

Upcoming Expiration of Shelf Registration Statements

New York
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Many issuers – particularly well-known seasoned-issuers, or WKSIs – filed new shelf registration statements on Form S-3 or F-3 on or shortly after the December 1, 2005 effective date of Securities Offering Reform (“SOR”). Under Securities Act Rule 415(a)(5), a shelf registration statement on Form S-3 or F-3, including an automatic shelf registration statement (“ASR”), remains effective for three years from its initial effective date. Under SEC staff guidance, shelf registration statements declared effective prior to December 1, 2005 commenced their three-year effectiveness period on that date. **Thus, all pre-December 1, 2005 shelf registration statements will expire on December 1, 2008, and many WKSI automatic shelf registration statements will expire on that date or soon thereafter.** This memorandum offers advice regarding what steps issuers should take.

DETERMINE WHETHER THE ISSUER IS A WKSI

WKSI status is determined as of any date within 60 days of the “determination date,” which under the circumstances discussed in this memorandum will be the filing date of the new ASR.

To qualify as a WKSI, an issuer must meet the registrant requirements of Form S-3 or F-3, including having timely filed its Exchange Act reports for the preceding 12 calendar months. In addition, an issuer must meet either of two tests designed to identify the most widely followed issuers:

- An issuer must have a worldwide market value of its voting and non-voting common equity held by non-affiliates of at least \$700 million. (In determining public equity float, a foreign private issuer can count certain participating preferred shares, as described in the SOR adopting release dated July 19, 2005.) An issuer meeting this test can file an ASR covering debt and equity securities.

- An issuer must have issued in the last three years at least \$1 billion aggregate principal amount of registered non-convertible securities, other than common equity, in primary offerings for cash. An issuer that relies on the registered offerings test can only register non-convertible securities, other than common equity, unless it also meets a \$75 million public float requirement. This test was designed primarily to capture large issuers of debt (such as finance subsidiaries) that have no public equity float.

As discussed above, one of these two tests must be met within 60 days of the filing date of an ASR. Because of the recent decline in equity markets, an issuer must be sure to recalculate whether it meets one of these tests today, even if it did three years ago or when it filed its last annual report on Form 10-K or 20-F.

The definition of a WKSI also excludes an “ineligible issuer,” a term that captures, among other things, companies emerging from bankruptcy proceedings and companies that have settled certain kinds of proceedings under the securities laws.

DETERMINE WHEN THE ISSUER’S SHELF REGISTRATION STATEMENTS ARE EXPIRING AND WHAT TYPE OF NEW SHELF REGISTRATION STATEMENT WILL BE FILED

For a Form S-3 or F-3 effective on or before December 1, 2005, a new shelf registration statement must be filed on or prior to December 1, 2008. For a Form S-3 or F-3 effective after December 1, 2005, a new shelf registration statement must be filed prior to the three-year anniversary of the shelf registration statement’s initial effective date.

For WKSI

If the new shelf registration statement is an ASR, it will become effective immediately upon filing, and the issuer may immediately begin offering and selling new securities.

For non-WKSI

If an issuer is a seasoned issuer (an issuer eligible to use Form S-3 or F-3 to register a primary offering of securities) but not a WKSI, and the new shelf registration statement is therefore not an ASR, the SEC rules provide for the following grace periods so long as the new shelf registration statement is filed before the end of the three-year effectiveness period:

- Securities covered by the expired shelf registration statement may continue to be offered and sold during a grace period that ends on the earlier of 180 days after the three-year anniversary and the date on which the new shelf registration statement is declared effective; and
- Continuous offerings (like MTN and at-the-market equity offering programs) may continue until the new shelf registration statement is declared effective *provided that* (a) the program commenced within three years after the initial effectiveness of the expired shelf registration statement and (b) the offering of such securities is permitted under the new shelf registration statement.

Unsold securities registered on an expiring shelf registration statement may be included in a new shelf registration statement pursuant to Rule 415(a)(6) by identifying on the inside front cover of the new shelf registration statement such unsold securities, the expiring shelf registration statement and applicable filing fees previously paid. Those fees are also transferred to the new shelf registration statement under Rule 415(a)(6).

CONFIRM THE ISSUER'S FINANCIAL STATEMENTS MEET ALL SHELF REGISTRATION STATEMENT REQUIREMENTS

An issuer may be unable to file a new shelf registration statement if its financial statements do not comply with the requirements of Regulation S-X at the time of filing, in the case of an ASR, or at the time of filing and at effectiveness, in the case of a non-ASR shelf registration statement. Reasons could include:

- a foreign private issuer has not filed an up-to-date U.S. GAAP reconciliation of its local GAAP financial statements;
- an issuer is required to include pro forma financial statements pursuant to Article 11 of Regulation S-X in connection with a significant business combination, acquisition or disposition but has not yet prepared or included them;
- an issuer is required to include separate financial statements of one or more acquired businesses (or where an acquisition is “probable”) in accordance with Rule 3-05 of Regulation S-X but has not yet prepared or included them; or
- an issuer’s historical financial statements do not comply with the requirements of Regulation S-X because it has filed a quarterly report on Form 10-Q with financial statements containing reconfigured segments or

showing discontinued operations without having filed restated historical financial statements for prior periods.

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Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under “Capital Markets” in the “Practices” section of our website (<http://www.clearygottlieb.com>) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

MOSCOW

Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE

Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax