



Preparing to Raise Capital in Volatile Markets Using a Shelf Registration

Exclusive Interview with
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To get started, what is a "shelf registration?"

A shelf registration statement is often referred to as a short-form registration statement. It's a type of registration statement that an issuer can use to register for sale publicly any combination of securities, common stock, preferred stock, debt securities, or any other securities for sale at some future time.

When an issuer registers securities on a shelf it doesn't have to have a precise offering contemplated; those securities are going to be registered and the shelf is going to be available anytime that the issuer wants to do a takedown off of a shelf.

A takedown off of a shelf can take any number of formats, and the convenience is from an issuer's perspective that the shelf will be there and will be ready so that the issuer can seize financing opportunities.

Can you discuss some of the specific benefits of a shelf registration?

I think that the principal benefit of a shelf registration statement for an issuer is that it provides the greatest possible flexibility. We're living through challenging times, the markets are really volatile, most issuers need to be very mindful about their capital-raising needs, and they probably want to be very opportunistic and very thoughtful about when and how they approach their capital-raising. So if an issuer has a shelf and it's effective, an issuer then has maximum advantage in terms of when it can decide to do a deal.

By contrast, if an issuer didn't have a shelf up and ready, the issuer would, when it decided to do a deal, have to go through the registration process with the SEC; the SEC might review the registration statement, and at that point the issuer would be subject to a time delay while it got through the SEC comments. A shelf avoids all of that; the issuer has an opportunity to frontload that time and effort and then has the certainty of knowing that whenever it chooses to do a deal it can do so quickly.

Does the issuer have to specify the amount and types of securities being offered during the registration process?

Issuers can choose to approach the shelf process in a number of different ways. Sometimes issuers will specify upfront the kinds of securities that they want to register for sale. Other times, depending on the issuer's size and sophistication, if it's a WKSI (Well-Known Seasoned Issuer), for example, it can choose to add other kinds of securities later. An issuer generally will either specify a share amount that it's going to issue or it will specify a dollar amount.

So for example, an issuer can say that it's going to register up to \$500 million of securities, and then leave unspecified how it's going to divvy up that amount, how much will be common, how much will be preferred.

Does the market assume that the issuer will be doing an offering once it files the shelf?

For a long time issuers, particularly issuers in certain industries, had some trepidation about filing a shelf. And the fear there was that if an issuer filed a shelf there would be some perception of a market overhang. And by market overhang really we mean that investors would be fearful that an issuer would essentially in one fell swoop do a very large issuance of securities and that that issuance might be dilutive.

I think with the passage of time and the real popularity of shelves the mindset has changed a great deal. Now almost every company that can file a shelf files a shelf, and consequently there's no negative perception and no negative association with the filing of the shelf. The market I think is sophisticated enough to understand that an issuer has to prepare, and having a shelf up and ready to go is a key step.

By filing the shelf, does that mean the issuer is considered to be in distribution by virtue of that registration?

For securities law purposes the SEC has been really very clear with its guidance and has said that merely by having a shelf up an issuer isn't considered to be in distribution.

Why is that important?

An issuer has to consider its pattern of communications while it's doing a securities distribution or conducting an offering. The SEC has said that an issuer is in distribution when it's reached an agreement with an underwriter or a

placement agent to actually do a specific deal. So it's the takedown off of a shelf that's considered the distribution, not just having the shelf available.

What types of offerings can you complete with a shelf?

For lawyers that's the fun part. Once you have a shelf effective you're really only limited by your imagination. An issuer can use a shelf for traditional underwritten public offering, but an issuer can also use a shelf for a hybrid offering. For example, an issuer can do a takedown off of a shelf that's a registered direct, an agented transaction; an issuer can use a shelf to set up an at-the-market offering program, or ATM program, which has become a very popular offering methodology; an issuer can also use a shelf to set up a continuous offering program, like a medium-term note program, an MTN, which is very popular for the very largest issuers who have investment-grade debt securities.

Are there any restrictions in terms of what kinds of companies are eligible to file a shelf?

In order to file a shelf the preconditions are pretty straightforward. First, the issuer has to have been a reporting company for a full 12-month period. And during that 12-month period the issuer has to have made all of its SEC filings on a timely basis, and can't have defaulted on any of its payment obligations. So no defaults on the payment of preferred dividends, credit agreements, or other obligations.

And then there are really two different kinds of shelves; there are the regular shelves for issuers that have a market cap of \$75 million or more, and then there are the smaller shelves for companies that don't meet that \$75 million threshold.

Have the shelf eligibility rules changed in recent years?

The shelf process has undergone some significant changes in the last few years. The first group of important changes to keep in mind were those that came about as a result of securities offering reform in 2005. And what the SEC did there is to simplify the shelf process a great deal. The SEC created an automatic shelf, and that automatic shelf is for the largest and best-known companies, those that are well-known seasoned issuers, or WKSIs.

WKSIs have the opportunity to file a shelf that's automatically declared effective; it's not subject to SEC review. At the same time, during securities offering reform the SEC also clarified that a shelf is considered valid or has a useful life of three years, so once a company files a shelf it knows that it can use that shelf for up to three years. And there were a number of practical changes that came about as a result of securities offering reform in 2005.

What are some of those changes?

More recently, as I alluded to, in 2007 the SEC again made some changes affecting shelves. Realizing that capital formation is very important, particularly for smaller public companies, what the SEC did was create this new category of shelves. Issuers that are below the \$75 million in market cap but that meet the other shelf requirements; that is, they've been public for a year, their securities are listed on a national securities exchange, those issuers can put up a shelf and in any 12-month period sell securities representing up to a third of their public float.

What kind of impact did that change have on your clients?

For a lot of our clients who are smaller public companies this was a really meaningful change. It meant that they were now on a more equal playing field with larger cap companies; they had access to doing registered direct transactions and to doing underwritten takedowns, which were really not

opportunities that they had before. Prior to that period a lot of smaller companies were limited to using pipe transactions as their principal means of capital raising. That was a very significant change.

What documentation is needed to file a shelf?

In order to get ready to file a shelf an issuer has to seek appropriate board authorizations -- gather its board and be authorized to prepare and file a registration statement. Of course, work with counsel to put together a registration statement. There are a number of exhibits that are usually filed with a shelf registration statement to be well-positioned and take maximum advantage of the benefits of a shelf an issuer generally will prepare a form underwriting agreement, a form indenture that it would use for debt securities, and file all of these exhibits when it makes the initial shelf filing.

What are some of the other requirements in terms of documentation?

In order to file a shelf, an issuer also has to have a consent from its independent accountants. In addition to working with counsel, the issuer will also be working with the accountants. The accountants will be providing comments and the consent that's included as an exhibit to the registration statement.

Can you tell us the difference between a primary and a secondary shelf?

A primary registration statement is for newly issued shares that are being offered by the company. A secondary registration statement, often referred to as a "resale registration statement", includes shares that are already issued and that are in the hands of selling stockholders.

The qualifications or eligibility criteria that I talked about earlier are for a primary shelf. For a resale registration statement, an issuer needn't meet that \$75 million capitalization criteria. Almost any issuer can file a shelf for resale purposes.

Can you tell us a little about the concept of automatically effective shelf registration statements?

The concept of an automatically effective shelf registration statement is a really important development because it allows the largest public companies to be able to put up a registration statement very quickly and access the market very promptly. Also, a WKSJ that's using an automatic shelf registration statement has much greater flexibility than does your average issuer. A WKSJ can exclude or omit different types of securities and add those subsequent to the registration statement having been filed. A WKSJ also has the opportunity to omit the names of selling stockholders and add a selling stockholder component to a registration statement after the registration statement's been filed.

So a WKSJ has many more options available to it by using an automatic shelf registration statement.

On the other end of the spectrum, what should a smaller public company think about with respect to the filing shelf?

Smaller public companies that are capable of meeting the eligibility criteria for filing a shelf should really attempt to do so and to have a shelf up and effective as promptly as they can. And the reason is that having the shelf offers many more opportunities. While PIPE transactions are a very attractive capital-raising alternative, it's often the case that an issuer will get more favorable pricing if it's able to offer investors fully-registered securities. There's no illiquidity discount

associated with those securities, so consequently a registered direct may offer better pricing for a smaller public company than a PIPE transaction would.

Likewise, a smaller public company may be able to do a takedown off of its shelf to meet specific obligations that it has before it, for example, for issuances to strategic partners, to joint venture partners. So it's very useful for a company to have a shelf ready.

Once a company files a shelf registration statement, how long is it effective?

A shelf registration statement is effective for a three-year period. Assuming that the company has not taken full use of the shelf, it can file a new shelf and it can roll forward any unused amounts. The company's not going to lose the fees that it paid, the registration fees it paid when it first filed, and effectively it can merge the two shelves. Companies need to be watchful of when that three-year date is up, because ahead of that deadline approaching they will want to have a new shelf on file so that they don't have a gap during which they don't have access to a shelf.

Another very useful change that the SEC implemented is that if a company is approaching that three-year time limit and it files a new shelf, the SEC will permit the company to continue to use the old shelf in the interim if the new shelf is being reviewed by the SEC. So the company won't find itself at a disadvantage.

Any final advice you'd have for companies considering a shelf registration?

Our best advice to clients is always be prepared and well-positioned to take maximum advantage of market windows. And the best way to do that is by having a shelf up, by keeping a shelf current, and by making sure that all of its

SEC filings are submitted in a timely way so that the issuer doesn't become ineligible to use a shelf registration statement.

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