

# PUBLICATION

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## Expiration Of Shelf Registration Statements to Commence December 1, 2008

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Several common types of shelf registration statements filed under the Securities Act of 1933 are set to begin expiring on December 1, 2008. Under the Securities Offering Reform rules adopted by the Securities and Exchange Commission (SEC) in 2005, a sunset provision causes certain shelf registration statements to expire three years after their initial effective date under the Securities Act of 1933. According to this provision, issuers need to refile certain shelf registration statements at least every three years. All public companies should consult legal counsel to determine which of their currently effective shelf registration statements must be replaced.

### Impact of the Three-Year Sunset on Shelf Registration Statements

For shelf registration statements that were effective prior to December 1, 2005, the SEC's transitional interpretation provides that the three-year period began to run on December 1, 2005. Such shelf registration statements will expire on December 1, 2008.

For shelf registration statements with effective dates on or after December 1, 2005, the three-year period begins on the initial effective date of the registration statement. Post-effective amendments subsequently filed do not extend the three-year period.

### Applicability of the Three-Year Sunset Provision

The three-year sunset applies only to certain types of registration statements. Under Rule 415(a)(5), these registration statements include:

***Form S-3 Automatic Shelf Registration Statement.*** Any automatic shelf registration statement filed by a well-known seasoned issuer (WKSI) for any type of offering, is subject to the three-year sunset. These registration statements may cover primary offerings by the company, secondary offerings by selling security holders and several other types of offerings that could have been registered on other types of registration statements. In particular, WKSI's that filed a universal shelf registration statement, or any other automatic shelf registration statement, shortly after December 1, 2005 may need to file a new registration statement.

***Registration Statements Registering Any Delayed or Continuous Shelf Offering.*** Registration statements registering any delayed or continuous shelf offering by an issuer under Rule 415(a)(1)(ix) or (x) such as universal, equity and debt registration statements are also subject to the three-year sunset. In order to continue to complete these offerings expeditiously, issuers will need to monitor and plan for the expiration of these shelf registration statements. In particular, any registration statement registering any delayed or continuous shelf offering by a company under Rule 415(a)(1)(ix) or (x) that became effective under the Securities Act before December 1, 2005 must be replaced by December 1, 2008.

***Registration Statements Covering Continuous Offerings.*** Registration statements covering continuous offerings such as combined dividend reinvestment/direct stock purchase plans (DRSPPs) that are open to new investors are subject to the three-year sunset.

***Mortgage Related Securities.*** Registration statements registering offerings of mortgage-related securities, including such securities as mortgage-backed debt and mortgage participation or pass through certificates, under Rule 415(a)(1)(vii) are also subject to the three-year sunset.

The three-year sunset does **not** apply to registration statements other than those noted above.

### **Plan for the Impact of Three-Year Sunset on Shelf Registration Statements**

With the expiration or sunset of many current shelf registration statements scheduled to begin on December 1, 2008, issuers should begin taking action to avoid potential timing problems that may affect ongoing offerings and capital markets access. Issuers should review their current shelf registration statements to determine whether (and if so, when) the three-year sunset provision will affect their registration statements. After determining when certain registration statements will expire, the issuer can develop a plan to refile new shelf registration statements to replace those that will expire under the sunset.

### **Use of "Expired" Registration Statements**

Under certain circumstances, issuers can continue to use expiring registration statements for a limited period of time after expiration, as long as the issuer has filed a new registration statement prior to the expiration. On the condition that the issuer has filed a new registration statement covering the securities offered by the prior registration statement, Rule 415(a)(5) provides for two different scenarios when a company can use a registration statement after the three-year sunset: First, a issuer may continue to offer and sell securities covered by the prior registration statement for up to 180 days after the third anniversary of the effective date of the prior registration statement (or, if earlier, until the new registration statement becomes effective). Second, in the case of a continuous offering of securities that began within three years of the initial effective date of the prior registration statement, the company may continue that offering until the effective date of the new registration statement if such offering is permitted under the new registration statement.

In all cases, issuers should be aware of possible impending expiration dates of their shelf registration statements and should plan to file new registration statements in accordance with the three-year sunset provision, allowing sufficient time to incorporate scheduling for timing factors and potential delays.