

Corporate Finance Alert

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February 2012

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Tricky Time of Year: Accessing the Capital Markets After Filing the Form 10-K but Before the Proxy

For many companies, the weeks leading up to proxy season is a deceptively tricky time to access the capital markets. During the period beginning when a company files its annual report on Form 10-K and ending when it files its definitive proxy statement, some companies unwittingly may shut themselves out from being able to conduct offerings unless they make advance preparations.

The pitfall arises due to the following common practice: Many companies forward incorporate by reference the compensation and other information required by Part III of Form 10-K from their definitive proxy statements which they intend to file later.¹ For example, a company may file its Form 10-K (omitting compensation discussion & analysis (CD&A) and other Part III information) on February 15, 2012, but not file its definitive proxy statement (containing the previously omitted Part III information) until April 15, 2012. During this two-month period, not all of the information required to be included in the company's Form 10-K would be on file with the SEC.

This convenience of obtaining additional time to prepare Part III information (some of which is indisputably time-consuming), however, has an important trade-off for a particular category of companies. For these companies, the SEC will not declare their shelf registration statements effective during this period and these companies therefore may be prevented from accessing the public markets.

Whether a company will be affected depends on a handful of factors. The key factor is whether the company is a well-known seasoned issuer (WKSI). Most commonly, a company qualifies as a WKSI if it has been subject to reporting requirements under the Securities Exchange Act of 1934 for at least the past 12 months, has timely filed all Exchange Act reports within that time subject to limited exceptions, and has \$700 million or more of non-affiliate common equity market capitalization within 60 days of the determination date. The determination date generally is the later of the time of filing of the company's most recent shelf registration statement and the filing date of the company's Form 10-K.² A secondary factor is, if the company is not a WKSI, whether the company already has an effective shelf registration statement on file.

Non-WKSIs without already effective shelf registration statements

The SEC has taken the position that it will not declare a shelf registration statement on Form S-3 effective for a non-WKSI that forward incorporates Part III information until the company files its definitive proxy statement or an amended Form 10-K containing the

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Part III information. This position is set forth in the SEC's Compliance and Disclosure Interpretations (C&DI) Securities Act Forms Question 123.01:

Question 123.01

Question: A registrant intends to file a non-automatic shelf registration statement on Form S-3 on April 10, hoping to become effective by April 25. The registrant intends to incorporate its most recent Form 10-K which will be filed on March 31. Certain information required in the Form S-3 concerning officers and directors is not intended to be furnished in the 10-K, but will be incorporated by reference from the registrant's definitive proxy statement which will be filed on April 30. What must the registrant do in order to become effective by April 25?

Answer: In order to have a complete Section 10(a) prospectus, the registrant must either file the definitive proxy statement before the Form S-3 is declared effective or include the officer and director information in the Form 10-K. [Feb. 27, 2009]

This SEC position has important timing consequences for any non-WKSI (without a pre-existing effective shelf registration statement) that seeks to opportunistically access the capital markets after it files its Form 10-K, but before it has filed its Part III information.

While a non-WKSI can still file a shelf registration statement on Form S-3 during this time period (and effectively "start the clock" on SEC review), the SEC will not declare the S-3 effective until the company has filed the definitive proxy statement (or amended Form 10-K) that contains the Part III information. For some companies, preparing the Part III information and, in particular, the SEC-mandated CD&A may take weeks and may involve third-party consultants and other parties over which the company has limited timing control. A non-WKSI that seeks to keep its options open on accessing the capital markets during this period, therefore, would be well served to start preparing the Part III information as soon as practicable and target including it in the initial filing of its Form 10-K (or soon thereafter in an amended Form 10-K). This advance preparation would eliminate or minimize the amount of time the company is shut out from accessing the public markets. As capital markets conditions can fluctuate rapidly and opportune market conditions sometimes prove fleeting, taking these steps in advance could be the difference between a timely successful capital raise and no raise at all.

Non-WKSIs with already effective shelf registration statements

The news is better for non-WKSIs that already have effective shelf registration statements on file. These non-WKSIs can complete shelf takedowns before they have filed Part III information so long as the missing Part III information is not material to an investment decision in the securities. If these non-WKSIs can conclude that their investors have sufficient information to make an investment decision (general disclosure considerations, U.S. antifraud provisions and other securities law considerations all continue to factor into play) without updating the Part III information, they can proceed with an offering under the shelf. For example, if the compensation and other Part III information to be contained in the current year's definitive proxy statement is expected to be generally consistent with the information described in the prior year's incorporated proxy (as updated by any applicable Current Reports on Form 8-K), the issuer should be able to conclude that it can proceed to conduct an offering under the shelf without updating its Part III information.

WKSIs

The news is even better for WKSIs. The SEC will allow a WKSI to both file an automatic shelf registration statement on Form S-3 and, subject to the ordinary course securities law considerations

described in the above paragraph, conduct an offering under the shelf before the WKSI has put its Part III information on file. This position is set forth in the C&DI Securities Act Forms Question 114.05:

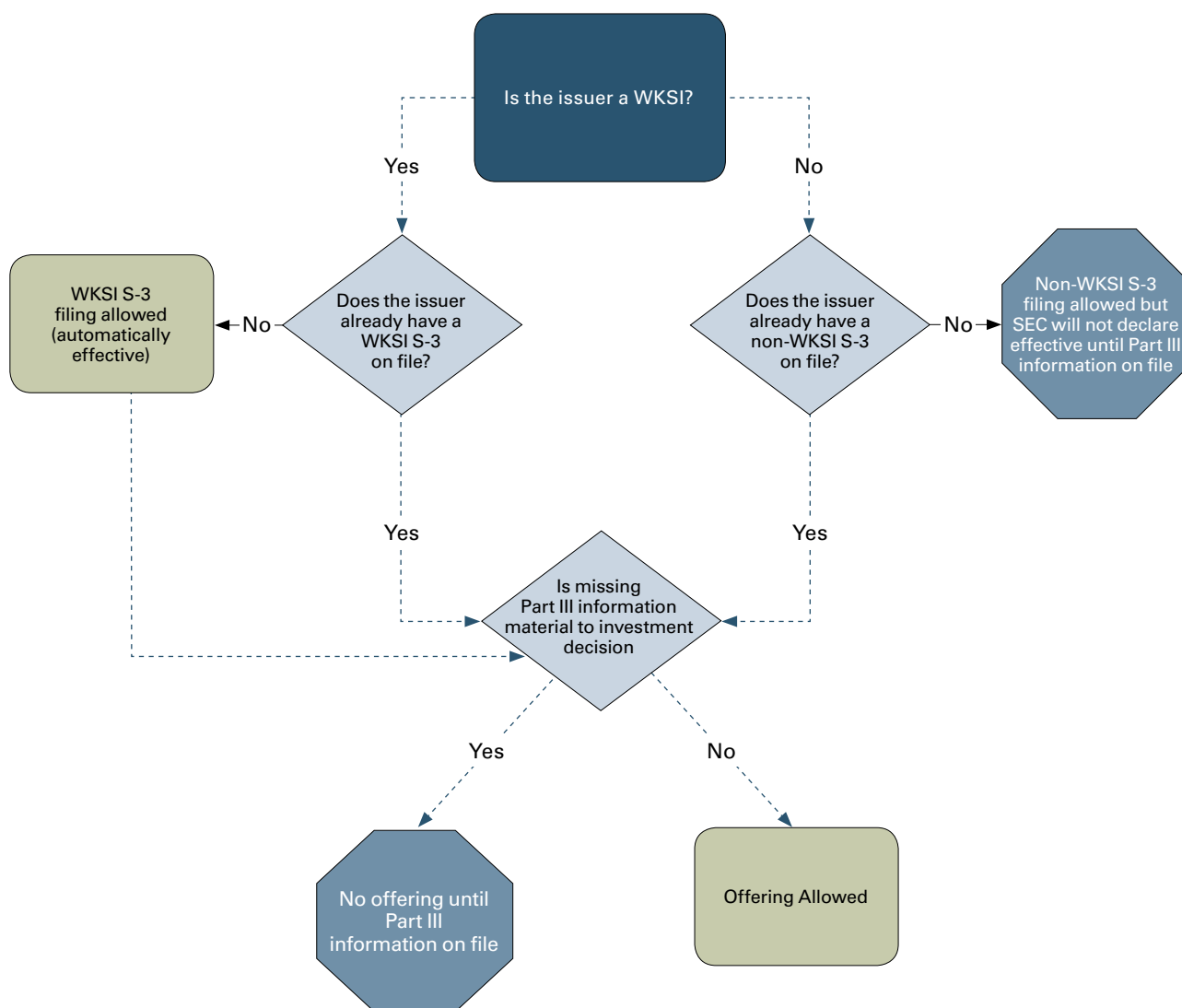
Question 114.05

Question: May an issuer file or use an automatic shelf registration statement on Form S-3 after the issuer has filed its Form 10-K but prior to filing the Part III information that will be incorporated by reference into the Form 10-K?

Answer: Yes. However, issuers are responsible for ensuring that any prospectus used in connection with a registered offering contains the information required to be included therein by Securities Act Section 10(a) and Schedule A. [Jan. 26, 2009]

Decision tree

The below flowchart depicts the step-by-step decision tree during the period beginning when a company files its Form 10-K and ending when it supplies its Part III information in its definitive proxy statement (or amended Form 10-K):



Conclusion

The period beginning when a company files its Form 10-K and ending when it files its definitive proxy statement presents several SEC issues of which non-WKSIs seeking to go to market through new shelf registration statements must be mindful. Advance preparation is crucial to allow these companies to continue to access the capital markets during this time period.

¹ General Instruction G(3) to Form 10-K permits information required by Part III of Form 10-K to be incorporated by reference from the registrant's definitive proxy statement (filed or required to be filed pursuant to Regulation 14A) or definitive information statement (filed or to be filed pursuant to Regulation 14C) which involves the election of directors, if such statement is filed with the SEC not later than 120 days after the end of the fiscal year covered by the Form 10-K. Part III consists of:

- Item 10. Directors, Executive Officers and Corporate Governance;
- Item 11. Executive Compensation;
- Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters;
- Item 13. Certain Relationships and Related Transactions, and Director Independence; and
- Item 14. Principal Accounting Fees and Services.

² See Rule 405 under the Securities Act of 1933 for a complete definition of "well-known seasoned issuer."

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