

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10831 / September 3, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-19957

In the Matter of

**FUELCELL ENERGY,
INC.,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, MAKING FINDINGS, AND
IMPOSING A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), against FuelCell Energy, Inc. (“FuelCell” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. This proceeding concerns failures by FuelCell, a Connecticut-based, publicly traded company that designs, manufactures, installs, and services fuel cell power plants, to satisfy its prospectus delivery obligations to investors in connection with five offerings the company conducted from 2005 to 2017.

2. The FuelCell offerings in question were at-the-market delayed shelf offerings. Delayed shelf registration provides eligible issuers with the flexibility to register securities offerings without issuing or offering the securities for sale immediately. An issuer may register securities for sale and include in its registration statement a "base prospectus" that leaves important aspects of the offering to be determined and disclosed at a later date, such as the specific type of securities offered and the manner and timing of their distribution. When an issuer decides to take its securities "off the shelf" and begin selling them into the market, it must supplement the filing to disclose any required offering-specific information that was previously omitted. Delayed shelf registration thereby enables issuers to time and structure their securities offerings in light of evolving market conditions and financing needs.

3. In an "at-the-market" offering, an issuer sells shares of its securities directly into the market at the prevailing market price, as opposed to selling a fixed number of shares at a fixed price all at once. In this type of offering, information regarding the ongoing nature of and size of the planned offering is of particular significance to investors and the market.

4. During the relevant time period, FuelCell filed registration statements for its at-the-market delayed shelf offerings that included base prospectuses that omitted information regarding the specific type and quantity of securities being offered, the specific plan of distribution, and the nature and terms of agreements with underwriters, dealers, and agents. But FuelCell did not later file such prospectus supplements or amend its registration statements to include the information it had omitted from the base prospectuses. FuelCell raised more than \$148 million from investors by selling more than 70 million shares of its common stock through these offerings, without timely disclosing its specific plans of distribution, the nature and terms of agreements with underwriters, dealers, and agents, and, in the most recent offerings, the specific type and quantity of securities offered.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

5. As a result, FuelCell violated Section 5(b)(2) of the Securities Act by failing to deliver to investors prospectuses containing the information required under Section 10(a) of the Securities Act and the rules thereunder.

Respondent

6. FuelCell is a Delaware corporation based in Danbury, Connecticut. The company designs, manufactures, installs, and services fuel cell power plants. FuelCell stock is registered with the Commission under Section 12(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and trades on the Nasdaq Global Market.

Shelf Registration and Section 5(b)(2)

7. The flexibility afforded by shelf registration is reflected in the Securities Act rules that authorize such registration. An issuer eligible to use Form S-3 for a primary offering may file a registration statement for a delayed shelf offering that includes a base prospectus that omits information “unknown or not reasonably available” at the time of filing. *See* Rule 430B. This can include information such as the specific type and quantity of securities being offered, the specific plan of distribution (e.g., whether the distribution will be at-the-market or otherwise), and the nature and terms of agreements with underwriters, dealers and agents.

8. The issuer is required to later file this information with the Commission. The information may be provided in a prospectus supplement or a post-effective amendment. If permitted by the applicable registration form, the information may also be provided in an Exchange Act filing that is incorporated by reference into the registration statement, provided that the issuer files a prospectus supplement that discloses the Exchange Act report or reports containing such information. *See* Rules 424 and 430B.

9. Section 5(b)(2) makes it unlawful to deliver a security “unless [it is] accompanied or preceded” by a final prospectus—i.e. one that meets the requirements of Section 10(a) by disclosing all the information required by the relevant registration form, including any information omitted previously. A base prospectus included in a shelf registration statement that omits required information in reliance on Rule 430B is not a final prospectus meeting the requirements of Section 10(a). Pursuant to the “access equals delivery” rule (Securities Act Rule 172), an issuer that files a final prospectus with the Commission within the time specified by Rule 424 (or makes a good faith and reasonable effort to do so) thereby satisfies its obligation under Section 5(b)(2) to ensure that a final prospectus “accompany or precede” delivery of a security for purposes of sale.

10. Delivering a final prospectus to investors pursuant to Section 5(b)(2) (or, in the alternative, satisfying the access equals delivery conditions of Rule 172) is a fundamental component of registering and selling shares under the Securities Act. A final prospectus serves to memorialize the terms and nature of the offering for those who purchase securities in an offering and for the market generally. *See* Securities Offering Reform, Release No. 33-8591, 70 Fed. Reg. 44722, 44782 (Aug. 3, 2005) (adopting Rule 172 and explaining that “the greatest utility of a final prospectus may be as a document that informs and memorializes the information for the

aftermarket”). This disclosure is especially important in the context of an at-the-market shelf offering. Without it, purchasers of shares in an at-the-market offering and the market remain unaware that an issuer has taken a specific type and number of securities off the shelf and begun selling them into the market.

Facts

11. From 2005 to 2017, FuelCell sold over 70 million shares of its common stock through at-the-market shelf offerings, raising over \$148 million from investors. Initially, FuelCell used the at-the-market offerings to fund the payment of dividends to its preferred shareholders. Later, FuelCell used the proceeds raised by its at-the-market offerings for general corporate purposes. The at-the-market offerings were made in connection with five shelf registration statements FuelCell filed with the Commission. The following chart summarizes the company’s at-the-market sale of its shares in connection with each of the shelf registration statements:

Shelf Registration	Dates of Sales	# of Shares Sold	Gross Proceeds
Filed 6/17/05	8/10/05 to 2/5/07	986,200	\$10,783,518
Filed 1/23/07	2/20/07 to 9/23/09	1,089,264	\$6,122,498
Filed 1/20/10	1/24/11 to 2/6/12	5,916,802	\$8,433,605
Filed 6/7/13	9/20/13 to 3/10/15	31,561,847	\$59,125,987
Filed 1/9/15	3/11/15 to 4/27/17	30,878,208	\$64,317,805
<u>Total</u>		70,432,321 ²	\$148,783,413

12. As permitted by Rule 430B(a) of the Securities Act, FuelCell omitted from the base prospectuses contained in the Form S-3 registration statements certain information about the offerings, including the specific plan of distribution and the nature and terms of compensation or

² This share total reflects the number of shares sold in the at-the-market offerings at the time of each sale. The company engaged in 12-1 reverse stock splits on December 3, 2015, and May 8, 2019.

other agreements with any underwriters, dealers, or agents. The base prospectuses in the 2013 and 2015 shelf registration statements also omitted the specific type and quantity of securities offered.

13. FuelCell did not file prospectus supplements (or otherwise fulfill the requirements of Rule 172) in connection with the above at-the-market offerings of securities. Nor did it otherwise timely disclose the information that had been omitted from its shelf registration statements.

14. Throughout the relevant time period, FuelCell did subsequently disclose in Form 10-Ks and 10-Qs filed with the Commission its at-the-market sales. These disclosures stated that “[t]he Company may sell stock on the open market from time to time,” and provided the number of shares FuelCell had sold over the reporting period, along with the net proceeds earned by FuelCell from those sales and a description of their use. These disclosures, however, did not cure FuelCell’s failure to file prospectus supplements or otherwise fulfill its obligations under Section 5(b)(2). Such disclosures are not a substitute for Section 10(a) prospectuses that timely inform the market of the at-the-market offerings and include all the information that had been previously omitted from the base prospectuses.

15. At all relevant times, FuelCell did not have its own general counsel and retained outside securities counsel to help prepare and file its registration statements in connection with its at-the-market stock offerings. Outside counsel advised FuelCell that it did not need to file prospectus supplements in connection with its at-the-market offerings.

16. In January 2018, after FuelCell hired its first general counsel and retained new outside securities counsel, FuelCell self-reported the facts concerning this matter to the Commission and disclosed in its annual report the company’s failures to file or deliver prospectus supplements.

Violations

17. As a result of the conduct described above, FuelCell violated Section 5(b)(2) of the Securities Act, which makes it unlawful for any person, directly or indirectly, to carry or cause to be carried through the mails or interstate commerce any security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of Section 10(a) of the Securities Act.

FuelCell’s Remedial Efforts

18. In determining to accept the Offer and not to impose a civil penalty, the Commission considered, among other facts, FuelCell’s self-report to the Commission, including voluntarily sharing details regarding the advice provided by counsel, remedial acts, and cooperation with the Commission’s investigation, including the company’s compilation of data and analysis regarding its securities offerings, which facilitated the investigation.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent FuelCell's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondent FuelCell shall cease and desist from committing or causing any violations and any future violations of Section 5(b)(2) of the Securities Act.

B. Respondent acknowledges that the Commission is not imposing a civil penalty based upon its cooperation in a Commission investigation. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission, or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay a civil money penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Vanessa A. Countryman
Secretary