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SEC Overhauls the Securities Offering Process in the United States

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The SEC has adopted major modifications to the offering process for raising capital under the Securities Act of 1933. The modifications, which are intended to make it easier for all issuers to access the US capital markets through registered securities offerings, greatly increase the types of communications that can be made before or at the time of a registered offering, liberalize the means by which information is to be delivered to investors as part of those offerings, and simplify the registration procedures for many of those offerings.

This memorandum provides an overview of the modifications, which will be effective December 1, 2005. In addition, as the reforms impact different types of issuers differently, we will be updating this memorandum over time with specific annexes for each type of issuer, as well as voluntary filers. We encourage you to return to this site for those additional updates.

In view of the extent of the reforms and our descriptions thereof, we start with an Executive Summary. For those who wish to print just the Executive Summary that follows, please click here.

EXECUTIVE SUMMARY

Categories of Issuers

In many cases, the degree of flexibility granted to issuers under the new/modified rules is based on the characteristics of the issuer, including the type of issuer, the issuer's reporting history and the issuer's equity market capitalization or historical level of debt issuance. The reforms divide issuers into various categories:

- a “non-reporting issuer”: an issuer that is not required, at that time, to file reports pursuant to Sections 13 or 15(d) of the Exchange Act;
- an “unseasoned issuer”: an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities;
- a “seasoned issuer”: an issuer that is eligible to use Form S-3 or Form F-3 to register a primary offering of securities (which eligibility will not change despite the creation of the new regime for well-known seasoned issuers);
- a “well-known seasoned issuer”: an issuer that meets the registrant requirements Form S-3 or Form F-3 (i.e., is current and timely in its Exchange Act reporting) and has either $700 million of worldwide public float (in voting and non-voting common) or has issued $1 billion of registered non-convertible securities (other than common equity) in primary offerings for cash in the preceding three years (the latter category applies for more limited purposes unless the issuer also has a $75 million worldwide public float) (added to Rule 405); and
- an “ineligible issuer”: an issuer that by reason of its status generally or at a particular time is ineligible to rely on the new rules (added to Rule 405).

Because of their market following, well-known seasoned issuers benefit the most from the changes to the communications rules and the rules governing the registration process.

New Concepts

Although the reforms are billed as "incremental" and do build on the existing registration regime, there are a few new concepts and some modifications to existing concepts that are key elements of the new regime. These include the concepts of:

- ***"Written communication,"*** which includes all methods of communication, other than oral communications. A "written communication" is any communication that is written, printed or broadcast, or is a graphic communication. Written communications include internet communications, e-mails and other electronic and web-based communications and electronic postings on web sites – including electronic road shows. They do not include oral communications, such as live telephone calls (whatever the medium by which they are carried, including the internet) and other direct oral communications, and do not include individual telephone voice mail messages, but do include broadly disseminated or "blast" voice mail messages.

- ***"Graphic communications,"*** which includes any form of electronic media, such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, internet web sites, and computers, computer networks and other forms of computer data compilation. They do not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication (even if transmitted as a graphic communication); these are deemed oral communications.

- ***"Factual business information,"*** which includes factual information about the issuer or some aspect of its business; advertisements of, or other information about, the issuer's products or services; factual information about business or financial developments with respect to the issuer; dividend notices; and factual information set forth in reports or other materials filed with, furnished to or submitted to the SEC pursuant to the Exchange Act.

- ***"Free writing prospectus,"*** which generally 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, but that is not a prospectus satisfying the requirements of Section 10(a) (i.e., a final prospectus). A communication is a free writing prospectus only where it constitutes an "offer" of a security under the Securities Act. Whether a particular communication constitutes such an offer will, as before the reforms, be determined based on facts and circumstances. Communications that are not considered offers or prospectuses for purposes of the gun-jumping provisions are not free writing prospectuses. The free writing prospectus allows certain issuers, subject to conditions, to make written offers using communications that are not themselves complete prospectuses (in fact, there are no content requirements, just legends).

- ***"Issuer free writing prospectus,"*** which means a free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer.

- ***"Bona fide electronic road show,"*** which means a version of an electronic road show (one that is provided or made available by means of graphic communication) that contains a presentation by some members of an issuer's management and that, where the issuer is using more than one version of an electronic road show, covers the same general areas regarding the issuer, its management and the securities being offered as the other versions.

- ***"Automatic shelf registration,"*** which is available to well-known seasoned issuers, and allows registration of unspecified amounts of specified types of securities on an S-3 or F-3 that goes effective immediately, with a base prospectus that can exclude certain information otherwise required to be included such as the description of securities and plan of distribution (which will be included subsequently in a prospectus supplement or incorporated by reference), and with fees paid "as-you-go" at takedown.

- ***"By or on behalf of an issuer,"*** which concept is used in various of the communications safe harbors. The SEC declined to provide a single definition and instead defines the phrase in the various safe harbors. Generally, information is provided or a communication is made, released or disseminated by or on behalf of an issuer when the issuer, or an agent or representative of the issuer, authorizes or approves the information or communication before its use. Generally, it excludes an offering participant (other than the issuer) such as an underwriter or dealer. An agent may include an advertising agency or public relations firm.

Substantial Modification of "Gun-Jumping" Rules

General Effect

The changes update and liberalize permitted offering activity and communications to allow more information to reach investors by revising the "gun-jumping" provisions under the Securities Act. These traditionally have severely restricted the ability of issuers to communicate about a public offering other than through a preliminary "red herring" prospectus. As a consequence of the reforms of the gun-jumping provisions:

- "well-known seasoned issuers" are able to engage at any time (i.e., before and after a registration statement is filed) in oral and written communications, including the use at any time of a "free writing prospectus" (definition added to Rule 405), subject to conditions (including legends and filing with the SEC) (Rule 163);

- all reporting issuers and well-known non-reporting foreign private issuers are, at any time, permitted to continue to publish regularly released factual business information and forward-looking information (Rule 168);

- non-reporting issuers are, at any time, permitted to continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors (Rule 169);

- communications by or on behalf of issuers more than 30 days before the filing of a registration statement are not considered prohibited offers as long as they do not reference a securities offering (Rule 163A);

- all issuers and other offering participants are permitted to use a "free writing prospectus" after the filing of a registration statement (only well-known seasoned issuers may use free writing prospectuses before the filing of the registration statement), subject to conditions (including legends and filing with the SEC) (Rules 164 and 433);

- 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, has been excluded from the definition of "prospectus" and thus may be communicated after the filing of a registration statement (amended Rule 134); and

- exemptions for research reports by broker-dealers have been expanded (Rules 137, 138 and 139).

A number of these reforms include conditions of eligibility. Most of the changes, for example, are not available to blank check companies, penny stock issuers or shell companies.

Free Writing Prospectuses

Perhaps the most significant reform in the gun-jumping area is the "free writing prospectus." These written communications do not have content requirements other than legends. How and when they can be used will depend on the type of issuer. Some of these communications need to be accompanied or preceded by a statutory prospectus (i.e., a preliminary prospectus with, in the case of an IPO, a price range), which condition can be met through an active hyperlink; many will need to be filed with the SEC (particularly if it is an "issuer free writing prospectus") and any not filed will be subject to record retention rules. Among other things, the definition of free writing prospectus will cover certain electronic road shows, certain information on issuer web sites and certain media publications and broadcasts.

Road Shows

In-person road shows are oral communications and, after a registration statement is filed, are not subject to the gun-jumping rules. Road shows that originate and are presented live, in real time to a live audience, as well as presentations to overflow rooms at live, in person road shows are excluded from the definition of graphic communications, and thus are not deemed written communication (or a free writing prospectus). Communications provided simultaneously (such as slides and visual aids) as part of these live road shows are not deemed written communications either.

Road shows that do not originate live, in real-time to a live audience and are graphically transmitted are written communications and, therefore, free writing prospectuses and are permitted as long as the conditions of Rule 433 are met. (Given issuer participation, they will be issuer free writing prospectuses.) An electronic road show generally will not be subject to filing requirements, except in the case of an IPO; however, if a bona fide IPO electronic road show is readily available without restriction electronically to any potential investor, no filing is required.

Web Sites

Rule 433 makes clear that an offer of an issuer's securities contained on an issuer's web site or hyperlinked by the issuer from the issuer's web site to a third party web site is considered a written offer of such securities made by the issuer and, unless otherwise exempt, is a free writing prospectus of the issuer. The requirements of Rule 433 apply to these free writing prospectuses as well as information contained on or hyperlinked to an offering participant's website. Rule 433(e) exempts from coverage historical information that meets the conditions of the exemption.

Improvements to Shelf Registration Procedures

The SEC reforms modify the operation of the "shelf" registration process under the Securities Act to permit eligible issuers to access the markets far more quickly. These modifications:

- codify in a single rule (Rule 430B, in effect a corollary to Rule 430A) the information that can be omitted from a base prospectus for a shelf at effectiveness and included later;

- replace the requirement that issuers register only securities they intend to offer within two years with a requirement that the issuer update any automatic shelf registration statement and any registration statement for offerings under Rule 415(a)(1)(vii), (ix) or (x) by filing a new registration statement every three years (amended Rule 415);

- eliminate a number of restrictions in Rule 415 on "at-the-market" offerings;

- permit immediate takedowns of securities off a shelf (amended Rule 415(a)(1)(x));

- permit issuers to use prospectus supplements (rather than post-effective amendments) to make material changes to the plan of distribution in the base prospectus (amended Regulation S-K, Item 512(a));

- for seasoned issuers with a $75 million public float, revise the requirement to identify selling security holders by permitting selling security holders to be identified in prospectus supplements (rather than post-effective amendments), where the securities to be sold are outstanding when the shelf is filed (amended Instructions to Form S-3/F-3); and

- establish "automatic shelf registration" for offerings by well-known seasoned issuers.

The automatic shelf registration process, together with the loosening of the restrictions on communications noted above, provide well-known seasoned issuers with maximum flexibility to access the market when they wish and to use free writing prospectuses as part of their marketing efforts.

Prospectus Delivery Reforms

The reforms change the ways in which the final prospectus delivery obligations under the Securities Act can be satisfied (i.e., physical delivery). The change creates an "access equals delivery" model for final prospectuses, such that filing a final prospectus with the SEC and complying with other conditions will satisfy delivery requirements. In addition, to preserve an investor's ability to trace securities to a registered offering, the reforms include a separate requirement to notify investors that they purchased securities in a registered offering.

Required Disclosure in Exchange Act Reports

Issuers are required to include the following in their Exchange Act periodic reports:

- for Form 10-K filers, disclosure regarding risk factors in their Form 10-Ks (and updates in 10-Qs; however, including full risk factors on a quarterly basis is discouraged);

- disclosure regarding the issuer's status as a "voluntary" filer of Exchange Act reports; and

- for issuers meeting the definition of "accelerated filers" (including foreign issuers) disclosure in their 10-K or 20-F annual reports of written staff comments that were issued more than 180 days before the end of the fiscal year to which the annual report relates, if those comments remain unresolved at the time of filing the annual report and the issuer believes those comments to be material.

Incorporation by Reference

Reporting issuers that are current in filing their Exchange Act reports will now be able to incorporate by reference previously filed Exchange Act reports into a Securities Act registration statement on Form S-1 or Form F-1.

Liability Timing Issues

The release includes an interpretation that, for purposes of disclosure liability under Section 12(a)(2) and Section 17(a)(2) of the Securities Act, the assessment of whether a material misstatement or material omission exists is to be made in respect of information conveyed to an investor at the time of its investment decision and not based information that is only conveyed or filed subsequently. The reforms ensure that prospectus supplements are included in the registration statement for disclosure liability purposes; and establish a new effective date for each prospectus filing reflecting a takedown of securities off a shelf registration statement that will largely eliminate the timing discrepancy in the application of disclosure liability to issuers and underwriters. Liability for officers, directors and experts (including auditors) generally will be tied to the filing date of the initial registration statement.

Impact on Foreign Private Issuers

Generally speaking, non-U.S. issuers are subject to the same constraints, and rely on the same processes for accessing the public markets, as do domestic issuers and, thus, will benefit to the same extent as domestic issuers from the reforms. For example, the flexibility under the new automatic shelf registration process will facilitate Securities Act registration of rights offers conducted by eligible foreign private issuers, who frequently do not extend rights offers to U.S. security holders because the traditional registration process did not accommodate the timing mechanics of rights offers, which are typically announced and launched in a very short period of time.

One item that will not affect Form 20-F filers is the requirement that 10-K filers include risk factors in periodic reports; Form 20-F already requires risk factors. However, Form 20-F filers that meet the definition of “accelerated filer” will be subject to the disclosure requirement in respect of unaddressed SEC comments.

The Rule 138 and 139 safe harbors have been expanded to cover research reports for non-reporting foreign private issuers with equity securities traded on designated offshore markets for at least 12 months or with a $700 million worldwide public float.

Under the definition of well-known seasoned issuer, non-affiliate equity market capitalization can be determined on a worldwide basis. In addition, foreign private issuers can include as “equity” for this calculation certain classes of participating voting or non-voting preferred stock that essentially are common stock.

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NEW CLASSIFICATION OF ISSUERS

For purposes of the communication rules, as well as the reform of the shelf registration process, the SEC has adopted a new set of categories of issuers accessing the public markets.

Well-Known Seasoned Issuers. This new category of issuer will have maximum flexibility under the communication rules and will be entitled to take advantage of the "automatic shelf registration process." A well-known seasoned issuer is an issuer that is *required* (under the federal securities laws) to file reports pursuant to Section 13(a) or Section 15(d) the Exchange Act (thus, it cannot be a voluntary filer) and satisfies the following:

- the issuer must have filed at least one annual report on Form 10-K or Form 20-F;
- the issuer must be current in its SEC reporting obligations and timely in satisfying those obligations for the preceding 12 calendar months;
- the issuer must not have defaulted on its debt, long term leases or preferred stock since the end of its last fiscal year for which an annual report on Form 10-K or 20-F has been filed, which defaults in the aggregate are material to the issuer's consolidated financial position;
- as of a date within 60 days of its eligibility date (see below) the issuer must either (A) have at least $700 million worldwide public float (of voting or non-voting common equity and, in the case of foreign private issuers, certain participating preferred stock that is economically equivalent to common) or (B) have issued at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash registered with the SEC during the last three years (if the issuer meets this latter test it may only register on an automatic shelf non-convertible securities, other than common equity, unless it also has a $75 million worldwide public float, in which case it can register any offering of securities on the automatic shelf);
- the issuer is not an "ineligible issuer;" and
- the issuer is not an asset-backed issuer, a registered investment company or a business development company.

A majority-owned subsidiary of a well-known seasoned issuer also may be considered a well-known seasoned issuer in connection with the offer and sale of its own securities if:

- the majority-owned subsidiary itself meets the conditions for eligibility;
- the securities are non-convertible securities, other than common equity, and the parent of the majority-owned subsidiary is a well-known seasoned issuer and fully and unconditionally guarantees those securities (as contemplated by Regulation S-X, Rule 3-10);
- the majority-owned subsidiary guarantees the non-convertible securities of (1) its well-known seasoned issuer parent or (2) another majority-owned subsidiary where there is also a full and unconditional guarantee of those securities by the parent that is a well-known seasoned issuer; or
- the majority-owned subsidiary is offering non-convertible investment grade debt.

Issuers that do not meet the $700 million public float threshold are considered well-known seasoned issuers solely for purposes of automatic shelf offerings of non-convertible securities (other than common equity) if they have sold more than an aggregate of $1 billion in non-convertible securities (other than common equity) through registered offerings for cash over the prior three years, unless they have at least $75 million worldwide public float. These issuers also have to satisfy the other conditions of the well-known seasoned issuer definition, such as the reporting history requirement. Issuers also meeting the public float test can register securities on an automatic shelf. For purposes of the $1 billion test, the securities can be registered on any form other than an S-4 or F-4 (thus eliminating 144A debt that is exchanged for registered securities), and need not be investment grade. A parent issuer can count guarantees of non-convertible securities (other than common equity) issued by its majority-owned subsidiaries for cash.

Whether an issuer meets the definition of "well-known seasoned issuer" is to be determined using a 60-day window measured at the later of the time of filing of its most recent shelf registration statement and the time of the most recent update of a shelf registration statement required by Section 10(a)(3) (by post-effective amendment, incorporated annual report or form of prospectus). Issuers that have not filed a shelf or amended a shelf for purposes of Section 10(a)(3) determine their status when they file a Form 10-K or 20-F. Note that if any such issuer is late in updating/filing, it is not timely and would not qualify for well-known seasoned issuer status.

Seasoned Issuers. A seasoned issuer is an issuer that is eligible to use Form S-3 or Form F-3 to register primary offerings of securities – securities to be sold by or on its behalf, on behalf of its subsidiary, or on behalf of a person of which it is the subsidiary. (The test is based on public float or issuance of investment grade securities.) Majority-owned subsidiaries eligible to use Form S-3 or Form F-3 for offerings of their securities also are considered seasoned issuers. Majority-owned subsidiary eligibility has been expanded to allow majority-owned subsidiaries to use the forms under the same circumstances in which majority-owned subsidiaries are well-known seasoned issuers.

Unseasoned Issuers. An unseasoned issuer is an issuer that is required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities.

Non-Reporting Issuers. A non-reporting issuer is an issuer that is not required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act, including an issuer that files such reports voluntarily.

Ineligible Issuers. Certain issuers or offerings are ineligible for use of the communications safe harbors, exemptions and exclusions, and the automatic shelf registration statement procedure. These include (subject to an SEC waiver procedure):

- reporting issuers who are not current in their Exchange Act reports for 12 months (with specified 8-K exceptions) – timeliness is not a factor;
- issuers who are (or were, or their predecessors were, in the past three years) blank check issuers;
- issuers who are (or were, or their predecessors were, in the past three years) shell companies;
- issuers who are (or were, or their predecessors were, in the past three years) penny stock issuers;

- issuers who are limited partnerships offering and selling their securities other than in a firm commitment underwriting;
- issuers who have filed for bankruptcy or insolvency during the past three years;
- issuers who have been or are the subject of refusal or stop orders under the Securities Act; or
- issuers who, or whose subsidiaries, have been found to have violated the anti-fraud provisions of the federal securities laws or have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the anti-fraud provisions of the federal securities laws during the past three years.

Determinations of ineligible status generally are to be made at the commencement of an offering and will not change during an offering. Persons relying on the free writing prospectus rules (164 and 433), other than issuers, need only have a reasonable belief that an issuer is not ineligible.

LIBERALIZATION OF COMMUNICATIONS RULES

Traditional "Gun-Jumping" Restrictions

The Securities Act, under the so-called "gun-jumping" restrictions, traditionally has restricted the types of offering communications that an issuer or other parties subject to the restrictions (such as underwriters) may use during a registered public offering. The nature of the restrictions has depended on the period during which the communications occur. These may be summarized as follows:

- Before the registration statement is filed, all "offers," in whatever form, are prohibited under Section 5(c).

- Between the filing of the registration statement and its effectiveness, offers made under Section 5(b) in writing (including by e-mail or the internet), by radio or by television are limited to a "***statutory prospectus***" that conforms to the requirements of Section 10. The only written material that is permitted during this period is a preliminary prospectus meeting the requirements of Section 10, which must be filed with the SEC. This is based on the characterization of all written offers as prospectuses under Section 2(a)(10).

- After the registration statement is declared effective, offering participants may still make written offers only through a statutory prospectus, except that they may use additional written offering materials if a ***final prospectus*** that meets the requirements of Section 10(a) is sent or given prior to or with those materials. Note that base prospectuses, preliminary prospectuses and prospectuses subject to completion that are permitted under SEC rules are statutory prospectuses that satisfy the requirements of Section 10, but are not prospectuses that satisfy the requirements of Section 10(a).

Where a final prospectus satisfying the requirements of Section 10(a) is sent or delivered prior to or with written offering materials, that communication will fall within the exception from the definition of "prospectus" in clause (a) of Section 2(a)(10).

For purposes of these rules, if a written communication is not deemed a prospectus, it will not be subject to the requirement under Section 5(b)(1) that it be a statutory prospectus (or not be used) and, if it is not deemed an "offer," it will not be subject to the restrictions of Section 5(c). The new/modified safe harbors for communications are designed to work within this framework, except for the "free writing prospectus," which is permitted as an offer and will be deemed a statutory prospectus even though it is not compliant with the traditional content requirements of Section 10.

Safe Harbors for Factual Business and Forward-Looking Information

The SEC has adopted two separate safe harbors from the gun-jumping provisions for continuing ongoing business communications. These safe harbors exclude such communications from the definition of "prospectus" for purposes of Section 2(a)(10), and thus are not subject to the restrictions of Section 5(b), and are not subject to the Section 5(c) restrictions on pre-filing "offers." These safe harbors do not affect the analysis of ordinary course communications that traditionally have not been deemed "offers."

- Rule 168 permits continued publication or dissemination of regularly released factual business and forward-looking information at any time, including around the time of a registered offering, by or on behalf of a reporting issuer and certain non-reporting foreign private issuers.

- Rule 169 permits a non-reporting issuer's publication or dissemination of factual business information that had been regularly released to persons other than in their capacity as investors or potential investors.

Investment companies and business development companies are ineligible to use the safe harbors for factual business information and forward-looking information.

These safe harbors are non-exclusive and do not create a presumption that any communication that falls outside either is an offer. Attempted compliance with either does not act as an exclusive election. They are "use" safe harbors, which means they relate to a communication; another communication of the information in an offering-related manner does not affect the safe harbor for the protected communication.

Safe Harbor under Rule 168

Coverage

Factual Business Information. The safe harbor permits communication of factual business information (as defined). Regularly released factual business information does not include information about the registered offering or information released as part of offering activities. Factual business information that reporting issuers release or disseminate continues to be subject to the provisions of Regulation FD, Regulation G, Regulation S-K¸ Item 10 and Item 2.02 of Form 8-K. For purposes of this safe harbor, factual business information is defined as:

- factual information about the issuer or some aspect of its business;
- advertisements of, or other information about, the issuer's products or services;
- factual information about business or financial developments with respect to the issuer; and
- dividend notices.

The Rule clarifies that factual business information can also be set forth in the reports or other materials filed with, furnished to or submitted to the SEC pursuant to the Exchange Act.

Forward-looking Information. The safe harbor also applies to the release or dissemination of the following forward-looking information if the release or dissemination satisfies the other conditions of Rule 168:

- projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;
- statements about management's plans and objectives for future operations, including plans or objectives relating 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 or relating to any of the foregoing information.

The premise for this prong of the safe harbor is that Regulation FD encourages release of earnings guidance and similar information, and Item 2.02 of Form 8-K reflects the SEC's intention of making such guidance and similar information public.

Conditions

"By or on behalf of the issuer." As adopted, factual business and forward-looking information is considered released or disseminated by or on behalf of an issuer, and thus entitled to the benefits of the safe harbor, if the issuer, an agent of the issuer, or a representative of the issuer (other than an offering participant that is an underwriter or dealer) authorized or approved its release or dissemination before it was made. The safe harbor is not available for information released in a manner intended to circumvent either the conditions to use or the permitted manner of use of the information.

"Regularly released." The purpose of the safe harbor is to enable a reporting issuer to continue its past ordinary course practice of releasing or disseminating publicly factual business and forward-looking information. Communications of both factual business information and forward-looking information must satisfy the same conditions regarding regular release.

Information is considered regularly released or disseminated if the issuer has previously released or disseminated the same type of information in the ordinary course of its business, releases or disseminates the information in the ordinary course of its business and the release or dissemination is materially consistent in timing, manner and form with the issuer's similar past releases or disseminations of such information. The method of releasing or disseminating the information, thus, must also be consistent with prior practice.

While the reform does not establish any minimum time period to satisfy the regularly released element, the safe harbor requires the issuer to have a track record of releasing the particular type of information. Issuers should consider the frequency and regularity with which they have released the same type of information. For example, an issuer's release of new types of financial information or projections just before or during a registered offering will likely prevent a conclusion that the issuer regularly released that type of forward-looking information in the ordinary course of its business. If an issuer has consistently released certain forward-looking information on a quarterly basis through ordinary course press releases, it could not satisfy the condition if it instituted an accelerated media campaign just before or during an offering to release that type of forward-looking information on a different basis or with different timing.

The safe harbors are not intended to cover only scheduled releases of information but also could cover communications, such as product advertising and product release information or earnings guidance changes, that are made on an unscheduled or episodic basis, provided that the issuer has previously provided such communications containing factual business and forward-looking information in that manner. Thus, for unscheduled or episodic releases, the nature of the event triggering the communication would be taken into account in determining whether the regularly released condition is satisfied. For example, if an issuer only gives guidance upon the occurrence of certain types of developments, a release of guidance when a materially similar event occurs could be materially consistent, even if not done at regular intervals. If an issuer launches a product only episodically, disclosure or advertising of a product launch still could be materially consistent.

Non-Offering Related Information. The safe harbor excludes any information about the registered offering itself. Publication of information about an offering outside the registration statement

is limited to statements allowed under Rule 134 (which has been expanded), Rule 135 or other exemptions or safe harbors, or contained in a permissible "free writing prospectus."

Information released as part of offering activities is also excluded from the safe harbor. As a practical matter,

- the safe harbor is unavailable for the text of an Exchange Act report that is incorporated by reference into a registration statement, a copy of a prior release that originally had been regularly released in accordance with the safe harbor but was specifically provided to investors or potential investors as part of offering activities, or disclosure of information at a road show.

- as permitted by the "regularly released condition," an issuer is able to rely on the safe harbor for the publication of an earnings release consistent with past practice, including posting and maintaining the release on its web site, whether or not located in a separate section of the web site for historical information. The use of that earnings release (or its contents), however, as part of the marketing activities to potential investors by an underwriter or dealer participating in distribution is outside the scope of the safe harbor and, in this case, is a free writing prospectus as used by the underwriter or dealer.

Public statements by issuers are not necessarily required to be included in registration statements. The same is true for any public release of information pursuant to Regulation FD and Item 2.02 of Form 8-K. The information might be required to be included in the registration statement pursuant to some other disclosure obligation.

Safe Harbor under Rule 169

A narrower safe harbor is available for a non-reporting issuer's regularly released factual business information. It protects a non-reporting issuer's release or dissemination of regularly released ordinary course factual business information to persons receiving the information other than in their capacity as investors or potential investors, such as customers and suppliers. The SEC has clarified that a widely-disseminated communication (such as a press release) intended for use by a non-investor audience and otherwise meeting the conditions of the safe harbor will not lose protection if it is available to or received by investors or potential investors.

Because a condition involves the manner and timing of the communication, the same issuer employees who have historically been responsible for providing the information to, for example, customers and suppliers, should communicate the information provided in reliance on this safe harbor.

Factual business communications is defined as factual information about the issuer, its business or financial developments, or other aspects of its business; and advertisements of, or other information about, the issuer's products or services.

As with the safe harbor for reporting issuers, the safe harbor requires that the information be regularly released in the ordinary course, disseminated by or on behalf of the issuer, and not include information about the registered offering or information released as part of the offering activities in the registered offering. The SEC declined to extend this safe harbor to cover forward-looking information given concerns about the potential for abuse in using the information as a way to condition the market for the issuer's securities. The SEC also declined to extend the forward-looking statements safe harbor generally (Securities Act Section 27A) to IPOs.

Pre-Filing Communications: 30-Day Exclusion for All Issuers

Rule 163A. All issuers benefit from a bright-line time period, ending 30 days prior to filing a registration statement, during which they may communicate without risk of violating the gun-jumping provisions. Such communications have been excluded from the definition of "offer" for purposes of Section 5(c). The exclusion only applies prior to filing a registration statement; therefore, it does not apply to issuers with a shelf registration statement on file.

This 30-day exclusion is subject to the following conditions:

- communications made in reliance on the rule cannot reference a securities offering that is or will be the subject of a registration statement;
- communications made in reliance on the rule have to be made "by or on behalf of the issuer" (that is, communications by an underwriter or prospective underwriter or a dealer, will not be covered); and
- the issuer must take reasonable steps within its control to prevent further distribution or publication of the information during the 30-day period immediately before the issuer files the registration statement.

Note that for all reporting issuers, the communications are still subject to Regulation FD and other disclosure requirements, as well as the anti-fraud provisions, because communications made in reliance on the rule will not be in connection with a registered securities offering for purposes of the exclusion in Regulation FD.

The exclusion is premised on a notion of control by issuers of their involvement in republication or redistribution of press releases and other communications. The issuer that gives an interview prior to the 30-day cut-off cannot rely on the exclusion if the interview is published during the 30 days before filing.

Certain categories of offerings and issuers that pose the greatest risk of abuse of the exclusion are not covered. These include: offerings by a blank check company; offerings by a shell company; or offerings of penny stock by an issuer. Communications regarding business combination transactions are not covered, as those communications are regulated separately under Regulation M-A. The rule also is will not available for communications regarding offerings made by a registered investment company or a business development company.

Other Exclusions. During the 30-day period immediately prior to filing, issuers will have available, in addition to the other exemptions, communications permitted under Rule 135, which permits an issuer or a selling security holder (and persons acting on behalf of either of them) to publish a notice of a proposed registered offering of securities containing limited information, without the notice being considered an offer of the securities. The 30-day period is intended to be consistent with the 30-day time period used in Rule 155, relating to integration of abandoned offerings.

Pre-Filing Communications by or on behalf of Well-Known Seasoned Issuers

Rule 163. In addition to the safe harbors for regularly released factual business and forward-looking information and the exclusion for communications more than 30 days prior to filing of a registration statement, well-known seasoned issuers are entitled to one additional benefit in the period prior to the filing of a registration statement. To address communications made in the 30 days prior to

filing a registration statement not otherwise excluded from the gun-jumping provisions and to complete the set of proposals permitting all communications by well-known seasoned issuers under the gun-jumping provisions, Rule 163 exempts from the prohibition on offers before the filing of a registration statement all offers made by or on behalf of eligible well-known seasoned issuers. As the exemption is available only for communications made "by or on behalf of" the issuer, communications by an underwriter or prospective underwriter or a dealer, are not covered. After a registration statement is filed, Rule 164 is available to offering participants (other than the issuer) as well.

The exemption permits well-known seasoned issuers to engage in unrestricted oral and written offers at any time before a registration statement is filed without violating the gun-jumping provisions. These communications, while exempt from the gun-jumping provisions, are still considered offers and subject to liability standards applicable to such offers. In addition, all such communications are still subject to Regulation FD (as communications made in reliance on the rule are not considered to be in connection with a registered securities offering for purposes of the exclusion from Regulation FD). The anti-fraud provisions of the federal securities laws also apply to these communications.

In view of the automatic shelf registration process (described below), well-known seasoned issuers usually will have a registration statement on file that they can use for any registered offerings (and as with any other delayed shelf registration statement, issuers using an automatic shelf registration statement will be considered to be offering securities off the shelf at the time of each takedown of securities). Thus, it will be rare for these issuers to make offers prior to the filing of a registration statement; however, to liberalize communications for these issuers, the SEC has provided this exemption from the prohibition on pre-filing offers.

Treatment as Free Writing Prospectus. A written offer made under the exemption, however, meets the definition of "free writing prospectus" and needs to include a legend and be filed promptly upon the issuer filing (assuming it does file) its registration statement. Any written communication used in reliance on this exemption is subject to the same cure and record retention provisions as those applicable to free writing prospectuses used after a registration statement is filed in reliance on the rules governing free writing prospectuses.

Post-Filing Communications – Expansion of Rule 134 Safe Harbor

Section 5(b)(1) limits the means by which written offers may be made following the filing of a registration statement. Section 5(b)(1) does not include a limitation on oral offers after the filing of a registration statement. Rule 134 provides a safe harbor from the gun-jumping provisions for limited public notices about an offering made after an issuer files its registration statement.

Rule 134 is available only after the issuer files a registration statement that includes a statutory prospectus. Because a purpose of Rule 134 is to facilitate the dissemination of the full information required in the prospectus, Rule 134 is not available until a preliminary prospectus or, in the case of shelf registration, a base prospectus, is available. To satisfy the requirements of Section 10 in an IPO, a prospectus must include a bona fide estimate of the offering price range and the maximum amount of securities to be offered. This does not mean, however, that a "final" prospectus meeting the requirements of Section 10(a) is required as a condition to Rule 134.

Rule 134 requires in some cases that the notice must be accompanied or preceded by a written prospectus meeting the requirements of Section 10, which may be satisfied in an electronic notice by including an active hyperlink to such a prospectus. The notice itself cannot, however, include

information beyond that permitted by the Rule, and, as such, the notice cannot include a hyperlink or URL for an address containing information beyond that permitted by Rule 134.

All issuers, including well-known seasoned issuers, are precluded from relying on Rule 134 until the issuer files a registration statement. If a well-known seasoned issuer communicates information of the type covered by Rule 134 in writing prior to filing its registration statement, such that the communication constitutes an offer, it will have to rely on Rule 163 excepting pre-filing offers from the gun-jumping provisions, and the communication will be a free writing prospectus.

The amendments to Rule 134:

- permit increased information about an issuer and its business, including where to contact the issuer;
- permit more information about the terms of the securities being offered;
- expand the scope of permissible factual information about the offering itself, including underwriter information, more details about the mechanics of and procedures for transactions in connection with the offering process, the anticipated schedule of the offering and a description of marketing events (the information on marketing events, such as road shows, could include greater detail on the date, time, location, and procedures for attending or otherwise accessing the events);
- allow more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities (a broker or dealer could inform investors of the procedural aspects of an auction or a directed share program; but written notices of allocations of securities, including those delivered electronically, will be a type of written confirmation of sale and, thus, prospectuses, and therefore will not be covered); and
- expand the disclosure permitted regarding credit ratings to include the security rating that is reasonably expected to be assigned.

The expansion does not permit use of a Rule 134 notice to provide a detailed term sheet for securities being offered.

The SEC has eliminated the reference in the legend to state securities laws and the requirement to specify whether the financing is a new financing or refunding.

Post Filing Communications - Use of Free Writing Prospectuses (Rules 164 and 433)

Overview

Even after the filing of a registration statement, by reason of the gun-jumping provisions, issuers and other offering participants could previously make written offers only in the form of a statutory prospectus (the red herring). After effectiveness of a registration statement, written offers other than a statutory prospectus could be made if prior to or at the same time as the written offer a final prospectus meeting the requirements of Section 10(a) were sent or given. To loosen these restrictions, the SEC will now permit, ***prior to effectiveness***, written communications that constitute offers, including electronic communications, outside the statutory prospectus, if certain conditions are met. Such written offers are "free writing prospectuses."

Note that this does not affect the existing statutory framework allowing written offers after effectiveness, if prior to or at the same time as the written offer is made a final prospectus meeting the requirements of Section 10(a) is sent or given. Those written offers are not prospectuses and, therefore, are not free writing prospectuses.

In brief:

- A free writing prospectus that satisfies specified conditions can be used by a well-known seasoned issuer at any time (see discussion of Rule 163 above as to use prior to filing a registration statement).

- A free writing prospectus that satisfies specified conditions can be used by any other issuer or other offering participant after a registration statement has been filed ***and***, in certain cases, if a statutory prospectus precedes or accompanies the free writing prospectus ***or***, in other cases, if a statutory prospectus is available. This permits affiliates, underwriters, dealers and others acting on behalf of them to use a free writing prospectus.

- A free writing prospectus can take any form and is not required to meet the informational requirements otherwise applicable to prospectuses. In other words, it does not need to include any particular information, including information contained in the prospectus that is part of the registration statement, other than a legend.

- The rules relate only to capital formation transactions and do not extend to business combination transactions, which are covered by Rules 162, 165, 166 and 425.

- A free writing prospectus is not part of a registration statement subject to liability under Section 11 unless the issuer elects to file it as a part of the registration statement.

- Free writing prospectuses prepared by an issuer or containing information provided by an issuer need to be filed as a free writing prospectus, but not as part of the registration statement. Free writing prospectuses prepared by other persons, such as underwriters, not containing such information do not need to be filed. Regardless of whether a free writing prospectus is filed (and if not filed, they must nonetheless be retained), any person using the free writing prospectus is subject to liability for prospectuses under Section 12(a)(2) and liability under the anti-fraud provisions of the federal securities laws.

Definition of Free Writing Prospectus

Written Communications and Graphic Communications. To fully understand the free writing concept, one must first understand the scope of "written communications." As a cornerstone of the reforms, all methods of communication, other than oral communications, are defined as written communications for purposes of the Securities Act. "Written communication" means any communication that is written, printed or broadcast, or is a graphic communication. The definition does not cover oral communications, such as live telephone calls (whatever the medium by which they are carried, including the internet) and other direct oral communications. Written communications do not include individual telephone voice mail messages but do include broadly disseminated or "blast" voice mail messages.

The definition of "graphic communication" (in Rule 405) has been amended to include any form of electronic media, such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, internet web sites, substantially similar messages widely (rather than individually) distributed on telephone answering

or voice mail systems, computers, computer networks and other forms of computer data compilation. Because written communications include internet communications, e-mails and other electronic and web-based communications, electronic postings on web sites are written communications within the scope of the definition. Graphic communications do not include a communication that, at the time of the communication, originates live, in real time to a live audience and does not originate in recorded form or otherwise as a graphic communication. Any such communication is not a graphic communication, even if it is transmitted through a means of graphic communication. These latter communications are considered oral communications, while those that are recorded and retransmitted are written communications, regardless of the audience. (This distinction is the basis for the treatment of electronic road shows.)

These are some examples of the foregoing:

- a live telephone call is not a written communication;
- a live telephone call that is recorded by the recipient is not a written communication;
- e-mails, facsimiles and electronic postings on web sites originate in graphic form and, therefore, are graphic communications;
- a live, in-person road show to a live audience is not a written communication;
- a live, in real-time road show to a live audience that is transmitted graphically is not a graphic communication;
- a live, in real-time road show to a live audience that is transmitted to an "overflow room" is not a graphic communication;
- 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;
- the ability of a member of the audience to record a webcast or video conference that is presented live and in real-time to a live audience would not affect the status of that webcast or video conference;
- a live telephone call or video or webcast conference that is recorded by or on behalf of the originating party or parties and then transmitted, or is otherwise transmitted other than live and in real-time, is a graphic communication and therefore a written communication;
- a live telephone call or video or webcast conference that is recorded by the recipient and then re-transmitted by the recipient is a graphic communication by the recipient when it is re-transmitted; and
- an interview with an issuer's CEO conducted live as part of a television program is a written communication regardless of how the television signal is transmitted (whether over the airwaves, or through cable, satellite, or the internet) and regardless of how it is received by the recipient (whether a TV set or a computer).

The Free Writing Prospectus. A "free writing prospectus" generally 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, but that is not a prospectus satisfying the requirements of Section 10(a) or the rules permitting the use of preliminary or summary prospectuses or prospectuses subject to completion, or that, by virtue of the exception in clause (a) of Section 2(a)(10), is not a prospectus because, at or prior to that time, a final prospectus meeting the requirements of Section 10(a) was sent or given.

Although a free writing prospectus will not be filed as part of a registration statement, regardless of the method of its use or distribution, it will still be considered to be used in connection with a public offering of securities that is or will be the subject of a registration statement. A free writing prospectus used other than in accordance with the rules continues to be a prospectus for Section 12(a)(2) purposes and the anti-fraud provisions of the federal securities laws, and its use would violate Section 5.

A communication is a free writing prospectus only where it constitutes an offer of a security under the Securities Act. Whether a particular communication constitutes such an offer, as before, is determined based on the particular facts and circumstances. Communications that are not considered offers or prospectuses for purposes of the gun-jumping provisions, such as Rule 134 notices, Rule 135 communications, regularly released factual business information and forward-looking information falling within the safe harbors, and research reports falling within the safe harbors, are not free writing prospectuses.

Conditions for Use of a Free Writing Prospectus under Rule 433

Rule 164 permits the use of a free writing prospectus where an eligible issuer has filed a registration statement and the conditions of Rule 433 are satisfied. Under Rule 164, after the filing of a registration statement, a free writing prospectus that satisfies the conditions of Rule 433 will be a permitted prospectus under Section 10(b) for purposes of Section 5(b)(1). Rule 433 sets out conditions for the use of free writing prospectuses after the filing of the registration statement that address requirements (which we discuss in greater detail below) for:

- delivery/availability of a statutory prospectus (i.e., a preliminary prospectus);
- content (principally a legend),
- filing with the SEC; and
- record retention.

Condition - Prospectus Delivery and/or Availability

The ability of any person participating in the offer and sale of securities to use free writing prospectuses under Rules 164 and 433 is conditioned on the ***availability*** of the issuer's most recently filed statutory prospectus (including a base prospectus and preliminary prospectus, but not a summary prospectus) satisfying the requirements of Section 10 and, in certain cases, on prior or concurrent ***delivery*** of the issuer's most recently filed statutory prospectus.

Non-Reporting Issuers and Unseasoned Issuers. In offerings of securities of an eligible non-reporting issuer, including IPOs, or offerings of securities of an eligible unseasoned issuer, use by offering participants of free writing prospectuses will be conditioned on filing of the registration statement for the offering.

If the free writing prospectus was prepared by or on behalf of an issuer or any other offering participant, if consideration was or will be given by the issuer or other offering participant for the dissemination (in any format) of any free writing prospectus (including any published article, publication or advertisement), or if Section 17(b) requires disclosure that consideration was or will be given by the issuer or other offering participant for any activity described therein, the use of the free writing prospectus will also be conditioned on it being ***accompanied or preceded*** by the most recent statutory prospectus that satisfied the requirements of Section 10. Rule 433 provides that a statutory prospectus is deemed to accompany an electronic free writing prospectus if the latter contains an active hyperlink to the former. In IPOs, a preliminary prospectus that does not contain a price range does not satisfy the requirements of Section 10.

Non-reporting and unseasoned issuers and other offering participants must ensure that the most recent statutory prospectus was actually provided to people who might receive a free writing prospectus. In the following situations, for example, use of the free writing prospectus will be conditioned on the most recent statutory prospectus preceding or accompanying the free writing prospectus or the communication cannot be made in reliance on Rules 164 and 433 (using broadly disseminated free writing prospectuses in this category may not be feasible unless they are in electronic form and contain a hyperlink to the statutory prospectus):

- a direct written communication by an issuer or other offering participant;
- a television or radio broadcast prepared by or on behalf of an issuer; or
- a paid published or broadcast advertisement by an issuer or other offering participant.

The condition that the statutory prospectus accompany or precede the free writing prospectus will not require that it be provided through the same medium, so long as it is provided at the required time. Although the prospectus will not have to be sent by the same means (paper or electronic) as the free writing prospectus, merely referring to its availability will not satisfy this condition.

Once the required statutory prospectus is sent or given to an investor, additional free writing prospectuses can be provided without having to send or give an additional statutory prospectus, unless there are material changes in the most recent statutory prospectus from the provided prospectus. For example, once an investor has been sent a preliminary prospectus, absent a material change, subsequent e-mail communications by an offering participant that constitute free writing prospectuses will be permitted without having to hyperlink to or otherwise redeliver a statutory prospectus with each communication.

After effectiveness and the availability of a final prospectus meeting the requirements of Section 10(a), no earlier statutory prospectus may be provided, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier statutory prospectus had been previously provided to the recipient. If a final prospectus is given or sent prior to or with a written offer, under the exception in clause (a) of Section 2(a)(10), the written offer is not a prospectus and therefore will not be a free writing prospectus, and Rules 164 and 433 will not apply.

Seasoned Issuers and Well-known Seasoned Issuers. In offerings of securities of eligible seasoned issuers and eligible well-known seasoned issuers, such issuers and other offering participants will be able to use a free writing prospectus after the filing of a registration statement containing a

statutory prospectus. For shelf offerings, this preliminary prospectus can be a base prospectus that satisfies the requirements of new Section 430B.

For offerings of securities of eligible seasoned issuers and well-known seasoned issuers, use of the free writing prospectus ***is not conditioned on actual delivery*** of the preliminary prospectus. Instead, the user of the free writing prospectus will notify the recipient, through a required legend, where the recipient can access, or hyperlink to, the preliminary or base prospectus by providing the URL for the SEC web site prospectus.

Instead of relying on Rules 164 and 433, the issuer or other offering participant can, as is currently the case, make a written offer in reliance on the exception to the definition of prospectus contained in clause (a) of Section 2(a)(10) if a final prospectus meeting the requirements of Section 10(a) has previously been sent or given to the person receiving the written offer. If the provisions of Section 2(a)(10) are followed, the written offer is not a prospectus.

Ineligible issuers. For any offering participant to use free writing prospectuses the issuer may not be an "ineligible issuer." The new rule does not apply to offerings by registered investment companies or business development companies or offerings that are exchange offers or business combination transactions that are subject to Regulation M-A.

Condition – Filing Obligation

General Conditions. Use of a free writing prospectus is conditioned on filing that prospectus or information contained in that prospectus in the following circumstances (note that Rule 135 notices and Rule 134 notices are not considered free writing prospectuses and, therefore, are not be subject to these conditions and electronic road shows are not subject to the filing condition in certain circumstances):

- where a free writing prospectus is prepared by or on behalf of the issuer, known as an "issuer free writing prospectus," and used by any person, the issuer files that free writing prospectus;

- where a free writing prospectus prepared by or on behalf of or used by an offering participant other than the issuer contains material information about the issuer or its securities that has been provided by or on behalf of an issuer, known as "issuer information," that is not already contained or incorporated in the registration statement or a filed free writing prospectus, the issuer files that information (as it is the information that must be filed, the entire free writing does not need to be filed);

- where a free writing prospectus used or referred to by an offering participant other than the issuer is distributed in a manner reasonably designed to lead to its broad unrestricted dissemination, the offering participant files the free writing prospectus; and

- where a free writing prospectus prepared by or on behalf of the issuer or other offering participant consists of a description of the final terms of the issuer's securities, the issuer must file the free writing prospectus after such terms have been established for all classes of the offering.

The issuer must file the issuer-prepared free writing prospectus or material issuer information ***on or before the date of first use***, except in the case of final terms of securities. Note that oral communications are not subject to any filing condition.

Subject to one important exception, there is no condition that underwriters and participating dealers file the free writing prospectuses that they prepare, use or refer to. This includes information prepared by underwriters and others on the basis of or derived from, but not containing, issuer information. Examples of this information include information prepared by underwriters that could be, but will not be limited to, information that is proprietary to an underwriter.

However, if any person, other than the issuer, participating in the offer or sale of the securities distributes a free writing prospectus in a manner that is reasonably designed to achieve broad unrestricted dissemination, such use will be conditioned on such person filing the free writing prospectus ***on or before the date of first use***. For example, the filing condition will apply where:

- an underwriter includes a free writing prospectus on an unrestricted web site or hyperlinked from an unrestricted web site to information that would be a free writing prospectus or if a dealer or other offering participant released or gave a copy of its free writing prospectus to a newspaper or other media; or

- an underwriter or other offering participant sends out a press release regarding the issuer or the offering (or otherwise disseminates information through the media) that is a free writing prospectus.

Free writing prospectuses sent directly to customers of an underwriter, without regard to number, are not "broadly disseminated."

A free writing prospectus that contains only a description of the securities offered, regardless of whether the issuer or other offering participant prepared or used it, will be subject to filing only if it reflects the final terms of the securities being offered. The issuer will have to file the free writing prospectus ***within two days after the later of the date such terms became final or the date of first use***. Preliminary term sheets and other descriptive material containing only the terms of the securities that do not reflect final terms of securities or transactions will not be subject to filing. All such written offering materials, whether or not filed, are free writing prospectuses.

Unintentional Failures to File. Material must be filed as soon as practicable after discovery of the failure to file. Rule 164 allows an issuer and any other person relying on the Rule the ability to cure any immaterial or unintentional failure to file or delay in filing the free writing prospectus, without losing the ability to rely on the Rule. This cure provision is available if a good faith and reasonable effort has been made to comply with the filing condition and the free writing prospectus is filed as soon as practicable after the discovery of the failure to file.

Filed Free Writing Prospectus Not Part of Registration Statement. A free writing prospectus used after a registration statement is filed complying with Rule 433 is governed by the provisions of Section 10(b), which provides that a prospectus permitted under that section is filed as part of the registration statement, but is not subject to Section 11 liability. A free writing prospectus filed pursuant to Rule 433 will identify the registration statement to which it relates, but will not have to be filed as part of the registration statement. This will more readily identify the filed information, whether an issuer or another party's free writing prospectus or issuer information in a free writing prospectus, as a free writing prospectus. Any free writing prospectus that is used, regardless of whether it is filed, will be subject to liability under Section 12(a)(2) and the anti-fraud provisions of the federal securities laws.

A free writing prospectus filed pursuant to Rule 433 will be filed as a separate filing similar to the way in which Rule 425 filings are made. A free writing prospectus does not have to be filed under

Form 8-K. Issuers may file a free writing prospectus on Form 8-K if they wish to have the information incorporated by reference into the registration statement. The free writing prospectus also can be filed as part of the registration statement or, where permitted, included in an Exchange Act report incorporated by reference into the registration statement. In such case, the free writing prospectus would be subject to Section 11 liability. Once a communication or other document is made part of or incorporated by reference into a registration statement, Section 11 applies to it as part of the registration statement, whether or not it is an offer.

Condition - Information in a Free Writing Prospectus

In contrast to a preliminary prospectus, a free writing prospectus meeting the conditions of Rule 433 may be a Section 10(b) prospectus without having line item disclosure requirements or otherwise containing any particular information, other than the legend. Information in a free writing prospectus may go beyond information the substance of which is contained in the prospectus included in the registration statement. However, information in a free writing prospectus may not "conflict" with information in, or incorporated by reference in, the registration statement.

The liability provisions applicable to free writing prospectuses, particularly Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, provide protection against material misstatements in, and material omissions from, information contained in a statutory prospectus. The SEC can halt the use of any materially false or misleading free writing prospectus and the Staff may request (under Rule 418) any free writing prospectus that has been used in connection with an offering.

Legend Condition (Rule 433(c)). A free writing prospectus must include a legend indicating where a prospectus is available, recommending that potential investors read the prospectus, including Exchange Act documents incorporated by reference, including risk factors, if any, and stating that the communication constitutes a written offer pursuant to a free writing prospectus. In addition, the legend advises investors that they can obtain the registration statement, including the prospectus and any incorporated Exchange Act documents, for free through the SEC's web site and that they may request the prospectus from the issuer, any underwriter or a dealer by calling a toll-free number. The legend must also indicate that the free writing prospectus is part of a public offering. Legends may be generic, rather than issuer-specific.

Because in most, if not all cases, the legend will not be included in published articles, the filing of a published article with the SEC as a free writing prospectus, including the legend, will satisfy the condition of Rule 164.

There is a cure provision for unintentional or immaterial failures to include legends. Retransmission by substantially the same means to substantially the same investors is required to cure such failures.

Disclaimers of responsibility or liability that would be impermissible in a statutory prospectus or registration statement are also impermissible in free writing prospectuses. Examples of impermissible legends include:

- disclaimers regarding accuracy or completeness or reliance by investors;
- statements requiring investors to read or acknowledge that they have read any disclaimers or legends or the registration statement;

- language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy (were it not a prospectus or an offer it would not be covered by Rules 164 and 433); and

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

Amendment to Rule 408. Rule 408 is amended to make clear that failure to include information that is included in a free writing prospectus in a prospectus filed as part of a registration statement is not, solely by virtue of inclusion of the information in a free writing prospectus, considered an omission of material information required to be included in the registration statement.

Condition -- Record Retention (Rule 433(g))

Rule 433 conditions the use of a free writing prospectus on issuers and offering participants retaining for three years any free writing prospectuses (other than those that are filed with the SEC) that they have used. The three years starts with the date of the initial bona fide offering of the securities in question. This record retention condition applies to all offering participants.

Cross-Liability Issues for Free Writing Prospectuses

The general filing condition does not extend to a free writing prospectus prepared by an underwriter, even one including information prepared on the basis of or derived from issuer information that does not include issuer information, unless the free writing prospectus falls into the "broad dissemination" category (of Rule 433(d)(ii)). Nonetheless, there have been concerns about cross-liability, and in response Rule 159A(b) clarifies when an offering participant, other than the issuer, is considered to offer and sell securities "by means of" a free writing prospectus. An offering participant other than the issuer will not be considered to offer or sell securities to a person "by means of" a free writing prospectus unless:

- the offering participant used or referred to the free writing prospectus in offering or selling the securities to that person;

- the offering participant offered or sold the securities to that person and participated in planning for the use of that free writing prospectus by other offering participants and such free writing prospectus was used or referred to in offering or selling securities to that person by one or more of such other offering participants; or

- under the conditions for use of the free writing prospectus in Rule 433, the offering participant is required to file the free writing prospectus with the SEC pursuant to Rule 433.

A person will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed the free writing prospectus with the SEC.

Treatment of Road Shows

Treatment as oral communications. In-person road shows continue to be considered oral communications.

A live, in real time road show to a live audience is not a graphic communication and, therefore, is not a written communication or a free writing prospectus. Information presented as part of the live, in

real-time road show to a live audience is not a free writing prospectus. Thus, where a communication (such as slides or other visual aids) is provided or transmitted simultaneously as part of a live road show that is not a written communication, including a live, in real-time graphically transmitted road show, and that communication is provided or transmitted in a manner designed to make it available only as part of the road show and not separately, that communication is deemed part of the road show. This provision also covers, for example, a communication of visual aids provided in a separate feed from a live, in real-time road show to a live audience transmitted by graphic means, where the separate communication is provided or transmitted in a manner such that the separate communication can only be seen as part of the road show. Such a communication is deemed also not to be a written communication. The exclusion for presentations to a live audience that originate live, in real-time also covers overflow rooms at live, in-person road shows.

Treatment as written communications. Road shows that do not originate live, in real-time to a live audience and are graphically transmitted are electronic road shows that are considered written communications and, therefore, free writing prospectuses. These road shows are permitted if the conditions for free writing prospectuses are satisfied. Issuer involvement or participation in an electronic road show that is a written communication make it an issuer free writing prospectus.

For road shows that are free writing prospectuses, the filing conditions of Rule 433 do not apply, with one exception. In the case of an IPO of common equity or convertible equity securities, the filing condition applies to a road show that is a free writing prospectus ***unless*** the issuer makes at least one version of a bona fide electronic road show for the offering in question readily available without restriction by means of graphic communications to any person, including any potential investor. If there is more than one version of a road show that is a written communication, the unrestrictedly available bona fide electronic road show must be available no later than the other versions. The other conditions of Rule 433 nonetheless apply, as applicable.

If the road show is written and not required to be filed, any simultaneous communication will also not need to be filed. This provision also would cover visual aids transmitted in a manner designed to make them available simultaneously only as part of an electronic road show. If the electronic road show is not subject to filing, neither are the visual aids. Otherwise, graphic or other written communications provided separately, for example by graphic means in a separate file designed to be available to be copied or downloaded separately, will be treated as a written communication and, if an offer, will be a free writing prospectus.

For road shows that are free writing prospectuses, the road show audience does not have to be limited in any way, and the road show does not have to be the re-transmission of a live presentation in front of an audience and the electronic road show may be edited. In addition, those distributing the road show do not have to limit viewers to seeing it either within a 24-hour period or twice. They also can allow viewers to copy, print or download the road show. Multiple versions of the electronic road show are permitted. Each will be a separate free writing prospectus.

Generally. Whether or not road shows are written communications, all road shows that are offers are subject to Securities Act Section 12(a)(2) liability. In addition, all road shows that are offers that are written communications are free writing prospectuses, whether or not required to be filed.

The SEC is not requiring that road shows be made available to unrestricted audiences, though issuers and underwriters will be free to open road shows to all investors. However, the NASD/NYSE IPO Advisory Committee has separately recommended that issuers make a version of their IPO road show available electronically to unrestricted audiences.

Treatment of Communications on Web Sites and Other Electronics Issues

General. Rule 433 makes clear that an offer of an issuer's securities that is contained on an issuer's web site or hyperlinked by the issuer from the issuer's web site to a third party web site is considered a written offer of such securities made by the issuer and, unless otherwise exempt, is a free writing prospectus of the issuer. The same is true of information contained on or hyperlinked to an offering participant's web site. Accordingly, the requirements of Rule 433 apply to these free writing prospectuses. For example, if an issuer or other offering participant includes a hyperlink within a written communication used to offer the issuer's securities, such as an electronic free writing prospectus, to another web site or to other information, the hyperlinked information is considered part of that written communication.

Historical Information on an Issuer Web Site. Rule 433 does not apply to historical issuer information that otherwise could be considered an offer but that is properly identified as historical and located in a separate section of the issuer's web site containing historical issuer information, sometimes known as archives, as that information will not be considered a current offer of the issuer's securities. This historical information can include, but will not be limited to, regularly released information that falls within the safe harbors.

The exclusion in Rule 433 for historical archived information covers information that could be demonstrated to be previously published (for example, by being dated). The information could not be incorporated or otherwise included in a prospectus or used, identified, updated or modified in connection with the offering or otherwise. Issuers will need to review information on their web sites to determine, for example, whether information constitutes an offer or is archived properly.

Treatment of Media Publications and Broadcasts

Not every media publication about an offering is an offer or a free writing prospectus of the issuer or other offering participant. In particular, where there is no other involvement of an issuer or other offering participant, media publications based on information filed with the SEC or available on an unrestricted basis are not offers of the issuer or other offering participant. The conditions of the free writing prospectus rule only apply to written offers prepared, published, or disseminated by the media where an issuer or other offering participant provides, authorizes, or approves the information.

Filed Registration Statement. If an issuer or any other offering participant provides information about the issuer or the offering that constitutes an offer, whether orally or in writing, to a member of the media and where the media publication of that information is an offer by the issuer or other offering participant, the publication will constitute a free writing prospectus. If the communication occurs after the filing of the registration statement, it will be subject to the requirements of Rule 433. Note that except for a well-known seasoned issuer, if the communication occurs prior to the filing of the registration statement, it will violate Section 5 unless it falls within one of the safe harbors or exemptions.

Prospectus Delivery/Filing of Writing. The treatment of a media publication that constitutes a free writing prospectus depends on whether the issuer or other offering participant prepares (meaning it provides, authorizes or approves information), pays for or gives consideration for the preparation, publication or dissemination of or uses or refers to a published article, television or radio broadcast, or advertisement. Prospectus delivery and filing requirements need to be considered.

Issuer prepares/pays: the issuer or other offering participant must satisfy the conditions to the use of a free writing prospectus at the time of the publication or broadcast. Thus,

- in the case of a non-reporting issuer, a statutory prospectus will have to precede or accompany the communication and as a consequence, in offerings by non-reporting and unseasoned issuers, issuers and offering participants will not be able to publish or broadcast written advertisements, "infomercials," or broadcast spots about the issuer, its securities, or the offering that includes information beyond that permitted by Rule 134; and

- for seasoned issuers, a current statutory prospectus (e.g., a base prospectus) will have to be on file.

Issuer does not prepare/pay: Where, however, the free writing prospectus is prepared by persons in the media that are unaffiliated with, and is not paid for by, the issuer or offering participants, the statutory prospectus will not be required to precede or accompany the media communication, although a filed registration statement and availability of a statutory prospectus are conditions (unless the issuer is a well-known seasoned issuer). In these cases, because of the media intervention, the SEC is prepared to conclude that its use should not be conditioned on prior or simultaneous delivery of the statutory prospectus. However, any such free writing prospectus will be subject to filing by the issuer or offering participant involved within four business days after the issuer or other offering participant becomes aware thereof. Persons in the media have no filing or other obligations under these provision.

As a result:

- an underwriter or issuer will be permitted to invite the press to a live road show or an electronic road show, but an article including information obtained at that road show will be a free writing prospectus of the issuer or underwriter and subject to the rules. Unlike an article published based on information obtained from a road show with a limited audience, an article published based on information provided at a readily accessible electronic road show open to an unrestricted audience will not be treated as a free writing prospectus of the issuer or offering participant due to the unrestricted and available nature of the electronic road show.

- if a chief executive of a non-reporting issuer gave an interview to a financial news magazine without payment to the magazine for the article, the publication of the article after the filing of the registration statement will be a free writing prospectus of the issuer that will have to be filed by the issuer after publication. In that case, there will be no requirement that a statutory prospectus precede or accompany the article at the time of the publication.

These rules also apply to issuers that are in the media business that meet certain conditions (notwithstanding that they are affiliated with the media outlet).

How to File. The filing condition can be met by filing the media publication; all of the information provided to the media in lieu of the publication; or a transcript of the interview or similar materials that the issuer or other offering participant provided to the media, provided that all the information provided to the media is filed. An issuer or other offering participant does not have to file the media publication if the substance of the written communication has been previously filed. Finally, the issuer or offering participant may file, together with or after the media publication is filed, information that the issuer reasonably believes is necessary or appropriate to correct information included in the media publication.

Interaction of Communications Reforms with Regulation FD

The communications regime contemplates that certain material non-public issuer information could be made public through the prospectus filed as part of a registration statement, the issuer's filing obligation for free writing prospectuses or, in the case of reporting issuers, through the satisfaction of Regulation FD. Oral communications of an issuer made in connection with a registered offering will continue to not be subject to any filing or public disclosure requirement.

As amended, Regulation FD will not apply to disclosures made in the following communications in connection with a registered securities offering that is of the type excluded from the Regulation:

- a registration statement filed under the Securities Act, including a prospectus contained therein;
- a free writing prospectus used after filing of the registration statement for the offering and satisfying the requirements of Rule 433, or a communication falling within the exception to the definition of prospectus contained in clause (a) of Section 2(a)(10);
- 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 the registered offering after filing of the registration statement.

The new rules narrow the types of registered offerings eligible for the exclusion to those involving capital formation for the account of the issuer and underwritten offerings that are both an issuer capital formation and a selling security holder offering, in addition to the existing exclusion for registered business combination transactions. If the issuer includes a *de minimis* tranche in a secondary offering to avoid the application of Regulation FD, Regulation FD will apply.

The communications excluded from the operation of Regulation FD are, in fact, those communications that are directly related to a registered capital raising securities offering. Communications made during or in connection with a registered offering and not contained in the enumerated list of exceptions from Regulation FD – for example, the publication of regularly released factual business information or regularly released forward-looking information or pre-filing communications – are subject to Regulation FD.

Research Reports (Amended Rules 137, 138 and 139)

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 prohibitions on pre-filing offers and impermissible prospectuses. The SEC has adopted amendments that make incremental modifications to these rules and also, for the first time, contain a definition of "research report." The amendments expand the circumstances in which offering and non-offering participants can disseminate research reports during a registered offering.

The safe harbor provisions of Rules 137, 138 and 139 continue to be available only to brokers and dealers. Issuers cannot use the safe harbor provisions or research reports prepared or distributed by

broker-dealers in reliance on the rules to directly or indirectly communicate with potential investors about the issuer's offering. For example, a hyperlink on an issuer's web site during its registered offering to a research report will raise these concerns. Issuers using research reports in this manner could be deemed to have adopted the contents of such reports and, as a result, the reports would be considered free writing prospectuses.

Definition of Research Report

To assure consistency between Regulation AC and Rules 137, 138 and 139, the definition of research report is the same as the definition of "research report" in Regulation AC and will also include media broadcasts. The safe harbors do not cover oral communications.

Rule 137

Rule 137 provides that a broker-dealer that is not an offering participant in a registered offering but publishes or distributes research will not be considered to be engaged in a distribution of the issuer's securities and will therefore not be an underwriter in the offering.

The exemption is expanded to apply to securities of any issuer, including non-reporting issuers, with exceptions for blank check companies, shell companies and penny stock issuers. Rule 137 is available only to broker-dealers who are not participating in the registered offering of the issuer's securities, have not received compensation from the issuer, its affiliates or participants in the securities distribution, among others, in connection with the report and publish or distribute the research report in the regular course of business.

Rule 138

Rule 138 permits a broker-dealer participating in a distribution of an issuer's common stock and similar securities to publish or distribute research that is confined, for example, to that issuer's fixed income securities, and vice versa, if it publishes or distributes the research in the regular course of its business. The premise of Rule 138 is that there is less opportunity to condition the market when a broker-dealer is underwriting one type of security but providing regular course research on the other type (for example, underwriting an offering of equity securities while providing research on debt securities).

The rule covers research reports on all reporting issuers that are current in their periodic Exchange Act reports on Forms 10-K, 10-KSB, 10-Q, 10-QSB and 20-F at the time of reliance on the exemptions, rather than only issuers who are Form S-3 or Form F-3 eligible, as was the case. It also covers non-reporting foreign private issuers that either have had equity securities traded on a designated offshore market for 12 months or have a $700 million worldwide public float. It excludes issuers that have historically posed certain risks of abuse, including blank check companies, shell companies and penny stock issuers.

The broker-dealer must have previously published or distributed research reports on the types of securities that are the subject of the reports in the regular course of its business. Previously, Rule 138 required that the broker or dealer publish or distribute research in the regular course of business, but did not contain a condition that the broker or dealer have published or distributed research reports on the same types of securities.

Rule 139

Rule 139 permits a broker-dealer participating in a distribution of securities by a seasoned issuer or a larger foreign private issuer publicly traded abroad to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed with reasonable regularity in the normal course of its business. Rule 139 also provides a safe harbor in those situations for distributions by smaller seasoned issuers, if the broker-dealer complies with additional restrictions on the nature of the publication and the opinion or recommendation expressed in it.

Issuer Specific Reports

Reports about a specific issuer can cover only issuers with at least a one year reporting history that are current and timely in their Exchange Act reports and are eligible to register a primary offering of securities on Forms S-3 or F-3, based on the $75 million minimum public float or investment grade securities provisions of those forms. They can also cover non-reporting foreign issuers consistent with the changes to Rule 138.

The requirement that the broker-dealer publish or distribute the research report in the regular course of its business is retained, but the requirement of publication with reasonable regularity is not. The broker-dealer must, at the time of use, also have distributed or published at least one research report about the issuer or its securities or have distributed or published at least one such research report following discontinuation of coverage.

There is no minimum time period to have distributed or published research reports. In addition, the previously published or distributed research report need not cover the same securities that are the subject of the registered offering.

Industry-Related Reports

Industry reports can cover issuers required to file reports pursuant to Exchange Act Section 13 or Section 15(d) or satisfying the conditions for non-reporting foreign private issuers. The safe harbor is not available if the issuer is or any predecessor of the issuer was during the last three years a blank check company, shell company (other than for business combinations) or penny stock issuer. The reforms extend the safe harbor for industry reports to registered offerings of any reporting issuer, not only reporting issuers eligible to register their securities on Form S-3 or Form F-3. The SEC declined to extend the safe harbor to all issuers (including voluntary filers).

Brokers-dealers are not be precluded from making more favorable recommendations than the one made in the last publication. The report need not include any prior recommendations. The research reports must contain a similar type of information about the issuer or its securities as contained in prior reports. Projections (if any) must be provided for substantially all issuers listed.

Research Report Reforms in Connection with Regulation S/Rule 144A Offerings

The SEC has provided that research reports meeting the conditions of Rule 138 and Rule 139 will not be considered offers or general solicitation or general advertising in connection with offerings relying on Rule 144A, and has codified an interpretive view that these research reports will not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.

Research and Proxy Solicitations

The SEC has codified a staff position that the publication or distribution of research under the conditions set forth in Rules 138 and 139 is permitted in connection with a registered securities offering that is subject to the proxy rules under the Exchange Act. The new rule will provide that distribution of research in accordance with Rule 138 or 139 will be a solicitation to which Rules 14a-3 through 14a-15 (other than Rule 14a-9) of the proxy rules do not apply.

CHANGES TO THE REGISTRATION PROCESS – SHELF OFFERINGS

Information in a Prospectus

Mechanics

The SEC has codified, in a single rule, the prospectus requirement for shelf registration statements for registered primary securities offerings, other than business combination transactions and exchange offers. Rule 430B is a shelf offering corollary to existing Rule 430A, in that it describes the type of information that primary shelf eligible and automatic shelf issuers may omit from a base prospectus in delayed offerings and include instead in a prospectus supplement, Exchange Act report incorporated by reference or a post-effective amendment. Rule 430B is largely consistent with current requirements and practice for shelf registration statements for delayed offerings on Forms S-3 and F-3. Under Rule 430B, a base prospectus in a shelf registration statement can continue to omit information that is unknown or not reasonably available to the registrant pursuant to Rule 409.

Rule 430B provides that a base prospectus that omits information is a permitted prospectus. Thus, after a registration statement is filed, offering participants can use a base prospectus that omits information in accordance with the rule. In addition, issuers can communicate using Rule 134 notices, and issuers and other offering participants can use free writing prospectuses under Rules 164/433.

Means of Providing Information

A base prospectus that omits information will not be considered a Section 10(a) final prospectus. To satisfy the requirements of Section 10(a), an issuer will have to include the information omitted from the base prospectus in a prospectus supplement, or, where permitted as described below, through its Exchange Act filings that were incorporated by reference into the registration statement and prospectus, and identified on the cover page of a prospectus supplement. Previously, information included in a base prospectus or in an Exchange Act periodic report incorporated into a base prospectus was included in the registration statement. Rule 430B makes clear that prospectus supplements and information in them also will be deemed to be part of and included in the registration statement.

Shelf issuers can add to a prospectus more additional or omitted information than was the case by means other than a post-effective amendment to the registration statement. The SEC has amended Forms S-3 and F-3 to permit **all** information required in the prospectus about the issuer and its securities to be incorporated by reference from Exchange Act reports. Such information can also be contained in the prospectus or a prospectus supplement. For example, material changes in the plan of distribution, which were required to be included in post-effective amendments, can be amended by incorporated Exchange Act reports or prospectus supplements.

Identification of Selling Security Holders Following Effectiveness

Transfers of restricted securities can occur after a private placement is completed so that the identities of the holders of those restricted securities at the time of filing the resale registration statement may not be known to the issuer. Filing post-effective amendments to add new or previously unidentified security holders can impose delays. To alleviate the timing concern arising from an issuer's inability to identify selling security holders prior to effectiveness, seasoned issuers eligible to use Form S-3 or Form F-3 for primary offerings in reliance on General Instruction I.B.1 to those Forms can identify selling security holders after effectiveness.

The identities of the selling security holders, and all information about them, as required by Item 507 of Regulation S-K, can be added to the registration statement covering the resale of their securities after effectiveness by an amendment to that registration statement, a prospectus supplement or an Exchange Act report incorporated into the filing (subject to filing a prospectus supplement identifying such report). In any case, the information will be part of and included in the prospectus in the registration statement. This ability to identify security holders after effectiveness is available only in an automatic shelf, ***or*** if:

- the resale registration statement identifies the specific private transaction or transactions pursuant to which the securities, or securities convertible into such securities, were sold;
- the initial offering of the securities, or securities convertible into such securities, is completed; and
- the securities, or securities convertible into such securities, that are the subject of the registration statement are issued and outstanding prior to initial filing of the resale registration statement.

The registration statement must specify the particular private transaction in which the securities covered by the registration statement, on behalf of the to-be-named selling security holders, were acquired. The securities covered by the registration statement will have to be issued and outstanding (i.e., a contractual undertaking to buy is not enough) before the resale registration statement is filed. In effect, the accommodation is unavailable to resales of securities offered in PIPES transactions.

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. Rule 430C has a similar provisions regarding the treatment of prospectus supplements that will apply to offerings made in reliance on Rule 415(a)(1)(i) and (ix). As a result, prospectus supplements will, in all cases, be considered part of and included in registration statements for purposes of Section 11.

Date of Inclusion of Prospectus Supplements in Registration Statements and New Effective Dates of Registration Statements

Rule 430B and Rule 430C deem information contained in prospectus supplements to be included in the registration statement as follows:

- for a prospectus supplement filed other than in connection with a takedown (pursuant to Rule 424(b)(3) or Rule 497(c) or (e)) under Rule 430B and Rule 430C, as applicable, all information contained in that prospectus supplement is 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)) under Rule 430B, all information in that prospectus supplement is deemed part of the registration statement as of the earlier of the date such subsequent form of prospectus is first used or the date and time of the first contract of sale of securities in the offering to which such subsequent form of prospectus relates.

Issuers/underwriters. Rule 430B also establishes a new effective date for a shelf registration statement for Section 11 liability purposes for issuers and underwriters. That new effective date is the date a prospectus supplement filed in connection with the takedown or takedowns is deemed part of the relevant registration statement. The new effective date is not, however, considered the filing of a new registration statement for purposes of Form eligibility. Such determination will remain to be made at the time of the Section 10(a)(3) update to the registration statement.

Directors and officers. For directors and signing officers, the filing of a form of prospectus does not result in a later Section 11 liability date. Therefore, under Rule 430B, except for an effective date resulting from the filing of a form of prospectus for purposes of updating the registration statement pursuant to Section 10(a)(3) or reflecting fundamental changes in the information in the registration statement pursuant to the issuer's undertakings, the prospectus filing does not create a new effective date for directors or signing officers of the issuer. The new effective date also does not apply to a person that becomes an underwriter after that effective date; in that case, Section 11(d) provides that the date the person became an underwriter is its effective date.

Auditors and other experts. Also unchanged is the effective date for auditors who provide consent in an existing registration statement for their report on previously issued financial statements or previous reports on management's assessment of internal control over financial reporting, unless a prospectus supplement (and any Exchange Act report incorporated by reference into the prospectus and registration statement) or post-effective amendment contains new audited financial statements or other information as to which the auditor is an expert and for which a new consent is required. As to any other expert, the filing of the prospectus supplement also does not trigger a new effective date, and thus does not require the filing of a consent, unless the prospectus supplement (including incorporated Exchange Act reports) includes a new report or opinion of an expert whose consent is required pursuant to Section 7 and who will have liability pursuant to Section 11.

The new effective date is for liability purposes only, does not, by itself, require the filing of additional consents of experts, and does not constitute an updating of the registration statement and prospectus for purposes of Section 10(a)(3). The triggering of a new effective date in respect of a takedown does not affect information that was in the registration statement at the time of any prior sale.

Amendments to Rule 415

Elimination of Limitation on Amount of Securities Registered

For offerings other than business combination transactions and continuous offerings, Rule 415(a)(1)(vii), (ix) and (x) no longer limit the amount of securities registered to an amount that intended to be offered or sold within two years from the registration statement effective date. However, such shelf registration statements can only be used for three years (subject to a limited extension) after the initial effective date of the registration statement. New shelf registration statements have to be filed every three years, with unsold securities and unused fees carried forward to the new registration statement for automatic shelfs and for offerings under Rule 415(a)(1)(vii), (ix) and (x).

Automatic shelfs are immediately effective, so filing a new shelf prior to the third anniversary is not problematic. For the other types of offerings, the SEC has granted a six-month extension so long as a new shelf is filed before the three years expires. Prior to effectiveness of the new registration statement (including at the time of filing for an automatic shelf registration statement), the issuer can amend the later registration statement to include any securities (and fees attributable to such securities) remaining unsold on the older registration statement. Continuous offerings begun prior to the end of the three years

could continue on the old registration statement until the effective date of the new registration statement, at which point the continuous offerings could continue on the new registration statement.

Immediate Takedowns From a Shelf Registration Statement Filed Under Rule 415(a)(1)(x)

Primary offerings on Form S-3 or Form F-3 can occur promptly after effectiveness of a shelf registration statement. With respect to immediate offerings from an effective registration statement, prior rules permitted omission of information from the prospectus at the time of effectiveness only in reliance on Rule 430A, while Rule 430B will permit far more to be left for inclusion via prospectus supplement. Rule 430A will continue to be available for immediate takedowns and for automatic shelfs.

Elimination of "At-the-Market" Offering Restrictions

Restrictions on primary "at-the-market" offerings of equity securities in Rule 415(a)(4), initially included to address concerns about the integrity of trading markets, are eliminated. An issuer eligible to conduct an offering pursuant to Rule 415(a)(1)(x) can conduct an "at-the-market" offering of equity securities without requiring identification of an underwriter in its registration statement and without a volume limitation.

Rule 424 Amendments; Elimination of Rule 434

New subsections have been added to cover forms of final prospectuses not filed within the required timeframe under Rule 424 and prospectuses identifying selling security holders. The term sheet rule (434) has been eliminated as superfluous.

Issuer Undertakings (Amended S-K Item 512)

The SEC has conformed revisions to the issuer undertakings that are required in connection with a shelf registration statement. These revisions reflect the issuer's agreement regarding the inclusion of information contained in prospectus supplements in registration statements and new effective dates of the registration statement.

Treatment of Information in Prospectus Supplements

Item 512(a) of Regulation S-K has required an issuer to undertake to file a post-effective amendment to a registration statement to:

- include in the registration statement any prospectus required by Section 10(a)(3);
- reflect in a prospectus included in the registration statement any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereto) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement; and
- include in a prospectus included in the registration statement any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change in such information in the registration statement.

Shelf issuers traditionally could satisfy the first two of these obligations by filing Exchange Act periodic reports incorporated by reference into the registration statement. Amended Item 512(a) clarifies that for shelf registration statements filed on Forms S-3 and F-3 for primary offerings of securities in

reliance on Rule 415(a)(1)(x), all disclosures required by this undertaking can be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report that an issuer files that is incorporated by reference into the registration statement, instead of only in periodic reports. This permits an issuer to use an incorporated Form 8-K (or incorporated Form 6-K) to satisfy the undertaking.

In the event that satisfaction of any element of the undertaking requires the filing by any of the permitted methods of a consent of an expert, that consent may be filed by post-effective amendment to Part II of the registration statement only or by filing of an Exchange Act report, such as an annual report on Form 10-K or 20-F or a report on Form 8-K or Form 6-K, incorporated by reference into the registration statement.

Prospectus Supplements Deemed Part of a Registration Statement and New Effective Dates

Issuers will now acknowledge that a prospectus supplement, other than one filed in connection with a takedown (under Rule 424(b)(3)), is deemed part of and included in the relevant registration statement as of the date of its first use and that a prospectus supplement filed in connection with a takedown is deemed part of and included in the relevant registration statement as of the earlier of the date of first use after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. Issuers will acknowledge that such date, in the case of a prospectus supplement filed in connection with a takedown, will also be deemed for purposes of liability to be a new effective date of the registration statement relating to the securities to which the prospectus supplement relates, and the offering of such securities at that time is deemed to be the initial bona fide offering of the securities.

Changes to Form S-3 and Form F-3

In addition to the changes that will allow additional Form S-3 or Form F-3 disclosures to be included through prospectus supplements and Exchange Act reports, Form S-3 and Form F-3 are amended to expand the categories of majority-owned subsidiaries that are eligible to register their non-convertible securities or guarantees. The permitted circumstances are the same as those provided for majority-owned subsidiaries to be well-known seasoned issuers.

Automatic Shelf Registration

Overview

Eligible well-known seasoned issuers can register unspecified amounts of different specified types of securities on automatically effective Form S-3 or Form F-3 registration statements. Unlike the process for other issuers registering primary offerings on Form S-3 or Form F-3, the automatic shelf registration process allows eligible issuers to add additional classes of securities and eligible majority-owned subsidiaries as additional registrants after an automatic shelf is effective. They are also able to freely accommodate both primary and secondary offerings using automatic shelf registration.

Issuers using an automatic shelf registration statement are permitted (but not required) to pay filing fees in advance or on a “pay-as-you-go” basis at the time of each takedown off the shelf registration statement in an amount calculated for that takedown.

More information can be excluded from the base prospectus in an automatic shelf registration statement than from a regular shelf registration statement. The omitted information can then be included in a prospectus supplement or incorporated by reference. The automatic shelf registration process,

together with the loosening of the restrictions on communications, provide well-known seasoned issuers maximum flexibility to use a free writing prospectus to structure transactions.

As with other delayed shelf registration statements, the issuer is only considered to be in registration or offering its securities when it offers securities in a takedown off its shelf.

The flexibility permitted under the automatic shelf registration process will benefit issuers and investors by facilitating different types of offerings on a registered basis. In particular, this process will facilitate the registration under the Securities Act of rights offers conducted by eligible foreign private issuers. Previously, foreign private issuers frequently did not extend rights offers to their U.S. security holders because the registration process under the Securities Act did not accommodate the timing mechanics of rights offers, which are typically announced and launched in a very short period of time. The ability of eligible foreign private issuers to use the automatic shelf registration process and to have a Securities Act registration statement become automatically effective so that sales in a rights offer can take place immediately after filing should encourage eligible foreign private issuers to extend rights offers to U.S. holders.

Automatic Shelf Registration Mechanics

Eligibility

The 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. It is not mandatory.

An issuer can file an automatic shelf registration statement if it met the eligibility criteria on the initial filing date and is to reassess its eligibility at the time of each updated prospectus required by Section 10(a)(3) (e.g., the filing of a Form 10-K or Form 20-F). If an issuer is no longer eligible to use an automatic shelf registration statement at the time of its Section 10(a)(3) update, it would have to either post-effectively amend its registration statement onto the form it was then eligible to use or file a new registration statement on such form. Any offerings that were ongoing at that time, such as registered conversions of outstanding convertible securities, could continue on the automatic shelf until a post-effective amendment or new registration that was filed in a timely manner is declared effective (per Section 10(a)(3), 120 days after the issuer's most recent fiscal year end).

In general, securities of majority-owned subsidiaries of well-known seasoned issuers can be included on the automatic shelf if the subsidiary satisfied the conditions for being considered a well-known seasoned issuer described above. Under automatic shelf registration, a registration statement can be amended by post-effective amendment to add an eligible subsidiary as an issuer.

Information That May be Omitted From the Base Prospectus

A base prospectus included in an automatic shelf registration statement can, as previously, omit information pursuant to Rule 409 that was unknown and not reasonably available and, now, can also omit the following additional information:

- whether the offering is a primary or secondary offering;
- the description of the securities to be offered other than identification of the name or class of the securities;

- the names of any selling security holders; and
- the plan of distribution.

Omitting this additional information from the base prospectus will not affect the information that an investor will be provided in connection with a particular sale. The right to omit information from a base prospectus does not affect the fact that under SEC interpretations and Rule 159, whether there are material misstatements or material omissions is assessed on the basis of information conveyed at the time of sale.

Mechanics for Including Information

Issuers can add omitted information to a prospectus generally by means other than a post-effective amendment to the registration statement. As discussed above, Forms S-3 and F-3 will be amended to permit all information required in the prospectus about the issuer and its securities to be incorporated by reference from Exchange Act reports or be contained in the prospectus or a prospectus supplement that will be deemed to be part of and included in the registration statement. Examples of the types of information that can be added in this manner for automatic shelf registration statements include:

- the public offering price;
- any updating information regarding the issuer (whether or not a fundamental change);
- a detailed description of securities, including information not contained or incorporated by reference in the base prospectus;
- the identity of underwriters and selling security holders; and
- the plan of distribution.

The principal exceptions to this approach are that an issuer desiring to add to the registration statement new types of securities and new eligible issuers, including new guarantors, and the securities they intend to issue must do so by post-effective amendment (which is effective immediately). New issuers and their specified officers and directors are required to be signatories to the post-effective amendment.

Registration of Securities to be Offered

An eligible issuer may register on an automatic shelf registration statement an unspecified amount of securities to be offered, without indicating whether the securities will be sold in primary offerings or secondary offerings on behalf of selling security holders. Well-known seasoned issuers that satisfy the definition based only on their aggregated registered issuances of non-convertible securities can register only non-convertible securities (other than common equity), unless they have a public float of $75 million or more.

The fee table in the initial registration statement will not need to include a dollar amount or specific number of securities (unless the fee is paid at the time), but will specify each class of security registered and indicate whether the fee will be paid on a pay-as-you-go basis. The issuer can specify the number or dollar amount of securities in a prospectus supplement at the time it pays a fee in advance or for each offering.

The base prospectus in the initial registration statement will identify and describe, to the extent the information is available at that time, the classes of securities registered. The descriptions will not need to contain detailed information as to particular security terms and conditions. Automatic shelf issuers can register classes of securities without allocating the mix of securities registered between the issuer, its eligible subsidiaries or selling security holders.

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 new classes of securities, an issuer will file a post-effective amendment to register an unspecified amount of securities of the new class of security. This requirement will make the registration statement cover each new class of securities to be offered. 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 and included in, or in an Exchange Act report incorporated by reference into, the registration statement.

Pay-as-You-Go Registration Fees

Issuers using automatic shelf registration statements will be able to pay filing fees at the time of a securities offering – known as "pay-as-you go"– or prior to that time.

The triggering event for a required fee payment will be a takedown off a shelf registration statement. For each takedown, the issuer can file a prospectus supplement for the takedown that will include a calculation of registration fee table or can file a post-effective amendment including the same information. The issuer will pay the appropriate fee calculated in accordance with Rule 457 (that is, based on the then applicable fee schedule) at the time of the filing of the prospectus supplement (fees withdrawn from the lockbox account are calculated based on date of withdrawal not deposit). Payment is to be effected within the time required for filing the prospectus supplement under Rule 424. There is also a cure provision (with a four business day extension).

At any time before one or more takedowns in the future (for example, in the case of a medium-term note program), the issuer can pay the appropriate fee and file a prospectus supplement.

An issuer using automatic shelf registration and the pay-as-you-go registration fee payment procedure will include on the cover page of the prospectus supplement a fee table calculating the registration fee for the current or future takedowns for which it is paying the required fee.

Registration under Sections 5 and 6

Compliance with Sections 5 (registration) and 6 (payment of fees) depends on the timing of the necessary filings and the content of the automatic shelf registration statement (including amendments, incorporated documents and prospectus supplements).

For purposes of Section 5, any securities offered and sold off an effective automatic shelf registration statement is deemed to satisfy the requirements of Section 5(c) if the registration statement, or any amendment thereto, included that class of securities prior to the offer and sale. If the class of securities was included on the registration statement, amendment, incorporated Exchange Act document or prospectus supplement reflecting the transaction and if the fee table was filed on a timely basis, and the appropriate fee was timely paid at or before the time of filing, the securities sold in the takedown are deemed to be registered for purposes of Section 6.

Automatic Effectiveness

All automatic shelf registration statements and post-effective amendments become effective automatically upon filing, without Staff review (under Rule 462(e) and (f)). Rule 401(g) provides that an automatic shelf registration statement will be deemed to be filed on the proper form unless the Staff notifies the issuer after filing of its objection to the use of such form.

If the Staff notifies an issuer of its objection, the issuer cannot proceed with subsequent offerings (those offerings not in progress), unless it amends the registration statement to the proper form, or otherwise resolved the issue. In that case, even if the Staff were to notify an issuer that it was ineligible to use an automatic shelf registration statement, securities sold prior to notification would not have been sold in violation of Section 5.

With automatic effectiveness of the automatic shelf registration statements, the Staff will expect issuers to evaluate whether there are unresolved disclosure or accounting issues that have been raised by the Staff on the issuer's Exchange Act filings before filing the automatic shelf registration statement or at the time of its Section 10(a)(3) update to such registration statement. However, because the SEC believes it is important that issuers address unresolved comments, accelerated filers, which include well-known seasoned issuers and foreign private issuers that meet the definition, are required to disclose written Staff comments received more than 180 days before an issuer's fiscal year end that the issuer believes are material and remain unresolved at the time of filing of the Form 10-K or Form 20-F.

Duration

An automatic shelf becomes effective automatically and covers an unspecified amount of securities. Issuers are required to file new automatic shelf registration statements every three years that will, in effect, restate their then-current registration statement and amend it, as they deem appropriate. Issuers are prohibited from issuing securities off an automatic shelf registration statement that is more than three years old. As long as eligibility for automatic shelf registration continues, the new registration statement becomes effective immediately and carries forward the securities registered and any fee paid on the old registration statement.

Unseasoned Issuers and Non-Reporting Issuers

Overview

The circumstances in which issuers may incorporate information from Exchange Act reports into Securities Act registration statements are expanded; Forms S-2/F-2 are eliminated.

The revisions to Rule 430C discussed above regarding prospectus supplements used in continuous offerings also affect offerings by non-reporting issuers and reporting issuers that are not seasoned issuers.

Amendments to Form S-1 and Form F-1 – Expanded Use of Incorporation by Reference

A reporting issuer that has filed at least one annual report and that is current in its reporting obligation is able to incorporate by reference into a Form S-1 or Form F-1 information from its previously filed Exchange Act reports and documents. Successor registrants are able to incorporate by reference if their predecessors were eligible. The ability to incorporate by reference into a Form S-1 or Form F-1 is not available to "ineligible issuers."

The ability to incorporate by reference is conditioned on the issuer making its Exchange Act reports and other documents readily accessible on its web site.

The prospectus in the registration statement at effectiveness is to identify all Exchange Act reports and documents, such as proxy and information statements, that are incorporated by reference. There will be no incorporation by reference of Exchange Act reports and documents that were not identified in the registration statement and filed after the registration statement is effective – known as "forward incorporation."

The Form S-1 or Form F-1 is to include material changes in or updates to the information that is incorporated by reference from an Exchange Act report or document.

PROSPECTUS DELIVERY REFORMS

Traditional Prospectus Delivery Requirements

The Securities Act requires delivery of a prospectus meeting the requirements of Section 10(a), known as a "final prospectus," to each investor in a registered offering. After the effective date of a registration statement, a written communication that offers a security for sale or confirms the sale of a security may be provided if a final prospectus is sent or given previously or at the same time. Otherwise, such a communication is a prospectus and may not be provided unless it meets the requirements of Section 10(a). A written confirmation is not designed to meet these requirements. Therefore, a final prospectus must accompany or precede a written confirmation. In addition, Section 5(b)(2) makes it unlawful to deliver a security "unless accompanied or preceded" by a final prospectus.

Previously, if no preliminary prospectus or written selling materials were distributed, the final prospectus was the only prospectus received by investors. However, an investor's investment decision and the sale of securities to the investor in the offering generally occur before the final prospectus is required to be delivered under the Securities Act. Moreover, for sales occurring in the aftermarket, investors in securities of reporting issuers are not delivered a final prospectus. Accordingly, the greatest utility of a final prospectus is as a document that informs and memorializes the information for the aftermarket. Actual delivery to purchasers is not necessary to satisfy this purpose.

Prospectus Delivery Reforms

The prospectus delivery requirements have been modified. In particular, new rules:

- eliminate the link between delivery of the final prospectus and the delivery of a confirmation of sale;
- provide that the obligation to have a final prospectus precede or accompany a security for sale can be satisfied by filing the final prospectus within the required time period;
- permit written notices of allocations; and
- permit the prospectus delivery obligations in dealer transactions during any prospectus delivery period and registered resale transactions in securities that are trading to be satisfied if the final prospectus has been or will be filed within the required time period.

Access Equals Delivery – Rule 172(c)

Under Rule 172, a final prospectus is deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) as long as the final prospectus meeting the requirements of Section 10(a) is filed as part of the registration statement by the required Rule 424 prospectus filing date. A cure provision has been added (and a new clause added to Rule 424) to address failures to timely file. The SEC declined to extend Rule 172 to preliminary prospectuses.

Certain types of offerings are excluded from the rule because either they do not raise the same issues as in corporate capital formation transactions or they are already subject to rules unique to these offerings. For example, in offerings on Form S-8, the final prospectus is never filed with the SEC and, thus, these offerings do not raise the same types of issues as other capital formation transactions. Business combination transactions and exchange offers also differ from other types of offerings registered under the Securities Act because the proxy rules and tender offer rules in conjunction with

state law impose informational and delivery requirements. The information contained in the final prospectus therefore is delivered regardless of the Securities Act's requirements.

Notification – Rule 173

Under Rule 173, for each transaction involving a sale by an issuer or underwriter to a purchaser or a sale in which the final prospectus delivery requirements apply, each underwriter, broker or dealer participating in a registered offering (or, if the sale was effected by the issuer and not an underwriter, broker or dealer, then the issuer) is to send to each purchaser from it, not later than two business days after the completion of the sale, 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 or in a transaction for which a final prospectus would have been required to be delivered in the absence of Rule 172.

An investor can request a final prospectus. Under the rule, a requested final prospectus will not have to be provided before settlement.

Compliance with Rule 173 is not a condition to the exemption from final prospectus delivery under Rule 172 and non-compliance with Rule 173 does not result in a Section 5 violation. The same offerings excluded pursuant to Rule 172 are also excluded from Rule 173.

Confirmations and Notices of Allocations – Rule 172(a)

Written confirmations and notices of allocation can be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus. This exemption is conditioned on the registration statement being effective and the final prospectus meeting the requirements of Section 10(a) being filed within the required time frame. 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 a Rule 173 notice; and

- written communications from an offering participant to a customer or from an underwriter to dealers in the selling group notifying them of the basic terms of the transaction and their allocations of securities in a registered offering.

Under the exemption, broker-dealers can send e-mail notices after effectiveness to inform investors in a public offering of their allocations. Under the rule, the notices of allocations can include the name of the securities, the amount allocated to the customer, the price of the securities, and the date or expected date of settlement and incidental information. Similar information is required for notices to participating dealers. The exemption is not available for the same offerings excluded from Rule 172(c).

Transactions Taking Place on an Exchange or Through a Registered Trading Facility – Amended Rule 153

Rule 153 addresses delivery of final prospectuses in transactions taking place between brokers over a national securities exchange; previously, it did not apply to transactions on an automated quotation system such as the Nasdaq Stock Market.

Under the amendments, broker-dealers effecting transactions on an exchange or through any trading facility registered with the SEC will be deemed to satisfy their prospectus delivery obligations

under Section 5(b)(2) with regard to transactions in securities that are already trading on the market or through the trading facility if:

- the final prospectus is on file/will be on file by the prospectus filing date;
- securities of the same class are trading on an exchange or through any trading facility registered with the SEC;
- the registration statement relating to the offering is effective and not the subject of any pending proceeding or examination issued under Section 8(d) or 8(e); and
- neither the issuer nor any underwriter or participating dealer is the subject of a pending Section 8A proceeding in connection with the offering.

Aftermarket Prospectus Delivery – Amended Rule 174

Dealers are required to deliver a final prospectus for a specified period after a registration statement becomes effective to persons who buy in the aftermarket. The SEC has revised Rule 174 to provide that during the aftermarket period, dealers can rely on Rule 172 to satisfy any aftermarket delivery obligations (other than for blank check companies).

ADDITIONAL EXCHANGE ACT DISCLOSURE

Risk Factor Disclosure

The SEC has extended risk factor disclosure to annual reports on Forms 10-K and registration statements on Form 10. Risk factor disclosure under the Exchange Act will be the same type of S-K Item 503 disclosure as in a Securities Act registration statement, other than information about a particular securities offering. The risk factor disclosure in Exchange Act reports is to be written in accordance with the same "plain English" standards as apply to risk factor disclosure in Securities Act registration statements. In addition, quarterly updates to the risk factors disclosure are to reflect any material changes from risks previously disclosed in Exchange Act reports. A restatement or repetition of risk factors in quarterly reports is not required, and is discouraged.

Disclosure of Unresolved Staff Comments

Because procedural changes will eliminate some of the incentives issuers have to respond to comments on their Exchange Act reports in a timely manner and shelf eligible issuers will have to file new registration statements only every three years, the SEC has added incentives for accelerated filers to timely resolve outstanding staff comments on their Exchange Act reports.

Domestic and foreign accelerated filers, whether or not they expect to file shelf registration statements, are required to disclose, in their annual reports on Forms 10-K or 20-F, written Staff comments made in connection with Staff review of Exchange Act reports that the issuer believes are material and that were issued more than 180 days before the end of the fiscal year covered by the annual report and that remain unresolved as of the date of the filing of the Form 10-K/Form 20-F. The disclosure is required to describe the substance of the comments. Staff comments that have been resolved, including those that the Staff and the issuer have agreed will be addressed in future Exchange Act reports, need not be disclosed. Issuers are permitted to disclose their position regarding any such unresolved comments.

Disclosure of Status as Voluntary Filer under the Exchange Act

The SEC has added a box on the cover page of Forms 10-K, 10-KSB and 20-F for an issuer to check if it is filing reports voluntarily. The box will be for informational purposes only. An issuer's filing obligation will be unaffected by an incorrectly checked box.

The SEC believes that it is important that investors and other market participants be aware that an issuer is a voluntary filer and, thus, may cease to file its Exchange Act reports at any time and for any reason without notice. In addition, the communications and procedural proposals do not permit voluntary filers to become seasoned issuers. Identification of voluntary filers will enable the SEC to monitor their use of the new communications rules as well as the other regulatory requirements.