

Navigating Loss of WKSJ Status

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February 2023

The status of a company as a well-known seasoned issuer (WKSJ) that previously filed an automatic shelf registration statement on Form S-3ASR is re-evaluated at the time the company files its Form 10-K.¹ The filing of the Form 10-K is the equivalent of filing a post-effective amendment to update such registration statement pursuant to Section 10(a)(3) of the Securities Act. If a company does not meet the definition of a WKSJ² as of a date within 60 days prior to the date of filing the Form 10-K, it will no longer be able to offer and sell securities using its existing S-3ASR unless it takes certain actions prior to the filing of its Form 10-K.

Although the loss of WKSJ status occurs upon the filing of the company's Form 10-K, counsel should flag the potential risk of loss of WKSJ status before the date of the 10-K filing. Failing to anticipate loss of WKSJ status prior to the filing of the 10-K may result in a period of time during which a company is both prohibited from using its existing automatic shelf registration statement and unable to have a new non-automatic shelf registration statement declared effective between the date of a company's 10-K filing and the date of its proxy statement filing. If a company does not take steps to preserve the ability to use its existing automatic shelf registration statement, as outlined below, before filing the 10-K, it will not be able to use its existing automatic shelf registration statement after the filing of the 10-K. If the company files a new non-automatic shelf registration statement after filing the 10-K and incorporates by reference its Part III information from its proxy statement into its 10-K, the SEC will not declare such registration statement effective until after the company files its definitive proxy statement.³

This note discusses the consequences of losing WKSJ status and steps a company can take to maintain an effective shelf registration statement after loss of WKSJ status.

Consequences of Loss of WKSJ Status

Because WKSJs are able to access the capital markets with fewer restrictions than a non-WKSJ, and have flexibility with respect to shelf registration procedures, there are several consequences a

¹ For a "foreign private issuer" the equivalent forms are Form F-3ASR and Form 20-F.

² Securities Act Rule 405 defines a well-known seasoned issuer as a company that satisfies the registrant requirements of General Instruction I.A of Form S-3, is not an ineligible issuer (as defined in Rule 405), and either (i) as of a date within 60 days of its eligibility determination date, has a public float of \$700 million or more, or (ii) as of a date within 60 days of its eligibility determination date, has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act. Under the Rule 405 definition, asset-backed issuers, and investment companies registered under the Investment Company Act of 1940 may not be a well-known seasoned issuer. Companies that have gone public through a deSPAC are typically considered an ineligible issuer for three years following completion of the deSPAC transaction and therefore cannot qualify as a WKSJ during such period regardless of their public float.

³ Securities Act Forms CDI 123.01.

company should consider after losing WKSJ status. First, a company that does not qualify as a WKSJ as of a date within 60 days of filing a registration statement, may not file an automatic shelf registration statement on Form S-3ASR. Second, a company with an existing automatic shelf registration statement is prohibited from using any existing Form S-3ASRs if it loses WKSJ status upon the filing of its Form 10-K, unless the company follows the specific process set forth in the SEC staff guidance outlined below. If the specific process set forth in the SEC staff guidance is not followed, a company will have to file a new S-3 registration statement and wait for it to be declared effective by the SEC because it will not be able to continue selling securities off its automatic shelf registration statement after filing the 10-K. Unlike automatic shelf registration statements filed by a WKSJ, which are automatically effective without SEC staff review, non-WKSJ shelf registration statements are subject to review by the SEC staff. In addition, the SEC staff will not declare a non-automatic shelf registration statement effective during the gap period between the 10-K filing and the filing of the proxy statement if the company's 10-K Part III information is included in the proxy statement. This could result in a period of time where a company would not be able to offer and sell securities off a shelf registration statement. Third, non-WKSJs may not omit from the base prospectus information that WKSJs may omit, including the amount of securities being registered, the plan of distribution, whether the offering is a primary or secondary offering, a description of the securities registered, and the identity of selling shareholders.

The loss of WKSJ status can also impact persons other than the company. A selling shareholder can no longer use a previously effective shelf registration statement on Form S-3ASR to resell shares following loss of WKSJ status. Note, however, many WKSJs file shelf registration statements on a regular Form S-3 for selling shareholders, instead of a Form S-3ASR, because a Form S-3 (unlike Form S-3ASR) for selling shareholders does not expire after three years. Moreover, a company that had registered on Form S-3ASR the issuance of shares upon the exercise of outstanding warrants or upon conversion of outstanding securities could no longer rely on the registration statement for these issuances. A company also could potentially be exposed to liability for breach of contractual commitments if it is not able to maintain, or did not use the requisite efforts or steps to maintain, an effective registration statement covering these sales or issuances of securities.

Maintaining an Effective Shelf Registration Statement

To qualify as a WKSJ, a company must (in addition to satisfying the registrant requirements for use of Form S-3) meet the public float criteria on any day selected by the company during the 60 days prior to the date on which the company files its Form S-3ASR. Once a WKSJ files a Form S-3ASR, the company may continue to use the registration statement until its next Section 10(a)(3) update is due, which typically is the filing of an annual report on Form 10-K.⁴ A company's loss of WKSJ status after filing its Form S-3ASR, but before its Section 10(a)(3) update, will not impact the company's ability to use the automatic shelf registration statement until the time of its Section 10(a)(3) update.⁵ When a company files its annual report on Form 10-K, this triggers a new determination date for WKSJ status. A company with an effective automatic shelf registration statement that does not qualify as a WKSJ at the time of the filing of a Form 10-K will no longer be eligible to use such registration statement, and will be

⁴ Regulation S-K Item 512(b) provides that for purposes of Securities Act Section 10(a)(3), "each filing of the registrant's annual report pursuant to [Exchange Act] section 13(a) or section 15(d)...that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein."

⁵ Securities Act Rules CDI 198.03.

required to amend its Form S-3ASR onto a form it is then eligible to use to offer and sell securities or file a new registration statement.⁶

The company may continue to offer and sell securities from its existing automatic shelf pending the effectiveness of the new registration statement or post-effective amendment provided it remains eligible to use Form S-3 in reliance on General Instruction I.B.1 or I.B.2 of Form S-3 at the time of the filing of the Form 10-K and follows the steps outlined below.⁷ In order to be able to comply with the steps to maintain an effective registration statement, counsel and the company must anticipate the loss of WKSJ status in order to have amendments prepared to be filed before and after the filing of the 10-K.

First, prior to filing the Form 10-K (and losing its WKSJ status), the company must amend any effective automatic shelf registration statements it wants to continue to use to include all of the information that would be required in a non-automatic shelf Form S-3 filed by a non-WKSJ. The company will need to file a post-effective amendment using the EDGAR submission type POSASR which will be automatically effective when filed. The base prospectus that must be included in the post-effective amendment will need to provide more extensive information than what is required in a WKSJ prospectus because the prospectus in the post-effective amendment may not omit information in reliance on provisions of Securities Act Rule 430B that are available only for automatic shelf registration statements. The POSASR needs to register a specific amount of securities and include the associated filing fee. To the extent this information is not already disclosed in the automatic shelf registration statement, the base prospectus may need to include, among other items:

- A specified maximum amount of securities to be registered;
- Payment of the registration fee at the time of filing (“pay-as-you-go” registration statements are only for WKSJs);
- Specific allocation of the securities among primary and secondary offerings;
- A plan of distribution;
- A description of the securities beyond the name or class of the securities; and
- Names of any selling security holders and the amounts registered on their behalf.

Second, promptly after the 10-K is filed, the company must file either (i) a post-effective amendment using EDGAR submission type POS AM or (ii) a new Form S-3 registration statement using EDGAR submission type S-3 covering the unsold securities previously registered on the Form S-3ASR. The post-effective amendment or new Form S-3 would have similar content to the POSASR filed prior to the filing of the 10-K, but the subsequent filing after the 10-K would have, among other changes, references to financials brought forward to be as of the 10-K date, updated documents incorporated by reference, and an updated auditor consent.

The post-effective amendment or new registration statement would be subject to SEC staff review and would need to be declared effective before it could be used to offer and sell securities. However, SEC Staff guidance permits a company to continue to offer and sell securities using the amended automatic shelf registration statement if the steps outlined above were followed in compliance with Securities Act Rule CDI 198.06. In considering whether to file a new Form S-3 or a post-effective amendment, a company may find it more advantageous to file a new Form S-3 if a company wants to add securities or because it wants to begin a new three-year period from effectiveness during

⁶ Securities Act Rules CDI 203.11.

⁷ Securities Act Rules CDI 198.06.

which the shelf registration statement may be used. Thus, for typical universal debt and/or equity shelf registration statements to be used for future capital raising, a company may find it more beneficial to file a new Form S-3 rather than filing a second post-effective amendment if the company wants to add securities or for offerings whose three-year expiration period will have begun at the initial effective date of the original Form S-3ASR. Pending the effectiveness of the post-effective amendment or new shelf registration statement, the company may continue to offer and sell securities using the amended automatic shelf registration statement if it has followed the steps outlined above. If a company has not followed the process above, it will not be permitted to sell securities off its prior S-3ASR registration statements and will have to wait to have any amendment or Form S-3 declared effective.

Failure to Take Steps to Preserve Existing Shelf. If a company does not follow the steps outlined above to preserve its ability to use its existing automatic shelf registration statement following the filing of its 10-K, the company should file a new Form S-3 registration statement rather than amend its prior Form S-3ASR. This is for two reasons. First, Form S-3, unlike an amendment, has the benefit of allowing the company to add new securities to the registration statement. Second, a company that utilized an automatic shelf registration statement with “pay-as-you-go” fee provisions of Rule 456(b) may not convert the registration statement to another form via post-effective amendment because fees cannot be paid to register securities via a post-effective amendment on any form other than an automatic shelf registration statement.⁸

Note that the SEC will not declare a registration statement effective until the Part III information for the most recent Form 10-K is filed. As such, a company that incorporates Part III information by reference from its subsequently-filed proxy statement will not have its new registration statement declared effective until the definitive proxy statement is filed. Thus, for a company that loses its WKSII status upon filing its 10-K that fails to follow the steps outlined in Securities Act Rule CDI 198.06 there will be a period of time where the company is unable to use its prior automatic shelf registration statement and not have its new non-automatic shelf registration statement declared effective.

Expiring Shelf Registration and Loss of WKSII status. If at the time of filing a replacement shelf due to the expiration of the existing shelf, a company’s public float has decreased to the point it will no longer be considered a WKSII, the company can continue to use the expiring automatic shelf for a grace period. However, if a company is no longer a WKSII and files a Form 10-K during the Rule 415(a)(5) grace period that acts as a Section 10(a)(3) update to its Form S-3ASR, the company may no longer use the Form S-3ASR until it post-effectively amends the Form S-3ASR to a form that the company is then eligible to use.

Under Rule 415(a)(5), securities registered on an automatic shelf registration statement expire after three years. Rules 415(a)(5) and (6) provide a mechanism to replace expiring registration statements. If a company is no longer a WKSII at the time it files a replacement registration statement under Rule 415(a)(5) to replace its expiring Form S-3ASR, the company may continue to use its expiring automatic shelf registration statement during the 180 day (or shorter) Rule 415(a)(5) grace period. A registration statement filed solely for purposes of complying with Rule 415(a)(5) is not considered a reassessment of the company’s WKSII status for purposes of an outstanding Form S-3ASR.⁹

Liability consideration. Companies that do not have robust controls and procedures to track, in real time, offers and sales of securities from effective shelf registration statements risk being subject to an

⁸ Securities Act Rules CDI 212.28.

⁹ Securities Act Rules CDI 212.27.

SEC enforcement action. In September 2022, the SEC charged a company with violations of the securities laws for unregistered offers and sales of securities in excess of what had been registered on the non-WKSI shelf registration statement, and imposed a significant civil penalty. In this case, the company had lost its WKSI status and had filed an amended registration statement to convert its prior WKSI shelf to a non-WKSI shelf, but the company failed to quantify the total number of securities it anticipated offering and selling, and failed to pay registration fees for such offerings upon the filing of a new registration statement. The SEC's order highlighted the company's failure to track actual offers and sales of securities against the amount of registered offers and sales on a real-time basis.