SICHENZIA ROSS FRIEDMAN FERENCE LLP

Utilizing a "Shelf" Registration Statement for a Follow-On Public Offering

Background

Under the Securities Act of 1933, as amended (the "Securities Act"), any public securities offering must be registered with the Securities and Exchange Commission (the "SEC"). In a follow-on public offering, a publicly reporting company offers securities to the public in an offering registered with the SEC subsequent to the completion of the issuer's initial public offering.

Form S-3 and Rule 415 Eligibility

The general form for registration of securities under the Securities Act is Form S-1. A filing made on Form S-1 must include extensive disclosure regarding the issuer and the offering, including, among other things, audited financial statements, a description of the issuer's business and properties, management's discussion and analysis of financial condition and results of operations, identification of and certain information regarding officers and directors of the issuer and its principal stockholders, the terms of the offering, and risk factors and plan of distribution (such as underwriting arrangements) for the offering.

As an alternative to the filing of a Form S-1, issuers that meet the requisite conditions may register offerings on Form S-3, a "short-form" registration pursuant to which certain information about the issuer may be incorporated by reference from previous and future filings made by the issuer with the SEC under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). It should be noted that Form S-1 also allows incorporation by reference under certain conditions, but only to prior filings made under the Exchange Act. By incorporating by reference future filings made by the issuer under the Exchange Act, a Form S-3 registration statement obviates the need to file post-effective amendments when, for example, the issuer's financial statements included in the initial registration statement are no longer deemed current, or there are otherwise material changes that have occurred to the issuer that are disclosed in filings made with the SEC.

Accordingly, issuers seeking to do a follow-on public offering will, subject to eligibility, file a Form S-3 rather than a Form S-1. To be eligible to file a registration statement on Form S-3, an issuer must meet the following conditions:

(i) the issuer is organized under the laws of, and has its principal business operations, in the United States (or files the same reports with the SEC as a domestic issuer subject to the Exchange Act);

(ii) the issuer has a class of securities registered pursuant to Section 12(b) or 12(g) under the Exchange Act, or is required to file reports under Section 15(d) under the Exchange Act;

(iii) the issuer has been subject to the requirements of Section 12 or 15(d) of the Exchange Act and has filed all the material required to be filed pursuant to the Exchange Act for a period of at least twelve calendar months immediately preceding the filing;

(iv) the issuer has filed in a timely manner all reports required under the Exchange Act during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement, other than a Current Report that is required solely pursuant to certain specified 8-K Items; and

(v) the issuer has not, since the end of the last fiscal year for which its audited financial statements were included in a report filed pursuant to the Exchange Act: (a) failed to pay any dividend or sinking fund installment on preferred stock; or (b) defaulted (i) on any installment or installments on indebtedness for borrowed money, or (ii) on any rental on one or more long term leases, which defaults are material to the financial position of the issuer.

Follow-on offerings are typically conducted under Rule 415 under the Securities Act, which allows for an "offering to be made on a continuous or delayed basis in the future". Thus, under Rule 415, an issuer may, at its convenience, file a "shelf" registration statement which includes a "base" prospectus, have the registration statement declared effective by the SEC, and subsequently, when it deems conditions suitable, conduct an offering by taking securities down "off the shelf." The shelf registration statement will specify a maximum dollar amount, and the type of securities (for example, common stock, preferred stock, warrants, debt securities and/or units consisting of some combination of the foregoing), that may be offered, but will not include specific offering terms. To take securities "off the shelf," the issuer will file a prospectus supplement which sets forth the specific terms of the offering (for example, underwriting arrangements, and price, number and type of securities). Unlike the original "base" Form S-3 filing, the prospectus supplement does not need to be declared effective by the SEC. The issuer can conduct multiple offerings on a single Form S-3 shelf registration statement, for a period of up to three years from when the shelf Form S-3 was declared effective, by filing a prospectus supplement for each such offering, up to the maximum dollar amount initially registered on the shelf registration statement (subject to any "baby shelf" limitations as discussed below), so long as the issuer remains S-3 eligible (which is determined on an annual basis when the issuer files its Annual Report on Form 10-K). Primary offerings made pursuant to Rule 415 must be made on (or be eligible for) Form S-3 and thus are typically registered on Form S-3.

"Baby Shelf" Offerings and Calculating "Public Float"

In addition to the issuer meeting the requirements for the filing of a Form S-3 specified above, primary offerings of common equity for cash made under Form S-3 must also meet the following conditions:

(i) the aggregate market value of the issuer's common equity held by non-affiliates of the issuer (sometimes referred to as the "public float") is $75 million or more; or

(ii) under what is known as a "baby shelf" offering, for an issuer which has a public float of its common equity of less than $75 million, (a) the aggregate market value of securities sold by the issuer under Instruction I.B.6 of Form S-3 (for primary offerings for cash) during the period of 12 months immediately prior to, and including, the sale is no more than one-third of its public float, (b) the issuer has not been a shell company for more than 12 months, or if it has been a shell company at any time previously, has filed current "Form 10 information" (which includes similar disclosure as required by a Form S-1 registration statement) with the SEC at least 12 months prior thereto, and (c) the issuer has a class of equity securities listed on a national securities exchange.

Thus, to conduct a "baby shelf" offering, an issuer must have a class of equity securities listed on a national securities exchange, such as the New York Stock Exchange or the Nasdaq Stock Market. This requirement does not apply to companies that have a public float of at least $75 million, which may conduct unlimited "shelf" offerings (subject to meeting the other conditions set forth above). The availability of "baby shelf" offerings to companies with less than $75 million in their public float, which has existed since amendments to Form S-3 were effected in January 2008, has provided an additional incentive for small companies to seek a listing on a national securities exchange while providing such companies with greater opportunities to conduct primary public offerings.

"Common equity" is defined for purposes of S-3 eligibility as any class of common stock or any equivalent interest and may include non-voting common stock. The calculation of the public float for purposes of determining whether the "baby shelf" limitations apply is based on the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, for such common equity as of any date within 60 days prior to the date of filing of the shelf Form S-3, multiplied by the number of shares of common equity held by non-affiliates. Non-affiliates are generally presumed to include shareholders other than officers, directors and shareholders who beneficially own 10% or more of the outstanding common equity. An issuer may use the highest such closing price within such 60 day period, multiplied by the number of shares held by non-affiliates as of the date of filing (or the number of shares held by non-affiliates as of any day within such 60 day period, which need not be the same date as the date used for the price of the common equity), to determine whether the "baby shelf" limitations apply or whether the issuer can sell an unlimited amount of securities off the shelf Form S-3. If the public float exceeds $75 million as of the date of the filing of the shelf Form S-3, calculated based on the 60 day lookback period described above, and subsequently falls below $75 million, the issuer will nonetheless not be subject to the "baby shelf" limitations until the issuer files its next Annual Report on Form 10-K, at which time such eligibility is reassessed.

Similarly, if an issuer is subject to the "baby shelf" limitation of selling only one-third of its public float over a one year period, the amount of securities an issuer may sell under a "baby shelf" offering will be equal to one-third of the public float as determined based on the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity for such common equity as of any date within 60 days prior to the date of sale, multiplied by the number of shares of common equity held by non-affiliates. The date used for the price of the common equity and the date used for the number of shares held by non-affiliates do not need to be the same. For example, if, as of October 20, 2015, the highest closing price of an issuer's common stock within the past 60 days was $3.00 which occurred on September 10, 2015, and the issuer has 10,000,000 shares of common stock held by non-affiliates as of October 20, 2015, the issuer may calculate its public float as of October 20, 2015 to be equal to $30,000,000 (notwithstanding that there may have been fewer than 10,000,000 shares held by non-affiliates as of September 10, 2015), and may sell up to $10,000,000 of common stock under Instruction I.B.6 of Form S-3 during the one year period ending on October 20, 2015. Further, if the issuer's public float was less than $75 million as of the date of the filing of the shelf Form S-3, but subsequently, while the Form S-3 is effective, the public float exceeds $75 million, the issuer will subsequently not be subject to the "baby shelf" limitations so long as the public float exceeds $75 million as calculated based on the 60 day lookback period described above. The value of securities underlying warrants included in a "baby shelf" offering will also count towards the "baby shelf" limitations.

Written by Sichenzia Ross Friedman Ference LLP Associate Jeff Cahlon, Esq.

Contact Mr. Cahlon at jcahlon@srff.com