

Securities Law News

INSIGHT: SEC Shelf Registration Gives Public Companies a Leg Up

By Craig M. Scheer

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Many companies may find themselves needing to access the capital markets much sooner than they previously expected in these challenging times. Craig M. Scheer, with Silver, Freedman, Taff & Tiernan LLP, says having an effective shelf registration statement on file with the SEC could mean the difference between gaining that access and missing out on a critical window of opportunity.

With the U.S. economy heading into a recession triggered by the Covid-19 pandemic, many public companies have suspended their buyback programs and plan to reduce or suspend the payment of dividends. For some companies, raising additional capital may also be necessary.

Capital markets have been extremely volatile of late, a trend likely to continue. For the foreseeable future, any opportunities to access the capital markets are likely to be brief. To better position itself for any such opportunity, a public company should consider having an effective shelf registration statement on file with the Securities and Exchange Commission.

Eligibility Considerations

A shelf registration statement on the SEC's Form S-3 (Form F-3 for a foreign private issuer) allows a company to periodically take securities "off the shelf" and offer them to the public. The typical "universal shelf" is designed for maximum flexibility and includes various types of debt and equity securities.

There is no cap on the amount of securities a company can register, and a shelf registration statement generally can be used for three years after its initial effective date.

To be eligible for Form S-3, a company must:

1. have a class of securities registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 (Exchange Act) or a class of equity securities registered pursuant to Section 12(g) of the Exchange Act or be required to file reports pursuant to Section 15(d) of the Exchange Act;
2. have been subject to Exchange Act reporting requirements for at least 12 months and, with limited exceptions, have timely filed all required reports during the preceding 12 months; and
3. not have, since the end of the last fiscal year for which audited financial statements have been filed, failed to pay any dividend or sinking fund installment on preferred stock or have had a material default on any debt or long-term lease payment.

A company not eligible for Form S-3 can use Form S-1 for a shelf registration statement. The focus of this article is on Form S-3.

The extent to which an eligible company can use Form S-3 for a universal shelf (there are other potential uses for Form S-3 not addressed here) is dependent on its public float, meaning the aggregate market value of its outstanding common equity securities held by “non-affiliates” (generally, directors, executive officers and, in some cases, greater than 10 percent stockholders).

A company with a public float of \$75 million or more faces no limitations on the dollar amount of securities it can sell (up to the amount registered). If a company’s public float is less than \$75 million, it can still use Form S-3 for a universal shelf, provided that:

1. the company is not, and has not been during the preceding 12 months, a “shell company;”
2. the company has at least one class of common equity securities listed on a national securities exchange; and
3. the aggregate market value of securities the company sells over a 12-month period does not exceed one-third of its public float.

For purposes of determining whether a company meets the \$75 million threshold (as well as the \$700 million threshold for an “automatic” shelf registration statement, discussed below), its public float is initially measured as of any date within 60 days prior to the date of filing the registration statement and is re-measured annually, as of any date within 60 days prior to the filing of the company’s Annual Report on Form 10-K.

Except for an automatic shelf registration statement, a company cannot use a Form S-3 registration statement to offer and sell securities until the registration statement has been declared effective by the SEC. If the SEC selects the registration statement for review, the timeline to effectiveness could be delayed significantly.

A company with a need or desire to raise capital quickly can ill afford such a delay. For this reason, any Form S-3-eligible company that does not have an effective shelf registration statement in place should consider filing one as soon as possible, especially if it does not qualify to file an automatic shelf registration statement.

Prospectus Requirements

A shelf registration statement includes a “base” prospectus, which mostly consists of limited, generalized information about the types of securities being registered, the company’s business, the intended use of proceeds and a plan of distribution regarding how the securities will be offered. More detailed financial and non-financial information about the company is incorporated by reference from its Exchange Act reports.

The specific terms of the securities being offered in a “takedown” from the shelf and other information regarding the offering are set forth in a prospectus supplement. The prospectus supplement, together with the base prospectus, comprises the disclosure document for investors in the offering. This document must be filed with the SEC but is not subject to review by the SEC prior to its use.

An S-3-eligible company with a public float of \$700 million or more, referred to as a “well-known seasoned issuer,” can file a shelf registration statement on Form S-3 that becomes effective automatically upon filing.

This “automatic” shelf registration statement has several advantages. A non-automatic shelf registration statement requires a company to specify an amount of securities being registered and pay a fee to the SEC prior to filing based on that amount. With an automatic shelf registration statement, a company can register an unspecified amount of securities and pay a registration fee each time securities are taken down for an offering. The company also has the option of providing less information in the base prospectus than is required in a non-automatic shelf registration statement.

In these challenging times, many companies may find themselves needing to access the capital markets much sooner than they previously expected. Having an effective shelf registration statement in place could mean the difference between gaining that access and missing out on a critical window of opportunity.

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Author Information

Craig M. Scheer is a partner at Silver, Freedman, Taff & Tiernan LLP in Washington, D.C., where he counsels clients on a wide range of corporate and securities law matters, including public and private securities offerings, mergers and acquisitions, SEC reporting compliance, proxy solicitations, corporate governance and general corporate matters.

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