

Securities Update

Sunset of Certain Shelf Registrations Begins December 1, 2008

As part of the 2005 Securities Offering Reform, the Securities and Exchange Commission (the "SEC") adopted a provision requiring issuers to re-file certain shelf registration statements filed under the Securities Act of 1933, as amended (the "Securities Act"), at least every three years. On December 1, 2008, the provision will begin to phase in, and certain shelf registration statements will no longer be available for offers and sales of securities. It is therefore necessary for all companies to review their currently effective registration statements and consult legal counsel to determine whether or not this provision will affect them.

Conducting this review on a timely basis is advisable because eligibility to be a well-known seasoned issuer ("WKSJ") and to use Forms S-3 and F-3 without offering size limitations are based, in part, on the worldwide market value of the issuer's common equity (voting and non-voting) held by non-affiliates ("Public Float") on a day of the issuer's choice during a 60-day look-back period. Although an issuer's Public Float may currently be depressed, it can utilize the look-back period to choose a day when market conditions were more favorable in order to meet the Public Float requirements for WKSJ status and to use Forms S-3 and F-3 without offering size limitations. WKSJ eligibility is, however, reassessed each time an issuer files its annual report on Form 10-K or Form 20-F, and an issuer who fails to qualify at that time will need to amend its automatic shelf registration statement on a form that it is then eligible to use.¹

Background

In December 2005, the SEC adopted significant reforms to the securities offering process. Prior to the reforms, the SEC limited the amount of the securities that could be registered on a shelf registration statement to the amount reasonably expected to be offered and sold within two years of effectiveness, regardless of whether such securities were actually sold during that two-year period. The reforms eliminated the two-year limitation on the amount of securities to be registered for most shelf registration statements, but imposed a three-year sunset period on the use of certain shelf registration statements.² Three years was chosen for the sunset period, in part, to conform to the three-year cycle mandated by Sarbanes-Oxley for the SEC's review of an issuer's periodic reports pursuant to the Securities Exchange Act of 1934.

The White & Case LLP Securities Update provides a brief overview of some of the latest legislative, regulatory and judicial actions, policy statements and decisions that affect public and private companies.

Please contact the lawyer at White & Case who regularly advises you or any of the attorneys listed on the last page of this memo with any questions in connection with this Securities Update.

1 See SEC Securities Offering Reform Questions and Answers; Division of Corporate Finance, Question 15 (November, 2005), available at http://www.sec.gov/divisions/corpfin/faqs/securities_offering_reform_qa.pdf.

2 Registration statements covering securities to be issued in connection with business combinations and continuous offerings by issuers not eligible to use Form S-3 or Form F-3 retain the two-year limitation. See Securities Offering Reform, Exchange Act Release Nos. 33-8,591; 34- 52,056 (July 19, 2005), available at <http://www.sec.gov/rules/final/33-8591.pdf>.

Applicability

The three-year sunset period under Rule 415(a)(5) applies only to the following shelf registration statements:

- automatically effective shelf registration statements;
- shelf registration statements registering securities registered (or qualified to be registered) on a Form S-3 or Form F-3 that are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the issuer, a majority owned subsidiary of the issuer or a person of which the issuer is a majority-owned subsidiary;
- shelf registration statements registering securities that will be offered promptly after effectiveness of the registration statement on a continuous basis and may continue to be offered more than 30 days after the date of initial effectiveness; and
- shelf registration statements registering offerings of mortgage related securities, including such securities as mortgage-backed debt and mortgage participation or pass-through certificates.

The sunset period does not apply to any registration statements other than those listed above.

Measuring the Three-Year Sunset Period

Rule 415 (a)(5)³ divides registration statements into two categories:

- **Registration Statements that became effective before December 1, 2005**⁴—All shelf registration statements that are subject to the sunset provision will no longer be permitted to be used for offers or sales of

securities on or after December 1, 2008. The three-year period began to run for these registration statements on December 1, 2005, regardless of how long they were effective prior to that date.

- **Registration Statements that became effective on or after December 1, 2005**—The three-year sunset period begins on the initial effective date of the registration statement. Subsequently-filed post-effective amendments do not extend the three-year sunset period.

Transitional Relief—Grace Period for Issuers Not Filing Automatic Shelf Registration Statements

An issuer who did not qualify for, or chose not to use, an automatic shelf registration statement may continue to use a registration statement beyond the three-year limit imposed by Rule 415(a)(5) in two situations. In both situations, the issuer must file a new registration statement covering the securities offered by the prior registration statement within three years of the effective date of the expiring registration statement. Once that new registration statement has been filed:

- an issuer may continue to offer and sell securities covered by a prior 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
- in the case of a continuous offering of securities that commenced within three years of the initial effective date of the prior registration statement, an issuer may continue with that offering until the effective date of the new registration statement if such offering is permitted under the new registration statement.

3 See SEC Securities Offering Reform Transition Questions and Answers; Division of Corporate Finance, Question 12 (September 13, 2005), available at <http://www.sec.gov/divisions/corpfin/transitionfaq.htm>.

4 December 1, 2005 was the effective date for the reforms. See Securities Offering Reform, Exchange Act Release Nos. 33-8,591; 34- 52,056 (July 19, 2005), available at <http://www.sec.gov/rules/final/33-8591.pdf>.

WKSIs do not have the protection of a grace period. Therefore, they can address the problems of an expiring shelf registration statement by filing a shelf registration statement that becomes effective automatically upon filing.

Action Items for Issuers

Timing is the critical factor. All issuers, in consultation with counsel, should review existing registration statements and replace any expiring shelf registration statements. Proper planning will enable issuers with registration statements that are subject to the sunset period to ensure that there is no disruption with respect to ongoing offerings or access to capital markets.

Shelf registration statements that were effective before December 1, 2005, will expire on December 1, 2008, and shelf registration statements with effective dates on or after December 1, 2005, will expire three years after the initial effective date.⁴ The first step of any issuer's planning process should be to review currently effective shelf registration statements to determine whether any of these registration statements are subject to the sunset period under Rule 415(a)(5). The issuer should then

determine the specific dates on which any of these registration statements will expire. Finally, the issuer will need to develop a plan, considering various timing factors such as obtaining consents, updating necessary information, and any potential review delays, to ensure timely filing of a new shelf registration statement prior to the sunset date.⁶

Both eligibility to be a WSKI and to use Forms S-3 and F-3 without offering size limitations are based, in part, on an issuer's Public Float. WSKI status requires a Public Float of US\$700 million or more.⁷ Issuers filing using Form S-3 or Form F-3 with a Public Float of \$75 million or more are not subject to offering limitations on primary offerings.⁸ An issuer is permitted to calculate its Public Float as of any date within 60 days prior to the filing of a new registration statement. Given the recent market turmoil, issuers should consider filing a new registration statement to replace an expiring shelf registration statement sooner rather than later in order to take advantage of 60-day look-back provisions, which give issuers the opportunity to choose the day with the most favorable market price. For example, an issuer filing on November 15, 2008, may use its share price as of October 17, 2008.

⁵ Rule 415 (a)(5) under the Securities Act.

⁶ Rule 457 (p) permits unused fees from the previous registration statement to be carried forward provided the new shelf registration statement is filed within five years of the initial filing date of the earlier shelf registration statement and the cover of the new registration statement contains an appropriate notation. The new registration statement must be filed by the issuer, its successor, a majority-owned subsidiary or a parent company owning at least 50 percent of the issuer. Issuers can also use Rule 429 to preserve unused filing fees. Rule 429 permits an issuer to carry over to a new registration statement any unsold securities from an existing registration statement.

⁷ If the issuer qualifies as a WSKI upon filing of its registration statement before December 1, 2008, it will need to reassess its WSKI status upon filing its next annual report on Form 10-K or Form 20-F. The issuer will need to file a new non-automatically effective registration statement or a post-effective amendment to its automatically effective registration statement if it no longer qualifies as a WSKI at that time.

⁸ Companies listed on a national stock exchange not meeting the \$75 million Public Float requirement, other than certain former shell companies, are permitted to use Form S-3 or F-3, but must limit the aggregate market value of securities offered during the period of 12 calendar months immediately prior to, and including, the sale to no more than one-third of the aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant. For all other companies, failure to meet the \$75 million public threshold will render the company ineligible to utilize Form S-3 or F-3. See Rule 401(g) under the Securities Act.

White & Case offers US securities law capabilities in the offices listed below. Please contact any of the lawyers listed below for additional information.

Beijing + 86 10 5912 9600

Stephen R. Payne – payne@whitecase.com

Budapest + 36 1 488 5200

Robert B. Irving – rirving@whitecase.com

Frankfurt + 49 69 29994 0

James Black – black@whitecase.com

Helsinki + 358 9 228 641

Petri Haussila – phaussila@whitecase.com

Hong Kong + 852 2822 8700

Jeremy C. Leifer – jleifer@whitecase.com

Johannesburg + 27 11 341 4000

Gabor Molnar – gmolnar@whitecase.com

London + 44 20 7532 1000

Francis Fitzherbert-Brockholes –

ffitzherbert-brockholes@whitecase.com

Joshua G. Kiernan – jkiernan@whitecase.com

David Becker – dbecker@whitecase.com

Robert S. Matthews – rmathews2@whitecase.com

Sven E. Krogius – skrogius@whitecase.com

Los Angeles + 1 213 620 7700

Daniel H. Peters – dpeters@whitecase.com

Neil W. Rust – nrust@whitecase.com

Miami + 1 305 371 2700

Mark O. Bagnall – mbagnall@whitecase.com

Kenneth C. Ellis – kellis@whitecase.com

Jorge L. Freeland – jfreeland@whitecase.com

Mexico City + 5255 5540 9600

Alberto Sepúlveda Cosío –

asepulveda-cosio@whitecase.com

New York + 1 212 819 8200

Ronald Brody – rbrody@whitecase.com

Colin J. Diamond – cdiamond@whitecase.com

David Johansen – djohansen@whitecase.com

N. Adele Hogan – ahogan@whitecase.com

Gary Kasha – gkasha@whitecase.com

Kevin Keogh – kkeogh@whitecase.com

Jin Kim – jkim@whitecase.com

Howard Kleinman – hkleinman@whitecase.com

Mark L. Mandel – mmandel@whitecase.com

Daniel Nam – dnam@whitecase.com

Tomer Pinkusiewicz – tpinkusiewicz@whitecase.com

Laura Sizemore – lsizemore@whitecase.com

Kenneth Suh – ksuh@whitecase.com

John Vetterli – jvetterli@whitecase.com

Nazim Zilkha – nzilkha@whitecase.com

Palo Alto + 1 650 213 0300

Jeffrey Washenko – jwashenko@whitecase.com

Prague + 420 255 771 111

Michal Dlouhý – mdlouhy@whitecase.com

São Paulo + 55 11 3147 5600

Donald E. Baker – dbaker@whitecase.com

Shanghai + 86 21 6132 5900

John C. Leary – jleary@whitecase.com

Singapore + 65 6225 6000

Yin Mei Lock – ylock@whitecase.com

Kaya H. Proudian – kproudian@whitecase.com

Washington, D.C. + 1 202 626 3600

Edward R. Neaheer (Ned), Jr. –

eneaheer@whitecase.com

This Securities Update is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Update should not be acted upon in any specific situation without appropriate legal advice, and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own, and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Securities Update is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.