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PERSPECTIVE

DR. T ON SECURITIES

Steering a WKSI through volatile markets

By Sara L. Terheggen

Being a well-known seasoned issuer (WKSI) has many benefits, not the least of which is the ability to file a registration statement on Form S-3 for an unlimited amount of securities and have such registration statement go immediately effective upon filing. Securities Act Rule 405 defines a WKSI as a company that is not an ineligible issuer and, as of a date within 60 days of its eligibility determination date, either (i) has a public float of \$700 million or more, or (ii) has issued at least \$1 billion aggregate principal amount of non-convertible debt securities in primary offerings for cash in the last three years. The eligibility determination date is the later of the filing date of the company's most recent shelf registration statement or the time of the most recent amendment to the shelf registration statement or pursuant to Section 10(a)(3) (which is the date a company files its annual report on Form 10-K).

In light of recent volatility in market conditions, many companies have experienced declines in the trading price of their common stock. As a result, upon the filing of their 10-K's, a WKSI may no longer meet the eligibility requirements and will therefore have to transition their S-3ASR to a non-automatic shelf registration statement.

Making Eligibility Determination before Filing of the 10-K or a New Form S-3ASR

If a WKSI is on top of their eligibility status and is double checking prior to filing of their 10-K, the SEC has established a process

2. Upon filing their 10-K, file either (a) a post-effective amendment on Form type POS AM to convert the existing S-3ASR to a non-ASR Form S-3 or (b) a non-ASR Form S-3.

Because a Form S-3ASR is only valid for three years, a company

have seen their stock prices decline and are in danger of losing their WKSI status may consider filing a new Form S-3ASR while it can still pass the public float test, which may serve to provide them with additional time until their 10-K is due before they have to reassess their eligibility.

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whereby a WKSI can take steps necessary to convert their S-3ASR to a non-automatic shelf registration statement without losing the ability to use their shelf during the transition. This is critically important for maintaining access to the capital markets during the transition.

The steps include:

1. Prior to filing a 10-K, file a post-effective amendment to the existing S-3ASR to (a) register a specific amount of securities, (b) pay the associated filing fee, and (c) include information that may have been omitted from the S-3ASR.

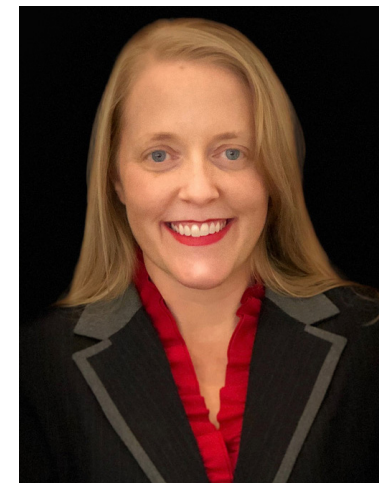
also needs to make an eligibility determination at the time of filing a new Form S-3ASR. If a company is no longer a WKSI at the time it files a replacement registration statement to replace its expiring Form S-3ASR, the company is eligible for a grace period for up to 180 days. This generous grace period provides companies with ample time to get a non-automatic Form S-3 on file and time to get it effective. It is important to remember that this grace period only works if the company does not otherwise have to file a 10-K during that period. Companies whose shelves are expiring and

Making Eligibility Determination After Filing of the 10-K

No company wants to find out after filing their 10-K that they have lost their status as a WKSI. Company counsel should be flagging the potential risk of loss of WKSI status before the date of the 10-K filing so there is ample time to im-

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plement the steps above without jeopardizing a company's ability to use their shelf during the transition process. If, however, a WKSI is unaware or determines after filing of the 10-K that they had lost eligibility, their only choice is to file a new Form S-3 and wait for the SEC to declare it effective. It is important to remember that because the previous Form S-3ASR can no longer be used

once the 10-K is filed if the above steps were not followed and given that the SEC will not declare the new Form S-3 effective until such time as the company has filed its proxy statement, there may be a significant amount of time when the company will be frozen out of the market. Further, even if the company promptly files its proxy statement, the new Form S-3 will be subject to review by the SEC

staff and that could further delay effectiveness in the event the SEC decides to conduct a review.

Prioritize Capital Markets Access

It is clear that determining whether a company's WKSI status is in jeopardy is something that should be done before filing its 10-K or even well in advance of an expiring Form S-3ASR. Taking the time

to make the eligibility determination and prepare the necessary filings will provide a company with the advantage of not losing access to the capital markets for any period of time. In a volatile market, ensuring constant access to the capital markets and maximum flexibility to conduct an offering if and when needed is critical to ensuring a company can survive through challenging times.