# SEC ADOPTS SECURITIES OFFERING REFORM

On July 19, 2005, the Securities and Exchange Commission (the "SEC") adopted final rules that will significantly modify the registration, communications and offering processes under the Securities Act of 1933 (the "Securities Act").[1] The new rules are intended to modernize the offering process to recognize the evolution of the securities markets and the proliferation of new technologies, including the Internet. They are part of the continuing efforts by the SEC to integrate the disclosure and other processes under the Securities Act and the Securities Exchange Act of 1934 (the "Exchange Act").

The rules, which are substantially similar to those proposed in November 2004, effect reforms in three main areas:

- communications related to registered securities offerings;
- registration and other procedures in the offering process, including the provision of a new automatic shelf registration process for large companies and a simplified shelf registration process for other companies; and
- delivery of information to investors, including "delivery" through access and notice, and the timeliness of that delivery.

The rules also provide for additional disclosures in annual reports on Form 10-K, including the addition of a "risk factors" section.

The rules will become effective on December 1, 2005.

## I. Executive Summary

### *A. Categories of Issuers*

The rules distinguish among four new categories of issuers: "*well-known seasoned issuers*," "*seasoned issuers*," "*unseasoned issuers*" and "*non-reporting issuers*." The most extensive reforms benefit well-known seasoned issuers, generally defined as Form S-3 or F-3 eligible issuers, with at least $700 million of worldwide common equity market capitalization held by non-affiliates or $1 billion aggregate amount of non-convertible securities (other than common equity) registered in primary offerings during the past three years.

[1] See SEC Release Nos. 33-8591, 34-52056 and IC-26993 (July 19, 2005), available at www.sec.gov/rules/final.shtml.

### *B. Communications Reforms*

The rules add a number of safe harbors that permit certain communications in connection with an offering of securities without violating the "gun-jumping" provisions of the Securities Act. See Appendix A for a chart summarizing these communications proposals.

- *Written Communications.* The new rules define all methods of communication other than oral communications as written. All forms of electronic communications (other than telephone and other real-time communications to a live audience) are "graphic" and therefore are considered written.
- *Regularly Released Factual Business Information.* The rules will permit all issuers, at any time, to continue to publish regularly released factual business information, as long as the released information is materially consistent in timing, manner and form with the issuer's past releases and does not include information about the offering. Such information, if released by non-reporting issuers, must be regularly released to persons other than in their capacity as investors or potential investors.
- *Regularly Released Forward-Looking Information*. The rules will similarly permit reporting issuers (but not non-reporting issuers such as an IPO issuer), at any time, to continue to publish regularly released forward-looking information.
- *Communications 30 Days Prior to Filing a Registration Statement.* Communications by all issuers, whether oral or written, made more than 30 days prior to filing a registration statement will not be considered prohibited offers as long as they do not reference a securities offering.
- *Communications by Well-Known Seasoned Issuers Within 30 Days Prior to Filing a Registration Statement.* Communications by well-known seasoned issuers will be permitted even during the thirty-day period prior to filing. However, any such written communications will be required to be filed with the SEC promptly upon the filing of the registration statement.
- *Rule 134 Notices.* The rules will expand the safe harbor for post-filing notices under Rule 134 to permit increased information about the issuer, the securities being offered, the offering and procedures for participating in the offering.
- *Free Writing Prospectuses*. Under the rules, issuers and other offering participants will be permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions. A "free writing prospectus" is broadly defined to include almost any communication (other than an oral communication), whether written, printed or broadcast, that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement. For non-reporting and unseasoned issuers (including in connection with an IPO), free writing prospectuses can only be used if they are accompanied or preceded by a preliminary prospectus. As a result, as a practical matter, these issuers can only broadly disseminate a free writing prospectus electronically, such as through a

hyperlink to the required prospectus. Seasoned issuers will only have to include a legend that notifies the recipient where he can access the prospectus. Any free writing prospectus prepared by or on behalf of an issuer or containing issuer-provided information will need to be filed with the SEC.

- *Media Publications.* Information provided to a member of the press or other media by an issuer or offering participant that gets published will qualify as a free writing prospectus that will be permitted if the various requirements are satisfied. Where information constituting an offer is prepared by members of the media unaffiliated with and not paid for by the issuer or participant, a preliminary prospectus will not be required to precede or accompany the communication.
- *Electronic Road Shows.* The revised definition of graphic communication will also apply in the context of electronic road shows. A live, real-time road show to a live audience will not be considered a graphic communication. Communications, such as visual aids, that are provided simultaneously as part of such a road show and not separately distributed similarly will not be considered a written communication.

- *Research Reports*. The amendments expand the circumstances under Rules 137, 138 and 139 under which brokers and dealers may publish research during a registered offering. Rule 137 will permit brokers and dealers that are not offering participants to publish research even regarding non-reporting issuers. Rule 138 will now permit a broker or dealer participating in an offering of equity securities to publish research on the issuer's debt securities, and vice versa, if the issuer is a reporting issuer current in its periodic Exchange Act reports. Rule 139 will permit participating brokers and dealers to continue to publish research on S-3-eligible companies and industry reports that include information regarding any reporting issuer.

- *Ineligible Issuers*. Certain issuers and offerings will not be eligible to use free writing prospectuses or the other new communications safe harbors and exemptions. Ineligible issuers include reporting issuers that are not current in their Exchange Act reporting obligations, blank check issuers, shell companies and penny stock issuers. Ineligible offerings include offerings by registered investment companies or business development companies and offerings that are exchange offers or business combination transactions that are subject to Regulation M-A.

### *C. Liability Issues*

Consistent with the SEC's current interpretation, the rules codify that liability for sales under Sections 12(a)(2) and 17(a)(2) under the Securities Act is determined based on the information conveyed at the time of the contract of sale, when investors make their investment decision. Thus, information provided after such time, including any modifications contained in a final prospectus, will not be taken into account in determining liability.

Liability under Section 11 is judged based on the information provided at the time of effectiveness of the registration statement. This includes information provided in the final

prospectus under Rule 430A and in a prospectus supplement under Rule 430B, which is deemed to be part of the registration statement as of the effective date.

### *D. Shelf Registration Statements*

The rules liberalize many of the requirements for shelf registration statements and create an automatic shelf registration process for well-known seasoned issuers.

*Liberalized Shelf Registration Requirements.* Under the rules, information required in the prospectus about the issuer and its securities can be included in a prospectus supplement or incorporated by reference from Exchange Act reports. Even material changes in the plan of distribution, which were required to be included in a post-effective amendment, can be included in a prospectus supplement or incorporated by reference.

The rules will also allow seasoned issuers eligible to use Form S-3 or Form F-3 for primary offerings to identify selling security holders in a prospectus supplement if the registration statement is an automatic shelf registration statement or if the securities were outstanding prior to the initial filing of the registration statement and the registration statement described the transaction pursuant to which the securities were initially issued.

The information included in a prospectus supplement will be deemed part of the registration statement, with a new effective date established for purposes of Section 11 liability.

The amendments eliminate the provision that limits the amount of securities registered in a primary offering to an amount intended to be offered or sold within two years from the registration statement effective date. Under the amendments, however, shelf registration statements can only be used for three years after their initial effective date; issuers will be required to file new shelf registration statements every three years in order to maintain their effectiveness. As long as the new shelf registration statement is filed within three years of the effective date of the previous shelf registration statement, the issuer can continue to rely on the previous shelf registration statement for up to six months thereafter until the new shelf registration statement is declared effective.

*Automatic Shelf Registration for Well-Known Seasoned Issuers.* The rules introduce a significantly more flexible "automatic" shelf registration for offerings on Form S-3 or Form F-3 by well-known seasoned issuers. An automatic shelf registration statement can be used for all primary and secondary offerings of securities of well-known seasoned issuers, other than those in connection with business combination transactions or exchange offers. This automatic shelf registration process will include the following features that will provide well-known seasoned issuers with greater flexibility to take advantage of market windows:

- *Ability to Omit Certain Information.* Under the automatic shelf registration, a base prospectus included in a shelf registration statement can omit information such as whether the offering is a primary or secondary offering, the names of any selling security holders and any plan of distribution for the offering securities. Moreover,

information such as the public offering price, a detailed description of the securities offered and the names of the underwriters can now be included in the prospectus supplement. However, new types of securities and new issuers must still be added through a post-effective amendment.

- *Registration of Securities to be Offered*. An eligible issuer may register on an automatic shelf registration statement an unspecified amount of different classes of securities to be offered, without allocating the mix of securities registered among the issuer, its eligible subsidiaries and selling security holders.
- *Pay-as-You-Go Registration Fees*. The rules permit issuers using automatic shelf registration statements to pay filing fees at the time of a securities offering.
- *Automatic Effectiveness*. Shelf registration statements and post-effective amendments will become effective automatically upon filing, without SEC staff review.

*Amendments to Forms S-1 and F-1 – Backwards Incorporation by Reference*. Under the amendments to Forms S-1 and F-1, an issuer that has filed at least one annual report and is current in its reporting obligations will be permitted to incorporate by reference into its Form S-1 or Form F-1 information from previously filed Exchange Act reports.

### *E. Prospectus Delivery Reforms*

*Access Equals Delivery Model*. The SEC has adopted an "access equals delivery" model for prospectus delivery, under which a final prospectus will be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) under the Securities Act as long as a final prospectus meeting the requirements of Section 10(a) is filed or the issuer makes a good faith and reasonable effort to file with the SEC by the required filing date.

*Notification*. The underwriters will be able to send to each purchaser, in lieu of the final prospectus, a notice informing them that they purchased securities in the transaction.

*Confirmations and Notices of Allocations*. A new exemption will also allow written confirmations and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus.

*Broker Transactions*. Rule 153, which permits brokers and dealers effecting transactions on an exchange to satisfy their prospectus delivery obligations through delivery of the final prospectus to the exchange, will now cover transactions through any registered trading facility.

### *F. Additional Exchange Act Disclosure Reforms*

Issuers will be required to include risk factor disclosure in their annual reports on Form 10-K and update this disclosure in their quarterly reports. Accelerated filers will be required to disclose in their annual reports any material unresolved SEC comments that were issued more than 180 days prior to fiscal year end. The rules will also require each filer to note whether it is a voluntary filer on a box on the cover page of its Form 10-K.

## II. Categories of Issuers

### *A. Well-Known Seasoned Issuers*

The SEC, recognizing the vast amount of information available to investors, has adopted the most extensive modifications of the communications rules and registration processes for the most widely followed companies. The SEC has created a new category of issuer called a "*well-known seasoned issuer*" (frequently referred to as "*Wiksees*"), which is defined as an issuer that:

- is required to file reports pursuant to Section 13(a) or Section 15(d) of the Exchange Act;
- meets the registrant requirements of Form S-3 or Form F-3;
- either (1) has at least $700 million of worldwide common equity market capitalization held by non-affiliates or (2) has issued $1 billion aggregate amount of non-convertible securities, other than common equity, in registered primary offerings for cash[2] during the past three years; and
- is not an "ineligible issuer."[3]

Under certain conditions, majority-owned subsidiaries of well-known seasoned issuers may also be considered well-known seasoned issuers.

*Commentary:*

- Whether an issuer satisfies the eligibility requirements of Form S-3 or F-3 and its status as an "eligible issuer" is determined at the time of filing of the relevant registration statement and thereafter at the time of the annual update of that registration statement pursuant to Section 10(a)(3) under the Securities Act upon the filing of the issuer's annual report on Form 10-K or 20-F, as applicable. Issuers must measure their non-affiliate equity market capitalization and the aggregate amount of their non-convertible securities issuances within 60 days of such eligibility determination.

- An issuer may use an automatic shelf registration statement to register *any* offering of securities if it meets the definition of well-known seasoned issuer based on:

  - the $700 million public float threshold; or

[2] Securities issued in registered exchange offers are not counted.

[3] See the discussion of "ineligible issuers" below.

- its meeting the $1 billion minimum of registered non-convertible security issuances in the prior three years, provided that it also is eligible to use Form S-3 or F-3 for primary offerings because it has a public float of its common equity of at least $75 million.

However, an issuer that meets the definition of well-known seasoned issuer based on the $1 billion minimum of registered non-convertible security issuances in the prior three years but is not so eligible to use Form S-3 or F-3 for primary offerings can only use an automatic shelf registration statement to register offerings for cash of non-convertible securities other than common equity.

### *B. Other Categories of Issuers*

The rules also create other new categories of issuers: A "*seasoned issuer*" is an issuer that is eligible to use Form S-3 or Form F-3 to register primary offerings of its securities. An "*unseasoned issuer*" is an issuer that is required to file Exchange Act reports but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. A "*non-reporting issuer*" is an issuer that is not required to file Exchange Act reports, regardless of whether it files such reports voluntarily.

## III. Communications Reforms

### *A. Overview*

Section 5 of the Securities Act restricts communications made in connection with an offering of securities. Prior to the filing of a registration statement with the SEC (the "pre-filing period"), all offers, in whatever form, are prohibited. Following the filing of the registration statement until it is declared effective by the SEC (the "waiting period"), oral offers may be made, but offers made in any written form (including by email or the Internet) or by radio or by television can only be made by means of a statutory prospectus that meets the applicable requirements (a "preliminary prospectus").[4] Following the effectiveness of the registration statement (the "post-effective period"), additional written materials may be provided if a final prospectus that satisfies the statutory requirements has preceded or accompanied such materials. Violations of these rules are generally referred to as "gun-jumping."

These communications restrictions, which were designed to make the statutory prospectus the primary source of information for investors regarding an offering, have proven unduly restrictive in today's communications environment. With the encouragement of the SEC and the stock exchanges, issuers now engage in many types of communications on an ongoing basis, which are disseminated rapidly through the media and the Internet. The new communications rules are

[4] The broad definition of "prospectus" under the Securities Act generally precludes any written communication during the waiting period other than the preliminary prospectus itself containing the requisite information.

designed to provide issuers with more flexibility, encouraging the continued flow of current information to investors, while maintaining the necessary safeguards for their protection.

The rules distinguish between well-known seasoned issuers, whose communications have less potential for conditioning the market, and other issuers:

- Well-known seasoned issuers will be permitted at any time to engage in oral and written communications, including use of a free writing prospectus, subject to enumerated conditions (including, in specified cases, filing such communications with the SEC).
- All reporting issuers will be permitted at any time to continue to publish regularly released factual business information and forward-looking information.
- Non-reporting issuers will be permitted at any time to continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors.
- Communications by issuers more than 30 days before filing a registration statement will not be prohibited offers as long as they do not reference a securities offering that is or will be subject to a registration statement.
- Issuers and other offering participants will be permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions (including, in specified cases, filing such communications with the SEC).
- A broader category of routine communications regarding issuers, offerings and procedural matters, such as communications about the schedule for an offering or about account-opening procedures, will be excluded from the definition of "prospectus."
- The exemptions for research reports have been expanded.

See Appendix A for a chart summarizing these rules.

### *B. Definition of Written Communications*

In order to eliminate confusion regarding the meaning of written communications under former regulations, the SEC now broadly defines all communications, other than oral communications, as written communications for purposes of the Securities Act. "*Written communication*" is defined to include any communication that is written, printed or broadcast or is a graphic communication. Every electronic communication (such as an audiotape, videotape, facsimile, CD-ROM, email and Internet website) is defined as a "*graphic communication*" and thus considered a written communication. Direct oral communications, such as live telephone calls or other live, real-time communications (including those carried over the Internet) and individual

voice-mail messages, are not written communications and will continue to be exempt from filing and public disclosure requirements.[5]

*Commentary:*

- As discussed further below, the rules now provide that a webcast or video conference that originates live and in real-time at the time of transmission and is transmitted through video conferencing facilities or is webcast in real-time to a live audience is not a graphic communication regardless of the ability of a member of the audience to record such communication. However, if the communication is recorded by or on behalf of the originating party, it will be a written communication.
- Broadly disseminated or "blast" voice-mail messages will be considered written communications, even though individual telephone voice-mail messages will not.
- All radio and television broadcasts remain graphic communications and therefore written communications, regardless of whether they are live and in real-time.

### *C. Regularly Released Factual Business and Forward-Looking Information*

#### *1. Reporting Issuers*

To eliminate confusion as to the permissibility of communications of business information, new Rule 168 provides reporting issuers with a safe harbor for the continued dissemination of regularly released factual business information and forward-looking information. Such communications are excluded from the definition of "prospectus" under Section 2(a)(10) of the Securities Act and therefore are permitted during the waiting period. These communications are also excluded from the prohibition against pre-filing offers.

"*Factual business information"* is defined as:

- factual information about the issuer, its business or financial developments, or other aspects of its business;
- advertisements of, or other information about, the issuer's products or services;
- dividend notices; and
- factual business information set forth in the issuer's Exchange Act reports.

The rule similarly provides a safe harbor for the continued release or dissemination of "*forward-looking business information*" in the ordinary course. Such information includes:

[5] See below for a discussion of obligations under Regulation FD.

- projections of the issuer's revenues, income, earnings per share, capital expenditures, dividends, capital structure or other financial items;
- statements about management's plans and objectives for future operations, including those that relate to the products or services of the issuer;
- statements about the issuer's future economic performance, including statements of the type contemplated by MD&A; and
- assumptions underlying the foregoing information.

In order for its communications to qualify for this safe harbor, the reporting issuer must satisfy three conditions: (1) the information must be released by or on behalf of the issuer; (2) the information must be regularly released; and (3) the information cannot include information about the registered offering itself.

*Commentary:*

- The release of the information will be considered "by or on behalf of the issuer" if the issuer, an agent of the issuer or a representative of the issuer authorized and approved its use beforehand.
- Information will be considered "regularly released" if the issuer, in the ordinary course of its business, has previously released the same type of information, and the release is materially consistent in timing, manner and form with the issuer's past releases. Thus, even the manner in which the information is released must be consistent with prior practice. The rule does not cover only scheduled releases of information, nor does it establish any minimum time period to satisfy this requirement, but the safe harbor requires the issuer to be able to establish a track record of releasing the particular type of information.
- The safe harbor excludes information related to the registered offering itself or released as part of the offering activities in the offering. Accordingly, the publication of information consistent with past practice will be within the safe harbor, but the use of that information as part of marketing activities to potential investors would be outside its scope.

### *2. Non-Reporting Issuers*

Rule 169 provides a similar safe harbor for the release by non-reporting issuers, including voluntary filers and in connection with an initial public offering, of regularly released factual business information, provided that such information is not provided to persons receiving the information in their capacity as investors or potential investors. The safe harbor is intended to permit the continued release of this information to persons, such as customers and suppliers, to whom the issuer has previously provided such information. Note that Rule 169 does not permit the release of dividend notices, which is information intended for investors.

However, unlike the safe harbor for reporting issuers, Rule 169 does *not* extend to forward-looking information. The SEC believes that permitting non-reporting issuers to disseminate forward-looking information would create an unacceptable potential for abuse as a way to condition the market for an offering of their securities.

### *D. Permitted Communications in Pre-Filing Period*

#### *1. 30 Days Prior to Filing a Registration Statement*

Rule 163A provides prospective issuers with a bright-line safe harbor period ending 30 days prior to filing a registration statement, during which they can communicate without risk of violating the gun-jumping provisions. Under the rule, any communication, whether oral or written, made more than 30 days prior to filing is excluded from the definition of "offer" for purposes of Section 5(c) of the Securities Act. This non-exclusive safe harbor will be available to both reporting and non-reporting issuers.

*Commentary:*

- This safe harbor, which applies only prior to the filing of a registration statement, will not help issuers who have a shelf registration statement on file, even if not declared effective.

The 30-day exclusion is subject to three conditions: (1) the communication must not reference a securities offering that is or will be the subject of a registration statement; (2) the communication must be made by or on behalf of the issuer; and (3) the issuer will have to take reasonable steps within its control to prevent further distribution or publication of the communication during the 30-day period before filing the registration statement. According to the SEC, while issuers are not expected to control the republication by third parties or accessing through third-party sources of previously published press communications, issuers and persons acting on their behalf are expected to control their own involvement in any subsequent redistribution or republication.

*Commentary:*

- If an issuer gives an interview to the press prior to the 30-day period, it will not be able to rely on the exclusion if the interview is published during the 30-day period. The SEC expects issuers to obtain assurances from the media regarding when the interview will be published.

- The SEC will not object to information left on an issuer's website, provided that the information is dated, identified as historical material and not referred to as part of the offering activities.

- The definition of "by or on behalf of" the issuer for the purpose of Rule 163A is the same as that adopted for Rules 168 and 169, thereby excluding underwriters and other offering participants from relying on the exemption.

The rule will not be available with respect to communications made in connection with offerings by a blank check company, a shell company or a penny stock issuer. Communications regarding business combination transactions and offerings made by a registered investment company, which are subject to separate regulation, are also excluded from the safe harbor. For reporting issuers, the communications will still be subject to Regulation FD and the anti-fraud provisions of the federal securities laws.

#### *2. Permitted Pre-Filing Offers by Well-Known Seasoned Issuers*

The rules go even further with respect to well-known seasoned issuers. Rule 163 exempts *all* offers made by well-known seasoned issuers from the prohibition on pre-filing offers in Section 5(c) of the Securities Act, even if made within thirty days of filing a registration statement. However, these communications, while exempt from the gun-jumping provisions, will still be considered offers and, accordingly, will remain subject to the liability and anti-fraud provisions of the securities laws, as well as Regulation FD. Written offers deemed to be exempt by reason of Rule 163 will need to contain a legend referring to the possible filing of a registration statement relating to the offering and be filed with the SEC promptly upon the filing of the registration statement.

*Commentary:*

- We expect that most well-known seasoned issuers will take advantage of the liberalized "automatic shelf" registration process discussed below and, thus, will not be able to avail themselves of this safe harbor.
- Because of the new filing requirement, well-known seasoned issuers contemplating the filing of a registration statement will need to review all written communications issued during the 30-day period prior to filing to determine whether such communications must be filed under Rule 163 or if they fall within another exemption.

### *E. Relaxation of Restrictions on Written Offers After Filing of Registration Statement*

The rules also relax restrictions on written offers made after a registration statement is filed. The two main elements of these rules are the expansion of information permitted under the Rule 134 safe harbor and the permitted use of "free writing prospectuses" in connection with a registered offering.

#### *1. Expansion of Information Permitted by Rule 134*

Rule 134 currently provides a safe harbor for limited public notices about an offering made by an issuer after filing a registration statement. The safe harbor excludes such notices from the definition of prospectus under Section 2(a)(10) of the Securities Act. As revised, Rule 134 will:

- permit increased information about an issuer and its business;

- permit more information about the terms of the securities being offered (such as greater information about final interest rates and yield information for fixed income securities);
- expand the scope of permissible factual information about the offering itself (such as the mechanics of and procedures for transactions and the anticipated schedule of the offering, and a description of marketing events such as road shows);
- allow more factual information about procedures for account opening and for submitting indications of interest and conditional offers to buy;
- allow more factual information regarding procedures for directed share plans and other participation in offerings by officers, directors and employees;
- permit the correction of inaccuracies in permissible information previously disclosed pursuant to this rule; and
- expand the permissible disclosure regarding credit ratings to include the security rating that is reasonably expected to be assigned.

The expansion does not, however, permit use of a Rule 134 notice to provide a detailed term sheet for the securities being offered.[6] The amendments also eliminate the requirements that a Rule 134 notice contain a state securities law legend and specify whether the financing is a new financing or refunding.

*Commentary:*

- Although the final rules permit Rule 134 notices even prior to the availability of a prospectus containing a price range, certain information, such as pricing of the security and use of proceeds, cannot be included in the notice unless it is included in the prospectus.

### *2. Permissible Use of Free Writing Prospectuses*

The rules permit written communications that constitute offers outside the statutory prospectus (defined as a "*free writing prospectus*") beyond those currently permitted (such as after delivery of a final prospectus), under certain conditions. Prior to filing a registration statement, only a well-known seasoned issuer will be able to use a free writing prospectus through Rule 163, as discussed above. Under Rule 164, after a registration statement is filed, the issuer and any other offering participant satisfying the conditions of the rules can use a free writing prospectus to communicate information about a registered offering of securities. "*Offering participants*" include affiliates, underwriters, dealers and others acting on behalf of the parties to the transaction. A free writing prospectus will not be deemed part of a registration statement subject

[6] It may, however, be possible to deliver such a term sheet as a free writing prospectus, as discussed below.

to liability under Section 11 of the Securities Act. Permitted free writing prospectuses under Rule 164 must satisfy the filing and other conditions specified in Rule 433, discussed below.

The definition of "free writing prospectus" includes any written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement (or, in the case of a well-known seasoned issuer taking advantage of Rule 163, even if no registration statement is filed). A communication will be a free writing prospectus only if it constitutes an offer of a security under the Securities Act, which will be determined based on the particular facts and circumstances. Communications that will not be considered offers or prospectuses for purposes of the gun-jumping restrictions, including Rule 134 notices, Rule 135 communications, and factual and forward-looking information falling within the new safe harbors, will not be free writing prospectuses. Similarly, written offers that are accompanied or preceded by a final prospectus (which offers are excluded from the definition of prospectus) will not be free writing prospectuses and thus will be permitted without having to satisfy Rules 164 and 433.

### *3. Media Publications and Free Writing Prospectuses*

Information provided to a member of the press or other media by an issuer or offering participant that gets published could nonetheless qualify as a permitted free writing prospectus. If the information constituted an offer, but dissemination of the information in writing by the issuer or participant would have constituted a free writing prospectus, publication by the press or media will be considered a free writing prospectus made by or on behalf of the issuer or participant.

If the issuer or offering participant prepared or paid for a published article, broadcast or advertisement, the issuer will have to satisfy the conditions to the use of a free writing prospectus at the time of the publication or broadcast. As discussed below, for non-reporting issuers, a preliminary prospectus must precede or accompany the communication; for seasoned issuers, a registration statement containing a preliminary prospectus must have been previously filed with the SEC. However, where information constituting an offer was prepared by members of the media unaffiliated with and not paid for by the issuer or participant, a preliminary prospectus will not be required to precede or accompany the communication.

*Commentary:*

- An executive of a non-reporting issuer could give an interview to an unaffiliated financial news magazine prior to the distribution of a preliminary prospectus, provided that there was no payment to the magazine. The resulting article will be a free writing prospectus that will have to be filed with the SEC by the issuer after publication, but there will not be any requirement that a preliminary prospectus precede or accompany the article at the time of publication.

- The rules exempt the issuer from filing a free writing prospectus if the substance of the information provided was already filed with the SEC.

### *4. Conditions for Use of a Free Writing Prospectus*

Rule 164 will permit the use of a free writing prospectus when an eligible issuer has filed a registration statement and the conditions of Rule 433 are satisfied, including prospectus delivery or availability, eligibility, filing, information, legend and record retention conditions.

#### *a. Prospectus Delivery and/or Availability*

##### *i. Non-Reporting and Unseasoned Issuers*

Non-reporting and unseasoned issuers will be required to satisfy the most stringent conditions to use free writing prospectuses. Like all issuers other than well-known seasoned issuers, a registration statement must have been filed. In addition, if the free writing prospectus was prepared by or on behalf of an issuer or offering participant, or if consideration was given by the issuer or offering participant for the publication or broadcast of any free writing prospectus, the free writing prospectus can be used only if preceded or accompanied by the most recent preliminary prospectus. The preliminary prospectus will not have to be sent by the same means (paper or electronic) as the free writing prospectus, but merely referring to its availability will not satisfy this condition.

*Commentary:*

- Practically speaking, this means that non-reporting and unseasoned issuers cannot broadly disseminate a free writing prospectus, other than by doing so electronically and including a hyperlink to the statutory prospectus, which is permitted under the rule.

Once the required preliminary prospectus has been provided to an investor, additional free writing prospectuses can be provided to the investor without providing an additional statutory prospectus, unless there have been material changes to the most recent prospectus. Thus, for example, once an investor has been sent a preliminary prospectus, absent a material change, the rule will permit subsequent email communications by an offering participant that constitute free writing prospectuses without the user having to hyperlink to, or the participant otherwise redelivering, a statutory prospectus with each communication.

Free writing prospectuses prepared by the media unaffiliated with the issuer and to whom consideration is not paid by the issuer will be permitted without delivery of the statutory prospectus. Thus, a media interview that the issuer or offering participant participates in but does not prepare or pay for will not be conditioned on the delivery of a preliminary prospectus, though such prospectus will need to have been filed. In addition, the issuer must file the free writing prospectus with the SEC within four business days after the issuer or offering participant becomes aware of its publication or broadcast.

*ii. Seasoned and Well-Known Seasoned Issuers*

Seasoned issuers and well-known seasoned issuers can use a free writing prospectus after filing a registration statement containing a preliminary prospectus, without the need to deliver a preliminary prospectus. For shelf offerings, this preliminary prospectus can be a base prospectus. However, the free writing prospectus will have to contain a legend notifying the recipient of where he can access or hyperlink to the preliminary prospectus. As discussed above, under Rule 163 well-known seasoned issuers (but not offering participants) may use free writing prospectuses even prior to filing a registration statement.

***b. Ineligible Issuers***

Certain issuers and offerings are not eligible to use free writing prospectuses or any of the communications safe harbors and exemptions other than a free writing prospectus that is limited to descriptions of the terms of the security being offered and the offering. The SEC can waive an issuer's ineligibility if it finds good cause to do so. Ineligible issuers and offerings include the following:

- reporting issuers that are not current in their Exchange Act reports;[7]
- issuers that are (or were in the past three years) blank check issuers;
- issuers that are (or were in the past three years) shell companies;
- issuers that are (or were in the past three years) penny stock issuers;
- issuers that are limited partnerships offering and selling their securities other than in a firm commitment underwriting;
- issuers that have filed for bankruptcy or insolvency during the past three years;
- issuers that have been or are the subject of refusal or stop orders under the Securities Act during the past three years;
- issuers that have been found to have violated the federal securities laws, have been the subject of a judicial or administrative order prohibiting certain conduct or activities regarding the federal securities laws during the past three years, or have entered into a settlement[8] with any government agency involving violations of federal securities laws after the effective date of the rules;
- offerings by registered investment companies or business development companies; and

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[7] A reporting issuer that is current, though not timely, in its Exchange Act reporting obligations will still be eligible.

[8] "Settlement" includes settlements in which the issuer neither admits nor denies violating the federal securities laws.

- offerings that are exchange offers or business combination transactions that are subject to Regulation M-A.

### *c. Free Writing Prospectus Filing Requirements*

#### *i. General Conditions*

The use of a free writing prospectus will be conditioned on the filing of that prospectus, as described below.[9] Under Rule 433(d), the issuer must file:

- any free writing prospectus prepared by or on behalf of the issuer (an "*issuer free writing prospectus*"), whether used by the issuer or another person;
- any free writing prospectus that is prepared by or on behalf of an offering participant other than the issuer and that contains material information about the issuer or its securities that has been provided by or on behalf of an issuer ("*issuer information*") and is not already contained or incorporated in the prospectus or a filed free writing prospectus; and
- any free writing prospectus prepared by any person that contains only a description of the final terms of the issuer's securities.

In addition, when a person other than the issuer prepares and distributes a free writing prospectus in a manner reasonably designed by such person to lead to its *broad unrestricted dissemination*, such person must file the free writing prospectus, unless the free writing prospectus has already been filed.

The filing of the free writing prospectus generally must be made on or before the date of first use, except in the case of final terms of securities. A free writing prospectus that contains only a description of the securities offered will need to be filed only if it reflects the final terms of the securities being offered. In that case, the issuer will have to file the free writing prospectus within two days of the later of the date such terms become final and the date of first use.

In the case of media publications where no payment is made, the issuer or other participant will be required to file such written communication within four business days of when the issuer or offering participant becomes aware of publication. The media will not be required to file any free writing prospectuses.

*Commentary:*

- The rules distinguish between a free writing prospectus that *contains* issuer information, which must be filed by the issuer as described in the second bullet

[9] Under Rule 433, notices under Rule 134 and Rule 135 are not considered free writing prospectuses and therefore are not subject to these conditions.

point above, and a free writing prospectus prepared by a party participating in the offering other than the issuer that includes only information prepared by that person "*on the basis*" of the issuer information.

- Under the above proposals, underwriter free writing prospectuses that do not contain issuer information will generally not need to be filed, unless they were distributed in a manner that was reasonably designed to achieve "broad unrestricted dissemination." Such broad unrestricted dissemination includes posting or hyperlinking the information on an unrestricted website or releasing it to the media, but does not include the underwriter sending the information to its customers, regardless of their number.

- The rules will apply to capital formation transactions even if they have some connection or are proximate in time to a business combination transaction. If a communication relates to both a capital formation transaction and a business combination transaction the communication may be subject to Rule 425 in addition to Rule 433. If the filing made pursuant to Rule 425 contains the required Rule 433 legend and indicates that it is being filed pursuant to Rule 433, it will satisfy the filing requirements of both rules.

*ii. Electronic Road Shows*

In an effort to encourage issuers to make electronic road shows available to all investors, the SEC will permit such road shows without many of the limitations set forth in a series of SEC no-action letters that issuers and underwriters have previously relied upon.[10] As discussed above, the SEC now excludes from the definition of graphic communication communications that, at the time of the communication, originate live, in real-time and to a live audience, and do not originate in recorded form or otherwise as a graphic communication. Accordingly, road shows that comply with the terms of this definition are not written communications or free writing prospectuses. Even slides or other visual aids provided simultaneously as part of a live road show will be deemed part of the road show and therefore not a written communication.

Electronic road shows that do not meet the requirements of this definition will be considered written communications and, therefore, free writing prospectuses. An electronic road show that is a free writing prospectus will generally not be subject to the filing requirements of Rule 433. However, an issuer that is not required to file reports under the Exchange Act and is offering common equity or convertible equity securities must file the road show materials unless at least one version of a bona fide electronic road show for the offering is readily available electronically to any investor. The SEC has adopted this filing requirement to encourage such issuers to make their road shows widely available.

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[10] See staff no-action letters to Private Financial Network (Mar. 12, 1997); Net Roadshow, Inc. (July 30, 1997); Bloomberg L.P. (Oct. 22, 1997); Thompson Financial Services, Inc. (Sep. 4, 1998); Activate.net Corporation (June 3, 1999); Charles Schwab & Co., Inc. (Nov. 15, 1999); and Charles Schwab & Co., Inc. (Feb. 9, 2000). These no-action letters will be withdrawn upon effectiveness of the new rules.

*iii. Unintentional Failure to File*

Rule 164 will allow an issuer and others to cure any immaterial or unintentional failure to file or delay in filing the free writing prospectus. This cure provision is available if a good faith and reasonable effort was made to comply with the filing condition and the free writing prospectus was filed as soon as practicable after the discovery of the failure to file.

*iv. Filed Free Writing Prospectus Not Part of Registration Statement*

A free writing prospectus filed pursuant to Rule 433 must identify the registration statement to which it relates but will not have to be filed as part of the registration statement. Therefore, a free writing prospectus will not be subject to liability under Section 11 of the Securities Act, although it will be subject to liability under Section 12(a)(2) of the Securities Act and the anti-fraud provisions of the federal securities laws.

***d. Information in a Free Writing Prospectus; Legend Requirement***

Rule 433 will permit information in a free writing prospectus to go beyond the information contained in the prospectus that is included in the registration statement (as long as it does not conflict with the information in the registration statement). However, under Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, liability will attach to material misstatements and material omissions in the free writing prospectus. No specific content will be required except the inclusion of a legend, which, under Rule 433, will have to:

- indicate where a prospectus is available;
- recommend that potential investors read the prospectus, including Exchange Act documents incorporated by reference;
- advise investors that they can obtain the registration statement, including the prospectus and any incorporated Exchange Act documents, for free through the SEC's website and that they may request the prospectus from the issuer, any underwriter or dealer by calling a toll-free number; and
- indicate that the free writing prospectus is part of a public offering.

The SEC has warned against the inclusion of inappropriate legends and disclaimers. The use of any such legend or disclaimer in free writing materials will cause the materials to fail to satisfy the exclusion. Examples of impermissible legends or disclaimers include:

- disclaimers regarding accuracy or completeness or reliance by investors;
- statements requiring investors to read or acknowledge that they have read or understand any disclaimers or legends;
- language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy; and

- for information that must be filed with the SEC, statements that the information is confidential.

#### *e. Record Retention Condition*

Under Rule 433, issuers and offering participants will be required to retain, for three years, any free writing prospectuses they have used from the date of the initial offering of the securities in question. This record retention condition will apply only to free writing prospectuses not filed with the SEC.

*Commentary:*

- For example, the record retention policy will apply to free writing prospectuses prepared by underwriters and not containing issuer information and term sheets not reflecting final terms, all of which are not required to be filed.

#### *f. Treatment of Communications on Websites*

Under Rule 433(e), an offer of an issuer's securities that is contained on an issuer's website (or hyperlinked by the issuer from the issuer's website to a third-party website) will be considered a written offer and, unless otherwise exempt, will be a free writing prospectus of the issuer.

Historical issuer information contained on the issuer's website will not be considered an offer if it is identified as historical issuer information and located in a separate "archive" section of the website. This exclusion in Rule 433 for historical archived information will cover information that could be demonstrated to be previously published (for example, by being dated). However, if the historical archived information were incorporated into or otherwise included in a prospectus or used in connection with the offering, it would become an offer and no longer fall under the exclusion.

### *F. Regulation FD*

The rules will limit the exemption from Regulation FD of communications in connection with a registered securities offering to the following:

- a registration statement filed under the Securities Act, including any prospectus contained in such registration statement;
- a free writing prospectus used after the filing of the registration statement for the offering or a communication falling within the exception to the definition of prospectus contained in clause (a) of Section 2(a)(10) under the Securities Act;
- any other Section 10(b) prospectus;
- a notice permitted by Rule 135;
- a communication permitted by Rule 134; and

- an oral communication made in connection with a registered offering after the filing of a registration statement in connection with such offering under the Securities Act.

Thus, for example, the publication of regularly released factual business information, the publication of regularly released forward-looking information and pre-filing communications will remain subject to Regulation FD.

Under the modified Regulation FD, disclosures made in connection with registered shelf offerings by selling security holders are excluded from the application of Regulation FD if the offering also includes a registered primary offering for the account of the issuer.

### *G. Use of Research Reports*

Rules 137, 138 and 139 under the Securities Act describe circumstances in which a broker or dealer may publish research constituting an offer around the time of a registered offering without violating the Section 5 prohibition on pre-filing offers and impermissible prospectuses. The rules as adopted expand the circumstances in which offering participants and non-participants can disseminate research reports during a registered offering.

The safe harbor provisions of Securities Act Rules 137, 138 and 139 will continue to be available only to brokers and dealers. Issuers cannot use the safe harbor provisions or research reports prepared or distributed by brokers or dealers in reliance on the rules to directly or indirectly communicate with potential investors about an offering. For example, an issuer with a hyperlink to a research report on its website during a registered offering could be deemed to have adopted the contents of such report. Under the rules, the report could be considered a free writing prospectus.

*Commentary:*

- The rule will require many issuers, who include links to all research reports on their websites, to change their practice. The research reports could be maintained only if the conditions in Rule 433 are satisfied.

The rules will continue to permit the distribution of independent research within the safe harbor provisions.[11]

#### *1. Definition of Research Report*

The rules add, for the first time, a definition of research report. A "*research report*" is defined as a written communication[12] that includes information, opinions or recommendations with respect

[11] Research reports published or distributed in reliance on Rules 138 and 139 are not offers for purposes of Section 2(a)(10) and 5(c) of the Securities Act. Brokers or dealers distributing research in reliance on Rule 137 are not considered underwriters of the securities.

[12] See Section III.B above regarding the definition of "written communication."

to securities of an issuer or an analysis of a security by an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision. This definition is intended to encompass all types of research reports, whether issuer-specific reports or industry research that separately identifies the issuer. Because of the broad definition of written communications, the definition of research reports would also include media broadcasts.

### *2. Rule 137*

Under Rule 137, a broker or dealer that is not an offering participant in a registered offering but who publishes or distributes research in the regular course of business is not considered to be an underwriter in the offering. The rules extend the current exemption under Rule 137 to apply to securities of any issuer, including non-reporting issuers, other than blank check companies, shell companies and penny stock issuers.

### *3. Rule 138*

Under Rule 138, a broker or dealer participating in a distribution of an issuer's common stock and similar securities is permitted to publish research related solely to fixed income securities, and vice versa, if it publishes the research in the regular course of its business. Rule 138 now expands the categories of eligible issuers to include all reporting issuers that are current in their periodic Exchange Act reports, rather than only issuers who are Form S-3 or Form F-3 eligible as is currently the case. Broker-dealers publishing research reports on non-reporting foreign private issuers that either have had equity securities traded on a designated offshore market or have a $700 million public float may also rely on the rule.

The rule will require that, to be eligible for the exemption under Rule 138, the broker or dealer must have previously published, in the regular course of its business, research reports on the types of securities that are the subject of the reports in question.

### *4. Rule 139*

Under current Rule 139, a broker or dealer participating in a distribution of securities by a seasoned issuer or a foreign private issuer satisfying certain "float" and other requirements and publicly traded abroad may publish research concerning the issuer or any class of its securities if that research is contained in a publication distributed with reasonable regularity in the normal course of its business. Research on smaller seasoned issuers is permitted if additional restrictions are complied with.

*Issuer-Specific Reports.* Rule 139 will now allow reports about a specific issuer that is current in its Exchange Act periodic reports, and (i) is eligible to register a primary offering of securities on Form S-3 or F-3, based on the $75 million minimum public float eligibility provision of those forms, or (ii) whose registration statement covers a primary offering of non-convertible, investment-grade securities. The amendments retain the requirement that the broker or dealer publish the research report in the regular course of its business, but not the requirement that the research be published with reasonable regularity. At the time of reliance on the

exemption, the broker or dealer must have published research reports about the issuer or its securities. Thus, a report initiating coverage would be precluded.

*Industry-Related Reports*. The amendments extend the safe harbor for industry reports to registered offerings of any reporting issuer. Under the amendments, a broker or dealer will no longer be prohibited from making a more favorable recommendation than the one it made in the previous publication. A research report will not have to include any prior recommendations, but will have to contain similar types of information about the issuer or its securities as contained in prior reports.

#### *5. Research Reports in Connection with Regulation S and Rule 144A Offerings*

Regulation S provides a safe harbor from the registration requirements of the Securities Act for offshore offers and sales of securities. The amendments to Regulation S provide that research reports meeting the conditions of Rules 138 and 139 will not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.

Rule 144A provides a safe harbor from the registration requirements of the Securities Act for resales of restricted securities to "qualified institutional buyers" ("QIBs"), restricting offers to non-QIBs and general solicitation. The amendments provide that research reports meeting the conditions of Rule 138 or 139 will not be considered offers, general solicitation or general advertising in connection with offerings relying on Rule 144A.

#### *6. Research and Proxy Solicitations*

New Exchange Act Rule 14a-2(b)(5) codifies an SEC staff position that the publication or distribution of research under Rules 138 and 139 is permitted in connection with a registered securities offering that is subject to the proxy rules under the Exchange Act. Distribution of research in accordance with Rule 138 or 139 is a solicitation to which Rules 14a-3 through 14a-15 (other than Rule 14a-9) of the proxy rules do not apply.

## IV. Liability Issues

Under the Securities Act, purchasers of an issuer's securities in a registered offering have private rights of action for materially deficient disclosure in registration statements under Section 11 and in prospectuses and oral communications under Section 12(a)(2). Liability under Section 11 is judged as of the time the registration statement became effective. Section 17(a) under the Securities Act is a general anti-fraud provision that similarly prohibits the offer and sale of a security through materially deficient disclosure.

### *A. Liability Under Section 12(a)(2) and Section 17(a)(2) for Information Conveyed at the Time of Sale*

The SEC interprets Section 12(a)(2) and Section 17(a)(2) to mean that liability for sales under such sections is determined based on the information conveyed at the time of the contract of sale,

when investors commit to the purchase. Thus, information provided after such time, including any modifications or additions contained in a final prospectus, would not be taken into account in determining liability. This interpretation is codified in new Rule 159, with conforming changes made to Rule 412 regarding subsequent information incorporated by reference.

*Commentary:*

- Given the expanded means of communications permitted under the rules, the SEC believes that issuers and underwriters should have sufficient flexibility to convey additional information in a manner that does not slow the offering process.

### *B. Section 11 Liability*

As stated above, liability under Section 11 is judged based on the information provided at the time of effectiveness of the registration statement, which may be at or before the time of the contract of sale. This includes information provided in the final prospectus under Rule 430A and deemed to be part of the registration statement as of its effective date. Similarly, as described below, Rule 430B establishes a new effective date for a shelf registration statement for liability purposes in connection with a takedown. Thus, information may be deemed part of the registration statement for purposes of Section 11 liability, but would not be taken into account under Section 12(a)(2) or Section 17(a)(2) unless the information was conveyed to the investor at or prior to the time of the contract of sale. Similarly, an investor's right under Section 11 will not be affected by information conveyed to an investor at or prior to the time of the contract of sale that is not included in or incorporated by reference into the registration statement for the securities sold to the investor.

### *C. Issuer as Seller*

Due to uncertainty created by recent caselaw regarding an issuer's liability under Section 12(a)(2) in a firm commitment underwriting, Rule 159A provides that an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, will be considered to offer or sell the securities to the purchaser and therefore will be a seller for purposes of Section 12(a)(2) as to any communications made by or on behalf of the issuer. These communications include prospectuses and prospectus supplements relating to the offering and free writing prospectuses and other communications made by or on behalf of the issuer.

A communication by an underwriter or dealer participating in an offering will not be on behalf of the issuer solely by virtue of its participation. However, there are circumstances where the involvement of an issuer could be sufficiently extensive so that a communication of another person, including an offering participant, could be deemed as made by an issuer.

# V. Securities Act Registration Reforms

## *A. Procedural Changes Regarding Shelf Offerings*

### *1. Mechanics*

Rule 430B implements liberalized prospectus requirements for shelf registration statements for all registered primary securities offerings, other than business combination transactions and exchange offers. Under the new rule, information required in the prospectus about the issuer and its securities can be included in a prospectus supplement or incorporated by reference from Exchange Act reports. Even material changes in the plan of distribution, which currently are required to be included in a post-effective amendment, can be disclosed in a prospectus supplement or by incorporated Exchange Act reports. The rule clarifies that this information will be deemed part of the registration statement.

*Commentary:*

- Rule 430B, like current Rule 409, only permits the omission of information that is "unknown or not reasonably available" to the issuer. Thus, the base prospectus included in the registration statement must include a general description of the types of securities and possible plans of distribution section, even if it will be amended at the time of a takedown in the prospectus supplement.

The rules also allow issuers eligible to use Form S-3 or Form F-3 for primary offerings to identify selling security holders and the amounts of securities to be offered on behalf of each of them after effectiveness. Rule 430B permits eligible seasoned issuers to add the identities of the selling security holders and the required information about them to the registration statement after effectiveness by either a post-effective amendment, a prospectus supplement or an Exchange Act report incorporated by reference into the registration statement if:

- the registration statement is an automatic shelf registration statement; or
- the following conditions are met: (i) the resale registration statement identifies the transaction pursuant to which the securities were initially sold; (ii) the initial offering of the securities is completed; and (iii) the securities that were the subject of the registration statement were issued and outstanding prior to initial filing of the resale registration statement.

Accordingly, if the securities are not yet issued in the private offering, the issuer may not rely on this provision, even if the investors are contractually bound to acquire the securities. The issuer can still register the resale of these securities, but it must identify the selling security holders in the registration statement prior to effectiveness.

### *2. Information Deemed Part of Registration Statement*

Under Rule 430B, information contained in a prospectus supplement, whether filed in connection with a takedown or otherwise, will be deemed part of the registration statement containing the base prospectus to which the prospectus supplement relates. As a result, a prospectus supplement will be considered part of the registration statement for purposes of Section 11 liability.

### *3. Date of Inclusion of Prospectus Supplement and New Effective Dates of Registration Statement*

Under Rules 430B and 430C, information contained in a prospectus supplement will be deemed included in the registration statement as follows:

- for a prospectus supplement filed other than in connection with a takedown of securities, all information contained in such prospectus supplement will be deemed part of the registration statement as of the date the prospectus supplement is first used; and
- for a prospectus supplement filed in connection with a takedown pursuant to Rule 424(b)(2), (b)(5) or (b)(7), all information in that prospectus supplement will be deemed part of the registration statement as of the *earlier* of the date it is first used or the time of the first contract of sale of securities in the offering to which the prospectus supplement relates.

The staff has previously stated that the date of first use is not the date that the prospectus supplement is given to a potential purchaser in connection with a sale. It is the date that the prospectus is available to the managing underwriter, a syndicate member or any prospective purchaser.[13]

As noted above, Rule 430B establishes a new effective date for a shelf registration statement for liability purposes under Section 11 in connection with a takedown. The new effective date will be the date a prospectus supplement filed in connection with the takedown was deemed part of the relevant registration statement. The new effective date will be for liability purposes only and will not constitute the filing of a new registration statement or an updating of the registration statement and prospectus for purposes of determining Form eligibility or the filing of consents of experts. Moreover, this new effective date for a takedown will not affect information that was in the registration statement at the time of any prior sale. Therefore, the rights of an investor in a prior sale (with a previous effective date) will remain unaffected by subsequently filed prospectus supplements or Exchange Act reports. In addition, it will not affect the determination of when information was conveyed to a purchaser for Section 12(a)(2) liability purposes.

[13] See SEC Release No. 33-6714 (May 27, 1987).

### *4. Amendments to Rule 415*

The amendments eliminate the current provision in Rule 415 that limits the amount of securities registered in a primary offering to an amount intended to be offered or sold within two years from the registration statement effective date. However, under the amendment a shelf registration statement can be used only for three years after its initial effective date. Thus, a new shelf registration statement must be filed every three years, with unsold securities and fees paid thereon allowed to be included on the new registration statement.

*Commentary:*

- As long as the new shelf registration statement is filed within three years of the original effective date of the old registration statement, the issuer may continue to sell securities from the old registration statement for up to six months thereafter until the new registration statement is declared effective.

The amendment to Rule 415 will allow primary offerings on Form S-3 or Form F-3 immediately following effectiveness of a shelf registration statement. The amendments also eliminate the restrictions for primary shelf eligible issuers on primary "at-the-market" offerings of equity securities currently set forth in Rule 415(a)(4).

### *5. Rule 424 Amendments*

In connection with these procedural changes, the SEC modified Rule 424 to allow the SEC to more readily identify prospectuses that list selling security holders or that were not filed timely. In light of the new rules permitting free writing prospectuses, Rule 434, which permits the use of term sheets, has been eliminated.

### *6. Issuer Undertakings*

Conforming revisions were also made to the issuer undertakings required in shelf registration statements. Under the amendment to the Item 512(a) undertaking, for shelf registration statements filed on Forms S-3 and F-3, all the required disclosures can be contained in any filed prospectus supplement, instead of only in periodic reports. Therefore, an issuer will be permitted to use an incorporated Form 8-K (or Form 6-K, if applicable) to satisfy this undertaking.

*Commentary:*

- Foreign private issuers will still be required under Item 512(a)(4) to undertake to update their financial and other information in a shelf registration statement, either through a post-effective amendment or by incorporation by reference.

A new undertaking will be added in which the issuer acknowledges liability for information deemed part of the registration statement and the new effective dates deemed for such purposes, under Rules 430B and 430C described above.

The amendments to Form S-3 and Form F-3 expand the categories of majority-owned subsidiaries that will be eligible to register their non-convertible debt securities or guarantees.

### *B. Automatic Shelf Registration for Well-Known Seasoned Issuers*

In addition to the improvements in the shelf registration process described above, the rules introduce a significantly more flexible "automatic shelf registration" for offerings on Form S-3 or Form F-3 by well-known seasoned issuers. This automatic shelf registration will provide well-known seasoned issuers with the flexibility to take advantage of market windows, to structure securities on a real-time basis to accommodate issuer needs or investor demand and to determine or change the plan of distribution of securities in response to changing market conditions.

#### *1. Eligibility*

An automatic shelf registration statement can be used for all primary and secondary offerings of securities of eligible well-known seasoned issuers, other than those in connection with business combination transactions or exchange offers. Under the rules as adopted, an issuer can file an automatic shelf registration statement if it meets the eligibility criteria on the initial filing date and would reassess its eligibility at the time of each updated prospectus required by Section 10(a)(3) upon the filing of the issuer's Form 10-K or Form 20-F for the prior fiscal year.

If an issuer is no longer eligible to use an automatic shelf registration statement at the time of its determination of eligibility, it will have to either (a) post-effectively amend its registration statement onto the form it was then eligible to use or (b) file a new registration statement on such a form.

#### *2. Information That May be Omitted from the Base Prospectus*

Currently, pursuant to Rule 409, a base prospectus included in a shelf registration statement can omit information that is unknown and not reasonably available at the time of effectiveness. Under the adopted automatic shelf registration, a base prospectus can omit the following additional information:

- whether the offering is a primary or secondary offering;
- the description of the securities to be offered other than an identification of the name or class of the securities;
- the names of any selling security holders; and
- any plan of distribution for the offering securities.

Information such as the public offering price, a detailed description of the securities offered and the names of the underwriters can be included in the prospectus supplement. However, new types of securities and new issuers will have to be added through a post-effective amendment, which will become effective immediately upon filing. The officers and directors of the new

registrant will be required to be signatories to the post-effective amendment, which will also need to include any necessary legal opinions and accounting and other consents.

*Commentary:*

- Thus, well-known seasoned issuers can file shelf registration statements with little more than a cover page listing the classes of securities offered by title and a signature page.

### *3. Registration of Securities to be Offered*

An eligible well-known seasoned issuer may register on an automatic shelf registration statement an unspecified amount of securities to be offered, without indicating whether the securities would be sold in primary offerings or secondary offerings. Well-known seasoned issuers that satisfy the definition based only on their registered non-convertible security issuances can register only non-convertible securities, other than common equity, unless they are eligible to use Form S-3 or F-3 for a primary offering because they have a public float of $75 million or more.

The base prospectus in the initial registration statement must identify in general terms the names or classes of securities registered. In addition, the rules expand the unallocated shelf procedure to allow automatic shelf issuers to register classes of securities without allocating the mix of securities registered among the issuer, its eligible subsidiaries or selling security holders.

Under the rules, a well-known seasoned issuer can add new classes of securities or securities of an eligible subsidiary to an automatic shelf registration statement at any time before the sale of those securities. In order to add a new class of securities, an issuer must file a post-effective amendment, which will be immediately effective, to register an unspecified amount of securities of the new class. An issuer can provide the disclosure about the new class of securities in the post-effective amendment to, in a prospectus supplement deemed part of, or in an Exchange Act report that is incorporated by reference into, the registration statement.

*Commentary:*

- If an issuer using an automatic shelf registration files a post-effective amendment to add a class of debt securities, it also will need to qualify the indenture under the Trust Indenture Act of 1939. Although the SEC requires that the indenture be qualified when the registration statement becomes effective (*i.e.,* not at the time of any post-effective amendment), under the new rules the effectiveness of an automatic shelf registration post-effective amendment that adds securities to a shelf registration statement will be the time "when registration becomes effective as to such securit(ies)." As such, the indenture for such added securities must be included in the registration statement at the time of filing of the post-effective amendment.

#### *4. Pay-as-You-Go Registration Fees*

The rules permit issuers using automatic shelf registration statements to pay filing fees at the time of a securities offering ("pay-as-you-go"), with no fees required at the time of the initial filing of the registration statement. Rule 424 was amended to require an issuer using automatic shelf registration and the pay-as-you-go registration fee procedures to include on the cover page of a prospectus supplement a fee table calculating the registration fee.

#### *5. Automatic Effectiveness*

Under the rules, automatic shelf registration statements and post-effective amendments will become effective immediately upon filing without SEC staff review. In addition, an amendment to Rule 401(g) provides that an automatic shelf registration statement will be deemed to be filed on the proper form unless the issuer receives notification of an SEC objection. After being notified, the issuer cannot proceed with subsequent offerings (those offerings not in progress) unless it amends the registration statement to the proper form or otherwise resolves the issue.

#### *6. Duration*

As with non-automatic shelf registrations, issuers will be required to file new automatic shelf registration statements every three years in order to maintain their effectiveness. The new automatic shelf registration statements will, in effect, restate the then-current registration statements and amend them, as appropriate. As long as eligibility for automatic shelf registration is maintained, the new registration statement will be effective immediately and will carry forward the unsold securities registered and the balance of any fee paid.

### *C. Amendments to Forms S-1 and F-1 – Expanded Use of Incorporation by Reference*

#### *1. Eligibility*

Under the amendments to Forms S-1 and F-1, a reporting issuer that has filed at least one annual report and is current in its reporting obligations under the Exchange Act for the previous 12 months will be permitted to incorporate by reference into its Form S-1 or Form F-1 information from *previously filed* Exchange Act reports. In addition, the issuer will have to make its Exchange Act reports readily accessible on its website to be able to incorporate such information by reference. Blank check issuers, shell companies and issuers of penny stock will not be able to take advantage of this provision.

#### *2. Procedural Requirements*

Under the amendments, the prospectus in the registration statement at effectiveness must identify all Exchange Act reports and materials, such as proxy and information statements, that are incorporated by reference. Exchange Act reports filed after the registration statement became effective (known as "forward incorporation") may not be incorporated by reference. Material

changes in the information that is incorporated by reference from an Exchange Act report must be included in the prospectus.

### *D. Elimination of Form S-2 and Form F-2*

The expansion of the types of issuers that may incorporate Exchange Act reports by reference makes Forms S-2 and F-2 superfluous. Therefore, these two forms have been eliminated.

## VI. Prospectus Delivery Reforms

### *A. Access Equals Delivery Model*

Under the current system, final prospectuses are generally delivered to investors only after they have made their investment decisions. Under the rules, the SEC has adopted an "access equals delivery" model for delivery of a final prospectus, based on the assumption that investors have access to the Internet, thereby permitting issuers and intermediaries to satisfy their delivery requirements if the filings or documents are posted on a website.

Under Rule 172, a final prospectus will be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) under the Securities Act as long as a final prospectus meeting the requirements of Section 10(a) is filed with the SEC or the issuer makes a good faith and reasonable effort to file it by the filing date required under Rule 424. Broker-dealers will still be required, under Exchange Act Rule 15c2-8(d), to take reasonable steps to comply promptly with written requests for copies of the final prospectus.

Certain types of offerings are excluded from the rule as adopted. For example, offerings made pursuant to Form S-8, where the final prospectus is not filed, are excluded. Business combination transactions and exchange offers, which may be subject to different informational and delivery requirements under the proxy rules, tender offer rules and state law, are also excluded. Registered investment companies and business development companies will not be able to rely on the rule.

### *B. Notification*

In addition to providing access to information, the delivery of a prospectus can be used to inform investors that they purchased securities in a registered transaction. Accordingly, under Rule 173, for each sale by an issuer or underwriter to a purchaser and in which the final prospectus delivery requirements apply, each underwriter or dealer participating in a registered offering must provide to each purchaser a copy of the final prospectus or, in lieu of the final prospectus, a notice providing that the sale was made pursuant to a registration statement. The notice must be sent not later than two business days after completion of the sale.

An investor also can request a final prospectus under the rule. The requested final prospectus does not have to be provided before settlement, and non-compliance with Rule 173 will not result in a violation of Section 5 of the Securities Act.

### *C. Confirmations and Notices of Allocations*

A new exemption from Securities Act Section 5(b)(1) allows written confirmations and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus. The exemption is conditioned on the registration statement being effective and the final prospectus meeting the requirements of Section 10(a) being filed.

The exemption permits:

- written confirmations containing information limited to that called for in Exchange Act Rule 10b-10 and other information customarily included in confirmations, including any notice pursuant to Rule 173; and
- written communications from an offering participant to a customer, or from an underwriter to dealers in the selling group, notifying them of the transaction and their allocations of securities in a registered offering.

The exemption is not available for the same offerings excluded from the prospectus delivery provision of Rule 172 discussed above.

### *D. Transactions Taking Place on an Exchange or Through a Registered Trading Facility*

With regard to transactions taking place between brokers over a national securities exchange, Rule 153 currently provides that where members of the exchange are on both sides of the transaction and the transaction is effected on that exchange, the Section 5 delivery obligation of a final prospectus before or with a security between the brokers will be satisfied if the issuer or underwriter delivers copies of the final prospectus to the exchange.

The amendment to Rule 153 will extend this exemption to permit brokers or dealers effecting transactions on an exchange *or* through any registered trading facility (including Nasdaq) to satisfy their prospectus delivery obligations if:

- the final prospectus has been filed or will be filed;
- securities of the same class are trading on an exchange or through any registered trading facility;
- the registration statement relating to the offering is effective and not the subject of a stop order; and
- neither the issuer nor any underwriter or participating dealer is the subject of a pending proceeding under Securities Act Section 8A in connection with the offering.

The rules do not require physical copies of the prospectus to be sent to the exchange or market maker, which in turn will no longer need to keep track of any prospectuses.

### *E. Aftermarket Prospectus Delivery*

Currently, for a specified period after a registration statement becomes effective, all dealers are required to deliver a final prospectus to persons who buy the securities in the aftermarket, unless an exemption applies. Rule 174 will permit dealers to rely on Rule 172 to satisfy any such aftermarket delivery obligations (other than for blank check companies). This rule, however, does not apply to underwriters or dealers with respect to any unsold allotment.

## VII. Additional Exchange Act Disclosure Proposals

### *A. Risk Factor Disclosure*

Under the rules, issuers will be required to include risk factor disclosure in their annual reports on Form 10-K and registration statements on Form 10. (Form 20-F, the annual report form used by foreign private issuers, already requires risk factor disclosure.) Issuers will be required to update their risk factor disclosure in their quarterly reports to reflect any material changes from previously disclosed risks. No restatement or repetition of risk factors is required in quarterly reports.

### *B. Disclosure of Unresolved Staff Comments*

The procedural changes adopted may eliminate some of the incentives issuers have to resolve SEC comments on their Exchange Act reports in a timely manner.[14] As a result, the SEC has added a disclosure requirement to incentivize accelerated filers to timely resolve any outstanding comments.

The rules will require all accelerated filers and well-known seasoned issuers to disclose, in their annual reports on Form 10-K or 20-F, written staff comments made in connection with a review of Exchange Act reports that (i) the issuer believes are material, (ii) were issued more than 180 days before the end of the fiscal year covered by the annual report and (iii) remain unresolved as of the Form 10-K or 20-F filing date.

### *C. Disclosure of Status as Voluntary Filer Under the Exchange Act*

As noted above, the communications and procedural rules do not treat voluntary filers as reporting or seasoned issuers. To better enable the SEC to monitor voluntary filers' compliance with these rules, the rules require each filer to note whether or not it is a voluntary filer in a box on the cover page of Forms 10-K, 10-KSB and 20-F.

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[14] For example, with immediate effectiveness of shelf registration statements, well-known seasoned issuers will not be subject to the possibility that effectiveness of a Securities Act registration statement could be delayed while SEC comments are resolved.

## VIII. Application of Reforms to Asset-Backed Securities

Asset-backed securities ("ABS") issuers offering securities registered on Form S-3 will be considered seasoned issuers, but cannot be well-known seasoned issuers. As a result, automatic shelf registration will not be available to issuers of ABS.

As adopted, the changes in communications restrictions will generally apply to ABS offerings, including the safe harbor exclusions from the definition of offer for purposes of the gun-jumping provisions. These issuers may use free writing prospectuses as permitted by Rules 164 and 433, and such use will not be limited to offerings registered on Form S-3. The contents of such free writing prospectuses are not limited to ABS informational and computational materials.

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If you wish to obtain additional information regarding these securities reform regulations, please contact John S. D'Alimonte, Steven J. Gartner, Serge Benchetrit, Jeffrey S. Hochman, Jeffrey R. Poss, Holly K. Youngwood or the attorney with whom you regularly work.

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Appendix A

## Permitted Communications Under New Safe Harbors

| | More Than 30 Days Before Filing of Registration Statement | During 30-Day Period Before Filing of Registration Statement | Waiting Period (Between Filing and Effectiveness) | Post-Effective Period |
|---|---|---|---|---|
| **Non-Reporting Issuers** | • Regularly released factual business information permitted, except to persons in their capacity as investors or potential investors (Rule 169) | | | |
| | • Notice of registered offering (current Rule 135) | | • Statutory preliminary prospectus | • Statutory final prospectus |
| | • Bright-line safe harbor for communications by the issuer that do not reference a securities offering (Rule 163A) | | • Oral offers permitted (current law)<br>• Expanded notices under Rule 134<br>• Free writing prospectuses if accompanied or preceded by a statutory prospectus (Rules 164 and 433(b)(2))<br>• Media publications (if not paid for) without delivery of prospectus (Rules 164 and 433(b)(2)) | |
| **Unseasoned Issuers*** | • Regularly released factual business information and forward-looking information permitted (Rule 168) | | | |
| **Seasoned Issuers*** | | | • Free writing prospectuses after a statutory prospectus is filed (Rules 164 and 433(b)(1)) | |
| **Well-Known Seasoned Issuers*** | • Oral and written communications by the issuer permitted (Rule 163) | | | |

* Communications described with respect to the issuer(s) listed above are also permitted with respect to this category of issuer.