

CHAPTER 7A

THE REGISTRATION PROCESS

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§ 7A.01 Introduction

[1] Overview

The Securities Act of 1933 is based on the premise that investors are fully capable of evaluating the merits of a securities offering if they are furnished with accurate and complete information regarding the issuer of the securities and the offering itself. Disclosure is the purpose of the statute, and registration of securities with respect to an offering is the principal tool used to achieve that purpose.¹

The focal point of registration is the registration statement,² which is filed with the SEC and consists of two parts: a prospectus that is used to offer the securities to the investing public and a separate segment containing supplemental information that is not furnished to investors.³ The prospectus contains both narrative and financial information about the issuer and the offering,⁴ and is intended to provide prospective investors with a balanced picture of all relevant material information.

The process of registration begins with the preparation of the registration statement by a team typically consisting of members of the issuer's management,

¹ Relatively few offerings actually are registered, due to the availability of a variety of exemptions from registration provided by the Securities Act.

² See Chapter 7 for information regarding the various registration forms that are available to register securities and the conditions for using them. Form S-1 or (for foreign private issuers) Form F-1 is utilized when no other form is authorized or prescribed for an offering and is commonly used for initial public offerings.

³ Both the prospectus and the supplemental information are available to the public upon filing with the SEC. See Rule 120, which indicates that registration statements filed electronically can be accessed through the SEC's web site (<http://www.sec.gov>).

⁴ The information required to be disclosed in the prospectus portion of a registration statement is specified in the applicable registration form. Each registration form contains a series of "items" and related instructions that typically refer to the disclosure requirements contained in either Regulation S-K, 17 C.F.R. § 229, or (for small business issuers) Regulation S-B, 17 C.F.R. § 228, and to the financial statement requirements contained in Regulation S-X, 17 C.F.R. § 210. In addition, Industry Guides set forth at 17 C.F.R. § 229.800 may apply to issuers in selected industries.

investment bankers representing the underwriters for the offering, lawyers for the issuer and the underwriters, and representatives of the auditor for the issuer. During the period the registration statement is being drafted, the responsible parties conduct a due diligence review of the issuer in an effort to ensure that the information in the registration statement satisfies the requirements of the Securities Act. A properly conducted due diligence review will provide these persons (other than the issuer) with a defense against liability that may arise from claims by investors in the offering that they suffered losses because the disclosures in the registration statement were materially deficient.

When the registration statement is deemed by the responsible parties to be accurate and complete, it is filed with the SEC. Some types of registration statements become effective automatically upon filing, but a substantial number are examined by the SEC staff soon after filing to determine whether a detailed review of some or all of the registration statement is appropriate. Where a registration statement is selected for review (and practically all initial public offerings are so selected), the staff will examine it closely and issue a letter commenting on disclosure deficiencies or other issues identified by it. The issuer will address the staff's concerns in amendments to the registration statement and informal letters or other communications. When the staff believes that its concerns have been satisfactorily addressed, it will make the registration statement effective upon request by the issuer. At that point, the issuer can complete the selling process by confirming sales to investors and taking the other steps necessary to complete the offering.

[2] Liability

The liability provisions of the Securities Act are essential to the successful application of the Act to registered offerings.⁵ Without these provisions, which expose the principal parties involved in an offering to severe sanctions for violations of the Act, there would be little incentive to comply with the Act's requirements. Liability for a deficient registered offering can arise under the following provisions of the Act:⁶

⁵ For discussion of liability under the Securities Act following major reforms adopted by the SEC in 2005, see J. McLaughlin, *Liability Considerations of Securities Offering Reform*, Sec. Lit. Rep. (Legalworks) (January-February 2006).

⁶ Liability of the certifying officers also can arise under Sections 302 and 906 of the Sarbanes-Oxley Act of 2002 where the CEO and CFO of an issuer in a registering public offering issue certifications of deficient periodic reports filed under the Exchange Act that are incorporated by reference into a registration statement under the Securities Act.

- Section 11 permits purchasers to sue the parties responsible for the preparation of the registration statement (i.e., the issuer, directors, officers who signed the registration statement, underwriters, and auditors and other experts) for losses sustained as a result of material misstatements or omissions in the registration statement;⁷
- Section 12(a)(2) entitles purchasers to rescind the purchase (or sue for damages if they have already sold the security) if the offer or sale was made by means of a prospectus or oral communication containing material misstatements or omissions;⁸
- Section 17(a)(2) prohibits the use of material misstatements or omissions to obtain money or property by any person involved in the offer or sale of a security.⁹

Liability under Sections 12(a)(2) and 17(a)(2) is determined at the time of the contract of sale, rather than at a later date after the commitment to invest has been made.¹⁰ In contrast, liability under Section 11 is determined at the time the registration statement becomes effective.¹¹ The statute of limitations for violations

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⁷ The Supreme Court, in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), made it more difficult for plaintiffs to plead and prove losses in registered offerings due to fraud (i.e., material misstatements or omissions) by requiring that the plaintiff allege that the loss suffered by the purchaser in the aftermarket was the direct result of the fraud becoming known in the marketplace.

⁸ The defendant, however, may avoid liability under Section 12(a)(2) by proving that the misstatements or omissions did not cause the loss. See Section 12(b) of the Securities Act.

⁹ The SEC has indicated that Sections 12(a)(2) and 17(a)(2) “do not require that oral statements or the prospectus or other communications contain all information called for under our line-item disclosure rules or otherwise contain all material information.” Sec. Act Rel. No. 33-8591, § IV.A.1. at n.393 (2005).

¹⁰ See Rule 159, which was adopted by the SEC as part of major Securities Act registration reforms that became effective on December 1, 2005. As a result of Rule 159 and Rule 430B(g), any information (whether written or oral) that might mitigate liability but is conveyed to the purchaser after the time of sale, including subsequently provided information deemed part of and included in or incorporated by reference into the registration statement or prospectus, is disregarded for purposes of determining liability. See Sec. Act Rel. No. 33-8591, § IV.A.1. (2005). See also J. McLaughlin, *Securities Offerings, Late-Breaking Information and the SEC’s Rule 159*, Securities Reg. & L. Rep. (BNA) (June 19, 2006) 1077.

¹¹ See Section 11(a) of the Securities Act. The decision in *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, Fed. Sec. L. Rep. (CCH) ¶ 93,126 (5th Cir. 2005), has narrowed (in the Fifth Circuit, at least) the class of plaintiffs that can sue under Section 11. See generally N. Hensley, N. Even and T.

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Behrens, *Court of Appeals for the Fifth Circuit Sharply Curtails Potential Liability Under Section 11 of the Securities Act of 1933*, 37 Sec. Reg. & L. Rep. (BNA) (April 11, 2005) 643.

