
	Determine if any FINRA filing is necessary	
Sept. 22	Begin drafting registration statement	CC
	Begin drafting indenture, if necessary	CC/UC
	Begin drafting underwriting agreement, if necessary*	UC
	Begin drafting ancillary documents	CC/UC
	Begin forming any necessary statutory trusts	CC
Sept. 29	Circulate first draft of registration statement	CC
	Circulate first draft of indenture, if necessary	CC/UC
	Circulate first draft of underwriting agreement	UC
	Circulate first draft of ancillary documents	CC/UC
Oct. 6	Comments on documents circulated	All parties

WEEK OF	ACTIVITY	RESPONSIBLE PARTY
Oct. 13	Circulate second draft of registration statement	CC
	Circulate second draft of indenture	CC/UC
	Circulate second draft of underwriting agreement	UC
	Confirm any statutory trusts formed	CC
	Circulate any FINRA questionnaires	UC
Oct. 20	Comments on documents circulated	All parties
	Circulate revised drafts of documents	CC/UC
	Draft board resolutions and powers of attorney	C
	Draft legal opinions and other exhibits	CC
Oct. 27	Circulate draft registration statement, resolutions, powers of attorney and FINRA questionnaires to board	C
	Circulate draft registration statement to accountants	C
	Circulate draft registration statement to trustee	C
	Contact rating agencies	C
Nov. 3	Board meeting to approve filing	C
	Obtain powers of attorney from CEO, CFO, CAO and at least a majority of the directors	C/CC
	Obtain signed signature pages	C/CC
	Obtain completed FINRA questionnaires	UC
Nov. 10	File Form 10-Q for third quarter	C
	Accountants circulate draft consent	A
	Trustee circulates draft Form T-1**	Trustee
Nov. 17	Finalize registration statement and exhibits	All parties
	EDGARize registration statement and exhibits	C/CC
Nov. 23	File registration statement with SEC	C/CC
	Registration becomes effective upon filing	
	Make any necessary FINRA filing	UC

* Form of underwriting agreement may be filed as an exhibit to a Form 8-K rather than as an exhibit to the registration statement

** Form T-1 may be filed in connection with a takedown pursuant to Rule 305(b)(2) under the Trust Indenture Act of 1939, rather than as an exhibit to the registration statement.

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