

Practice Note



When the Devil is in the Details: Special Issues Around SEC Registration Fees

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Amidst the flurry of paperwork, filing deadlines, disclosure requirements and other puzzle pieces required to successfully complete an offering of securities, it is easy to lose track of routine details, such as the payment of the registration fee required by the Securities and Exchange Commission (SEC) for an offering of registered securities. Failure to pay the required SEC registration fee could result in serious consequences for the issuer of the securities and the applicable underwriters. This *Sidley Practice Note* discusses the SEC registration fee requirements, best practices and special fee issues that issuers, underwriters and their respective counsel may confront.

Executive Summary

To register the offer and sale of securities with the SEC, companies must pay a fee under Section 6(b) of the Securities Act of 1933 (Securities Act). This requirement applies uniformly to all registered offerings, to all issuers and to all classes of securities.

The registration fee is calculated by multiplying the actual or estimated public offering price for all securities being offered by the prevailing registration fee rate. The elements of the calculation are shown and explained in a fee table included in a registration statement or, in limited cases described herein, the final prospectus.

The consequences of a mistake in the payment of the registration fee range in severity. Forgetting to make a fee payment may be easy to fix in some cases, requiring only a supplementary filing with the SEC and payment of the fee itself, but in other cases, it would prevent the effective registration of the securities being offered. Other fee issues involving offerings denominated in a foreign currency, mistakes in wiring the proper amount of funds to the SEC and reallocating pre-funded but unused fees, are all straightforward for seasoned practitioners.

Calculating the Registration Fee

The Securities Act sets the registration fee at a given rate per \$1 million of securities offered. For many years, the fee was fixed at two-tenths of 1% of the offering amount. Since 1996, the rate of the fee has changed annually. The SEC publishes the current rate and the calculation method online at <http://www.sec.gov/ofm/Article/feeamt.html>. As of the date of this *Sidley Practice Note*, the fee is \$100.70 per \$1 million of securities offered; accordingly, the fee is currently determined by multiplying the maximum aggregate offering proceeds by .0001007.

The registration fee may be calculated in one of two ways, which may be used interchangeably during the course of an offering. Under the first method, as provided by Rule 457(a) of the Securities Act, a fixed number of securities is registered. The fee is determined by multiplying the number of securities registered by a *bona fide* estimate of the public offering price per security to calculate the proposed maximum aggregate offering proceeds. The benefit of Rule 457(a) is that increases in the price of the company's securities being offered subsequent to the filing of the registration statement will not require payment of an additional registration fee. Because a number of securities, rather than a dollar amount, is registered, such number of securities will be considered registered regardless of the actual public offering price per security at which the offering is eventually consummated.

Accordingly, only an increase in the number of securities registered will require payment of an additional registration fee. The following fee table illustrates a fee calculation under Rule 457(a):

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered	Proposed Maximum Aggregate Offering Price per Share(1)	Proposed Maximum Aggregate Offering Price(1)	Amount of Registration Fee
Common Stock, par value \$0.00001 per share	1,000,000	\$100.00	\$100,000,000.00	\$10,070.00

(1) Estimated solely for the purpose of calculating the amount of registration fee in accordance with Rule 457(a) under the Securities Act of 1933.

Under the second calculation method, as provided by Rule 457(o) of the Securities Act, a dollar amount of securities is registered. Rule 457(o) is useful in the early stages of an offering, when a company may not wish to disclose (or does not yet know) the number of securities it expects to offer or the price at which it will offer them. Only an increase in the maximum aggregate offering proceeds of the securities registered will require payment of an additional registration fee. The following fee table illustrates a fee calculation under Rule 457(o):

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered	Proposed Maximum Aggregate Offering Price per Share	Proposed Maximum Aggregate Offering Price(1)	Amount of Registration Fee
Common Stock, par value \$0.00001 per share			\$100,000,000.00	\$10,070.00

(1) Calculated pursuant to Rule 457(o) based on an estimate of the proposed maximum aggregate offering price.

A fee table must be included on the facing page of each registration statement filed with the SEC, including automatic shelf registration statements on Form S-3 filed by “well-known seasoned issuers,” or “WKSIs.” WKSIs have two options for payment of the registration fee: they may take advantage of the SEC’s “pay as you go” rules or pre-fund all or part of the registration fee.

Under the pay-as-you-go rules, the fee table may simply state that the company is deferring payment pursuant to Rule 456(b) and Rule 457(r):

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered (1)	Proposed Maximum Aggregate Offering Price per Unit (1)	Proposed Maximum Aggregate Offering Price (1)	Amount of Registration Fee (1)
Common Stock, \$0.00001 par value				
Debt Securities				
Warrants				
Preferred Stock				
Total				

- (1) An indeterminate number of securities of each class, proposed maximum offering price per security of each class and proposed maximum aggregate offering price of securities of each class are being registered as may from time to time be offered or be issued on exercise, conversion or exchange of other securities. Separate consideration may or may not be received for securities that are issuable on exercise, conversion, or exchange of other securities, or that are issued in units. In accordance with Rules 456(b) and 457(r) under the Securities Act of 1933, the registrant is deferring payment of the registration fee. Any registration fee will be paid subsequently on a pay-as-you-go basis in accordance with Rule 457(r). The securities registered hereunder may be sold separately or as units with other securities registered hereby.

Except for WKSIs filing automatic shelf registration statements in reliance upon the pay-as-you-go rules, a company must pay the registration fee prior to the filing of its shelf registration statement on Form S-3. To preserve flexibility in a company's ability to offer all classes of securities on a shelf registration statement, often referred to as a universal shelf, it need not specify the exact number or offering price for the types of securities being registered, instead using a blanket fee payment toward all classes of securities being registered. The fee table for a pre-funded, universal shelf by a non-WKSI is illustrated below:

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered	Proposed Maximum Aggregate Offering Price per Unit	Proposed Maximum Aggregate Offering Price (1)	Amount of Registration Fee
Common Stock, par value \$0.00001 per share			\$100,000,000.00	\$10,070.00
Debt Securities				
Warrants				
Preferred Stock				

- (1) The proposed maximum aggregate offering price of all securities issued from time to time pursuant to this registration statement shall not exceed \$100,000,000 or the equivalent thereof in one or more foreign currencies. Any securities sold hereunder may be sold separately or as units with other securities registered hereunder.

WKSIs may choose to pre-fund a portion of the registration fee applicable to securities registered in a universal shelf by noting the fee allocable to a specified maximum offering proceeds from securities offered in the future and disclosing reliance on the pay-as-you-go rules for all subsequent offerings. The fee table for such a situation could read as follows:

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to be Registered (1)	Proposed Maximum Aggregate Offering Price per Unit (1)	Proposed Maximum Aggregate Offering Price (1)(2)	Amount of Registration Fee (1)(2)
Common Stock, par value \$0.00001 per share				\$10,070.00
Debt Securities				
Warrants				
Preferred Stock				

- (1) An indeterminate number of securities of each class, proposed maximum offering price per security of each class and proposed maximum aggregate offering price of securities of each class are being registered as may from time to time be offered or be issued on exercise, conversion or exchange of other securities. Separate consideration may or may not be received for securities that are issuable on exercise, conversion or exchange of other securities, or that are issued in units.
- (2) Pursuant to Rules 456(b) and 457(r) under the Securities Act, the registrant is deferring payment of the filing fees relating to the securities that are registered and available for sale under this registration statement, except for \$10,070.00 of filing fees that have been paid on the date of this registration statement pursuant to Rule 457(o) with respect to \$100,000,000 in maximum aggregate offering price of securities that are available for sale in future offerings.

Payment Mechanics

Companies may pay registration fees by check, money order or wire transfer through the FEDWIRE system. Instructions to make payments via check, money order or wire transfer are available at:

<http://edgar.sec.gov/info/edgar/fedwire.htm>.

Checks or money orders must be made payable to the Securities and Exchange Commission, and should *not* include the name or title of any individual agency official.

When making a payment through the FEDWIRE system, the company must include the:

- transaction dollar amount (*i.e.*, the total wire value);
- sending bank's name and ABA number;
- receiving bank's name and ABA number;
- SEC's account number (152307768324) with U.S. Bank (available through: <http://edgar.sec.gov/info/edgar/wire-instruction.pdf>);

- Central Index Key (CIK) number of the company registering securities (if different than the entity remitting the funds);
- name, address and bank account number of the entity remitting the funds; and
- CIK number of the entity paying the funds.

U.S. Bank's hours of operations for wire transfers are 8:30 a.m. to 6:00 p.m., Eastern Time.

Wire transfers through the FEDWIRE system are not instantaneous and a company should be sure to discuss wire transfer procedures with its banks or wire transfer service in advance of filing to ensure timely payment.

Payment Timing

A company filing a registration statement on Form S-1 must pay the registration fee prior to filing. To the extent an estimated offering size is used to calculate the registration fee for purposes of a company's initial Form S-1 filing, the company must also pay any additional fee resulting from a subsequent recalculation whenever it updates the contemplated offering size included in its fee table. As with the initial filing, any additional fee must be paid prior to the amended filing. The same method applies to a company that registers a discrete (non-shelf) offering on Form S-3. See *Special Issues – Increasing the Offering Size* with respect to the payment of the registration fee pursuant to Rule 462(b).

For automatic shelf registration statements, timing of the registration fee payment depends on whether a WKSII elects to rely on the pay-as-you-go rules or to pre-fund its offerings thereunder. Under the pay-as-you-go rules, a WKSII is required to pay the registration fee prior to the end of the second business day following the earlier of the date of the determination of the offering price or the date the final prospectus supplement and base prospectus is first used. In practical terms, this means that the WKSII must ensure that the SEC receives its registration fee prior to 5:30 p.m., Eastern Time, on the second business day after the pricing of an offering. The "second business day" is always the second business day following the calendar day when the offering was priced, even if pricing occurred after the close of the market.

WKSIIIs that have elected to pre-fund the applicable registration fee, if a specific dollar amount of securities are registered on an automatic shelf registration statement, and companies filing a universal shelf other than on an automatic shelf registration statement are required to pay the registration fee prior to the filing of the shelf registration statement.

Special Issues

Failure to Pay: Automatic Shelf Registrations

Where a good faith effort to pay the registration fee for a particular offering under an automatic shelf registration statement is made within the prescribed two-business day period but such effort is not fully successful or compliant with the pay-as-you-go rules (for example, where a payment is made, but a CIK code is omitted), SEC rules allow a four-business day grace period for the company to satisfy the pay-as-you-go rules. No additional prospectus filings are required.

If a company does not make a good faith effort to pay the registration fee in the initial two-business day period, or fails to properly pay the registration fee prior to the expiration of the four-business day grace period, it should promptly make the required payment of the registration fee to the SEC and file a new prospectus supplement that includes the proper fee table. Importantly, SEC rules provide that an automatic shelf registration statement whose WKSII is relying on the pay-as-you-go rules will be considered filed for the purposes of the particular offering when such automatic shelf registration statement is initially filed with the SEC. The SEC staff has asserted that the failure to pay a registration fee involves no violation of Section 5 of the Securities Act.¹

In connection with each offering of securities, WKSIIIs and their counsel should communicate with the financial printer to confirm the amount of the company's funds that the SEC holds in its account and ensure that sufficient funds are available, and proper instructions are given, for payment of the registration fee. Underwriters and their

¹ Securities Act Rules Compliance and Disclosure Interpretations 639.01, (Jan. 26, 2009), [available here](#).

counsel should also consult company counsel and, when possible, the financial printer to ensure that the pay-as-you-go rules have been satisfied, thereby avoiding last-minute registration fee issues.

Failure to Pay: Form S-1 Offerings and Regular Form S-3 Offerings

Unlike offerings conducted on a Form S-3 automatic shelf registration statement, offerings conducted on Form S-1 or other Form S-3 registration statement (including shelf registration statements that are not automatic) (regular shelf registration statements) do not allow for any timing flexibility for the payment of the registration fee. To complete the filing of a Form S-1 or a regular Form S-3 registration statement, a company must pre-fund its SEC account with sufficient funds to cover the amount of registration fee included in the registration statement's fee table.

If the company does not pre-fund its SEC account with sufficient funds, then it will not be permitted to file its registration statement and, accordingly, any such filing will be in fee suspension. In this case, the company must immediately transfer funds through the FEDWIRE procedures described above, and then re-file its registration statement. Transfers made outside of U.S. Bank's hours of operations (including filings made when the EDGAR system opens for the day at 6:00 a.m., Eastern Time) may not appear in the company's SEC account until U.S. Bank opens the next day at 8:30 a.m., Eastern Time. Until the required transfer so appears, the company may not file its registration statement.

As with automatic shelf registration statements, advance communications to confirm that sufficient funds for payment of the registration fee for Form S-1 registration statements and regular shelf registration statements on Form S-3 are available in the company's SEC account and that proper payment instructions have been given will prevent last-minute registration fee issues.

Failure to Include a Fee Table

If a company fails to include a fee table in its registration statement, it cannot register an offering of securities, even if it has already wired the required amount of the registration fee to the SEC. The fee table is required to indicate to the SEC that any such funds should be allocated to a particular offering. The practical consequences of, and remedies for, such an omission will mirror those discussed above under Failure to Pay – Automatic Shelf Registrations and Failure to Pay: Form S-1 Offerings and Regular Form S-3 Offerings.

Increasing the Offering Size

Upon filing the preliminary registration statement, companies conducting an offering on Form S-1 or a regular shelf registration statement on Form S-3 can increase the number or dollar amount of securities being registered before the registration statement is declared effective. To increase the offering size before the registration statement is declared effective, the company can file a Form S-1/A or Form S-3/A with a fee table indicating the amended offering size and associated fee and rule pursuant to which such fee is being calculated. Under Rule 457(a), the company would have to pay an additional fee only if the number of securities being registered increased, while under Rule 457(o), the company would have to pay an additional fee only if the dollar amount of the securities being registered increased.

After effectiveness, increasing the offering size is technically more complicated. Except for automatic shelf registration statements filed by WKSIs, post-effective amendments are generally not permitted for this purpose, as expressed in Rule 413, and a new registration statement relating to the additional securities will be required. Rule 462(b) provides a simplified process for filing such a registration statement to increase an offering up to 20% above the maximum aggregate offering price stated in the fee table for the original filing, which, in the case of shelf registration statements, the SEC has construed to mean up to 20% of the dollar amount of securities remaining as part of the last offering under the applicable registration statement.² Rule 462(b) registration statements become effective on filing with the SEC and payment of the registration fee is required prior to the close of business on the next business day after filing. An important limitation to observe is that Rule 462(b) filings must precede the time any confirmations of sale are sent or given.

When a WKSI registers a specified amount of securities on an automatic shelf registration statement and sells all of such securities, it can register additional securities on such registration statement through one or more post-effective amendments that automatically become effective upon filing, and payment of the associated registration fee may be deferred pursuant to the pay-as-you-go rules or be pre-funded, as described above.

² Securities Act Rules Compliance and Disclosure Interpretations 244.03, (Jan. 26, 2009), [available here](#).

Underwriters' Options to Purchase Additional Securities

If a company grants its underwriters an option to purchase additional securities in connection with the offering of securities on Form S-1 or a discrete (non-shelf) offering of securities on Form S-3, called a "Green Shoe" option, the company must register and pay the registration fee for the securities relating to the Green Shoe at the time of the original filing. The fee table may include a footnote that indicates that the securities being registered includes securities that the underwriters have the option to purchase, although there is no technical requirement to do so.

For companies offering securities on a regular shelf registration statement, there must be an amount of securities registered at the time of the particular offering that includes the Green Shoe option, and the registration fee for those securities must have been paid prior to the filing of such registration statement. The same holds true for WKSIs that fail to rely on the pay-as-you-go rules. Otherwise, WKSIs must pay the registration fee for the Green Shoe option pursuant to the pay-as-you-go rules. If a WKSI relying on the pay-as-you-go rules cannot determine, at the time of filing the final prospectus supplement and base prospectus, if the Green Shoe option has been exercised, it may defer payment of the registration fee on the securities relating to the Green Shoe option until the time the option is later exercised, if applicable. This would also require the WKSI to re-file a prospectus supplement with an updated fee table reflecting the exercise of the Green Shoe option.

Offering Securities on the Basis of Fluctuating Market Prices

For discrete (non-shelf) offerings of securities with fluctuating prices (e.g. a follow-on common stock offering), as provided in Rule 457(c) of the Securities Act, companies must calculate the registration fee based on the average price of the same class of securities on a specified date within five days prior to the date of filing of the registration statement. If the securities are exchange-traded or last-sale-reported over-the-counter securities, the company should use the average of the high and low prices reported in the consolidated reporting system. If the securities are other types of over-the-counter securities, then the company should use the average of the bid and ask prices. In either case, the fee table should contain an explanatory note on the manner in which the fee was calculated.

Failure to Include a CIK

A company must include its CIK number when submitting the wire transfer intended to pay its registration fee. Because this number identifies the entity from which the SEC is receiving the associated funds, failure to include the CIK is almost tantamount to an anonymous donation to the SEC's bank account.

To remedy such an oversight, a company officer having direct control over fee payments or company funds needs to write a letter, on company letterhead, requesting that the SEC move the exact amount of the fee paid to the specified CIK. The company must then e-mail that letter to the SEC at filingfees@sec.gov. Upon receipt and processing of the letter, the SEC will designate the funds to the specified CIK. Designation of the funds will take at least one hour from SEC receipt of the letter, but may take considerably longer. Companies should be sure to contact the SEC by telephone upon e-mailing the designation letter, and to follow up until the problem is resolved to ensure prompt recognition of the registration fee.

Foreign Currency Issues

Even when securities are denominated in foreign currencies, the registration fee rate for their offering is always calculated using U.S. dollars. As such, the choice of exchange rate for foreign currency-denominated securities will affect the required registration fee. The SEC has not prescribed any rules on currency translations for foreign-currency denominated securities. As a matter of market practice, many companies refer to the most recent noon-buying rate from the Federal Reserve, which is updated weekly and is available at http://www.federalreserve.gov/releases/h10/hist/dat00_eu.htm. Other companies refer to the most recent spot rate available before the registration statement is filed, using information sources such as a Bloomberg (<http://www.bloomberg.com/markets/currencies>) or Reuters (<http://www.reuters.com/finance/currencies>). All of these sources appear acceptable to the SEC's staff.

The company should disclose, in a footnote to the fee table, the exchange rate it used to calculate the registration fee, the date as of which this rate was taken, and the source from which the exchange rate was obtained, as follows: "The U.S. dollar equivalent of the maximum aggregate offering price has been calculated using an exchange rate of ___ as of ___, as announced by ___ as of ___ [a.m./p.m.], Eastern Time."

Debt Securities Sold at a Discount

Debt securities are often sold with a discount, where the price an investor pays for a given security is lower than the principal amount of such security. The amount of the registration fee should be based on the discounted price to be paid by the investor, and not the principal amount of the debt securities offered.³

Offering of Convertible Securities

Where a company offers securities that are convertible or exchangeable into other securities within one year of issuance, the applicable company must register its underlying securities. Unless additional consideration is payable for issuance of the underlying securities on conversion or exchange, the registration fee will be based only on the offering price of the convertible/exchangeable securities issued at closing, and no fee will be due on the underlying securities, pursuant to Rule 457(i).

In the rare case that a company registers convertible/exchangeable securities alone (because they are not convertible or exchangeable under any circumstances within one year of issuance), the company would be required to pay a registration fee on the convertible/exchangeable securities. Later conversions (but not generally exchanges) of those securities would normally be exempt from registration pursuant to Section 3(a)(9) of the Securities Act.

Renewal of Shelf Registrations – Re-Registering Unsold Securities

Rule 415(a)(5) under the Securities Act limits the duration of automatic shelf registration statements and other delayed or continuous securities shelf offerings permitted by Rule 415(a)(1)(vii), (ix), and (x) under the Securities Act to three years from effectiveness. On or before the third anniversary of effectiveness, a shelf offering may be refreshed under Rule 415(a)(6) of the Securities Act. Unsold securities and the associated fees are transferred to the new registration statement, subject only to the requirement for identification of the securities and fees allocated to the new registration statement. An explanatory footnote should be included on the bottom of the facing page, as shown below:

“Note: Pursuant to Rule 415(a)(6) under the Securities Act, the registrant is carrying forward to this registration statement \$_____ in aggregate offering price of securities that were previously registered on registration statement no. _____ of the registrant and registration fees of \$_____ that were previously paid in connection with those securities pursuant to Rule 457([a/o]).”

The inclusion of any newly registered securities in a new shelf registration statement under Rule 415(a)(6) will mean that an additional registration fee will be due. To prevent confusion, the unsold securities should not be included in the maximum aggregate offering price in the new fee table.

If new securities will not be registered on the replacement registration statement, a company should enter “\$1” as the proposed maximum aggregate offering price in its EDGAR header tag, but should enter “\$0” as the fee paid. Because EDGAR will not accept any registration statement unless a proposed maximum aggregate offering price is specified in the EDGAR header tag, failing to enter a dollar amount will result in the system’s rejection of the registration statement. Following this procedure will not result in the assessment of a registration fee.

Reallocation of Leftover Fees for New Securities

While refunds of registration fees are not permitted, companies may allocate pre-funded but unused registration fees from terminated offerings for the registration of new securities through Rule 457(p) under the Securities Act, even if the new securities are of a different class. The rule also allows the allocation of pre-funded but unused fees to offerings by majority-owned subsidiaries of the original filer or a parent that owns a majority of the original filer’s voting stock. Rule 457(p) may be used as an alternative to the procedure prescribed in Rule 415(a)(6), especially when the fee rate for the current period is lower than the rate in effect at the time of filing the initial registration statement.

To take advantage of Rule 457(p), a company must offer securities using a registration statement filed within five years of the initial registration statement. The company should add a footnote to the fee table on any such subsequent registration statement as follows: “Pursuant to Rule 457(p) under the Securities Act of 1933, the registrant is offsetting such amount that has already been paid against the \$_____ registration fee relating to the securities offered by this registration statement [or, in the case of an automatic shelf registration statement, the applicable prospectus supplement].”

³ Securities Act Rules Compliance and Disclosure Interpretations 140.03, (Nov. 26, 2008), [available here](#).

When the registration fee is reallocated under Rule 457(p), the unsold securities under the initial registration statement are removed from registration without the necessity of a post-effective amendment. As a consequence, a company may not offer any securities under the initial registration statement.

Fractional Share Aggregation

Rule 236 under the Securities Act provides that the aggregation of fractional shares in connection with certain transactions is exempt from registration. Although a company wishing to conduct such an “aggregation offering” is required to furnish certain information to the SEC in advance of the offering, no registration fee is required.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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