

Corporate Advisory & Corporate Governance | November 18, 2008

Expiration of Shelf Registration Statements begins December 1, 2008

Sunset Provisions for Shelf Registration Statements

As part of the 2005 Securities Offering Reform, the Securities and Exchange Commission (the “SEC”) amended Rule 415 (“**Rule 415**”) to provide that most shelf registration statements on Form S-3 filed under the Securities Act of 1933, as amended, expire after three years.

Under Rule 415(a)(5), shelf registration statements filed before December 1, 2005 (the effective date of Securities Offering Reform) will expire on December 1, 2008, while shelf registration statements filed on or after December 1, 2005 will expire on the third anniversary of their effective date. Registrants with expiring shelf registration statements who wish to continue to offer the securities covered by such registration statement will have to file a new shelf registration statement.

Is Your Shelf Registration Statement Affected?

The three-year expiration provisions of Rule 415(a)(5) apply only to the following shelf registration statements:

- automatically effective shelf registration statements;
- registration statements registering securities to be offered promptly on a continuous basis and may continue to be offered for a period in excess of 30 days from the date of initial effectiveness;
- registration statements on Form S-3 or F-3 for securities 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; and

- registration statements registering mortgage-related securities.

Filing of a New Shelf Registration Statement and Grace Period

Issuers wishing to continue to offer the securities covered by their existing registration statements should review such registration statements to determine if they are expiring and if new shelf registration statements should be filed prior to such expiration.

Registrants with a shelf registration statement that became effective prior to December 1, 2005 will have to file a new shelf registration statement prior to December 1, 2008. Registrants with a shelf registration statement that became effective after December 1, 2005 will have to file a new shelf registration statement before the third anniversary of the effectiveness of their current shelf registration statement.

The new registration statements (other than automatic shelf registration statements (“**ASRs**”)) will become effective when declared effective by the SEC. In order to ensure that the transition between registration statements does not result in a gap, the SEC provided for a grace period for registrants that have filed a new shelf registration statement as mandated by Rule 415(a)(6). Pursuant to Rule 415(a)(5):

- the registrant may continue to use the expiring shelf registration statement until the earlier of the effective

date of the new registration statement or 180 days after the third anniversary of the initial effective date of the prior registration statement; and

- continuous offerings of securities covered by the expiring registration statement that commenced within three years of the initial effective date of the new registration statement may continue until the effective date of the new registration statement if such offering is permitted under the new registration statement.

For shelf registration statements that became effective prior to December 1, 2005 the 180-day period begins on December 1, 2008.

The six month extension does not apply to ASRs which will become automatically effective once filed. Note that eligibility for “well-known seasoned issuer” (“**WKSI**”) status depends on a registrant having a worldwide market value of \$700 million or more, excluding equity held by affiliates, or having issued at least \$1 billion in publicly registered non-convertible debt securities in the last three years. The market value and debt issuances may be measured as of any date within 60 days prior to the filing of the new registration statement. In light of the recent market turmoil, issuers with an expiring shelf registration

statement whose WKSI status is in jeopardy should consider filing a new ASR sooner rather than later in order to ensure that they will have met either the market value or debt issuance requirement during the applicable 60-day period. Issuers that no longer qualify as a WKSI, but who otherwise meet the Form S-3 requirements may take advantage of the six month grace period until their Form S-3’s are declared effective.

Carry Over of Unsold Securities and Registration Fee

Rule 415(a)(6) provides that Registrants may include any unsold securities covered by the expiring shelf registration statement on the new registration statement. The filing fee paid in connection with such unsold securities can also be carried over and will continue to be applied to such unsold securities.

For shelf registration statements that became effective prior to December 1, 2005, the SEC staff orally confirmed to us that the filing fee can be carried forward as provided for in Rule 415(a)(6) even though the initial effective date of such expiring shelf registration statement is older than three years from the filing of the new shelf registration statement.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

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