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Market Trends: Shelf Registrations and Takedowns

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Overview

Registered offerings pursuant to shelf registration statements permit companies to issue securities under a previously filed registration statement (referred to as a takedown of securities off the shelf) and offer them to the public on a continuous or delayed basis. Shelf registration statements are typically filed under Form S-3, for U.S. companies, or Form F-3, for foreign private issuers. This article discusses the market trends for shelf registrations and takedowns in 2016 as well as deal structure and process, disclosure trends, and outlook for 2017. Shelf registration statements filed by closed-end investment companies using Form N-2 and acquisition shelf registration statements on Form S-4 or Form F-4 are beyond the scope of this article. For additional information on shelf registrations generally, see [Shelf Registration](#).

In 2016, there were an estimated 1,472 shelf registration filings that sought to register approximately \$613.3 billion in aggregate offerings (excluding certain offerings by real estate investment trusts, closed-end investment companies, Canadian issuers under the Multijurisdictional Disclosure System, sovereign issuers, and dividend reinvestment plans). Approximately 7% of these registrations were filed by foreign private issuers, compared to approximately 5% in 2015. Shelf registration on Form S-1 also increased in 2016 to 23% of the total number of shelf registrations, compared to only 14% in 2015. The increased use of Form S-1 for shelf registration transactions is likely the result of the rule revisions that were adopted under the Fixing America's Surface Transportation (FAST) Act (114 P.L. 94, 129 Stat. 1312, 2015 Enacted H.R. 22, 114 Enacted H.R. 22), which became effective in January 2016, and allow smaller reporting companies to incorporate by reference filings they make in the future (forward incorporation) into their S-1 registration statements. For additional information on the FAST Act, see [FAST Act Effective Dates Chart](#).

Notable Transactions

In 2016, there were over 200 shelf takedown transactions that raised in excess of \$1 billion, including the Chinese online travel site Ctrip.com's \$1.3 billion shelf takedown of its American Depositary Shares (ADSs), apparel retailer TJX's issuance of \$1 billion of senior unsecured notes and the sale by certain selling stockholders of approximately \$1.3 billion of common stock of Zimmer Biomet Holdings, a medical device manufacturer. These transactions are examples of the broad variety of securities that may be offered pursuant to effective shelf registration statements.

Deal Structure and Process

A shelf registration statement is typically filed with the SEC on Form S-3 or Form F-3 depending on whether the company is a domestic issuer or a foreign private issuer. The shelf registration statement contains (i) a base prospectus, which includes general information about the issuer's business and risk factors and the securities to be registered, including a general plan of distribution, and (ii) other information about the issuer, including offering-related expenses, director and officer indemnification, certain exhibits, and undertakings. If the registrant is a [well-known seasoned issuer](#) (WKSIs), which is further discussed below, the registration statement will be automatically effective. A non-WKSI that files a shelf registration statement must clear any SEC review of the registration statement and then have its registration statement declared effective by the SEC before it can issue securities (i.e., take down securities off the shelf). Non-WKSIs must identify any selling stockholders (or, in certain circumstances, may refer generically to selling stockholders of securities initially issued in a specified transaction) in the registration statement and base prospectus (as opposed to in a prospectus

supplement). Once its shelf registration statement is effective, the registrant may issue securities using a prospectus supplement to the base prospectus that describes the specific securities to be offered as well as other terms relating to the offering that were not included in the base prospectus, such as the specific plan of distribution (e.g., an underwritten offering, etc.) and the intended use of proceeds for that particular offering. For additional information, see [How to Conduct a Shelf Offering](#) and [Filing Rule 424 Prospectus Supplements](#).

Shelf Eligibility

To be eligible to use a Form S-3 or Form F-3 shelf registration statement, an issuer must satisfy the following registrant requirements (collectively, the registrant requirements):

- Be a domestic entity (or a foreign issuer other than a foreign government that files the same reports under the Securities Exchange Act of 1934, as amended (the Exchange Act), as a domestic registrant) in the case of Form S-3 or a foreign private issuer in the case of Form F-3
- Have a class of securities registered under Section 12 of the Exchange Act
- Have been subject to the requirements of Section 12 or 15(d) of the Exchange Act for at least 12 calendar months and timely filed all Exchange Act reports (other than certain specified reports on Form 8-K) required to be filed during the 12 calendar months (and any portion of the current month) immediately preceding the filing of the registration statement
- Not have defaulted on indebtedness for borrowed money or material leases or have failed to pay any dividend or sinking fund installment on preferred stock since the end of the last fiscal year

If a registrant fails to file timely an Exchange Act report, it may not continue making offers and sales under an effective Form S-3 or Form F-3 registration statement after it files its next annual report (or other post-effective amendment to the Form S-3 or Form F-3 registration statement) until it once again has timely filed all of its Exchange Act reports for a period of 12 months.

In addition to the registrant requirements, the issuer must comply with the following applicable transaction requirements depending upon the type of securities being offered and whether the offering is a primary or secondary offering:

- Issuers that meet the registrant requirements and have a non-affiliate public float of at least \$75 million (within 60 days prior to the date of the filing of the registration statement) may register a primary offering of securities for cash using Form S-3 or Form F-3. See General Instruction I.B.1 of Form S-3 and Form F-3.
- Issuers that meet the registrant requirements and have a public float of less than \$75 million may register a primary offering of securities for cash if the company is not a shell company and has not been a shell company for the past 12 months and has at least one class of common equity securities listed and registered on a national securities exchange. These issuers are limited to selling securities equal to no more than one-third of their public float during any 12-month period. See General Instruction I.B.6 of Form S-3 and I.B.5 of Form F-3. If the issuer's public float equals or exceeds \$75 million at any time after the effective date of the shelf registration statement, this one-third offering cap will no longer apply. If, however, the issuer's public float subsequently falls below \$75 million at the time when its next annual report (or other post-effective amendment) is filed, the issuer will again be subject to the one-third offering cap.
- Issuers meeting the registrant requirements may offer non-convertible debt securities for cash on Form S-3 or Form F-3 if (as of a date within 60 days of the filing of the registration statement) the registrant has issued at least \$1 billion of non-convertible securities (other than common equity) for cash in registered offerings over the prior three years or has outstanding at least \$750 million in non-convertible securities (other than common equity) that were issued in registered primary offerings for cash. See General Instruction I.B.2 of Form S-3 and Form F-3.
- Issuers meeting the registrant requirements may also register outstanding securities to be offered for the account of any person other than the issuer so long as securities of the same class are listed and registered on a national securities exchange or are quoted on the automated quotation system of a national securities association. See General Instruction I.B.3 of Form S-3 and Form F-3. However, in certain circumstances such as sales by founders or other affiliates or resales of recently issued securities, the SEC may consider a secondary offering of a significant number of shares of an issuer who does not satisfy the \$75 million non-affiliate public float requirement as a disguised primary offering subject to the limitations described above for primary offerings.

For further information on Form S-3, see [Using Form S-3 Registration Forms](#), [Form S-3 Checklist](#), and [Comparison of Form S-1 and Form S-3 Registration Statements Checklist](#).

Three Year Limitation

Once effective, any of the securities registered under a shelf registration statement may be offered and sold at any time when needed or when market conditions allow. However, a shelf registration statement is generally available for primary offerings for only three years after its initial effective date. Shares to be sold by selling securityholders under a secondary offering shelf registration statement are not subject to a similar limitation. Unsold securities and SEC filing fees paid under an expiring registration statement may be carried over to a new registration statement.

WKSI Registrants

In order to be eligible for automatic effectiveness of a shelf registration statement, more flexible disclosure requirements, and a “pay-as-you-go” system for paying SEC registration fees, an issuer must qualify as a WKSI. A WKSI is an issuer that meets the following requirements as of a date within 60 days of the determination date (defined below):

- Has a worldwide non-affiliate public float of \$700 million or more or 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
- Is eligible to register a primary offering of its securities relying on General Instruction I.B.1 of Form S-3 or Form F-3
- Is not an ineligible issuer

The determination date refers to the date upon which it is determined whether an issuer qualifies for WKSI status, and is the later of (i) the filing of its most recent shelf registration statement, (ii) the filing of its most recent post-effective amendment, or (iii) if it has not filed a shelf registration statement in the previous sixteen months, the filing of its most recent annual report on Form 10-K. WKSI status is retested when the issuer files its annual report on Form 10-K. A key benefit to being a WKSI is that the automatically effective registration statement filed on Form S-3 is not subject to the risk of delay due to potential SEC review or the process of requesting acceleration of the effective date. In addition, the pay-as-you-go system allows WSIs to pay SEC registration fees at the time of each takedown rather than in the aggregate at the time of filing the registration statement. For additional information on WSIs, see [Understanding WSIs and Seasoned Issuers and Their Advantages](#).

Deal Terms

A shelf registration can be used by an issuer to register multiple offerings under the same registration statement, including primary offerings by an issuer, resales of outstanding securities by selling securityholders (i.e., secondary offerings), or a combination of the two. A shelf registration statement can cover issuances of both debt and equity securities, including common stock, preferred stock, securities underlying options, warrants, rights, and other convertible securities, and convertible and nonconvertible debt— in each case, to be offered on an immediate, delayed, or continuous basis.

A shelf registration statement may be used to register securities to be issued (or resold) under various offering structures, including:

- At-the-market offerings (ATMs)
- Equity lines of credit
- Block trades/bought deals
- Registered direct offerings
- Private investment in public equity (PIPE) transactions
- Medium-term note (MTN) programs

For additional information on these various types of offering structures, see [Comparison of Types of Equity Offerings Chart](#), [Understanding At-the-Market Offerings](#), [Market Trends: Block Trades](#), [Bought Deals: Time and Responsibility Schedule](#), [Bought Deals: The Right Questions to Ask Checklist](#), [Conducting Registered Direct Offerings](#), [Raising Capital Using a PIPE](#), [Understanding the Steps for Conducting a PIPE](#), [Drafting the Key Documents for a PIPE](#), [Market Trends: PIPEs](#), and [Establishing, Updating and Conducting Takedowns under a Medium-Term Note \(MTN\) Program](#).

The majority of follow-on equity offerings in the first quarter of 2016 used shelf registration statements and, as a result of market volatility, marketed their offerings over accelerated periods or via confidential offerings or overnight block trades. That percentage increased to approximately 80% of the follow-on equity offerings in the second and third quarters of 2016 as market volatility and the

flexibility of shelf registration offerings significantly reduced the level of traditionally marketed deal activity. In 2016, companies used shelf registration statements to conduct 197 ATM offerings raising approximately \$32.0 billion, compared to 136 ATM offerings in 2015 raising approximately \$18.3 billion. Companies also established smaller equity lines of credit using shelf registration statements in 2016 as compared to 2015, where 38 equity lines for nearly \$268 million in aggregate total commitment were implemented in 2016 versus 34 equity lines for over \$479 million in aggregate total commitment in 2015. Shelf registration PIPEs were down as well through the end of the third quarter of 2016 as a total of \$35.2 billion was raised in 673 PIPE transactions as compared to \$45.4 billion in 685 PIPE transactions during the corresponding period of 2015. Block trade transactions, however, were up, with a total of \$84.8 billion raised in 233 block trade transactions in 2016 as compared to \$53.9 billion in 136 block trade transactions in 2015.

As the trend towards fewer marketed transactions has accelerated in favor of more bought deals and overnight block trades, the length of lockup agreements entered into by issuers, their officers and directors, and the selling securityholders has shortened, likely due at least in part to the reduced negotiating leverage available to underwriters in overnight block trades and other non-marketed transactions. In 2015 almost 70% of underwritten secondary transactions included a 90-day lockup and an additional 20% of underwritten secondary transactions included a 60-day lockup. In contrast, in 2016 90-day lockups were included in just over 50% of underwritten secondary transactions, 60-day lockups were included in just over 30% of underwritten secondary transactions, and there was an increase in the use of both 30-day and 45-day lockup periods. For a general discussion of selling stockholder offerings, see [Taking into Account Issuer Considerations for Secondary Offerings](#).

Disclosure Trends

Emerging Growth Companies

Under the Jumpstart Our Business Startups Act of 2012 (112 P.L. 106, 126 Stat. 306) (JOBS Act), issuers that are [emerging growth companies](#) (EGCs), which generally includes issuers with annual gross revenues of less than \$1 billion during the most recently completed fiscal year, are eligible for exemptions from certain reporting, corporate governance and stock exchange listing requirements that otherwise apply to public companies. Accommodations to EGCs include reduced executive compensation disclosure, exemption for say-on-pay vote requirements, limited applicability of new accounting standards, and exemption from internal control auditing requirements. A company will retain EGC status until the earliest of:

- The end of the fiscal year in which its annual revenues exceed \$1 billion
- The end of the fiscal year in which the fifth anniversary of its initial public offering (IPO) occurred
- The date on which the company has, during the previous rolling three-year period, issued publicly or privately more than \$1 billion in non-convertible debt securities
- The date on which the company qualifies as a [large accelerated filer](#), which generally is an issuer that has an aggregate worldwide non-affiliate public float of at least \$700 million, has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for at least 12 months, and meets certain other requirements

Thus, an EGC with a fiscal year-end of December 31 that completed its IPO in 2016 would lose its EGC status on December 31, 2021, if not earlier. While larger EGCs may qualify as WKSIs while retaining EGC status, such companies will lose EGC status relatively quickly upon qualifying as a large accelerated filer. Smaller EGCs, with public floats of less than \$75 million, may register primary offerings on Form S-3 but will be subject to the one-third offering cap discussed above.

EGCs should closely monitor their EGC status for potential changes, which will result in more extensive disclosures in their Exchange Act periodic reports, expanded corporate governance and stock exchange listing requirements, and, potentially, accelerated SEC filing deadlines, all of which can impact the required disclosures and timing associated with shelf registrations. For additional information on EGCs, see [Emerging Growth Company Practice Guide](#), [Emerging Growth Company versus Smaller Reporting Company Comparison Chart](#), and [IPO Requirements for Emerging Growth Companies Checklist](#).

New Revenue Recognition Accounting Standard

In 2014, the Financial Accounting Standards Board (FASB) published “Accounting Standards Update (ASU) No. 2014-09, Revenue from Contracts with Customers (Topic 606)” (ASC 606), which will apply to public companies for reporting periods beginning after December 15, 2017. There are two methods to adopt ASC 606: the full retrospective transition method, which requires recasting past financial statements; and the modified retrospective method, which does not require recasting. In new or amended registration statements filed after reporting the first interim period reflecting adoption of the new standard, companies that use the full retrospective transition method to adopt ASC 606 must provide retrospectively recasted financial statements for the most recent annual periods required to

be included (or incorporated by reference) into the registration statement. This would result in recasting financial statements earlier and for an additional year than would otherwise be required if the Company was not filing a registration statement.

For example, if a calendar year-end company adopts ASC 606 under a full retrospective approach on January 1, 2018 and then files a Form S-3 in June 2018 (which is after filing its first quarter Form 10-Q), it is required by Form S-3, Item 11(b)(ii), to retrospectively recast its previously filed annual financial statements for the years ending 2017, 2016, and 2015, since financial statements for these years would be incorporated into the registration statement from the last Form 10-K. If the company did not file a Form S-3, it would only be required to recast 2017 and 2016, when it files its 2018 Form 10-K in early 2019. This would not apply if a company uses the modified retrospective method because that method does not require recasting any periods before the date of adoption.

The staff has further observed that generally accepted accounting principles (GAAP) provides for an impracticability exception to retrospective application if a company is unable to apply the requirement after making every reasonable effort to do so. The SEC’s Office of Chief Accountant is available for consultation if a registrant believes that, based on its facts and circumstances, a retrospective application of the new revenue recognition standard to all periods required to be presented in a Form S-3 is impracticable. Also, you should note that a prospectus supplement used in a shelf takedown from a currently effective Form S-3 is not subject to Item 11(b)(ii) updating requirements, but instead, under Item 512(a) (17 C.F.R. § 229.512) of Regulation S-K, registrants must update the prospectus with respect to any fundamental change. As a result of the potential requirement to recast financial statements for an additional year, issuers should consider whether to renew their shelf registration statements or file new shelf registration statements in late 2017 prior to a full retrospective adoption of this new accounting standard.

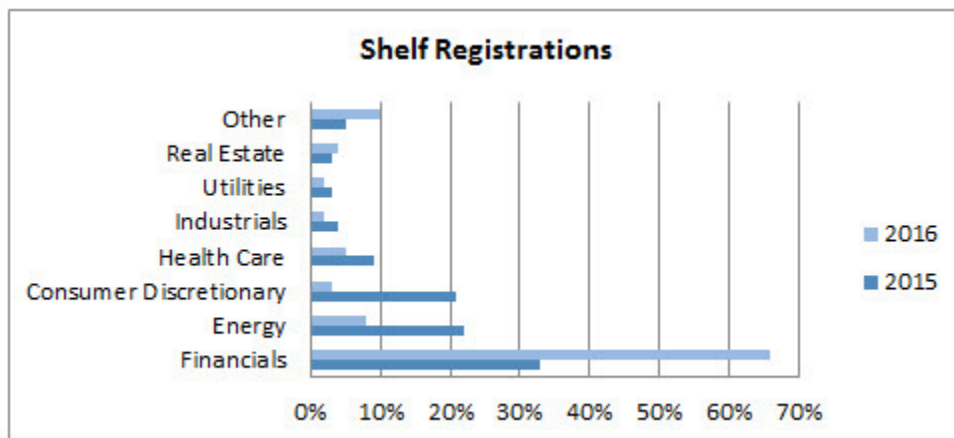
Industry Insights

Financial services companies dominated the volume of shelf registration statement filings in 2016 on a dollar-weighted basis (as measured by the amount of securities registered) representing about 66% of all shelf filings for the year, up significantly from 33% in 2015. JP Morgan Chase & Co. filed a universal shelf registration statement, registering over \$173.6 billion of securities, including debt securities, preferred stock, depositary shares representing preferred stock, common stock, warrants, units, and guarantees, which became effective in April 2016.

Although the energy sector significantly trailed financial services companies, it was the second largest sector in overall shelf registration activity in 2016, representing about 8%, a sharp decrease from 22% in 2015. Plains All American Pipeline, L.P. registered approximately \$4.5 billion of common units representing limited partner interests in November 2016 and Tallgrass Energy GP, LP registered over \$2.6 billion of Class A shares representing limited partner interests in August 2016.

The health care sector represented 5% of all shelf filings in 2016, declining from about 9% in 2015. CVS Health Corporation registered \$10.0 billion of debt securities on a shelf registration statement, which became effective in May 2016.

The volume of shelf registration statement filings for the consumer discretionary sector significantly declined from 21% in 2015 to 2.5% of all shelf filings in 2016.



Legal and Regulatory Trends

Proposed Changes to the Smaller Reporting Company Definition

In June 2016, the SEC proposed amendments to the definition of “smaller reporting company” that, if adopted, would expand the number of companies that qualify as a smaller reporting company. See SEC Release No. 33-10107, 34-78168 (June 27, 2016) available

at <https://www.sec.gov/rules/proposed/2016/33-10107.pdf>. The proposed amendments would modify the definition to include, among others, registrants with less than \$250 million in non-affiliate public float.

The below table summarizes the proposed amendments to the smaller reporting company definition:

Registrant Category	Current Definition	Proposed Definition
Reporting Registrant	Less than \$75 million of public float at end of second fiscal quarter	Less than \$250 million of public float at end of second fiscal quarter
Registrant Filing Initial Registration Statement	Less than \$75 million of public float within 30 days of filing	Less than \$250 million of public float within 30 days of filing
Registrant with Zero Public Float	Less than \$50 million of revenues in most recent fiscal year	Less than \$100 million of revenues in most recent fiscal year
Non-Smaller Reporting Company that Seeks to Qualify as a Smaller Reporting Company Based on Public Float	Less than \$50 million of public float at end of second fiscal quarter	Less than \$200 million of public float at end of second fiscal quarter
Non-Smaller Reporting Company with Zero Public Float that Seeks to Qualify as a Smaller Reporting Company	Less than \$40 million of revenues in most recent fiscal year	Less than \$80 million of revenues in most recent fiscal year

The proposed thresholds are consistent with those recommended by the Advisory Committee on Small and Emerging Companies and SEC Government-Business Forum on Small Business Capital Formation. While it is unclear whether these proposed amendments will ultimately be adopted by the SEC, if adopted, they would expand the number of companies that qualify as a smaller reporting company, which would increase the number of companies eligible to use forward incorporation on Form S-1 and, potentially, the number of shelf registration statements filed.

New SEC Staff Guidance Regarding Baby Shelf Offerings

In November 2016, the staff of the SEC Division of Corporation Finance issued a new Compliance & Disclosure Interpretation (C&DI) regarding Form S-3 and limited primary offerings under General Instruction I.B.6., or so-called baby shelf offerings, by issuers with public floats below \$75 million. See Securities Act of 1933 Forms C&DI, Question 116.25 (November 2, 2016), which is available at <https://www.sec.gov/divisions/corpfin/guidance/safinterp.htm#116-25>.

The new C&DI discusses a company that structures an offering to sell securities to investors, with a portion offered pursuant to a takedown from its shelf registration statement (in reliance on Instruction I.B.6., which permits it to sell up to one-third of its public float within a 12-month period) and a portion issued to the same investors pursuant to a separate private placement that it concurrently registers for resale on a separate Form S-3 (in reliance on Instruction I.B.3 for secondary sales). In such a circumstance, the C&DI advises that, if the aggregate number of securities exceeded the Instruction I.B.6 limitation, the staff would count the securities registered for resale on the separate resale Form S-3 against the company's available capacity under the baby shelf registration statement because the staff would view this offering structure as an impermissible evasion of the I.B.6 limitation. The C&DI further explains that if an issuer does not have sufficient capacity under Instruction I.B.6 to issue the aggregate amount of securities at the time of filing the resale registration statement, the issuer would need to either register the resale on Form S-1 or wait until it has sufficient capacity under Instruction I.B.6 to register the resale on Form S-3.

While this C&DI provides helpful clarification regarding baby shelf offerings, it is unlikely to have a significant impact on market practice, particularly given the availability to smaller reporting companies of forward incorporation on a Form S-1.

Other Key Market Trends

The financial services industry is moving towards the implementation of a T+2 settlement cycle (i.e., two-day settlement period) for U.S. equities, corporate and municipal bonds, and unit investment trusts by the third quarter of 2017, and regulatory changes are underway to accommodate the T+2 settlement cycle. While the shortened settlement cycle should not have a significant effect on market practice for shelf registrations and takedowns, deal teams will likely need to accelerate the process of finalizing the various closing documents and coordinating the settlement process with the transfer agent as the shortened settlement cycle will compress the period between pricing and closing. For additional discussion of the settlement cycle, see [Alternative Settlement Cycle Disclosure](#).

Market Outlook

Shelf registration statements generally provide an efficient and flexible means for issuers to access the capital markets, including during periods of market volatility. During periods of significant market volatility such as has been experienced recently, it is especially important for companies to establish and/or maintain an effective registration statement in order to facilitate rapid access to the capital markets during favorable market windows.

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