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News Bulletin

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Upcoming Expiration of Shelf Registration Statements: Avoiding a Blackout Period

As amended by the Securities and Exchange Commission (the "SEC") in its 2005 Securities Offering Reform rulemaking, Rule 415(a)(5) limits the offer and sale of certain securities registered on a shelf registration statement to a three-year period. For some issuers, this three-year period will end as early as December 1, 2008. However these and other issuers facing approaching expiration of their shelf registration statements can avoid a blackout period by filing a new registration statement on a timely basis.

Because December 1, 2008 will be the first date on which shelf registration statements can expire under the new rules, we have prepared this alert to remind clients of the need to review their existing registration statements and to take appropriate action to replace them, as needed.

Three-Year Limitation

Under the revised rule, securities registered on an automatic shelf registration statement by a well-known seasoned issuer (a "WKSI") may not be offered and sold if more than three years have passed since the initial effective date of that registration statement. This three-year limitation also affects shelf registration statements relating to:

- offerings of securities registered on Form S-3 or F-3 and offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority-owned subsidiary of the registrant or the registrant's parent corporation ("primarily eligible" issuers);
- offerings that will be made on a "continuous basis"; and
- offerings of mortgage related securities, including mortgage backed debt and mortgage participation or pass-through certificates.[1]

For a shelf registration statement that became effective before December 1, 2005, the three-year period began on December 1, 2005, regardless of the length of time that the registration statement had been effective as of that date. For a shelf registration statement that became effective on or after December 1, 2005, the three-year period begins on the initial effective date of that shelf registration statement.[2]

[1] Rule 415(a)(5). Accordingly, so-called "universal shelves" (or "kitchen sink shelves") are subject to the three-year limitation.

[2] Rule 415(a)(5) and the SEC's Securities Offering Reform Transition Questions and Answers; Division of Corporation Finance (September 13, 2005), Question 12.

Upon expiration of the three-year period, except as described in the next section, the shelf registration statement may not be used for new offerings. The applicable issuer will be "blacked out," and unable to issue securities in a public offering until it has a new effective registration statement.

Some 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.

Avoiding a Blackout Period

An issuer can avoid a blackout period for its registered offerings by properly filing a new registration statement before the "expiration date" of its current shelf registration statement. For WKSIs, as long as the issuer remains a WKSI, the new shelf registration statement will be effective immediately upon filing pursuant to Rule 462(e). 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. 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 those offerings would be permitted to be made under the new registration statement.[3]

With the filing of a new automatic shelf registration statement, a WKSI may elect to include on the new registration statement any unsold securities covered by the old registration statement, and to roll-over the previously paid SEC filing fees that are attributable to those securities. For other issuers, prior to the effectiveness of a new shelf registration statement, they may amend the new shelf registration statement to include any securities and SEC filing fees attributable to those securities remaining unsold on the old registration statement.[4]

Underwriter Due Diligence

In light of the three-year limitation and the approaching expiration date for many shelf registration statements, underwriters should, in performing their due diligence obligations under Section 11 of the Securities Act, also confirm the initial effective date of the registration statement pursuant to which the securities will be offered. The underwriters will need to confirm that sufficient time remains under Rule 415 to complete the proposed offering.

Conclusion

Public companies will need to file a large number of shelf registration statements during the next several months in order to replace the shelf registration statements that will expire. These filings may substantially increase the workload of the staff of the SEC's Division of Corporate Finance, and as a result, could result in the staff needing longer periods of time to complete the review of some registration statements. Accordingly, issuers (especially those that are not WKSIs) may wish to file new registration statements at the earliest possible date, to help ensure that they will not be blacked-out upon the expiration of their current registration statements.

Please contact your Morrison & Foerster LLP attorneys if you have any questions as to the matters discussed in this client alert.

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[3] Rule 415(a)(5) and SEC Release No. 33-8591, Section V.B.1.b.iv.A and Section V.B.2.b.ii.G.

[4] Rule 415(a)(5) and SEC Release No. 33-8591, Section V.B.1.b.iv.A and Section V.B.2.b.ii.G.

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