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TOP 10 PRACTICE TIPS: SHELF REGISTRATION STATEMENTS AND TAKEDOWNS

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A shelf registration statement allows an issuer to conduct one or more public offerings on a delayed or continuous basis. Once an issuer has an effective shelf registration statement on file with the U.S. Securities and Exchange Commission (SEC), it can offer securities included in the registration statement by filing a prospectus supplement with the SEC containing the specific terms of the offering. This is referred to as taking the securities down “off the shelf” or a “takedown.”

Below are ten practice points that can help you navigate setting up a shelf registration statement and conducting a shelf takedown. This article provides tips related to shelf registration statements, subsequent takedowns, and utilizing Form S-3. Other registration statement forms may be used for shelf registration statements and related offerings but these forms are not addressed in this article.

1. DISCUSS ISSUER'S OBJECTIVES

Each issuer has its own business objectives for putting up a shelf registration statement. While some issuers maintain a shelf on file for convenience and flexibility with no present intent to use it, other issuers file shelf registration statements only when they have specific plans for future takedowns. The issuer's objectives will dictate many aspects of the shelf, including (i) whether to file a universal shelf (i.e., an unallocated registration statement that registers various classes of securities without specifying the dollar amount of each security registered) or a shelf that registers a single security or a fixed dollar amount or number of specific securities, (ii) the types of securities to register if filing a universal shelf, and (iii) the timing for the filing of the shelf. The content and timing of the filing may also have consequences, such as, in certain situations, signaling to the market that an offering is imminent.

2. CONFIRM ISSUER ELIGIBILITY

You should verify that the issuer is eligible to use Form S-3. The qualifications that are more easily tripped up include whether the issuer (i) has failed to file or been untimely in its filing of any Current Report on Form 8-K, even if inadvertent (note, however, that Form 8-Ks filed solely pursuant to certain item numbers will not impact Form S-3 eligibility, even if untimely filed), (ii) has timely posted on its website all eXtensible Business Reporting Language (XBRL) files

required pursuant to Rule 405 (17 C.F.R. § 232.405) of Regulation S-T, and (iii) is in default of any of its indebtedness. You should also confirm whether the issuer meets the definition of a well-known seasoned issuer (WKSI), allowing the shelf to become automatically effective upon filing with the SEC, or whether the shelf will be subject to the SEC review and comment process for non-WKSIs. While preparing the shelf, you should continuously monitor the issuer's Form S-3 eligibility and WKSI status.

3. PERFORM DUE DILIGENCE

Similar to other securities offerings, you must perform due diligence. You should carefully review all of the issuer's material agreements (e.g., credit agreements, shareholders' agreements, and registration rights agreements) to, among other things, make sure that future takedowns of any securities being registered—whether presently intended or not—are permitted under such agreements and whether or not the filing of the shelf will trigger consequences, such as registration rights or notice requirements.

4. CONFIRM WHETHER THERE WILL BE GUARANTEES AND GUARANTORS

If the issuer intends to issue securities separate from the related debt securities and will need to be registered on the shelf registration statement. The guarantors will also need to be listed as co-registrants on the shelf and sign the registration statement. You should keep

in mind that the addition of co-registrants may impact timing for filing the shelf since each co-registrant will need to apply for and obtain SEC Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) access codes (which can take up to 48 hours). Also consider financial statement/Regulation S-X (17 C.F.R. §§ 210.1-01 – 12-29) implications if registering guarantees.

5. DO NOT FORGET TO CONSIDER FINRA ISSUES

Many shelves are exempt from the Financial Industry Regulatory Authority, Inc. (FINRA) filing requirements regarding potential underwriting arrangements due to various exemptions in the FINRA rules. However, (i) certain shelves may not qualify for the FINRA filing exemptions, and (ii) even in the case of a shelf that is exempt from the filing requirement, subsequent takedowns must still comply with the substantive provisions in applicable FINRA rules (including fairness of underwriting compensation, disclosure of underwriting compensation, and regulation of underwriter conflicts of interest).

6. CHECK FOR UNUTILIZED FILING FEES

If the issuer previously filed a shelf and paid filing fees in connection with such filing, you should check to see if the issuer sold fewer securities than it initially registered. If so, under Rule 457(p) (17 C.F.R. § 230.457), the issuer can use any unused filing fees to offset fees that may be due in connection with the new shelf filing or future takedowns. In order to carry forward fees, the new shelf must be filed within five years of the prior registration statement. If the issuer uses Rule 457(p) to carry forward unused filing fees, any securities remaining on the prior registration statement are immediately deemed deregistered upon filing of the new shelf. Additionally, in lieu of offsetting filing fees, Rule 415(a)(6) (17 C.F.R. § 230.415) allows an issuer to carry forward unsold securities from a prior shelf (and the associated fees).

7. GET THIRD PARTIES INVOLVED EARLY

Getting the law right is not enough—it is important for you to manage the process and set appropriate deadlines to meet the issuer's timing and other objectives. Involve other parties, such as auditors and any local counsel, early in the process. Such parties may require time to onboard or prepare documents, such as Exhibit 5 validity opinions and consents, that need to be filed in connection with the shelf. If debt securities are being registered, be sure to also consider whether you need to coordinate with the trustee to qualify any indenture being filed with the shelf under the Trust Indenture Act of 1939, as amended (the TIA). Subject to limited exceptions, an indenture covering debt securities that is filed with the shelf must be qualified under the TIA when the shelf becomes effective; qualification cannot be accomplished via a post-effective amendment

8. REMEMBER TO BRING-DOWN DUE DILIGENCE

In terms of diligence, a takedown should be treated like any other securities offering. Takedowns are meant to streamline the document process, but the legal standards for diligence are the same. Do not assume that what was true at the time of the shelf filing is true at the time of the offering. You should confirm (i) whether the issuer is still a WKSI (or has since become a WKSI), (ii) that the takedown is permitted under the issuer's material agreements, including those that were previously reviewed as part of the preparation for the shelf, and (iii) whether the issuer has capacity left for the intended takedown if it previously registered a set dollar amount or number of securities on the shelf.

9. CONSIDER A NEED TO UPDATE DISCLOSURE

Just because the shelf incorporates prior filings under the Securities Exchange Act of 1934, as amended (the Exchange Act), do not assume that the disclosure is up-to-date. New disclosure may be required for material developments since the filing of the issuer's latest Exchange Act reports or to update disclosure due to discoveries made during the diligence process. This includes whether any recent significant acquisitions trigger the need to file new financial statements or pro forma financial information pursuant to Regulation S-X. Additionally, if you are doing an offering between the filing of an Annual Report on Form 10-K and proxy statement, consider the need to incorporate by reference the prior year's proxy statement and any subsequent Current Reports on Form 8-K filed pursuant to Item 5.02 that may update or change the information in the most recent proxy statement on file with the SEC.

Further, base shelf documents are drafted to be generic. As such, specific takedown transactions may require modifications or additions to give effect to the business deal, such as the addition of selling security holders (if not previously contemplated by the shelf) or modifications to the covenants of any debt instruments being issued.

10. DO NOT FORGET ABOUT FILING FEES

If the issuer is a WKSI and elected to pay filing fees on a pay-as-you-go basis (i.e., in connection with each takedown as opposed to with the initial shelf), the final prospectus supplement will need to include a fee table and the issuer will need to pay the applicable SEC filing fees. The SEC issues a fee advisory annually by August 31st of each year, with the new filing fee rate to become effective as of October 1st. The SEC generally posts the new fee on its website at <http://sec.gov/info/edgar/feeamt.htm>.