

The Metropolitan Corporate Counsel

www.metrocorpcounsel.com

Volume 16, No. 9

© 2008 The Metropolitan Corporate Counsel, Inc.

September 2008

Certain Shelf Registration Statements Will Expire Beginning December 1, 2008

Edward Smith

CHADBOURNE & PARKE LLP

Many shelf registration statements will expire on December 1, 2008. Prior to the Securities Act rule changes adopted in 2005, shelf registration statements generally did not have an expiration date. Former Securities Act Rule 415(a)(2), however, limited the amount of securities that could be registered on certain shelf registration statements to an amount which, at the time the registration statement became effective, was reasonably expected to be offered and sold within two years from the initial effective date of a registration statement. This two-year limitation was designed to ensure that the issuer had a *bona fide* intention to offer and sell securities in the proximate future. Former Rule 415(a)(2) was significantly changed by the 2005 Securities Act reforms as the Securities and Exchange Commission did not believe that the two-year rule provided significant investor protection and, subject to limited exceptions noted below, the two-year requirement was eliminated.

The Securities Act rule changes adopted by the SEC in 2005 included a requirement that certain shelf registration statements filed under the Securities Act of 1933 be re-filed every three years to keep the shelf registration statement current. (See SEC Release 33-8591; 34-52056; IC-26993; File No. S7-38-04. A copy of the release is available on the SEC's website at www.sec.gov/rules/final/33-8591.pdf.)

The three-year re-filing requirement will begin to be phased in on December 1, 2008. For any shelf registration statement

Edward Smith is a Partner in the corporate practice at Chadbourne & Parke LLP.

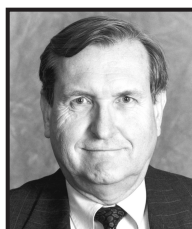
subject to the re-filing requirement that became effective before December 1, 2005 (regardless of how long it had been in effect prior to that date), the three-year period began on December 1, 2005 and ends on December 1, 2008. For any shelf registration statement subject to the re-filing requirement that became effective on or after December 1, 2005, the three-year period began on the effective date of the registration statement. A post-effective amendment does not extend the three-year period. Rule 415(a)(2) still limits the amount of securities that may be registered to those that are reasonably expected to be offered within two years for (i) securities to be issued in business combinations and (ii) offerings which will commence promptly, are to be made on a continuous basis and may continue for a period longer than 30 days after effectiveness of the registration statement and that are *not* registered on Form S-3 or Form F-3.

Issuers should review their currently effective shelf registration statements to determine whether they are subject to the three-year re-filing requirement being phased in beginning December 1, 2008 and should begin to consider whether to prepare replacement registration statements for those requiring re-filing in advance of the expiration of the three-year period.

Registration Statements Subject To The Three-Year Re-Filing Requirement

Under Securities Act Rule 415(a)(5), the following types of securities are subject to the three-year re-filing requirement:

- Securities registered by a "well-known seasoned issuer" (WKSI) on an



Edward
Smith

automatic shelf registration statement Form S-3ASR, which is effective automatically upon filing without SEC review;

- Securities registered (or qualified to be registered) on Form S-3 or Form F-3 which are to be 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 a person of which the registrant is a majority-owned subsidiary. These include securities offered by universal, debt and equity registration statements that issuers use for quick access to the capital markets through shelf take-downs (Rule 14(a)(1)(x));

- Securities that will be offered promptly after effectiveness of the registration statement on a continuous basis and may continue to be offered more than 30 days after the date of initial effectiveness, such as dividend reinvestment/direct stock purchase plans that are not offered exclusively to existing security holders of the issuer as well as best efforts and similar continuous offerings (Rule 14(a)(1)(ix)); and

- Mortgage-related securities, including mortgage-backed debt and mortgage participation or pass-through certificates (Rule 14(a)(vii)).

The re-filing requirement does not apply to the following registration statements unless they are automatic shelf registration statements:

- Resale registration statements covering offerings by selling security holders other than the issuer, a subsidiary of the issuer or a person of which the issuer is a subsidiary (Rule 415(a)(1)(i));

- Registration statements on Form S-8 for securities offered and sold pursuant to an employee benefit plan or registering securities sold pursuant to a dividend or interest reinvestment plan solely to existing

Please email the interviewee at esmith@chadbourne.com with questions about this interview.

security holders of the issuer (Rule 14(a)(1)(ii));

- Registration statements registering securities to be offered and sold upon the exercise of outstanding options, warrants or rights (Rule 14(a)(1)(iii));

- Registration statements covering securities to be issued upon conversion of other outstanding securities (Rule 14(a)(1)(iv));

- Registration statements covering securities which are pledged as collateral (Rule 14(a)(1)(v));

- Registration statements covering securities (ADRs) registered on Form F-6 (Rule 415(a)(1)(vi));

- Registration statements covering securities which are to be issued in connection with business combination transactions (Rule 415(a)(1)(viii)); and

- Registration statements covering shares of common stock which are to be offered and sold on a delayed or continuous basis by or on behalf of a registered closed-end management investment company or business development company that makes periodic repurchase offers pursuant to Investment Company Act Rule 23c-3 (Rule 415(a)(1)(xi)).

Grace Period For Issuers Not Filing Automatic Shelf Registration Statements

For issuers not eligible to use or not electing to use an automatic shelf registration statement, the issuer may continue to offer and sell securities using the prior registration statement after the three-year expiration of the prior registration statement in the following two circumstances:

- During a grace period that extends until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the effective date of the prior registration statement; and

- In the case of a continuous offering of securities that began within three years of the effective date of the prior registration statement, the issuer may continue to offer and sell the securities covered by the prior registration statement if such offering is covered by the new registration statement.

These extensions permitting the use of shelf registration statements after their third anniversary provide valuable transition relief so that an issuer that is unable to get a new registration statement declared effective before the prior registration statement expires may continue to access the capital markets.

In order to take advantage of either of these extensions, however, the issuer must have filed a new registration statement cov-

ering the offering before the expiration of the prior registration statement.

The permitted extensions will, of course, be unnecessary for WKSIs filing automatic shelf registration statements as they will become effective immediately upon filing.

Carrying Over Unsold Securities And Unused Fees From Prior Registration Statements

Any issuer filing a new shelf registration statement may carry over unsold securities and unused fees from a prior shelf registration statement, subject to the five-year time limit of Securities Act Rule 457(p) described below. A WKSI filing a new automatic shelf registration statement should file the registration statement prior to the expiration of the prior registration statement in order to carry over the unsold securities and unused fees from the prior registration statement. A non-WKSI (or WKSI electing to use a non-automatic shelf registration statement) that has filed a new registration statement which has not yet become effective and that continues to offer and sell securities during the grace period using the prior registration statement will be required to amend the new registration statement prior to effectiveness in order to reflect the number of unsold securities and unused fees being carried over. The offering of securities on the prior registration statement will be deemed terminated as of the date of effectiveness of the new registration statement.

In order to effectively carry over unsold securities and unused fees, the issuer should identify on the bottom of the facing page of the new registration statement or latest amendment thereto the amount of the unsold securities being included and any filing fee paid in connection with the unsold securities, which will continue to be applied to the unsold securities.

Under Securities Act Rule 457(p), in order to carry over any unused filing fees from the prior registration statement, the new registration statement must be filed within five years of the initial filing date of the prior registration statement. Accordingly, if an existing shelf registration statement that became effective prior to December 1, 2005 is approaching the fifth anniversary of its filing, the issuer may want to consider filing the new registration statement prior to the five-year deadline (even if before the December 1, 2008 re-filing deadline) in order to be able to carry over the unsold securities and unused fees to the new registration statement. Note that the use of Rule 457 to carry over unused

fees is deemed to result in the withdrawal of the existing registration statement immediately upon filing.

What Issuers Should Do Now

Issuers should plan a timetable to replace expiring shelf registration statements. It will be necessary to arrange for obtaining required consents from the issuer's independent accountants, obtain any necessary board or committee approvals and other matters. Issuers not filing automatic shelf registration statements should anticipate potential delays in SEC staff review of their filings due to the large number of new registration statements that may be filed before December 1, 2008. However, for WKSIs not desiring to carry over substantial unsold securities or unused fees, the three-year shelf registration renewal process may not be as urgent, as they should be able to file an automatic shelf registration statement as and when required, assuming they maintain WKSI status.

Issuers should also consider the recent amendments to SEC Rule 144 in determining the necessity of re-filing shelf registration statements that are expiring and that cover sales by security holders. For example, as noted above, it is necessary to re-file a registration statement that is an automatic shelf registration statement covering offerings by selling security holders other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary. Recent amendments to Rule 144, however, provide that security holders who are not affiliates of the issuer, and who have held their shares for more than one year, may generally sell the securities publicly without restrictions. Thus, the issuer should consider whether there is a need to refile an automatic shelf resale registration statement as many of its security holders who received their shares in an unregistered offering may now be able to sell their shares without registration under amended Rule 144. Of course, the issuer would need to review any applicable registration rights agreement to determine whether the maintenance of a current resale registration statement is contractually required notwithstanding the liberalized Rule 144.

Rule 415 does not apply to any registration statement covering securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investment trust under the Investment Company Act of 1940 or any registration statement filed by any foreign government or political subdivision thereof.