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Barclays' failure to implement adequate internal controls to track sales of securities under shelf registration statements resulted in Barclays repurchasing $17.6 billion in unregistered securities at a substantial loss

By Robert Finkel

Shelf registration statements are used by issuers of securities to register and sell securities. Shelf registration statements customarily incorporate by reference historical SEC filings, such as Form 10-Ks, and otherwise do not contain significant investor information concerning the issuer. The ability to register the securities, and thereby have the securities "on the shelf," is advantageous for issuers because it expedites future sales of securities. An issuer, with an effective shelf registration, that desires to sell securities, need not seek further approval from the SEC. Instead, the issuer can take the securities it already registered "off the shelf" and sell those to investors. This allows issuers to capitalize on changes in market conditions without delay. Shelf registration statements are valid for up to three years.

To file a shelf registration statement the issuer must meet the eligibility requirements defined in Form S-3.[1] To qualify as a "Well-Known Seasoned Issuer" (WKSI), an issuer must meet the criteria set forth in 17 CFR § 230.405.[2] In general terms, to qualify as a WKSI, the issuer must meet the following criteria: (1) (A) "as of a date within sixty days of the determination date," have "a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of $700 million" or (B)(1) "as of the date within sixty days of the determination date," have "issued in the last three years more than $1 billion in aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash" and (B)(2) "will register only non-convertible

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1 17 CFR § 239.13.
2 17 CFR § 230.405.


securities, other than common equity," and (2) "is not an ineligible issuer."[3] In May 2017, Barclays became an "ineligible" issuer and thereby lost its WKSI status because Barclays was the subject of an administrative order arising out of a government action that required Barclays to cease and desist from violating the anti-fraud provisions of the federal securities laws.[4] Barclays continued to be eligible to file shelf registration statements, but not as a WKSI.[5]

Shelf registration is particularly advantageous for WKSIs because WKSIs need not specify the quantity of securities the WKSI intends to sell or pay registration fees upfront. In 2016, for example, Barclays Bank PLC filed a shelf registration statement ("2016 Shelf") as a WKSI and therefore did not detail the quantity of securities it intended to sell. Due to the loss of its WKSI status in 2017, Barclays' 2016 Shelf was no longer valid. After Barclays lost its WKSI status, Barclays was required to identify the quantity of the securities to be sold pursuant to its shelf registration statements and pay the registration fees upfront.[6] Barclays did not amend the 2016 Shelf until March 2018 ("2018 Shelf").[7] Barclays' 2018 Shelf covered $21.3 billion in securities and was effective for the next 18 months. In 2019, Barclays filed another shelf registration statement, which covered up to $20.8 billion in securities ("2019 Shelf").[8]

Because Barclays had historically been a WKSI issuer, it lacked internal controls to track the market price of securities it had sold pursuant to its 2018 Shelf and 2019 Shelf. In March 2022, Barclays disclosed that it sold more securities than it registered in its 2018 Shelf and 2019 Shelf; therefore, Barclays sold unregistered securities. This revelation caused Barclays' stock price to fall, on March 28, 2021, from $9.05 to $8.09. Barclays' blunder could have been prevented if a proper system of internal controls was in place to track the quantity of securities sold pursuant to the 2018 Shelf and 2019 Shelf. The sale of unregistered securities not only harms the issuer's reputation but also provides all the purchasers of said unregistered securities with a right of rescission.[9] A right of recission essentially provides the purchaser of an unregistered security with a put on the security for the price said security was purchased. The issuer is required to buy back all the securities it sold without proper registration. The issuer incurs a loss to the extent the securities repurchased fell in value after their issuance. In July 2022, Barclays acknowledged in its Form 6-K that the unregistered securities it sold had declined in value and that it would incur £1.3 billion in losses to buy back those securities.[10]

Plaintiffs, who were investors in Barclays, rather than in the unregistered securities, sued Barclays for securities fraud. Plaintiffs alleged that Barclays violated the Securities Exchange Act § 10(b) because it had misstated in its public SEC filings that the securities issued pursuant to shelf registrations were appropriately registered with the SEC. The Plaintiffs further alleged that Barclays

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3 17 CFR § 230.405 (Definition of Well-Known Seasoned Issuer).
4 In the Matter of Barclays Capital Inc., Adm. Proc. File No. 3-17978 (May 10, 2017).
5 In the Matter of Barclays PLC and Barclays Bank PLC, Adm. Proc. File No. 3-21181 (Sept. 29, 2022).
6 Id.
7 Id.
8 Id.
9 15 U.S.C.A. § 77l (West).
10 Barclays' July 2022 Form 6-K. https://home.barclays/content/dam/home-barclays/documents/investor-relations/ResultAnnouncements/HY2022/20220728-Barclays-PLC-H122-6K.pdf.

had misrepresented its internal controls concerning securities registration. Barclays went so far as to describe its internal control system as "robust and effective" despite the fact that it was completely non-existent in regard to tracking the quantity of securities sold.

Barclays moved to dismiss the complaint alleging that its statements concerning internal controls were mere "puffing." In general, the doctrine of puffery protects issuers from potential § 10(b) violations when the issuer makes statements that are "'simple and generic assertions' regarding [a company]'s 'commitment to regulatory compliance.'" In re Citigroup Sec. Litig., No. 20 Civ. 9132 (LAP), 2023 WL 2632258, at *14 (S.D.N.Y. Mar. 24, 2023) (quoting Singh v Cigna Corp., 918 F.3d, 64 (2d Cir. 2019)). This is because, according to the courts, no reasonable investor would rely on such generalized statements when deciding whether to buy or sell an issuer's shares; therefore, the statements would not be considered material.

The District Court rejected Barclays' "puffing" argument. The District Court explained that typically such statements would be considered puffing; however, since the internal controls described as "robust and effective" did not exist at all, plaintiffs' allegations gave rise to a § 10(b) violation. According to the District Court, there is a difference between when a company's system of internal controls merely underperforms and when the system of internal controls does not exist at all. In holding that Barclays' misstatements were not puffery, the District Court relied on In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig., 757 F. Supp. 2d 260, 310 (S.D.N.Y. 2010) ("[T]here is a difference between enthusiastic statements amounting to general puffery and … statements that are anchored in misrepresentations of existing facts.").[11]

Barclays' failure to implement sufficient internal controls offers a cautionary tale for other issuers that use shelf registrations. It is crucial that issuers track the quantity of securities sold pursuant to the issuer's existing shelf registration. Failure to do so can lead to harm to the issuer's reputation and stock price, the issuer owing a right of recission to past purchasers of its stock, and liability for securities fraud to the issuer's own shareholders.

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11 Barclays filed on March 8, 2024 a motion for reconsideration arguing that its statements, regarding its internal controls, were not specific enough to qualify as material and that its statements did not reference an internal control for tracking the quantity of securities sold, and therefore were not misleading. That motion has not been decided at the time of the writing of this article.

About the Authors

Robert C. Finkel is a senior partner and member of the executive committee at Wolf Popper LLP.

Robert is a graduate of the Columbia Law School, Class of 1981 (where he was a Harlan Fiske Stone Scholar), and the University of Pennsylvania, Class of 1978, where he obtained a B.S. in accounting from the Wharton School of Business and a B.A. in history from the College of Arts and Sciences. Robert began his employment in the 1980s with two large New York City defense firms. Robert became a partner at Wolf Popper LLP effective January 1, 1992. He has been repeatedly designated a Super Lawyer® in Securities Litigation.

Robert has written for The New York Law Journal on subjects including shareholder voting rights and ERISA class actions.

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