

SEC Proposes to Overhaul Various Aspects of the Securities Offering Process in the United States

The SEC has proposed major modifications to the offering process for raising capital under the Securities Act of 1933. The proposals address communications related to registered offerings of securities, delivery of information to investors and registration and other procedures in the offering and capital formation process.

The proposals are the most recent initiative in a long line of attempts to modernize the offering process and to refocus the registration process on the disclosure regime under the Securities Exchange Act of 1934. The proposals represent incremental changes in the regulatory structure and offering process, and are designed to further integrate the Securities Act and the Exchange Act (in part by taking advantage of the recent enhancements to Exchange Act disclosure, thus allowing the SEC to rely on these reports to a far greater degree as a cornerstone of reforming the offering process). As such, the proposals do not involve revolutionary changes to either of these statutory regimes. In brief, the proposals:

- increase the amount of information available to investors at the time of an offering;
- eliminate barriers to open communications with the marketplace that are particularly outmoded by technological advances, while continuing to subject any new communications to the anti-fraud provisions of the securities laws;
- reflect the increased use of electronic communications;
- increase the efficiency of the capital raising process; and
- define more clearly the information on which liability would be premised.

The proposed rules are subject to a comment period. Comments should be received on or before the 75th day after publication in the Federal Register.

EXECUTIVE SUMMARY

The SEC has proposed new rules and modifications of various fundamental principles. As part of these reforms, the SEC has also proposed various new classifications of communications and of issuers.

Substantial Modification of “Gun-Jumping” Rules

The proposals would 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, which today severely restrict the ability of

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issuers to communicate about a public offering other than through the preliminary “red herring” prospectus. The cumulative effect of the proposed reforms on the gun-jumping provisions would be the following:

- “well-known seasoned issuers,” who because of their market following should benefit from the most far-reaching revisions to the communications rules and registration process, would be able to engage at any time in oral and written communications, including the use at any time of a new type of written communication called a “free writing prospectus” (definition added to Rule 405), subject to conditions (including, in some cases, filing with the SEC) (proposed Rule 163);
- all reporting issuers would, at any time, be permitted to continue to publish regularly released factual business information and forward-looking information (proposed Rule 168);
- non-reporting issuers would, at any time, be permitted to continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors (proposed Rule 169);
- communications by issuers more than 30 days before the filing of a registration statement would not be considered prohibited offers so long as they did not reference a securities offering (proposed Rule 163A);
- all issuers and other offering participants would be permitted to use a “free writing prospectus” after the filing of a registration statement, subject to conditions (including, in some cases, filing with the SEC) (proposed 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, would be excluded from the definition of “prospectus” (under amended Rule 134); and
- exemptions for research reports by broker-dealers would be expanded (Rules 137, 138 and 139).

A “free writing prospectus” generally would include any written communication (such as e-mail notifications) that constitutes an “offer” to sell securities that are, or will be, the subject of a registration statement and that does not meet the requirements of a Section 10(a) prospectus (i.e., under the existing regime, a “red herring” prospectus). In effect, the free writing prospectus concept would allow 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), without violating the gun-jumping rules. Communications that would not be considered offers or prospectuses for purposes of the gun-jumping provisions, such as those described above relating to regularly released factual information and forward-looking information falling within proposed Rules 168 or 169, would not be (and would not need to be) free writing prospectuses.

The proposals also address the treatment under the Securities Act of electronic communications, including electronic road shows and information located on or hyperlinked to an issuer's website. Electronic road shows would fall within the proposed definition of “written communication” and thus would be a written offer and prospectus, but could also be a free writing prospectus. An electronic road show or script would not be subject to the proposed filing requirements, except for material information not previously included in the registration statement or in a free writing prospectus related to the offering, so long as certain conditions are met.

Proposed Rule 433 would make clear that an offer of an issuer’s securities that is contained on the issuer’s website or hyperlinked by the issuer from the issuer’s website to a third party website is considered a written offer of such securities made by the issuer and, unless otherwise exempt, would be a free writing prospectus of the issuer. The requirements of proposed Rule 433 would apply to these free writing prospectuses as well as information contained on or hyperlinked to an offering participant’s website.

A number of these new proposals would include conditions of eligibility. Most of the proposals, for example, would not be available to blank check companies, penny stock issuers or shell companies.

Improvements to Shelf Registration Procedures

The SEC proposals would modernize the operation of the “shelf” registration process under the Securities Act, to permit eligible issuers to access the markets far more quickly. These proposals would:

- codify in a single rule (proposed Rule 430B) the information that could 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 the registration statement with a new registration statement every three years (amended Rule 415);
- eliminate restrictions in Rule 415 on “at-the-market” offerings;
- permit immediate takedowns of securities off of 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 registration statement is filed (amended Instructions to Form S-3/F-3); and

- establish a significantly more flexible version of shelf registration, referred to as “automatic shelf registration” for offerings by “well-known seasoned issuers.” This would feature automatic effectiveness and pay-as-you-go registration fees (amended Instructions to Form S-3/F-3).

The proposal relating to “automatic shelf registration” would permit more information to be excluded from the base prospectus in an automatic shelf registration statement than from a regular shelf. The omitted information could 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 noted above, would provide well-known seasoned issuers with maximum flexibility to use a free writing prospectus to structure transactions.

Prospectus Delivery Reforms

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

Required Disclosure in Exchange Act Reports

The proposals would require issuers to include the following in their Exchange Act periodic reports:

- for Form 10-K filers, disclosure regarding risk factors;
- disclosure regarding the issuer's status as a “voluntary” filer of Exchange Act reports; and
- for “accelerated filers,” disclosure in their Exchange Act 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 would 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 would be made against information conveyed to an investor at the time of its investment decision, and not

information that is only conveyed or filed subsequently. The proposals would also ensure that prospectus supplements would be 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 would largely eliminate the timing discrepancy in the application of disclosure liability to issuers, underwriters and other parties.

Categories of Issuers

In many cases, the degree of flexibility granted to issuers under the new or modified rules would be 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 debt issuance. The proposals divide issuers into various categories:

- a “non-reporting issuer” which means 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” which means 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” which means an issuer that is eligible to use Form S-3 or Form F-3 to register a primary offering of securities (which eligibility would not change in spite of the creation of the new regime for well-known seasoned issues);
- a “well-known seasoned issuer” which is a new class of issuer that is eligible to register a primary offering of its securities on Form S-3 or Form F-3 and has either \$700 million of public common equity float or, for limited purposes, has issued \$1 billion of registered debt in the preceding three years (added to Rule 405); and
- an “ineligible issuer”: which means an issuer that by reason of its status generally or at a particular time is ineligible to rely on the proposed rules (added to Rule 405).

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 would benefit to the same extent as domestic issuers from the proposed reforms. For example, the flexibility under the proposed automatic shelf registration process would 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 current registration process does not accommodate the timing mechanics of rights offers, which are typically announced and launched in a very short period of time. One item that would 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.

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NEW CLASSIFICATION OF ISSUERS

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

Well-Known Seasoned Issuers. This new category of issuer would have maximum flexibility under the communication rules and would be entitled to take advantage of the proposed “automatic shelf registration process.” A well-known seasoned issuer would be an issuer that is *required* 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 requirements:

- the issuer must be current in its reporting obligations under the Exchange Act and timely in satisfying those obligations for the preceding 12 calendar months;
- the issuer must be eligible to register a primary offering of its securities on Form S-3 or Form F-3;
- the issuer either (A) must have outstanding a minimum \$700 million of common equity market capitalization held by non-affiliates; or (B) must have issued \$1 billion aggregate amount of debt securities in registered offerings during the past three years and register only debt securities (this latter category could only register non-convertible debt on an automatic shelf); and
- neither the offering nor the issuer may be of a type that falls within the category of “ineligible issuers or offerings” (see below).

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;
- a parent of the majority-owned subsidiary is a well-known seasoned issuer and fully and unconditionally guarantees the subsidiary’s non-convertible obligations (as contemplated by Regulation S-X, Rule 3-10);
- the majority-owned subsidiary guarantees the obligations of (1) its parent or (2) another majority-owned subsidiary where there is also a full and unconditional guarantee of the same obligation by a parent that is a well-known seasoned issuer and the obligations are non-convertible; or
- the majority-owned subsidiary’s non-convertible obligations are fully and unconditionally guaranteed by another majority-owned subsidiary that itself is a well-known seasoned issuer.

Whether an issuer satisfies the requirements for current and timely filing of Exchange Act reports and the general eligibility requirements of Form S-3 or Form F-3

would be determined at the time of filing of its registration statement and, thereafter, at the time of the update of that registration statement required by Section 10(a)(3) (e.g., when the issuer files its Form 10-K or Form 20-F). Issuers would measure their public float and the aggregate amount of their debt issuances as of the last business day of their most recently completed second fiscal quarter prior to the date of filing the Form 10-K or Form 20-F. (This is the approach used for testing “accelerated filer” status and not Form S-3/F-3 eligibility.)

Issuers that do not meet the public equity float test would be considered well-known seasoned issuers solely for purposes of debt offerings if they have sold more than an aggregate of \$1 billion in debt through registered offerings over the prior three years. These issuers also would have to satisfy the other conditions of the well-known seasoned issuer definition, such as the reporting history requirement. These issuers would only be eligible to register non-convertible obligations on an automatic shelf registration statement.

Seasoned Issuers. A seasoned issuer would be 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 would be considered seasoned issuers. Majority-owned subsidiary eligibility would be expanded to allow majority-owned subsidiaries to use the forms under the same circumstances in which majority-owned subsidiaries would be well-known seasoned issuers.

Unseasoned Issuers. An unseasoned issuer would be 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. An issuer that is filing Exchange Act reports voluntarily (e.g., by reason of debt covenants) would be treated as a reporting unseasoned issuer.

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

Ineligible Issuers. Certain issuers or offerings would be 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;
- 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 received a “going concern” opinion from their auditors for the most recent fiscal year;
- 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 federal securities laws, have entered into a settlement with any government agency involving allegations of violations of federal securities laws, or have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the federal securities laws during the past three years.

LIBERALIZATION OF COMMUNICATIONS RULES

The Principles underlying the Existing “Gun-Jumping” Restrictions

The Securities Act, under the so-called “gun-jumping” restrictions, restricts 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 depends on the period during which the communications are to occur.

- 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 Internet), by radio or by television are limited to a “*statutory prospectus*” that conforms to the information 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 would

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 would 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 would not be subject to the restrictions of Section 5(c). The safe harbors for communications are designed to achieve this result. The concept of a “free writing prospectus” would be permitted as an offer outside the statutory process currently in place.

A summary of the proposed communications reforms follows, and a chart setting forth the relationship between the proposed reforms and the existing gun-jumping principles is included as Annex A.

New Concepts

“Written Communications.” As a cornerstone of the reforms, all methods of communication, other than oral communications, would be defined as written communications for purposes of the Securities Act. “Written communication” would mean any communication that is written, printed or broadcast, or is a graphic communication. The definition would 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 would not include individual telephone voice mail messages but would include broadly disseminated or “blast” voice mail messages.

The definition of “graphic communication” (in Rule 405) would be amended to include 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. Because written communications would include Internet communications, e-mails and other electronic and web-based communications, electronic postings on web sites – including electronic road shows – would be written communications within the scope of the definition. Under the proposals, electronic road shows would be considered written communications, regardless of the audience, but would be permitted, subject to conditions.

“Factual Business Information.” For purposes of a new safe harbor for communications, factual business information would be 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;
- dividend notices; and
- factual information set forth in the issuer’s Exchange Act reports.

“Free Writing Prospectus.” A “free writing prospectus” generally would include 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). A communication would be a free writing prospectus only where it constituted an “offer” of a security under the Securities Act. Whether a particular communication constitutes such an offer would, as today, be determined based on the particular facts and circumstances. Communications that would not be 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 proposed Rule 168 or 169, and research reports falling within Rule 137, 138 or 139, would not be free writing prospectuses.

“Bona Fide Electronic Road Show.” A “bona fide electronic road show” would mean 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. To be bona fide, the version need not address all of the same subjects or provide the same information as the other versions of an electronic road show. It also need not provide an opportunity for questions and answers or other interaction, even if other versions of the electronic road show do provide such opportunities.

Safe Harbors for Factual Business and Forward-Looking Information

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

- Proposed Rule 168 would permit 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.
- Proposed Rule 169 would permit 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 would be ineligible to use the proposed safe harbors for factual business information and forward-looking information.

Safe Harbor under Proposed Rule 168

Coverage

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

Forward-looking Information. The safe harbor would also apply to the release or dissemination of the following forward-looking information if the release or dissemination satisfies the other conditions of proposed 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 proposed, factual business and forward-looking information would be 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 authorized and approved its use before its release or dissemination. The proposed safe harbor would not be 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 proposed 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 will be 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 proposal does not establish any minimum time period to satisfy the regularly released element, the safe harbor would require 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 would 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.

Non-Offering Related Information. The proposed safe harbor would exclude any information about the registered offering itself. Publication of information about an offering outside the registration statement would be limited to statements allowed under Rule 134 (which is proposed to be expanded), Rule 135 or other exemptions or safe harbors, or contained in a permissible "free writing prospectus."

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

- the safe harbor would be 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 would be able to rely on the proposed safe harbor for the publication of an earnings release consistent with past practice, including the posting of, 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 would be outside the scope of the proposed safe harbor and, in this case, would be a free writing prospectus as used by the underwriter or dealer.

Public statements by issuers would not necessarily require that the disclosed information be included in registration statements. The same would be 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 Proposed Rule 169

A narrower safe harbor would be available for a non-reporting issuer's regularly released factual business information. The proposal would provide a safe harbor for 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. 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 would be defined the same way as for the Rule 168 safe harbor, except that the definition would exclude dividend notices and information set forth in Exchange Act reports.

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. This safe harbor would not 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.

Pre-Filing Communications: 30-Day Exclusion for All Issuers (Proposed Rule 163)

Under proposed Rule 163, all issuers would 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 would be excluded from the definition of "offer" for purposes of Section 5(c). The exclusion would only apply prior to filing a registration statement; it would not apply to issuers with a shelf registration statement on file since the prohibitions on "offers" would no longer apply at that point.

This 30-day exclusion would be subject to the following conditions:

- communications made in reliance on the proposed rule could not reference a securities offering;
- communications made in reliance on the proposed rule would have to be made "by or on behalf of the issuer" (that is communications by an underwriter or prospective underwriter, would not be covered); and
- the issuer would have to 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 would still be subject to Regulation FD and other disclosure requirements, as well as the anti-fraud provisions, as

communications made in reliance on rule would 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. As proposed, the issuer that gave an interview prior to the 30-day cut-off could not rely on the exclusion if the interview were published during the 30 days before filing.

Certain categories of offerings and issuers that pose the greatest risk of abuse of the exclusion would not be 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 would not be covered, as those communications are regulated separately under Regulation M-A. The rule would also not be available for communications regarding offerings made by a registered investment company or a business development company.

During the 30-day period immediately prior to filing, issuers would have available, in addition to the other proposed 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 Well-Known Seasoned Issuers (Proposed Rule 163)

In addition to the proposed 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 would be entitled to one additional benefit in the period prior to the filing of a registration statement. As the gun-jumping provisions of Section 5(c) prohibit all offers – written or oral – before 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, proposed Rule 163 would exempt 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.

The proposed exemption would permit these issuers to engage in unrestricted oral and written offers before a registration statement is filed without violating the gun-jumping provisions. As proposed, these communications, while exempt from the gun-jumping provisions, would still be considered offers and subject to liability standards

applicable to such offers. In addition, while “offers,” all such communications would still be subject to Regulation FD (as communications made in reliance on the proposed rule would not be 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 would also continue to apply to these communications. The exemption would be available only for communications made “by or on behalf of” the issuer.

In view of the proposed “automatic shelf” registration process (described below), well-known seasoned issuers usually would have a registration statement on file that they could use for any registered offerings (and as with any other delayed shelf registration statement, issuers using an automatic shelf registration statement would be considered to be offering securities off the shelf at the time of each takedown of securities). Thus, it would 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 proposes providing this exemption from the prohibition on pre-filing offers.

A written offer made under the proposed exemption would, however, meet the proposed definition of “free writing prospectus” and would need to include a legend and be filed promptly upon the issuer filing its registration statement. Any written communication used in reliance on this proposed exemption would be 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 proposed 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 was intended originally to provide an “identifying statement” that could be used to locate persons that might be interested in receiving a prospectus. 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 would not be 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 initial public offering, a prospectus must include bona fide estimates of the offering price range and the maximum amount of securities to be offered. This would not mean, however, that a “final” prospectus meeting the requirements of Section 10(a), including a price, would be 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. The notice cannot, however, otherwise 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 communicated information of the type covered by Rule 134 in writing prior to filing its registration statement, such that the communication constituted an offer, it would have to rely on proposed Rule 163 excepting pre-filing offers from the gun-jumping provisions, and the communication would be a free writing prospectus

The proposed amendments to Rule 134 would:

- 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, would be a type of written confirmation of sale and, thus, prospectuses, and therefore not covered); and
- expand the disclosure permitted regarding credit ratings to include the security rating that is reasonably expected to be assigned.

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

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

Permissible Use of Free Writing Prospectuses (Proposed 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 currently may make written offers only in the form of a statutory prospectus (today, the red herring). After effectiveness of a registration statement, written offers other than a statutory prospectus may be made if prior to or at the same time as the written offer a final prospectus meeting the requirements of Section 10(a) is sent or given. To loosen these restrictions, the SEC proposes to permit written communications that constitute offers, including electronic

communications, outside the statutory prospectus beyond those currently permitted, if certain conditions are met. Such written offers would be defined as “free writing prospectuses.”

Note that this would 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 would not be prospectuses and, therefore, would not be free writing prospectuses.

As proposed,

- A free writing prospectus that satisfies specified conditions could be used by a well-known seasoned issuer at any time.
- A free writing prospectus that satisfies specified conditions could be used by any other issuer or 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 would permit affiliates, underwriters, dealers, and others acting on behalf of them to use a free writing prospectus without violating the gun-jumping rules.
- A free writing prospectus could take any form and would not be required to meet the informational requirements otherwise applicable to prospectuses. In other words, it would not need to include any particular information, including information contained in the prospectus that is part of the registration statement, other than a legend.
- These 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 would not be part of a registration statement subject to liability under Section 11, unless the issuer elected to file it as a part of the registration statement.
- Free writing prospectuses prepared by an issuer or containing information provided by an issuer would 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 would not need to be filed. Regardless of whether a free writing prospectus is filed, any person using the free writing prospectus would be 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

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

A communication would be a free writing prospectus only where it constituted an offer of a security under the Securities Act. Whether a particular communication constituted such an offer would, as today, be determined based on the particular facts and circumstances. Communications that would not be 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 proposed safe harbors, and research reports falling within the safe harbors, would not be free writing prospectuses.

Media Publications. If an issuer or any offering participant provides information about the issuer or the offering that constituted an offer, whether orally or in writing, to a member of the press or other media that was published (in any form), where dissemination in writing by the issuer or offering participant would constitute a free writing prospectus, the publication would be a free writing prospectus that would have been made by or on behalf of the issuer or offering participant. If the communication occurred after the filing of the registration statement, it would be subject to the requirements of proposed Rule 433. Note that except for a well-known seasoned issuer, if the communication occurred prior to the filing of the registration statement, it would violate Section 5 unless it fell within one of the existing or proposed safe harbors or exemptions.

The treatment of a media publication that constitutes a free writing prospectus would depend on whether the issuer or other offering participant prepared the publication or broadcast or paid for or provided other consideration for the publication or broadcast.

Issuer prepares/pays. If so, the issuer would have to 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 would have to precede or accompany the communication and as a consequence, in offerings by non-reporting and unseasoned issuers, issuers and offering participants would not be able to publish or broadcast written advertisements, “infomercials,” or broadcast spots about the issuer, its securities, or the offering that included information beyond that permitted by Rule 134; and

- for seasoned issuers, the most recent statutory prospectus would have to be on file and the issuer or offering participant would have to file the free writing prospectus not later than the date of first use.

Issuer does not prepare/pay. Where, however, the free writing prospectus is prepared by persons in the media that are unaffiliated with, and not paid for by, the issuer or offering participants, the statutory prospectus would not be required to precede or accompany the media communication, although a filed registration statement and availability of a statutory prospectus would be conditions. Therefore, an interview or other media publication or broadcast where an issuer or offering participant participates (but does not prepare or pay for the event) could be a free writing prospectus, but 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. In addition, any such free writing prospectus would be subject to filing by the issuer or offering participant involved within one business day after first publication or first broadcast. Persons in the media would have no filing or other obligations under these provisions.

As a result:

- an underwriter or issuer would 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 would be a free writing prospectus of the issuer or underwriter and subject to the proposed 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 would 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 would be a free writing prospectus of the issuer that would have to be filed by the issuer after publication. In that case, there would be no requirement that a statutory prospectus precede or accompany the article at the time of the publication.

Permitted Use of a Free Writing Prospectus after the Filing of a Registration Statement under Proposed Rule 433

Proposed Rule 164 would permit the use of a free writing prospectus where an eligible issuer has filed a registration statement and the conditions of proposed Rule 433 are satisfied. (For a discussion of the use of free writing prospectuses by well-known seasoned issuers prior to filing a registration statement, see the discussion above.)

Under proposed Rule 164, after the filing of a registration statement, a free writing prospectus that satisfies the conditions of proposed Rule 433 would be a permitted prospectus under Section 10(b) for purposes of Section 5(b)(1). Proposed Rule

433 sets out eligibility, information, legend, filing and record retention conditions for the use of free writing prospectuses after the filing of the registration statement.

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 proposed Rules 164 and 433 would be conditioned on the availability of the issuer's most recently filed statutory prospectus (other than 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 initial public offerings, or offerings of securities of an eligible unseasoned issuer, use by offering participants of free writing prospectuses would 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 offering participant, if consideration was or would be given by the issuer or an offering participant for the publication or broadcast (in any format) of any free writing prospectus (including any published article, publication or advertisement), or if Section 17(b) required disclosure that consideration was or would be given by the issuer or an offering participant for any activity described therein, then the use of the free writing prospectus would be conditioned on it being accompanied or preceded by the most recent statutory prospectus that satisfied the requirements of Section 10. Proposed Rule 433 would provide that a prospectus would be deemed to accompany an electronic free writing prospectus if the latter contained a hyperlink to the former. In initial public offerings, a preliminary prospectus that does not contain a price range does not satisfy the requirements of Section 10.

If a final prospectus satisfying the requirements of Section 10(a) is sent or given with or prior to the written offer, proposed Rules 164 and 433 would not apply, but the written offer would not be a prospectus under the exception in clause (a) of Section 2(a)(10) and would therefore be permitted.

These issuers and offering participants would have to assure 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 would be conditioned on the most recent statutory prospectus preceding or accompanying the free writing prospectus or the communication could not be made in reliance on proposed 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 offering participant;
- an interview in print or broadcast given or prepared by an issuer, its officers, directors or representatives or an offering participant, the publication or broadcast (in any format) of any free writing prospectus (including any published article,

publication or advertisement) for which consideration was or would be given by the issuer or an offering participant, or for which Section 17(b) required disclosure of a payment made or consideration given by an issuer or other offering participant;

- a press release disseminated by an issuer or offering participant and rebroadcast by the media; or
- a paid advertisement, in any format, by an issuer or offering participant.

In these situations, following effectiveness of a registration statement, if a final prospectus meeting the requirements of Section 10(a) was previously or at the same time sent or given to each person to whom the written offer was made, proposed Rules 164 and 433 would not apply, but, as is currently the case, a written offer is permitted.

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

Once the required statutory prospectus was sent or given to an investor, additional free writing prospectuses could be provided without having to send or give an additional statutory prospectus, unless there were material changes in the most recent statutory prospectus from the provided prospectus. For example, once an investor had been sent a preliminary prospectus, absent a material change, the proposed rule would permit subsequent e-mail communications by an offering participant that constitute free writing prospectuses 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 would not be a free writing prospectus and proposed Rules 164 and 433 would 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 could use a free writing prospectus after the filing of a registration statement containing a statutory prospectus. For shelf offerings, this preliminary prospectus could be a base prospectus that satisfied the requirements of new Section 430B.

For offerings of securities of eligible seasoned issuers, use of the free writing prospectus would not be conditioned on actual delivery of the preliminary prospectus.

Instead, the user of the free writing prospectus would notify the recipient, through a required legend, of where the recipient can access or hyperlink to the preliminary or base prospectus by providing the URL for the prospectus.

For offerings of securities of eligible well-known seasoned issuers, free writing prospectuses may be used by issuers at any time before or after the filing of a registration statement, and by any other offering participants after the filing of a registration statement containing a preliminary or base prospectus that satisfies the requirements, as detailed above.

Instead of relying on Rules 164 and 433, the issuer or 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) is previously 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.

Condition - Ineligible Issuers

For any offering participant to use free writing prospectuses the issuer may not be an “ineligible issuer.” The proposed new rule also would 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 would be conditioned on filing that prospectus or information contained in that prospectus in the following circumstances (note that Rule 135 notices and Rule 134 notices would not be considered free writing prospectuses and would, therefore, not be subject to these conditions and electronic road shows would not be 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 shall file that free writing prospectus;
- where a free writing prospectus prepared by a party participating in the offering 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 shall file that information;
- where a free writing prospectus is prepared by a party other than the issuer and is distributed in a manner reasonably designed by such party to lead to its broad unrestricted dissemination, the other party shall file the free writing prospectus, unless it has already been filed; and

- where a free writing prospectus prepared by any person contains only a description of the terms of the issuer's securities, the issuer must file the free writing prospectus that contains the final terms of the issuer's securities.

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. Issuer information contained in free writing prospectuses would be publicly available on the EDGAR system. Note that oral communications would not be subject to any filing condition.

There would be no condition that underwriters and participating dealers file the free writing prospectuses that they prepare. This would include information prepared by underwriters and others on the basis of, but not containing, issuer information. Examples of this information would include information prepared by underwriters that could be, but would not be limited to, information that is proprietary to an underwriter.

If any person, other than the issuer, participating in the offer or sale of the securities distributed a free writing prospectus in a manner that was reasonably designed to achieve broad unrestricted dissemination, such use would be conditioned on such person filing the free writing prospectus *on or before the date of first use*. An issuer, underwriter, dealer, or other offering participant could not indirectly disseminate information through the press or otherwise without complying with the conditions of proposed Rule 433. In that case, the materials provided to the press would be a free writing prospectus of the underwriter, dealer, or other offering participant. For example, the filing condition would apply where:

- an underwriter included 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 sent out a press release regarding the issuer or the offering that would be a free writing prospectus.

A free writing prospectus including information about the issuer, its securities or the offering, provided by or on behalf of the issuer or an offering participant that is prepared by persons in the media who are not affiliated with or paid by the issuer or an offering participant would be subject to filing by the issuer or offering participant involved *within one business day after* first publication or first broadcast. Persons in the media would have no filing or other obligations under these provisions.

A free writing prospectus that contained only a description of the securities offered, regardless of whether the issuer or other offering participant prepared or used it, would be subject to filing only if it reflected the final terms of the securities being offered. The issuer would 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 would not be subject to filing. All such written offering materials, whether or not filed, would be free writing prospectuses.

Electronic Road Shows. Electronic communications, including electronic road shows, are graphic communications that fall within the proposed definition of written communication. Thus, an electronic road show would be a written offer and a prospectus, but it would also be a free writing prospectus. It would therefore be permitted if the conditions of proposed Rule 433 were satisfied. Issuer involvement or participation in an electronic road show would make it an issuer free writing prospectus; live road shows would continue to be considered oral communications. These rules would apply to electronic road shows in all registered securities offerings, not just initial public offerings.

Electronic road shows – those road shows transmitted electronically by the Internet, videos, e-mail, CD-ROM or any other medium – have to date proceeded in reliance on a series of no-action letters granted by the staff of the Division of Corporation Finance. The proposals would permit the use of electronic road shows without many of the conditions in the electronic road show no-action letters, provided the issuer satisfies the conditions of Rule 433. They would need to bear a legend, and for road shows involving a non-reporting or unseasoned issuer, would be subject to the condition that the issuer’s statutory prospectus accompany or precede the electronic road show. As such, those issuers would have to include in the electronic road show a hyperlink to the issuer’s filed statutory prospectus in its registration statement.

An electronic road show or its script would not be subject to filing, except for material issuer information not previously included (including by incorporation by reference) in the registration statement or in a free writing prospectus related to the offering, if the issuer does the following:

- makes at least one version of a “bona fide electronic road show” readily available electronically to any potential investor at the same time as the electronic road show; and
- files any issuer free writing prospectus or material issuer information used at an electronic road show (other than the road show itself).

The SEC is not proposing to require that road shows be made available to unrestricted audiences, though issuers and underwriters would be free to open road shows to all investors.

Unintentional Failures to File. Material must be filed as soon as practicable after discovery of the failure to file. Proposed Rule 164 would allow an issuer and any other person relying on the proposed 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 would be available if a good faith and reasonable effort was made to comply with the filing condition and the free writing prospectus was filed as soon as practicable after the discovery of the failure to file.

Filed Free Writing Prospectus Not Part of Registration Statement. A free writing prospectus used after a registration statement is filed complying with Rule 433 would be 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 proposed Rule 433 shall identify the registration statement to which it relates, but would 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, would be subject to liability under Section 12(a)(2) and the anti-fraud provisions of the federal securities laws.

Condition - Information in a Free Writing Prospectus

The SEC is proposing to permit a free writing prospectus meeting the conditions of Rule 433 to be a Section 10(b) prospectus without having line item disclosure requirements or otherwise requiring that the free writing prospectus contain any particular information, other than the legend. The proposed rule would permit information in a free writing prospectus to go beyond information the substance of which is contained in the prospectus included 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, are expected to provide protection against material misstatements in, and material omissions from, information contained in a statutory prospectus.

Legend Condition (proposed 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 also would advise 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 dealer by calling a toll-free number. The legend must also indicate that the free writing prospectus is part of a public offering. Because in most, if not all cases, the legend would not be included in published articles, the filing of a published article with the SEC as a free writing prospectus, including the legend, would satisfy the condition of proposed Rule 164.

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

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

- language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy.

Proposed Amendment to Rule 408. Rule 408 would be 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 would not, solely by virtue of inclusion of the information in a free writing prospectus, be considered an omission of material information required to be included in the registration statement.

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

Proposed Rule 433 would condition the use of a free writing prospectus on issuers and offering participants retaining for three years any free writing prospectuses they have used from the date of the initial bona fide offering of the securities in question. This record retention condition would apply to all offering participants, and would apply regardless of whether the free writing prospectus was filed.

Treatment of Communications on Web Sites and Other Electronics Issues

General. Proposed Rule 433 would make 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, would be a free writing prospectus of the issuer. The same would be true of information contained on or hyperlinked to an offering participant's web site. Accordingly, the requirements of Rule 433 would apply to these free writing prospectuses. For example, if an issuer or other offering participant included 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 would be considered part of that written communication.

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

The proposed exclusion in Rule 433 for historical archived information would cover 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 would need to review information on their web sites to determine, for example, whether information constituted an offer or was archived properly.

Interaction of Communications Proposals with Regulation FD

The proposed 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 would continue to not be subject to any filing or public disclosure requirement.

The SEC proposes to amend Regulation FD to specify the circumstances, both in terms of the type of offering and the means of communication, in which issuer communications would be excluded from the operation of that Regulation in connection with a registered securities offering. The effect of the amendments would be to identify the types of communications that would continue to be excluded from Regulation FD in connection with registered securities offerings.

As amended, Regulation FD would 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 proposed 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 proposals also would 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.

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 – would be 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 prohibition on pre-filing offers and impermissible prospectuses. The SEC proposes amendments that would make incremental modifications to these rules and would also, for the first time, contain a definition of “research report.” The proposals would also expand the circumstances in which offering and non-offering participants could disseminate research reports during a registered offering.

The safe harbor provisions of Rules 137, 138 and 139 would continue to be available only to brokers and dealers. Issuers could not use the safe harbor provisions or research reports prepared or distributed by brokers or dealers in reliance on the rules to directly or indirectly communicate with potential investors about an issuer’s offering. For example, a hyperlink on an issuer’s web site during its registered offering to a research report would raise these concerns. Issuers using research reports in this manner could be deemed to have adopted the contents of such reports and, under the proposals, the reports would be considered free writing prospectuses.

Definition of Research Report

To assure consistency between Regulation AC and the research safe harbors contained in Rules 137, 138 and 139, the definition of research report will be the same as the definition of “research report” in Regulation AC and would also include media broadcasts. “Research report” would be defined as a written communication that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision. This definition is intended to encompass all types of research reports, whether issuer specific or industry compendiums separately identifying the issuer.

Rule 137

Rule 137 provides that a broker or 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 would therefore not be an underwriter in the offering.

The exemption would be 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 would continue to be available only to brokers and dealers who are not participating in the registered offering of the issuer’s securities, have not received compensation from the issuer, its affiliates, participants in the securities distribution, among others, and publish or distribute the research report in the regular

course of business. Permitting research on non-reporting issuers in reliance on Rule 137 would make clear when research can be provided on these issuers.

Rule 138

Rule 138 permits a broker or 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 underlying premise of Rule 138 is that there is less opportunity to condition the market when a broker or 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 SEC proposes to expand the categories of eligible issuers for Rule 138 purposes. As proposed, the rule generally would cover 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 is currently the case. Like the proposals regarding Rules 137 and 139, the rule would exclude issuers that have historically posed certain risks of abuse, including blank check companies, shell companies and penny stock issuers.

As a condition to the exemption, the broker or 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. Current Rule 138 requires that the broker or dealer publish or distribute research in the regular course of business, but does 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 or 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 or 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 could 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. Penny stock issuers, blank check companies, and shell companies would be excluded.

The requirement that the broker or dealer publish or distribute the research report in the regular course of its business would be retained, but the requirement of publication with reasonable regularity would not. The broker or dealer must, at the time of use, also have distributed or published research reports about the issuer or its securities. This new proposed requirement would retain the most important element of the “reasonable regularity” requirement, namely that the report initiating coverage of an issuer not benefit from an exemption under Rule 139.

There would be no minimum time period for the broker or dealer to have distributed or published research reports. In addition, the proposal does not require that the previously published or distributed research report cover the same securities that are the subject of the registered offering.

Industry-Related Reports

Industry reports under the proposals could cover issuers required to file reports pursuant to Exchange Act Section 13 or Section 15(d) or satisfying the conditions to use by foreign private issuers. The safe harbor for industry reports is not available if the issuer is now or any predecessor of the issuer was during the last two years a blank check company, shell company or penny stock issuer. The proposals 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. Registered offerings by non-reporting issuers would not benefit from the exemption.

Brokers or dealers would not be precluded from making a more favorable recommendation than the one made in the last publication, and the SEC is not proposing that the report include any prior recommendations. The proposals provide, however, that the research reports must contain similar type of information about the issuer or its securities as contained in prior reports.

Research Report Proposals in Connection with Regulation S and Rule 144A Offerings

The restrictions in Regulation S on directed selling efforts and offshore transactions and in Rule 144A on offers to non-QIBs and general solicitation have resulted in brokers and dealers withholding regularly published research that they have prepared with a view towards promoting the offering to investors in those types of offerings.

The SEC proposes 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. The proposals also would provide that these research reports would not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.

Research and Proxy Solicitations

The SEC proposes to codify 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 would provide that distribution of research in accordance with Rule 138 or 139 would be a solicitation to which Rules 14a-3 through 14a-15 (other than Rule 14a-9) of the proxy rules would not apply.

REGISTRATION PROPOSALS – SHELF OFFERINGS

Information in a Prospectus

Mechanics

The SEC proposes to codify, in a single rule, the prospectus requirement for shelf registration statements for registered primary securities offerings, other than business combination transactions and exchange offers. Proposed Rule 430B would be a shelf offering corollary to existing Rule 430A, in that it would describe 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 intended to be largely consistent with current requirements and practice for shelf registration statements for delayed offerings on Forms S-3 and F-3. Under proposed Rule 430B, a base prospectus in a shelf registration statement could continue to omit information that is unknown or not reasonably available to the registrant pursuant to Rule 409.

Rule 430B would provide that a base prospectus that, as today, omitted information as provided in the Rule would be a permitted prospectus. Thus, after a registration statement is filed, offering participants could use a base prospectus that omitted information in accordance with the rule. In addition, issuers could communicate using Rule 134 notices, and issuers and other offering participants could use free writing prospectuses under proposed Rules 164 and 433.

Means of Providing Information

As today, a base prospectus that omits information would not be considered a Section 10(a) final prospectus. To satisfy the requirements of Section 10(a), as is the case with shelf registration statements today, an issuer would 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. Currently, information included in a base prospectus or in an Exchange Act periodic report that is incorporated into a base prospectus is included in the registration statement. Proposed Rule 430B would make clear that prospectus supplements and information in them also would be deemed to be part of and included in the registration statement.

Shelf issuers will have the ability to add to a prospectus more additional or omitted information than is currently the case by means other than a post-effective amendment to the registration statement. The SEC proposes to amend 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 could also be contained in the prospectus or a prospectus supplement. For example, material changes in the plan of distribution, which currently are required to be included in post-effective amendments, could 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 would be able to identify selling security holders after effectiveness.

The proposals would provide that the identities of the selling security holders, and all information about them, as required by Item 507 of Regulation S-K, could be added to the registration statement covering the resale of their securities after effectiveness by either an amendment to that registration statement or a prospectus supplement. In either case, as a result of the proposals, the information would be part of and included in the prospectus in the registration statement. This ability to identify security holders after effectiveness would be available under the proposals only if:

- the resale registration statement identified the specific private transaction or transactions pursuant to which the securities were sold; and
- the private transaction was completed and the securities that were the subject of the registration statement were issued in the private transaction and outstanding prior to initial filing of the resale registration statement.

The proposals would require the registration statement to 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 would have to be issued and outstanding and the private offering in which the securities were sold completed under Rule 152 before the resale registration statement could be filed.

Information Deemed Part of Registration Statement

Rule 430B would make clear that 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 would have similar provisions regarding the treatment of prospectus supplements that would apply to offerings made in reliance on Rule 415(a)(1)(i) and (ix). As a result of the proposed rules, prospectus supplements would, 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

Proposed Rule 430B and proposed Rule 430C would 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 proposed Rule 430B and Rule 430C, as applicable, all information contained in that prospectus supplement would be deemed part of the registration statement as of the date the prospectus supplement is first used; and
- for a prospectus supplement filed in connection with a takedown (pursuant to Rule 424(b)(2), (b)(5), (b)(7) or proposed Rule 424(b)(8)) under proposed Rule 430B, all information in that prospectus supplement would be deemed part of the registration statement as of the earlier of the date it is first used or the date and time of the first contract of sale of securities in the offering to which the prospectus supplement relates.

Proposed Rule 430B also would establish a new effective date for a shelf registration statement for liability purposes for a takedown or takedowns. That new effective date would be the date a prospectus supplement filed in connection with the takedown or takedowns was deemed part of the relevant registration statement. The new effective date would not, however, be considered the filing of a new registration statement for purposes of Form eligibility. Such determination would remain, as today, to be made at the time of the Section 10(a)(3) update to the registration statement.

As proposed, the new effective date would be for liability purposes only, would not, by itself, require the filing of additional consents of experts, and would not constitute an updating of the registration statement and prospectus for purposes of Section 10(a)(3). For example, a prospectus supplement filed in connection with one or more takedowns of securities that did not include other disclosure for which the consent of an expert would be required pursuant to Section 7 and Rule 436 would not require consents to be filed or be considered the filing of a new registration statement.

The triggering of a new effective date for a takedown would not affect the information that was in the registration statement at the time of any prior sale.

Proposed Amendments to Rule 415

Elimination of Limitation on Amount of Securities Registered

For offerings other than business combination transactions and continuous offerings, the proposals would eliminate the current provision in Rule 415 that limits the amount of securities registered to an amount that are intended to be offered or sold within two years from the registration statement effective date. However, shelf registration statements could only be used for three years after the initial effective date of the registration statement. Under this proposal, new shelf registration statements would have to be filed every three years, with unsold securities and unused fees carried forward to the new 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)

The SEC proposes to amend Rule 415 to allow primary offerings on Form S-3 or Form F-3 to occur promptly after effectiveness of a shelf registration statement. With respect to immediate offerings from an effective registration statement, the rules currently permit omission of information from the prospectus at the time of effectiveness only in reliance on Rule 430A, while the proposed rules would permit far more to be left for inclusion via prospectus supplement. Rule 430A would continue to be available for immediate takedowns.

Elimination of “At-the-Market” Offering Restrictions

The SEC proposes to eliminate the restrictions on primary “at-the-market” offerings of equity securities currently set forth in Rule 415(a)(4), initially included to address concerns about the integrity of trading markets. Once the restriction is eliminated, an issuer eligible to conduct an offering pursuant to Rule 415(a)(1)(x) could 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

In conjunction with the other procedural proposals, there would be certain companion modifications to Rule 424. First, Instruction 2 would require that any prospectus supplement filed pursuant to Rule 434 (which permits the use of term sheets) must be filed at the same time as other prospectus supplements for shelf registration statement takedowns. The SEC does not believe that prospectus supplements used by issuers relying on Rule 434 should be treated differently than any other type of offering. The liability for the information would be the same in all cases. The SEC is also proposing to amend Rule 434 to make similar changes to the timing of a prospectus supplement filing.

Second, in cases of offerings where information regarding the terms of the securities or the plan of distribution or other information related to the offering (including changes or additions to information previously provided) is included in Exchange Act reports incorporated by reference, the prospectus supplement filed pursuant to Rule 424 would be required to disclose on its cover page the Exchange Act report or reports containing such information. This cover page disclosure would assist investors and the markets in locating this offering-related information.

Issuer Undertakings (Amended S-K Item 512)

The SEC is proposing conforming revisions to the issuer undertakings that are required in connection with a shelf registration statement. These revisions would 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 currently requires 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.

Currently, shelf issuers can satisfy the first two of these obligations by filing Exchange Act periodic reports that are incorporated by reference into the registration statement. The amended Item 512(a) undertaking would clarify 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 could 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 would permit an issuer to use an incorporated Form 8-K (or Form 6-K) to satisfy the undertaking.

As discussed below, the undertaking would be revised to allow automatic shelf issuers to include in this manner all other information that has been omitted from the base prospectus. 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

A new undertaking would provide that the issuer would acknowledge that a prospectus supplement, other than one filed in connection with a takedown (under Rule 434(b)(3)), would be 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 would be deemed part of and included in the relevant registration statement as of the earlier of the date it is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. The issuer would acknowledge that such date, in the case of a prospectus supplement filed in connection with a takedown, would 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 would be deemed to be the initial bona fide offering of the securities.

Changes to Form S-3 and Form F-3

In addition to the proposed changes that would 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 would be amended to expand the categories of majority-owned subsidiaries that would be eligible to register their non-convertible securities or guarantees. The permitted circumstances would be the same as those needed for majority-owned subsidiaries to be well-known seasoned issuers.

Automatic Shelf Registration

Overview

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

Issuers using an automatic shelf registration statement would be permitted 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.

The proposals would permit more information to be excluded from the base prospectus in an automatic shelf registration statement than from a regular shelf registration statement. The omitted information could 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, would permit well-known seasoned issuers with maximum flexibility to use a free writing prospectus to structure transactions.

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

The flexibility permitted under the proposed automatic shelf registration process would benefit issuers and investors by facilitating different types of offers that issuers currently may not conduct on a registered basis. In particular, this process would facilitate the registration under the Securities Act of rights offers conducted by eligible foreign private issuers. At present, foreign private issuers frequently do not extend rights offers to their U.S. security holders because the current registration process under the Securities Act does 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 could 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.

As proposed, an issuer could file an automatic shelf registration statement if it met the eligibility criteria on the initial filing date and would reassess its eligibility at the time of each updated prospectus required by Section 10(a)(3) (e.g., the filing of a Form 10-K or Form 20-F). If an issuer were 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 a form. Any offerings that were ongoing at that time, such as registered conversions of outstanding convertible securities, could continue on the automatic shelf registration statement until a post-effective amendment or new registration that was filed in a timely manner was 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 could be included on the automatic shelf registration statement if the subsidiary satisfied the conditions for being considered a well-known seasoned issuer described above. Under automatic shelf registration, as proposed, a registration statement could 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 could, as today, omit information pursuant to Rule 409 that was unknown and not reasonably available and, as proposed, could omit the following additional information:

- whether the offering is a primary or secondary offering;
- the names of any selling security holders; and
- any plan of distribution for the offering securities.

Omitting this additional information from the base prospectus would not affect the information that an investor would 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 proposed 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 could 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 would 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 would be deemed to be part of and included in the registration statement. Examples of the types of information that could be added in this manner for automatic shelf registration statements would include:

- the public offering price;
- 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 of the securities.

The principal exceptions to this approach would be that an issuer desiring to add to the registration statement new types of securities or new eligible issuers, including guarantors, and the securities they intend to issue must do so by post-effective amendment. New issuers and their officers and directors would be 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 would 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 debt issuances could register only non-convertible obligations under General Instruction I.B.2. of Form S-3 and Form F-3. The calculation of registration fee table in the initial registration statement also would not need to include a dollar amount or specific number of securities, but would specify each class of security registered. The issuer could specify the number or dollar amount of securities in a prospectus supplement for each offering.

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

Currently, an issuer offering securities on Form S-3 or Form F-3 is not required to specify the amount of each class of securities that it will offer, but it is required to separately register and designate the amount and classes of securities that may be offered and sold by eligible subsidiaries and selling security holders. Under current rules, offerings for selling security holders are not considered delayed offerings under Rule 415(a)(1)(x) and thus must be separately registered or designated prior to effectiveness of the registration statement. Issuers cannot currently offer and sell securities of selling security holders using an unallocated shelf registration statement.

A well-known seasoned issuer could 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 would file a post-effective amendment to register an unspecified amount of securities of the new class of security. This requirement would make the registration statement cover each new class of securities to be offered. An issuer could provide the disclosure about the new class of securities of the issuer in the post-effective amendment to, in a prospectus supplement deemed part of and included in, or in an Exchange Act report that was incorporated by reference into, the registration statement.

Pay-as-You-Go Registration Fees

Issuers using automatic shelf registration statements would be able to pay filing fees at the time of a securities offering – commonly known as “pay-as-you go” – or prior to that time. The issuer would pay a small initial filing fee at the time of filing the initial registration statement, that would be offset against payment for the first takedown.

The triggering event for a required fee payment would be a takedown off a shelf registration statement. For each takedown, the issuer could file a prospectus supplement for the takedown that would include a calculation of registration fee table or could file a post effective amendment including the same information. The issuer would pay the appropriate fee calculated in accordance with Securities Act Rule 457 at the time of the filing of the prospectus supplement.

The proposals would require that the issuer file the prospectus supplement in accordance with the due date for the prospectus supplement under Rule 424(b)(2), (b)(5), (b)(7) or (b)(8). In addition, at any time before one or more takedowns in the future (for example, in the case of a medium-term note program), the issuer could pay the appropriate fee and file such a prospectus supplement.

An issuer using automatic shelf registration and the pay-as-you-go registration fee payment procedure would 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) would depend 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 would be 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, the amendment, incorporated Exchange Act document or prospectus supplement reflecting the transaction and 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 would be deemed to be registered for purposes of Section 6.

Automatic Effectiveness

As proposed, all automatic shelf registration statements and post-effective amendments thereto would become effective automatically upon filing, without Staff review (under proposed Rule 462(e) and (f)). Securities Act Rule 401(g) would provide that an automatic shelf registration statement would be deemed to be filed on the proper form unless the Staff notified the issuer after filing of its objection to the use of such form.

If the Staff notified an issuer of its objection, the issuer could not proceed with subsequent offerings (those offerings not in progress), unless it amended 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 would expect issuers to evaluate whether there are unresolved disclosure or accounting issues that have been raised 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, would be required to disclose written Staff comments received 180 days before an issuer's fiscal year end that the issuer believes are material and that have remained unresolved at the time of filing of the Form 10-K or Form 20-F.

Duration

An automatic shelf registration statement would become effective automatically and would cover an unspecified amount of securities. Issuers would be required to file new automatic shelf registration statements every three years that would, in effect, restate their then-current registration statement and amend it, as they deem appropriate. Issuers would be prohibited from issuing securities off an automatic shelf registration statement that is more than three years old. So long as eligibility for automatic shelf registration is maintained, the new registration statement would be effective immediately and would carry forward the securities registered and any fee paid on the old registration statement. As a result, an issuer's securities offerings under the registration statement would be uninterrupted.

Unseasoned Issuers and Non-Reporting Issuers

Overview

The SEC is proposing a number of procedural changes that would affect reporting issuers that are not seasoned issuers. These include:

- expanding the circumstances under which issuers may incorporate information from their Exchange Act reports into their Securities Act registration statements; and
- eliminating Form S-2 and Form F-2.

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

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

Eligibility

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

In addition, the ability to incorporate by reference would be further conditioned on the issuer making its Exchange Act reports and other documents readily accessible on the issuer's web site.

Proposed Procedural Requirements

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

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

Elimination of Form S-2 and Form F-2

Expanding the types of issuers that may incorporate by reference through the proposed amendments to Form S-1 and Form F-1, without requiring delivery of the incorporated documents, would make Form S-2 and Form F-2 superfluous. The SEC, therefore, proposes to rescind Form S-2 and Form F-2.

Prospectus Delivery Reforms

Current 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.

Under these requirements, in the current system, if no preliminary prospectus or written selling materials are distributed, the final prospectus is 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 maybe 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 Proposals

The SEC proposes to change the prospectus delivery requirements. The proposals are intended to facilitate effective access to information, while taking into account

advancements in technology and the practicalities of the offering process. These changes are intended to alleviate timing difficulties that may arise under the current securities clearance and settlement system, and also to facilitate the successful delivery of, and payment for, securities in a registered offering.

The proposals would:

- eliminate the existing 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 could be satisfied by filing the final prospectus within the required time;
- 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 filed or will be filed within the required time.

Access Equals Delivery – Proposed Rule 172

Under proposed Rule 172, a final prospectus would be 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.

Certain types of offerings are excluded from the proposed 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 their offerings. For example, in offerings made pursuant to 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 in those transactions. The information contained in the final prospectus therefore would be delivered regardless of the Securities Act's requirements.

Notification – Proposed Rule 173

Proposed Rule 173 provides that 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) may send to each purchaser from it, not later than two business days after the completion of the sale, in lieu of the final prospectus, a notice providing that the sale was made

pursuant to a registration statement or a final prospectus pursuant to a registration statement.

An investor could request a final prospectus. Under the proposed rule, a requested final prospectus would not have to be provided before settlement.

Compliance with proposed Rule 173 would not be a condition to the exemption from final prospectus delivery under proposed Rule 172 and non-compliance with proposed Rule 173 would not result in a violation of Section 5. The same offerings excluded pursuant to proposed Rule 172, as discussed above, would also be excluded from this notification provision.

Confirmations and Notices of Allocations

Written confirmations and notices of allocation could be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus. The exemption would be 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 would permit:

- confirmations containing information limited to that called for in Exchange Act Rule 10b-10 and other information customarily included in confirmations; and
- written communications from a broker-dealer to a customer or from an underwriter to participating dealers in the selling group notifying them of the basic terms of the transaction or their allocations of securities in a registered offering.

Under the proposed exemption, broker-dealers could send e-mail notices after effectiveness to inform investors in a public offering of their allocations. Under the proposed rule, the notices of allocations could 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 would be required for notices to participating dealers. The exemption would not be available for the same offerings excluded from the access equals delivery proposal discussed above.

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; it does not currently apply to transactions on an automated quotation system such as the Nasdaq Stock Market.

Under proposed amendments, 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) 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 or will be on file by the applicable prospectus filing date;
- securities of the same class are trading on an exchange or through any trading facility registered with the SEC; and
- the registration statement relating to the offering is effective and not the subject of a stop order issued under Section 8.

Aftermarket Prospectus Delivery – Amended Rule 174

All dealers are required to deliver a final prospectus for a specified period after a registration statement becomes effective to persons who buy the securities in the aftermarket. Rule 174 exempts from aftermarket prospectus delivery any transaction relating to securities of a reporting issuer. The rule applies only to dealers and does not apply to underwriters or dealers continuing to act as such with regard to any unsold allotment. If the transaction relates to securities of a non-reporting issuer that will be listed on a national securities exchange or quoted on an electronic inter-dealer quotation system, current Rule 174 sets an aftermarket delivery period of 25 days. For offerings of securities of non-reporting issuers that will not be so listed or quoted and offerings by blank check companies, Rule 174 sets an aftermarket prospectus delivery period of 90 days after effectiveness or after the funds are released from the escrow or trust account, as the case may be.

The SEC proposes to revise Rule 174 to provide that during the aftermarket period, dealers can rely on proposed Rule 172 to satisfy any aftermarket delivery obligations (other than for blank check companies).

ADDITIONAL EXCHANGE ACT DISCLOSURE

Risk Factor Disclosure

The SEC proposes extending risk factor disclosure to annual reports on Forms 10-K and registration statements on Form 10. Risk factor disclosure under the Exchange Act would be the same type of 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 would have 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 would be required to reflect any material changes from risks previously disclosed in Exchange Act reports. A restatement or repetition of risk factors in quarterly reports would not be required.

Disclosure of Unresolved Staff Comments

Because proposed procedural changes would eliminate some of the incentives issuers have to respond to comments on their Exchange Act reports in a timely manner and shelf eligible issuers would have to file new registration statements only every three

years, the SEC thinks it is necessary to establish added incentives for accelerated filers to timely resolve outstanding staff comments on their Exchange Act reports.

Accelerated filers, whether or not they expect to file shelf registration statements, would be required to disclose, in their annual reports on Forms 10-K or 20-F, written Staff comments made in connection with review of Exchange Act reports that the issuer believes are material 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 would be required to be sufficient to describe the substance of the comments. Staff comments that have been resolved, including those that the Staff and the issuer have agreed would be addressed in future Exchange Act reports, would not need to be disclosed. Issuers would be able to disclose their position regarding any such unresolved comments.

Disclosure of Status as Voluntary Filer under the Exchange Act

The SEC proposes to include 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 would be for informational purposes only. An issuer's filing obligation would be unaffected by an incorrectly checked box.

The SEC believes that it is important that investors and other market participants are 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 would enable the SEC to monitor their use of the proposed communications rules as well as the other regulatory requirements.

* * * *

Any questions concerning the foregoing should be addressed to any of the following. This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. In addition, memoranda on related topics may be accessed under Securities Group publications on our web site (www.paulweiss.com).

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Annex A

The following table provides a brief overview of the operation of the communication proposals.

	Could it be an “offer” per Section <u>2(a)(3)?</u>	Is it a prospectus per Section <u>2(a)(10)?</u>	Is it a prohibited pre-filing offer for purposes of Section <u>5(c)?</u>	Is it a prohibited prospectus for purposes of Section <u>5(b)(1)?</u>
Regularly Released Factual Business Information	Yes	No	Rule would define it as not an offer for Section 5(c) purposes	Section 5(b)(1) relates only to “prospectuses” – it would not be applicable
Regularly Released Forward-Looking Information	Yes	No	Rule would define it as not an offer for Section 5(c) purposes	Section 5(b)(1) relates only to “prospectuses” – it would not be applicable
Communications Made More Than 30 Days Before Filing of Registration Statement	Yes	No	Rule would define it as not an offer for Section 5(c) purposes	Section 5(b)(1) does not apply in the pre-filing period – it would not be applicable
Well-Known Seasoned Issuers -- Written Offers Made Within 30 Days of Filing of Registration Statement	Yes	Yes. Also, would be a free writing prospectus	Would be exempted from prohibition of Section 5(c)	Section 5(b)(1) does not apply in the pre-filing period – it would not be applicable
Well-Known Seasoned Issuers -- Oral Offers Made Within 30 Days of Filing of Registration Statement	Yes	No	Would be exempted from prohibition of Section 5(c)	Section 5(b)(1) would not be applicable
Well-Known Seasoned Issuers -- Free Writing Prospectuses Used Before Filing of Registration Statement	Yes	Yes	Would be exempted from prohibition of Section 5(c)	Section 5(b)(1) does not apply in the pre-filing period – it would not be applicable
Notices Under Rule 134	Yes	No	Section 5(c) is not applicable, as Rule 134 relates only to the period after the filing of a registration statement	Section 5(b)(1) relates only to “prospectuses” – it would not be applicable

	Could it be an “offer” per Section <u>2(a)(3)?</u>	Is it a prospectus per Section <u>2(a)(10)?</u>	Is it a prohibited pre-filing offer for purposes of Section <u>5(c)?</u>	Is it a prohibited prospectus for purposes of Section <u>5(b)(1)?</u>
All Eligible Issuers -- Free Writing Prospectuses Used After Filing of Registration Statement	Yes	Yes	Section 5(c) would not be applicable, as it does not apply in the post-filing period	Section 5(b)(1) would be satisfied, as free writing prospectus would be a permitted Section 10(b) prospectus