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NEW SEC GUIDANCE EASES FORM S-3 REGISTRATION PROCESS FOR MORE PUBLIC COMPANIES

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WHAT HAPPENED

On March 20, 2025, the SEC staff published new interpretations:

- Allowing any company to file and go effective with a Form S-3 shelf registration statement after filing its Form 10-K but before filing its proxy statement.
- Relaxing certain disclosure requirements for foreign private issuers.

TAKEAWAYS

The new registration statement guidance will make capital raises by non-WKSI companies filing on Form S-3 easier, as they can proceed with offerings during periods before their proxy statements are finalized – a privilege previously only available to WKSIs (large seasoned public companies).

However, companies will need to consider whether to supplement their disclosures with any pending Part III information that may be material in the context of the particular offering. For example, while a company may look to rely on information from the prior year's proxy statement and subsequent Item 5.02 Form 8-Ks in a shelf takedown prospectus, in some cases an additional Form 8-K may make sense.

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FILING OR EFFECTIVENESS OF FORM S-3 AFTER FORM 10-K BUT BEFORE PROXY STATEMENT

In Revised CDI 114.05 (and Revised CDI 198.05), the staff extended the flexibility previously afforded only to WKSIs eligible to file automatically effective registration statements on Form S-3ASR to any company eligible to file Form S-3. This means that any eligible company can file and go effective with a Form S-3 during the gap period -- after filing its 10-K but before Part III information that will be incorporated into the 10-K from the proxy statement.

The staff withdrew CDI 123.01, which previously required companies filing non-automatic registration statements during the gap period to include Part III information in the 10-K or file the definitive proxy statement before the S-3 was declared effective.

At the same time, staff continues to caution that companies should make sure to include any information required to prevent the prospectus from becoming misleading. It stated:

> "[I]ssuers are responsible for ensuring that any prospectus used in connection with a registered offering contains the information required to be included therein by Securities Act Section 10(a) and Schedule A."

This statement suggests that companies should take care that disclosures in the prospectus are sufficient at the time of the offering.

RELIEF FOR FOREIGN PRIVATE ISSUERS

The SEC staff also published several interpretations relating to FPIs:

- Treating disclosure about a change in accountant in Form 6-K as "previously reported" for purposes of Form 20-F (CDI 110.10).
- Withdrawing several interpretations relating to Form F-SR (CDI 113.01; CDI 113.02; and CDI 113.03). The form had already been removed by the SEC in Technical Amendments (April 8, 2024), consistent with the Fifth Circuit's invalidation of the SEC's "Share Repurchase Modernization" rule, as discussed in our November 27, 2023 post and our April 8, 2024 post.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM

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