

# Availability and Benefits of Shelf Offerings for Public Issuers

Article By:

Kenneth W. Bart, Jr.

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**Public issuers may benefit from the use of shelf offerings as an efficient, cost-effective alternative to Form S-1 in order to register shares as part of a primary offering, secondary offering, or as a benefit to its shareholders pursuant to a dividend reinvestment plan.**

## Shelf Offerings Generally

A shelf offering is a public offering of securities used by qualifying issuers as a way to offer securities in situations where some or all of the shares being offered are not planned to be immediately sold. A shelf offering allows for the registration of new sales of securities, resales of outstanding securities, and purchases of securities on behalf of an issuer's shareholders. Shelf registration statements are most commonly filed on Form S-3, which is a registration statement under the Securities Act of 1933 (the "Securities Act"); however, shelf offerings may also be filed on Form F-3 by foreign issuers. In most situations, shelf offerings on Form S-3 allow for sales of registered securities on a continuous or delayed basis, which allows for issuer flexibility when structuring the offering. A continuous offering is an offering where the registered securities will be offered within two days from effectiveness and will continue to be offered for the duration of the offering. A delayed offering is an offering where at the time of effectiveness, the issuer has no current intention of offering the securities being registered. Issuers that intend to conduct a delayed offering must satisfy additional requirements than those that intend to conduct a continuous offering.

## Benefits of Shelf Offerings

In most situations, the period of time between filing and effectiveness of a Form S-3 registration statement for a shelf offering is much shorter than for a primary or secondary offering registered on Form S-1, due to the fact that historically, the Securities and Exchange Commission is less likely to conduct a full review of the Form S-3 registration statement. The abbreviated time period for effectiveness allows issuers to conduct an offering quickly during advantageous market conditions. Also, when using Form S-3, an issuer is able to incorporate by reference documents previously filed under the Exchange Act, including the issuer's most recent annual report on Form 10-K, all other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the most recent fiscal year end, and Exchange Act reports and documents filed subsequent to the filing of the Form S-3. The ability to incorporate by reference documents filed subsequent to the Form S-3 alleviates the need to file post-effective amendments to disclose changes in the issuer's business. Additionally, Form S-3 requires the disclosure of less information than is required by other types of registration statements,

which can lower the costs and time associated with the preparation of the registration statement. The fact that a Form S-3 is, in most circumstances, a timelier filing than a Form S-1, less expensive than a Form S-1, and allows for the continuous or delayed offering of securities, results in shelf offerings being a desirable option for some public issuers.

## **Use of Form S-3 for Dividend Reinvestment Plans**

As a benefit to an issuer's shareholders, a qualifying issuer may use Form S-3 as a convenient and economical way for the issuer's shareholders to acquire additional shares of the issuer's stock pursuant to an issuer's dividend reinvestment plan, whereby shareholders who participate in the plan are able to reinvest interest and/or cash dividends that have accrued or been earned on the shareholders' existing shares, in order to purchase newly issued shares or shares that already trade in the open market. The benefits to the shareholders with respect to shares acquired pursuant to a dividend reinvestment plan, are that (i) the issuer, or the issuer's dividend reinvestment plan administrator, will purchase the shares on behalf of the shareholders without any further action by the shareholders, and (ii) typically, shareholders do not pay brokerage fees, commissions, or service charges related to the acquisition of the newly issued shares, as they would likely need to do if the shares were purchased directly by the shareholders in the open market. It is important to note that dividends received under a dividend reinvestment plan are treated as cash received for federal income tax purposes, even though the dividends are used to purchase additional shares.

## **Issuer requirements for shelf offerings on Form S-3**

In order to be eligible to conduct a shelf offering using Form S-3, an issuer must comply with several requirements. For instance, the issuer must be organized under the laws of the United States or a state or territory or the District of Columbia, and it must conduct its principal business operations in the United States or its territories. In addition, the issuer must: (i) have a class of securities registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), or (ii) have a class of equity securities registered pursuant to Section 12(g) of the Exchange Act, or (iii) be required to file reports pursuant to Section 15(d) of the Exchange Act. The issuer must also have been subject to the requirements of Section 12 or 15(d) of the Exchange Act and must have timely filed all material required pursuant to Section 13, 14 or 15(d) for at least twelve calendar months immediately preceding the filing of the Form S-3, with various exceptions for disclosures required to be filed on Form 8-K. There are additional issuer requirements for the filing of a shelf registration on Form S-3 related to certain dividend and financial default occurrences, foreign issuer qualifications, and electronic interactive data filings.

## **Transaction Requirements for Shelf Offerings on Form S-3**

As stated above, shelf offerings on Form S-3 may include either new sales of securities by the issuer, also known as a "primary offering," secondary resales of outstanding securities, known as a "secondary offering," or a combination of both a primary offering and a secondary offering. The Securities Act provides for various conditions that must be met in order for a primary offering or a secondary offering transaction to be registered on Form S-3. In the case of a primary offering by the issuer for cash, or in the case of outstanding securities to be offered for cash for the account of any other person, an issuer must have an aggregate market value of its voting and non-voting common equity held by non-affiliates of at least \$75 million. For primary offerings of non-convertible securities, other than common equity, an issuer must: (i) have issued (as of a date within 60 days prior to the filing of the registration statement), at least \$1 billion in non-convertible securities, other than

common equity, in primary offerings for cash, registered under the Securities Act during the prior three years, or (ii) the issuer must have outstanding (as of a date within 60 days prior to the filing of the registration statement) at least \$750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, registered under the Securities Act, or (iii) must be a wholly-owned subsidiary of a well-known seasoned issuer, or (iv) must be a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer. A well known seasoned issuer or "WKSI" is a company that is required to file reports with the SEC under Section 13(a) or 15(d) of the Exchange Act, meets the registrant requirements of Form S-3 or F-3, and either: (i) as of a date within 60 days of the filing of the registration statement has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of \$700 million or more, or (ii) as of a date within 60 days of the filing date of the registration statement, has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, registered under the Securities Act.

In order for secondary offerings to be eligible as a shelf offering on Form S-3, securities of the same class as those being registered must be listed and registered on a national securities exchange or must be quoted on the automated quotation system of a national securities association.

For smaller companies that do not qualify under the primary and secondary requirements listed above, Form S-3 may still be used for a shelf registration if: (i) the aggregate market value of the securities sold by or on behalf of the issuer during the twelve calendar months prior to, and including, the sale being registered, is not greater than one-third of its public float, and (ii) the issuer is not a shell company and has not been a shell company for at least 12 calendar months, and, if it has been a shell company at any time previously, has filed current Form 10 information at least 12 calendar months prior to the filing of the registration statement, providing disclosure and financial information that does not resemble a shell company, and (iv) the issuer has at least one class of common equity securities listed and registered on a national securities exchange.

## Conclusion

The above discussion of shelf offerings and the Form S-3 registration statement does not purport to be a complete description of all requirements and conditions for an issuer's eligibility to conduct a shelf offering or use Forms S-3 or F-3. For detailed information regarding the process of conducting a shelf offering, as well as additional disclosures and requirements necessary to conduct a shelf offering, please contact Ward and Smith, P.A.

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