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TOP 10

PRACTICE TIPS BY EXPERTS: DRAFTING A REGISTRATION STATEMENT

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Drafting a registration statement for filing with the U.S. Securities and Exchange Commission (SEC) can be a daunting challenge, particularly in an initial public offering (IPO) with an issuer or counsel who has not previously faced the detailed regulatory requirements of the SEC. However, registration statements are not required only for IPOs. Issuers will also encounter peculiarities in the registration process for follow-on offerings as well. The following practice points address a variety of issues that issuers and counsel need to consider across the gamut of the registration process.

1. START WITH GOOD PRECEDENTS

There's no such thing as plagiarism in drafting a registration statement. With appropriate search tools, you should be able to find on Edgar a precedent that closely matches company size, industry, form and deal structure.

2. SELECT THE RIGHT FORM

Consider whether the issuer is eligible to use short-form Form S-3 and whether the "baby shelf" rules (instruction I.B.6 to Form S-3) apply, which limit the amount of money that can be raised in a 12-month period pursuant to a Form S-3 registration statement to not more than one-third of the non-affiliate public float. Consider whether the issuer is a foreign private issuer and eligible to use the F-series of forms, which have their own advantages. If the issuer is a smaller reporting company subject to the baby shelf rules, consider taking advantage of both the historical and forward incorporation provisions of Form S-1, which make the Form S-1 very similar to a Form S-3.

3. FILE A FORM OF INDENTURE WHEN SETTING UP A UNIVERSAL SHELF

If the issuer is filing a universal shelf registration statement, which would typically register a variety of securities, including common stock, preferred stock, warrants, units and debt securities, the issuer should file a generic form of indenture with its shelf registration statement. The reason for doing so is that filing a form indenture with an issuer's registration statement serves to qualify the indenture under the Trust Indenture Act of 1939 at the time the registration statement is declared effective. Unless the issuer is a well-

known seasoned issuer, it will not be entitled to qualify an indenture via a post-effective amendment. The generic form of indenture can be supplemented with the specific terms of any debt securities actually being issued by way of a supplemental indenture relating to such issuance.

4. USE "PLAIN ENGLISH"

Remember the obligation pursuant to Rule 421(d) (17 C.F.R. S230.421) under the Securities Act of 1933 to use "plain English." This means that the prospectus needs to be drafted in the first person, and there should be limited or no use of defined terms or technical jargon. Avoid words such as "certain," "such" and "unique". You also need to balance the need for the prospectus to be both a marketing document and a liability-preventing document. Most lawyers err on the side of making the registration statement an "insurance policy," but there should be a balance.

5. HANDLE CONFIDENTIAL INFORMATION WITH CARE

Be careful in drafting descriptions of material agreements when there is confidential information in the agreements. If the issuer would like to keep certain material terms of the agreements confidential, you need to file a confidential treatment request with, and obtain specific clearance from, the SEC to omit such terms in the filing. The SEC will not allow the registration statement to become effective until it is satisfied with the confidential treatment request. Since the registration process is based on a disclosure regime, the SEC is typically reluctant to provide confidential treatment except on a very narrow basis, so don't overreach in your request.

6. OBTAIN PERMISSION FROM THIRD-PARTY SOURCES

If an issuer is using third-party sources to support market data or similar information, you need to make sure that the issuer has permission from the source to use the information in the registration statement. Also, the SEC will require that consent be obtained from any such source if the source was commissioned by the issuer to generate the information. If a third party's consent is required but the third party is unwilling to provide such consent, you will most likely need to remove the information from the filing.

7. CONSIDER NECESSITY OF FINANCIAL INFORMATION

Before including financial information in the prospectus, consider whether the accountants for the issuer would be willing to provide comfort on that information. If it is unlikely that the accountants would provide comfort, the underwriters might be reluctant to include such information in the registration statement unless they were willing to perform the necessary diligence themselves to support the inclusion of the information.

8. REVIEW FINANCIAL STATEMENTS CAREFULLY

You cannot ignore financial statements. You should read them carefully and understand them, as often the most important information about an issuer is in the financial statements (in particular, the footnotes). Also, be aware of what financial statements need to be included in the

registration statement. This is a function of the status of the issuer (e.g., whether it is an emerging growth company, a foreign private issuer, or a smaller reporting company). Also be aware of the special rule for a non-public foreign private issuer, which provides that the financial statements be no older than 12 months at the date of filing. The SEC will waive this requirement if the issuer can establish that this is not required in any other jurisdiction outside the United States and complying with this obligation would be an undue hardship.

9. BE AWARE OF ANY RECENT ACQUISITIONS

Also with respect to financial statements, be cognizant of acquisitions that the issuer has made within the last couple of years. If an individual acquisition is significant enough (with "significance" being defined in the SEC rules) or if the aggregate of all acquisitions over the particular reporting period is significant enough, audited financial statements for the acquired companies may be required to be included in the registration statement. This can cause a major delay if it is not recognized early on.

10. SPELL ALL NAMES CORRECTLY

Often, the first thing (and maybe only thing) that a director, officer or a member of an underwriting syndicate might read in a registration statement is his, her, or its name in the prospectus or on the signature page. You will want to avoid a comment from a director, officer, or underwriter that his, her or its name has been misspelled.