

Finance Digest

Caution – Your Automatic Shelf Registration May Not Be So “Automatic”

By Matthew Bloch and
Barbra Broudy

Well-known seasoned issuers (WKSIs) are able to access the capital markets quickly and opportunistically by using an existing shelf registration statement or simply filing a new automatic shelf registration statement (ASR). Often times, WKSIs will file an ASR prior to the opening of the market on the morning they intend to launch a new offering in an effort not to signal the market prematurely that an offering is in the pipeline. Once the ASR is on file, underwriters can begin speaking to investors and an offering is underway. However, we recently learned these ASRs are not always so automatic if a WKSI has an old ASR on file.

From time to time (but apparently not all the time), the Securities and Exchange Commission's (SEC) EDGAR system will not accept a new ASR filing but rather suspend it as “duplicative” – even if the company's prior ASR has long ago expired.¹ This suspension needs to be manually corrected by someone at the SEC staff before the new ASR will be on file and any offering can be launched. This can pose problems for an issuer that is filing its ASR the morning it intends to commence an offering, especially when the filing agent tells you that the SEC staff is only available to manually clear the filing during the EDGAR Filer Support phone hours from 9:00 a.m. to 5:30 p.m. (Eastern time).

Given that any delay in filing the ASR has the potential to affect the marketing and pricing of the offering or delay the offering altogether, we recommend the following actions to WKSIs and their counsel to avoid any last minute pitfalls:

- The best way to deal with this potential issue is to avoid it altogether. WKSIs can do this by being prepared to file a new ASR promptly upon expiration of the old ASR (rather than waiting until the WKSI is preparing to go to market with a new issue under a shelf takedown). This helps alleviate the market signaling issue and ensures that a WKSI is able to access the capital markets when ready. This also allows you time to deal with any EDGAR duplicative filing glitch.
- If you have not filed a new ASR upon expiration of the old ASR as outlined above, the next best way to deal with the potential problem is to have the filing agent do a test filing of the new ASR early in the process. If the test filing results in the duplicative error for the WKSI, you will know before you are in the midst of a filing/offering. This early test allows the issuer, its counsel and the underwriters to evaluate the situation. Market signaling may not be an issue for the client, and the new ASR can be filed during the EDGAR Filer Support phone hours in advance of the date of the planned offering launch.
- Finally, if you have not been able to take either of the steps described above, and you need to file the new ASR on the day you intend to market, you still could file the new ASR before the market opens. Even though the phone hours for EDGAR Filer Support are from 9:00 a.m. to 5:30 p.m., we have been told by an SEC staff member that the staff is

on site by 7:30 a.m. on business days to monitor filings and look for these and other issues. If facing this situation, your filing agent can initiate the filing and then e-mail the SEC Corporation Finance Office of Information Technology at cfitedgar@sec.gov to alert them to the suspended filing and have it cleared between the hours of 7:30 a.m. and 9:00 a.m. However, we strongly recommend that you contact the staff a day or two prior to the anticipated filing

date to make absolutely certain that this procedure will work for you on the day of filing. A delay of even a couple minutes has the potential to cost the client money, not to mention the stress it puts on the entire deal team.

We understand that the SEC staff is looking to implement a fix to EDGAR when the duplicative error relates to an expired ASR; however, no timeline has been set. It is important that repeat WKSI filers are aware of this issue so

they, along with their counsel and filing agents, can avoid any offering delays or missed opportunities to access the capital markets. As counsel to a WKSI, do not assume that your filing agent (such as a financial printer) will necessarily alert you to this potential problem or know how to respond to it.

¹ All ASRs expire three years from their date of effectiveness. In addition, a WKSI can get this duplicative error if it has other non-expired ASRs on file.

If you would like more information about the contents of this issue, or about Weil's finance practices, please speak to your regular contact at Weil, the authors, or to any member of the Editorial Board.

Authors:

Matthew Bloch
(Capital Markets)

matthew.bloch@weil.com

+1 212 310 8165

Barbra Broudy
(Capital Markets)

barbra.broudy@weil.com

+ 1 212 310 8744

Editorial Board:

Danek Freeman, Editor
(Banking & Finance)

danek.freeman@weil.com

+1 212 310 8646

Faiza N. Rahman, Deputy Editor
(Capital Markets)

faiza.rahman@weil.com

+1 212 310 8235

Alexander D. Lynch
(Capital Markets)

alexander.lynch@weil.com

+1 212 310 8971

Nancy Lynch
(Structured Finance & Derivatives)

nancy.lynch@weil.com

+1 212 310 8306

Roshelle Nagar
(Banking & Finance)

roshelle.nagar@weil.com

+1 212 310 8023

Jason A.B. Smith
(Structured Finance & Derivatives)

jason.smith@weil.com

+1 212 310 8914

Douglas R. Urquhart
(Banking & Finance)

douglas.urquhart@weil.com

+1 212 310 8001

Finance Digest is published by the Capital Markets, Banking & Finance, and Structured Finance and Derivatives Groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000.
<http://www.weil.com>.

©2012. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations which depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list or if you need to change or remove your name from our mailing list, please log on to www.weil.com/weil/subscribe.html, or send an email to subscriptions@weil.com.