BNA, INC.

SECURITIES REGULATION & LAW

BNA Employee-Owned Since 1947

REPORT

REGISTRATION OF SECURITIES

Practice Tip: Use Stickers to Reflect Material Changes in a Form S-1 Resale Registration Statement

BY STEPHEN M. GOODMAN

Many companies that go public (whether through reverse mergers, other alternative financings or through a smaller public offering) do not qualify for listing on a national securities exchange or being quoted on one of the NASDAQ markets. Instead, their shares are traded on an inter-dealer quotation network, such as the OTC Bulletin Board[1] or one of the markets operated by OTC Markets, Inc., such as OTC Pink (formerly, the Pink Sheets).[2]

Frequently, such an unlisted company agrees to file a registration statement after it goes public to cover resales of shares of stock that certain stockholders acquired earlier in private transactions,[3] the sale of which would otherwise be restricted under Rule 144.[4] Alternatively, the issuer may wish to offer registration rights to new potential investors (as part of another PIPE offering, for example). Because the selling stockholders generally intend to sell their securities over an extended period of time, the offering is considered a ''delayed or

[1] www.otcbb.com, operated by the Financial Industry Regulatory Authority, Inc. (FINRA).

[2] http://www.otcmarkets.com/pink-sheets/home.

[3] For example, in connection with a PIPE (''private investment in public equity''). See ''Frequently Asked Questions About PIPES'' at http://www.sec.gov/info/smallbus/gbfor25_2006/pinedo_tanenbaum_pipefaq.pdf.

[4] 17 C.F.R. § 230.144. The definition of ''restricted securities'' under Rule 144 includes, among others, securities which have been acquired in private transactions (whether or not under Regulation D) and securities sold overseas in Regulation S transactions.

 ISSN 0037-0665

continuous offering'' within the meaning of Rule 415.[5] This means that, for the duration of the offering, the issuer must update the information in the registration statement whenever necessary in order to ensure that the prospectus contains no material misstatements or omissions.[6]

Certain types of information (audited financial statements that are more than 16 months old, material changes in the plan of distribution and anything reflecting a ''fundamental change'' in the information contained in the prospectus) can only be updated by filing a post-effective amendment to the registration statement.[7] In the Integrated Disclosure Release, the SEC indicates that ''fundamental changes'' requiring post-effective amendments include ''major and substantial changes . . . to information contained in the registration statement,'' ''major changes in the issuer's operations, such as significant acquisitions or dispositions,'' and ''any change in the business or operations of the registrant that would necessitate a restatement of the financial statements.''[8]

Issuers utilizing a Form S-1 resale registration statement should keep in mind that certain events could require the filing of a 424(b) prospectus even though they may not specifically require the filing of a Form 8-K.

An issuer making an offering subject to Rule 415 must give the undertakings in Item 512(a)(1) regardless of whether the issuer is listed or not.[9] Therefore, as far as fundamental changes are concerned, both a listed issuer and an unlisted issuer would be required to file a post-effective amendment to reflect a ''fundamental change.'' However, as also noted in the Integrated Disclosure Release, ''many variations in matters such as operating results, properties, business, product development, backlog, management and litigation ordinarily would not be fundamental.'' In other words, there are a number of changes to the issuer's business, operations or prospects that would not trigger the requirement to file a post-effective amendment, but that arguably would be material to investors. And for these types of changes, unlisted companies are subject to different disclosure rules.

Specifically, listed issuers are generally eligible to register shares for resale on Form S-3.[10] Thanks to the adoption of the SEC's integrated disclosure system,[11], an issuer that registers shares for resale on a Form S-3 is able to incorporate by reference into the Form S-3 all of its reports on Forms 10-K, 10-Q and 8-K under the Securities Exchange Act of 1934, as amended,[12] that are filed after the effective date of the registration statement. Thus, most if not all material information regarding the issuer in the Form S-3 registration statement is automatically updated through the forward incorporation of these reports.[13]

[5] 17 C.F.R. § 230.415. Rule 415 was adopted by the SEC in 1982 as part of the integrated disclosure system, which standardized the disclosures to be made both in registrations under the Securities Act of 1933 (the ''Securities Act'') and in periodic reports to be filed under Section 15(c) of the Securities Act and Sections 13(a) and 15(d) of the Securities Exchange Act of 1934 (the ''Exchange Act''). See *Adoption of Integrated Disclosure System*, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380] (''Integrated Disclosure Release''); *Delayed or Continuous Offering and Sale of Securities*, Release No. 33-6423 (Sept. 2, 1982) [47 FR 39799]; and *Shelf Registration*, Release No. 33-6499 (Nov. 17, 1983) [48 FR 52889].

[6] It is unlawful for an issuer to sell securities using a prospectus which contains ''any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.'' Section 17(a)(2) of the Securities Act, 15 U.S.C § 77q(a)(2).

[7] When a delayed or continuous offering is registered, the issuer is required to include the undertaking set forth in Item 512(a) of Regulation S-K (17 C.F.R § 229.512(a)), which requires the issuer to file a post-effective amendment in order (1) to include updated financial statements as required by Section 10(a)(3) of the Securities Act; (2) to reflect a fundamental change in the information set forth in the registration statement; and (3) to include any new or changed material information with respect to the plan of distribution. Because a post-effective amendment will generally not become effective automatically upon filing, issuers need to beware of the timing of such filing to minimize the impact on the ability of selling stockholders to sell during the period between the filing and the effectiveness of the post-effective amendment.

[8] At least one court has stated that the standard for determining whether a change is ''fundamental'' is ''more demanding'' than merely determining that it is ''material''. *In Re Metropolitan Securities Litigation*, 2010 U.S. Dist. LEXIS 10613; Fed. Sec. L. Rep. (CCH) P95,596 (E.D.Wash, 2010). Note, however, the language of footnote 79 of the Integrated Disclosure Release, which states that ''numerous small changes to information in the registration statement can become cumulatively fundamental,'' citing *In re Franchard Corporation*, 42 S.E.C. 163, 184-85 (1964).

[9] See footnote 7 above.

[10] Form S-3 was also adopted by the SEC in 1982 as part of the integrated disclosure system. See footnote 5 above.

[11] See footnote 5 above.

[12] 15 U.S.C. § 78a et seq.

[13] An issuer's ''acquisition or disposition of a significant amount of assets, otherwise than in the ordinary course of business'' must now be reported on a Form 8-K. The term ''significant'' is defined in Item 2.01 of the Form 8-K for transactions involving assets and in Rules 11-01(b) and 1-02(w) of Regulation S-X for transactions involving a business. Based on the language quoted at footnote 8 above from the Integrated Disclosure Release, it is unclear whether a post-effective amendment to a Form S-3 resale registration statement would be required to reflect such a transaction, given that the Form 8-K would already be incorporated by reference in the Form S-3. However, a post-effective amendment (rather than a prospectus supplement) would almost certainly be required to update a Form S-1 resale registration statement regarding a ''sig-

  SRLR ISSN 0037-0665

However, an unlisted issuer cannot use Form S-3 to register securities for resale.[14] Instead, the securities to be resold by stockholders of an unlisted company can only be registered on Form S-1, which does not permit the issuer to incorporate its future Exchange Act reports by reference. As a result, although a material change would still require an unlisted issuer to file a Form 8-K, if that change is not a ''fundamental change'', the Form 8-K would not be automatically incorporated by reference in the Form S-1 resale registration statement. Therefore, the unlisted issuer must use a different method to update the registration statement.

The SEC's Compliance and Disclosure Interpretations (''C&DIs'') for Securities Act Forms currently includes the following guidance regarding how to update a Form S-1 resale registration statement:

> ***Question:*** How should a registrant conducting a continuous offering on Form S-1 update the prospectus to reflect the information in its subsequently filed Exchange Act reports?
>
> ***Answer:*** If Form S-1 is used for a continuous offering, the prospectus may have to be revised periodically to reflect new information since, unlike Form S-3, the form does not provide for incorporation by reference of subsequent periodic reports. For example, in a continuous offering on a Form S-1 pursuant to Rule 415(a)(1)(ix), a registrant wants to update the prospectus to include Exchange Act reports filed after the effective date of the Form S-1. Item 512(a)(1) of Regulation S-K requires certain changes, including a Section 10(a)(3) update, to be reflected in a post-effective amendment. *Other changes may be made in a prospectus supplement filed pursuant to Rule 424(b)*. If the registrant files a post-effective amendment, it could incorporate by reference previously filed Exchange Act reports if it satisfied the conditions in Form S-1 allowing incorporation by reference. [Jan. 26, 2009][15]

Although the Integrated Disclosure Release seems to indicate that stickers are appropriate only if the material changes ''can be stated accurately and succinctly in a short sticker,'' in a later C&DI the staff specifically indicated that it is appropriate to update a Form S-1 resale registration statement by using a Form 10-Q as a 424(b) prospectus supplement (assuming that the Form 10-Q does not contain any information amounting to a fundamental change).[16] Logically, this interpretation implies that Current Reports on Form 8-K can also be used as prospectus supplements (subject to the same assumption), in which case it suggests a (relatively) simple procedure that an unlisted issuer can use to maintain its Form S-1 resale registration statement as current.

In 2004, the SEC greatly expanded the number of items requiring the filing of a Form 8-K, stating that ''[t]he revisions we adopt today will benefit markets by increasing the number of *unquestionably or presumptively material events* that must be disclosed currently. They will also provide investors with better and more timely disclosure of important corporate events.''[17] Based on the staff's characterization of such items as ''presumptively material,'' it would seem highly advisable to treat each occurrence of a covered event as a ''material'' change. Thus, every time an issuer is required to file a Form 8-K, the issuer should simultaneously prepare and file a 424(b) prospectus supplement consisting of (or at least reflecting the content of) the Form 8-K.

Issuers utilizing a Form S-1 resale registration statement should keep in mind that certain events could require the filing of a 424(b) prospectus even though they may not specifically require the filing of a Form 8-K. For example, depending on total revenues, the hiring of a new salesperson with a substantial customer base, which could be considered ordinary course of business or otherwise non-material for a larger company, may be regarded as ''material'' for a smaller, unlisted public company. In adopting the expanded Form 8-K, the staff pointed out that, even though the number of items was being significantly increased, ''[o]ur general rules . . . prohibiting material omissions that make the contents of the disclosure misleading, of course, continue to apply.''[18]

In short, unlisted companies face the challenge that they cannot take full advantage of the integrated disclosure system to maintain resale registration statements as current. However, if they are diligent in filing each required Current Report on Form 8-K, it should be fairly easy to simultaneously file a prospectus supplement sufficient to update the S-1 resale registration statement with the relevant material information contained in the Form 8-K. Thus, with a limited amount of additional effort, issuers can make sure that the prospectus contained in the registration statement remains ''evergreen'' in compliance with the requirements of the Securities Act.

---

nificant'' acquisition or disposition, since the Form 8-K filing would not automatically be incorporated by reference.

[14] See Form S-3, General Instructions I(B)(3).

[15] Compliance and Disclosure Interpretations, Securities Act Forms, Question 113.02 (emphasis added).

[16] Compliance and Disclosure Interpretations, Securities Act Rules, Question 212.07. (''If the Form 10-Q contains no disclosure that would constitute a fundamental change in the information contained in the prospectus, there is no Item 512(a) requirement to file a post-effective amendment. If the company must update for anti-fraud and Rule 159 purposes, it may do so by a prospectus supplement.'' [Jan. 26, 2009]).

[17] SEC Release No. 33-8400 (August 23, 2004) (emphasis added).

[18] In the footnote to this statement, the staff gave as an example Rule 12b-20, which states, ''In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.

Note to Readers

The editors of BNA's *Securities Regulation & Law Report* invite the submission for publication of articles of interest to practitioners.

Prospective authors should contact the Managing Editor, BNA's *Securities Regulation & Law Report*, 1801 S. Bell St. Arlington, Va. 22202-4501; telephone (703) 341-3889; or e-mail to sjenkins@bna.com.