

Securities Alert: Do You Need to Refile Your Shelf Registration Statements?

11/13/2008

On December 1, 2008, certain types of shelf registration statements declared effective prior to December 1, 2005 will expire.

History

In 2005, as part of the Securities Offering Reform rules, the Securities and Exchange Commission (SEC) mandated that companies refile certain shelf registration statements every three years. If your company's shelf was effective prior to December 1, 2005, the SEC indicated that the three-year period to determine when a company needed to refile those registration statements would begin to run on December 1, 2005, and, therefore, those shelf registration statements are now going to expire on December 1, 2008.

Since the SEC's three-year expiration rule also applies to certain shelves (see below for which ones) that went effective after December 1, 2005, the advice and guidance in this alert is also intended to apply to any such shelf that is set to expire at the end of its three-year term.

Which Types of Shelves Expire after Three Years?

In the chart below, we have summarized those shelves that expire after three years and those that do not.

Refile

Automatic shelf registration statement (ASR) filed by a WKSJ (well known seasoned issuer)
Registration statements that offer securities on a delayed or continuous basis under Securities Act Rule 415(a)(1)(ix) and (x)—such as universal, equity and debt shelves
Registration statements covering continuous offerings, such as combined dividend reinvestment/direct stock purchase plans if open to new investors

No Need to Refile

Resale registration statements, other than ASRs, for offerings by selling stockholders
Registration statements, other than ASRs, pertaining to pure dividend reinvestment plans that are not open to new investors
Registration statements, other than ASRs, registering the issuance of securities upon exercise or conversion of outstanding warrants, options, and other rights
Registration statements on Form S-8

The expiration date is tied to the effective date of the shelf filing—so if your shelf went effective on January 15, 2006, your shelf expires on January 15, 2009, regardless of when you filed it. If your shelf went effective *any time* before December 1, 2005, your expiration date is **December 1, 2008**.

Now What?

If you have a shelf that will expire in December, or even have one expiring soon after December, you need to start planning to file a new shelf well in advance of the expiration date so you can have a new shelf effective prior to any such expiration. Given that December is just around the corner, you should immediately start planning a new shelf, or call us and we can handle it for you. As with any registration statement, consider things such as drafting any necessary updates to the "Business" and "Risk Factors" sections, consents required, SEC filing mechanics, and any possible review/comment period following such initial, pre-effective filing. Also, as there will inevitably be a large number of issuers with shelves about to expire, the SEC will likely have their hands full wading through all these new shelves, which could add more time to the process.

Exception

There is an important exception to the SEC's three-year rule. In a nutshell, the SEC will allow an issuer to continue to use a registration statement for up to 6 months following its expiration, but *only if*, prior to such expiration date, an issuer has filed a new registration statement covering the offering (*i.e.*, for shelves declared effective prior to December 1, 2005, the new shelf would need to be filed no later than Friday, November 28, 2008). This was designed to allow for an orderly transition where an issuer may be working to get a new registration statement effective before the older one expires.

Other Details

When determining whether to put up a replacement shelf, please consult one of us, and we can discuss circumstances in which it may be possible to get credit towards filing fees of the new registration statement based on unused filing fees from your expiring registration statement, or help you consider the impact of the relatively new 144 rules if you are a WKSJ and have a selling stockholder registration statement expiring, and otherwise help walk you through the process to make replacing your shelf registration statements as seamless as possible.

Please contact the Mintz Levin attorney who handles your corporate and securities law matters if you have any questions or concerns regarding the expiration of your existing shelf registration statements.

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