WHAT'S THE DEAL?

Shelf Registration Statements & Shelf Takedowns

Here's the deal:

- An effective shelf registration statement allows an issuer to be in a position to complete multiple offerings from time to time in the future without having the timing of any such offering delayed by a possible SEC review.
- In a continuous offering, issuers may offer securities promptly following the declaration of effectiveness of a shelf registration statement and do so pursuant to an offering program, such as a medium-term note program.
- Alternatively, when the issuer has no present intention to offer securities, and intends to do so from time to time in the future in distinct offerings, the issuer will be said to be conducting a series of delayed offerings.
- A shelf registration statement may be used for a variety of types of offerings, including at-the-market offerings, depending on the issuer's needs

What's the Deal?

The shelf registration process allows an issuer to file a registration statement with the Securities and Exchange Commission ("SEC") in order to register a public offering, when the issuer has no present intention to sell the securities being registered. A shelf registration statement permits multiple offerings off of the same shelf registration statement and it can be used for the sale of new securities by the issuer ("primary offerings"), the resale of outstanding securities held by securityholders ("secondary offerings"), or a combination of both.

With an effective shelf registration statement, when the issuer wants to offer securities, it takes them "off the shelf." These "shelf takedowns" are usually offered pursuant to a base prospectus (contained in the registration statement) and a prospectus supplement. Securities are usually registered for sale either on a continuous or a delayed basis, although a portion of the securities may be offered immediately.

Benefits of a Shelf Registration Statement

The primary advantages of a shelf registration statement are timing and certainty. An effective shelf registration statement enables an issuer to access the capital markets quickly when necessary or when market conditions are optimal. As noted above, once an issuer's shelf registration statement has been declared effective, no SEC review is required in connection with subsequent takedowns.

When a specific offering is planned, a prospectus supplement that describes the terms of the offering must be filed with the SEC pursuant to Rule 424(b) under the Securities Act of 1933, as amended (the "Securities Act") within the time period specified in the relevant provision of Rule 424(b) that is being relied on in connection with the supplement filing.

In the case of a shelf registration statement on Form S-3 (for U.S. issuers) or Form F-3 (for foreign private issuers), the registration statement may provide historical information by relying on incorporation by reference from the issuer's reports previously filed under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and also can incorporate Exchange Act reports that are filed by the issuer after the shelf registration statement's effective date. The ability to forward incorporate will allow the issuer to ensure that the shelf registration statement remains current, without having to undertake amendments.

Takedowns from an effective shelf registration can be made without SEC Staff review or delay. Unlike a post-effective amendment, a prospectus supplement does not have to be declared effective by the SEC Staff.

Differences Between a "Continuous" Offering and a "Delayed" Offering

In a "continuous offering," securities are offered promptly after effectiveness of the registration statement (within two days) and will continue to be offered from such date forward. The term "continuous" only applies to offers of the securities, not to sales of the securities, as sales may be made sporadically over the duration of the continuous offering.

By contrast, in a "delayed offering," there is no present intention to offer securities at the time of effectiveness. Generally, only more "seasoned" issuers that are "primarily eligible" to use Form S-3 or Form F-3 may engage in delayed primary offerings. In a delayed primary offering, the issuer typically will file a "core" or "base" prospectus as part of the initial filing of the registration statement. The actual terms and specifics of an offering will be filed after effectiveness of the shelf registration statement, in either a prospectus supplement (the most common method), a post-effective amendment or, where permitted, an Exchange Act report incorporated by reference into the registration statement.

Eligibility Requirements for Filing a Shelf Registration Statement

In order to be eligible to use Form S-3 or Form F-3, among other requirements, the issuer:

- Must have a class of securities registered under the Exchange Act (or must be required to file reports under Section 15(d) of the Exchange Act);
- Must have been subject to the reporting requirements of Section 12 or Section 15(d) of the Exchange Act for at least 12 calendar months immediately preceding the filing of the registration statement and have timely filed all required reports with the SEC during that period; and
- Since the end of the last year covered by its audited financial statements, cannot have failed to pay dividends or sinking fund installments on preferred stock or defaulted on installments on indebtedness for borrowed money or on material leases.

Issuance of Nonconvertible Securities

An issuer is considered "primarily eligible" to use Form S-3 or Form F-3 if the aggregate market value of its voting and non-voting common equity held by non-affiliates (its "public float") is at least $75 million. As an alternative to the $75 million public float requirement, issuers may use Form S-3 or Form F-3 for offerings of nonconvertible securities (other than common equity), if the issuer satisfies any one of the following criteria:

- The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in nonconvertible securities, other than common equity, in primary offerings for cash registered under the Securities Act, over the prior three years;
- The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of nonconvertible securities, other than common equity, issued in primary offerings for cash registered under the Securities Act;
- The issuer is a wholly-owned subsidiary of a well-known seasoned issuer ("WKSI"); or
- The issuer is a majority-owned operating partnership of a real estate investment trust ("REIT") that qualifies as a WKSI.

"Baby Shelf" Issuers

Smaller issuers with a public float of less than $75 million may also be primarily eligible to use Form S-3 or Form F-3 if the issuer:

- Meets the other eligibility requirements of the relevant Form;
- Is not and has not been a "shell company" for at least 12 calendar months prior to the filing of the Form;
- Has a class of common equity securities listed on a national securities exchange (i.e., not the over-the-counter market or the "pink sheets"); and
- Does not sell in a 12-month period more than the equivalent of one-third of its public float (the "one-third cap").

However, an issuer with a public float that does not exceed the $75 million market value threshold may not sell more than the equivalent of one-third of its public float during any 12 consecutive months. The determination of the issuer's public float will be made 60 days prior to the proposed sale.

The aggregate market value of all securities sold during the 12-month period prior to the sale is calculated by using the price of all securities sold by the issuer under the applicable Form in the previous 12 months, whether debt or equity, including those to be sold in the proposed sale. For securities convertible into or exercisable for equity securities ("derivative securities"), issuers will calculate the amount that they may sell in any 12-month period by reference to the market value of the underlying shares as opposed to the market value of the derivative securities. The one-third cap will not impact a holder's ability to convert or exercise derivative securities once a derivative security has been properly issued under the test, even if the issuer's public float decreases.

After all or any portion of the derivative securities are exercised or converted, in order to determine the amount of any securities that may be issued under the one-third cap in addition to any of the derivative securities that remain unexercised, the value of the exercised or converted portion will be calculated by multiplying the number of underlying shares issued by the market price on the date of conversion. Because the calculation of the one-third limitation depends on the issuer's public float at any point in time, an issuer's ability to use its shelf registration statement may increase or decrease during the life of the shelf. Increases to an issuer's public float will increase its "shelf capacity"; decreases to its public float will decrease its "shelf capacity."

Ineligible Issuers

An ineligible issuer is an issuer for which any of the following is true:

- The issuer has not filed all reports required to be filed during the preceding 12 months (or any shorter period for which the issuer has been required to file);
- The issuer is, or during the past three years was, a "blank check company" or a shell company or offered penny stock;
- The issuer is a limited partnership offering securities other than through a firm commitment underwriting;
- The issuer was the subject of a bankruptcy proceeding within the past three years;
- Within the past three years the issuer (or any subsidiary) was convicted of any felony or misdemeanor under Section 15(b)(4)(b) of the Exchange Act;
- Within the past three years the issuer (or any subsidiary) was the subject of any judicial or administrative decree or order arising out of a governmental antifraud action;
- The issuer filed a registration statement that is the subject of any pending proceeding or examination under Section 8 of the Securities Act (which relates to misleading or incomplete registration statements) or was the subject of any refusal order or stop order within the past three years; or
- The issuer is the subject of any pending proceeding under Section 8A of the Securities Act in connection with an offering.

The SEC has the power under its rules to determine, upon a showing of good cause, that it is not necessary under certain circumstances for an issuer to be considered an ineligible issuer.

Qualifying as, and the Benefits of Being, a WKSI

Qualifying as a WKSI

In order to qualify as a WKSI, an issuer will be required to file reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act and satisfy the following requirements:

- It must meet the registrant requirements of Form S-3 or Form F-3 (i.e., it must be a "primarily eligible" issuer);
- It must, as of a date within 60 days of filing its shelf registration statement, either:
    - Have a worldwide market value of its outstanding voting and non-voting common stock held by non-affiliates of $700 million or more; or
    - Have issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities in registered primary offerings for cash; and
- It must not be an "ineligible issuer."

A majority-owned subsidiary of a WKSI will itself be a WKSI in connection with:

- Its issuance of non-convertible investment grade securities that are fully and unconditionally guaranteed by its parent; or
- Its issuance of guarantees of non-convertible securities of its parent or of another majority-owned subsidiary whose non-convertible securities are so guaranteed by the WKSI parent.

If the majority-owned subsidiary is itself a WKSI by reason of its issuance of $1 billion or more of nonconvertible securities and also meets the test of a primarily eligible issuer, the subsidiary may register an offering of its common stock or other equity securities as a WKSI, filing an automatic shelf registration statement.

Benefits of WKSI Status

A WKSI may take advantage of a more flexible automatic registration process. If a WKSI checks the applicable box on the cover of a registration statement (including a shelf registration statement) on Form S-3 or Form F-3, for either a primary or secondary offering or a combination, the registration statement will automatically be effective upon filing. Therefore there will be no delay in effectiveness.

A WKSI will also have the ability to:

- Register unspecified amounts of different types of securities;
- Register additional classes of securities and eligible majority-owned subsidiaries as additional registrants after effectiveness by filing a post-effective amendment that also will be automatically effective upon filing;
- Exclude additional information from the base prospectus including:
    - Whether the offering is a primary or secondary offering;
    - A description of the securities, other than the name or class of securities (i.e., "debt," "common stock" and "preferred stock");
    - The names of selling security holders and the amounts of securities to be offered by each; and
    - Disclosure regarding the plan of distribution;
- Pay filing fees on a "pay-as-you-go" basis at the time of each takedown; and
- Use "free writing prospectuses" relating to an offering before the registration statement is filed.

Shelf Registration Filing Requirements

An issuer must include the undertakings set forth in Item 512(a)(1) of Regulation S-K in its shelf registration statement filing. These undertakings include the duty to update the prospectus under Section 10(a)(3) of the Securities Act to reflect fundamental changes and changes in the plan of distribution. Issuers also must undertake to deregister any unsold securities at the end of the offering. An issuer must also agree that, consistent with Rule 430B and Rule 430C, information in the prospectus supplement is deemed part of and included in the applicable registration statement as of specified dates (generally the earlier of the date the prospectus supplement is first used or the date of the first contract of sale for securities in the offering described in the prospectus supplement). Further, for liability purposes of the

issuer and any underwriter, that date will be deemed the new effective date of the registration statement relating to the securities to which that prospectus supplement relates.

A post-effective amendment is required instead of a prospectus supplement when:

- There is a "fundamental change" (a higher threshold than "material") to the disclosure;
- The disclosure in the registration statement has to be updated for Section 10(a)(3) purposes; or
- There is a change to the plan of distribution (e.g., switching to an "at-the-market" offering from a firm commitment offering).

However, the undertaking to file a post-effective amendment in these instances will not apply if the registration statement is on Form S-3 or Form F-3, and the required information is contained in an Exchange Act report (including a Current Report on Form 8-K) that is incorporated by reference in the registration statement or is contained in a prospectus supplement filed pursuant to Rule 424(b).

In a delayed primary shelf offering, the specific terms of the offering (e.g., price, number of securities, etc.) are usually provided in a prospectus supplement filed under Rule 430A of Regulation C. Accordingly, a post-effective amendment to the registration statement is not needed.

Incorporation by reference occurs when disclosure in one filed document is legally deemed to be included in another document. A Form S-3 or Form F-3 allows a company to incorporate by reference the disclosure from its current and future Exchange Act reports to satisfy the disclosure requirements of the Form.

Limitations on a Shelf Registration Statement

Offerings under Rule 415(a)(1)(x) and continuous offerings under Rule 415(a)(1)(ix) that are registered on Form S-3 or Form F-3 are not subject to the two-year limitation on the amount of securities that can be registered, but a shelf registration statement can only be used for three years (subject to a limited extension) after its initial effective date. Under the current rules, new shelf registration statements must be filed every three years (the three-year period begins on the initial effective date of the shelf registration statement), with unsold securities and fees paid under an "expiring" registration statement rolled over to the new registration statement where it relates to:

- Offerings by WKSIs on an automatic shelf registration; or
- Offerings described in Rule 415(a)(1)(vii), (ix) or (x).

The three-year time limitation was adopted because the SEC believes that the precise contents of shelf registration statements may become difficult to identify over time (since many different documents may be incorporated by reference) and that markets will benefit from a periodic updating and consolidation requirement. The two-year limitation on the amount of securities that may be registered continues to apply to business combination transactions under Rule 415(a)(i)(viii) and continuous offerings under Rule 415(a)(i) and (ix) not registered on Form S-3 or Form F-3.

Some other types of shelf registration statements are not subject to the three-year limitation, including:

- Registration statements to be used only for secondary offerings by selling security holders; and
- Acquisition shelf registration statements.

In the case of shelf registration statements other than automatic shelf registration statements filed by WKSIs, as long as the new shelf registration statement is filed within three years of the original effective date of the old registration statement, the issuer may continue to offer and sell securities from the old registration statement for up to 180 days thereafter until the new registration statement is declared effective. The 180-day extension does not apply to automatic shelf registration statements, which are effective immediately upon filing.

Prior to the effectiveness of the new shelf registration statement, the issuer can amend it to include any securities remaining unsold from the old registration statement. The SEC filing fees attributable to those securities may be rolled over to the new registration statement. In addition, continuous offerings commenced under the old registration statement prior to the end of the three-year period may continue on the old registration statement until the effective date of the new registration statement if these offerings are permitted to be made under the new registration statement.

For WKSIs, as long as the issuer remains a WKSI, the new shelf registration statement will be effective immediately upon filing. The issuer may elect to include on the new registration statement any unsold securities covered by the old registration statement and SEC filing fees paid attributable to those securities.

Shelf Eligibility and Volatile Markets

In order to remain eligible to use a Form S-3 registration statement, neither the issuer nor any of its consolidated or unconsolidated subsidiaries shall have failed to pay any dividend on its preferred stock since the end of the last fiscal year for which audited financial statements are included in the registration. However, if an issuer's board of directors does not declare a dividend on non-cumulative preferred stock, the issuer is not disqualified from using Form S-3 since no liability to pay the dividend arises under the terms of the non-cumulative preferred stock. Conversely, a declared but unpaid dividend on non-cumulative preferred stock would disqualify the issuer from using Form S-3, as would the existence of accrued and unpaid dividends on cumulative preferred stock. The issuer would also be disqualified from using Form S-3 even if it has a history of accumulating such dividends for three quarters before paying them at the end of each year. However, if the cumulative preferred stock was issued as part of a trust preferred financing and the terms of the underlying debt permit the issuer to defer interest payments for a specific time period and such deferral is not considered a default under the financing, then the issuer may correspondingly defer the accrued dividend payment on the cumulative preferred stock without losing its eligibility to use Form S-3.

As a result of the market volatility caused by the COVID-19 pandemic, certain issuers may lose their status as WKSIs following the effective date of their shelf registration statements. As discussed above, an issuer qualifying as a WKSI may typically file an automatic shelf registration statement with the SEC. A WKSI is defined as an issuer that, among other things, as of a determination date, had a public float of at least $700 million. The "determination date" used to assess an issuer's WKSI eligibility may be any date within 60 days before the filing of (i) the shelf registration statement; (ii) the issuer's most recent post-effective amendment to a previously filed shelf registration statement; or (iii) its most recent Annual Report on Form 10-K or Form 20-F (in the event the issuer has not filed a shelf registration statement or a post-effective amendment for 16 months). An issuer does not need to have a $700 million public float at the time its automatic shelf registration statement is filed so long as it did reach such threshold within the 60-

day period prior to the filing. A former WKSI will be required to amend its automatic shelf registration statement by filing a post-effective amendment on Form S-3 to convert the automatic shelf registration statement to a regular shelf registration statement. Given that WKSIs also are entitled to other benefits and accommodations, including certain communications-related safe harbors, the issuer should consult closely with counsel.

Permitted Offerings Pursuant to a Shelf Registration Statement

Rule 415 lists the types of permitted shelf offerings, including:

- Resales by selling security holders;
- Immediate, delayed and continuous offerings by an issuer on Form S-3 or Form F-3, including "at-the-market" offerings by the issuer;
- Securities offered and sold under dividend reinvestment and employee benefit plans;
- Securities underlying options, warrants, rights and convertible securities;
- Securities pledged as collateral;
- Depositary shares evidenced by American Depositary Receipts;
- Securities issued in business combinations;
- Mortgage-related and other investment grade asset-backed securities; and
- Offerings that commence promptly and are made on a continuous basis for more than 30 days.

All transactions registered on Form S-4 or Form F-4 are considered continuous offerings under Rule 415. An issuer can use a shelf registration statement for acquisitions. An issuer can use a shelf registration statement for one or more acquisitions, even if the targets are unknown at the time of filing. An issuer may also register securities for future issuance in connection with acquisitions on a delayed basis. These are known as "acquisition shelves." However, an automatically effective shelf registration statement may not be used as an acquisition shelf.

Liability Considerations

Section 11

Rule 430B and Rule 430C codify the SEC's position that the information contained in a prospectus supplement required to be filed under Rule 424, whether in connection with a takedown or otherwise, will be deemed part of and included in the registration statement containing the base prospectus to which the prospectus supplement relates. For prospectus supplements filed other than in connection with a takedown of securities, all information contained therein will be deemed part of and included in the registration statement as of the date the prospectus supplement is first used. For prospectus supplements in connection with takedowns, it is the earlier of the date the supplement is first used or the date and time of the first contract of sale for the securities.

Regulation FD

In some cases, Rule 100(b)(2)(iv) of Regulation FD exempts offerings registered under the Securities Act, except offerings registered under Rule 415(a)(i)-(vi). In the case of an offering under Rule 415(a)(i)-(vi), the issuance and delivery of the registration statement, the prospectus and certain free writing prospectuses will not be deemed a violation of Regulation FD.

In general, ongoing and continuous offerings on behalf of selling security holders will not be exempt from Regulation FD. However, continuous and ongoing offerings on behalf of selling security holders that also involve a registered offering, whether or not underwritten, by the issuer for capital formation purposes will be exempt (because Rule 415(a)(i) pertains to resale transactions "solely on behalf" of selling security holders).

For example, a registered underwritten offering that includes shares issued by the issuer and selling security holders is exempt from Regulation FD, but a registered underwritten offering of only selling security holders' shares is subject to Regulation FD. Accordingly, in the former case, an issuer free writing prospectus can be used without raising any Regulation FD concerns. However, in the latter case, the use of an issuer free writing prospectus must be evaluated in the context of Regulation FD. In adopting Regulation FD, the SEC has expressed its concern that, because registration statements involving only secondary sales are often effective and used for a very long period, an issuer could be effectively exempt from Regulation FD if the exclusion for registered offerings covered them.

Underwriter Due Diligence

Rule 176 under the Securities Act sets forth the factors to determine whether a reasonable investigation or reasonable grounds for belief under Section 11(c) of the Securities Act exist, under which an underwriter's due diligence defense is available. These factors include:

- The type of issuer;
- Reasonable reliance on officers, employees and others whose duties should have given them knowledge of particular facts; and
- With respect to facts or documents incorporated by reference, whether the particular person had any responsibility for the facts or documents at the time of the filing from which it was incorporated.

Checklist of Key Questions

- Is the issuer planning to sell new securities or outstanding securities?
- Are securities being immediately offered after the registration statement becomes effective?
- Will the issuer choose to offer securities in a delayed primary offering?
- Is the issuer considered a well-known seasoned issuer?
- Is the issuer subject to the baby shelf limitation?
- Is the issuer considering using a shelf registration for one or more acquisitions?
- Will the issuer be required to file a post-effective amendment as opposed to a prospectus supplement?