The Confidentially Marketed Public Offering for the Smaller Reporting Company

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What is it?

A Confidentially Marketed Public Offering (“CMPO”) is an offering of securities registered on a shelf registration statement on Form S-3 where securities are taken “off the shelf” and sold when favorable market opportunities arise, such as an increase in the issuer’s price and trading volume resulting from positive news pertaining to the issuer. In a CMPO, an underwriter will confidentially contact a select group of institutional investors to gauge their interest in an offering by the issuer, without divulging the name of the issuer. If an institutional investor indicates its firm interest in a potential offering and agrees not to trade in the issuer’s securities until either the CMPO is completed or abandoned, the institutional investor will be “brought over the wall” and informed on a confidential
basis of the name of the issuer and provided with other offering materials. The offering materials made available to investors are typically limited to the issuer’s public filings, and do not include material non-public information ("MNPI"). By avoiding the disclosure of MNPI, the issuer mitigates the risk of being required to publicly disclose the MNPI in the event the offering is terminated. Once brought over the wall, the issuer, underwriter and institutional investors will negotiate the terms of the offering, including the price (which is usually a discount to the market price) and size of the offering. Once the offering terms are determined, the issuer turns the confidentially marketed offering into a public offering by filing a prospectus supplement with the Securities and Exchange Commission ("SEC") and issuing a press release informing the public of the offering. Typically, this occurs after the close of markets. Once public, the underwriters then market the offering broadly to other investors, typically overnight, which is necessary for the offering to be a “public” offering as defined by NASDAQ and the NYSE (as discussed further below). Customarily, before markets open on the next trading day, the issuer informs the market of the final terms of the offering, including the sale price of the securities to the public, the underwriting discount per share and the proceeds of the offering to the issuer, by issuing a press release and filing a prospectus supplement and Current Report on Form 8-K with the SEC. The offering then closes and shares are delivered to investors and funds to the issuer, typically two or three trading days later.

What Type of Issuer Can Conduct a CMPO and How Much Can an Issuer Raise?

To be eligible to conduct a CMPO, an issuer needs to have an effective registration statement on Form S-3, and is therefore only available to companies that satisfy the criteria to use such form. For issuers that have an aggregate market value of voting and non-voting common stock held by non-affiliates of the issuer ("public float") of $75M or more, the issuer can offer the full amount of securities remaining available for issuance under the registration statement. Issuers that have a public float of less than $75M will be subject to the “baby shelf rules”. In a CMPO, issuers subject to the baby shelf rules can offer up to one-third of their public float, less amounts sold under the baby shelf rules in the trailing twelve month period prior to the offering. To determine the public float, the issuer may look back sixty days from the date of the offering, and select the highest of the last sales prices or the average of the bid and ask prices on the exchange where the issuer’s stock is listed. For an issuer subject to the baby shelf rules, the amount of capital that the issuer can raise will continually fluctuate based on the issuer’s trading price.

What Exchange Rules Does an Issuer Need to Consider?

The public offering period of a CMPO must be structured to satisfy the applicable NASDAQ or New York Stock Exchange criteria for a “public offering”. In the event that the criteria are not satisfied, rules requiring advance shareholder approval for private placements where the offering could equal 20% or more of the pre-offering outstanding shares may be implicated. Moreover, a sale of securities in a transaction other than a public offering at a discount to the market value of the stock to insiders of the issuer is considered a form of equity compensation and
requires stockholder approval. Nasdaq also requires issuers to file a “listing of additional shares” in connection with a CMPO.

**Advantages and Disadvantages of CMPOs**

There are a number of advantages of a CMPO compared to a traditional public offering, including the following:

- A CMPO offers an issuer the ability to raise capital on an as needed basis as favorable market conditions arise through a process that is much faster than a traditional public offering.

- The shares issued to investors in a CMPO are freely tradeable, resulting in more favorable pricing for the issuer.

- In a CMPO, the issuer can determine the demand for its securities on a confidential basis without market knowledge. If terms sought by investors are not agreeable to the issuer, the issuer can abandon the CMPO, generally without adverse consequences on its stock price.

- If properly structured as a public offering, a CMPO will negate the requirement to obtain stockholder approval for the transaction under applicable Nasdaq and NYSE rules.

Disadvantages of conducting a CMPO include:

- To conduct a CMPO, an issuer must be eligible to use Form S-3 and have an effective registration statement on file with the SEC.

- Issuers subject to the baby shelf rules may be limited in the amount of capital they can raise in a CMPO.

- In the event a CMPO is abandoned, investors that have been “brough over the wall” and received MNPI concerning the issuer may insist that the issuer publicly disclose such information to enable such investors to publicly trade the issuer’s securities.

This article is for general information only and may not be relied upon as legal advice. Any company exploring the possibility of a CMPO should engage directly with legal counsel.

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