LATHAM & WATKINS LLP

Christmas in July—The SEC Improves the Securities Offering Process

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August 2005

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Christmas in July — The SEC Improves the Securities Offering Process

I. Introduction

Santa Claus came early this year for the securities industry. On June 29, 2005, the Securities and Exchange Commission (the "***SEC***") unanimously adopted a series of new rules that will reform the registration, communication and public offering processes under the Securities Act of 1933 (the "***Securities Act***"). On July 19, 2005, the SEC released the final rules, which will take effect December 1, 2005.[1]

So, with all of the presents unwrapped and spread out in front of us, what do we see? Overall, the final rules represent a welcome change to the current public offering process. They enable certain large-cap issuers to conduct public offerings without being subject to SEC review. They recognize that the principal written document permitted under the current regime – namely, the statutory prospectus – is often too long, too dense and too late for many investors, and hence permit a much wider range of more timely written offering materials. They lessen concerns over "gun jumping" and liberalize other aspects of communications during offerings and include related modifications to the liability regime.

But, as with any selection of holiday presents, some concerns remain once the initial thrill has worn off. First, all issuers did not receive the same gifts from Santa. Smaller issuers – and above all, voluntary filers with the SEC – are largely shut out from the most attractive features of the final rules. Second, with the new opportunities come new challenges – particularly in the area of liability. These will need to be assimilated by the securities industry. Finally, some presents are likely to be less popular than others. It remains unclear to us, for example, to what extent deal teams will become comfortable with widespread use of the new powers to use offering materials outside the prospectus.

On July 25, 2005, we published a Client Alert[2] providing an introduction to the new rules and the key headlines. This publication is designed to supplement that Client Alert. It presents a comprehensive summary of the final rules. For your convenience, we have attached a summary of the final rules in chart form as Annex A. We have also identified the central issues we see at this stage, and set out our preliminary views on those topics. Needless to say, we expect those views to evolve as market practice develops and the SEC issues additional interpretive guidance. Given the December 1 effective date, much will be stirring in the nights before Christmas as we all find out how these new rules work and what benefits they provide to investors and the public offering process.

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1 *Securities Offering Reform*, SEC Release Nos. 33-8591, 34-52056, IC-26993, *http://www.sec.gov/rules/final/33-8591.pdf.*

2 The Client Alert can be found on our website at *http://www.lw.com/resource/Publications/_pdf/pub1317_1.pdf.*

II. Overview, Key Questions and the New Hierarchy of Issuers

A. Overview

The final release contains a series of new rules and amendments to existing rules. The new rules are designed to tackle old problems and open up new avenues for conducting offerings. Among other things, the new rules:

- ***Create a new breed of issuers called well-known seasoned issuers, or "WKSIs."*** WKSIs are large-scale, seasoned issuers (representing approximately 30 percent of all listed issuers), and will benefit from special treatment in public securities offerings. In particular, they will be able to make offers to sell securities before a registration statement has been filed and without regard to previously applicable gun-jumping restrictions. In addition, WKSIs will be entitled to automatic shelf registration on demand without SEC review. WKSIs are the primary winners under the new rules.

- ***Encourage communication with the market both before and during public securities offerings.*** Even non-WKSI issuers have greater freedom to communicate without fear of the prohibitions on pre-offering publicity (often referred to as "gun jumping"), so long as those communications occur more than 30 days before a registration statement is filed and do not refer to a securities offering. This bright-line approach will make life easier for all issuers, but we do not expect to change our advice to non-WKSIs that it is best to be cautious in public communications prior to the filing of a registration statement. In addition, two new safe harbors will allow the continued regular release of factual and forward-looking information by certain issuers during the offering process, largely codifying existing practice.

- ***Allow use of a new species of prospectus, the "free writing prospectus."*** Issuers can use a new type of written document in connection with offerings, called a "free writing prospectus." Free writing prospectuses will not be subject to the strict form and content requirements of current statutory prospectuses. In most but not all cases, free writing prospectuses will need to be filed with the SEC concurrently with first use.

- ***Improve the shelf registration process.*** By streamlining the shelf registration process for all issuers, the new rules will fix a number of problems that made the old shelf registration process inefficient. For example, anyone who has ever worked on a selling security holder shelf registration will quickly see the benefits of the new provision allowing the addition of new selling security holders after effectiveness by prospectus supplement, which dispenses with the cumbersome historical requirement to file a post-effective amendment.

- ***Change the liability regime.*** In an authoritative interpretation of Section 12(a)(2) of the Securities Act, the new rules make clear that information delivered after an investor makes his or her investment decision – which the new rules define as the point at which the investor enters into a contract for sale – will not be taken into account in determining whether the investor previously received materially inaccurate information. In other words, the preliminary prospectus will be at least as important as the final prospectus in determining liability in most offerings.

B. Key Questions Raised by the New Rules

The new rules raise a number of interesting questions and issues. Above all:

- ***To register or not to register?*** Given that many seasoned issuers already have a universal shelf in place and can issue securities relatively quickly off of the shelf, it remains to be seen whether the new rules will lure those seasoned issuers back into the world of registered offerings and away from the domain of Rule 144A.

- ***Volunteers are not welcome at Club WKSI.*** The new rules define voluntary filers as non-reporting issuers. As a result, many high-yield-only public companies will be unable to take advantage of most of the benefits under the new rules. For example, the registration-on-demand freedoms extended to WKSIs and certain of the new "gun jumping" safe harbors will not be available to voluntary filers that only have high yield bonds registered with the SEC.

- ***Goods may not be exchanged.*** In a similar vein, securities issued in A/B exchange offers may not be counted toward the thresholds for eligibility as a WKSI. This means, for example, that a high yield issuer that has issued a large volume of securities in Rule 144A offerings with registration rights may still not qualify as a WKSI. It remains to be seen whether this will result in more high yield offerings that are initially registered.

- ***They may be free, but will they be used?*** The extent to which free writing prospectuses will be widely used is not yet clear. Among other concerns, deal teams will need to be comfortable with the requirement that information in a free writing prospectus not "conflict with" information in the registration statement. The new rules – although an improvement on the proposals – also raise liability questions, including the ability of underwriters to avoid "cross-liability" for the free writing prospectuses they do not prepare, and their ability to establish a due diligence defense with respect to those free writing prospectuses. And finally, some questions remain about the treatment of rating agency reports. While the new rules do not explicitly exclude rating agency reports from being deemed free writing prospectuses subject to filing and liability, we believe the new rules were not intended to change the current view that these reports are not the issuer's responsibility unless the issuer has a sufficiently high level of involvement in their preparation or takes steps to distribute them.

- ***A day late and a dollar short?*** Under the new rules, delivery of a final prospectus may not be effective to shield an issuer or its underwriters from claims that an earlier preliminary prospectus or free writing prospectus contained a material misstatement or omission. This approach will put significant additional pressure on issuers and underwriters to ensure that all arguably material changes are reflected in either a supplemental free writing prospectus or a pre-effective amendment before pricing – in effect, accelerating the delivery of the final prospectus.

C. The New Hierarchy of Issuers

The new rules draw a key distinction between four different types of issuers – WKSIs; seasoned issuers; unseasoned reporting issuers; and non-reporting issuers. Although the new rules affect all issuers, WKSIs are far and away the primary beneficiaries.

1. WKSIs – The Big Winners

a) Definition of WKSI

The new rules define a WKSI as any issuer (including its majority-owned subsidiaries under certain circumstances) that:

- meets the registrant requirements of Form S-3 or Form F-3, which include being current and timely in its reporting obligations under the Securities Exchange Act of 1934 (the "***Exchange Act***");
- as of a date within 60 days of the determination date,[3] has either:
  - a worldwide market value of outstanding voting and non-voting common equity held by non-affiliates of $700 million or more; or
  - both (i) registered and issued at least $1 billion in aggregate principal amount of non-convertible debt or preferred stock for cash, not exchange, during the past three years, and (ii) will only offer non-convertible debt or preferred stock (unless the issuer is also eligible to register a primary offering of its securities on Form S-3 or Form F-3); and
- is not an "ineligible issuer" or "asset-backed issuer."[4]

b) Issues Raised by the WKSI Definition

The definition of "ineligible issuer" includes those issuers that have, within the past three years, been convicted of any felony or misdemeanor under certain provisions of the Exchange Act or been made the subject of judicial or administrative decrees or orders prohibiting conduct relating to the U.S. federal securities laws (including future violations), requiring them to cease and desist from violating the anti-fraud provisions of the U.S. federal securities laws or determining that they have violated those anti-fraud provisions. Issuers that have

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[3] For purposes of determining whether an issuer qualifies as a WKSI, the determination date is the later of (i) the time of filing of its most recent shelf registration statement; (ii) the time of the most recent amendment to its shelf registration statement for purposes of satisfying Section 10(a)(3) of the Securities Act; and (iii) the date of filing of the issuer's most recent annual report on Form 10-K or Form 20-F (if it has not filed a shelf registration statement for the prior 16 months).

[4] An "ineligible issuer" includes issuers that (i) are not current in their Exchange Act reporting obligations (other than certain enumerated Form 8-K filings); (ii) are blank check companies, shell companies, penny stock issuers or limited partnerships offering other than through a firm commitment underwriting; (iii) have filed for bankruptcy within the past three years; (iv) within the past three years, have been convicted of any felony or misdemeanor under certain provisions of the Exchange Act; (v) within the past three years, were made the subject of any judicial or administrative decree or order arising out of a governmental action that prohibits certain conduct or activities regarding (including future violations of) the U.S. federal securities laws, requires them to cease and desist from violating the anti-fraud provisions of the U.S. federal securities laws or determines that they have violated those anti-fraud provisions; or (vi) have had any registration statement subject to a refusal order or stop order within the past three years.

been the subject of judicial or administrative proceedings in the past three years will need to evaluate whether they qualify as WKSIs. This may require a significant diligence exercise for acquisitions, as well as a detailed self-examination (for example, in the case of large-scale financial institutions with complex regulatory positions). In addition, the SEC can waive ineligibility "upon a showing of good cause." Issuers that are WKSIs will almost certainly want to request such a waiver when settling SEC enforcement actions.

Furthermore, in order to be an eligible issuer, an issuer must be *current* in its Exchange Act filings. In order to be a WKSI, however, an issuer must be both *current* in its Exchange Act filings and *timely* in making those filings in the prior twelve months (because the WKSI definition looks to Form S-3 and Form F-3 eligibility requirements). A late filing can result in a one-year loss of WKSI status – because the issuer would not be Form S-3 or Form F-3 eligible – even though the company would otherwise be eligible to be a WKSI.

2. Three Other Categories of Issuers

In addition to WKSIs, the new rules create three other categories of issuers: seasoned issuers; unseasoned reporting issuers; and non-reporting issuers.

- ***Seasoned Issuers.*** A seasoned issuer is an issuer that is eligible to use Form S-3 or Form F-3 to register certain primary offerings of securities. Seasoned issuers are distinguished from WKSIs primarily by the size of their public float. However, a WKSI that is S-3 or F-3 eligible but is otherwise an "ineligible issuer" – for example, a WKSI that has been convicted of certain Exchange Act violations – is considered a seasoned issuer.

- ***Unseasoned Reporting Issuers.*** An unseasoned reporting issuer is an issuer that is required to file Exchange Act reports, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. As noted above, a WKSI that is not current and timely in its Exchange Act filings and hence loses S-3 or F-3 eligibility is considered an unseasoned reporting issuer.

- ***Non-reporting Issuers.*** A non-reporting issuer is an issuer that is not required to file Exchange Act reports. Voluntary filers are considered to be non-reporting issuers under the new rules.

III. Liberalizing Communications

A. Background to the New Rules – The Current Regime Governing Communications

By way of background, it is important to understand the current restrictions on communications during the offering process.

Section 5(c) of the Securities Act prohibits all "offers," in whatever form, prior to the filing of a registration statement. The term offer is interpreted broadly. As a result, before a registration statement is filed, an issuer may only:

- continue to advertise products and services and to issue press releases regarding factual business and financial developments in accordance with past practice; and

- release a limited notice regarding a proposed registered offering under Rule 135.[5]

Between the filing of a registration statement and its effective date, Section 5(b)(1) requires that any "prospectus" – an expansive term that captures nearly all forms of written or broadcast communication – used in connection with a securities offering be limited to a statutory prospectus that conforms to detailed information and form requirements. Accordingly, the only written information that is currently permitted in connection with a public securities offering between the time the registration statement is filed and its effective date is:

- a preliminary prospectus meeting the requirements of Section 10 of the Securities Act;
- product advertisements and press releases regarding factual business and financial developments of the sort described above; and
- limited public notices in accordance with Rule 134.[6]

Offers in violation of these restrictions are often referred to as "gun jumping."

B. Rule 163 – Pre-filing Offers by WKSIs

1. The New Rule

Rule 163 creates a non-exclusive exemption for WKSIs from the Section 5(c) prohibition on pre-filing offers. Under the new rule, which is not available to underwriters, offers by or on behalf of a WKSI *before* the filing of a registration statement are free from the restraints of Section 5(c), provided that certain conditions are met. These include that:

- the written communication must contain a prescribed legend;
- it must be filed with the SEC promptly upon filing of the registration statement for the offering (unless the communication has previously been filed with the SEC or is exempt from filing under Rule 433); and
- it must not relate to "ineligible offerings," including certain business combination transactions.

In short, Rule 163 allows WKSIs to engage in unrestricted oral and written offers before a registration statement is filed without fear of gun jumping.

Written offers under Rule 163 are deemed to be both a statutory prospectus subject to Section 12(a)(2) liability, and a "free writing prospectus" subject to filing in accordance with Rule 433 (discussed in more detail below). If no registration statement is filed, however, a Rule 163 communication will not need to be filed.

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[5] Foreign private issuers may also take advantage of the safe harbor for offshore press activity provided by Rule 135e.

[6] Foreign private issuers may continue to take advantage of Rule 135e during this period.

Rule 163 offers are subject to Regulation FD.[7] In addition, Rule 163 communications will trigger liability under various anti-fraud provisions of the securities laws, including Section 12(a)(2) and Rule 10b-5 under the Exchange Act. But they will not automatically be subject to Section 11 liability because, as discussed below, a free writing prospectus will not be deemed to be part of the registration statement for Section 11 purposes.

2. Issues Raised by Rule 163

There is no doubt that Rule 163 will provide WKSIs with more freedom to communicate with the market prior to filing a registration statement. But we believe very few WKSIs will choose to rely on Rule 163. Without even paying a filing fee, a WKSI can file a short automatic shelf registration statement for an unlimited amount of unspecified securities. That registration statement becomes effective on filing and provides, in effect, a blanket, unconditional exemption from Section 5(c)'s prohibition on pre-filing offers. So, we expect WKSIs will look to an effective automatic shelf registration statement, not to Rule 163, for shelter from Section 5(c).

C. Rule 163A – The 30-Day Bright Line Safe Harbor

1. The New Rule

Rule 163A provides all issuers (whether WKSIs, seasoned issuers, unseasoned reporting issuers or non-reporting issuers) with a non-exclusive safe harbor for certain communications made more than 30 days prior to the filing of a registration statement. Even voluntary filers (such as a high yield issuer preparing for its IPO) will benefit from this new rule. Communications occurring more than 30 days prior to filing are not considered pre-filing "offers" prohibited by Section 5(c), and so will be free from traditional restrictions on gun jumping.[8] They are likewise not deemed to be free writing prospectuses.

Use of the safe harbor is subject to the following key requirements:

- Rule 163A communications must not refer to the securities offering that is the subject of the registration statement;

- the communications must be made by or on behalf of an issuer – in other words, the issuer will need to authorize or approve Rule 163A communication and communications authorized or approved by underwriters or dealers will not come within the safe harbor;

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[7] Specifically, these communications will not be considered to be made in "connection with a securities offering registered under the Securities Act" for purposes of Rule 100(b)(2)(iv) of Regulation FD.

[8] Like Rule 163 communications, Rule 163A communications are still subject to Regulation FD, as they would not be considered to be made in "connection with a securities offering registered under the Securities Act" for purposes of Rule 100(b)(2)(iv) of Regulation FD.

- the issuer must take "reasonable steps within its control" to prevent further distribution of the information during the 30-day period prior to filing the registration statement (although the final release suggests that the issuer may maintain this information on its website, if the information is appropriately dated, identified as historical material, and not referred to as part of the offering activities); and

- the safe harbor may not be used in connection with certain business combination transactions already covered by Rule 165, offerings to employees registered on Form S-8, and offerings by blank check companies, shell companies or penny stock issuers.

2. Issues Raised by Rule 163A

The issues raised by Rule 163A include the following:

- ***Redistribution of Information.*** The 30-day bright-line safe harbor may offer less protection in practice than might at first appear. Consider, for example, the position of the CEO of a company planning an IPO who is invited to make a presentation at a trade show or at a conference organized by an investment bank scheduled to take place 45 days before the anticipated filing of the IPO registration statement. If the CEO attends and mentions the IPO in response to a question, Rule 163A will no longer be available. Moreover, even though the CEO scrupulously replies "no comment" to the inevitable question about the IPO, if the CEO gives an interview to the press during the conference at which the CEO makes bullish comments about the company's prospects, and the interview is published during the 30-day period, the final release makes clear that Rule 163A will again no longer be available. In both cases, the CEO's communication may be deemed an "offer" and the issuer will have to find another way to avoid the restrictions of Section 5(c) of the Securities Act. In short, because situations like this are all too easy to envision, we believe practice with respect to pre-filing publicity will not change significantly as a result of Rule 163A, and we do not expect to change our advice to non-WKSI issuers to be cautious in their public communications prior to the filing of a registration statement.

- ***Foreign Private Issuers.*** Foreign private issuers that are first-time registrants can submit their registration statements on a confidential basis to the SEC. As a result, they are able to make a *public* filing considerably later in the registration process than their U.S. domestic counterparts. Although the rule does not address this issue specifically, we think the better view is that the 30-day look-back should start at the time of first *public* filing, not from the date of the first confidential submission.

D. Rules 168 and 169 – New Safe Harbors for Factual Business Information and Forward-Looking Information During an Offering that Generally Codify Existing Practice

Since at least 1971, the SEC has permitted issuers to continue to advertise products and services and to issue press releases regarding factual business and financial developments in accordance with past practice, despite the limitations on gun jumping.[9] Rules 168 and 169 now codify (and expand) this exclusion in the form of two new safe harbors.

In particular, Rules 168 and 169 exempt from the definition of "offer" under Section 5(c) and Section 2(a)(10) certain information regularly released by or on behalf of an issuer in the ordinary course of its business. Communications that fall within the new safe harbors will not be prohibited pre-filing offers pursuant to Section 5(c) (and are not free writing prospectuses).[10]

1. Rule 168 – Safe Harbor for Factual Business Information and Forward-Looking Information by Reporting Issuers

Rule 168 is the new non-exclusive safe harbor for reporting issuers. It allows a reporting issuer and certain non-reporting foreign private issuers[11] – but not voluntary filers – to make continued regular release or dissemination of "factual business information" and "forward-looking information," subject to certain conditions. Disclosure of Rule 168 information will be permitted at any time, including before and after the filing of a registration statement.

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[9] *See Guidelines for the Release of Information by Issuers Whose Securities are in Registration,* Securities Act Release No. 5180 (Aug. 16, 1971). The new safe harbors do not affect the analysis regarding ordinary course business communications that are do not fall within the safe harbors. This point is of practical significance, as the safe harbor provided by new Rule 168 will not be available to non-reporting issuers, including voluntary filers, under the Exchange Act.

[10] Public statements that do not satisfy these safe harbors will continue to be analyzed under the traditional "facts and circumstances" test. For example, we do not believe that voluntary filers will need to restrict their ability to refer to prior Form 10-K or Form 10-Q disclosures in most circumstances, even though the Rule 169 safe harbor does not technically apply to such communications.

[11] Non-reporting foreign private issuers that may use Rule 168 include those that:

- meet the registrant eligibility requirements for Form F-3, other than the reporting history requirements of the Form;
- either satisfy certain public float thresholds or are issuing certain non-convertible investment grade securities; and
- either:
  - have equity securities that have traded on certain markets outside the United States for at least 12 months; or
  - have a worldwide market value of outstanding common equity held by non-affiliates of $700 million or more.

a) Definitions of Factual Business Information and Forward-Looking Information

Under Rule 168, "factual business information" means:

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

"Forward-looking information" means:

- projections of an issuer's revenues, income or loss, earnings or 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 generally contemplated by the issuer's MD&A discussion; and
- assumptions underlying or relating to the foregoing.

However, neither term includes information about an offering or information released or disseminated as part of offering activities.

b) Information Released by or on Behalf of an Issuer

As is the case under Rules 163 and 163A (discussed above), factual business information and forward-looking information under Rule 168 will be considered released "by or on behalf" of an issuer if the issuer, its agent or its representative, other than an underwriter or a dealer, authorized or approved its use before its release. The final release does not define who may be considered an agent or a representative for these purposes (other than to exclude underwriters or dealers that are offering participants), although it does offer advertising agencies and public relations firms as possible examples.

c) Additional Conditions for Use of Rule 168 Safe Harbor

Conditions for using the Rule 168 safe harbor include that:

- the issuer has previously released or disseminated Rule 168 information in the ordinary course of its business; and
- the timing, manner and form in which the information is released is materially consistent with similar past disclosures.

2. Rule 169 – Safe Harbor for Factual Business Information by Non-Reporting Issuers and Voluntary Filers

Rule 169 is the new non-exclusive safe harbor for non-reporting issuers and voluntary filers. It is similar to, but more limited than, Rule 168. Under Rule 169, non-reporting issuers and voluntary filers may continue to release factual business information, but not forward-looking information, subject to certain conditions. In addition, the definition of factual business information is narrower under Rule 169 than under Rule 168.[12] Rule 169 information may be released at any time, including before or after the filing of a registration statement.

a) Definitions of Factual Business Information

Under Rule 169, "factual business information" means:

- factual information about the issuer, its business or financial developments, or other aspects of its business; and
- advertisements of, or other information about, the issuer's products or services.

b) Information Released by or on Behalf of an Issuer

As is the case under Rule 168, information will be considered to be released "by or on behalf" of an issuer under Rule 169 if the issuer, its agent or its representative, other than an offering participant that is an underwriter or a dealer, authorized or approved its use before its release.

c) Additional Conditions for Use of Rule 169 Safe Harbor

In order to use the Rule 169 safe harbor:

- the issuer must have previously released or disseminated information of the type described in Rule 169 in the ordinary course of its business;
- the timing, manner and form in which the information is released must be materially consistent with similar past disclosures; and
- the information must be released or disseminated to persons, such as customers or suppliers, other than in their capacity as investors or potential investors, by the issuer's employees or agents who historically have provided this information.

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[12] Unlike Rule 168 for reporting issuers, Rule 169 does not include dividend notices or factual information set forth in the issuer's Exchange Act reports in the definition of "factual business information." The SEC explained in the final release that it had not included dividend notices within the definition because the communications covered by Rule 169 are those intended for use by persons other than in their capacity as investors. But the two Rules are similar in that under both Rules, factual business information does not include information about an offering or information released or disseminated as part of offering activities.

In the final release, the SEC explained that Rule 169 is aimed at protecting communications intended for non-investors. But the safe harbor will continue to be available even if a widely disseminated communication that otherwise meets the requirements of the Rule is available to or received by investors.

3. Issues Raised by Rules 168 and 169

- ***Regularly Released Information.*** Both Rule 168 and Rule 169 require that information must have been previously released in the ordinary course of business.[13] In order to meet this standard, the method of releasing or disseminating the information, and not just the content, must be consistent with prior practice. Therefore, the issuer will need to be able to demonstrate a track record of releasing the particular type of information in the same particular manner. Significantly, the final release acknowledges that one prior release is sufficient to establish a track record. Information can also be regularly released for these purposes if it is made on an unscheduled or episodic basis (such as product advertising, product release information or earnings guidance). Furthermore, the final release states that merely using new or different technologies will not necessarily disqualify a communication.

- ***Liability.*** If any specific information release constituting an "offer" were to fall outside the safe harbors and not qualify for any other exemption, it will amount to a free writing prospectus, carrying Section 12(a)(2) liability (and potentially requiring filing and legending, or, if issued prior to the filing of a registration statement, violating Section 5(c)). In some cases, issuers and underwriters may find it difficult to conclude that a particular communication falls neatly within the safe harbor and is not, in fact, a free writing prospectus. In cases where there is doubt after the registration statement is on file, we would expect to see deal teams follow the free writing prospectus route.

E. Amended Rule 134 – Tombstones Get Creative

1. The Current Rule

Rule 134 under the Securities Act currently provides a safe harbor for an issuer to make certain limited written communications related to a securities offering as to which a registration statement has been filed. However, Rule 134 essentially limits those communications to a "tombstone" announcement reflecting the basic terms of the offering without allowing substantive disclosure about the issuer itself.

2. Amendments to Rule 134 – Relaxation of Restrictions on Written Offering-Related Communications After Filing

Amended Rule 134 will only be available once a statutory prospectus has been filed, although in the case of an IPO, most of the information permitted by Rule 134 may be disclosed before the inclusion of a *bona fide* price range in the registration statement.

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[13] Although the final release provides guidance on the meaning of regularly released information in the context of Rule 168 only, we believe the requirement should be interpreted in the same way for purposes of both Rules.

The amendments to Rule 134 permit, in addition to the information already allowed under Rule 134:

- certain basic factual information about the legal identity and business location of the issuer, including contact details of the issuer;
- information about the business segments through which the issuer operates;
- greater information about the securities being offered;
- the names of all underwriters participating in the offering and their roles in the underwriting syndicate;
- the anticipated schedule for the offering, and a description of marketing events;
- a description of the procedures by which the underwriters will conduct the offering and information about procedures for opening accounts and submitting indications of interest;
- expanded disclosure regarding credit ratings (although a *bona fide* price range, in the case of a non-reporting issuer, must be included in the registration statement before including ratings information in a Rule 134 communication);
- certain additional information, including the names of selling securityholders, certain email addresses, the exchanges on which the securities will be listed and the ticker symbols; and
- a shortened legend.

The amended version of Rule 134 does not change the current version in allowing a release to solicit an offer to buy the security or to request the recipient to indicate whether he or she is interested in the security, if that release is accompanied or preceded by a statutory prospectus (including a price range in the case of an IPO). Under the new version of Rule 134, however, the prospectus-delivery condition may be satisfied with an electronic communication containing an active hyperlink to the prospectus on file with the SEC. We expect that this aspect of the amended rule will be particularly helpful in the context of a directed share or "friends and family" program in connection with an IPO.

The amendments to Rule 134 do not permit a detailed term sheet for the securities being offered. A term sheet may instead be provided as a free writing prospectus.

IV. Land of the Free Writing Prospectus and the Home of the WKSI

A. Overview

New Rules 164 and 433 allow issuers *and underwriters* to make written offers by way of a "free writing prospectus" *after* a registration statement has been filed. As noted above, WKSIs can use a free writing prospectus even before filing a registration statement under Rule 163. Free writing prospectuses will not have to meet the extensive form and content requirements of statutory prospectuses.

B. Definition of Free Writing Prospectus

A free writing prospectus is any "written communication" that constitutes an offer to sell or a solicitation of an offer to buy securities relating to a registered offering, that is used after a registration statement has been filed, other than:

- a permitted preliminary or final statutory prospectus; and
- a communication delivered after effectiveness of a registration statement that is accompanied or proceeded by a statutory prospectus.

The term "written communication" for these purposes includes any written or printed communication, any radio or TV broadcast (regardless of how transmitted), or any "graphic communication." The term "graphic communication" has been defined (in Rule 405) to cover all forms of electronic media, except for a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted electronically.

Examples of graphic communications that may be treated as free writing prospectuses include:

- emails;
- websites;
- "blast" voicemail messages; and
- CD-ROMs.

Individual telephone voicemail messages from live telephone calls, as well as live road shows, will not be considered graphic communications. Subsequent electronic retransmission of these communications, however, may be considered graphic communications, and, therefore, free writing prospectuses.

Note that communications that are not considered offers or prospectuses, such as Rule 134 or Rule 135 communications, communications benefiting from the new Rule 168 or 169 safe harbors, and research reports exempted from the definition of offers, will not be considered to be free writing prospectuses.

C. Rule 164

Under Rule 164, once a registration statement has been filed, a free writing prospectus of the issuer or any other offering participant will be deemed not to violate Section 5(b)(1)'s prohibition on the use of a non-conforming prospectus prior to effectiveness if:

- the issuer is an eligible issuer (or, in the case of any offering participant other than the issuer, that participant has a "reasonable belief" that the issuer is eligible);
- the offering is an eligible registered offering; and
- the additional conditions of Rule 433 are met.

"Ineligible issuers" for these purposes include the same group that are ineligible to qualify as WKSIs, with one exception. An ineligible issuer (other than blank check companies, shell companies and penny stock companies) may nevertheless use a free writing prospectus consisting only of a description of the terms of the offering, such as a term sheet. Ineligible transactions include certain business combinations, as well as offerings on Form S-8 other than by a WKSI.

D. Rule 433

Rule 433 sets forth the conditions for use of a free writing prospectus. These include the following.

1. Prospectus-Delivery Requirements

a) WKSIs and Seasoned Issuers

In connection with offerings of any Rule 164 eligible securities by WKSIs, and most primary offerings by seasoned issuers, the issuer and other offering participants may use a free writing prospectus at any time during the offering process once a registration statement has been filed. There is no requirement to deliver a statutory prospectus with or in advance of a WKSI or seasoned issuer free writing prospectus; a legend containing information regarding how to obtain a statutory prospectus suffices.

b) Non-Reporting Issuers and Unseasoned Issuers

Non-reporting and unseasoned issuers (including all voluntary filers), and other offering participants, may use a free writing prospectus once a statutory prospectus – including a price range in the case of an IPO – is on file with the SEC. In addition, the statutory prospectus must accompany or precede the free writing prospectus, with two exceptions:

- once a statutory prospectus has been provided, if there is no material change between that prospectus and the most recent statutory prospectus, then no additional statutory prospectus will need to be delivered; and

- in the limited situation where a free writing prospectus is not prepared by or on behalf of or used or referred to by the issuer or its underwriters – for example, an article by an unaffiliated journalist – and no consideration by the issuer or other offering participant is given for publication, no statutory prospectus will need to be provided (although one will need to be on file with the SEC prior to the communication). This exclusion would not, however, protect retransmission of such a free writing prospectus by offering participants.

For electronic free writing prospectuses, this prospectus-delivery requirement can be met by including an active hyperlink to the statutory prospectus in the free writing prospectus. In other words, a physical prospectus will not need to be delivered if the free writing prospectus is delivered by email. As a result, in most instances, we expect that free writing prospectuses used by non-reporting or unseasoned issuers will be electronic free writing prospectuses, such as email communications. A paper copy cannot contain an active hyperlink, so a paper free writing prospectus would have to be accompanied or preceded by actual delivery of a statutory prospectus.

2. Information and Legend Requirements

Under Rule 433, a free writing prospectus may include information "the substance of which is not included in the registration statement." But this information must not "conflict with:"

- information contained in the registration statement; or
- information in the issuer's Exchange Act reports that are incorporated by reference into the registration statement.

Free writing prospectuses must also contain a prescribed legend.

The final release explains that disclaimers of responsibility or liability that are impermissible in a statutory prospectus are also impermissible in free writing prospectuses. These would include disclaimers regarding accuracy, completeness or reliance by investors; statements requiring investors to read the registration statement; language indicating that the free writing prospectus is not an offer; and, for filed free writing prospectuses, statements that the information is confidential. As discussed below, inclusion of information deemed to "conflict" with information in the registration statement or inclusion of a prohibited disclaimer has the draconian result of triggering a Section 5 violation.

3. Filing Requirements

With certain exceptions noted below, an issuer or offering participant must file a free writing prospectus with the SEC no later than the day the free writing prospectus is first used.

a) Issuer Filing Requirements

An issuer must file:

- any "issuer free writing prospectus," which is defined as:
  - a free writing prospectus prepared by or on behalf of the issuer; or
  - a free writing prospectus used or referred to by the issuer;

- any "issuer information" – *i.e.*, material information about the issuer or its securities provided by or on behalf of the issuer – contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant ("but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from issuer information");[14] and

- a description of the final terms of the issuer's securities contained in a free writing prospectus prepared by or on behalf of the issuer or any offering participant.

Information is considered prepared or provided by or on behalf of an issuer if the issuer or an agent or representative of the issuer authorizes the communication or information or approves the communication or information before it is used. The final release explains that a selling security holder unaffiliated with the issuer is treated like any other offering participant, but a selling security holder that is an affiliate of the issuer and prepares, uses or refers to a free writing prospectus needs to consider whether it is acting by or on behalf of the issuer.

In other words, we think issuers will be required to file free writing prospectuses under most circumstances. Common situations will likely include:

- an underwriter drafts a free writing prospectus that the issuer reviews and approves (this would be a free writing prospectus prepared by or on behalf of the issuer);

- an underwriter drafts a free writing prospectus that the issuer uses or refers to, such as a road show presentation;

- an issuer distributes an underwriter's free writing prospectus, even though the issuer was not involved in preparing it (this would be a free writing prospectus used by the issuer); or

- an issuer provides an underwriter with information, and the underwriter then drafts and distributes a free writing prospectus without issuer involvement (this would be issuer information in a free writing prospectus used by an offering participant).

b) Offering Participant Filing Requirements

Any other offering participant, such as an underwriter, must file every free writing prospectus that it uses or refers to, and is distributed by it in a manner reasonably designed to lead to its "broad unrestricted dissemination." The final release explains that a website restricted to an investment bank's customers or a subset of its customers will not require filing, regardless of the number of distributees. Similarly, an email sent by an underwriter only to its customers will not require filing, regardless of the number of customers receiving the email distribution.

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[14] We believe this exception is intended to make clear that the issuer does not have a responsibility to file already available issuer information that is picked up and reworked by third parties and then republished.

c) Exceptions to the Filing Requirements

There are certain exceptions to the requirement to file a free writing prospectus. These include:

- issuers and other offering participants do not need to file a free writing prospectus that does not contain "substantive changes from or additions to" a previously filed free writing prospectus;
- issuers do not need to file issuer information contained in a free writing prospectus prepared by or on behalf or used by any other offering participant if that information is already included in a previously filed statutory or free writing prospectus relating to the offering; and
- issuers and other offering participants do not need to file a free writing prospectus that is a preliminary term sheet, although a free writing prospectus that is a final term sheet must be filed by the issuer within two days of the later of establishing the terms and the date of first use.

4. Taking the Show on the Road

Rule 433 provides that a road show[15] that is deemed to be a written communication is a free writing prospectus, but with one exception need not be filed. Bear in mind that the term "written communication" now includes most electronic communications, but not communications in real-time to a live audience (other than TV broadcasts) that do not originate in recorded form. Accordingly, a live road show is not a free writing prospectus, even if it is simultaneously transmitted to other locations (such as overflow rooms). In addition, slides or other visual aids transmitted simultaneously with communications of this sort would also not be considered written communications.

The one exception where filing is required is for road shows that are written communications and hence free writing prospectuses (such as pre-recorded electronic road shows) in connection with an IPO. But even these road shows need not be filed if the issuer makes at least one version of a *bona fide* electronic road show[16] available without restriction electronically to any person (for example on its unrestricted web site). Pre-recorded road shows outside the context of an IPO are considered to be free writing prospectuses but need not be filed.

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[15] Rule 433 defines a "road show" as an offer (other than a statutory prospectus) that contains a presentation regarding an offering by one or more members of an issuer's management, and includes discussion of the issuer, management or the securities being offered.

[16] Rule 433 defines a "*bona fide* electronic road show" as a road show that is a written communication transmitted by graphic means. If the issuer is using more than one electronic road show, the *bona fide* electronic road show posted on the issuer's website must include a discussion of the "same general areas of information" regarding the issuer, management and the securities being offered as contained in such other electronic road show or road shows for the same offering. The final release states that the *bona fide* electronic road show need not, however, address all of the same subjects or provide the same information as the other versions, and also need provide an opportunity for questions and answers (even if this is done in other versions of the road show).

5. Information on an Issuer's Web Site

Under Rule 433, offers of securities contained on an issuer's website or hyperlinked from the issuer's website to a third-party website will be free writing prospectuses that must be filed (unless a Rule 433 exemption from filing otherwise applies). Historical information about an issuer, however, that is identified as such and is located in a separate section of an issuer's website will not be considered a free writing prospectus if that information has not been incorporated by reference into or otherwise included in a prospectus for the offering, or otherwise used or referred to in connection with the offering. Information on the issuer's website, such as past earnings releases, may also be protected under Rule 168 or 169 without segregation, if the requirements of those rules are satisfied.

It will be interesting to see how (and to what extent) issuers involved in offerings will change the content of their websites.

6. Media Free Writing Prospectuses – The *Google* Provision

Rule 433 provides that any written offer that includes information provided, authorized or approved by the issuer or any other offering participant that is prepared and disseminated by an unaffiliated media third party will be deemed to be an issuer free writing prospectus. Nevertheless, the requirements for prior or current prospectus delivery, legending and filing that would otherwise apply to these free writing prospectuses will be deemed satisfied if:[17]

- no payment is made or consideration given for the publication by the issuer or other offering participants; and

- the issuer or other offering participant files the media free writing prospectus with the required legend within four business days after the issuer or other offering participant becomes aware of publication or dissemination (provided that the free writing prospectus need not be filed if the substance of the written communication has previously been filed).

Any filing of a media free writing prospectus in these circumstances may include information that the issuer or offering participant believes is needed to correct information included in the free writing prospectus. In addition, in lieu of filing the media free writing prospectus as actually published, the issuer or offering participant may file a copy of the materials provided to the media, including transcripts of interviews.

The media free writing prospectus concept appears to be a formal response to the *Playboy* magazine article about Google that stirred up so much controversy, as well as similar (albeit less colorful) situations that have arisen in the past.

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[17] Note, however, that retransmission by an offering participant of such a free writing prospectus would itself be a separate free writing prospectus subject to Rule 433's requirements for prospectus delivery, legending and filing.

7. Record Retention

Rule 433 requires issuers and other offering participants to retain all free writing prospectuses they have used and that have not been filed for three years from the initial *bona fide* offering of the securities.

E. Some Additional Points About Free Writing Prospectuses

1. Free Writing Prospectuses are not Part of the Registration Statement but are Subject to 12(a)(2) Liability

A free writing prospectus will not be considered to be part of the registration statement. As a result, it will not be subject to liability under Section 11. But every free writing prospectus, regardless of whether it is filed, will be subject to liability under Section 12(a)(2) (and other anti-fraud provisions of the federal securities laws, such as Section 17(a)(2) in the case of actions by the SEC). In addition, the final release notes that statements at road shows are subject to Section 12(a)(2) liability (to the extent the statements are an "offer" of securities), regardless of whether the road show constitutes a free writing prospectus. In other words, oral statements at live road shows will be subject to Section 12(a)(2).

2. Minor Deviations – Rule 164

The failure to comply with the conditions of Rule 433 will result in a violation of Section 5(b)(1). Rule 164 provides some relief from the harsh consequences of such an event in the case of certain "immaterial or unintentional" deviations from the requirements of Rule 433. In particular:

- a failure to file or delay in filing a free writing prospectus will not be a violation, so long as a good faith and reasonable effort was made to comply with the filing requirement and the free writing prospectus is filed as soon as practicable after the discovery of the failure to file;

- a failure to include the required legend will not be a violation, so long as (i) a good faith and reasonable effort was made to comply with the legending requirement, (ii) the free writing prospectus is amended to include the required legend as soon as practicable after the discovery of the omitted or incorrect legend and (iii) if the free writing prospectus has been transmitted without the required legend, it must be retransmitted with the legend by substantially the same means as, and directed to substantially the same purchasers to whom, the original free writing prospectus was sent; and

- a failure to comply with the record retention requirements of Rule 433 will not be a violation, so long as a good faith and reasonable effort is made to comply with the record retention requirements.

3. Removal of Existing Restrictions on Electronic Road Shows

In view of Rule 433, the SEC is withdrawing a series of no-action letters that governed the use of electronic road shows in connection with registered offerings. Embedded in these no-action letters were many restrictions and conditions that will no longer apply to electronic road shows under Rule 433. There will no longer be any reason, for example, to limit the audience of an electronic road show in any way, to permit the re-transmission only of a live presentation in front of an audience, to limit viewers to seeing it only within a 24-hour period or a limited number of times, or to prohibit the printing or copying of the road show.

F. Issues Raised by the New Rules

Under the current regime, statutory prospectuses used in connection with securities offerings can be too long, too dense and arrive too late. We share the SEC's desire to open the range of permitted written communications to a broader range of documents, and believe this can lead to more timely, investor-friendly and widely read communications. Nevertheless, we see a range of issues under new Rules 164 and 433. These include the following.

1. Failure to Satisfy Rule 433 Due to Conflicting Information

It may be difficult in practice to draw the line contemplated by Rule 433's requirement that information in a free writing prospectus not "conflict with" information in the registration statement or previously filed Exchange Act reports. Although the information in a free writing prospectus may go beyond that which is otherwise already included in the registration statement, issuers and underwriters may feel compelled to include the information contained in the free writing prospectus in the registration statement or prospectus supplement (and, therefore, subject the information to Section 11 liability), because the consequences of not meeting the conditions set forth under Rule 433 will be a potential Section 5 violation for a non-conforming prospectus. As a result, some deal teams may decide only to allow free writing prospectuses that are identical to portions of the statutory prospectus. For example, we think it likely that an email of the "box summary" section of the statutory prospectus might well become a common form of free writing prospectus for seasoned issuers and WKSIs.

2. Rating Agency Reports

The final release declines to exclude rating agency reports from the definition of free writing prospectuses. However, the release acknowledges that whether a particular communication constitutes an offer, and thus a free writing prospectus, will continue to be based on facts and circumstances. In particular, it points to the "entanglement" and "adoption" theories for analyzing rating agency reports and releases.

We believe that issuers and underwriters should feel comfortable in continuing the current practice with regard to rating agency reports, keeping mindful of the hazards of becoming deeply enmeshed in the process of reviewing or commenting on rating agency reports, or of distributing those reports. Even though the final release is not completely clear on the point, we do not think the SEC intends that rating agency press releases be deemed to be issuer free writing prospectuses, absent adoption or entanglement.

3. Liability for Underwriters

a) Cross-Liability Issues – Rule 159A

Possibly the most fundamental question for underwriters is which free writing prospectuses subject them to liability? To address this issue, new Rule 159A provides that an offering participant will not be considered to offer or sell securities to a particular person "by means of" a free writing prospectus for Section 12(a)(2) purposes unless:

- the offering participant used or referred to the free writing prospectus in offering or selling securities to that person;
- the offering participant sold securities to that person and "participated in the planning for the use of the free writing prospectus that was used by another offering participant to sell securities to that person;" or
- the offering participant was otherwise required to file the free writing prospectus under Rule 433 (as in the case of a free writing prospectus that it distributes by broad unrestricted dissemination).

In addition, under Rule 159A an offering participant will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed it with the SEC.

It remains to be seen whether these cross-liability rules adequately address the uncertainty over one deal team member's potential liability for free writing prospectuses that they did not use or prepare. We expect that standard form underwriting agreements and agreements among underwriters will be revised to impose some "rules of the road show" that will supplement the bare bones of Rule 159A. A key issue in this connection is whether reviewing or consenting in advance to the use of a free writing prospectus by another offering participant will be deemed to rise to the level of "planning for the use" of that prospectus and thereby subject the reviewing or consenting person to liability for the prospectus. We do not believe that a provision in an underwriting agreement or agreement among underwriters prohibiting the use of free writing prospectuses by syndicate members without the consent of the lead underwriter (designed to ensure that any free writing prospectuses comply with Rules 164 and 433) should be viewed as planning for the use of a prospectus. Accordingly, such a provision should not trigger cross liability for the lead underwriter.

We will be surprised if lead managers permit unfettered use of free writing prospectuses by syndicate members, even though Rule 159A would seem to permit this without any increase in the lead underwriter's liability. As a practical matter, it will be vital for deal participants to agree at an early stage (such as the organizational meeting) what will and will not be permitted by way of free writing prospectuses.

b) Due Diligence Issues for Underwriters

Closely related to the liability issue for underwriters is the question of establishing a due diligence defense under Section 12(a)(2). Since every free writing prospectus will be subject to Section 12(a)(2) liability, it remains to be seen what due diligence procedures underwriters will decide to conduct in order to be comfortable with the disclosure in a free writing prospectus. For example, will underwriters request comfort letters from auditors and negative assurance letters from counsel covering the information contained in these free writing prospectuses? Even if the materials were produced in part by the underwriters, as is the case with electronic road show presentations, will the same due diligence procedures on the issuer information extend to underwriter-prepared free writing prospectuses as well? There is little question that underwriters will demand strict control over the release of any free writing prospectuses during the offering process, which may limit the usefulness of these communications. We expect that underwriters (and law firms) will be revisiting traditional opinion and negative assurance practice in response to the new regime.

4. Distribution of a Statutory Prospectus by Non-Reporting and Unseasoned Issuers

Non-reporting and unseasoned issuers will be required to distribute a statutory prospectus with their free writing prospectus in nearly all cases where a "hard" copy of the free writing prospectus is delivered. As a result, broadly disseminating a hard copy free writing prospectus (for example, by issuing a press release or a widely distributed paid advertisement) will not be feasible because it will be impossible for the issuer or its underwriter to be sure that each person who receives a copy of the free writing prospectus was first provided with the latest statutory prospectus. While Rule 433 does not require delivery by the same medium, non-reporting and unseasoned issuers will be required to deliver something – merely referring to the availability of the statutory prospectus will not be enough. The exception from the delivery requirement in situations where there has not been a "material change" to the statutory prospectus may be hard to use in practice, since issuers and underwriters are likely to shy away from having to make this judgment.

The rules are much more permissive for free writing prospectuses distributed by email. The result is that for unseasoned issuers and non-reporting issuers, only free writing prospectuses in electronic form will be feasible in most cases, as they satisfy Rule 433's prospectus-delivery requirement if they contain an active hyperlink to the statutory prospectus. Perhaps the days of hard copy prospectuses are nearly over.

5. Transmission and Retransmission of Road Shows

Although live transmission of a road show, for example using a video phone link, is not considered to be a written communication (and hence not a free writing prospectus), a TV or radio broadcast is treated as a written communication (and hence a free writing prospectus). The rules and the final release do not make clear where the boundary lies between a live transmission and a TV broadcast. While the distinction between a video telephone call and a TV broadcast may be easily understood in today's technological environment, it likely will not be long before the difference is merely an amusing historical footnote.

In addition, subsequent *retransmission* of a road show that was recorded live will be considered a graphic communication and hence a free writing prospectus.

V. Fancy Carpentry – Improvements to the Shelf Offering Process

A. Automatic Shelf Registration for WKSIs

"Automatic shelf registration" is the big reward for WKSIs. Modifications to Forms S-3 and F-3, coupled with new Rule 430B, will allow WKSIs (and in certain cases, their majority-owned subsidiaries) to register (without paying a filing fee) an unspecified amount of securities on a shelf registration statement that becomes automatically effective, so that sales can take place immediately after filing, without risk of SEC review. In theory, that registration statement could be as brief as two or three pages. Filing such an automatic shelf registration will also remove the WKSI from the ambit of Section 5(c), thereby permitting "offers" by the WKSI or other offering participants at any time.

1. Definition of Automatic Shelf Registration Statement

An automatic shelf registration statement is a registration statement on Form S-3 or F-3 filed by a WKSI that meets certain requirements, outlined below.

Any registrant that is an eligible WKSI as of the relevant determination date may use Form S-3 or F-3 to file an immediately effective registration statement for offerings of most types of securities, as well as certain securities of its majority-owned subsidiaries (including unconditional guarantees of the parent's securities). The determination date for these purposes is the latest of (i) the time of filing of the issuer's most recent shelf registration statement; (ii) the time of the most recent amendment to its shelf registration statement for purposes of satisfying Section 10(a)(3); and (iii) the date of filing the issuer's most recent annual report on Form 10-K or 20-F (if it has not filed a shelf registration statement for the prior 16 months). This means that an issuer must test its eligibility for automatic shelf registration both on the initial filing date and at the time of each annual Section 10(a)(3) update (which is typically accomplished by means of the filing of an incorporated Form 10-K or 20-F annual report).

2. Rules 462 and 401 – Immediate Effectiveness of Automatic Shelf Registration Statement

Under revised Rule 462, an automatic shelf registration statement, and any post-effective amendment to an automatic shelf registration statement (including an amendment to add additional classes of securities under Rule 413) becomes effective immediately upon filing with the SEC. Under a related amendment to Rule 401(g), an automatic shelf registration statement will be deemed to be on the proper form unless the SEC notifies the issuer of its objection to use of the form. (If the SEC does so, an issuer cannot proceed with subsequent offerings without amendment to the automatic shelf registration statement and for on-going offerings will have to file a post-effective amendment to reflect that the registration statement is no longer an automatic shelf registration statement.)

3. Rule 430B – Omitted Information From an Automatic Shelf Registration Statement

Under Rule 430B, a prospectus filed as part of an automatic shelf registration statement may omit:

- information that is unknown or not reasonably available to the issuer (pursuant to Rule 409);
- whether the offering is a primary or secondary offering, or a mix between the two;
- the plan of distribution for the securities;
- a description of the securities registered other than an identification of the name or class of the securities;
- the identity of other issuers; and
- the names of any selling security holders and amounts of securities to be registered on their behalf.

In other words, an automatic shelf registration statement will be a very skinny document, limited to a few pages of boilerplate, the name(s) of the registrant(s) and the types of securities being registered (for example, common stock, preferred stock and debt securities). This is, in effect, the long-anticipated arrival of company registration.

Rule 430B provides that virtually all of the omitted information can be included in a post–effective amendment to the registration statement, a prospectus supplement filed under Rule 424(b) or by incorporation by reference of Exchange Act reports. In addition, under revised Rule 462, a post-effective amendment to an automatic shelf registration statement will become effective immediately upon filing. Note, however, that an issuer adding new types of securities or new registrants must do so by immediately effective post-effective amendment, which will require appropriate signature pages, Exhibit 5 opinions and consents.

4. Rule 413 – Adding New Classes of Securities to an Automatic Shelf Registration Statement

Under revised Rule 413, WKSIs will be allowed to add new classes of securities to an automatically effective shelf registration statement (and certain securities of its majority-owned subsidiaries) at any time through a post-effective amendment. That post-effective amendment will itself automatically become effective upon filing (by virtue of Rule 462). Details about the new class of securities to be offered can be provided via a post-effective amendment, a prospectus supplement or an incorporated Exchange Act report.

5. Rules 456 and 457 – Pay-as-You-Go Registration Fees for an Automatic Shelf Registration Statement

Under new Rules 456 and 457, WKSIs registering securities under the automatic shelf registration process may defer paying filing fees until the time of the actual offering when a prospectus supplement under Rule 424(b) is due.[18] For each shelf takedown, a WKSI will include the amount of these "pay-as-you-go" registration fees (in the "Calculation of Registration Fee" table) either in a Rule 424(b) prospectus or in a post-effective amendment filed at the time of fee payment.

A registration statement relying on pay-as-you-go registration fee payment will be considered filed upon receipt by the SEC, and the securities will be considered registered if the fee has been paid and the post-effective amendment or Rule 424(b) prospectus including the revised calculation table has been filed.

6. Issues Raised by Automatic Shelf Registration

The new "on demand" shelf registration program for WKSIs is a positive change. Under the current rules, however, the shelf registration process imposes significant time pressure on underwriters seeking to complete their due diligence procedures in a timely manner. This pressure will only be amplified by the use by WKSIs of automatic shelf registrations as a result of the new rules. This pressure can be ameliorated through increased reliance on, and involvement of, designated underwriters' counsel for WKSIs. It remains to be seen, however, whether WKSIs will elect to involve designated underwriters' counsel in the preparation of Exchange Act reports.

B. Other Shelf-Related Changes

1. Rule 430B – Omitted Information From a Shelf Registration Statement Other Than an Automatic Shelf Registration Statement

In addition to automatic shelf registration statements, Rule 430B covers offerings such as immediate, delayed and continuous primary offerings by shelf-eligible issuers under Rule 415(a)(1)(x), and secondary offerings by certain primary shelf-eligible issuers. Rule 430B permits a prospectus filed as part of shelf registration statements in these offerings to omit (subject to certain conditions):

- information that is unknown or not reasonably available to the issuer (pursuant to Rule 409); and

- the identities of selling shareholders and the amounts of securities being registered on their behalf, subject to satisfying certain conditions.

Rule 430B provides that the omitted information can be included in a post-effective amendment to the registration statement, a prospectus supplement filed under Rule 424(b) or by incorporation by reference of Exchange Act reports.

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[18] If the issuer fails, after a "good faith effort" to pay the filing fee by the required time, it will still be deemed to have timely paid if it pays the fee within four business days of its original due date.

2. Rule 430B – Consents

Rule 430B provides that no additional consents of auditors and other experts will be required in connection with the use of a prospectus supplement, unless a prospectus supplement, any incorporated Exchange Act report or post-effective amendment "contains new audited financial statements or other information as to which the auditor is an expert and for which a new consent is required." This is a significant and positive change from the SEC's proposals.

3. Additional Modifications to Rule 415

The new rules contain a number of welcome changes to Rule 415. The changes, which are discussed below, eliminate certain barriers to the use of shelf programs that currently exist and will make Rule 415 offerings significantly more attractive for issuers that do not qualify for WKSI status. The changes to Rule 415 are the big payoff for non-WKSI issuers.

a) Elimination of Limitation on Amount of Securities Registered

Rule 415, as currently in effect, generally limits the amount of securities registered in a shelf registration statement to an amount that the issuer actually intends to offer or sell within two years from the registration statement's effective date. As modified, Rule 415 eliminates this requirement for primary offerings under Rule 415(a)(1)(x) registered on Form S-3 or F-3, and continuous offerings under Rule 415(a)(1)(ix) registered on those Forms. The requirement remains in effect for other shelf offerings.

b) Shelves Have a Three-Year Shelf Life

Under amended Rule 415, shelf registrations under Sections 415(a)(1)(vii) (mortgage-related), 415(a)(1)(ix) (continuous offerings) and 415(a)(1)(x) (delayed or continuous offerings) terminate automatically on the third anniversary of the initial effective date. If, however, a new registration statement has been filed prior to the end of the three-year period, then it will become immediately effective in the case of an automatic shelf registration statement filed by a WKSI and in all other cases:

- securities covered by the prior registration statement may continue to be sold until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the initial effective date of the prior registration statement; and

- a continuous offering of securities covered by the prior registration statement that is commenced within three years of the initial effective date may continue until the effective date of the new registration statement.

Unsold securities and unused fees may be carried forward to the new shelf registration statement. Once the new shelf registration statement is declared effective, the offering under the earlier registration statement will be deemed terminated.

c) Immediate Shelf Takedowns under Rule 415(a)(1)(x)

Rule 415(a)(1)(x) is being amended to allow primary offerings on Form S-3 or F-3 to occur immediately after effectiveness of a shelf registration statement. This effectively eliminates the SEC's current prohibition against using a "convenience shelf."

d) Elimination of "At-the-Market" Offering Restrictions

Rule 415(a)(4) has been amended to eliminate the current restrictions on primary "at-the-market" offerings of equity securities under Rule 415(a)(1)(x) for seasoned issuers. An "at the market" offering is made into an existing trading market at other than a fixed price. Only issuers eligible for primary offerings on Form S-3 or F-3 will be permitted to make at-the-market offerings under revised Rule 415(a)(4). Therefore, smaller issuers – those most likely to want to take advantage of the flexibility and cost-savings of these offerings – will be unable to do so.

4. Elimination of Rule 434

Because the new rules regarding free writing prospectuses allow the use of a term sheet, Rule 434 has been eliminated.

5. Modification to Issuer Undertakings Under Item 512(a)

Item 512(a) of Regulation S-K currently requires an issuer filing a shelf registration statement to undertake to file a post-effective amendment to:

- include in the registration statement any prospectus required by Section 10(a)(3) of the Securities Act;
- reflect in a prospectus included in the registration statement (*i.e.*, by filing a post-effective amendment) any facts or events after the effective date 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 (again, by filing a post-effective amendment) 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.

For primary offerings on Form S-3 or Form F-3, the amendments to Item 512(a) will permit all of the disclosures required by these undertakings to be contained (i) in any filed prospectus supplement deemed part of and included in the registration statement or (ii) any Exchange Act report that is incorporated by reference into the registration statement. For example, an issuer may use an incorporated Form 8-K or 6-K to satisfy this undertaking. If the undertaking would require the filing of a consent, that consent may be filed by post-effective amendment or by an incorporated Exchange Act report. This change will eliminate the cumbersome post-effective amendment requirements of the current regime associated with "fundamental" disclosure changes and changes to the plan of distribution section and will streamline current practice in a welcome and helpful way. However, only seasoned issuers will benefit and the old rules still apply to S-1 and F-1 issuers.

6. Form S-3 and Form F-3 Modifications

Forms S-3 and F-3 have been modified to expand the categories of majority-owned subsidiaries that will be eligible to register their non-convertible securities or guarantees.

VI. No Free Lunch – Liability Reforms

The final rules relax the limitations on communication and eliminate the prohibition on the sale of securities using documents other than a final statutory prospectus. But these rule changes contain sticks in addition to carrots. As noted above, the new rules clearly establish that Section 12(a)(2) liability extends to free writing prospectuses. They also make certain other revisions to the existing liability regime.

A. Rule 159 – Timing of the Investment Decision

1. The New Rule

According to the SEC, an investor makes an investment decision at the time of the contract of sale for securities (*i.e.*, at the time the offering is priced in most underwritten deals). Much of the current liability regime arrives late to the party, in the SEC's view, by attaching to the final prospectus, which is not delivered until after the contract of sale.

The SEC has accordingly adopted new Rule 159 to address the liability implications of this timing issue. Rule 159 provides that, for purposes of determining whether a prospectus or oral statement included a material misstatement or omission at the time of the contract of sale under Sections 12(a)(2) or 17(a)(2), "any information conveyed to the purchaser only after such time of sale" will not be taken into account.

The key implication of Rule 159 is that Section 12(a)(2) and 17(a)(2) liability will be determined by reference to the total package of information conveyed to the purchaser at or before the time of sale. Accordingly, a preliminary prospectus, a free writing prospectus or an oral communication at a "road show" may give rise to liability under Section 12(a)(2) (in suits by private plaintiffs) and Section 17(a)(2) (in suits by the SEC), even if later corrected or supplemented in a final prospectus that is filed or delivered after pricing. In other words, changes made to the disclosure after pricing and included in the final prospectus will not provide a liability shield for the issuer or its underwriters. The critical inquiry will be whether the preliminary prospectus, as supplemented at the time of pricing (including by way of one or more free writing prospectuses), included an untrue statement of material fact, or omitted to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading. The final prospectus will be irrelevant, except, of course, for Section 11 purposes.

2. Issues Raised by Rule 159

Rule 159 will place a great deal of pressure on issuers and underwriters to correct any misstatements or omissions contained in a preliminary prospectus at the time of pricing. Under the new regime, correcting information contained in the preliminary prospectus at the time of pricing might be the most important function served by the use of a free writing prospectus. A corrective free writing prospectus will be permitted to be distributed electronically to potential investors (with a hyperlink to the

preliminary prospectus in the case of an IPO) and filed with the SEC. This will allow distribution to investors of a "sticker" to the original preliminary prospectus without having to recirculate a full revised statutory prospectus.

It remains to be seen whether underwriters with a due diligence defense under Section 12(a)(2) will change their diligence procedures in view of the potentially heightened liability with respect to preliminary offering materials. For example, underwriters do not currently obtain comfort letters from auditors or negative assurance letters from counsel on preliminary prospectuses. As a result of the new rules, underwriters may begin asking for comfort letters and negative assurance covering the "package" of statutory and free writing prospectuses that have been conveyed to all purchasers by the time of pricing. Alternatively, underwriters may elect not to tolerate any difference between the disclosure available at pricing and the disclosure in the final prospectus. We think it would be a welcome development if pricing date "stickers" became commonplace and lost their negative stigma.

In addition, Rule 159 does not address disclosure in Rule 144A offerings, although it will likely cause deal teams to focus more on the analogous timing question in Rule 144A deals. As mentioned above, we believe that all major underwriting houses and their law firms will be re-evaluating traditional opinion and negative assurance practice in light of Rule 159.

B. Rule 430B; Rule 412

Consistent with Rule 159, Rule 430B provides that information that is part of or deemed incorporated in a registration statement or prospectus, and that is provided after the effective date of the registration statement, will not supersede or modify the information conveyed to an investor at an earlier time of sale. (Modifications are also being made to Rule 412 to bring it into line with the revised shelf registration rules.)

C. Rule 159A – Issuer as Seller Under Section 12(a)(2)

Rule 159A provides that for purposes of Section 12(a)(2), regardless of the underwriting method used to sell securities, the term "seller" will include the issuer of the securities sold to a person as part of the initial distribution of those securities. (Rule 159A is a direct response to a line of cases suggesting that an issuer did not have Section 12(a)(2) liability to a purchaser with whom it was not in privity of contract.) Under Rule 159A, the issuer will be deemed to offer or sell securities by means of:

- any preliminary prospectus or prospectus required to be filed under Rule 424;
- any free writing prospectus relating to the offering prepared by or on behalf of the issuer or used or referred to by the issuer;
- the portion of any other free writing prospectus relating to the offering containing material information about the issuer or its securities provided by or on behalf of the issuer; and
- any other communication that is an offer made by or on behalf of the issuer.

For purposes of Rule 159A, information and communications are provided "by or on behalf" of an issuer if an issuer or an agent or a representative of the issuer authorizes or approves the information or communication before use. However, underwriters and dealers will not be treated as agents or representatives of the issuer – and hence will not be deemed to be acting by or on behalf of the issuer – solely by virtue of acting as offering participants. As a result, underwriters and dealers will not be deemed to be a "seller" for Section 12(a)(2) purposes under these circumstances.

D. Interaction Between Section 11 and Section 12(a)(2)

Because free writing prospectuses will not be deemed to be part of a registration statement, issuers and underwriters will need to consider carefully whether any information in those documents should be filed as part of the registration statement. Including the information in the registration statement will subject that information to Section 11 liability. However, failure to include the information in the registration statement, by including the same text in the prospectus or otherwise, will mean that the issuer and underwriters will lose the benefit of any corrections in those documents for Section 11 purposes. In addition, as mentioned above, if a free writing prospectus is found to "conflict with" the prospectus (or any incorporated Exchange Act documents), it will not be treated as a free writing prospectus and will instead be a "gun jumping" violation of Section 5. As a result, we do not expect to see any significant divergence between the content of free writing prospectuses and the content of registration statements.

VII. A Grab Bag of Additional Reforms to the Offering Process

The new rules contain a number of additional reforms to the offering process. These are generally more incremental and less dramatic than the rules discussed above.

A. Research Reports – Amendments to Rules 137, 138 and 139

Rules 137, 138 and 139 of the Securities Act, as currently in effect, set out the circumstances under which a broker or dealer may publish research contemporaneously with a registered offering without violating the Section 5(c) prohibitions on pre-filing offers or the form of prospectus requirements of Section 5(b)(1). The amendments to these Rules define "research report" for the first time, and make certain incremental changes to the existing Rules.

1. Definition of Research Report

Under the new versions of Rules 137, 138 and 139, a "research report" is a written communication that includes information, opinions or recommendations with respect to securities or an issuer, or an analysis of securities or an issuer, whether or not it provides information reasonably sufficient for an investment decision. Bear in mind that the term "written communication" now includes a wide variety of electronic communication, such as emails and websites. According to the final release, the definition of "research report" is intended to encompass all types of research reports, whether issuer-specific or industry compendiums separately identifying the issuer. In addition, the definition (and the related safe harbors) do not cover oral communications.

2. Rule 137 – Publication of Research by Non-Participating Broker-Dealers

Old Rule 137 provides that a broker or dealer that is not a participant in a registered offering but publishes or distributes research on an issuer that files Exchange Act reports will not be deemed to make offers of a security or to participate in a distribution of those securities as an underwriter.

As revised, Rule 137 now applies to securities of any issuer, including non-reporting issuers and voluntary filers (but excluding blank check companies, shell companies and penny stock issuers). Like the old version of Rule 137, amended Rule 137 will be available only to brokers and dealers who are not participating in the registered offering of the issuer's securities and have not received compensation from the issuer, its affiliates or participants in the securities distribution. However, amended Rule 137 also adds a condition that the broker-dealer must publish or distribute the research report in the regular course of business.

3. Rule 138 – Publication of Research by an Underwriter on Other Securities of an Issuer

Old Rule 138 provides that a broker or dealer participating in a distribution of securities by an issuer that is Form S-3 or F-3 eligible (or, in the case of a foreign private issuer only, meets certain conditions of Form F-3) will not be deemed to make an offer of those securities if it publishes or distributes research that is confined to a different type of security of that issuer. For example, old Rule 138 allows publication of research with respect to debt securities by an underwriter when participating in a distribution of the issuer's common stock, and vice versa.

Revised Rule 138:

- covers research reports on all reporting issuers, other than voluntary filers, that are current in their Exchange Act reporting (with the exception of blank check companies, shell companies and penny stock issuers);

- adds a requirement that the broker or dealer publish research reports on the types of securities in question in the regular course of its business;[19] and

- applies to unregistered transactions (codifying an interpretation announced in the SEC's 1998 "Aircraft Carrier" proposals). In particular, if the conditions of the Rule are otherwise met, publication of research by a broker-dealer will not be considered to be an offer or a general solicitation in connection with a Rule 144A transaction. It will likewise not be considered to be prohibited directed selling efforts in connection with a Regulation S transaction.

[19] Previously, Rule 138 had required that the broker-dealer publish research in the regular course, but not necessarily research on the types of securities covered by the research report.

The final release explains that the regular course requirement under revised Rule 138 does not mean that the broker or dealer must have a history of publishing research reports about the particular issuer or its securities. Instead, the research report must cover the "same types of securities." It remains to be seen whether the concept of "types" of securities extends beyond categories of *securities* (such as equity securities or debt securities) to categories of *issuers* (such as securities of companies in a given industry).

4. Rule 139 – Publication of Research About the Securities Being Offered by an Underwriter

Old Rule 139 provides that a broker or dealer participating in a registered offering by certain seasoned issuers can publish on-going research about the issuer and its securities without being deemed to offer those securities by way of its research reports. Rule 139 research can take the form of issuer-specific reports, or more general reports covering an industry sector.

Revised Rule 139 covers essentially the same group of issuers as old Rule 139 – namely, Form S-3 or Form F-3 eligible issuers that are current in their Exchange Act reporting for issuer-specific research reports; Exchange Act reporting companies for industry research reports; and certain foreign private issuers for both types of reports. However, the revised Rule excludes research reports about blank check companies, shell companies and penny stock issuers from the scope of the safe harbor. It also excludes voluntary filers.

- ***Issuer-Specific Reports:*** To qualify for the revised Rule 139 safe harbor, the broker-dealer will have to publish issuer-specific research reports in the regular course of its business. That publication may not represent the initiation of publication of research about the issuer or its securities (or re-initiation of publication following discontinuation). The final release explains that this requirement means that the broker-dealer must have previously published at least one research report on the issuer or its securities, or have published one such report following discontinuation of coverage.[20]

- ***Industry Reports:*** Revised Rule 139 requires that the broker or dealer must publish research in the regular course of its business and, at the time of the publication of the research report, must include similar information about the issuer or its securities in similar reports. It also eliminates the current requirement that the broker-dealer not make a more favorable recommendation in the report than that contained in previous reports, and in fact the broker-dealer need not have included any recommendation in its prior reports.

- ***Rule 144A/Regulation S Offerings:*** As with Rule 138, if the other conditions of amended Rule 139 are met, research may be published in connection with Rule 144A or Regulation S offerings.

[20] Unlike the current version of the Rule, revised Rule 139 drops the requirement that a broker-dealer must publish research reports "with reasonable regularity."

5. Issues Raised by the New Rules

a) Interaction Between Research Reports and Free Writing Prospectuses

Because amended Rules 137, 138 and 139 exclude research reports from the definition of an "offer" under Section 5(c) and Section 2(a)(10), they will not be free writing prospectuses subject to the requirements of Rule 433. To the extent that a given research report does not fit squarely within the four corners of the Rules, however, underwriters may be left wondering if filing and legending requirements (and Section 12(a)(2) liability) apply.

b) How About Voluntary Filers?

The final release states that Rule 139 is not available for voluntary filers. This may be a step backwards, since practitioners have generally been comfortable concluding that research about voluntary filers that otherwise meets the requirements of Rule 139 ought to be permissible. Indeed, it seems hard to understand why all three Rules should not be available to voluntary filers. We would expect the policies underlying these three Rules would extend to voluntary filers in most cases.

B. Amendments to Regulation FD

1. The New Rules

Currently, Regulation FD excludes oral or written disclosures made in connection with a registered securities offering. The reforms to Regulation FD clarify the types of registered offerings eligible for exclusion from Regulation FD. As modified, Regulation FD will not apply only to disclosures made in the following communications in connection with a registered securities offering for capital-raising purposes:

- a registration statement filed under the Securities Act, including a prospectus contained in a registration statement;
- a free writing prospectus used after the registration statement is filed that meets the requirements of a statutory prospectus – *i.e.*, that satisfies Rules 164 and 433;
- any other Section 10(b) prospectus;
- a notice permitted by Rule 135 (the safe harbor for communications related to securities offerings made prior to the filing of a registration statement);
- a communication permitted by Rule 134 (the safe harbor for communications made after filing a registration statement); and
- an oral communication made in connection with the registered offering after the registration statement is filed.

In addition, the Regulation FD exclusion also applies to registered offerings by selling security holders under Rule 415(a)(1)(i), if the offering also includes a registered primary offering that is a capital-raising transaction for the account of the issuer.

2. Issues Raised by the Amendments to Regulation FD

Under the amendments, communications made in connection with pure secondary public offerings will be subject to Regulation FD. We note that a popular exit strategy for private equity firms that purchase companies in a leveraged buy out (and have publicly traded high yield debt securities outstanding as a result) is to complete a pure secondary IPO (*i.e.*, no primary shares of the company are issued). One implication of the new rules will be that all of the material nonpublic information conveyed during the road show for these IPOs will now be subject to public release under Regulation FD. These situations will raise interesting questions about how to communicate the research analysts' projections without having to do so in the form of a free writing prospectus.

C. Prospectus-Delivery Reforms – Access Equals Delivery

1. Current Prospectus-Delivery Requirements; New Rules 172, 173, 174 and 153

Section 5(b)(2) currently requires physical delivery of a prospectus meeting the requirements of Section 10(a) to each purchasing investor in a registered offering. In addition, Section 5(b)(1) prohibits the use of any non-conforming prospectuses. Since broker-dealers are required to send trade confirmations to securities purchasers, and since trade confirmations are not statutory prospectuses, this means that trade confirmations are currently required to be accompanied or proceeded by a final prospectus. Rules 172, 173, 174 and 153 work together to establish a new "access equals delivery system" for most capital-raising transactions.[21]

2. Rule 172

Under Rule 172, after the effective date of a registration statement:

- written trade confirmations and notices of allocation of securities will be exempt from Section 5(b)(1)'s prohibition on non-conforming prospectuses; and

- any obligation to deliver a final prospectus under Section 5(b)(2) will be deemed to be met provided the issuer makes a good faith and reasonable effort to file a final prospectus meeting the requirements of Section 10(a) by the required Rule 424 prospectus filing date (and if it fails timely to file, it files the prospectus as soon as possible thereafter).

In order to satisfy Rule 172, the registration statement cannot be the subject of any stop orders and the issuer cannot be subject to any cease and desist proceedings.

[21] The Rules are not available for certain types of transactions, notably offerings registered on Form S-8.

3. Rule 173

Under Rule 173, each underwriter or broker-dealer participating in an offering in which the final prospectus-delivery requirements apply may deliver, in lieu of a final prospectus, a notice to the effect that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of Rule 172.[22] The notice – which will be exempt from Section 5(b)(1)'s prohibition on non-conforming prospectuses – must be delivered not later than two business days following completion of the sale. Compliance with Rule 173 will not be a condition for the Rule 172 exemption from prospectus delivery, and hence failure to send the required notice will not result in a violation of Section 5.

We would expect underwriters to build this notice into their standard form of trade confirmations.

4. Rule 174

Rule 174 (governing prospectus-delivery requirements of dealers) will be modified to make clear that any obligation to deliver a prospectus under the Rule will be satisfied by complying with Rule 172. In other words, during the 25-, 40- or 90-day period following effectiveness (depending on the type of transaction and whether the issuer was an Exchange Act reporting company prior to filing the registration statement), no physical prospectus will need to be delivered.

5. Rule 153

Old Rule 153 requires an issuer or its underwriter to deliver copies of the final prospectus to a national securities exchange in transactions in which members of the exchange are on both sides of the transaction (*i.e.*, transactions between brokers on the exchange). The Rule does not cover transactions on Nasdaq.

Under the amendment to Rule 153, brokers and dealers effecting transactions on an exchange or through any national securities exchange or trading facility (including Nasdaq) will be deemed to satisfy Section 5(b)(2)'s prospectus-delivery requirements for securities that are already trading on the market or through the trading facility if, among other things:

- securities of the same class were trading on that exchange or facility;
- the registration statement relating to the offering is effective and not subject to a stop order; and
- the issuer has filed or will file a final prospectus that meets the requirements of Section 10(a).

[22] The prospectus-delivery period is generally 40 days after effectiveness, although this period is shortened to 25 days in the case of listed IPOs under Rule 174 and extended to 90 days in the case of unlisted IPOs. There is no requirement to deliver a prospectus if the issuer is subject to Exchange Act reporting immediately before the registration statement is filed.

D. Backward Incorporation by Reference in Form S-1 and Form F-1

Forms S-1 and F-1 are being amended to allow an issuer to incorporate information by reference from its previously filed Exchange Act reports if the issuer:

- is required to file Exchange Act reports (once again, no candy canes for voluntary filers);
- has filed all required materials under the Exchange Act during the prior 12 months;
- has filed an annual report for its most recently completed fiscal year;
- is not a blank check issuer, shell company or penny stock issuer; and
- makes its Exchange Act reports readily available on its website (including by way of hyperlinks to the reports).

Unlike Forms S-3 and F-3, the amended Forms S-1 and F-1 will not allow for *forward* incorporation of Exchange Act reports and other documents filed after the effective date. The consequence will be that a filing under Rule 424 or the cumbersome post-effective amendment procedure will be the only way to modify the information in a registration statement on Form S-1 or F-1 after the date on which it is declared effective.

E. Risk Factor Disclosure in Form 10-K, Form 10 and Form 10-Q

Revisions to Form 10-K and Form 10 will require "plain English" risk factor disclosure in annual reports on Form 10-K and registration statements on Form 10. The amendments also include a requirement that an issuer set forth in its Form 10-Q filings any material changes to the risks previously disclosed in Form 10-K.

Foreign private issuers are already required to include risk factor disclosure in annual reports on Form 20-F. In addition, many domestic U.S. issuers already include risk factor disclosure in annual and quarterly reports, so we do not expect these revisions to significantly change current practice.

F. Disclosure of Unresolved Comments in Forms 10-K and 20-F by Accelerated Filers and WKSIs

Revisions to Form 10-K and Form 20-F require an accelerated filer[23] or a WKSI to disclose the substance of any written comments from the SEC staff that remain unresolved on the filing date of the Form 10-K or 20-F and that:

- the issuer believes are material; and
- were received 180 days or more before the end of the fiscal year to which the annual report relates.

[23] The SEC has not subjected foreign private issuers that file on Form 20-F to accelerated filing.

The disclosure may provide other information, including the position of the issuer with respect to the unresolved comments.

These new rules may cause seasoned issuers to truncate the traditional dialogue with members of the SEC staff to resolve any disagreements about SEC comments and simply amend the disclosure to satisfy the comments more quickly than they otherwise would.

G. Disclosure of Status as Voluntary Filer on Form 10-K and Form 20-F

Form 10-K and Form 20-F have been modified to add a requirement that voluntary filers check a box to identify their status on the cover page of their Form 10-K or Form 20-F. This "scarlet letter" approach to voluntary filers is consistent with their overall treatment under the new rules.

H. Elimination of Form S-2 and Form F-2

The new rules eliminate Forms S-2 and F-2 as unnecessary. They are rarely used in current practice.

VIII. Conclusion

The new rules, taken together, amount to a major new way of looking at and regulating the public offering process. WKSIs are the big winners under the new rules – they will be able to access the capital markets at will, and are released from many aspects of the current rules without posting bail. Most other issuers will benefit from the streamlining of the shelf offering process and the ability to incorporate by reference to Exchange Act filings on Forms S-1 and F-1. Voluntary filers are kept firmly out of the new clubhouse, although they too benefit from some aspects of the new rules. For all issuers, Exchange Act reports will be much more important for Securities Act purposes and will become even more central to the disclosure used in registered securities offerings. The new rules pose interesting challenges to underwriters and their counsel, who may find their ability to influence issuer disclosure even further truncated by the new regime's increased reliance on Exchange Act filings.

Please feel free to call Brian Cartwright, Alex Cohen, Kirk Davenport, John Huber, Ian Schuman, Joel Trotter, Loryn Zerner or any other Latham lawyer with any questions you may have about the new rules.

IX. Annex A – Summary of the New Rules

A. WKSIs and Other Types of Issuers

What is a WKSI?	**Any issuer (including majority-owned subsidiaries under certain circumstances) that –** • meets the registrant requirements of Form S-3 or Form F-3, which includes being current and timely in its Exchange Act reporting obligations; • as of a date within 60 days of the determination date, has either: ○ a worldwide market value of outstanding voting and non-voting common equity held by non-affiliates of $700 million or more; or ○ both (i) registered and issued at least $1 billion in aggregate principal amount of non-convertible debt or preferred stock for cash, not exchange, during the past three years and (ii) will only offer non-convertible debt or preferred stock (unless the issuer is also eligible to register a primary offering of its securities on Form S-3 or Form F-3); and • is not an "ineligible issuer" or "asset-backed issuer."
What are ineligible issuers?	**An "ineligible issuer" includes issuers that –** • are not current in their Exchange Act reporting obligations (other than certain enumerated Form 8-K filings); • are blank check companies, shell companies, penny stock issuers or limited partnerships offering other than through a firm commitment underwriting; • have filed for bankruptcy within the past three years; • within the past three years, have been convicted of any felony or misdemeanor under certain provisions of the Exchange Act; • within the past three years, were made the subject of any judicial or administrative decree or order arising out of a governmental action that prohibits certain conduct or activities regarding (including future violations of) the U.S. federal securities laws, requires them to cease and desist from violating the anti-fraud provisions of the U.S. federal securities laws or determines that they have violated those anti-fraud provisions; or

	• have had any registration statement subject to a refusal order or stop order within the past three years.
What are the other types of issuers?	**Seasoned issuer –** an issuer that is eligible to use Form S-3 or F-3 to register certain primary offerings of securities. Seasoned issuers are distinguished from WKSIs primarily by the size of their public float. However, a WKSI that is S-3 or F-3 eligible but is otherwise an "ineligible issuer" – for example, a WKSI that has been convicted of certain Exchange Act violations – is considered a seasoned issuer. **Unseasoned reporting issuer –** an issuer that is required to file Exchange Act reports, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. A WKSI that is not current and timely in its Exchange Act filings and hence loses S-3 or F-3 eligibility is considered an unseasoned reporting issuer. **Non-reporting issuer –** an issuer that is not required to file Exchange Act reports. Voluntary filers are considered to be non-reporting issuers.

B. Liberalizing Communications

Rule 163 – pre-filing offers by WKSIs	**Available only for WKSIs –** all written and oral offers made by or on behalf of a WKSI before the filing of a registration statement are exempt from Section 5(c)'s prohibition on "offers" before registration statement is filed. Rule 163 is not available for underwriters. **Requirements of Rule 163 –** include: • the written communication must contain a prescribed legend; • it must be filed with the SEC promptly upon filing of the registration statement for the offering (unless the communication has previously been filed with the SEC or is exempt from filing under the terms of Rule 433); and • it must not relate to "ineligible offerings," including certain business combination transactions. **Written offers made in reliance on new Rule 163 –** are both a statutory prospectus subject to Section 12(a)(2) liability and a free writing prospectus once the registration statement is filed.

Rule 163A – 30-day bright-line exclusion from gun-jumping	**Available for all issuers –** Rule 163A provides all issuers with a non-exclusive safe harbor for certain communications made during the period ending 30 days prior to the filing of a registration statement. **Not considered offers –** these communications are not considered prohibited "offers" under Section 5(c). **Requirements of Rule 163A –** in order to use the safe harbor: • Rule 163A communications must not refer to the securities offering that is the subject of the registration statement; • the communications have to be made by or on behalf of an issuer – in other words, the issuer will need to authorize or approve Rule 163A communication and communications authorized or approved by underwriters or dealers will not come within the safe harbor; • the issuer must take "reasonable steps within its control" to prevent further distribution of the information during the 30-day period prior to filing the registration statement (although the final release suggests that the issuer may maintain this information on its website, if the information is appropriately dated, identified as historical material, and not referred to as part of the offering activities); and • the safe harbor may not be used in connection with certain business combination transactions already covered by Rule 165, offerings to employees registered on Form S-8, and offerings by blank check companies, shell companies or penny stock issuers.
Rule 168 – safe harbor for factual business information and forward-looking information by reporting issuers	**Rule 168 –** exempts from the definition of "offer" under Section 5(c) certain information regularly released by or on behalf of an issuer in the ordinary course of its business. **Who is covered by the rule? –** a reporting issuer and certain non-reporting foreign private issuers (but not voluntary filers). **Rule 168 allows –** continued regular release or dissemination of "factual business information" and "forward-looking information," subject to certain conditions. **Rule 168 information may be released at any time –** including before and after the filing of a registration statement.

	Rule 168 factual business information – means: • factual information about the issuer, its business or financial developments, or other aspects of its business; • advertisements of, or other information about, the issuer's products or services; • dividend notices; and • factual information set forth in the issuer's Exchange Act reports. **Rule 168 forward-looking information –** means: • projections of an issuer's revenues, income or loss, earnings or 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 contemplated by MD&A discussion; and • assumptions underlying or relating to the foregoing. **Information about the offering or information released or disseminated as part of offering activities –** is not factual business or forward-looking information.
Rule 169 – safe harbor for factual business information regularly released by non-reporting issuers	**Rule 169 –** exempts from the definition of "offer" under Section 5(c) certain information regularly released by or on behalf of an issuer in the ordinary course of its business. It is more limited than Rule 168. **Who is covered by the Rule? –** non-reporting issuers and voluntary filers. **Rule 169 allows –** the continued release by or on behalf of an issuer of factual business information (but not forward-looking information). **Rule 169 information may be released at any time –** including before and after the filing of a registration statement. **Rule 169 factual business information –** • factual information about the issuer, its business or financial developments, or other aspects of its business; and

	• advertisements of, or other information about, the issuer's products or services. **Rule 169 vs. Rule 168 –** Rule 169 does not include dividend notices or factual information set forth in the issuer's Exchange Act reports in the definition of "factual business information." But the two Rules are similar in that under both Rule 169 as well as Rule 168, factual business information does not include information about an offering or information released or disseminated as part of offering activities.
Rule 134 – expanded safe harbor for communications after filing	**As amended, Rule 134 permits the following –** in addition to the information currently allowed under the Rule: • certain basic factual information about the legal identity and business location of the issuer, including contact details; • information about the business segments through which the issuer operates; • greater information about the securities offered; • the names of all underwriters participating in the offering and their roles in the underwriting syndicate; • the anticipated schedule for the offering, and a description of marketing events; • a description of the procedures by which the underwriters will conduct the offering and information about procedures for opening accounts and submitting indications of interest; • expanded disclosure regarding credit ratings (although a *bona fide* price range, in the case of a non-reporting issuer, must be included in the registration statement before including this in a Rule 134 communication); • certain additional information, including the names of selling securities holders, certain email addresses, the exchanges on which the securities will be listed and the ticker symbols; and • a shortened legend.

C. Free Writing Prospectus – Rules 164 and 433

Overview	**New Rules 164 and 433 –** allow issuers *and* underwriters to make written offers by way of a "free writing prospectus" *after* a registration statement is filed. **WKSIs –** may use a free writing prospectus before filing, under Rule 163.
Definition of a free writing prospectus	**A free writing prospectus is –** any "written communication" that constitutes an offer to sell or a solicitation of an offer to buy securities relating to a registered offering, that is used after a registration statement has been filed, other than: • a permitted preliminary or final statutory prospectus; and • a communication delivered after effectiveness of a registration statement that is accompanied or proceeded by a statutory prospectus. **The term "written communication" –** includes any written or printed communication, any radio or TV broadcast (regardless of how transmitted), or any "graphic communication." **The term "graphic communication" –** includes all forms of electronic media, except for a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted electronically.
Rule 164	**Under Rule 164 –** once a registration statement has been filed, a free writing prospectus of the issuer or any other offering participant will not violate Section 5(b)(1)'s prohibition on the use of a non-conforming prospectus prior to effectiveness if: • the issuer is an eligible issuer; • the offering is an eligible registered offering; and • the additional conditions of Rule 433 are met. **Ineligible issuers –** are largely the same as in the WKSI definition. **Ineligible transactions –** comprise certain business combinations, as well as offerings on Form S-8 other than by a WKSI.

Rule 433 – prospectus-delivery requirements	**In connection with offerings by WKSIs and seasoned issuers –** a free writing prospectus may be used by WKSIs and seasoned issuers without delivering a statutory prospectus. In the case of seasoned issuers, a statutory prospectus must first be on file with the SEC. **Non-reporting and unseasoned issuers –** a statutory prospectus, including a price range when required (as in the case of an IPO), must accompany or precede a free writing prospectus, with two exceptions: • once a statutory prospectus has been provided, if there is no material change between that prospectus and the most recent statutory prospectus; and • when the free writing prospectus is prepared and disseminated by someone other than the issuer or its underwriters – for example, an article by an unaffiliated journalist – and no consideration is given for publication.
Rule 433 – information and legend requirements	**A free writing prospectus may include information –** the substance of which is not included in the registration statement. **But the information in a free writing prospectus must not "conflict with" –** the information in the registration statement or an issuer's Exchange Act reports. **Legend –** the free writing prospectus must contain a legend in prescribed form. Disclaimers of responsibility or liability that are impermissible in a statutory prospectus are also impermissible in free writing prospectuses.

Rule 433 – filing requirements

All issuers – must file, on or prior to the day the free writing prospectus is used:

- any "issuer free writing prospectus" which is defined as:
  - a free writing prospectus prepared by or on behalf of the issuer; or
  - a free writing prospectus used or referred to by the issuer;
- any "issuer information" – *i.e.*, material information about the issuer or its securities provided by or on behalf of the issuer – contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant (but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from issuer information); and
- a description of the final terms of the issuer's securities contained in a free writing prospectus prepared by or on behalf of the issuer or any offering participant.

Information is provided "by or on behalf" – if the issuer or its agent or representative authorizes the communication or approves it before use.

Underwriters – an underwriter must file any free writing prospectus it uses or refers to, and is distributed in a manner reasonably designed to lead to its "broad unrestricted dissemination." But an email to customers or a website restricted to customers will not require filing.

Exceptions to filing – these include:

- issuers and other offering participants do not need to file a free writing prospectus that does not contain "substantive changes from or additions to" a previously filed free writing prospectus;
- issuers do not need to file issuer information contained in a free writing prospectus prepared by or on behalf or used by any other offering participant if that information is already included in a previously filed statutory or free writing prospectus relating to the offering; and
- issuers and other offering participants do not need to file a free writing prospectus that is a preliminary term sheet, although a free writing prospectus that is a final term sheet must be filed by the issuer within two days of the later of establishing the terms and the date of first use.

Rule 433 – road shows	**Road shows that are written communications –** are free writing prospectuses. But with one exception these do not need to be filed. **Live road shows –** are not written communications, even if simultaneously retransmitted to other locations. Nor are road show slides, if not handed out. **Pre-recorded electronic road shows –** are written communications and hence free writing prospectuses. These must be filed if used in connection with an IPO, unless one version of a *bona fide* electronic road show is made available electronically without restriction to any person (*e.g.*, by posting the road show on an unrestricted website).
Rule 433 – website information	**Issuer website information –** offers of securities contained on an issuer's website or hyperlinked from an issuer's website to a third-party website are free writing prospectuses that must be filed. Historical information about an issuer, however, that is identified as such and is located in a separate section of an issuer's website will not be considered a free writing prospectus if that information has not been incorporated by reference into or otherwise included in a prospectus for the offering, or otherwise used or referred to in connection with the offering.
Rule 433 – media free writing prospectuses	**Media free writing prospectuses –** any written offer that includes information provided or authorized by an issuer or one of its underwriters that is prepared and disseminated by an unaffiliated media third party is an issuer free writing prospectus. Nevertheless, the requirements for prior or current prospectus delivery (in the case of non-reporting and unseasoned issuers), legending and filing that would otherwise apply to these free writing prospectuses will be deemed satisfied if: • no payment is made or other consideration is given for the publication by the issuer or its underwriters; and • the issuer or underwriter files the media free writing prospectus within four business days after publication or dissemination (provided that the media free writing prospectus need not be filed if the substance of the written communication has previously been filed). **Filing may include –** corrections. Also, a transcript may be filed in lieu of filing the article.

Rule 433 – record retention	**Issuers and underwriters –** must retain all free writing prospectuses they have used and that have not been filed for three years from the initial *bona fide* offering of the securities.
Free writing prospectuses subject to Section 12(a)(2) but not Section 11	**Section 12(a)(2) and 17(a)(2) but not Section 11 –** a free writing prospectus is subject to Section 12(a)(2) and Section 17(a)(2) liability, regardless of whether it is filed. A free writing prospectus is not considered part of the registration statement and hence not subject to Section 11.
Rule 159A – cross-liability issues	**An underwriter will not be considered to offer or sell –** by means of a free writing prospectus for Section 12(a)(2) purposes unless: • the underwriter used or referred to the free writing prospectus in offering or selling securities to that person; • the underwriter sold securities to that person and participated in the planning for the use of the free writing prospectus that was used by another offering participant to sell securities to that person; or • the underwriter was otherwise required to file the free writing prospectus under Rule 433 (as in the case of a free writing prospectus that it distributes by broad unrestricted dissemination). **In addition –** under Rule 159A an offering participant will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed it with the SEC.

D. Reforms to the Shelf Offering Process

Automatic shelf registration	**Available only for WKSIs –** WKSIs may register (without paying a filing fee) an unspecified amount of securities on a shelf registration statement that is automatically effective upon filing. **What may be omitted in the base prospectus? –** under new Rule 430B, the base prospectus may omit: • information that is unknown or not reasonably available to the issuer; • whether the offering is a primary or secondary offering, or a mix;

	• the plan of distribution for the securities; • a description of the securities registered, other than an identification of the name or class of the securities; • the identity of other issuers; and • the names of any selling security holders and the amount of securities to be registered on their behalf. **Rule 430B permits –** virtually all the omitted information to be included in a post-effective amendment, a prospectus supplement or by incorporation of Exchange Act reports. A post-effective amendment to an automatic shelf registration statement will become effective immediately upon filing. **New class of securities and additional issuers added through post-effective amendment –** new Rule 413 permits WKSIs to add new classes of securities and additional issuers to an automatic shelf registration statement through an immediately effective post-effective amendment. **Pay-as-you-go –** under new Rules 456 and 457, WKSIs are only required to pay filing fees at the time of a securities offering.
Rule 430B – information that may be omitted from a shelf registration statement other than an automatic shelf registration statement	**Under Rule 430B, shelf-eligible issuers may omit –** information that is unknown or not reasonably available (under Rule 409) and the identities of selling shareholders and the amount of securities being registered on their behalf, subject to certain conditions. **The omitted information may be included –** in a post-effective amendment, prospectus supplement or through incorporation of Exchange Act reports.
Rule 415 modifications	**Rule 415 has been modified –** in various ways, including: • elimination of the limitation on the amount of securities registered (this no longer needs to equal the amount the issuer intends to offer within two years); • shelf registrations generally terminate automatically on the third anniversary of the initial effective date; and • "at-the-market" offering restrictions are eliminated for seasoned issuers.

E. Liability Reforms

Rule 159 – timing of the investment decision	**Section 12(a)(2) and Section 17(a)(2) liability at the time the investment decision is made –** Under new Rule 159, for purposes of determining whether a prospectus or oral statement included a material misstatement or omission at the time of sale, information conveyed to the investor after the time the investment decision is made (*i.e.*, the pricing date in most underwritten offerings) will not be taken into account. **A final prospectus does not cure –** the key implication of Rule 159 is that Section 12(a)(2) and 17(a)(2) liability will be determined by reference to the total package of information conveyed to the purchaser at or before the time of sale. Accordingly, a preliminary prospectus, a free writing prospectus or an oral communication at a "road show" may give rise to liability under Section 12(a)(2) (in suits by private plaintiffs) and Section 17(a)(2) (in suits by the SEC), even if later corrected or supplemented in a final prospectus that is filed or delivered after pricing. *In other words, changes made to the disclosure after pricing and included in the final prospectus will not provide a liability shield for the issuer or its underwriters.*
Rule 159A – issuer as "seller" under Section 12(a)(2)	**Rule 159A provides –** for purposes of Section 12(a)(2), regardless of the underwriting method used to sell securities, the term "seller" will include the issuer of the securities sold to a person as part of the initial distribution of those securities **Issuer will be deemed to offer or sell –** by means of: • any preliminary or final prospectus; • any free writing prospectus relating to the offering prepared by or on behalf of the issuer or used or referred to by the issuer; • the portion of any other free writing prospectus relating to the offering containing material information about the issuer or its securities provided by or on behalf of the issuer; and • any other communication that is an offer made by or on behalf of the issuer.

F. Additional Reforms to the Offering Process

Rule 137 – publication of research by non-participating broker-dealers	**Old Rule 137 –** provides that a broker or dealer that is not a participant in a registered offering but publishes or distributes research on an issuer that files Exchange Act reports will not be deemed to make offers of a security or to participate in a distribution those securities as an underwriter. **Modified Rule 137 –** now applies to securities of any issuer, including non-reporting issuers and voluntary filers (with certain exceptions). Like the old version of Rule 137, amended Rule 137 will be available only to brokers and dealers who are not participating in the registered offering of the issuer's securities and have not received compensation from the issuer, its affiliates, or participants in the securities distribution. However, amended Rule 137 also adds a condition that the broker-dealer must publish or distribute the research report in the regular course of business.
Rule 138 – publication of research by an underwriter on other securities of an issuer	**Old Rule 138 –** provides that a broker or dealer participating in a distribution of securities by an issuer that is Form S-3 or F-3 eligible (or, in the case of foreign private issuers only, meets certain conditions of Form F-3) will not be deemed to make an offer of those securities if it publishes or distributes research that is confined to a different type of security of that issuer. **Modified Rule 138 –** • covers research reports on all reporting issuers (other than voluntary filers) that are current in their Exchange Act reporting (with certain exceptions); • adds a requirement that the broker or dealer publishes research reports on the types of securities in question in the regular course of its business; and • applies to Rule 144A and Regulation S transactions. **The regular course requirement –** does not mean that the broker or dealer must have a history of publishing research reports about the particular issuer or its securities. Instead, the research report must cover the "same types of securities."

Rule 139 – publication of research about the securities being offered by an underwriter

Old Rule 139 – provides that a broker or dealer participating in a registered offering by certain seasoned issuers can publish on-going research about the issuer and its securities without being deemed to offer those securities by way of its research reports. Rule 139 research can take the form of issuer-specific reports, or more general reports covering an industry sector.

Revised Rule 139 covers – essentially the same group of issuers as old Rule 139 – namely, Form S-3 or Form F-3 eligible issuers that are current in their Exchange Act reporting for issuer-specific research reports; Exchange Act reporting companies for industry research reports; and certain foreign private issuers for both types of reports. However, the revised Rule excludes research reports about blank check companies, shell companies and penny stock issuers from the scope of the safe harbor. It also excludes voluntary filers.

- *Issuer-specific reports:* To qualify for the revised Rule 139 safe harbor, the broker-dealer will have to publish issuer-specific research reports in the regular course of its business. That publication may not represent the initiation of publication of research about the issuer or its securities (or re-initiation of publication following discontinuation). This requirement means that the broker-dealer must have previously published at least one research report on the issuer or its securities, or have published one such report following discontinuation of coverage.
- *Industry reports:* Revised Rule 139 requires that the broker or dealer must publish research in the regular course of its business and, at the time of the publication of the research report, must include similar information about the issuer or its securities in similar reports. It also eliminates the current requirement that the broker-dealer not make a more favorable recommendation in the report than that contained in previous reports, and in fact the broker-dealer need not have included any recommendation in its prior reports.
- *Rule 144A/Regulation S transactions:* As with Rule 138, if the other conditions of amended Rule 139 are met, research may be published in connection with Rule 144A or Regulation S offerings.

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