

Access to Public Capital Markets for Seasoned Issuers Upon Loss of WKSI Status

New York
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During the next several months, issuers that are currently well-known seasoned issuers (“WKSI”) with effective automatic shelf registration statements (“ASRs”) will be required to evaluate their WKSI status in connection with the new determination date resulting from the filing of their respective annual reports on Form 10-K or 20-F. In light of recent stock market declines, many current WKSI may no longer meet the definition of well-known seasoned issuer and therefore will no longer be eligible to use an ASR following the new determination date. Most will remain seasoned issuers eligible to use Form S-3 or F-3 to register a primary offering of securities for cash. However, there currently is no “grace period” that would allow continued offers and sales of securities under an ASR after the new determination date and prior to the effectiveness of a non-ASR Form S-3 or F-3. Absent relief from the SEC Staff, these issuers would appear to be unable to access the public capital markets until their Form S-3 or F-3 is declared effective.

On January 8, the Staff provided oral guidance to the Firm describing under what circumstances issuers that cease to be WKSI but remain seasoned issuers can continue to have uninterrupted access to the public capital markets. Under the guidance, which is expected to be published by the Staff, such an issuer will be granted a “grace period” during which it may continue to offer and sell securities under its ASR until its non-ASR registration statement is effective, if it takes the following steps:

FILE A POST-EFFECTIVE AMENDMENT BEFORE NEW DETERMINATION DATE

Prior to the new determination date (the filing of its annual report on Form 10-K or 20-F), the issuer must file a post-effective amendment to its ASR, which will become automatically effective.¹

This post-effective amendment must conform the ASR to the requirements of a non-ASR Form S-3 or F-3 filed by a seasoned issuer. For example,

¹ The Staff’s guidance requires the filing of a post-effective amendment because the guidance is based on Rule 401(b) relating to the form requirements of amendments to registration statements.

- the post-effective amendment must register a specified amount of securities and allocate the registered securities between primary and secondary offerings and among the various registrants;
- registration fees must be paid on the amount of securities registered (no “pay-as-you-go” option); and
- the post-effective amendment must include a base prospectus conforming to the requirements of Rule 430B that apply to a seasoned issuer (as opposed to a WKSI). For example, the base prospectus must specify whether the contemplated offerings are primary or secondary, must describe the securities to be offered, must name any selling security holders, and must include a plan of distribution section.

FILE A NON-ASR REGISTRATION STATEMENT PROMPTLY AFTER NEW DETERMINATION DATE

Promptly after the new determination date, an issuer that no longer qualifies as a WKSI must file either (a) a new, non-ASR registration statement on Form S-3 or F-3 or (b) another post-effective amendment to its original ASR that is a non-ASR Form S-3 or F-3. In either case, the new registration statement will be subject to SEC review prior to being declared effective. The substance of the registration statement, whether filed as a stand-alone Form S-3 or F-3 or as a post-effective amendment to the original ASR, will likely mirror the first ASR post-effective amendment described above. The registration statement also should refer to any unsold securities registered on the first ASR post-effective amendment described above, and the registration fee paid in connection with registering these unsold securities, in order for those securities and related fees to be carried over onto the new registration statement.

An issuer complying with the steps outlined above will be permitted to continue to offer and sell securities under its ASR, as amended (up to the aggregate amount of securities registered), even though that issuer has ceased to be a WKSI, until the effective date of its non-ASR registration statement.

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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.

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