"Anatomy of a Shelf Takedown"

Thursday, December 18, 2025

Course Materials

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2 to 3 p.m. Eastern [archive and transcript to follow]

The shelf takedown process permits established public companies to access the capital markets quickly and efficiently. But every shelf takedown involves a lot of moving parts, and issuer's and underwriters' counsel need to effectively manage all of them to ensure a successful transaction. Join our panel of experts for an in-depth look at the legal and practical issues involved in a shelf takedown of debt or equity securities.

Joining us are:

- **Era Anagnosti,** Partner, DLA Piper
- **Amanda Rose,** Partner, Fenwick & West
- **Andrew Thorpe,** Partner, Gunderson Dettmer

Among other topics, this program will cover:

1. Overview of the Shelf Registration Process & Mechanics of a Shelf Takedown
2. Disclosure and Compliance Challenges
3. Underwriting Arrangements
4. Liability and Due Diligence Issues
5. Offering-Specific Considerations

"Anatomy of a Shelf Takedown"

Course Outline

1. Overview of the Shelf Registration Process & Mechanics of a Shelf Takedown

    - An issuer can use Form S-3 to set up "shelf" registrations under Rule 415 — registering a number of different types of securities (*e.g.*, common stock, preferred stock, debt, warrants) for sale in advance — and conducting future securities offerings through takedowns from the shelf with relative speed at varying market prices.

        - Rule 415 doesn't allow issuers to conduct primary offerings on a shelf basis using a Form S-1 registration statement. So, all securities in a Form S-1 offering must be sold at the same price and at the same time, giving the issuer less opportunity to take advantage of market conditions.

    - Most Form S-3 registrations involve "shelf" offerings made on a delayed or continuous basis under Rule 415.

        - A Form S-3 filed for primary and secondary shelf offerings — a "shelf S-3" — has a distinctive format. The shelf S-3 will typically contain a "base prospectus" that's included in the registration statement at the time it becomes effective. That base prospectus will contain a brief summary of the issuer's business, and will typically include general information about the types of securities to be offered, the use of proceeds (if a primary offering), and the plan of distribution.

        - When the issuer or selling shareholders decide to proceed with a "takedown" from that shelf S-3, the issuer will file a prospectus supplement containing detailed information about the specifics of the offering. This will include identification of any underwriters and selling shareholders involved in the transaction, the specific use of proceeds (if a primary offering), a description of the additional terms of the securities to be offered beyond those described in the base prospectus, a plan of distribution or "underwriting" section addressing the

distribution arrangements that will apply to the securities being offered, and a risk factors section that will address offering-related risks and may also update or add additional risk factors of general applicability.

- A detailed prospectus summary, summary financial information, a capitalization table, and other transaction-specific disclosures are typically included in the prospectus supplement as well. The prospectus supplement will be filed under Rule 424(b) and will be deemed to be a part of the registration statement that contains the base prospectus (*see* Rule 430B and Rule 430C).

2. Disclosure and Compliance Challenges

- A Form S-3 registration statement consists of:
  - Cover sheet
  - Prospectus containing the information required by Part I of Form S-3
  - Information, list of exhibits, undertakings and signatures required by Part II of Form S-3
  - Any required exhibits
  - Any other information or documents filed as part of the registration statement
  - All documents or information incorporated by reference in the Form S-3 (whether or not required to be filed). (Form S-3 provides issuers with flexibility to determine the extent to which they wish to satisfy the Form's disclosure requirements through incorporation by reference or by including the text of the required disclosure itself in the document.)

- In light of the flexibility provided by S-3 and the variations in formats discussed above, if an S-3 is being prepared for the first time, it's important for you to keep the following questions in mind:
    - Is the registration statement going to cover a single transaction or is it intended to be a shelf registration statement?
    - Are primary, secondary, or combined offerings contemplated?
    - Is the registration statement going to cover multiple classes of securities (*i.e.*, is it going to be a universal shelf S-3?
    - Is the issuer a WKSI?
    - Has a lead underwriter been selected? If so, information on stylistic preferences and the underwriters views on the disclosures included versus incorporated into the prospectus should be obtained.
- Once these questions have been answered, the next step should be to review precedent disclosure documents. Again, if a lead underwriter for the offering has been identified, their representatives or counsel may be a good source for information on precedent documents. If not, a review of the EDGAR database will lead to an abundance of precedent for any S-3 registered transaction.
    - When in doubt, review the S-3 filings of peer companies for insight on how others in the industry have approached the preparation of these registration statements. When drafting a registration statement, it's better for the initial draft to be over-inclusive rather than under-inclusive.
- Preparing the prospectus supplement for a particular transaction requires an understanding of the nature of the transaction. Again, there are ample precedents available on EDGAR for almost any possible variation of offering contemplated.
    - What particular securities are being offered?

  - Are there unique risks associated with the securities to be offered?
  - Is the transaction a primary, secondary or combined offering?
  - Is the takedown a traditional underwritten offering?
  - Is it a registered direct offering?
  - Is it an at the market offering?
  - Will the securities be sold exclusively in the United States — or will they be marketed to investors in other jurisdictions?

- To be eligible to use Form S-3, an issuer must meet certain issuer and transaction eligibility requirements established by the SEC. Eligibility requirements for the use of Form S-3 are set forth in General Instruction I to Form S-3.
- To be eligible to use Form S-3, an issuer must, among other things, satisfy the following issuer eligibility requirements:
  - Be a U.S. issuer
  - Have a class of securities registered under Section 12(b) or 12(g) of the Exchange Act, or be required to file reports under Section 15(d) of the Exchange Act
  - Have been subject to the Exchange Act reporting requirements for at least the twelve months immediately preceding the filing of the Form S-3
  - Have timely filed all required reports (including its proxy statement, annual report on Form 10-K, quarterly reports on Form 10-Q, and certain current reports on Form 8-K) during that time period and any portion of a month immediately preceding the filing of the Form S-3

- Missing a deadline to file a Form 10-K, 10-Q or certain 8-Ks will cause an otherwise eligible issuer to lose Form S-3 eligibility for at least 12 months

    - For example, if a company missed a filing that was due on January 15 but filed all subsequent periodic reports on time, it will be eligible to use a Form S-3 starting February 1 of the following year. This is because of the requirement to have timely filed all reports for the 12 calendar months — and any portion of a month preceding the use of Form S-3. *See* Securities Act Forms CDI 115.06.

    - The original date a filing was due — not the date when the filing was actually made — is used for calculating the return to S-3 eligibility

    - The SEC has acknowledged the hardship that could result from Form S-3 ineligibility caused by a missed 8-K filing. As a result, General Instruction I to Form S-3 specifically provides that failure to timely file certain 8-Ks won't result in loss of S-3 eligibility

    - An issuer that misses a filing deadline for an Exchange Act report may preserve its ability to use Form S-3 in one of three ways:

        - Rule 12b-25 filing deadline extension — for 10-Ks or 10-Qs that can't be timely filed "without unreasonable effort or expense"

        - Filing date adjustment — for late filings due to technical difficulties beyond the issuer's control

- Form S-3 eligibility waiver — used in very limited situations, allows an issuer to file or use a specific Form S-3 after missing an Exchange Act filing deadline

- For transaction eligibility requirements, a company that satisfies the issuer eligibility requirements and has a public float of ≥$75 million can use Form S-3 to register any offering of debt or equity for cash.
  - The SEC Staff has explained that General Instruction I.B.1's reference to "for cash" was intended only to make clear that Form S-3 isn't available for exchange offers or other business combination transactions. For example, Form S-3 would be available for transactions in which the consideration for the securities consists of promissory notes or services performed for the issuer by the recipient of the securities. *See* Securities Act Forms CDI 116.09.

- Companies with a public float of less than $75 million can use Form S-3 for the following types of offerings:
  - Primary offerings of non-convertible securities if the issuer:
    - Has issued at least $1 billion in aggregate principal amount of non-convertible securities (other than common equity) in registered primary offerings for cash in the past three years;
    - Has outstanding at least $750 million in non-convertible securities (other than common equity), which were issued in registered primary offerings for cash;
    - Is a wholly-owned subsidiary of a WKSI; or
    - Is a majority-owned operating partnership of a REIT that is a WKSI (General Instruction I.B.2)

- Secondary offerings of securities that are of a class listed on a national securities exchange (General Instruction I.B.3)

- Securities to be offered on the conversion of outstanding convertible securities, on the exercise of outstanding warrants, options or rights, or under a dividend reinvestment plan (General Instruction I.B.4)

- Any primary offering if the issuer meets certain requirements (General Instruction I.B.4, aka the "Baby Shelf Rule") (General Instruction I.B.6)

    - Under the Baby Shelf Rule, a registrant with a public float of less than $75 million may only sell under a Form S-3, during any 12-month period, securities having an aggregate market value of not more than one-third of the registrant's public float. To qualify for the Baby Shelf Rule, the issuer also must have a class of common stock listed on a national securities exchange and not be or have been a shell company for the past 12 months (and, if it had been a shell company previously, it must have filed current Form 10 information at least 12 months earlier reflecting that it's no longer a shell company).

    - Whether a company is subject to the Baby Shelf Rule limitations is initially determined at the time the Form S-3 is filed. If the public float was at least $75 million within 60 days prior to filing the Form S-3, there is no one-third cap initially. The standard is reassessed every time the company files a Form 10-K. As a result, even if the S-3 is filed when the company has a public float greater than or equal to $75 million, if the company's public float was not at least $75 million within 60 days prior to the filing of a subsequent Form 10-K, the company will be subject to the Baby Shelf Rule going forward — until the public float meets or exceeds $75 million again.

- To determine an issuer's "aggregate market value" for purposes of General Instruction I.B.1, you look at the price at which the issuer's common equity was last sold, or the average of the bid and asked prices of the common equity, as of a date within 60 days prior to the date of filing, and multiply that price by the number of shares of common equity held by non-affiliates. *See* Securities Act Forms CDI 116.06.

    - In calculating an issuer's public float for purposes of General Instruction I.B.1, an interim daily price may not be used instead of a closing daily price. *See* Securities Act Forms CDI 216.05.

    - In calculating whether the public float requirement has been met for purposes of General Instruction I.B.1, you only count common equity that is traded on a public market, such as an exchange, the OTC Bulletin Board, or the Pink Sheets.

    - In addition, you can't include shares in the public float computation until they are actually issued. *See* Securities Act Forms CDIs 116.08 and 216.05.

    - General Instruction I.B.1 requires a calculation of public float as of a date within 60 days of the Form S-3 filing date. However, in making the public float calculation, you don't have to calculate the number of shares held by non-affiliates for the same day on which the stock price is determined.

        - For example, you can use the number of shares outstanding on the date of filing, together with stock price for any day within the 60-day period. This means that an issuer is able to select the date(s) most favorable to it during the 60-day period. *See* Securities Act Forms CDIs 116.06 and 116.07.

- Section 10(a)(3) of the Securities Act provides that "when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use." Section

10(a)(3) is important because it's the source of the requirement to update shelf registration statements, including those on Form S-3. Eligibility for continued use of Form S-3 is assessed at the time of the required Section 10(a)(3) update of the prospectus.

- Once a Form S-3 has been filed, the issuer typically may continue to use that S-3 until its next Section 10(a)(3) update is due (typically, filing Form 10-K). When reassessing S-3 eligibility in connection with a Section 10(a)(3) update, for purposes of calculating public float under General Instruction I.B.1, you can use any day during the 60-day "look back" period from the filing date of the Form 10-K. *See* Securities Act Forms CDI 116.07.

- If an issuer's public float doesn't meet the minimum required by General Instruction I.B.1 at the time of the Section 10(a)(3) update, the issuer can't continue using the Form S-3 to conduct primary offerings pursuant to that instruction. Instead, it must amend its registration statement onto the form it's then eligible to use for a primary offering. (But it might be eligible to use Form S-3 pursuant to General Instruction I.B.6, the "Baby Shelf Rule." *See* Securities Act Forms CDI 114.02.

3. Underwriting Arrangements

- The Financial Industry Regulatory Authority ("FINRA") regulates the conduct of its member firms that act as underwriters in SEC-registered securities offerings. FINRA's Corporate Financing Department administers rules designed to ensure that underwriting terms and arrangements are not unfair or unreasonable. When a FINRA filing is required, an underwriter may not sell the issuer's securities until FINRA confirms that it has no objections to the underwriting arrangements (via a "No Objections Letter"). Pursuant to FINRA Rule 5110 (also known as the "Corporate Financing Rule"), all U.S. public debt and equity offerings must be filed with FINRA for review and approval prior to making any sales — unless an express exemption is available. In other words, a FINRA filing is required for each shelf

takedown for an issuer that is unable to rely on an exemption under the Corporate Financing Rule.

- Sometimes an issuer wants to file a shelf registration statement with the SEC at a time when no particular offering off that shelf is planned. The issuer may not yet have selected potential underwriters — and most likely hasn't identified any underwriters — in the registration statement. In this situation, the issuer itself can nevertheless make a FINRA filing at the time the base is filed even though it isn't required. An issuer might decide to do this to minimize the work that will have to be done — and therefore any potential delays — just before a takedown is planned.

- A FINRA filing is required for each shelf takedown for an issuer that is unable to rely on an exemption under the Corporate Financing Rule. Where a FINRA filing is required, the underwriters for the offering (or more likely, the underwriters' counsel) typically take the lead in gathering information needed to make the filings, making the filings, and communicating with the FINRA reviewer assigned to the offering.

- Certain types of public offerings don't typically have to be filed with FINRA. These include:

    - Shelf offerings registered on Form S-3 or F-3 by certain "experienced issuers" (as defined in FINRA Rule 5110).

    - Offerings (other than IPOs) by issuers that have investment grade unsecured nonconvertible debt securities or preferred securities, outstanding with a term of at least four years.

    - Offerings of investment grade-rated non-convertible debt or preferred securities.

    - Offerings of certain highly-rated asset backed securities.

- However, even if one of these exemptions otherwise applies, the presence of a conflict of interest under the provisions of FINRA Rule 5121 may trigger the need for a FINRA filing.

4. Liability and Due Diligence Issues

- Various parties (including the issuer, underwriters, directors, officers, experts) may be liable for misstatements or omissions from the registration statement and prospectus supplement under Sections 11 and 12 of the Securities Act and the anti-fraud rules.

- Establishing the underwriters' statutory due diligence defense against claims under Section 11 of the Securities Act involves:

  - Legal due diligence document review;

  - Management due diligence call, auditor due diligence call, bring down due diligence calls;

  - Obtaining a negative assurance letter, which refers to a statement in the legal opinions delivered to the underwriters by the issuer's counsel and the underwriters' counsel (or in a separate letter from each counsel) that confirms that nothing has come to counsel's attention to cause it to believe that the offering document contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements therein, in the light of the circumstances under which they are made, not misleading;

  - Obtaining a "Comfort letter," which refers to a letter from the issuer's auditors to the underwriters providing certain assurances with respect to financial information included in the offering document; and

  - Possibly obtaining other support for KPIs, financial information or other disclosures, sometimes in the form of certificates of the Chief Financial Officer or other member(s) of management.

5. Offering-Specific Considerations

    - Considerations for debt versus equity offerings
    - Considerations for at-the-market offerings, equity lines of credit, forward transactions and medium-term note programs
    - Application of Nasdaq Listing Rule 5635 and NYSE Listed Company Manual Section 312.03 requiring shareholder approval for the issuance of securities in certain situations
    - “Covered securities” and other blue sky law considerations

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Table of Contents — Course Materials

Market Edge
Timely insights, market trends

SEC Division of Corporation Finance announces significant change to shareholder proposal no-action process for upcoming proxy season

By Era Anagnosti & Sanjay Shirodkar on November 18, 2025

On November 17, 2025, the United States Securities and Exchange Commission (SEC)'s Division of Corporation Finance announced that it would significantly curtail its review of no-action submission requests for the upcoming proxy season (October 2025–September 30, 2026).

According to its **statement**, the SEC staff will not respond to no-action requests nor express any views on companies' intended reliance on any bases for exclusion under Rule 14a-8 of the Securities Exchange Act (Exchange Act) (except for those based on Rule 14a-8(i)(1), which generally relates to proposals that are not a proper subject for shareholder action under state law).

New Rule 14a-8 policy

The announcement sets out a bifurcated process for (1) procedural and substantive grounds for the exclusion of shareholder proposals under all basis for exclusion under Rule 14a-8 other than Rule 14a-8(i)(1) and (2) grounds for exclusion under Rule 14a-8(i)(1). Companies seeking to exclude shareholder proposals under Rule 14a-8 are still required to notify the SEC staff and the proponent at least 80 calendar days before filing their definitive proxy statement of their intent to exclude the proposal in compliance with Rule 14a-8(j).

Companies should be aware that while informational in nature, the notification pursuant to Rule 14a-8(j) must include "[a]n explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule."

Recent statements regarding Rule 14a-8(i)(1)

The SEC cited "recent developments regarding the application of state law and Rule 14a-8(i)(1)" and the lack of "a sufficient body of applicable guidance for companies and proponents to rely on" in its decision to preserve the review of no-action requests based on the Rule 14a-8(i)(1) exclusion. It is notable that SEC Chair Paul Atkins also recently commented on the Rule 14a-8(i)(1) exclusion. As discussed in our prior **article** regarding the future of Rule 14a-8, Chairman Atkins indicated that the SEC would be receptive to requests from Delaware incorporated companies seeking to exclude precatory shareholder proposals based on Rule 14a-8(i)(1), and that such requests would likely prevail provided that they were supported by opinions from Delaware counsel.

Key considerations for the upcoming proxy season

If a company intends to rely on Rule14a-8(i)(1) to exclude a shareholder proposal, it should follow the current procedures that include submitting a no-action letter to the SEC staff. However, rather than the previous process in which the SEC staff would formally review and

respond to each such no-action letter, the SEC staff will no longer review and respond to the procedural and substantive ground raised by a company to exclude a particular proposal for the upcoming proxy season.

In addition, if a company wishes to have a formal record of corresponding with the SEC staff as part of its decision to exclude a proposal, the company will need to include unqualified representations in its correspondence indicating that it has reasonable bases for exclusion, relying on Rule 14a-8, prior published guidance, and/or judicial decisions.

In such an instance, the Division's response will be limited to stating that, based solely on the company's representation, the SEC staff will not object to the exclusion. Importantly, the Division will no longer evaluate the adequacy of the representation or the merits of the exclusion basis asserted by a company for the upcoming season.

The guidance also applies to no-action requests received before October 1, 2025, to which the SEC staff has not responded. Accordingly, companies wishing to receive a response for previously submitted requests must provide the required representation. All notifications must be submitted via the Division's online Shareholder Proposal Form.

On the same day of the announcement, SEC Commissioner Caroline Crenshaw issued a **response** criticizing the policy for appearing to benefit companies at the expense of shareholders, stating:

"This is the latest in a parade of actions by this Commission that will ring the death knell for corporate governance and shareholder democracy, deny voice to the equity owners of corporations, and elevate management to untouchable status."

Implications for companies

The Division's new policy regarding Rule 14a-8 proposals is a significant change to the current process. While it is not clear whether there will be any challenges to this new process, the policy could potentially reduce the volume of shareholder proposals for the upcoming proxy season.

Companies receiving shareholder proposals for their upcoming annual meetings stand in a unique position of deciding whether to exclude a shareholder proposal without the ability to

rely on a no-action ruling, unless the company has to ability to argue an exclusion under the Rule 14a-8(i)(1) basis.

While the SEC no-action relief is non-binding, companies or shareholder proponents previously did not often resort to the courts to address the appropriateness of excluding a shareholder proposal.

Given the change in the SEC's policy for this proxy season, companies should also bear in mind that shareholder proponents still have the ability to seek judicial review of exclusions under Rule 14a-8, which could become more prevalent during the upcoming proxy season.

As a result, companies should carefully assess whether they have one or more reasonable bases to seek to exclude a shareholder proposal under Rule 14a-8, as well as the likelihood of a court challenge. Companies are encouraged to work with legal counsel in assessing next steps, including whether, in light of this SEC policy change, a formal withdrawal of a submitted no-action request would be in order to the extent the company decides to include the proposal in its proxy statement. (*See* **Staff Legal Bulletin No. 14** (Questions 14 and 15).

DLA Piper will continue to monitor developments related to Rule 14a-8 and shareholder proposals for the upcoming proxy season.

For more information, please contact the authors.