The Securities Laws Grow Up—The SEC Proposes Improvements to the Securities Offering Process
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The Securities Laws Grow Up—
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I. Introduction

On November 3, 2004, the Securities and Exchange Commission (the “SEC”) proposed a series of new rules that would reform the registration, communication and offering processes under the Securities Act of 1933 (the “Securities Act”). The current proposals are incremental, building on the integrated disclosure system and shelf registration through increased reliance on the periodic and current reports filed by public companies under the Securities Exchange Act of 1934 (the “Exchange Act”). Increased reliance on Exchange Act reports for public offerings under the Securities Act is a logical extension of the reforms produced by the Sarbanes-Oxley Act of 2002. The overriding theme of the new proposals is to elevate the role of Exchange Act filings in the public offering process and streamline access to the public markets for all issuers.

Overall, the proposals represent a welcome change to the current public offering process. They simplify the ability of certain large-scale issuers to conduct public offerings. They recognize that the only 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 liberalize other aspects of communications during offerings and propose related modifications to the liability regime. But the proposals contain challenges as well as opportunities.

This Client Alert both summarizes the new rules and identifies the key questions and issues we see raised by the proposals. For your convenience, we have attached as Annex A a chart setting out the key aspects of the proposals.

II. Overview and Background

A. Overview of the Proposals

The release contemplates a series of new rules and proposed amendments to existing rules. If adopted, the proposals would tackle old problems and open up new avenues for conducting offerings. Among other things, the proposals would:

- **Create a new breed of issuers called well-known seasoned issuers, or “WKSIs.”** WKSIs are large-scale, seasoned issuers, and would benefit from special treatment in securities offerings. In particular, they could use “free writing prospectuses” (discussed below) even before a statutory prospectus had been filed, and without SEC review. In addition, WKSIs would be entitled to automatic shelf registration on demand without SEC review.

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• **Allow use of a new species of prospectus, the “free writing prospectus.”** Issuers could use a new type of written document in connection with offerings, called a “free writing prospectus.” Free writing prospectuses would not be subject to the strict form and content requirements of current statutory prospectuses. The free writing prospectus shares certain common features with its first cousin, the prospectus supplement used in the context of shelf takedowns. In most but not all cases, free writing prospectuses would need to be filed with the SEC concurrently with first use.

• **Encourage communications with the market both before and during public securities offerings.** An issuer would be free to communicate freely without fear of the prohibitions on pre-offering publicity (often referred to as “gun jumping”), so long as those communications occurred more than 30 days before a registration statement was filed and did not refer to a securities offering. This bright-line approach would make life much easier for all issuers. In addition to the free writing prospectus, two new safe harbors would allow the continued regular release of certain factual and forward-looking information about the issuer during the offering process.

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

• **Improve the shelf registration process.** By streamlining the shelf registration process for all issuers, the proposals would fix a number of old problems inherent in accessing the public securities markets and make life easier for practitioners. For example, anyone who has ever worked on a selling security holder shelf registration will quickly see the benefits of the proposals to permit the addition of new selling security holders after effectiveness by prospectus supplement, dispensing with the cumbersome requirement to file a post-effective amendment.

**B. Key Questions Raised by the Proposals**

The proposals 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 is unclear whether the SEC’s proposals would be effective in enticing those issuers back into the world of registered offerings and away from the domain of Rule 144A.

• **Ring Out the Old and Ring in the New?** The proposals do not make clear whether rating agency reports would be considered free writing prospectuses subject to filing and liability. The proposals also raise a host of liability questions, particularly as to the potential liability of underwriters for free writing prospectuses they do not prepare, and the ability of underwriters to establish a due diligence defense with respect to those materials. Finally, the proposals contain certain requirements to deliver a statutory prospectus in connection with the free writing prospectus under certain circumstances, which may prove unworkable in practice.
• **Is That Your Final Offer?** Under the proposals, 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 would put significant additional pressure on issuers and underwriters to ensure that no material changes are made between the preliminary prospectus and the final prospectus – in effect, accelerating the delivery of the final prospectus.

C. **Background – the Current Regime Governing Communications**

By way of background to the proposals, 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 135.2

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;
- 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.

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

III. **A Tale of Two Issuers – WKSIs and Others**

A. **The Four Different Categories of Issuers**

The proposals draw a distinction between four different types of issuers – WKSIs; seasoned issuers; unseasoned reporting issuers; and non-reporting issuers. Although the proposals affect all issuers, they have the most dramatic impact on WKSIs.

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2 Foreign private issuers may also take advantage of the safe harbor for offshore press releases provided by Rule 135e.
1. **WKSIs**

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

- is eligible to register a primary offering of its securities on Form S-3 or Form F-3;
- has either (i) a market value of outstanding common equity held by non-affiliates of $700 million or more or (ii) issued at least $1 billion in aggregate amount of debt securities in registered offerings during the past three years and "will only register debt securities;"
- has been a reporting issuer under the Exchange Act for at least 12 months;
- is current in its reporting obligations under the Exchange Act and has timely filed all required material; and
- is not an “ineligible issuer” or "asset-backed issuer."  

2. **Three Other Categories of Issuers**

In addition to WKSIs, the proposals also affect three other categories of issuers: seasoned issuers; unseasoned reporting issuers; and non-reporting issuers.

- **Seasoned Issuers.** A "seasoned issuer" would be an issuer that is eligible to use Form S-3 or Form F-3 to register a primary offering of securities.

- **Unseasoned Reporting Issuers.** An "unseasoned reporting issuer" would be 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. Voluntary filers would be considered to be unseasoned reporting issuers under the proposals.

- **Non-reporting Issuers.** A non-reporting issuer is an issuer that is not required to file Exchange Act reports and is not filing those reports voluntarily.

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3 An “ineligible issuer” would include issuers that (i) are not timely in their Exchange Act reporting obligations; (ii) are blank check companies, shell companies, penny stock issuers or limited partnerships offering other than through a firm commitment underwriting; (iii) have received a “going concern” qualification from their independent auditors in the most recent fiscal year; (iv) have filed for bankruptcy in the last three years; (v) have been convicted of certain felonies or misdemeanors within the past three years; (vi) have entered into any settlement with any government agency alleging violations of the federal securities laws within the past three years; (vii) are subject to judicial order prohibiting them from violating the federal securities laws; and (viii) have had any registration statement subject to a refusal order or stop order within the past three years.
B. Rule 163 – Pre-filing Offers by WKSIs

Rule 163 would create a special exemption for WKSIs from Section 5(c)’s prohibition on pre-filing offers. Under the proposed exemption, offers by or on behalf of a WKSI before the filing of a registration statement would be free from the restraints of Section 5(c). Note that an issuer would need to authorize and approve the communication; communications by its underwriter would not come within the safe harbor. Rule 163 would allow WKSIs to engage in largely unrestricted oral and written offers before a registration statement is filed without fear of gun jumping.

Rule 163 imposes certain limited requirements on written offers. They would need to contain a prescribed legend and be filed with the SEC promptly upon filing of the registration statement for the offering. In addition, written offers would be deemed to be both a statutory prospectus and a “free writing prospectus” after the registration statement is filed (as discussed below).

Communications covered by Rule 163 would still be subject to Regulation FD.4 Rule 163 communications would also trigger liability under various anti-fraud provisions of the securities laws, including Section 12(a)(2) and Rule 10b-5 of the Exchange Act. But they would not automatically be subject to Section 11 liability, because as discussed below, a free writing prospectus would not be deemed to be part of the registration statement at the time of effectiveness.

C. Issues Raised by the Proposed Rule

There is no doubt that Rule 163 would provide WKSIs with more freedom to communicate with the market prior to filing a registration statement. But it remains to be seen whether seasoned issuers eligible to take advantage of proposed Rule 163 would elect to use it rather than alternatives, such as a shelf takedown or an offering pursuant to Rule 144A. Many of these seasoned issuers already have a universal shelf registration statement on file in order to access the public equity and debt markets quickly. The current rules already provide for the immediate availability of a prospectus supplement to an issuer with an effective universal shelf registration statement, so it is not clear whether Rule 163 will dramatically alter the current landscape. And, of course, Rule 144A offerings would always be available to all issuers, including WKSIs.

In addition, the definition of WKSIs is unclear in certain respects. In particular:

- **Registering Only Debt Securities?** The proposals limit the $1 billion aggregate amount of debt requirement with the additional qualification that the issuer “will register only debt securities.” It is not clear what this restriction means. Would an issuer that registers both debt and equity be ineligible to qualify as a WKSI as a result of this debt-only provision? Would a repeat debt issuer that consummates an equity IPO for proceeds of less than $700 million cease to be WKSI because it has public equity outstanding?

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4 Specifically, these communications 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.
• **Foreign Private Issuers?** The proposals do not specify how the WKSI calculations are intended to work for foreign private issuers. Although this is not stated in the proposals, we understand that the dollar thresholds are intended to be based on worldwide market capitalization, not just capitalization in the United States. As exchange rates fluctuate, would an issuer’s status as a WKSI fluctuate as well?

• **$1 Billion Aggregate Amount?** The proposals do not explain whether the $1 billion aggregate amount of debt securities requirement refers to gross proceeds or aggregate principal amount at maturity.

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

Proposed Rules 164 and 433 would allow issuers and underwriters to make written offers by way of a “free writing prospectus” after a registration statement is filed. (Note that WKSI could use a free writing prospectus even before filing a registration statement under Rule 163.) A free writing prospectus would include any written communication – including any electronic communication – that constitutes an offer to sell after a registration statement has been filed, other than a permitted statutory preliminary or final prospectus. This could include emails, newspaper or magazine articles, voicemail messages, advertisements or electronic road show presentations. Free writing prospectuses would not have to meet the extensive form and content requirements of statutory prospectuses.

A. Requirements of Rule 433

Proposed Rule 433 lays out the conditions for use of a free writing prospectus. These would include the following.

1. **Prospectus Delivery for Non-Reporting Issuers and Unseasoned Issuers**

A statutory prospectus (including a price range in the case of an IPO) would always be required to accompany or precede a free writing prospectus of a non-reporting issuer or an unseasoned issuer, with two exceptions. First, 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 would need to be delivered. Second, in the limited situation where a free writing prospectus is prepared by someone other than the issuer (or its underwriters) – for example, by a journalist – and no consideration is given for publication, no statutory prospectus would need to be provided.

For electronic free writing prospectuses, this proposed prospectus delivery requirement would be met by providing a hyperlink to the statutory prospectus, and a physical prospectus would not need to be delivered. This feature would provide a significant incentive to use electronic free writing prospectuses.

2. **No Prospectus Delivery Requirement for Seasoned Issuers and WKSI**

Seasoned issuers and WKSI would be able to use a free writing prospectus without delivering a statutory prospectus, although one would need to be on file with the SEC.

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5 Note, however, that after effectiveness of the registration statement, the final prospectus would always be required to be provided with any free writing prospectus, whether or not an earlier statutory prospectus has been provided.
3. **Issuer Must Not be an “Ineligible Issuer”**

“Ineligible issuers” would not be able to use a free writing prospectus. This group would include reporting issuers who are not current in their Exchange Act filings; issuers who have filed for bankruptcy or insolvency during the past three years; and issuers who have violated the federal securities laws or been the subject of a decree prohibiting violations of the federal securities laws during the past three years.  

4. **Information and Legend Requirements**

The proposed Rules provide that the information in a free writing prospectus must not be inconsistent with information contained in any prospectus or in the issuer’s Exchange Act reports, to the extent not superseded or modified. This requirement might significantly limit the ability to use a free writing prospectus to cover territory not contained in the statutory prospectus filed as part of the registration statement. In addition, a free writing prospectus would also be required to contain a legend in the prescribed form.

5. **Issuers and Underwriters Would Be Required to File Free a Writing Prospectus Under Certain Circumstances**

An issuer would be required to file, on or prior to the day a free writing prospectus is first used:

- any issuer free writing prospectus used by any person;
- any free writing prospectus of any person used by the issuer;
- any issuer information contained in a free writing prospectus prepared by any other person (but not information prepared by a person other than the issuer on the basis of issuer information); and
- any free writing prospectus prepared by any person that contains only a description of the final terms of the issuer’s securities.

In addition, any other offering participant, such as an underwriter, would be required to file a free writing prospectus it distributes in a manner reasonably designed to lead to its broad dissemination, unless the information in the free writing prospectus has already been filed (e.g., by the issuer).

The rules on filing provide for certain exceptions. These include that:

- a free writing prospectus would not need to be filed if it were substantially the same as a free writing prospectus already on file; and
- the requirement to file issuer information contained in a free writing prospectus of a person other than the issuer would not apply if that information were already included in a previously filed statutory or free writing prospectus.

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6. See Note 3.
As discussed above, underwriters would only be required to file a free writing prospectus if it were broadly distributed. The release clarifies that a free writing prospectuses sent directly to customers of an underwriter, without regard to number, would not be considered broadly distributed.

6. Use of Electronic Roadshows

Proposed Rule 433 would treat electronic roadshows as free writing prospectuses. As a result, these would need to be filed (together with any script for the road show) unless the issuer:

- made at least one version of the electronic road show available electronically to any person; and

- filed any information disclosed at the road show that goes beyond information already included in a statutory or free writing prospectus already on file.

7. Information on an Issuer’s Website

Under proposed Rule 433, offers of securities contained on an issuer’s website or hyperlinked from the issuer’s website to a third party website would be free writing prospectuses that would be required to be filed. However, historical information about an issuer that is identified as such and is located in a separate section of an issuer’s website would not be considered a free writing prospectus unless that information had been included in a prospectus for the offering.


Proposed Rule 433 would deem any written communication about an issuer that is published or disseminated by third party media to be a free writing prospectus if it includes information provided by an issuer or one of its underwriters (for example, a newspaper article including quotes from the issuer’s management). However, those prospectuses would not need to be accompanied or preceded by a statutory prospectus (as would normally be the case for non-reporting and unseasoned issuers) and are not subject to the prior filing and information/legend requirements of other free writing prospectuses if:

- no payment is made or consideration given for the publication by the issuer or its underwriters; and

- the issuer files the media free writing prospectus with the required legend within one business day after publication or dissemination.

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.
B. Some Additional Points About Free Writing Prospectuses

1. Free Writing Prospectuses Would Not Be Part of the Registration Statement but Would Be Subject to 12(a)(2) Liability

A free writing prospectus would not be considered part of the registration statement. As a result, it would not be subject to liability under Section 11. However, every free writing prospectus, regardless of whether it is filed, would 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 light of the requirement under proposed Rule 433 that a free writing prospectus not be “inconsistent” with the information found in the registration statement (including the documents incorporated by reference), both issuers and underwriters may feel compelled to include the information contained in the free writing prospectus in the registration statement or prospectus supplement (which, under the proposed rules, would be considered to be part of and included in the registration statement). In that event, the contents of the free writing prospectus would be subject to Section 11 liability.

2. Removal of Existing Restrictions on Electronic Road Shows

Under the current regime, issuers proceed with electronic road shows in reliance on a series of no-action letters granted by the Division of Corporation Finance. Embedded in these no-action letters are many restrictions and conditions that would no longer apply to electronic road shows under the proposed rule changes. Each electronic road show would be considered a separate free writing prospectus, with all material information regarding the issuer required to be filed with the SEC prior to its use. Therefore, if the proposals are implemented, all of the currently applicable restrictions would fall away and there would 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.

3. Unintentional Failure to File

The failure to comply with the conditions under proposed Rule 433 would result in a violation of Section 5 of the Securities Act. However, proposed Rule 164 would provide that an issuer and any other person relying on the rule would be able to cure any immaterial or unintentional failure to file a free writing prospectus. The cure provision would be available, and a failure to file would not be considered a violation of Section 5(b)(1), if a good faith and reasonable effort were made to comply with the filing requirement and the free writing prospectus was filed as soon as practicable after the discovery of the failure to file.

C. Issues Raised by the Proposed Rules

Under the current regime, statutory prospectuses used in connection with securities offerings are 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 hope this will lead to more timely, investor-friendly and widely read communications.

Nevertheless, we see a range of issues under proposed Rule 433. These include the following.
1. Failure to Satisfy Proposed Rule 433 Due to Inconsistent Information

It may be difficult in practice to meet proposed Rule 433’s requirement that information in a free writing prospectus not be “inconsistent” with information in the registration statement or previously filed Exchange Act reports. Issuers and underwriters may feel compelled to include the information contained in the free writing prospectus in the registration statement or prospectus supplement, as the consequences of not meeting the conditions set forth under proposed Rule 433 would be a potential Section 5 violation for a non-conforming prospectus. As a result, underwriters may prefer to distribute only free writing prospectuses that are identical to the summary box of the statutory prospectus.

It is interesting to note that the term “inconsistent” was chosen as the standard here as opposed to “additional” or a similar term. This would suggest that free writing prospectuses could include information beyond that which is included in the registration statement.

2. Rating Agency Reports

It is not clear how press releases distributed by rating agencies would be treated under Rule 433. These press releases often contain much of the same information found in a statutory prospectus and are prepared based on private presentations by issuers to the rating agencies. Since a fee is usually paid by the issuer to the rating agencies, under the proposed rules a rating agency press release would appear to be deemed to be a free writing prospectus that would be required to be filed with the SEC concurrently with its first use. In addition, the issuer (other than a WKSI or a seasoned reporting issuer) would have to take care to make sure the rating agency press release was preceded or accompanied by a statutory prospectus, which may not be practical. All issuers would have to be sure that a registration statement was on file before allowing rating agencies to publish. Again, this may not be feasible. Finally, the issuer (and perhaps its underwriters) would be subject to Section 12(a)(2) liability for rating agency press releases, which are not currently prepared with the care of a statutory prospectus. This would represent a substantial change in the current liability regime.

3. Liability for Underwriters

Possibly the most fundamental open question for underwriters raised by the proposed rules is which free writing prospectuses subject them to liability? Are they liable under Section 12(a)(2) for each free writing prospectus released to the marketplace, including those distributed in media publications? Would underwriters be subject, for example, to Section 12(a)(2) liability for information contained in materials released by rating agencies during the marketing process? These unanswered questions will need to be resolved in the final rulemaking proposal.

4. Due Diligence Issues for Underwriters

Closely related to the liability issue is the question of establishing a due diligence defense under Section 12(a)(2). If every free writing prospectus would be subject to Section 12(a)(2) liability, it remains to be seen what due diligence procedures underwriters would need to conduct in order to be comfortable with the disclosure in a free writing prospectus. For example, would 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, would the same due diligence procedures on the issuer information extend to underwriter-prepared free writing prospectuses as well? There is little question that underwriters would demand strict control over the release of any free writing prospectuses during the offering process, which may limit the usefulness of these documents.

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

Non-reporting and unseasoned issuers would be required to distribute a statutory prospectus with their free writing prospectus in nearly all cases. Is this practical? Broadly disseminating a free writing prospectus (for example, by issuing a press release or a widely distributed paid advertisement) would not be feasible because it would be impossible for the issuer or its underwriter to be sure that each person who received a copy of the free writing prospectus was first provided with the latest statutory prospectus. Delivering free writing prospectuses to some limited group (for example, investors who have placed orders for the security being offered) does not seem like a result the SEC should be encouraging. While proposed Rule 433 does not require delivery by the same medium, non-reporting and unseasoned issuers would be required to deliver something – merely referring to the availability of the statutory prospectus would 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 ultimate result may be that for unseasoned issuers and non-reporting issuers, only free writing prospectuses in electronic form may be feasible, as they satisfy the statutory prospectus delivery requirement if they contain a hyperlink to the statutory prospectus.

6. No Need to File Certain Free Writing Prospectuses Containing Issuer Information Prepared By Others

Proposed Rule 433 would require filing by an issuer of any issuer information contained in a free writing prospectus prepared by any other person “but not information prepared by a person other than the issuer on the basis of issuer information.” It is not clear to us how an issuer would easily make a distinction between its information and information prepared on the basis of its information. We understand the need to address the Playboy situation, but the proposed rule risks sowing confusion.

7. Website Information

Proposed Rule 433 states that historical information about an issuer that is identified as such and is located in a separate section of an issuer’s website would not be considered a free writing prospectus unless that information has been included in a prospectus for the offering. It is very likely that an issuer will have prior year financial statements included both in the historical section of its website and in its current registration statement. Would this mean that the prior financial statements become a free writing prospectus? This problem is particularly acute for foreign private issuers, which routinely include their home country annual reports on their website (and in some cases may be required by local stock exchange rules to do so). Do those reports become free writing prospectuses subject to Section 12(a)(2) liability?
V. Additional Reforms to the Offering Process

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

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

Proposed Rule 163A would provide all issuers with a safe harbor for communications made during the period ending 30 days prior to the filing of a registration statement. These communications would not be considered pre-filing “offers” prohibited by Section 5(c), and so would be free from traditional restrictions on gun jumping.7

Use of the safe harbor would be subject to the following key requirements:

- Rule 163A communications would not be permitted to refer to a securities offering;
- the communications would have to be made by or on behalf of an issuer – communications by an underwriter (or prospective underwriter) would not come within the safe harbor;
- the issuer would have to take “reasonable steps within its control” to prevent further distribution of the information during the 30-day period prior to filing the registration statement (except to the extent otherwise covered by another safe harbor, such as the proposed Rule 168 and Rule 169 safe harbors discussed below); and
- the safe harbor would not be permitted to be used in connection with certain business combination transactions already covered by Rule 166, offerings registered on Form S-8, and offerings by ineligible issuers (as defined above).

B. Issues Raised by Rule 163A

The issues raised by Rule 163A include the following:

- **Redistribution of Information.** Although issuers would not be expected to control the republication and access of previously published information, they would be expected to control their own involvement in redistributing the information. How would this work in practice? For example, if an issuer or its representative participated in an interview with the press prior to the 30-day period, would it not be able to rely on Rule 163A if the interview were republished during the 30-day period?

- **Foreign Private Issuers.** How would the proposed bright-line test be applied in the case of foreign private issuers that are first-time registrants? Since those issuers can submit their registration statements on a confidential basis to the Division of Corporation Finance, they are able to make a public filing considerably later in the registration process than their U.S. domestic counterparts. We think the SEC probably intends the 30-day clock to start from the date of a first public filing. However, in the absence of clarification on this point, it would seem prudent to calculate the 30-day look back from the date of the first confidential submission.

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7 Communications covered by Rule 163A would still be 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.
C. Rules 168 and 169 – Proposed Safe Harbors for Factual Business Information and Forward-Looking Information During an Offering

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. Proposed Rules 168 and 169 would codify (and expand) this exclusion in the form of two new safe harbors. These new safe harbors would only be available to issuers.

Proposed Rules 168 and 169 would 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 would not be prohibited pre-filing offers pursuant to Section 5(c), would not be considered free writing prospectuses and would be free from the post-filing restrictions on the use of a prospectus that is not a statutory prospectus.

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

Proposed Rule 168 would permit an issuer that files reports under the Exchange Act, or a person acting on its behalf, to make continued regular release or dissemination of “factual business information” and “forward-looking information,” subject to certain conditions. Disclosure of proposed Rule 168 information would be permitted at any time, including before and after the filing of a registration statement.

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

Under proposed Rule 168, “factual business information” means:

- factual information about the issuer or some aspect of its business;
- advertisements of, or other information about, the issuer’s products or services;
- factual information about business or factual developments with respect to the issuer;
- 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;

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- statements about the issuer’s future economic performance, including statements generally contemplated by the issuer’s MD&A discussions; and
- assumptions underlying or relating to the foregoing.

However, neither term would include information about the offering or information released or disseminated as part of the offering activities.

b) Information Released By or on Behalf of the Issuer

Factual business and forward-looking information would be considered released “by or on behalf” of the issuer if the issuer, its agent or its representative authorized and approved its use before its release.

c) Additional Conditions For Use of Rule 168 Safe Harbor

In order to use the safe harbor:

- the issuer would need to have previously released or disseminated information of the type described in proposed Rule 168 in the ordinary course of its business; and
- the information would need to be released in the ordinary course and the timing, manner and form would need to be materially consistent with similar past disclosures.

In order for the information to be considered regularly released in the ordinary course, the method of releasing or disseminating the information would be required to be consistent with prior practice, not just the type of information disseminated. Therefore, proposed Rule 168 would require that the issuer have a track record of releasing the particular type of information in the same particular manner.

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

Proposed Rule 169 is similar to, but more limited than, proposed Rule 168. Under proposed Rule 169, non-reporting issuers would be permitted to continue to release factual business information, but not forward-looking information. For non-reporting issuers, forward-looking information would only be permitted as a free writing prospectus. In addition, the definition of factual business information would be narrower under proposed Rule 169 than under proposed Rule 168.

Proposed Rule 169 would permit an issuer that does not file reports under the Exchange Act, or a person acting on its behalf, to make continued regular release or dissemination of factual business information, subject to certain conditions. Proposed Rule 169 information would be permitted to be released at any time, including before or after the filing of a registration statement.
a) Definitions of Factual Business Information

Under proposed Rule 169, “factual business information” means:

• factual information about the issuer or some aspect of its business;

• advertisements of, or other information about, the issuer’s products or services; and

• factual information about business or factual developments with respect to the issuer.

Note that the categories of permitted factual business information for non-reporting issuers would be narrower than for reporting issuers. For example, proposed Rule 169 would 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 did not explain in the release why it drew this distinction. Finally, as is the case in the Rule 168 proposal, the term also would not include information about the offering or information released or disseminated as part of the offering activities.

b) Information Released By or on Behalf of the Issuer

Factual business and forward-looking information would be considered released “by or on behalf” of the issuer if the issuer, its agent or its representative authorized and approved its use before its release.

c) Additional Conditions For Use of Rule 169 Safe Harbor

In order to use the safe harbor:

• the issuer would be required to have previously released or disseminated information of the type described in proposed Rule 169 in the ordinary course of its business;

• the information would need to be released in the ordinary course and the timing, manner and form would have to be materially consistent with similar past disclosures; and

• the information would need to 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 regularly and historically have provided this information to those persons.

In order for the information to be considered regularly released in the ordinary course, the method of releasing or disseminating the information would need to be consistent with prior practice, not just the type of information disseminated.
D. Issues Raised by Proposed Rules 168 and 169

- **Regularly Released Information.** The question of what constitutes “regularly” released information in the ordinary course by or on behalf of a reporting issuer may not prove easy to answer in any specific situation. Would one prior release be sufficient for these purposes? If not, how many more than one would be required? Presumably market practice would have to develop an understanding as to what constitutes “regularly” released information in the ordinary course.

- **Liability.** If any specific information release were to fall outside the proposed safe harbors, it would amount to a free writing prospectus, carrying Section 12(a)(2) liability (and potentially requiring filing). Would issuers and underwriters find it easy to become comfortable that the information falls neatly within the safe harbor and is not, in fact, a free writing prospectus? If this standard lacks certainty, the usefulness of the proposed rules would be limited.

E. Amended Rule 134 – Relaxation of Restrictions on Written Offering-Related Communications After Filing

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. Proposed Amendments to Rule 134

Amended Rule 134 would only be available once a statutory prospectus had been filed. The revisions make clear that, in the case of an IPO, a preliminary prospectus with a bona fide price range would need to be on file before amended Rule 134 can be used.

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

- basic factual information about the legal identity, business location and contact details of the issuer;
- 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 additional role 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;
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- expanded disclosure regarding credit ratings;
- certain additional information, including the names of selling securities holders, the exchanges on which the securities will be listed and the ticker symbols; and
- a shortened legend.

The proposed amendments to Rule 134 would increase the amount of information that may be disclosed free from the prospectus requirements of Section 10, but do not represent a major expansion of current practice. Among other things, a detailed term sheet for the securities being offered would not be permitted under the amended rule.

F. Regulation FD – Proposed Amendments

Currently, Regulation FD excludes oral or written disclosures made in connection with a registered securities offering. The proposed reforms to Regulation FD would narrow the types of registered offerings eligible for exclusion from Regulation FD. As modified, Regulation FD would not apply to disclosures made in the following communications in connection with a registered securities offering:

- a registration statement filed under the Securities Act, including a prospectus contained therein;
- a free writing prospectus used after the registration statement is filed that meets the requirements of proposed Rule 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; and
- an oral communication made in connection with the registered offering after the registration statement is filed.

In general, the FD exclusion would only apply to issuances for “capital formation purposes” for the account of the issuer, including underwritten offerings that include both primary and secondary securities.

G. Issues Raised by the Proposed Amendments to Regulation FD

Under the proposed amendments, communications made in connection with pure secondary public offerings would 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 initial public offering (i.e., no primary shares of the company are issued). One possible implication of the proposals would be that all of the material nonpublic information conveyed during the road show for these initial public offerings would now be subject to public release under Regulation FD. This seems counterintuitive to us.
H.  Research Reports – Proposed Amendments to Rules 137, 138 and 139

1.  The Current Rules; Proposed Amendments

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 proposed amendments to these rules would define "research report" for the first time, and expand the circumstances under which a research report may be used.

2.  Definition of Research Report

The proposed amendments would define a “research report” as a written communication – including an electronic communication such as an email – which includes an analysis of a security and/or an issuer and provides information reasonably sufficient upon which to base an investment decision. According to the SEC’s proposing release, this definition is intended to encompass all types of research reports, whether industry-specific or industry compendiums separately identifying the issuer.

3.  Rule 137

Rule 137 currently 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 considered to be engaged in a distribution of those securities (i.e., will not be deemed an underwriter of those securities). The proposed changes to the rule would expand the exemption to apply to securities of any issuer, including non-reporting issuers (with the exception of blank check companies, shell companies and penny stock issuers). Amended Rule 137 would continue to be available only to brokers and dealers who are not participating in the registered offering of the issuer’s securities, have not received compensation from the issuer, its affiliates, or participants in the securities distribution, and publish or distribute the research report in the regular course of business.

4.  Rule 138

Rule 138 currently permits a broker or dealer participating in a distribution of an issuer that is S-3 or F-3 eligible or, in the case of foreign private issuers only, meets certain conditions of Form F-3 to publish or distribute research that is confined to a different type of security of that issuer. For example, Rule 138 allows publication of research with respect to debt securities by an underwriter when participating in the distribution of the issuer’s common stock, and vice versa.

The proposed amendments would:

- expand the rule to cover research reports on all reporting issuers that are current in their periodic Exchange Act reports, even those not eligible to issue securities on Form S-3 or Form F-3;
- continue to permit research on foreign private issuers that are not reporting companies but that meet certain other criteria of Form F-3;
• add a requirement that the broker or dealer publishes research reports on the types of securities in question “in the regular course of its business” (i.e., that it has a history of publishing a particular type of research); and

• if the other conditions of the amended rule are met, allow the publication of research in connection with Rule 144A and Regulation S transactions.

5. **Rule 139**

Rule 139 currently permits a broker or dealer participating in a registered distribution of securities to publish on-going research about a Form S-3 or Form F-3 eligible issuer in certain situations.

Under the proposed revisions:

• **Issuer-Specific Reports:** The issuer would continue to be required to be eligible to use Form S-3 or Form F-3 or, in the case of foreign private issuers, to meet certain of the criteria of Form F-3 (and must not be a blank check company, shell company or penny stock issuer). Although the broker-dealer would have to publish the research report “in the regular course of its business,” it would no longer be required to publish it “with reasonable regularity” (as required under the current version of the rule). In other words, a broker-dealer would still not be permitted to initiate coverage of the issuer and take advantage of the rule.

• **Industry-Related Reports:** The issuer would only need to be an Exchange Act reporting company (or an eligible foreign private issuer) and would not need to be eligible to use Form S-3 or F-3. The proposals would eliminate the current requirement that the broker-dealer not make a more favorable recommendation in the report than that contained in previous reports.

• **Rule 144A/Regulation S Offerings:** Similar to Rule 138, if the other conditions of amended Rule 139 were met, research would be published in connection with Rule 144A or Regulation S offerings.

6. **Research Reports Not a Free Writing Prospectus**

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

VI. **No Free Lunch – Liability Reforms**

The proposals would relax the limitations on communication and effectively encourage the sale of securities using documents other than a final statutory prospectus. But the proposals contain sticks in addition to carrots. As noted above, the proposals would extend Section 12(a)(2) liability to a free writing prospectus. They would also make certain other changes to the existing liability regime. We discuss the proposals below.
A. Proposed Rule 159 of the Securities Act – Timing of the Investment Decision

The proposals set out the SEC’s view that 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 delivered after the contract of sale.

The SEC has accordingly proposed new Rule 159 to address the liability implications of this timing issue. In particular, proposed 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” would not be taken into account.

The key implication of proposed Rule 159 is that a preliminary prospectus, a free writing prospectus or an oral communication at a “road show” would 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. In other words, changes made after pricing and included in the final prospectus would not provide a liability shield for the issuer or its underwriters. The critical inquiry would be whether the preliminary prospectus, as supplemented at the time of pricing (including by way of free writing prospectus), was accurate and complete in all material respects. The final prospectus would be irrelevant, except, of course, for Section 11 purposes.

B. Issues Raised by the Proposed Rule

Proposed Rule 159 would 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 proposed 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 would be permitted to be distributed electronically to potential investors (with a hyperlink to the preliminary prospectus) and filed with the SEC. This would allow distribution to investors of a “sticker” to the original preliminary prospectus without having to recirculate a full revised statutory prospectus. In that case, however, the issuer and its underwriters would need to consider whether the corrective free writing prospectus is inconsistent with the information in the registration statement on file. If so, it may be necessary to file a suitably corrected amendment to the registration statement at the same time the free writing prospectus is circulated in order to satisfy the conditions set forth in proposed Rule 433.

It remains to be seen whether underwriters with a due diligence defense under Section 12(a)(2) would 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. That practice may need to be revisited if Rule 159 is adopted as proposed.

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

The release states that there is currently “unwarranted uncertainty” under Section 12(a)(2) as to whether an issuer is liable in connection with certain underwriting arrangements. Proposed Rule 159A would overrule the First and Fifth Circuits’ interpretations of Section 12(a)(2), and in particular, those Circuits’ reading of the U.S. Supreme Court’s decision in Pinter v. Dahl, 486 U.S. 622 (1988).
In *Pinter*, the Supreme Court held that Section 12(a)(2) requires a defendant must be a seller – that is, a person who successfully solicits the purchase, motivated at least in part by financial interest – and the plaintiff must actually have bought the securities from that defendant. In the view of the First and Fifth Circuits, this means that an issuer in a firm commitment underwriting is not liable as a seller under Section 12(a)(2) because it did not actually pass title to the purchasers. Instead, it passed title to the underwriters who in turn passed title to the purchaser/plaintiffs.

Proposed Rule 159A addresses this point. Under the proposed rule, a “seller” for purposes of Section 12(a)(2) would include the issuer, and the issuer would be deemed to offer or sell securities by means of:

- a registration statement, any preliminary prospectus and prospectus;
- any free writing prospectus provided by or on behalf of the issuer;
- information about the issuer provided by the issuer and included in any other free writing prospectus; and
- any other communication made by or on behalf of the issuer.

D. Section 11 of the Securities Act

The release states that, in the SEC’s view, information contained in a prospectus or prospectus supplement filed after the date of sale would be considered to be part of and included in the registration statement at the time of effectiveness for purposes of Section 11 liability (which may be before or after the time of sale). Thus, an investor’s rights under Section 11 would not be affected by information delivered at or prior to the contract of sale, to the extent that information was not included in the registration statement (such as information in a free writing prospectus). Similarly, information in a prospectus or prospectus supplement would not be taken into account under Section 12(a)(2) or Section 17(a)(2), unless delivered to an investor at or prior to the contract of sale, even if that information would be deemed part of the registration statement at the time of effectiveness.

Because free writing prospectuses would not be deemed to be part of a registration statement, issuers and underwriters would 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 would subject that information to Section 11 liability. However, failure to include the information in the registration statement, by including it in the prospectus or otherwise, would mean that the issuer and underwriters would lose the benefit of any corrections in those documents for Section 11 purposes.

E. Rule 412

Under current Rule 412, information contained in a prospectus supplement or Exchange Act filing incorporated by reference into a registration statement may modify or supersede previously disclosed information. Consistent with the SEC’s other liability proposals, however, Rule 412 is proposed to be amended to provide that subsequently provided information would not modify or supersede information provided at the time of sale for determining what information was given to the investor at the time of sale.
VII. Modifications to the Shelf Offering Process

A. Automatic Shelf Registration for WKSIs

"Automatic shelf registration" is the big reward proposed in the release for WKSIs. Proposed modifications to Forms S-3 and F-3, coupled with new Rule 430B, would allow WKSIs (and in certain cases, their majority-owned subsidiaries) to register 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.

1. Omitted Information

The automatic shelf registration process would allow eligible issuers to omit from the base prospectus information as to:

- whether the offering is a primary or secondary offering;
- the plan of distribution for the securities;
- the identity of other issuers;
- the names of any selling security holders; and
- the amount of securities to be registered on their behalf.

Under the proposal, the omitted information could be included in a prospectus supplement filed under Rule 424 (which would be deemed to be part of the registration statement at the time of effectiveness), by post-effective amendment or by incorporation of Exchange Act reports. Note that, under proposed amendments to Rule 462, a post-effective amendment to an automatic shelf would become effective immediately upon filing.

2. New Classes of Securities

Under proposed amendments to Rule 413, WKSIs would be allowed to add new classes of securities to an automatically effective shelf registration statement at any time through a post-effective amendment, that would itself automatically become effective.

3. Pay-as-You-Go Registration Fees

Under proposed Rules 456 and 457, WKSIs registering securities under the automatic shelf registration process would only be required to pay filing fees at the time of a securities offering. The proposal would require issuers to pay a small initial filing fee at the time of filing the shelf registration statement and an additional fee whenever securities were taken down off of the shelf. For each takedown, the WKSI would either file a prospectus supplement that includes a calculation of registration fee table or file a post-effective amendment including the same information.
B. Issues Raised by Automatic Shelf Registration

The proposed new “on demand” shelf registration program for WKSIIs is an entirely positive proposal in our view. However, as is the case today, the shelf registration process imposes significant time pressure on underwriters seeking to complete their due diligence procedures in a timely manner. This pressure would only be amplified by the likely reliance on shelf registrations that we would expect if the proposals are adopted.

C. Proposed Rule 430B – Information that May be Omitted From the Base Prospectus

Under proposed Rule 430B, a shelf registration statement would be permitted to omit the following information as of effectiveness:

- information that is unknown and not reasonably available on the filing date;\(^9\)
- the information itemized above in the case of an automatic shelf registration statement; and
- for other S-3 or F-3 eligible issuers, subject to certain conditions, the identities of selling shareholders and the amounts of securities being registered on their behalf.

The omitted information could be included in a prospectus supplement filed under Rule 424, by post-effective amendment or by incorporation from Exchange Act reports.

In addition, in connection with shelf takedowns under Rule 430B, information omitted from a base prospectus that is included in a prospectus supplement would be deemed to be part of the registration statement (for purposes of Section 11 liability, among other things) on the earlier of the date the prospectus supplement is used and the date of the first contract of sale of securities to which the supplement relates. Under the proposed regime, this date would be deemed, for liability purposes under Section 11, to be a new effective date of the shelf registration statement.

D. Proposed Rule 430C

Proposed Rule 430C is similar to Rule 430B. It addresses offerings under Rule 415 by issuers that do not file Exchange Act reports or are not eligible to use Form S-3.

E. Additional Modifications to Rule 415

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

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\(^9\) This omission would be permitted pursuant to Rule 409.
1. **Elimination of Limitation on Amount of Securities Registered**

Rule 415, as currently in effect, 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 would eliminate this requirement for primary offerings.

2. **Three-Year Shelf Life**

Shelf registration statements would have a shelf life of three years under the proposals. In other words, a new shelf registration statement would have to be filed every three years. Unsold securities and unused fees would be carried forward to the new shelf registrations statement.

3. **Immediate Takedowns under Rule 415(a)(1)(x)**

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

4. **Elimination of “At-the-Market” Offering Restrictions**

Under the proposals, Rule 415(a)(4) would be amended to eliminate the current restrictions on primary “at-the-market” offerings of equity securities. As a result, issuers would be permitted to conduct these types of offerings without identifying the underwriters in the registration statement and without any volume limitation.

F. **Other Shelf-Related Changes**

1. **Rule 424**

The proposals would modify Rule 424 to require that any prospectus supplement filed under Rule 434 (which permits the use of term sheets) be filed at the same time as other prospectus supplements for shelf takedowns.

2. **Issuer Undertakings**

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 (i.e., 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 proposed amendments to Item 512(a) would permit all of the disclosures required by these undertakings to be contained in any filed prospectus supplement deemed part of and included in the registration statement or any Exchange Act report that is incorporated by reference into the registration statement. For example, an issuer could use an incorporated Form 8-K or 6-K to satisfy this undertaking. This change would 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 would streamline current practice in a welcome and helpful way.

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

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

VIII. Additional Reforms

A. Expanded Ability to Incorporate by Reference in Form S-1 and Form F-1

The new rules would amend Forms S-1 and F-1 to allow an issuer to incorporate information from its previously filed Exchange Act reports by reference if the issuer:

- is an Exchange Act reporting company;
- 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 an “ineligible issuer,” 10 and
- makes its Exchange Act reports readily available on its website.

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

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

The proposals to expand the types of issuers than may incorporate by reference in Forms S-1 and F-1 would render Forms S-2 and F-2 unnecessary. As a result, the proposals eliminate Forms S-2 and F-2. These Forms are rarely used in current practice.

10 See Note 3.
C. Prospectus Delivery Reforms – Access Equals Delivery


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, 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. Rule 172, 173, 174 and 153 work together to establish a new “access equals delivery system” for most capital-raising transactions.\(^\text{11}\)

2. Rule 172

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

- written trade confirmations and notices of allocation of securities would 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) would be deemed to be met provided the final prospectus meeting the requirements of Section 10(a) is filed with the SEC by the required Rule 424 prospectus filing date.

In order to satisfy Rule 172, the registration statement could not be the subject of any stop orders and the issuer could not be subject to any cease and desist proceedings. Furthermore, the prospectus would need to meet the requirements of Section 10(a).

3. Rule 173

Under proposed 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.\(^\text{12}\) The notice would have to be delivered not later than two business days following completion of the sale. Compliance with proposed Rule 173 would not be a condition for the proposed Rule 172 exemption from prospectus delivery, and hence failure to send the required notice would not result in a violation of Section 5.

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

12 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 90 days in the case of unlisted IPOs. There is no requirement to deliver a prospectus if the issuer is an Exchange Act reporting company immediately before the registration statement is filed.
4. **Rule 174**

Existing Rule 174 (governing prospectus delivery requirements of dealers) would be modified to make clear that any obligation to deliver a prospectus under the rule would 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 would need to be delivered.

5. **Rule 153**

Existing 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 currently cover transactions on NASDAQ.

Under the proposed amendment to Rule 153, brokers and dealers effecting transactions on an exchange or through any trading facility (including NASDAQ) would 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:

- the final prospectus were filed on timely basis;
- securities of the same class were trading on an exchange or through any trading facility registered with the SEC; and
- the registration statement relating to the offering were effective and not subject to stop order.

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

Proposed revisions to Form 10-K and Form 10 would require “plain English” risk factor disclosure in annual reports on Form 10-K and registration statements on Form 10. The proposals 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. Many domestic U.S. issuers already include risk factor disclosure in annual and quarterly reports, so we do not expect this proposal to significantly change current practice.
E. Disclosure of Unresolved Comments on Forms 10-K and 20-F

Proposed revisions to Form 10-K and Form 20-F would require a registrant to disclose any material unresolved written comments regarding its periodic filings from the SEC Staff if:

- the registrant is an accelerated filer,\(^{13}\) and
- it received the written comments not less than 180 days before the end of the fiscal year to which the annual report relates.

These proposals 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. Because the SEC would be focusing more of its resources on reviewing the Exchange Act reports of reporting issuers, underwriters and their counsel would likely have less ability to take part in the process of responding to staff comments absent a highly coordinated and somewhat unusual designated underwriters’ counsel arrangement.

F. Disclosure of Status as Voluntary Filer on Forms 10-K or 20-F

Because a voluntary filer may cease to file Exchange Act reports at any time without notice, the proposals include a requirement that voluntary filers identify their status as voluntary filers on the cover page of their Form 10-K or Form 20-F. Note that voluntary filers would not be considered to be seasoned issuers for purposes of the free writing prospectus proposals.

IX. Conclusion

The proposed new rules, taken together, amount to a major new way of looking at, and regulating, the public offering process. WKSIs would be the big winners under the new proposals – they would be left alone to fend for themselves in the capital markets much more than ever before, but by participating in the public offering regime they would be subject to greater liability than they would be for unregistered offerings. Most other issuers would 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. For all issuers, Exchange Act reports would be much more important for Securities Act purposes and would become even more central to the disclosure used in registered securities offerings. The new proposals pose interesting challenges to underwriters and their counsel, who may find their ability to influence issuer disclosure even further truncated by the proposed regime’s increased reliance on Exchange Act filings.

The SEC has asked for comments on the proposals by January 31, 2005. We have no doubt that much of what is being proposed will survive in the final form of the law to be adopted in 2005. We will advise you of all developments as they become known to us.

Please feel free to call Brian Cartwright, Alex Cohen, Kirk Davenport, John Huber or Ian Schuman with any questions you may have about the proposed new rules or any of the other Latham lawyers referred to on the last page of this Client Alert.

\(^{13}\) The SEC has not yet subjected foreign private issuers that file on Form 20-F to accelerated filing.
X. Annex A – Summary of the Proposals

A. WKSIs and Other Types of Issuers

<table>
<thead>
<tr>
<th>What is a WKSI?</th>
<th>Any issuer (including majority-owned subsidiaries under certain circumstances) that:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• is eligible to register a primary offering of its securities on Form S-3 or Form F-3;</td>
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<tr>
<td></td>
<td>• has either (i) a market value of outstanding common equity held by non-affiliates of $700 million or more or (ii) issued at least $1 billion in aggregate amount of debt securities in registered offerings during the past three years and will only register debt securities;</td>
</tr>
<tr>
<td></td>
<td>• has been a reporting issuer under the Exchange Act for at least 12 months;</td>
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<tr>
<td></td>
<td>• is current in its reporting obligations under the Exchange Act and has timely filed required material; and</td>
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<tr>
<td></td>
<td>• is not an “ineligible issuer” or “asset-backed issuer.” ¹⁴</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What are the other types of issuers?</th>
<th>Seasoned issuer – an issuer that is eligible to use Form S-3 or F-3 to register a primary offering of securities.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unseasoned reporting issuer – an issuer that is required to file Exchange Act reports, but does not satisfy the requirements of Form S-3 or F-3 for a primary offering of its securities. In addition, this category includes issuers that voluntarily file Exchange Act reports.</td>
</tr>
<tr>
<td></td>
<td>Non-reporting issuer – an issuer that is not required to file Exchange Act reports and is not filing those reports voluntarily.</td>
</tr>
</tbody>
</table>

¹⁴ An “ineligible issuer” would include issuers that (i) are not timely in their Exchange Act reporting obligations; (ii) are blank check companies, shell companies, penny stock issuers or limited partnerships offering other than through a firm commitment underwriting; (iii) have received a “going concern” qualification from its independent auditors in the most recent fiscal year; (iv) have filed for bankruptcy in the last three years; (v) have been convicted of certain felonies or misdemeanors within the past three years; (vi) have entered into any settlement with any government agency alleging violations of the federal securities laws within the past three years; (vii) are subject to judicial order prohibiting them from violating the federal securities laws; and (viii) have had any registration statement subject to a refusal order or stop order within the past three years.
### B. Free Writing Prospectus

<table>
<thead>
<tr>
<th>Who may use a free writing prospectus?</th>
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<tbody>
<tr>
<td><strong>WKSIs</strong> – would be able to use a free writing prospectus at any time.</td>
</tr>
<tr>
<td><strong>Any issuer (or underwriter)</strong> – would be able to use a free writing prospectus after a registration statement is filed.</td>
</tr>
<tr>
<td><strong>Ineligible issuers</strong> – would not be able to use a free writing prospectus.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>What are the prospectus delivery requirements in connection with a free writing prospectus?</th>
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<tbody>
<tr>
<td><strong>WKSIs and seasoned issuers</strong> – a free writing prospectus could be used by WKSIs and seasoned issuers without delivering a statutory prospectus. In the case of seasoned issuers and WKSIs, a statutory prospectus would first have to be on file with the SEC.</td>
</tr>
<tr>
<td><strong>Non-reporting and unseasoned issuers</strong> – a statutory prospectus, including a price range when required (in the case of an IPO), would have to accompany or precede a free writing prospectus, with two exceptions:</td>
</tr>
<tr>
<td>• once a statutory prospectus has been provided, if there is no material change between that prospectus and the most recent statutory prospectus; and</td>
</tr>
<tr>
<td>• when the free writing prospectus is prepared and disseminated by someone other than the issuer or its underwriters – for example, a journalist – and no consideration is given for publication.</td>
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<tr>
<th>What are the information and legend requirements?</th>
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<tbody>
<tr>
<td><strong>Not inconsistent</strong> – the information in a free writing prospectus would need to be consistent with the information in any prospectus or an issuer’s Exchange Act Reports.</td>
</tr>
<tr>
<td><strong>Legend</strong> – the free writing prospectus would be required to contain a legend in prescribed form.</td>
</tr>
</tbody>
</table>
What are the filing requirements?

All issuers – all issuers would be required to file, on or prior to the day the free writing prospectus is used:

- any issuer free writing prospectus used by any person;
- any free writing prospectus of any person used by the issuer;
- any issuer information contained in a free writing prospectus prepared by another person (but not information prepared by a person other than the issuer on the basis of issuer information); and
- any free writing prospectus prepared by a person that contains only a description of the final terms of the issuer’s securities.

Underwriters – an underwriter would be required to file any free writing prospectus it distributes in manner reasonably designed to lead to its broad dissemination, unless information in the free writing prospectus has already been filed (e.g., by the issuer).

Exceptions to filing – no free writing prospectus would need to be filed if it is substantially the same as a free writing prospectus already on file. In addition, the requirement to file issuer information contained in a free writing prospectus of a person other than the issuer would not apply if that information were already included in a previously filed statutory or free writing prospectus.

Electronic roadshows – electronic road shows would be treated as free writing prospectuses which would need to be filed unless the issuer were to:

- make at least one version of a *bona fide* electronic road show available electronically to any person; and
- file any information disclosed at the road show that is not already included in the information already on file.

Issuer website information – offers of securities contained on an issuer’s website or hyperlinked from the issuer’s website to a third party website would be free writing prospectuses that must be filed. However, historical information about an issuer that is identified as such and is located in a separate section of an issuer’s website would not be considered a free writing prospectus unless that information had been included in a prospectus for the offering.
Media free writing prospectuses – any written communication about an issuer that is published by third party media would be a free writing prospectus, if it includes information provided by an issuer or one of its underwriters. However, media free writing prospectuses would not need to be accompanied or preceded by a statutory prospectus, and would not be subject to the prior filing and information/legend requirements if:

- no payment were made or other consideration is given for the publication by the issuer or its underwriters; and
- the issuer files the media free writing prospectus within one business day after publication or dissemination.

What are the liability implications?

Section 12(a)(2) and 17(a)(2) but not Section 11 – a free writing prospectus would be subject to Section 12(a)(2) and Section 17(a)(2) liability, regardless of whether it is filed. A free writing prospectus would not be considered part of the registration statement and hence not subject to Section 11.

C. Additional Reforms to the Offering Process

Rule 163A – 30-day bright line exclusion from gun-jumping

Available for all issuers – Rule 163A would provide issuers with a safe harbor for communications made during the period ending 30 days prior to the filing of a registration statement; these communications would not be considered prohibited “offers” under Section 5(c).

Requirements – in order to use the safe harbor:

- Rule 163A communications could not refer to a securities offering;
- the communications would have to be made by or on behalf of an issuer, so that communications by an underwriter (or prospective underwriter) would not come within the safe harbor;
- the issuer would have to take “reasonable steps within its control” to prevent further distribution of the information during the 30-day period prior to filing the registration statement (except to the extent otherwise covered by another safe harbor, such as proposed Rules 168 and 169); and
- the communication could not be used in connection with certain transactions.
Rule 163 – Pre-filing offers by WKSI

Available only for WKSI offers made by or on behalf of a WKSI before the filing of a registration statement would be exempt from Section 5(c)'s restrictions on “offers.”

Written offers made in reliance on proposed Rule 163 would be considered a free writing prospectus once the registration statement is filed.

Rule 168 – Safe harbor for factual business information and forward-looking information regularly released by reporting issuers

Reporting issuers; factual business information and forward-looking information – an issuer that files reports under the Exchange Act, or a person acting on its behalf, would be allowed to make continued regular release or dissemination of “factual business information” and “forward-looking information,” subject to certain conditions.

Rule 168 information could be released at any time – including before and after the filing of a registration statement.

Information is released “by or on behalf” – if the issuer, its agent or its representatives authorized and approved the information before release.

Rule 168 factual business information –

- factual information about the issuer or some aspect of its business;
- advertisements of, or other information about, the issuer’s products or services;
- factual information about business or factual developments with respect to the issuer;
- dividend notices; and
- factual information set forth in the issuer’s Exchange Act reports.

Rule 168 forward-looking information —

- 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;
- statements about the issuer’s future economic performance, including statements contemplated by MD&A; and
- assumptions underlying or relating to the foregoing.
### Information about the offering

Would not be factual business or forward-looking information.

### Additional conditions

- The issuer must have previously released or disseminated information of this type in the ordinary course; and
- The timing, manner and form of release must be consistent with past disclosure.

In order for the information to be considered regularly released in the ordinary course, the method of releasing or disseminating the information must be consistent with prior practice, not just the type of information disseminated. In other words, the issuer must have a track record of releasing information in that manner.

### Non-reporting issuers; factual business information only

An issuer that does not file reports under the Exchange Act, or a person acting on its behalf, would be able to make continued regular release 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.

### Information is released “by or on behalf”

If the issuer, its agent or its representatives authorized and approved the information before release.

### Rule 169 factual business information

- Factual information about the issuer or some aspect of its business;
- Advertisements of, or other information about, the issuer’s products or services; and
- Factual information about business or factual developments with respect to the issuer.

Additional conditions – to use the safe harbor:

- The issuer would have to have previously released or disseminated information of this type in the ordinary course;
- The timing, manner and form of release would have to be consistent with past disclosure; and
The information would have to be released 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 regularly and historically have provided this information to those persons.

As amended, Rule 134 would permit the following – in addition to the information currently allowed under the rule:

- basic factual information about the legal identity, business location and 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 additional 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;
- certain additional information, such as names of selling securities holders; and
- a shortened legend.

D. Expanded Safe Harbors for Research Reports

Rule 137 – Research issued by brokers or dealers not participating in the offering

Under the current Rule 137 – a broker or dealer not participating in a registered offering may continue to publish research about a reporting issuer without being considered an underwriter in the offering.

Applies to all issuers – amended Rule 137 would expand the rule to apply to securities of all issuers, including non-reporting issuers.

Not a free writing prospectus – research reports published under amended Rule 137 would not be considered a free writing prospectus subject to the requirements of proposed Rule 433.
<table>
<thead>
<tr>
<th>Rule 138 – Research issued by brokers or dealers participating in the offering regarding a different type of security</th>
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</thead>
<tbody>
<tr>
<td>Under current Rule 138 – a broker or dealer participating in a registered securities offering of a Form S-3 or F-3 eligible issuer (and certain foreign private issuers) may continue to publish research regarding a different type of security of that issuer.</td>
</tr>
<tr>
<td>Applies to all reporting issuers – amended Rule 138 would expand the rule to cover reports on securities of all reporting issuers (including those not eligible to use Forms S-3 and F-3).</td>
</tr>
<tr>
<td>Foreign private issuers – amended Rule 138 would continue to permit research on certain non-reporting foreign private issuers.</td>
</tr>
<tr>
<td>Regular course – amended Rule 138 adds a requirement that the broker or dealer must publish research reports on the type of securities in question “in the regular course of business.”</td>
</tr>
<tr>
<td>Rule 144A/Regulation S – if the other conditions of the rule are met, amended Rule 138 would allow the publication of research in connection with Rule 144A and Regulation S transactions.</td>
</tr>
<tr>
<td>Not a free writing prospectus – research reports published under Rule 138 are excluded from the definition of “offer” under Section 5(c) and Section 2(a)(10), and would not be considered a free writing prospectus subject to the requirements of proposed Rule 433.</td>
</tr>
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</table>

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<thead>
<tr>
<th>Rule 139 – On-going research published by brokers or dealers participating in the offering</th>
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<tbody>
<tr>
<td>Under current Rule 139 – a broker or dealer participating in registered offering of securities may publish on-going research about a Form S-3 or Form F-3 eligible issuer in certain situations</td>
</tr>
<tr>
<td>Issuer-specific reports – under amended Rule 139, the issuer would continue to be required to be Form S-3 or F-3 eligible, or in the case of foreign private issuers to meet certain of the F-3 criteria. Although the broker-dealer would have to publish the report in the regular course of business, it would no longer need to publish with “reasonable regularity.”</td>
</tr>
<tr>
<td>Industry-related reports – under amended Rule 139, the issuer would need only to be an Exchange Act reporting company (or an eligible foreign private issuer) and would not need to be eligible to use Form F-3 or Form S-3. The proposals eliminate the current requirement that the broker or dealer not make a more favorable recommendation in the report as compared to previous reports.</td>
</tr>
</tbody>
</table>
Rule 144A/Regulation S offerings – if the other conditions of amended Rule 139 are met, research may be published in connection with Rule 144A or Regulation S offerings.

Not a free writing prospectus – research reports published under amended Rule 139 would be excluded from the definition of “offer” under Section 5(c) and Section 2(a)(10), and would thus not be considered a free writing prospectus subject to the requirements of proposed Rule 433.

E. Liability Reforms

Rule 159 – Liability for information conveyed at the time the investment decision is made

Section 12(a)(2) and Section 17(a)(2) liability at the time the investment decision is made – under proposed Rule 159, for purposes of determining whether a prospectus or oral statement included a material misstatement or omission, information conveyed to the investor after the time the investment decision is made (i.e., the pricing date in most underwritten offerings) would not be taken into account.

A final prospectus cannot cure – if adopted, proposed Rule 159 would eliminate the ability of issuers and underwriters to correct misstatements and omissions in the preliminary prospectus with updated information in the final prospectus delivered after pricing.

Rule 159A – Issuer as “seller” under Section 12(a)(2)

Issuer on the hook – under proposed Rule 159A, a “seller” for purposes of Section 12(a)(2) would include the issuer of the securities in a firm commitment underwriting, notwithstanding the fact that the actual sale occurred between the underwriter and the would-be plaintiff investor.

Section 11 liability

The prospectus or prospectus supplement is considered part of the registration statement under Section 11 – under the proposed regime, information contained in a prospectus or prospectus supplement filed after the effective date would be considered part of the registration statement for purposes of Section 11 liability.
The Securities Laws Grow Up—
The SEC Proposes Improvements to the Securities Offering Process

## F. Reforms to the Shelf Offering Process

### Automatic shelf registration

**Available only for WKSIs** – the proposed regime allows WKSIs to access the public capital markets quickly, as WKSIs would be able to register 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 proposed Rule 430B, the base prospectus could omit:

- whether the offering is a primary or secondary offering;
- the plan of distribution for the securities;
- the identification of other issuers;
- the names of any selling security holders; and
- the amount of securities to be registered on their behalf.

The omitted information could be included in a prospectus supplement, post-effective amendment or through incorporation of Exchange Act reports.

**New class of securities added through post-effective amendment** – proposed Rule 413 would permit WKSIs to add new classes of securities to an automatic shelf registration statement through post-effective amendment.

**Pay-as-you-go** – under proposed Rules 456 and 457, WKSIs would only be required to pay filing fees at the time of a securities offering (only a nominal fee at the time of filing the shelf registration statement would be required).
Rule 430B – Information that may be omitted from the base prospectus for seasoned issuers and WKSIs

Applies only to seasoned issuers and WKSIs – under proposed Rule 430B (and Rule 409), information that is unknown or not reasonably available may be omitted from a base prospectus in delayed primary offerings. In addition, the base prospectus may omit:

- as noted above for automatic shelf registration statements, certain information regarding offerings by WKSIs; and
- for all seasoned issuers, the identities of selling shareholders and the amount of securities being registered on their behalf.

The omitted information could be included in a prospectus supplement, post-effective amendment or through incorporation of Exchange Act reports.

Three-year shelf life; no limitation on amount of securities registered

Update shelf every three years – under the proposed regime, a new shelf registration statement would have to be filed every three years, with unsold securities and unused fees carried forward to the new registration statement.

No limitation on securities to be registered – the provision in Rule 415 limiting the amount of securities registered to an amount that is intended to be offered or sold within two years from the registration statement effective date would be eliminated for primary offerings.
<table>
<thead>
<tr>
<th>City</th>
<th>Name(s)</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boston</td>
<td>Ian B. Blumenstein</td>
<td>+1-617-663-5700</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brussels</td>
<td>John P. Lynch</td>
<td>+32 (0) 2-788-60-00</td>
</tr>
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<tr>
<td>Chicago</td>
<td>Mark D. Gerstein</td>
<td>+1-312-876-7700</td>
</tr>
<tr>
<td></td>
<td>Christopher D. Lueking</td>
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<tr>
<td>Frankfurt</td>
<td>John D. Watson</td>
<td>+49-40-41-40-30</td>
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<tr>
<td>Hamburg</td>
<td>Joachim von Falkenhausen</td>
<td>+49-40-41-40-30</td>
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