



FENWICK & WEST LLP

Corporate and Securities Law Update

Proposed New “Quiet Period” Rules, Shelf Registration Procedures

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SEC Proposes Rule Changes to Ease “Quiet Period” Restrictions and Change Shelf Registration Procedures

The SEC recently issued rule proposals that would ease “quiet period” restrictions and modernize shelf registration procedures. We expect these proposals to be adopted in due course. While it is difficult to predict what changes to the proposals may be made during the comment and review process, we expect that the final rules will make it easier for companies to continue marketing activities around the time of securities offerings, and facilitate the use of shelf registrations for capital raising.

Easing of “Quiet Period” Restrictions

Currently, companies planning to make a public offering of securities must not engage in any pre-offering publicity that could be seen as “conditioning the market” for its securities or otherwise unduly promoting the company to potential investors. This limitation begins in advance of an offering, and ends up to 25 days following an IPO. In a number of recent high profile IPOs, the SEC has imposed “cooling off” periods and required specific disclosures in the prospectus relating to pre-offering publicity by the company.

Some of the proposed changes to these “quiet period” restrictions include:

- 30-day safe harbor. Communications by a company more than 30 days prior to the time it files its registration statement with the SEC would be permitted if they did not reference a securities offering.
- “Well-known seasoned issuers.” Well-known seasoned issuers, or companies with a public float of at least \$700 million, could make any written or oral communication prior to an offering of their securities, subject in some cases to filing with the SEC.
- All public companies. All public companies would be allowed to continue publishing regularly released factual business information and forward-looking information.
- Private companies. Non-reporting issuers would be permitted to continue publishing factual business

information that is regularly released to persons other than in their capacity as investors or potential investors.

Changes to Shelf Registration Procedures

The SEC has also proposed technical changes designed to “modernize” the shelf registration process. Some of the more significant proposals are:

- Replace the current requirement that a company may register only the amount of securities it intends to offer within two years with a new requirement that the company update its registration statement with a new one every three years.
- Permit immediate shelf takedown transactions (the SEC currently has an informal requirement that takedowns occur no sooner than 48 hours after effectiveness).
- Clarify what may be omitted from the base prospectus, and liberalize the use of prospectus supplements to disclose changes to the plan of distribution or selling security holders (rather than requiring post-effective amendment and SEC review).
- Establish a flexible “automatic shelf registration” process for “well-known seasoned issuers,” including automatic effectiveness and “pay-as-you-go” fees.
- Extend incorporation by reference of Exchange Act to Form S-1 registration statements.

Other Proposed Changes

The SEC also proposed changes to the prospectus delivery requirements for public offerings, and proposed to require companies to notify investors that they purchased securities in a registered offering. With respect to periodic reports, the SEC proposed requiring Form 10-K disclosure of risk factors, and of unresolved staff comment letters.

How do I find the full text of the rule proposal?

The rule proposal (389 pages) is available at <http://www.sec.gov/rules/proposed/33-8501.pdf>.

What if I have more questions?

If you have any questions about these new rule proposals, please contact any member of your Fenwick & West team. You may also contact Jeffrey Vetter (jvetter@fenwick.com) or Horace Nash (hnash@fenwick.com), each of whom contributed to this update.