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REGISTRATION

WKSIs Have Shelf Registration Choices Beginning December 1, 2005

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The recently adopted reforms of the offering rules under the Securities Act of 1933 became effective on Dec. 1, 2005. Well-known seasoned issuers, or WKSIs, which generally include S-3 eligible issuers with a public common equity float of at least \$700 million, will benefit the most from the new rules, particularly the flexible automatic shelf registration procedures and the greater permissible communications related to registered offerings. Questions that will certainly come up for many WKSIs that already have effective shelf registration statements on file with the Securities and Exchange Commission are whether these existing shelf registrations should be amended or replaced under the new offering framework and if so when that should be accomplished. The answers to these questions will depend on the facts surrounding a particular company's existing shelf as well as the company's plans for capital raising activities. Before analyzing how an issuer should approach the new rules, an

overview of how the new securities offering framework benefits WKSIs may be helpful.¹

Automatic Shelf Registrations and Takedowns—New Rules vs. Previous Rules. The prior SEC rules already afforded seasoned public companies the flexibility of so-called shelf registration, which allows issuers to register securities, including equity and debt securities, well in advance of an actual offering. The registration statement, once declared effective by the SEC, could remain on the shelf and be utilized for offerings (or “take-downs”) from the shelf. As no further SEC review was required for a takedown, an offering could proceed quickly, allowing issuers to take full advantage of favorable conditions in the capital markets.

The new rules make shelf registration even more streamlined for WKSIs. WKSIs can file “automatic shelf registration statements” for most securities offerings. Automatic shelf registration statements (and related post-effective amendments) are, as their name suggests, effective immediately upon filing with the SEC without any SEC staff review. Under prior rules, issuers faced the real possibility that the SEC staff would elect to review and comment on a shelf registration filing or post-effective amendment, including any of the issuer's re-

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¹ While this article focuses on application of the securities offering reforms to WKSIs, some of the new rules that are discussed also apply to “seasoned issuers” (i.e., Form S-3 eligible issuers) who have not achieved WKSI status.

ports filed under the Securities Exchange Act of 1934 incorporated by reference into the shelf registration statement. SEC review and comment, and the process for responding and re-filing or amending the registration statement or Exchange Act reports, could be quite lengthy—that's no longer the case for WKSIs using automatic shelf registration statements under the new rules.

Existing Rules. Under the old rules, issuers filing shelf registration statements were required to register a specific dollar amount of securities and pay filing fees based on the entire registered amount upon filing. In addition, under the prior rules issuers were required to limit the amount registered to the amount of securities that the issuer reasonably expected to offer and sell within two years from effectiveness of the shelf registration. In practice, many issuers didn't actually sell the entire amount within two years and these issuers may continue to utilize the shelf well beyond the two years so long as at the time of filing they met the "reasonable expectation" test. Issuers were also limited by the so-called "convenience shelf" doctrine, which generally did not permit offerings immediately following effectiveness of a shelf registration statement.

New Rules. Under the new rules, WKSIs can register unspecified amounts of different specified types of securities and add additional classes of securities at any time by post-effective amendments after an automatic shelf registration is filed. These post-effective amendments are automatically effective without SEC staff review. WKSIs also have the option of paying filing fees at the time of the initial filing or on a "pay-as-you-go" basis at the time of each takedown from the shelf—we suspect that most issuers will elect the latter. While the new rules no longer require an issuer to limit the amount registered to what the issuer reasonably expects to offer and sell within two years, issuers now must file a new shelf registration statement every three years—unsold securities and unused fees may be carried forward to any new registration statement. The new rules also eliminate the "convenience shelf" doctrine and allow "instant" market access by expressly permitting immediate takedowns by a Wksi after filing an automatically effective shelf registration statement.

The new rules permit WKSIs to exclude much more information from the base prospectus than under the old rules. For example, the plan of distribution and descriptions of types of securities may be omitted from the base prospectus and added through prospectus supplements or through incorporation by reference to Exchange Act reports.

The new rules also relax existing "gun jumping" and other communications restrictions and permit WKSIs to use other offering-related communications known as "free writing prospectuses" at any time, whether before or after the filing of a registration statement, or before or after effectiveness of the registration statement.

Finally, under the new rules "access equals delivery" of the final prospectus for a takedown offering, meaning that issuers generally no longer are required to deliver physical copies of a final prospectus if it has been filed with the SEC.

Existing Wksi Shelf Registrations Under New Rules. Many WKSIs already have an existing effective shelf registration statement in place and will be considering how the new rules described above affect these existing shelf registrations. In September 2005, the SEC staff is-

sued frequently asked questions on transitioning to the new rules. The FAQs clarify that under the new rules the three-year limitation period for shelf registration statements begins on Dec. 1, 2005 for any shelf registration statement that was effective before Dec. 1, 2005, regardless of how long it may have been effective prior to that date. Therefore, WKSIs can continue to use an existing shelf registration statement until Dec. 1, 2008.

Post-Effective Amendments. An existing shelf registration statement is not, however, an "automatic shelf registration," and cannot be converted to "automatic shelf" status post-Dec. 1, 2005. One practical effect of this is that post-effective amendments to an existing shelf registration will not be automatically effective upon filing as they would for an automatic shelf registration. When would issuers with an existing shelf be required to file a post-effective amendment? It depends on the facts, but for most issuers the answer is probably almost never. A post-effective amendment would be required to add new types of securities to the registration statement or to include new material information about the plan of distribution. Many issuers have so-called "universal" shelf registration statements on file, which register many different types of debt and equity securities and include a "kitchen sink" plan of distribution description covering almost every conceivable method of distribution. For these issuers, post-effective amendments should not be needed and so the benefits of automatic effectiveness for post-effective amendments are of little consequence for their existing shelf registration statements.

Undertakings. The new rules amend the undertakings that an issuer must include in shelf registration statements, including automatic shelf registration statements, and post-effective amendments filed on or after Dec. 1, 2005. In its September 2005 FAQs, the SEC staff clarified that issuers with existing shelf registration statements on file that were effective prior to Dec. 1, 2005 need not file a post-effective amendment on or after Dec. 1, 2005 for the sole purpose of including the new undertakings. The new undertakings include the following:

- clarification that an issuer may update a shelf registration statement by means of a filed prospectus supplement or an Exchange Act report (including Form 8-K and not just Form 10-Q or 10-K) that is incorporated by reference into the registration statement to update information in the prospectus that is more than 16 months old for Section 10(a)(3) purposes, to reflect a fundamental change or to include new material information about the plan of distribution;

- an undertaking that permits WKSIs to include by means of prospectus supplements or Exchange Act reports any other information that has been omitted from the base prospectus as permitted by the new rules; and

- an acknowledgement by the issuer that for purposes of liability under Section 11 of the Securities Act, information included in a prospectus supplement is deemed part of and included in a registration statement consistent with new Rules 430B and 430C and a new effective date for a registration statement will be established as to the issuer and any underwriters with respect to prospectus supplements for shelf takedowns consistent with new Rule 430B.

As a practical matter, we do not see a need to adopt the new undertakings for existing shelf registration statements, since even under the prior rules WKSIs

with shelf registrations on Form S-3 could avoid the need to file post-effective amendments to update shelf registration statements for Section 10(a)(3) purposes or to reflect a fundamental change by incorporation by reference of filed Forms 10-K and 10-Q. The only situations in which a WKSIs would be required to file a post-effective amendment to an existing shelf registration statement under the old rules would be to add a new type of security to be offered from the shelf registration or for a material change in the plan of distribution. For WKSIs that already have an effective universal shelf with a kitchen sink plan of distribution covering almost every method of distribution, post-effective amendments of the shelf registration statements will not likely be necessary.

The new undertakings permit updating through prospectus supplements and Exchange Act reports, including Form 8-K, to include additional information permitted to be omitted in a base prospectus under the new rules. However, if the traditional form of base prospectus included in an existing universal shelf registration statement continues to be used for primary offerings by the issuer, there should be very little in the way of omitted information required to be included by prospectus supplement in connection with a takedown offering from an existing shelf registration statement, other than the traditional types of information concerning the specific terms of the securities offered and the offering itself included in prospectus supplements today.

The new undertaking addressing Securities Act liability simply confirms the issuer's agreement that under new Rules 430B and 430C, information in a prospectus supplement is deemed part of a registration statement and establishes a new effective time for Section 11 liability purposes. These new rules became effective Dec. 1, 2005 and apply regardless of whether the new undertaking is specifically included in an existing shelf registration statement.

Automatic Shelf Registrations. Should a WKSIs with an existing shelf registration statement file a new "automatic shelf registration statement" as soon as possible after the Dec. 1, 2005 effective date for the new rules, or continue to rely on the existing shelf? The answer depends in part on the facts.

For WKSIs with an existing universal shelf registration statement with a substantial dollar amount remaining available to meet their foreseeable financing needs, if the base prospectus in the existing shelf registration covers the types of securities that could reasonably be expected to be issued over the next couple of years and includes a kitchen sink plan of distribution description, there may be no pressing need to file an automatic shelf

immediately after the Dec. 1, 2005 effective date. The new rules do not require WKSIs to use automatic shelf registration statements and there is no reason WKSIs could not continue to use their existing shelf registrations to do shelf takedowns. An existing shelf registration statement effective prior to Dec. 1, 2005 does not have to be renewed until Dec. 1, 2008. In addition, it may take some time for capital markets participants to work out how the expanded flexibility under the new rules will be implemented in practice in the marketplace. WKSIs who take a wait-and-see approach may benefit from the learning derived from the first wave of automatic shelf registration statement filers. In particular, there is still some question as to what form the base prospectuses of automatic shelf registration statements will take. There are two views on this subject: one, which would include in the base prospectus almost everything currently included in a base prospectus, with the exception of perhaps the plan of distribution and the descriptions of the more exotic types of securities included in the shelf registration; the other, which would take advantage of the flexibility provided under the new rules and would include only the minimum required information in the base prospectus and omit the remainder as permitted by the new rules. The key question, which may not be answered immediately, is "What will the capital markets and the underwriters want the base prospectus to look like?" Until there is more clarity and guidance on this question, we expect that a number of WKSIs may delay replacing their existing shelf registration statements with automatic shelf registration statements.

Notwithstanding the uncertainty, there may be circumstances under which it would be beneficial to replace an existing shelf registration statement with an automatic shelf registration statement promptly after the Dec. 1, 2005 effective date. For WKSIs with small amounts remaining registered on their existing shelf registration statements and who may need to add more capacity on their shelf registrations in the near future, or for WKSIs looking to add a type of security not included in the original shelf registration, filing a new automatic shelf registration statement may be more practical than filing a post-effective amendment to the existing shelf registration statement, which may be subject to SEC review. Unsold securities and unused fees from the existing shelf registration statement may be rolled over into the new automatic shelf registration statement. In addition, WKSIs that currently meet the \$700 million public equity float requirement, but are concerned that they may not be able to maintain WKSIs status due to market volatility, may want to consider filing a new automatic shelf registration statement to replace an existing shelf registration statement to secure the benefits of an automatic shelf registration statement for an interim period. Even if the issuer were to lose WKSIs status after filing an automatic shelf registration statement, it would be able to continue to use the automatic shelf registration statement for offerings at least until the filing of its next Form 10-K, at which time its WKSIs status would be reevaluated.

Next Steps for WKSIs. Regardless of whether a WKSIs decides to file a new automatic shelf registration statement promptly after the Dec. 1, 2005 effective date or continues to use its existing shelf registration statement for the time being, it is not too early for WKSIs to start

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taking certain steps in anticipation of filing a new automatic shelf registration statement:

- confirm the issuer's status as a WKSII (note that certain specified actions affecting an issuer or a subsidiary of the issuer within a three-year look back period could make an issuer that otherwise meets the WKSII standard, an ineligible issuer);

- prepare, and have ready for prompt adoption, board or committee resolutions authorizing the filing of the automatic shelf registration statement and related actions;

- consider what types of securities the WKSII realistically contemplates offering (no need to throw in the kitchen sink when filing an automatic shelf registration statement);

- consider if any additional eligible issuers (*i.e.*, subsidiaries) should be included in the automatic shelf registration;

- consider how much information will be included in the base prospectus versus the prospectus supplement, gather market intelligence on what the capital markets expect in base prospectuses and prepare drafts of a base prospectus and related prospectus supplement; and

- consider updating the form of shelf underwriting agreement, including the representations and warranties, covenants, and indemnity and contribution arrangements with respect to (1) the new rules regarding the timing of liability for information delivered on or prior to the time of an investor's commitment to purchase securities, (2) the issuer's WKSII status and use of the automatic shelf registration statement, (3) the potential use or non-use of free writing prospectuses and the filing of such free writing prospectuses, if any, with the SEC, (4) bring-downs of representations and war-

rants to the closing date, and (5) any unresolved SEC comments, and monitor market developments regarding these types of provisions.

Conclusion. The SEC's securities offering reforms effective Dec. 1, 2005 provide WKSIs with an extraordinary amount of flexibility with respect to shelf registration procedures and communications related to registered offerings. Exactly how much of this flexibility WKSIs will use in practice will depend in part on the capital markets and their acceptance of the broader methods of information delivery permitted by the new rules. While the automatic shelf registration statement provides WKSIs with certain advantages over existing shelf registrations, for many WKSIs with currently effective universal shelf registration statements, we do not see a compelling need to replace an existing shelf registration statement with a new automatic shelf registration statement for the time being, until a clearer picture develops as to the direction the marketplace is headed in implementing the additional flexibility afforded by the new rules. For those WKSIs who would otherwise need to file a new registration statement or a post-effective amendment to an existing shelf registration statement, either to add more securities or a new type of security, or for those WKSIs that have concerns about maintaining their WKSII status for an extended period (for example, due to market volatility affecting their public float), there may be benefits to filing an automatic shelf registration statement to replace an existing shelf registration statement promptly now that the new rules have gone into effect. In any event, we believe that it is not too early for WKSIs to consider taking certain steps with respect to automatic shelf registration statements under the new SEC rules.