

SEC Staff Issues Guidance Affecting the Registration of Securities for Resale on Form S-3

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The staff of the Securities and Exchange Commission recently issued interpretive guidance relating to the registration of the resale of shares sold to an investor pursuant to a private placement, if the issuer concurrently sold, to the same investor, shares in a primary offering utilizing a shelf registration statement. As explained in this alert, the guidance primarily impacts "smaller reporting companies."^[1]

The guidance, which is reproduced below, applies if the issuer is registering the resale of privately placed securities by investors in reliance on Instruction I.B.3 of Form S-3^[2] while simultaneously registering securities for its own primary issuance to the same investors in reliance on Instruction I.B.6 of Form S-3.^[3] Instruction I.B.6 limits the amount of shares that an issuer can sell (or "take down") during a 12-month period to no more than one-third of the issuer's public float, measured at the time of sale. In its new guidance, the staff clarifies that in measuring this one-third limit, the issuer must include not only the shares intended to be sold in the issuer's primary offering pursuant to Instruction I.B.6, but also the shares sold in the concurrent private placement registered for resale pursuant to Instruction I.B.3. If the aggregate amount exceeds the one-third limit, then the issuer cannot register the resale of the privately placed shares on Form S-3. However, the issuer may register the resale on Form S-1 without regard to the aggregate limit. In implementing the guidance, common stock and securities convertible or exercisable for the common stock (e.g., a warrant) are considered the same class.

Earlier this year, the SEC revised the Form S-1 registration statement to permit a smaller reporting company to incorporate by reference into a Form S-1 its periodic reports filed *after* the effectiveness of the Form S-1. This change, combined with the existing ability to incorporate by reference periodic reports filed prior to the effectiveness of the Form S-1, means that a smaller reporting company registering the resale of securities may have little incentive to use Form S-3 over Form S-1. Larger reporting companies would not be relying on Instruction I.B.6 to conduct a primary issuance of securities and, accordingly, this new guidance would not impact their use of Form S-3.

Text of the Guidance:

Question: An issuer with less than \$75 million in public float is eligible to use Form S-3 for a primary offering in reliance on Instruction I.B.6, which permits it to sell no more than one-third of its public float within a 12-month period. May it sell securities to the same investor(s), with a portion coming from a takedown from its shelf registration statement for which it is relying on Instruction I.B.6 and a portion coming from a separate private placement that it concurrently registers for resale on a separate Form S-3 in reliance on Instruction I.B.3, if the aggregate number of shares sold exceeds the Instruction I.B.6 limitation that would be available to the issuer at that time?

Answer: No. Because we believe that this offering structure evades the offering size limitations of Instruction I.B.6, the securities registered for resale on Form S-3 should be counted against the issuer's available capacity under Instruction I.B.6. Accordingly, an issuer may not rely on Instruction I.B.3 to register the resale of the balance of the securities on Form S-3 unless it has sufficient capacity under Instruction I.B.6 to issue that amount of securities at the time of filing the resale registration statement. If it does not, it would need to either register the resale on Form S-1 or wait until it has sufficient capacity under that instruction to register the resale on Form S-3.

[1] Generally, a "smaller reporting company" is an issuer that has a public float (i.e., value of common equity securities held by non-affiliates) of less than \$75 million, measured as of the last business day of the issuer's most recently completed second fiscal quarter.

[2] An issuer may rely on Instruction I.B.3 to register the resale of shares as long as the class of shares is listed on a national securities exchange.

[3] An issuer generally relies on Instruction I.B.6 to register its issuance of shares if its public float is less than \$75 million and it has at least one class of securities listed on a national securities exchange.

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