July 26, 2005

A Breath of Fresh Air: The SEC Adopts Securities Offering Reform Amendments

The Securities and Exchange Commission has now adopted long-awaited amendments to the rules governing the public offer and sale of securities under the Securities Act of 1933.[1] With the goal of modernizing offering rules to allow greater communications during registration and to better accommodate current offering practices and technologies, the rule amendments offer a breath of fresh air from the additional responsibilities imposed on public companies under the Sarbanes-Oxley Act of 2002.

Proposed originally in November of 2004, the amendments will be effective December 1, 2005. They address three principal areas for reform–communications during the offering process, offering procedures and mechanics and liability provisions for offering-related communications. This advisory discusses the significant reforms adopted by the SEC in the securities offering reform amendments and highlights issues to consider as the new rules are implemented.

The securities offering amendments address three principal areas for reform.

- *Communications during registration* - relaxing and modernizing the rules for communications by offering participants during registration.
- *Procedural changes* - reducing and streamlining procedural barriers to capital raising.
- *Liability framework* - enhancing and providing greater clarity for the liability provisions applicable to registered offerings.

Categories of Issuers

Many of the reforms are best understood as they apply to various categories of issuer. The reforms create two new categories of issuer, the "well-known seasoned issuer" and the "ineligible issuer." These are layered onto three existing categories, which the SEC calls seasoned issuers, unseasoned issuers and non-reporting issuers. Privileges and obligations under the securities offering reform amendments differ depending on the category within the hierarchy in which an issuer falls.[2]

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[1] *See* Securities Offering Reform, Rel. No. 33-8591 (Jul. 19, 2005) ("Offering Reform Release"). All references to page numbers in the Offering Reform Release refer to the page numbers on the pdf version of the release that is available on the SEC's website at http://sec.gov/rules/final/33-8591.pdf.

[2] The rules implicate a sixth category of issuer - "reporting issuers," which are issuers that are required to file periodic and current reports with the SEC under the Securities Exchange Act of 1934. An issuer becomes a reporting issuer under the Exchange Act either by registering a class of its securities under Section 12 or under Section 15(d) if it has sold registered securities under the Securities Act. The "reporting issuer" category encompasses well-known seasoned issuers, seasoned issuers, unseasoned issuers and some ineligible issuers.

Well-Known Seasoned Issuers

Well-known seasoned issuers are the big winners under the securities offering amendments. As newly defined in Securities Act Rule 405, well-known seasoned issuers represent the largest and most active participants in the capital markets. To qualify as such, an issuer must be an eligible registrant to register its securities on Form S-3 or F-3 (see "Seasoned Issuers" below) and must have (as of a date within 60 days of the determination date) world-wide market value of at least $700 million of outstanding voting and non-voting common equity held by non-affiliates or have issued at least $1 billion aggregate amount of non-convertible securities (other than common equity) in registered cash offerings during the past three years.[3]

An issuer generally determines whether or not it qualifies as a well-known seasoned issuer at two points in time. First, an issuer determines its eligibility when it files its registration statement. Second, an issuer must evaluate its continued eligibility for well-known seasoned issuer status at the time of the annual update to the financial statements.[4]

More Reason to be Current and Timely

The securities offering reforms place special emphasis on reporting under the Exchange Act. The broadest applications of the new rules look to issuers that are both *current* and *timely* in their reporting. Generally, the term *current* refers to whether an issuer has filed all of the reports that are required under the Exchange Act. In contrast, the term *timely* refers to whether an issuer has filed its Exchange Act reports on time. An issuer must be current *and* timely during the preceding 12 calendar months in order to qualify as a well-known seasoned issuer under the new rules or as a seasoned issuer.

Seasoned Issuers

An issuer that is eligible to register a primary offering of its securities on Form S-3 or F-3 is generally referred to as a seasoned issuer.[5] The new rules do not change the eligibility requirements for a primary offering on these short form registration statements, which require an issuer to have filed all required Exchange Act reports (except certain current reports on Form 8-K) on a timely basis for at least 12 months preceding the filing of the registration statement. In addition, the issuer must have paid all dividend or sinking fund installments on preferred stock and must not have defaulted on any material installment on indebtedness or rental on one or more long-term leases. Lastly, to be eligible to register a primary offering of securities on Form S-3 or F-3, the issuer must have a minimum market float of at least $75 million of outstanding equity held by non-affiliates or be registering non-convertible investment-grade securities. Seasoned issuers enjoy a number of benefits under the new rules.[6]

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[3] This definition excludes a significant component of the debt markets - Rule 144A offerings, which are not registered transactions, and subsequent "Exxon Capital Exchanges" (also "A/B Exchanges"), where an issuer exchanges registered debt securities for Rule 144A placed debt.

[4] Under Section 10(a)(3) of the Securities Act, a prospectus that is being used more than nine months after effectiveness of the registration statement must include audited financial statements that are no more than 16 months old. This means that an issuer must update the financial statements in ongoing registration statements at least every year.

[5] The term "primary offering" refers to an issuer's sale of its own securities. A "secondary offering," by contrast, generally refers to the resale of an issuer's securities by its security holders.

[6] See the Appendix for a summary of the eligibility requirements and benefits under the new rules that pertain to well-known seasoned issuers and seasoned issuers.

Unseasoned Issuers

An issuer that is required to file reports with the SEC but not eligible to register a primary offering of its securities on Form S-3 or F-3 is generally referred to as an unseasoned issuer. Often, such issuers are ineligible to register a primary offering on Form S-3 or F-3 because they have an insufficient market value or because they failed to file a required periodic or current report, at all or on time. Unseasoned issuers enjoy only some benefits under the new rules.

Non-Reporting Issuers

An issuer that is not required to file periodic and current reports under the Exchange Act is generally referred to as a non-reporting issuer. This category includes voluntary filers. Like unseasoned issuers, non-reporting issuers enjoy only some benefits under the new rules.

Voluntary Filers Are Non-Reporting Issuers

A "voluntary filer" is not required to file reports under the Exchange Act but does so voluntarily. Often, the voluntary filer will have completed a registered offering under the Securities Act and continued to file Exchange Act reports even after its reporting obligations have been suspended, for instance, to fulfill contractual arrangements, such as under an indenture. A voluntary filer is not considered a reporting issuer under the new rules and is therefore unable to enjoy the benefits afforded reporting issuers, even if the voluntary filer has been reporting for many years. A voluntary filer now must identify itself as such on the cover page of its annual report on Form 10-K, 10-KSB or 20-F.

Ineligible Issuers

Finally, the amendments to Rule 405 create a category of issuers that are ineligible for most of the privileges under the new rules. In this category, we find any issuer (or its predecessor) which is

- a reporting issuer that is not current in reports and other materials required to be filed under the Exchange Act during the prior 12 months (except certain current reports on Form 8-K);
- a limited partnership offering its securities on an other than firm commitment offering basis; or
- the subject of a stop order or cease and desist proceeding under the Securities Act.

This category also covers an issuer (or its predecessor) that in the preceding three years was

- a blank check company, shell company or penny stock issuer;
- the subject of a bankruptcy or insolvency petition;[7]
- the subject of a refusal or stop order under the Securities Act;
- found to have violated (or whose subsidiaries were found to have violated at the time they were subsidiaries of the issuer) the anti-fraud provisions of the federal securities laws or have been made the subject of a judicial or administrative decree or order (including a settled claim

[7] This ineligibility criterion does not apply to: (1) involuntary bankruptcy petitions that are discharged within 90 days of the filing of the involuntary petition, or (2) issuers that file an annual report with audited financial statements subsequent to their emergence from bankruptcy, insolvency or receivership.

or order) prohibiting certain conduct or activities regarding the anti-fraud provisions of the federal securities laws;[8] or

- convicted (or whose subsidiaries were convicted at the time they were subsidiaries of the issuer) of any felony or misdemeanor arising from the sale of securities or conduct as a financial market participant, crimes involving the unlawful misappropriation of property or various similar criminal offenses.

As would be expected, ineligible issuers may not be well-known seasoned issuers, seasoned issuers or unseasoned issuers and will have limited ability to use free writing prospectuses, one of the most significant aspects of the communications rule reforms.[9] Among ineligible issuers, blank check, shell company and penny stock issuers have the fewest privileges. Such issuers are precluded from relying on the new rules permitting free writing prospectuses in any manner. In addition, research reports covering blank check, shell company and penny stock issuers would not be covered by the safe harbors for research reports in Rules 137, 138 and 139 under the Securities Act.[10]

Communications Reforms

Perhaps the most eagerly anticipated reforms included in the amendments are those relating to communications by issuers and offering participants during registered securities offerings. As capital markets are beginning a post-Enron thaw, the so-called quiet period, imposed by the Securities Act on registered offerings, is once again in the news.[11] When investors and indeed the SEC itself often demand greater information, executives and their companies have chafed at the constraints of silence that the Securities Act imposes on public offerings. The SEC has adopted a number of provisions to relax communication restrictions and give issuers the opportunity to speak more freely while in, and out, of registration.[12] These can be summarized as follows.

- Well-known seasoned issuers may communicate orally or through a new class of regulated communication - the free writing prospectus - outside the registration statement at any time, subject in certain circumstances to filing and other conditions.

- All but certain ineligible issuers may rely on a new safe harbor to communicate more than 30 days before filing a registration statement without concern of gun-jumping violations.

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8 This applies only to settlements entered into after the effective date for the new rules.

9 The SEC has delegated to the Division of Corporation Finance the ability to waive one or all of the ineligibility factors.

10 The SEC recently adopted a definition of the term "shell company" in Securities Act Rule 405. Under that definition, a shell company is defined as a registrant (other than an asset-backed issuer or shell company formed for the purpose of completing a business combination) that has no or nominal operations and no or nominal assets or assets consisting solely of cash. *See* Use Of Form S-8, Form 8-K, And Form 20-F By Shell Companies, Rel. No. 33-8587 (Jul. 15, 2005).

11 The "quiet period" under the Securities Act refers to the period during which Section 5 prohibits communications outside of a registration statement and prospectus filed with the SEC. That period is generally understood to begin at least when an issuer files a registration statement (or in the case of shelf offerings, when the issuer engages an underwriter for the offering) and to end when the registration statement is declared effective. And, in order to guard against premature offers, in initial public offerings and other non-shelf offerings, many counsel that the quiet period begins when the issuer engages an underwriter.

12 The new rules do not change the treatment of communications made in business combination transactions, which the SEC previously liberalized in ways that foreshadowed approaches adopted in the offering reform rules.

- All but certain ineligible issuers may communicate outside of the registration statement through the use of free writing prospectuses after the filing of the registration statement, subject in certain circumstances to filing and other conditions.

- Reporting issuers (well-known seasoned issuers, seasoned issuers, unseasoned issuers and reporting ineligible issuers) may rely on a new safe harbor to publish regularly released factual business information and forward-looking information.

- All issuers may rely on a new safe harbor to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors.

- All issuers may communicate about an expanded category of information concerning routine issuer, offering and procedural matters, such as communications about the schedule for an offering or account-opening procedures, in reliance on amendments to Rule 134.

- The safe harbors for research reports are expanded.[13]

Below, we discuss the significant aspects of the new communications rules.[14]

Definitions

All Communications That Are Not Oral Are "Written"

Federal securities law draws a distinction between written and oral communications once an issuer has filed a registration statement for a proposed securities offering. Section 5 of the Securities Act provides that no offers, written or oral, may be made before the filing of a registration statement with the SEC. Once a registration statement is filed with the SEC, Section 5 prohibits the making of any offer by means of a prospectus, other than a statutory prospectus.[15] In turn, the term "prospectus," as defined by Section 2(a)(10) of the Securities Act, covers "any prospectus, notice, circular, advertisement, letter, or communication, *written or by radio or television*, which offers any security for sale or confirms the sale of any security" (emphasis added). Taken together, these rules prohibit the making of any offer through a written communication outside of the statutory prospectus before a registration statement is declared effective. If an issuer violates Section 5 during these periods by, for example, using a prospectus that does not include all the information required by a statutory prospectus, the violation of Section 5 is commonly referred to as "gun-jumping."

A key axis in the new communication rules is formed by the definitions of "graphic communication" and "written communication" in Securities Act Rule 405. In the reform amendments, "graphic communication" is expanded to include "all forms of electronic media," such as "audiotapes,

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[13] The SEC has adopted amendments to the rules governing the publication of research reports while an issuer is in registration – Rules 137, 138 and 139 under the Securities Act. The amendments generally have expanded the types of reports that can be covered by these safe harbors. For example, Rules 138 and 139 have been amended to include research reports covering Regulation S and Rule 144A securities. At the same time, the amendments have eliminated the availability of the safe harbors for research reports covering the securities of blank check, shell company and penny stock issuers.

[14] As a general matter, investment companies and business development companies may not rely on the new communications rules.

[15] Although there is no formal definition of "statutory prospectus," the term is generally understood to refer to a prospectus that complies with Section 10 of the Securities Act. The SEC staff also has made clear that, in the context of an initial public offering, a statutory prospectus requires a price range.

videotapes, facsimiles, CD-ROM, electronic mail, Internet web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation." A new definition for the term, "written communication," covers "any communication that is written, printed, broadcast by radio or television, or a graphic communication." As a result of these definitions, virtually any communication that is not oral is deemed to be written.

This is significant because most new communications technologies are likely to be deemed written and therefore subject to the restrictions under Section 5 of the Securities Act.[16] Although useful for its clarity, this construct may nonetheless engender criticism as discouraging the development and use of new technologies. On the other hand and in part, any such defect will be mitigated by other of the communications reforms that give issuers and offering participants increased latitude to communicate before, during and after the registration process.

Written versus oral communications - what does it all mean?

Written communications include

- any form of electronic media - audiotapes, videotapes, facsimiles, CD-ROM, e-mail, Internet web sites, and other forms of computer data compilation;
- road shows transmitted electronically on a recorded or delayed basis;
- pre-recorded communications, even if only played once; and
- "blast" voice mail messages.

Oral communications include

- live road shows, including the simultaneous presentation of slides or other materials in such communications;
- live telephone calls;
- live web casts; and
- transmission of a live presentation to an overflow room.

Oral Versus Broadcast

The definition of "graphic communication" excludes a live, real-time communication to a live audience that does not originate in recorded form, although it may be transmitted through graphic means. A communication that fits within this exception, such as a live web cast or conference call, is treated as an oral communication and, therefore, is not subject to the same treatment as written communications.

The exclusion of a live, real-time communication to a live audience from the definition of graphic communication only applies to communications that are not broadcast over television or radio. That is because the Securities Act's definition of "prospectus," which serves as the predicate for the application of Section 5, and the new definition of "written communication" encompasses communications by television or radio. As a result, a live, real-time communication to a live audience that is broadcast by television or radio would be a written communication and,

[16] *See* Offering Reform Release at 44 ("In this manner, we intend to encompass new technologies. Accordingly, we are adopting new definitions of 'graphic communication' and 'written communication' to promote consistent understanding of what constitutes such a communication in view of the technological developments since the enactment of the Securities Act and to significantly reduce remaining uncertainty regarding the permitted means for delivery of information under the Securities Act.").

therefore, a prospectus that is subject to Section 5 of the Securities Act. In contrast, a live, real-time communication to a live audience that is communicated through the Internet would not be a written communication.

The premise for this seemingly close distinction is likely that issuers and offering participants can control the recipient of the communication when they use the Internet, while they do not have such control when communicating through the television or radio. The latter thus fits into what typically would be viewed as a broadcast.

Free Writing Prospectuses

One of the most significant elements in the amendments is a series of rules (Rules 163, 164, 405 and 433) that create a safe harbor system under Section 5 of the Securities Act for the "free writing prospectus." A free writing prospectus is any written communication used in the offer or sale of securities covered by a registration statement that is made by means other than a prospectus satisfying the requirements of Section 10(a) of the Securities Act or SEC rules permitting the use of preliminary or summary prospectuses. The free writing prospectus rules are designed to let issuers and offering participants communicate more freely in registered offerings. For a variety of reasons, however, the extent to which the these rules will change offering practices in the short-term is unclear. At first, the most likely utility for these rules will be with offerings of investment grade securities or in situations where there are offering-related communications that mistakenly occur outside of the statutory prospectus.

Well-known seasoned issuers, seasoned issuers, unseasoned issuers and non-reporting issuers may use free writing prospectuses so long as the following four conditions, set forth in new Rule 433, are satisfied.

- *Filing Requirement* – As a general matter, Rule 433 requires that issuers and other offering participants file free writing prospectuses no later than the date of first use of the free writing prospectus.[17] The rule draws a distinction between the issuer and "other offering participants," described as persons "other than the issuer" participating in the offer and sale of the securities (for instance, underwriters). An issuer is required to file with the SEC any free writing prospectus that it prepared as well as issuer information used in a free writing prospectus prepared by or on behalf of or used by any other offering participant. Any other offering participant is required to file any free writing prospectus that it distributes in a manner reasonably designed to lead to its broad unrestricted dissemination.[18] These filing conditions do not apply in two situations: if the free writing prospectus does not contain substantive differences from a free writing prospectus previously filed with the SEC, or if the issuer information in the free writing prospectus was previously filed.

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[17] The new rules include a provision allowing unintentional failures to file so long as a reasonable, good faith effort was made. In such cases the materials must be filed as soon as practicable.

[18] The free writing prospectus rules exclude from the filing requirement any free writing prospectus that an offering participant distributes solely to its clients. This exception, which applies without regard to the number of clients involved, is intended to allow offering participants greater flexibility in communicating with their clients about forthcoming securities offerings.

- *Legend Requirement* – A free writing prospectus must include a legend indicating that it relates to a registered offering and where the registration statement and statutory prospectus are available.

- *Record Retention Requirement* – Issuers and other offering participants must retain free writing prospectuses that they did not file with the SEC for three years from the initial bona fide offering of the securities to which the free writing prospectuses relate.[19]

- *Availability or Delivery of a Statutory Prospectus Requirement* – An unseasoned or non-reporting issuer must accompany or precede each free writing prospectus with the most recent statutory prospectus (unless there have been no changes to a previously provided prospectus). A well-known seasoned issuer or a seasoned issuer, by contrast, is only required to have filed a statutory prospectus with the SEC. Further, a well-known seasoned issuer may use a free writing prospectus prior to the filing of its registration statement pursuant to Rule 163.

Advertisements for Registered Offerings?

The new communications rules open up new lines of communication, particularly for well-known seasoned issuers and seasoned issuers. These issuers may now use a variety of means to market registered offerings, including advertisements on unrestricted Internet media, television and radio broadcasts. Unseasoned and non-reporting issuers will not be able to do this, however, due to the requirement that they physically deliver a statutory prospectus to every prospective recipient of the free writing prospectus.

These conditions to the use of free writing prospectuses rules may be somewhat familiar to many practitioners. They were largely modeled after the rules in Regulation M-A governing communications regarding business combination transactions that the SEC adopted in 1999.[20]

Pre-Filing Offers By Well-Known Seasoned Issuers

Another reduced regulation zone for well-known seasoned issuers is new Rule 163. Rule 163 allows well-known seasoned issuers to communicate freely, subject to anti-fraud rules, prior to the filing of the registration statement. A pre-filing communication under Rule 163 is excluded from the gun jumping provisions of Section 5 but would, however, be a free writing prospectus. Issuers making these communications have to include a legend and file the communication with the SEC promptly upon the filing of the registration statement. Rule 163 is available only to issuers.

Media Free Writing Prospectuses

Under the new free writing prospectus rules, issuers and offering participants may communicate more freely with members of the media.[21] Prior to these changes, any communication by an issuer or underwriter with the media during an offering has posed serious issues. Such a communication risked being viewed as a form of written communication, thereby violating the gun-jumping provisions of

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[19] The SEC staff will have an enhanced ability to request copies of free writing prospectuses under revised Securities Act Rule 418.

[20] *See* Regulation of Takeovers and Security Holder Communications, Rel. No. 33-7760 (Oct. 26, 1999).

[21] *See* Rule 433(f).

Section 5. Under the new rules, communications with the media will be free writing prospectuses and therefore subject to the four conditions outlined above.[22]

Recognizing the challenge of these conditions in the context of communicating with broadcast or print media, the SEC further eased regulatory friction with media communications by relaxing the free writing prospectus conditions for certain free writing prospectuses published by the media. Such communications are subject only to legend, retention and relaxed filing requirements, and not the prospectus delivery requirement, of other free writing prospectuses. To qualify for this treatment, the issuer or the offering participant that is responsible for the media free writing prospectus must not have provided consideration for the preparation or distribution of such prospectus. Further, the issuer or offering participant must file the media free writing prospectus or the information underlying the media free writing prospectus within four days of becoming aware of its dissemination, publication or broadcast. If, however, an issuer or offering participant provides consideration for the communication or fails to file the communication within four days of becoming aware of its dissemination, the media publication is considered a regular free writing prospectus that must comply with all of the rules noted above.

Electronic Road Shows

The securities offering reform amendments adopt a new approach to electronic road shows.[23] Under the new rules, electronic road shows, as graphic communications, are written offers and, unless included in a prospectus filed as part of a registration statement, would be free writing prospectuses. Electronic road shows for initial public offerings of common equity securities or convertible equity securities are subject to all of the rules applicable to other free writing prospectuses. Such road shows must include the legend prescribed by Rule 433 and must be preceded or accompanied by a statutory prospectus with a price range. As an accommodation to such offerings, an issuer is afforded the choice between making a bona fide version of the road show publicly available, for instance on a website, or filing a bona fide version of the road show with the SEC. As with other free writing prospectuses, if an issuer has filed at least one bona fide version of the road show with the SEC it must retain, but need not file, subsequent road shows. Electronic road shows that do not involve initial public offerings of equity securities or convertible equity securities are not subject to the filing condition imposed on other free writing prospectuses. Instead, such communications need only include the required legend, be retained for three years and be preceded or be accompanied by the statutory prospectus, which could be accomplished, for instance through the inclusion of a hyper-link.

As noted in the discussion of written and graphic communications, the rules distinguish live, real-time communications to a live audience from those that have been recorded. This means that an electronic

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[22] Only a communication that would be deemed to be an offer that an issuer or any other offering participant (or any person acting on its behalf) provided, authorized, or approved which is then published or disseminated by the media is subject to the free writing prospectus rules. *See* Rule 433(f).

[23] Electronic road shows are road shows "transmitted electronically by the Internet, videos, e-mail, CD-ROM or any other medium." Securities Offering Reform Proposing Release, Rel. No. 33-8501 (Nov. 3, 2004). Since 1997, electronic road shows have been governed by a series of no-action letters issued by the staff of the Division of Corporation Finance. *See, e.g.*,Charles Schwab & Co., Inc., SEC No-Action Letter (Feb. 9, 2000); Net Roadshow, Inc., SEC No-Action Letter (Jul. 30, 1997). Those letters placed numerous conditions on the operators of the road shows, including restrictions as to the audience, manner of publication and how often the road shows could be seen. Upon effectiveness of the new rules, the SEC will rescind the positions expressed by the staff in the electronic road show no-action letters. While this may mean a change in business model for some entities that specialize in electronic road shows, the elimination of the conditions previously applied to such communications should provide much greater flexibility.

road show that is transmitted live, in real time to a live audience (such as via Bloomberg or similar service providers) will be an oral communication that would not be a "free writing prospectus" and therefore not have to be filed with the SEC or otherwise subject to the new rules for electronic road shows. If an electronic road show is recorded or broadcast, even if only replayed or broadcast once, it is considered a free writing prospectus and must include a legend, be filed and be retained like all other free writing prospectuses.[24]

Cross-Liability for Free Writing Prospectuses

Free writing prospectuses are subject to liability under Section 12(a)(2) of the Securities Act as well as under the general anti-fraud provisions of the Securities Act and the Exchange Act. Section 12(a)(2) provides a private cause of action against any person who offers a security by means of a materially misleading communication in connection with a registered offering.

Various commenters on the proposed rules, including representatives of the investment banking community, expressed serious concerns about the liability that offering participants might assume for each other's communications. To address these concerns, in Rule 433 the SEC has clarified the liability of offering participants for the use of free writing prospectuses. As a general matter, an offering participant will not be held liable for a free writing prospectus unless

- the offering participant used or referred to the free writing prospectus in offering or selling the securities to the purchaser;
- the offering participant offered or sold the securities and participated in the planning of the use of the free writing prospectus by one or more other participants that used the free writing prospectus; or
- the offering participant was required to file the free writing prospectus under Rule 433 (*e.g.*, because the offering participant was broadly distributing the free writing prospectus).

Other Communications Reforms

In addition to the communications reforms that relate to specific issuer categories, the new rules adopt some significant rules that apply to virtually all issuers. Collectively, the rules allow issuers to provide the market with more current factual, and in some cases forward-looking, information on a real-time basis. Further, the reforms expand the safe harbor under Rule 134 for the publication of more information about an offering outside of the registration statement and statutory prospectus.

Regularly Released Factual Business and Forward-Looking Information

As proposed, the SEC has adopted two safe harbors permitting the publication of "regularly released" business information by issuers without violating the gun-jumping provisions of the Securities Act. Underwriters cannot rely on these safe harbors. These rules codify a long-standing position of the SEC, first announced in the 1970s, that regularly released factual communications would not violate

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[24] The carve-out of live, real-time electronic road shows from the definition of "written communication" is a significant accommodation. It gives prospective investors in one region of the country the opportunity to participate in electronic road shows that are being held in another part of the country without subjecting the issuer and underwriters to the requirements applicable to electronic road shows.

the gun jumping provisions of federal securities law.[25] That prior position was often complicated to apply in practice, and the new rules attempt to provide greater clarity in this area.

One safe harbor, Rule 169, would allow all issuers, including non-reporting issuers, to publish factual business information so long as the information does not reference an offering. Examples of such information include factual information about the issuer or some aspect of its business, advertisements of, or other information about, the issuer's products or services as well as factual information about business or financial developments with respect to the issuer. Presumably to guard against gun-jumping, issuers may not rely on this safe harbor to communicate with persons in their capacity as investors or potential investors.

The other safe harbor, Rule 168, is available only to issuers that are required to file reports under the Exchange Act and certain non-reporting foreign private issuers.[26] It permits the publication of *forward-looking* information (such as projections of financial results and forward-looking information otherwise required to be disclosed in Management's Discussion & Analysis), in addition to factual business information. Issuers may rely on this safe harbor without regard to whether the communication is being used to communicate with persons in their capacity as investors or potential investors.

Both of these rules require that the issuer have communicated previously information of the type to be covered by the safe harbor in the ordinary course of business, and that the timing and form in which the information is released be consistent with similar previous disclosures. There are no filing, prospectus delivery or record retention requirements that must be satisfied in order to rely on these safe harbors.

30-Day Safe Harbor for Pre-filing Communications

In addition to the safe harbors for regularly released factual and forward-looking information, the SEC also adopted Rule 163A, a safe harbor for communications that take place more than 30 days *prior to* the filing of a registration statement. Such communications would be excluded from the definition of "offer" and therefore would not constitute gun-jumping violations under Section 5. This safe harbor is available only to the issuer but may not be relied upon by blank check, shell company or penny stock issuers. It also does not apply to issuers offering securities off of a previously filed shelf registration statement. There are no content restrictions placed on such communications, other than a prohibition on references to a securities offering.

Expansion of Rule 134 Notice

Securities Act Rule 134 provides a safe harbor from the gun-jumping provisions for limited communications outside the registration statement by an issuer once it has filed a registration statement with the SEC. As discussed in the Offering Reform Release, Rule 134 "was intended originally to provide an 'identifying statement' that could be used to locate persons that might be interested in receiving a prospectus."[27] In the securities offering reform amendments, the SEC has

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[25] *See* Rel. No. 33-5180 (Aug. 16, 1971).

[26] A non-reporting foreign private issuer may rely on this safe harbor if it meets all of the requirements of Form F-3 other than the reporting provisions, satisfies the public float requirements for a primary offering on Form F-3, and has securities trading on a designated offshore securities market under Rule 902 of the Securities Act or a worldwide market value of its outstanding common equity held by non-affiliates of at least $700 million or more.

[27] Offering Reform Release at 83.

expanded the kinds of information that may be included in communications under Rule 134. An issuer may now disclose, for instance, increased information about itself and its business, more information about the terms of the securities being offered (*e.g.*, final interest rates, yield information and actual or anticipated credit ratings), more information about the offering, including underwriter information, as well as more details about the mechanics of the offering (*e.g.*, procedures for opening accounts, submitting indications of interest, anticipated schedule of the offering and a description of marketing events). Since Rule 134 is available to all issuers, its expansion will be of particular benefit to issuers, such as non-reporting issuers or ineligible issuers, which otherwise enjoy only limited additional benefits under the new rules.

Broadening the Application of Regulation FD

Regulation Fair Disclosure (Regulation FD) is an issuer disclosure rule that addresses selective disclosure.[28] It provides that when an issuer, or person acting on its behalf, discloses material nonpublic information to certain enumerated persons, the issuer must make prompt or simultaneous public disclosure of that information. As currently written, Regulation FD excludes from its coverage communications in connection with Securities Act registration statements except certain shelf registration statements. The SEC had modified this exclusion in light of the new communication rules, in effect broadening the application of Regulation FD. In the future, the Securities Act exclusion in Regulation FD will include only the following communications:

- a registration statement filed under the Securities Act, including a prospectus contained therein;
- a free writing prospectus used *after* filing of the registration statement;
- any preliminary prospectus that complies with Section 10(b) of the Securities Act;
- a communication permitted by Rule 134 or 135 under the Securities Act;[29] and
- an oral communication made in connection with a registered offering under the Securities Act after filing of the registration statement.

As a result of these provisions, an issuer conducting a registered Securities Act offering will have a reduced carve-out from Regulation FD for communications during the offering.

Procedural Changes to the Offering Process

For many issuers, it will be procedural changes to the securities offering process that spell the greatest relief. Largely, these changes remove so-called speed bumps in the system. Most of these changes favor well-known seasoned issuers, but there is also helpful reform for other classes of issuers.

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[28] 17 C.F.R. §§ 243.100-.103.

[29] Rule 135 allows issuers to publish a notice of a proposed offering in advance of the filing of a registration statement. Rule 135 notices may contain only very limited information about the offering, including the name of the issuer, the title of the securities and other basic information.

Enhanced Shelf Registration Procedures for Well-Known Seasoned Issuers

The centerpiece of procedural changes to the offering process provides for a system of registering securities that is very similar to a company registration regime. The new rules effectively create an enhanced shelf system for well-known seasoned issuers that should improve dramatically their ability to conduct offerings quickly and in real time in response to market windows. Under the new rules, a well-known seasoned issuer may file a shelf registration statement, and any amendments thereto, that will become effective upon filing with the SEC, for both primary and secondary offerings. That registration statement can register unspecified amounts of different classes of securities. In addition, the issuer can add classes of securities or additional subsidiary registrants to the registration statement through post-effective amendments. As a result of these reforms, public securities offerings by well-known seasoned issuers are now largely removed from the SEC staff's review process. Of course, Exchange Act reports will continue to be reviewed by the staff of the SEC, including under the once-every-three-year mandate of the Sarbanes Oxley Act. Issuers using these registration statements would be permitted to pay filing fees in advance or on a "pay-as-you-go" basis.

Many of the restrictions applicable to other offerings, including restrictions on the kinds of information that must be included in a registration statement at the time of effectiveness, will not apply to enhanced shelf registration statements. For example, an issuer relying on this procedure may omit from the registration statement whether the offering is a primary or secondary offering, the names of any selling security holders and any plan of distribution for the offered securities. Eligibility to rely on this enhanced shelf procedure is determined at the same time that an issuer determines its status as a well-known seasoned issuer - upon initial filing of the registration statement and again upon annual updating of the registration statement for new audited financial statements.

Automatic Effectiveness Under Securities Offering Reform

Who is eligible? Well-known seasoned issuers.

Will there be any staff review prior to effectiveness? No. The registration statement and any post-effective amendments will become effective automatically upon filing.

What can be registered? An issuer will be able to register classes, rather than discrete offerings, of securities. It may add classes of securities after effectiveness through post-effective amendments to the registration statement, which also are effective automatically upon filing.

When do issuers determine eligibility? Issuers determine eligibility at the same time that well-known seasoned issuer status is determined - upon initial filing of the registration statement and again when the issuer updates the registration statement by filing new audited financial statements in its annual report.

What can be omitted from the prospectus? Issuers may omit information as to the nature of the offering, the names of selling security holders and any plan of distribution information.

How are fees paid? Fees are paid 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.

Does an issuer have to renew the procedure? Yes. Under Rule 415, a new registration statement must be filed every three years that combines with any unused portion of the previously filed registration statement. Issuers have a six-month grace period to get the new registration statement effective before they have to stop selling off of the prior registration statement. This requirement also applies to traditional shelf registration statements filed by seasoned issuers.

An issuer that qualifies as a well-known seasoned issuer based on its world-wide market value is eligible to conduct any kind of offering on an automatically effective shelf registration statement. An issuer that qualifies as a well-known seasoned issuer because of its issuances of non-convertible securities (except common equity) may only use the automatic shelf registration statement to register investment-grade non-convertible securities, other than common equity, on a primary basis, unless it also possesses an aggregate market value of outstanding voting and non-voting common equity of at least $75 million held by non-affiliates, in which case it may register any kind of offering.

Incorporation by Reference into Securities Act Registration Statements

The SEC has amended Forms S-1 and F-1 to permit most line item requirements to be satisfied through the incorporation by reference of *previously filed* periodic and current Exchange Act reports. In order to rely on these new provisions, issuers must make copies of their periodic and current reports available on their websites.[30] All issuers, including ineligible issuers, will be able to rely on this provision for incorporation by reference, except non-reporting issuers and issuers that are not current in their periodic and current reports and other materials. This expansion of material that may be incorporated by reference will permit greater use of periodic and current reports in registration statements of smaller public companies. In order to provide investors with information about what is being incorporated by reference, the rules require that the prospectus identify the reports being incorporated and make them available upon request.[31] The benefit of these reforms is that information in any report or proxy or information statement which is incorporated by reference will no longer have to be restated in or physically delivered with the prospectus. Instead, as is the case currently for seasoned issuers using Form S-3 or F-3, "incorporation by reference" will be sufficient for the purposes of physical delivery of the information contained in the report or statement so incorporated.

Liberalizing Shelf Takedowns

Currently, shelf takedowns typically are based on oral communications with little, if any, written documentation before the transaction is completed. In order to ease procedures for the negotiation of shelf takedowns, including takedowns of investment-grade debt, the new free writing prospectus rules permit the circulation of preliminary term sheets without filing. Under those rules, a preliminary term sheet would be considered a free writing prospectus, which could be circulated after the registration statement has been filed so long as the other requirements for the use of free writing prospectuses are satisfied. To rely on this procedure, the issuer would have to file the free writing prospectus containing the final terms of the transaction within two days after the later of the date such terms become final or the date that the issuer first uses the prospectus that includes the final terms.[32] This rule applies to all issuers eligible to use free writing prospectuses, but promises the most benefit for shelf offerings. These new rules will allow issuers and offering participants to circulate preliminary written information without violating Section 5, thereby enhancing the quality and availability of information before a sale is completed in these transactions.

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[30] In connection with these rules, the SEC is eliminating Forms S-2 and F-2, which are superseded by the amendments to Forms S-1 and F-1.

[31] Form S-1 and F-1 filers will still not be permitted to incorporate by reference materials filed *after* the effectiveness of the registration statement. Instead, materials filed *after* the effectiveness of the registration statement may only be incorporated by reference by the filing of a post-effective amendment to the S-1 or F-1 to include such information.

[32] All preliminary and final written offering materials, whether or not filed, would be free writing prospectuses and therefore subject to liability under Section 12(a)(2) of the Securities Act.

Eliminating Restrictions on Delayed and Continuous Offerings

Rule 415, the SEC's so-called shelf registration rule, governs delayed and continuous offerings. The amendments to Rule 415 eliminate several restrictions under this rule. First, the amendments modify the current provision in Rule 415 that limits the amount of securities registered for sale to an amount that is reasonably expected to be offered or sold within two years from the registration statement effective date. In place of this requirement, the new rules will require that shelf registration statements be refreshed every three years, with unsold securities and unused fees carried forward to a new registration statement.[33] 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 offerings could continue on the new registration statement.

The second amendment to Rule 415 is the elimination of the restrictions on primary "at-the-market" offerings of equity securities. An at-the-market offering is essentially an offering of securities on a continuous basis at current market prices. Because of concerns about market manipulation, the SEC restricted such offerings when Rule 415 was originally adopted in 1982. Due to the subsequent adoption of anti-manipulation rules, including those adopted as Regulation M under the Exchange Act in 1996, the SEC has determined that the restrictions placed on at-the market offerings are no longer necessary.

Prospectus Delivery Changes – Adopting an Access-Equals-Delivery Model

Another of the more significant changes to offering procedures and practices is the adoption of an "access-equals-delivery" model of prospectus delivery in new Rule 172. Under current law, issuers and underwriters are required to deliver a statutory prospectus prior to or at the same time that they deliver securities. This requirement is satisfied only by the physical delivery of the final prospectus. Under an access-equals-delivery model, however, the prospectus delivery requirements will be satisfied if a final prospectus meeting the requirements of Section 10(a) of the Securities Act is timely filed with the SEC as part of the registration statement. All issuers, except for registered investment companies and business development companies, are eligible to rely on this delivery model.[34]

The access-equals-delivery approach also applies to transactions between brokers or dealers on an exchange. Brokers or dealers effecting transactions on an exchange or through any trading facility registered with the SEC would be deemed to satisfy their prospectus delivery obligations under Section 5(b)(2) of the Securities Act as long as the final prospectus is timely filed with the SEC and other conditions are met.[35]

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[33] Offerings that are not being registered on Form S-3, however, will still be limited to the amount reasonably expected to be sold within two years of the effective date of the registration statement.

[34] To notify an investor that he or she was allocated securities in a registered offering, the new rules require that offering participants deliver a notice of allocation if the issuer filed the final prospectus on time. If the final prospectus is not filed on time, issuers must physically deliver a final prospectus to serve as notice of allocation. The failure to provide the notice of allocation does not constitute a violation of Section 5.

[35] First, the final prospectus must be on file with the SEC or will be on file with the SEC by the applicable prospectus filing date. Second, securities of the same class must be trading on an exchange or through any trading facility registered with the SEC. Third, the registration statement relating to the offering must be effective and not the subject of a stop order issued under Section 8 of the Securities Act.

Adding Selling Shareholders Post-Effectively

Supplementing the foregoing liberalizations, the new rules allow well-known seasoned issuers and seasoned issuers to identify selling security holders after effectiveness. Currently, if an issuer is filing a resale registration statement, it must identify the selling security holder in the original registration statement or by post effective amendment. Filing a post-effective amendment can be disruptive and requires that the staff declare the amendment effective. Under the new rules, well-known seasoned issuers and seasoned issuers would be able to identify selling security holders by a prospectus supplement so long as the transaction by which they received the securities was complete and described in the registration statement.[36]

Enhanced Exchange Act Reporting

To balance against reforms which may have the effect of removing the staff from the registration process for the largest companies, the new rules impose new Exchange Act reporting requirements. The first of these new requirements is that most reporting issuers must now include, where appropriate, risk factors in their annual reports on Form 10-K and in registration statements on Form 10. These risks are required to be updated through quarterly reports on Form 10-Q. Small business issuers and non-reporting issuers are not subject to this requirement.

The second new requirement is that accelerated filers and well-known seasoned issuers will be required to disclose certain outstanding comments from the staff in their annual reports on Form 10-K.[37] The amendments require disclosure of "the substance of" unresolved staff comments that "the registrant believes are material," that are outstanding for at least 180 days as of the end of the fiscal year and that remain unresolved.

During the comment period, many commenters expressed concerns about having to disclose publicly outstanding comments. While these concerns are legitimate, the rule does have a forgiving play in its joints. First, comments need not be disclosed until they have been outstanding for more than 180 days as of the end of the fiscal year and that remain outstanding at the time of filing. This should give companies ample time to resolve comments before they have to share them in their annual reports. Second, the rule only requires disclosure of the "substance of the comments." Questions will no doubt abound as to what "substance" should mean here. Third, only comments that the registrant believes to be material must be disclosed. Although one could argue that any comment outstanding more than 180 days is presumptively material, the rules, nonetheless, do accord this disclosure discretion to registrants.

Liability Reforms

The securities offering reforms also add changes to the liability provisions under the Securities Act for offering-related communications, including guidance in significant gray areas. These reforms address

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[36] PIPEs (private investment in public equity) are among the transactions excluded from this rule. Selling security holders in a PIPE transaction must be identified pre-effectively. If the registration statement is an automatically-effective registration statement, however, the issuer does not have to identify the selling shareholders in the original registration statement.

[37] Under Rule 12b-2 under the Exchange Act, an accelerated filer is an issuer that, as of the end of its fiscal year, has market float of $75 million or more voting and non-voting common equity held by non-affiliates, has been reporting with the SEC for at least 12 months, has previously filed at least one annual report and is not eligible to use Forms 10-KSB or 10-QSB. Foreign private issuers using Form 20-F are not accelerated filers.

the knowledge that investors are presumed to possess at the time of a sale of securities, the application of Section 11 liability to prospectus supplements and the question of whether and when an issuer is deemed to be a seller in an initial distribution for the purposes of Section 12(a)(2) of the Securities Act.[38]

Information Conveyed at the Time of Sale

A sale, for the purposes of the Securities Act, takes place at the time that an investor is contractually bound to purchase the securities. In a typical registered offering, this moment is generally viewed as occurring on the basis of oral confirmation regarding price and amount immediately after the effectiveness of the registration statement (or, in the case of a shelf registration, immediately after the pricing of the offered securities). Thereafter, the issuer provides final offering information by means of the final prospectus. The securities laws, however, do not precisely mandate this sequence of events.

Well-advised capital markets participants have long understood that it is inadvisable to include information in the final prospectus that is materially different from that which is available to the investor at the time of pricing. Nonetheless, there have always been circumstances in which material changes were made to final offering documentation and delivered to purchasers after pricing and, in many instances, shortly before closing.

These situations create issues under Sections 12(a)(2) and 17(a)(2) of the Securities Act. Section 12(a)(2) provides a private cause of action to purchasers of securities in a registered offering by means of a prospectus or oral communication that is materially misleading. Section 17(a)(2) makes it unlawful to obtain money or property by means of a material misstatement in an offer or sale of securities. Both provisions require an assessment of statements made in connection with the sale of securities to determine whether they contain any material misstatements.

In the proposing release for the new rules, the staff of the SEC provided an explicit interpretive position to the effect that liability for purposes of Sections 12(a)(2) and 17(a)(2) is determined at the time the contract of sale is entered into by the investor. The staff was clear at the time that it proposed these rules that this interpretive position was not a change in policy, but instead a reiteration of existing law. The SEC reaffirmed this interpretive position when it adopted the rules, and thus that position is now an agency position which is effective immediately.

In addition, the SEC has adopted new Rule 159 to codify this position under the Securities Act. Rule 159 provides that information conveyed to the investor after the time of the contract of sale should not be taken into account for the purposes of assessing whether information that is conveyed to an investor at the time of sale is materially misleading and therefore provides a basis for a claim under Section 12(a)(2) or 17(a)(2).

This position has significant implications for shelf offerings where the final prospectus is not prepared until after the contract for sale has been formed. Because of free-writing concerns under current law,

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[38] By way of background, Section 11 of the Securities Act provides a private cause of action to purchasers of securities in a registered offering for materially deficient disclosure in registration statements at the time that a registration statement becomes effective. Section 12(a)(2) of the Securities Act provides a private cause of action to purchasers of securities for offers or sales by means of a prospectus or oral communication with respect to a registered offering that is materially misleading. Unlike Section 11, Section 12(a)(2) applies to information contained in the registration statement and in prospectus supplements to that registration statement, oral communications and any other written offers to sell securities in the registered offering.

written memorializations of the terms of the securities being sold are generally not prepared. Issuers and underwriters have, nonetheless, relied on the expectation that the final prospectus would be deemed part of the information available to the investor at the time of sale. Now, based on the SEC's interpretive position and Rule 159, however, it will be clear that information contained in a final prospectus in such an offering will not be deemed part of the information available to investors at the time of the contract of sale. Accordingly, issuers and underwriters will want to structure shelf offerings differently so as to ensure that the final terms of the offered securities and other material information relating to the issuer and the transaction have been conveyed to the investor at the time of sale. We expect that free writing prospectuses (most likely in the form of a term sheet) will be used for this purpose.

It is still possible, of course, that a material change in the information conveyed to the investor at the time of sale could occur after that point in time and prior to closing. Now, the SEC's interpretive position and Rule 159 effectively mandate that the new information be provided. In order to do this, an issuer must terminate the existing contract of sale and give the investor a meaningful opportunity to elect whether to enter into a new contract of sale. If the investor so elects, then the new material information will be deemed to be have been delivered to the investor for purposes of Sections 12(a)(2) and 17(a)(2).

Subjecting Prospectus Supplements to Liability under Section 11

Under current law, prospectus supplements filed to update the statutory prospectus after a registration statement is declared effective are subject to liability for material misstatements or omissions under Section 12(a)(2) but not to the strict liability provisions of Section 11.[39] Further, issuer liability for the information in the registration statement under Section 11 is determined at the time of initial effectiveness, while under Section 11(d) of the Securities Act, an underwriter becomes liable for the information in the registration statement under Section 11 at the time that it is engaged to act as an underwriter with respect to the offering. This creates two anomalies in shelf offerings. First, the information in the prospectus supplement, which includes more information than the prospectus in the original registration statement, is subject to the lower liability standard of Section 12(a)(2) than the Section 11 standard applicable to the registration statement. Second, the underwriter is subject to Section 11 liability as of the date of a shelf take-down, while the issuer is subject to Section 11 liability as of the original effectiveness of the registration statement. To address these anomalies, the SEC will subject prospectus supplements to liability under Section 11 under new Rule 430B.[40]

The result of this change is that there is no longer any doubt that the information in a prospectus supplement is subject to the strict liability provisions of Section 11. The change will also move forward the effective date of a registration statement to the date of the filing of any supplement, rather than

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[39] The SEC and its Division of Corporation Finance have previously expressed the view that prospectus supplements are also subject to Section 11 liability, but neither the courts nor the outside bar have fully embraced this approach. *See* The Regulation Of Securities Offerings, Rel. No. 33-7606A (Nov. 13, 1998) ("We recognize that certain commentators have questioned whether Section 11 applies to Rule 424 information and forward-incorporated Exchange Act reports. While we believe that under existing law such Section 11 liability applies, and do not accept the views of those commentators on these issues, we recognize that an explicit statement in the proposed Form would serve to eliminate any uncertainty practitioners may believe exists.").

[40] This new liability only applies to the issuer and the underwriters. It does not apply to the issuer's officers, directors, auditors or other experts. If a new report or opinion requiring a consent under Securities Act Rule 436 is filed with the supplement, however, the expert providing the report or opinion would be subject to Section 11 liability for the portion of the prospectus supplement covered by such report or opinion.

the date that the registration statement originally was declared effective. Lastly, the change will harmonize the liability dates for issuers and underwriters in shelf offerings.

Issuer as Seller

Section 12(a)(2) limits an investor's recovery for material misstatements or omissions to statements made by the statutory "seller." Courts have split on the circumstances in which the issuer is viewed to be the statutory seller for the purpose of Section 12(a)(2), with at least one Circuit requiring direct and active solicitation in an immediate sale in order to find that an issuer is a statutory seller.[41] Under that view, in some instances the issuer might not be a seller for the purpose of Section 12(a)(2). In firm commitment offerings, for example, the issuer sells the securities to the underwriters, which in turn pass title to the investors in the offering. To address this issue, the SEC has adopted new Rule 159A under the Securities Act, which provides that an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, is considered to offer or sell the securities to the investors and, therefore, is a seller for purposes of Section 12(a)(2) as to any communications made by the issuer.

Conclusion

The SEC should be commended for tackling issues that have burdened securities offerings as a result of new communications technologies and market practices. The new rules recognize advances in electronic communications, the pervasiveness of information available to the markets and the evolution of business practices in registered offerings. Certainly, issuers, underwriters and investors should benefit from the enhanced communications, offering procedures and liability components of the new rules. The new rules also reflect thoughtful consideration by the SEC staff of the large quantity of comments that were submitted on the proposed rules.

Even the most devoted SEC followers, however, will acknowledge the almost bewildering complexity of the reform package. This is the price of adjusting, versus replacing, a regulatory model, the plans for which could stand fundamental overhaul. But, any change of that magnitude would have required legislative involvement and commitment that was unlikely to have been marshaled over the last several years.

Hopefully, some of the simpler, broadly applicable rules, such as the safe harbor for non-offering related business communications, will make up for the more complex reforms created in the areas of communications and offering mechanisms. Hopefully, too, innovations, such as the free writing prospectus, and renovations, such as automatic shelf and access equals delivery, will be successful enough to warrant eventual regulatory expansion. In any case, the hard work of the SEC and its staff is hardly over as the reform package is likely to generate substantial explication and interpretive inquiry.

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[41] *See, e.g.*, Rosenzweig v. Azurix Corp. 332 F.3d 854, (5th Cir. 2003).

This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects covered in this advisory.

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Appendix - *Eligibility requirements and benefits for seasoned issuers and well-known seasoned issuers under new securities offering reform amendments.*

Seasoned Issuers

Eligibility

- Filed all required Exchange Act reports (except certain current reports on Form 8-K) on a timely basis for at least the preceding 12 months.
- Paid all dividend or sinking fund installments on preferred stock.
- Not have defaulted on any material installment on indebtedness or rental on one or more long term leases.
- Outstanding market float of at least $75 million of voting and non-voting unaffiliated common equity or registering non-convertible investment grade securities.
- Not an ineligible issuer under Rule 405.

Benefits under New Rules

- *Expanded notice under Rule 134* - May rely on Rule 134 to communicate offering-related information once the registration statement has been filed with the SEC.
- *Expanded research reports under Rules 137-139* - Research reports covering seasoned issuers that are in registration may rely on expanded safe harbors.
- *Communications more than 30 days before filing a registration statement under Rule 163A* - Communications more than 30 days before filing a registration statement will not be considered offers for the purposes of Section 5 of the Securities Act.
- *Free writing prospectuses under Rule 164 and Rule 433* - May rely on new rules permitting the use of a free writing prospectus to make written communications outside the registration statement, subject to filing, retention, statutory prospectus delivery (which can be satisfied by filing) and legend requirements.
- *Communications of regularly released forward-looking and factual information under Rule 168* - May rely on a new safe harbor for regularly released forward-looking and factual business information.
- *Access-equals-delivery model of final prospectus delivery under Rule 172* - May rely on a new rule that provides that the timely filing of a final statutory prospectus with the SEC satisfies an issuer's prospectus delivery requirement under Section 5 of the Securities Act.

Well-Known Seasoned Issuers

Eligibility

- Qualify as a registrant to register its securities on Form S-3 or F-3 (see first three bullets for Seasoned Issuer eligibility above).
- Outstanding world-wide market value of at least $700 million of unaffiliated voting and non-voting common equity *or* have issued at least $1 billion aggregate amount of non-convertible securities (other than common equity) in registered cash offerings during the past three years.
- Not an ineligible issuer under Rule 405.

Benefits under New Rules

- All benefits available to seasoned issuers.
- *Written Offers Before Filing a Registration Statement Under Rule 163* - May rely on a new safe harbor for written offers made before filing a registration statement. Such communications would be free writing prospectuses that must include a legend and be filed "promptly" once the registration statement was on file with the SEC.
- *Enhanced Shelf Registration Under Rule 415 and Rule 462* - May utilize enhanced shelf registration under amendments to Rule 415. The most significant aspect of the enhanced shelf registration system is that, under amendments to Rule 462, shelf registration statements filed by well-known seasoned issuers are automatically effective upon filing. Further, such issuers may register classes of securities, rather than a specific offering of securities, with the ability to add additional classes, selling shareholders, plan of distribution information and other information through automatically-effective post-effective amendments.