FREQUENTLY ASKED QUESTIONS ABOUT SHELF OFFERINGS

Understanding Shelf Offerings

What is a shelf registration statement?

A shelf registration statement is a filing with the Securities and Exchange Commission (the "SEC") to register a public offering, usually where there is no present intention to immediately sell all the securities being registered. A shelf registration statement permits multiple offerings based on the same registration. A shelf registration can be used for sales of new securities by the issuer ("primary offerings"), resales of outstanding securities ("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" usually are made pursuant to a base prospectus and a prospectus supplement. *See "What is a 'base' or a 'core' prospectus?"* and *"What is a 'prospectus supplement'?"*

In a shelf registration statement, securities usually are registered for sale either on a continuous or delayed basis, although a portion of the securities may be offered immediately. *See "What is the difference between a 'delayed' and a 'continuous' offering?"* It should be noted that the rules described in these FAQs do not apply to registered investment companies and business development companies, which are regulated under the Investment Company Act of 1940, as amended.

Source: Rule 415 of the Securities Act of 1933 (the "Securities Act") provides the basis for shelf registration.

What are the benefits of shelf registration statements?

An effective shelf registration statement enables an issuer to access the capital markets quickly when needed or when market conditions are optimal. The primary advantages of a shelf registration statement are timing and certainty. Takedowns from an effective shelf registration statement can be made without the SEC's Division of Corporation Finance's (the "Staff") review or delay. *See "What is a 'takedown off the shelf'?"*

When a specific offering is planned, a prospectus supplement that describes the terms of the offering normally must be filed with the SEC under Rule 424(b) within two days of the supplement's first use or the determination of the offering price, whichever is earlier. In most cases, the prospectus supplement is filed after the shelf takedown has already priced. *See "What is a 'prospectus supplement'?"*

In the case of a shelf registration statement on Form S-3 or Form F-3, the registration statement incorporates by reference the issuer's reports filed under the Securities Exchange Act of 1934 (the "Exchange Act") after the shelf registration statement's effective date. This enables the issuer to use a registration statement that became effective before the occurrence of material developments in its business, without the need to file a post-effective amendment. *See "What is 'incorporation by reference'?"*

The advantage of this type of structure is that, once an issuer has an effective shelf registration statement, there is no delay in waiting for the SEC to review the prospectus or the terms of the offering. Unlike a post-effective amendment, the prospectus supplement does not have to be declared effective by the Staff. In addition, the Staff historically has been less likely to review the initial filing of a shelf registration statement on Form S-3 or Form F-3 than other forms of registration statements. Accordingly, it is usually more time-efficient and cost-efficient to register securities using a shelf registration statement.

What is a "takedown off the shelf"?

A "takedown" is an actual offering of securities from a shelf registration statement that has already been declared effective.

What is the difference between a "delayed" and a "continuous" offering?

In a "continuous offering," securities are offered promptly after effectiveness (within two days) and will continue to be offered in the future. The term "continuous" only applies to offers of the securities, not to sales of the securities; sales can be made sporadically over the duration of the offering.

In a "delayed offering," there is no present intention to offer securities at the time of effectiveness. *See "How is a delayed primary offering typically conducted?"* Generally, only more seasoned issuers that are eligible to use Form S-3 or Form F-3 on a primary basis may engage in delayed primary offerings. *See "Can an issuer use any registration statement form to conduct a shelf offering?"* and "*What is primary eligible?*"

Source: Rule 415(a)(1)(i) - (iv) lists the types of shelf offerings that may be effected on a delayed basis. Rule 415(a)(1)(ix) contains the requirements for continuous offerings by any issuer that will commence promptly and may continue for more than 30 days. Rule 415(a)(1)(x) contains the requirements for an immediate, continuous, or delayed primary offering by seasoned primary eligible issuers.

How is a delayed primary offering typically conducted?

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. *See "What is a 'base' or a 'core' prospectus?"* The actual terms and specifics of an offering will be filed after effectiveness, in either a prospectus supplement (this is the most common method), a post-effective amendment or, where permitted, an Exchange Act report incorporated by reference into the registration statement. *See "What is 'incorporation by reference'?"* and "*What is a 'prospectus supplement'?*" Issuers may engage in sales immediately after effectiveness if the offering-specific information is included as a part of the registration statement in the base prospectus or in a prospectus supplement filed under Rule 424 after effectiveness.

What is a "base" or a "core" prospectus?

A "base" (also known as a "core") prospectus is filed in order to comply with the applicable disclosure requirements to have a shelf registration statement declared effective by the Staff, with more specific information to follow after effectiveness in a prospectus supplement once the details about an offering are known. *See "What is a 'prospectus supplement'?"*

The base prospectus typically contains general information, such as:

- the types of securities to be offered;
- a brief summary of the issuer's business;
- the use of proceeds; and
- a plan of distribution.

The base prospectus also may contain a description of the risk factors of the offering and, in the case of debt securities, may contain a ratio of earnings to fixed charges. Although the base prospectus can incorporate substantial amounts of information from the issuer's Exchange Act reports, additional information about the issuer may be provided if it is expected that the base prospectus will be used for "marketing purposes."

The shelf registration statement also will include (in the so-called "Part II pages") the estimated expenses of the registration, required exhibits, the undertakings required by the SEC rules, and the issuer's signature pages.

Source: General Instructions of Form S-3, General Instructions of Form F-3, and Rule 430B.

What information can be omitted from the base prospectus?

A base prospectus for immediate, continuous or delayed offerings on Form S-3 or Form F-3 by primary eligible issuers (including "well-known seasoned issuers," or "WKSIs") may omit the pricing and other information specified in Rule 430A and all other information that is unknown or not reasonably available to the issuer, as permitted by Rule 409. *See What is primary eligible?*" and "*What is a 'Well-Known Seasoned Issuer,' or 'WKSI'?*" In addition, all offerings (other than mortgage-related or business combination offerings) by WKSIs filing automatic shelf registrations may, under Rule 430B, omit:

- information as to whether the offering is a primary offering or a secondary offering on behalf of selling security holders or a combination of the two;
- the plan of distribution;
- a description of the securities registered, other than the name or class of the securities (*e.g.*, "debt," "common stock" or "preferred stock"); and
- the identity of other issuers (*e.g.*, certain majority-owned subsidiaries that may be added later as issuers or guarantors).

In secondary offerings by selling security holders of primary eligible issuers on Form S-3 or Form F-3, the identities of the selling security holders, all the information about them required by Item 507 of Regulation S-K, and the amounts of securities to be registered on their behalf may be added to the registration statement covering the resale of these securities after effectiveness so long as:

- the registration is an automatically effective shelf registration filed by a WKSI; or
- all of the following conditions are satisfied:

- the registration statement refers to the unnamed selling security holders in a generic manner by identifying the initial offering transaction in which the securities were sold;
- the initial offering of the securities is completed; and
- the securities are issued and outstanding prior to the initial filing date of the registration statement.

These rules acknowledge that privately placed securities often are transferred after they are issued and before a resale registration statement is filed. In such a case, the issuer may be unaware of the identities of the new beneficial owners and the amount of securities they own. Filing post-effective amendments to add new or previously unidentified security holders can impose delays, which these rules alleviate.

The flexibility to identify selling security holders after effectiveness is not available for PIPE transactions where the securities may not have been issued in the private offering at the time the resale registration statement is filed. In this case, the issuer will know the expected initial identity of, and initial amount of securities held by, the selling security holders. *See "What is a 'PIPE' transaction and how can shelf registration statements be used for such an offering?"* In addition, issuers that are not eligible to file a primary offering on Form S-3 or Form F-3 are not permitted to identify selling security holders after effectiveness, as the SEC believes that these issuers are more prone to engage in transactions that involve heightened disclosure and registration issues.

In the case of a WKSI, all of the omitted information may be subsequently included in the registration statement and the prospectus by:

- a prospectus supplement;
- a post-effective amendment; or
- an Exchange Act report, including a current report on Form 8-K, incorporated by reference into the registration statement.

If the information is included in an Exchange Act report, the issuer must file a prospectus supplement under Rule 424 disclosing the Exchange Act report or reports containing such information.

If the issuer includes the omitted information in a prospectus supplement, under Rule 424(c), the base prospectus need not be re-filed with the SEC with the prospectus supplement if the base prospectus has not changed since it was previously filed. However, many issuers choose to re-file the base prospectus together with the prospectus supplement to help ensure that investors have more convenient access to all of the relevant disclosure.

Source: Rule 430B, Rule 424, Form S-3 and Form F-3, and SEC Release No. 33-8591 (July 19, 2005), Section V.B.1.b.i(C).

What is a "prospectus supplement"?

A prospectus supplement is a document that is delivered with a base prospectus to investors. (Depending upon the circumstances, the delivery may take place with a physical document, an electronic copy, or through "access equals delivery" under SEC Rule 172.) The prospectus supplement typically contains the terms of an offering that are not provided in the base prospectus. *See "What is a 'base' or a 'core' prospectus?"* The prospectus supplement also may

include a description of the risk factors and tax consequences of the specific offering, as well as a description of the specific distribution arrangements and any planned use of the proceeds that differs from the description in the base prospectus.

Prospectus supplements are filed under Rule 424(b). However, under Rule 430B and Rule 430C, prospectus supplements are deemed part of, and included in, the registration statement containing the base prospectus to which the prospectus supplement relates. *See "Does Section 11 liability attach to a 'takedown'?"*

Can an issuer amend a registration statement to convert a non-shelf offering to a shelf offering?

Yes, if the conversion occurs before the registration statement is declared effective. As in the case of a non-shelf registration statement, additional securities also may be added to the registration statement by a pre-effective amendment. *See "Can a shelf registration statement be converted into an unallocated shelf registration statement?"*

Source: SEC Compliance and Disclosure Interpretations, Securities Act Rules, Questions 212.04 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

What is "incorporation by reference"?

Incorporation by reference occurs when disclosure in one filed document is deemed to be included in another document.

Incorporation by reference is central to the SEC's "integrated disclosure" framework, which was developed in the early 1980s. The logic is that disclosure that is available to investors doesn't necessarily need to be repeated in each disclosure document. As a result, 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. In addition, the SEC's 2005 securities offering reform amended Form S-1 and Form F-1 to permit reporting companies that are current in their reporting obligations to incorporate by reference into their Form S-1 or Form F-1 information from their previously filed (but not future) Exchange Act reports. In December 2015, Congress enacted the Fixing America's Surface Transportation Act (the "FAST Act"). Pursuant to amendments required by the FAST Act, Form S-1 permits "smaller reporting companies" (as defined in Rule 405) to incorporate by reference Exchange Act filings made after the effectiveness of the Form S-1.

There are a number of SEC rules and regulations that restrict how incorporation by reference can be used.

Source: The SEC's incorporation by reference regulations include Item 12(a) of Part I of Form S-3, Item 6(a) of Part I of Form F-3, Item 12(a) of Part I of Form S-1, Item 5(a) of Part I of Form F-1, General Instruction G(4) of Form 10-K, and Rule 12b-23(b). Section 84001 of the FAST Act.

How can omitted information be included in the final prospectus?

A base prospectus that omits information required by Form S-3 or Form F-3 as permitted by Rule 430B is a permitted prospectus that satisfies the requirements of Section 10 of the Securities Act for purposes of Section 5(b)(1) of the Securities Act. As a result, it can be used by the issuer and other offering participants to offer securities registered under the shelf registration.

However, such a base prospectus is not a Section 10(a) final prospectus for purposes of Section 5(b)(2) of the Securities Act (which relates to the delivery of a prospectus after a sale). To satisfy Section 10(a), the issuer must include the omitted information in:

- a prospectus supplement;
- a post-effective amendment; or
- where permitted, through its Exchange Act reports that are incorporated by reference into the registration statement and the prospectus and identified in a prospectus supplement.

Primary eligible issuers (including WKSIs) are permitted to include all information about the issuer by incorporation by reference to its Exchange Act reports, including Current Reports on Form 8-K. *See* "*What is primary eligible?*" and "*What is a 'Well-Known Seasoned Issuer,' or 'WKSI'?*"

Source: Rule 430B, Form S-3 and Form F-3, and Rule 424(b). *See* SEC Release No. 33-8591 (July 19, 2005), Section V.B.1.b.i(B).

Shelf Eligibility

What are the eligibility requirements for filing a shelf registration statement?

To be eligible to use Form S-3 or Form F-3, the issuer, among other things:

- 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.

Source: General Instructions of Form S-3 and General Instructions of Form F-3.

What is primary eligible?

A company is primary eligible to use Form S-3 or Form F-3 to offer securities on its own behalf for cash on an unlimited basis 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.

Until the SEC revised its shelf eligibility rules in July 2011, an issuer would also be eligible to use Form S-3 or Form F-3 to register non-convertible investment grade securities. These are securities that, at the time of sale, were rated by at least one nationally recognized statistical rating organization in one of its generic rating categories that signify investment grade.

Under the eligibility requirements adopted in July 2011, as an alternative to the $75 million public float requirement, issuers may satisfy any one of four criteria to use Forms S-3 or F-3 for offerings of non-convertible securities other than common equity:

- the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible

securities, other than common equity, in primary offerings for cash registered under the Securities Act, over the prior three years; or

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

Source: General Instruction I.B of Form S-3 and General Instruction I.A. of Form F-3; SEC Release No. 33-9245 (July 27, 2011).

When can smaller public companies be primary eligible to register offerings of their securities on a shelf registration statement?

A company whose public float is less than $75 million may register primary offerings of its securities on Form S-3 or Form F-3 if it:

- 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").

In order to benefit from these amendments, former shell companies must also have timely filed their periodic reports for at least 12 calendar months and filed all of the detailed information that would be required under the Exchange Act in a registration statement on Form 10 or Form 20-F. *See* "*How is the market value threshold of primary eligible issuers and WKSIs calculated?*" and "*How is the aggregate market value of all securities sold during any 12-month period calculated for purposes of the one-third cap?*"

Source: General Instruction I.B.6 of Form S-3 and General Instruction I.B.5 of Form F-3.

What are the eligibility requirements for secondary-only shelf registration statements?

If the issuer's public float is below $75 million, the issuer still may use Form S-3 or Form F-3 to register secondary offerings if it meets the other eligibility requirements of the Form. Secondary offerings are not subject to the one-third cap. (*See* "*What is primary eligible?*" for an explanation of the one-third cap.) However, in some instances, registration of a secondary offering may involve a significantly large percentage of the issuer's outstanding capital stock, causing the SEC to deem the offering a "disguised primary offering." *See* "*What is a 'disguised primary offering'?*"

In addition, in the case of concurrent primary and secondary offerings involving the same investor(s) but using separate shelf registration statements, an issuer cannot register securities for resale on Form S-3 unless it has sufficient capacity to issue that amount of securities in a primary offering at the time of filing the resale

registration statement. If the issuer does not have such capacity, then it must either register the resale on Form S-1 or wait until it has sufficient capacity to register the resale on Form S-3.

Source: General Instructions I.B.3 and I.B.6 of Form S-3, General Instruction I.B.3 of Form F-3, and SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 116.25 (Nov. 2, 2016) , available at

www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

What is a "Well-Known Seasoned Issuer," or "WKSI"?

A well-known seasoned issuer is an issuer that is required to file reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act and satisfies the following requirements:

- it must meet the registrant requirements of Form S-3 or Form F-3 (*i.e.*, it must be a primary 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 non-convertible securities and also meets the test of a primary eligible issuer (*i.e.*, the market value of common equity held by non-affiliates is at least $75 million), the subsidiary may register an offering of its common stock or other equity securities as a WKSI filing an automatic shelf registration statement.

What are the benefits of qualifying as a WKSI?

WKSIs benefit from 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 of the two, the registration statement will automatically be effective upon filing. There will be no delay in effectiveness in order to receive and respond to any SEC comments.

Additional benefits include:

- the ability to register unspecified amounts of different types of securities;
- the ability to 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;

- the ability to exclude additional information from the base prospectus (*see "What is a 'base' or a 'core' 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; and
- the ability to:
    - 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.

Source: Rule 430B, Form S-3 and Form F-3, and Rule 163.

Can an emerging growth company be a WKSI?

An "emerging growth company" is defined as an issuer with total gross revenues of less than $1.07 billion during its most recently completed fiscal year. An emerging growth company will lose that status (among other circumstances): (a) following the fifth anniversary of its first registered offering of common equity securities, (b) upon issuing more than $1 billion in non-convertible debt securities within a three-year period (whether in *registered or unregistered* offerings) or (c) upon becoming a "large accelerated filer" as defined under Rule 12b-2. (As to (c), an issuer becomes a large accelerated filer at the end of a fiscal year if its public float was at least $700 million as of the last business day of its most recently completed second fiscal quarter.) In other words, due to (b) and (c), an issuer will lose its emerging growth company status as a result of becoming a WKSI. (*See "What is a 'Well-Known Seasoned Issuer,' or 'WKSI'?"* above.) Due to (a), an emerging growth company may lose that status earlier, depending on when the fifth anniversary of its IPO occurs.

However, because the "large accelerated filer" status does not apply until the beginning of the fiscal year after the end of the relevant second quarter, an emerging growth company that has $700 million in public float can enjoy WKSI status for several months, if it can time its offerings appropriately. For example, if an issuer with a December 31st fiscal year end becomes a WKSI on January 2nd, when its market capitalization first exceeds $700 million, and the issuer maintains that market capitalization through the end of its second quarter, it will lose its emerging growth company status on January 1st of the following year.

Source: Section 2(a)(19) of the Securities Act sets forth the definition of emerging growth company (and the circumstances under which a company ceases to be an emerging growth company).

Can any issuer use a shelf registration statement?

It depends on the type of offering that will be conducted.

Only issuers that are primary eligible to use Form S-3 or Form F-3 (including smaller issuers subject to the one-third cap) may sell on a delayed basis or conduct an "at-the-market" offering. (*See "What is primary eligible?"* for an explanation of the one-third cap.) Any issuer may engage in any other type of shelf offering. *See "Can an issuer use any registration statement form to conduct a shelf offering?"* and *"What is an 'at-the-market' offering?"*

Source: Rule 415(a)(1)(x) generally requires that delayed primary offerings be conducted by issuers that meet the eligibility requirements for primary offerings on Form S-3 or Form F-3. *See* Rule 415(a)(1)(vii) and the SEC's Compliance and Disclosure Interpretations, Securities Act Rules regarding Rule 415.

Can an emerging growth company use a shelf registration statement?

Yes, an emerging growth company may use a shelf registration statement. For a limited period of time, an issuer may be both an emerging growth company and a WKSI. Smaller emerging growth companies may use a shelf registration statement, subject to the one-third cap described above. *See "Can an emerging growth company be a WKSI?"* and *"When can smaller public companies be primary eligible to register offerings of their securities on a shelf registration statement?"*

Can an issuer use any registration statement form to conduct a shelf offering?

No, issuers are restricted as to which form they may use to conduct various shelf offerings.

Only issuers that have timely filed their required periodic reports for the last 12 months may use a Form S-3 or Form F-3 to register securities. In the case of primary offerings by or on behalf of the issuer, if the issuer does not have a public float of at least $75 million when it files the registration statement, the amount of securities that may be sold in a 12-month period is capped. *See "What is primary eligible?"*

If an issuer has not been timely in its reporting for the last 12 months, it may only register securities for resale and shares underlying options on a Form S-1 or Form F-1 registration statement. An issuer with a public float of less than $75 million also may use a Form S-1 or Form F-1 to register a primary offering of securities in excess of the one-third cap imposed on these issuers by the eligibility requirements of Form S-3 and Form F-3, including a continuous offering. *See "What is primary eligible?"*

Source: Rule 415, General Instructions of Form S-3, and General Instructions of Form F-3 provide shelf eligibility requirements.

How is the market value threshold of primary eligible issuers and WKSIs calculated?

The aggregate market value of the registrant's outstanding public float is computed by use of the:

- price at which the common equity was last sold; and
- average of the bid and asked prices of such common equity in the principal market for such common equity as of a particular date.

This calculation excludes common equity held by officers, directors and shareholders of the registrant who are deemed affiliates. The $75 million threshold and WKSI status must be satisfied on any date within 60 days prior to the filing of the registration statement.

Source: General Instructions I.B.1 and I.B.6 of Form S-3, General Instructions I.B.I and I.B.5 of Form F-3.

How is the aggregate market value of all securities sold during any 12-month period calculated for purposes of the one-third cap?

Companies whose public float does not exceed the $75 million market value threshold may use Form S-3 or Form F-3 to register primary offerings of their securities. However, they may not sell more than the equivalent of one-third of their public float during any 12 consecutive months.

Under this test, the determination of the issuer's public float will be made on any date in the 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. For example, if an issuer has nine million shares outstanding, and its common stock trades at $10 per share, it may not offer in any 12-month period preferred stock that is convertible into more than three million of its common shares if the conversion price is also $10 per share. 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. A derivative security's market value will be included for purposes of calculating the one-third cap, even if that derivative security is not exercisable for more than one year.

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."

The one-third cap will be removed if a company's public float increases to $75 million after the effective date of the shelf registration statement. However, if the public float of the company falls below $75 million at the time that its next annual report on Form 10-K (or Form 20-F) is filed, the cap will be reimposed.

Issuers that use Form S-3 or Form F-3 in reliance upon these rules will need to set forth on the front cover of the relevant prospectus supplement the amount of their public float and the amount of securities offered in reliance on this rule.

Although the one-third cap will limit actual sales, smaller reporting companies can register an amount of securities that exceeds this amount as of the filing date. Any unused amount may be "rolled over" into subsequent shelf registration statements when the required filing fee of the new registration statement is calculated.

Source: General Instruction I.B.6 of Form S-3, General Instruction I.B.5 of Form F-3, and Rule 401, SEC

Compliance and Disclosure Interpretations, Securities Act Rules, Questions 116.24 (May 16, 2013).

What is a "disguised primary offering"?

When an issuer sells a disproportionately large (relative to the issuer's pre-transaction public float) amount of securities in a secondary offering, the SEC takes the view that the offering could in fact be a primary offering, with the selling security holders acting as "underwriters" that are selling their securities on the issuer's behalf. The SEC has pointed to several factors that should be assessed in making a determination as to whether an offering is a primary offering or a secondary offering, including:

- the amount of securities involved;
- how long the securities have been held;
- whether the investors are at market risk from the time they purchased the securities;
- the circumstances under which the securities were acquired;
- the relationship between the selling security holders and the issuer;
- whether a selling security holder is in the business of underwriting securities; and
- whether it appears that a selling security holder is acting as a conduit for the issuer.

As a guidepost, and not a bright-line test, the SEC has indicated that it will subject secondary offerings of securities in excess of 33% of the issuer's pre-transaction public float to closer scrutiny, although each determination involves a case-by-case analysis of the facts and circumstances of each transaction.

Source: SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 612.09 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm, sets forth several factors in determining whether a secondary offering is a disguised primary offering. *See also* "When a Primary is not a Primary" by Anna Pinedo and James Tanenbaum, first published in *International Financial Law Review* May 2007.

What is an "ineligible issuer"?

An "ineligible issuer" will not qualify as a WKSI. *See "What is a 'Well-Known Seasoned Issuer,' or 'WKSI'?"* 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 anti-fraud 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.

Source: Rule 405.

Under what circumstances will the SEC grant a waiver from ineligible issuer status?

The SEC has the power under its rules to determine, upon a showing of good cause, that it is not necessary under the circumstances for an issuer to be considered an ineligible issuer. This authority was designed in large measure for the benefit of financial holding company issuers. These issuers often have one or more subsidiaries, that, by virtue of their activities in the securities business, often are subject to litigation or SEC actions relating to violations of the federal securities laws, and which often lead to settlements of the type contemplated by the ineligible issuer definition. This provision enables issuers entering into such settlements to negotiate a waiver of the ineligible issuer disqualifications at the time of the settlement.

In March 2014, the Staff updated its prior guidance regarding requests for waivers by WKSIs that would otherwise become ineligible issuers under Rule 405. The revised guidance outlines a more detailed framework that the SEC generally will follow in considering whether to grant a waiver of ineligible issuer status.

According to this guidance, the SEC will consider the nature of the violation or conviction, whether it involved disclosure for which the issuer or its subsidiaries was responsible or calls into question the ability of the issuer to produce reliable disclosures, and whether the conduct involved a criminal conviction or scienter-based violation. The SEC will also consider the following factors, with no single factor being dispositive: (1) who was responsible for the misconduct and the duration of the misconduct (including the level of the employees involved and whether there were any "red flags" that were disregarded); (2) what remedial steps were taken by the issuer (including improvements in internal controls); and (3) what the impact of a denial of the waiver request would be (including effects that the issuer's loss of WKSI status could have for the market as a whole).

In April 2014, the SEC further clarified its guidance. The April 2014 guidance indicates:

- An issuer's burden to show good cause that a waiver is justified would be significantly greater where there is a criminal conviction or a scienter-based violation involving disclosure for which the issuer or any of its subsidiaries was responsible.
- The Staff will consider the effects that the issuer's loss of WKSI status could have for the markets as a whole and the investing public, in light of the issuer's significance to the markets and its connectedness to other market participants; however, this guidance removes the March 2014 reference indicating that the SEC would consider "the issuer's significance to the markets and its connectedness to other market participants."

- Whether the issuer took appropriate remedial measures to prevent the misconduct from recurring.
- Whether the misconduct was pervasive, and how recently it occurred. For example, older misconduct, for which a small number of non-senior employees were responsible, would be more likely to result in a waiver.
- The impact on the issuer if the waiver request is denied. The SEC will also look to whether the impact on the issuer, and the resulting impairment of its ability to raise capital, could also have an adverse impact on the markets as a whole.

Source: Rule 405 and SEC Release No. 33-8591 (July 19, 2005), Section III.D.3.b.; and Division of Corporation Finance, Revised Statement on Well-Known Seasoned Issuer Waivers (April 2014), available at http://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm.

Where can one find the determinations of the SEC as to issuers that have been granted a waiver from ineligible issuer status?

The SEC posts to its website the waiver requests that are granted, along with a copy of the initial request. See Division of Corporation Finance No-Action, Interpretive and Exemptive Letters, Rule 405 – Determination regarding ineligible issuer status, available at

http://www.sec.gov/divisions/corpfin/cf-noaction.shtml#405

Common Uses for Shelf Registration

What types of offerings can be conducted on a shelf registration statement?

Rule 415 lists 11 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 (*see "What is an 'at-the-market' offering?"*);
- 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.

Can an issuer use a shelf registration statement for acquisitions?

Yes. All transactions registered on Form S-4 or Form F-4 are considered continuous offerings under Rule 415 (even though there is no Rule 415 box to check on the cover of these Forms). However, an automatically effective shelf registration statement may not be used as an acquisition shelf.

Source: Form S-4's adopting release (No. 33-6578, April 23, 1985), states that all business combinations are considered Rule 415 offerings. *See also* SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 203.13 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

Can an issuer use a shelf registration statement for future acquisitions?

Yes. 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 also may register securities for future issuance in connection with acquisitions on a delayed basis. These are known as "acquisition shelves."

Registering shares for future issuance in connection with acquisitions also allows the issuer flexibility to complete numerous acquisitions that, individually, would not require registration, but may require registration on a collective basis due to the SEC's integration doctrine.

An acquisition shelf must be filed on Form S-4, Form F-4, Form S-1 or Form F-1. Form S-3 and Form F-3, including the automatic shelf registration provisions for WKSIs, are not available for registering securities to be issued in business combination transactions because the securities must be offered for cash under those forms. *See "What is a 'Well-Known Seasoned Issuer,' or 'WKSI'?"*

Generally, an issuer would register a certain number of securities for future issuance, and then use the base prospectus when negotiating the acquisition. *See "What is a 'base' or a 'core' prospectus?"* The base prospectus does not have to contain information about the specific acquisition or the companies being acquired.

If an acquisition normally would require registration by itself (for example, because there are a large number of target stockholders that are not "accredited investors"), the issuer must update the Form S-4 or Form F-4 by post-effective amendment to reflect the acquisition prior to soliciting offerees; the issuer cannot use a prospectus supplement. *See "What is a 'prospectus supplement'?"* If a post-effective amendment is required, no further acquisitions should be entered into based on the registration statement before the post-effective amendment is declared effective. *See "When is a post-effective amendment (as opposed to a prospectus supplement) required to be filed?"*

In addition, if the issuer would be required to file financial statements for a target under Regulation S-X due to the size of the acquisition, the issuer will have to file a post-effective amendment to the Form S-4 or Form F-4, rather than a prospectus supplement.

Source: For more details concerning shelf acquisition procedures, *see* the no-action letter Service Corporation International (October 31, 1985). Form limitations for shelf acquisitions are derived from General Instruction H to Form S-4, General Instruction III to Form S-1 and General Instruction III to Form F-1.

What is an "at-the-market" offering?

An at-the-market offering is an offering of securities into an existing trading market for outstanding shares of the same class at other than a fixed price on, or through the facilities of, a national securities exchange, or to or through a market maker otherwise than on an exchange.

An example is an offering in which common stock is sold by an underwriter by means of ordinary brokerage transactions (as opposed to a block transaction) on the NYSE.

Only primary eligible issuers (*i.e.*, issuers eligible to register a primary offering on Form S-3 or Form F-3, including issuers subject to the one-third cap) may register "at-the-market" offerings. *See "What is primary eligible?"* The SEC's 2005 securities offering reform rule amendments (in Section V.B.1.b.iv(C)) eliminated restrictions in Rule 415 that required involvement of underwriters and limited the amount of securities that could be sold in "at-the-market" offerings. For additional information relating to at-the-market-offerings, please see "Frequently Asked Questions About At-the-Market Offerings" (http://www.mofo.com/docs/pdf/FAQAtTheMarketOfferings.pdf).

What is a "PIPE" transaction and how can shelf registration statements be used for such an offering?

The acronym "PIPE" stands for "private investment, public equity." A traditional PIPE transaction occurs when a company issues securities to investors in a private transaction, and a condition to closing the private transaction is the effectiveness of a shelf registration of the securities for resale. PIPE transactions are different from "equity-line" offerings, described below.

What is an "equity-line" offering?

Under an equity line of credit, the company enters into an agency agreement with an investor, under which the company has the right, during the term of the equity line and subject to certain conditions, to put its securities to the investor.

Some equity lines of credit are completed using a shelf registration statement and others are completed as private placements with an obligation to register the resale of the securities sold under the equity line. In the latter case, because of the delayed nature of the offering, and because the investor is not "at investment risk" for the securities when the resale registration statement is filed, the SEC considers this type of registration to be an indirect primary offering. In these situations, the SEC will allow the company to register the "resale" of the securities before exercising the "put" only if the transactions satisfy the following conditions:

- the company must have "completed" the private transaction with respect to all of the securities it is registering for "resale" prior to the filing of the registration statement;
- the registration statement must be on a form that the company is eligible to use for a primary offering; and
- in the prospectus, the investor(s) must be identified as underwriter(s) as well as selling shareholder(s).

If these conditions are not met, the SEC's position is that the company may register the securities for resale if it is primary eligible to use Form S-3 or Form F-3 and discloses in the prospectus issues relating to the potential violation of Section 5 in connection with the private transaction.

Source: SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 139.13 and Question 139.14 (May 16, 2013 and November 26, 2008, respectively), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

What is an "unallocated" shelf registration statement?

An unallocated shelf registration statement registers only a dollar amount of various classes of securities in an offering, without identifying the specific dollar amount registered for each class of securities. This is also known as a "kitchen sink" or "universal" registration statement. Only issuers and their affiliates that are primary eligible to use Form S-3 or Form F-3 may file an unallocated shelf registration statement.

In unallocated shelf registration statements, all that is required to be disclosed is the types of securities that may be sold. The specific type of security and amount to be sold is disclosed at the time of a takedown in a prospectus supplement. *See "Can a shelf registration statement be converted into an unallocated shelf registration statement?"* below.

Source: SEC Release No. 33-6964 (October 22, 1992) adopted the unallocated shelf procedure. *See also* SEC Release No. 33-8591 (July 19, 2005), Section V.B.2.b.ii(A).

Can a shelf registration statement be converted into an unallocated shelf registration statement?

Yes, a shelf registration statement that registers a specific type of security or dollar amounts allocated among specific classes of securities generally may be amended by post-effective amendment to become an unallocated shelf registration statement as long as no new classes of securities are added.[1] In addition, WKSIs may add new classes of securities by post-effective amendment. *See "What is an 'unallocated' shelf registration statement?"* and *"What are the benefits of qualifying as a WKSI?"*

The Trust Indenture Act of 1939 (the "Trust Indenture Act") prevents issuers from issuing debt securities under a shelf registration statement that were not included as one of the types of securities described in the unallocated registration statement. Specifically, the Trust Indenture Act requires the indenture covering those securities to be qualified when the registration statement becomes effective. Qualification cannot be accomplished via a post-effective amendment. However, a WKSI may add a new class of debt securities by post-effective amendment; the automatic effectiveness of an amendment that adds securities to a shelf registration statement will be the time "when registration becomes effective" as to such new securities, as that term is used in Trust Indenture Act Section 309(a)(1). In this case, the indenture will be required to be filed as an exhibit to the registration statement at the time that the post-effective amendment becomes effective.

Source: SEC Release No. 33-6964 (October 22, 1992). *See also* SEC Release No. 33-8591 (July 19, 2005), footnote 527; and SEC Compliance and Disclosure Interpretations, Securities Act Rules, Questions 212.18 and 19 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm; and SEC Compliance and Disclosure Interpretations, Trust Indenture Act of 1939, Question 201.02 (March 30, 2007), available at http://www.sec.gov/divisions/corpfin/guidance/tiainterp.htm.

[1] Note that a post-effective amendment can be on any form then available to an issuer. Thus, an issuer with an allocated shelf on Form S-1 could file a post-effective amendment on Form S-3 to convert to an unallocated shelf registration statement and to take advantage of forward incorporation by reference.

May an issuer simultaneously engage in more than one "takedown" off an unallocated shelf registration statement?

Yes. For example, an issuer could simultaneously offer shares of common stock and a class of debt securities from the same shelf registration statement. In addition, if the issuer filed a shelf registration statement on Form S-1 or Form F-1 and the base prospectus indicated that the issuer could use the prospectus to engage in acquisitions or firm commitment underwritten offerings, the issuer may engage in both at the same time. *See "Can an issuer use a shelf registration statement for acquisitions?"*

Source: *See, e.g.*, SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 212.02 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

Filing Requirements for Shelf Registration

Are there specific undertakings that an issuer must provide in connection with a shelf offering?

Yes. All issuers must include the undertakings set forth in Item 512(a)(1) of Regulation S-K. 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.

Item 512(a) of Regulation S-K requires a registrant to agree that, consistent with Rule 430B and Rule 430C, information in prospectus supplements 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). These undertakings also include an agreement that, for liability purposes of the registrant 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.

Source: SEC Release No. 33-8591 (July 19, 2005), Section V.B.1.b.vii; and SEC Division of Corporation Finance Securities Offering Reform Transition Questions and Answers (September 13, 2005), Question 3, available at http://www.sec.gov/divisions/corpfin/transitionfaq.htm.

When is a post-effective amendment (as opposed to a prospectus supplement) required to be filed?

The four instances when a post-effective amendment is required instead of a prospectus supplement are when:

- there is a "fundamental change" (a greater threshold than "material") to the disclosure;
- disclosure in the registration statement must be updated for Securities Act Section 10(a)(3) purposes;
- there is a change to the plan of distribution (*e.g.*, switching to an "at-the-market" offering from a firm commitment offering); and
- for an automatic shelf registration statement to qualify an indenture or add a new class of securities. *See "When should an indenture be qualified under the Trust Indenture Act in connection with a delayed offering of debt securities?"*

However, the undertaking to file a post-effective amendment for those three 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 under Rule 424(b).

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

Source: *See* Item 512(a)(1) of Regulation S-K and SEC Release No. 33-8591 (July 19, 2013), Section V.B.1.b.vii.

When must financial statements in a shelf registration statement be updated?

The "going stale" rules under Regulation S-X are applied as of the filing date of the shelf registration statement and/or the effective date of the registration statement. In addition, after nine months have passed from the effective date of the registration statement, the audited balance sheet can be no more than 16 months old. Financial statements typically are updated through incorporation by reference of the issuer's annual and quarterly reports filed under the Exchange Act.

Source: Section 10(a)(3) of the Securities Act and Rule 427.

When must subsidiary guarantors be named in a shelf registration statement?

The federal securities laws treat subsidiary guarantees as securities separate from the related debt securities. However, under a shelf registration statement, a separate prospectus and registration statement need not be prepared for the subsidiary guarantees, and no additional SEC filing fees will apply.

An SEC practice rule prohibits additional subsidiary guarantors for debt securities registered on a shelf registration statement from being added to the effective shelf registration statement, unless the parent corporation is a WKSI. *See* "*What is a 'Well-Known Seasoned Issuer,' or 'WKSI'?*" This means that, at the time of filing a shelf registration statement, the issuer must identify each of the subsidiaries that will potentially guarantee any debt securities. Each of these subsidiary guarantors must sign the registration statement, and be bound by the "undertakings" set forth in the so-called "Part II pages" of the form.

Source: General Instruction I.D of Form S-3, General Instruction I.C of Form S-3, and SEC Release No. 33-8591 (July 19, 2005) at footnote 520 and related text.

When must a shelf registration statement comply with the financial statement requirements for subsidiary guarantors set forth in Rule 3-10 of Regulation S-X?

With respect to financial reporting requirements for subsidiary guarantors, Rule 3-10 of Regulation S-X relates to a variety of situations that involve a parent issuer/subsidiary guarantor or a subsidiary issuer/parent guarantor. Although Rule 3-10 is silent as to its application in the case of a shelf registration statement, the SEC has provided informal guidance to issuers and their auditors that a shelf registration statement must be in compliance with Rule 3-10 at the time of effectiveness. The SEC's position means that an issuer contemplating the registration of guaranteed debt would have several options:

File Exchange Act reports with the footnote disclosure required under Rule 3-10. This approach would require the issuer to anticipate the likely subsidiary guarantors that would be named in an upcoming shelf registration statement, and to prepare its footnote disclosure under Rule 3-10 accordingly.

File amended financial statements together with the shelf filing. This approach could involve the filing of a Form 8-K that contained amended and restated financial statements that include the required footnote disclosure.

Parent companies with no independent assets or operations. These companies could have the most flexibility. In lieu of financial statements with the required footnote disclosure, these companies could simply make the following statement (if true) in the text of their "Description of Debt Securities": "The parent company has no independent assets or operations, the guarantees will be full and unconditional and joint and several, and any subsidiaries of the parent company other than the subsidiary guarantors named in the registration statement of which this prospectus forms a part are minor."

If the situation changes at the time of a takedown (for example, an offering involves different subsidiary guarantors than those contemplated by the existing financial statements, or a parent corporation that previously acted solely as a holding company acquires material assets or operations of its own), prior to effecting the offering, the issuer would need to file amended financials to be incorporated by reference in the shelf registration statement, together with the required auditor's consent letter filed as an exhibit. Adding the amended information only to a prospectus supplement would not be sufficient, as an issuer cannot file an auditor's consent as an exhibit to a prospectus supplement.

The financial reporting requirements described above do not necessarily end at the time the shelf registration statement is filed or a takedown completed. This is because each subsidiary guarantor becomes an SEC registrant, required to file periodic reports for the first year thereafter under Section 15(d) of the Exchange Act. As in the case of the Securities Act, separate reports are not required for each subsidiary guarantor. Rather, Rule 12h-5 under the Exchange Act provides that parent company financials prepared in accordance with Rule 3-10 of Regulation S-X will satisfy the requirement to provide financial information as to the subsidiary guarantors under the Exchange Act.

Under the Staff's informal guidance since October 2007, this obligation would begin to apply following the effectiveness of a shelf registration statement, even though no securities with subsidiary guarantees are actually outstanding. Accordingly, issuers registering guaranteed debt need to be sensitive to the Rule 3-10 requirements after the filing of the shelf registration statement. *See also* Topic 9820 in the Division of Corporation Finance Financial Reporting Manual, available at http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf.

Must a WKSI re-evaluate its status as such?

Yes. A WKSI that has filed an automatic shelf registration statement must re-evaluate its WKSI status when it files each subsequent Form 10-K in order to effect its Securities Act Section 10(a)(3) update. If it determines that it no longer qualifies as a WKSI at the time it files its Form 10-K (or on the due date of that

annual report, if earlier), the issuer should amend its effective automatic shelf registration statement on the form that it is then eligible to use.

An issuer that has an effective automatic shelf registration statement, but learns after the effective date that it has lost its status as a WKSI, may continue to use that registration statement until the time of its Securities Act Section 10(a)(3) update.

Source: The SEC's Securities Offering Reform Questions and Answers (November 30, 2005), Questions 15 and 21, available at http://www.sec.gov/divisions/corpfin/faqs/securities_offering_reform_qa.pdf. *See also* SEC Compliance and Disclosure Interpretations, Securities Act Rules, Questions 198.03 and 198.06 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

Is a legality opinion required to be pre-effectively filed for a shelf registration statement relating to a delayed offering?

Yes. A registration statement under Rule 415 cannot be made effective without a legality opinion, even if no takedown is currently contemplated, and even if the specific terms of the securities to be offered are not known at the time of filing.

The issuer may file a signed opinion of counsel that contains appropriate qualifications, subject to the understanding that an unqualified opinion will be filed prior to the time any sales are made under the registration statement.

Examples of acceptable assumptions that may be made in the qualified opinion are:

- the issuer's board of directors will have taken all actions, and passed all resolutions necessary to authorize the issuance and sale of the securities; and
- all regulatory approvals will have been received.

If a WKSI amends its effective automatic registration statement to add a new class of securities, a legality opinion (which may contain appropriate qualifications) must be filed with the post-effective amendment.

Once a takedown is planned, an unqualified opinion must be filed either in a post-effective amendment (a post-effective amendment solely to add exhibits is automatically effective upon filing per Rule 462(d)) or through incorporation by reference into the registration statement by filing under cover of Form 8-K or Form 6-K. *See "What is 'incorporation by reference'?"* and *"When should an indenture be qualified under the Trust Indenture Act in connection with a delayed offering of debt securities?"*

Frequent issuers using a medium-term note program registered on a shelf registration statement may find it difficult or cumbersome to file an unqualified opinion by post-effective amendment or on a Form 8-K or 6-K for each shelf takedown. In 2011, the SEC issued Staff Legal Bulletin No. 19, in which they provided for the filing of a "forward looking opinion" with the shelf registration statement for future takedowns, subject to the requirements of the bulletin. For more information, see "Frequently Asked Questions About Medium-Term Note Programs — Effecting an MTN Offering – *How do issuers satisfy their obligations to file legal opinions for an MTN offering?*" at http://media.mofo.com/files/Uploads/Images/080818FAQsMTN.pdf.

Source: SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 212.05 (Aug. 14, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm. *See also* the SEC's Securities Offering Reform Questions and Answers (November 30, 2005), Question 20. Staff Legal Bulletin No. 19 may be found on the SEC's website at: http://www.sec.gov/interps/legal/cfslb19.htm.

When is a shelf offering exempt from FINRA filing under the Corporate Financing Rule?

Under Financial Industry Regulatory Authority ("FINRA") Rule 5110, known as the Corporate Financing Rule, shelf offerings by an issuer that is eligible to use a Form S-3 or Form F-3 registration statement based on the eligibility requirements for those Forms that were in effect prior to October 21, 1992, are generally exempt from FINRA filing. The pre-October 21, 1992 eligibility requirements are (1) the issuer has a public float of at least $150 million ($300 million for issuers using Form F-3) and (2) the issuer has been a reporting company under Section 13(a) or Section 15(d) of the Exchange Act for at least 36 months.

Shelf offerings also are generally exempt if the issuer is registering investment grade unsecured non-convertible debt with a term of issue of at least four years, or unsecured non-convertible preferred securities. A FINRA filing is required for each shelf takedown for an issuer that is unable to rely on these or another exemption under the Corporate Financing Rule.

Please note that if the shelf registration statement involves an underwriter that is affiliated with the issuer, the shelf filing will be subject to filing with FINRA under FINRA's conflict of interest rules, unless FINRA's exemption from such a filing applies, as set forth in FINRA Rule 5121(a)(1). This rule requires, among other things, prominent disclosure of the conflict of interest.

Source: FINRA Rules 5110(b)(7) and 5121.

When should an indenture be qualified under the Trust Indenture Act in connection with a delayed offering of debt securities?

Under the Trust Indenture Act, the indenture must be "qualified under the statute." An indenture covering securities to be issued in a shelf registration statement must be filed with the registration statement prior to effectiveness because the Trust Indenture Act does not provide for an indenture to be qualified by post-effective amendment. The shelf registration statement must include a form, usually a Form T-1, and must describe certain key provisions of the indenture. A Form T-1 sets forth information enabling the SEC to determine whether the designated trustee is eligible to act under the standards of the Trust Indenture Act.

If the terms of future debt offerings are not known at the time of filing, the indenture that is filed pre-effectively may contain a generic, non-specific description of the securities. The details of a particular series to be offered (*i.e.*, interest rate, term, etc.) may be provided in a supplemental indenture at the time such series is offered. A prospectus supplement may be used to reflect the specific terms of the series in the prospectus, and the supplemental indenture may be filed as an exhibit to a Form 8-K in the same manner as specified for underwriting agreements, or in an automatically effective, exhibits-only, post-effective amendment under Rule 462(d).

A WKSI that files an automatic shelf registration may determine after effectiveness to add a new class of debt

securities or guarantees of debt securities. In addition to filing a post-effective amendment to register the new class of debt securities or guarantees, the issuer also needs to qualify all appropriate indentures under the Trust Indenture Act. Under the amended automatic shelf registration procedure, the Trust Indenture Act qualification requirement will be satisfied for those new debt securities or guarantees by including the indentures in the registration statement at the time the post-effective amendment is filed and becomes automatically effective.

Source: SEC Compliance and Disclosure Interpretations, Securities Act Rules, Questions 212.18 and 19 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm; *see also* SEC Compliance and Disclosure Interpretations, Trust Indenture Act of 1939, Questions 103.01 and 109.01 (Mar. 30, 2007), available at http://www.sec.gov/divisions/corpfin/guidance/tiainterp.htm and SEC Release No. 33-8591 (July 19, 2005), footnote 527.

When is the trustee designated if the identity of the trustee is not known at the time the registration statement is filed?

At the time that an issuer files a shelf registration statement, it may not know who will serve as trustee. Accordingly, Section 305(b)(2) of the Trust Indenture Act permits the trustee to be designated on a delayed basis. In that case, for an issuer that is not a WKSI, the Form T-1 would be filed with the SEC just prior to the applicable takedown.

If an issuer has completed its use of a shelf registration statement, and securities remain unsold, what should be done?

If securities remain unsold, the issuer can do one of two things. First, the issuer could deregister the securities by filing a post-effective amendment with the SEC. The post-effective amendment is simple. It should consist of:

- a registration statement cover page; and
- an additional page indicating that the offering has been terminated and listing the number or amount of securities remaining unsold.

In the alternative, if the remaining securities are not deregistered, the issuer may "carry forward" these securities, and the related registration fee, to a later Securities Act filing.

Source: Item 512(a)(3) of Regulation S-K and SEC Release 33-7943 (January 26, 2001), footnote 68. The ability to "carry forward" shares to a later registration statement is based on Rule 429. *See also "For how long can a shelf offering be used?"*

Limitations on Shelf Registration

For how long can a shelf registration statement be used?

Prior to the 2005 securities offering reform rule amendments, offerings under Rule 415(a)(i), (viii), (ix) and (x) were unlimited in time. A shelf registration statement did not have an "expiration date." However, the amount of securities that could be registered was limited 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.

The 2005 amendments provide that 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 also provide that 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, 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) that are 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.

Source: Rule 415(a)(2) and (5) and SEC Release No. 33-8591 (July 19, 2005), Section V.B.1.b.iv.

When does the three-year period begin for shelf registration statements?

The three-year period begins on the initial effective date of the shelf registration statement.

Source: Rule 415(a)(5).

How can an issuer avoid a blackout period between effective 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 begun 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 they 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.

Source: Rule 415(a)(5) and SEC Release No. 33-8591 (July 19, 2005), Section V.B.1.b.iv.A and Section V.B.2.b.ii.G.

Is an issuer prevented from engaging in private transactions during the pendency of a shelf registration because of the doctrine of integration?

It depends.

The answer is "generally no" for delayed offerings by the issuer, unless the issuer is currently engaged in a "takedown." The answer is "maybe" if the issuer is engaged in a continuous offering.

If, at the time of the private offering, the issuer is engaged in a "takedown" or offering securities in a continuous offering, the five-factor integration test of Rule 502(a) must be considered.

The acquisition shelf procedures are a means by which integration can be avoided when completing multiple privately negotiated acquisitions. *See "Can an issuer use a shelf registration statement for acquisitions?"*

Source: SEC Compliance and Disclosure Interpretations, Securities Act Rules, Question 212.06 (Jan. 26, 2009), available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm and Securities Act Release No. 8828 (August 3, 2007) confirm that the analysis of whether an existing shelf offering precludes an issuer from engaging in a concurrent private offering depends upon the facts and circumstances.

Is "free writing" permissible in connection with a delayed offering?

The SEC's 2005 securities offering reform rule amendments enabled the use of "free writing prospectuses." Generally, under Rule 433, free writing is permitted after a registration statement containing a statutory prospectus has been filed. For shelf registrations, the statutory prospectus contained in the registration statement may be the base prospectus. *See "What is a 'base' or a 'core' prospectus?"* Under Rule 163, WKSIs also may use free writing prospectuses before a registration statement is filed.

Source: Rule 163, Rule 433, and SEC Release No. 33-8591 (July 19, 2005), Section III. D.3.b. Section 2(a)(10) of the Securities Act permits an issuer to issue written materials relating to an offering that do not satisfy the requirements of Section 10(a) of the Securities Act, as long as the non-conforming writings are accompanied or preceded by a prospectus that meets the requirements of Section 10(a).

Liability Issues for Shelf Registration

Does Section 11 liability attach to a "takedown"?

The SEC's position has always been that Section 11 liability under the Securities Act attaches to the prospectus supplement and incorporated Exchange Act reports, but some commentators disagreed. However, Rule 430B and Rule 430C, adopted in 2005, codify the SEC's position (which was generally taken by the courts in the case of takedowns off a shelf) 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. *See "What is a 'prospectus supplement'?"*

Source: SEC Release No. 33-6714 (May 27, 1987); SEC Release No. 33-7606A (November 13, 1998), Section V.A.1.e.; Rule 430B; Rule 430C; and SEC Release 33-8591 (July 19, 2005), Section V.B.1.b.ii. For an example of case law supporting the application of Section 11 to prospectus supplements filed in connection with "takedowns," *see Shaw v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996).

As of what dates are prospectus supplements deemed included in the related registration statement? As to misstatements in a registration statement, what is the new effective date of such registration statement for takedowns?

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.

For Section 11 liability purposes only for the issuer and any underwriter in connection with a takedown, Rule 430B establishes a new effective date for the shelf registration statement, which will be the date the prospectus supplement filed in connection with the takedown is deemed part of and included in the relevant registration statement as described above. This rule establishes a new starting date for the applicable statute of limitations in the Securities Act and also eliminates what may have been an unwarranted disparate treatment of underwriters and issuers if an issuer's liability was assessed as of the earlier initial effective date of the registration statement.

Source: Rule 430B, Rule 430C, and SEC Release No. 33-8591 (July 19, 2005), Section V.B.1.b.iii.

Are shelf offerings subject to 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 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.

Source: Regulation FD, Section 100(b)(2)(iv); SEC Release No. 33-8591 (July 19, 2005), Section XII, Item 61; and SEC Release No. 33-7881 (August 15, 2000), footnote 80.

Are underwriters expected to perform the same standard of due diligence for a shelf offering?

Rule 176 under the Securities Act sets forth several relevant circumstances for determining whether conduct constitutes a reasonable investigation or reasonable grounds for belief under Section 11(c) of the Securities Act, which defines the circumstances in which an underwriter's due diligence defense is available.

These circumstances 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.

A 2004 U.S. federal district court examined underwriters' due diligence obligations with respect to shelf offerings and suggested that Section 11 requirements for underwriters have not been diluted even though there has been a significant decrease in the amount of time underwriters have to perform due diligence (largely because issuers can incorporate by reference prior disclosure), underwriters lack input into filings incorporated by reference, and the cast of underwriters often changes from one shelf offering to the next.

The SEC's historical commentary with respect to Rule 176 states that the implementation of the rule did not alter the fundamental nature of underwriters' due diligence obligations and that competitive timing and pressures are not to be considered when evaluating the reasonableness of an underwriters' investigation.

Source: Rule 176. *See also In re WorldCom, Inc. Securities Litigation*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004).

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