

# Client Alert

A report  
for clients  
and friends  
of the firm

February 2006

## Use of Media Free Writing Prospectuses under New Securities Offering Reform Rules

The SEC voted on June 29, 2005 to change the registration, communication, and offering rules under the Securities Act of 1933. The new Rules became effective December 1, 2005 (Release No. 33-8591).<sup>1</sup> In November 2005, the SEC issued a set of Frequently Asked Questions<sup>2</sup> about the new rules. FAQs #4, #5, #6 and #12 provide helpful guidance under the new rules for using media free writing prospectuses, or media FWP's.<sup>3</sup>

Before the SEC adopted the new rules for using media FWP's, there were some celebrated instances of members of management communicating with the press shortly before or during the issuer's registration period. The new rules now give issuers and underwriters a conditional and limited safe-harbor for publications of communications by management with the media.

### Media FWP's

A media FWP is a publication where:

- an issuer or any offering participant (such as an underwriter) provides information about the

issuer or the offering that constitutes an offer (whether orally or in writing)

- to a member of the media ( i.e., a person who is in the business of publishing, radio or television broadcasting or otherwise disseminating written communications),<sup>4</sup> and
- the media's publication of that information is an offer by the issuer or underwriter.

### FAQ #4

#### A common and proper use of a media FWP

**Q:** After the filing of the registration statement for an offering, if the issuer's CEO participates in a live interview with unaffiliated and uncompensated media that is broadcast on radio or television, would that interview be an issuer free writing prospectus that the issuer must file?

**A:** Yes, if the interview constitutes an offer. In that case, the CEO's interview on a live television or radio program conducted by unaffiliated and uncompensated media would be a written offer and would be treated the same as any other unaffiliated, uncompensated media publication or broadcast. The issuer would have to satisfy its filing obligation with regard to the interview within four business days after the broadcast.

<sup>1</sup> We summarized Securities Offering Reform and Release 33-8591 in our Client Alert "SEC Adopts Sweeping Offering Reform Rules" dated August 2005, available in "News and Publications" on our website at [www.proskauer.com](http://www.proskauer.com).

<sup>2</sup> Securities Offering Reform Questions and Answers dated November 30, 2005. To date, the SEC has released two sets of Securities Offering Reform FAQs. The first set was Securities Offering Reform Transition Questions, which was released in September 2005. The full text of both sets of FAQs appear on the SEC's website at [www.sec.gov](http://www.sec.gov).

<sup>3</sup> In our August 2005 Client Alert, we explained many of the terms that we use in this Client Alert, including "free writing prospectus," "offer," "prospectus," "seasoned" and "unseasoned" issuer and "WKS." Please consult our August 2005 Client Alert for a description of these and other principal terms used in Securities Offering Reform.

<sup>4</sup> Rule 433(f) of the '33 Act.

## Affiliated Media FWP

An affiliated media FWP exists where:

- an issuer or underwriter prepares, or pays for, the preparation, publication or dissemination of, or uses or refers to
- a published article, television or radio broadcast, or advertisement.

To use an affiliated media FWP, the issuer or underwriter must satisfy several conditions to use.<sup>5</sup>

For unseasoned or non-reporting issuers, the most recent statutory prospectus must precede or accompany an affiliated media FWP. As a result, in an IPO, the issuer and underwriters may not prepare or pay for “infomercials” about the issuer, its securities, or the offering.

## FAQ #6

### The new Rules for media FWPs do not allow paid infomercials in IPOs

Q: After the filing of the registration statement for an issuer’s initial public offering, but before that registration statement becomes effective, can the issuer’s CEO participate in a broadcast that is a paid “infomercial”?

A: While there is an exclusion from the requirement that the statutory prospectus must precede or accompany a media broadcast in an initial public offering, that exclusion is available only if no payment is made or consideration given by or on behalf of the issuer or such other offering participant for the written communication or its

dissemination, and the other conditions to the exclusion are satisfied. Because the “no payment” condition is not satisfied, the requirement that the statutory prospectus precede or accompany the communication applies and cannot be satisfied for a broadcast. Therefore, Rule 164 and Rule 433 would not be available for that communication.

## Unaffiliated Media FWPs

An unaffiliated media FWP exists where:

- persons in the media business who are unaffiliated with the issuer or underwriter prepare and publish or broadcast the media FWP; and
- the issuer or underwriter does not pay for the preparation, publication or broadcast.

There are fewer conditions to use for an unaffiliated media FWP.<sup>6</sup> But the issuer or underwriter must file an unaffiliated media FWP within four business days after the issuer or underwriter becomes aware of its publication or broadcast. The issuers or underwriter may file any one of the following:

- the media publication;
- all of the information provided to the media; or
- a transcript of the interview.

The unaffiliated media FWP need only be filed once, regardless of the number of publications in which the information appears. An issuer or underwriter may also file information to correct inaccuracies in the unaffiliated media

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<sup>5</sup> The issuer or underwriter must satisfy all of the conditions to use required for any other FWP. Under Rule 433 of the ‘33 Act, these conditions are:

(1) **Filing.** Issuers and underwriters must file a FWP no later than the date of first use.

- An issuer FWP that is prepared by the issuer must be filed by the issuer;
- a FWP that is prepared with information from the issuer and used by an underwriter, must be filed by the issuer; and
- an issuer FWP that is broadly disseminated by an underwriter, must be filed by the underwriter.

(2) **Retention.** If an issuer or underwriter does not file a FWP, then the issuer or underwriter must retain it for three years from the bona fide offering of the relevant securities.

(3) **Delivery.** The prospectus delivery requirement for a FWP depends on the type of issuer:

- Unseasoned issuer. If the issuer is unseasoned or non-reporting, a FWP must be accompanied with or preceded by the most recent statutory prospectus.
- Seasoned issuer. A seasoned issuer must have already filed a statutory prospectus when it uses a FWP.
- WKSI. A well-known seasoned issuer may use a FWP prior to the filing of the registration statement under Rule 163 of the ‘33 Act.

(4) **Legend.** The FWP must be legended to:

- recommend that investors read the prospectus in the registration statement and other filed documents available on the SEC website; and
- say that investors can arrange to have a prospectus sent to them.

<sup>6</sup> There is no prospectus delivery requirement for unaffiliated media FWPs. But a statutory prospectus must be on file (except for WKSI who may use a FWP before a registration statement is on file under Rule 163 of the ‘33 Act). In an IPO, the statutory prospectus on file need not include a price range. The SEC recently clarified this in Release 33-8591A (February 6, 2006), which made technical corrections to Release 33-8591.

FWP. Finally, an issuer or underwriter does not have to file the unaffiliated media FWP if its substance has been previously filed.<sup>7</sup>

### **FAQ #5**

#### **A media FWP does not need to be filed if its substance has already been filed**

Q: After the filing of the registration statement for an offering, if an issuer's CEO participates in an interview with unaffiliated and uncompensated media that is published and the substance of the information in the interview is contained in the registration statement, does the issuer have to file the interview as an issuer free writing prospectus?

A: No, even if the interview with the unaffiliated and uncompensated media constitutes an offer. If the CEO interview is an offer, it will be an issuer free writing prospectus, but it does not have to be filed as a free writing prospectus. Rule 433(f)(2) contains an exception from the filing conditions for unaffiliated and uncompensated media publications and broadcasts if the substance of the free writing prospectus has been filed previously with the Commission. Of course, the issuer will be responsible for determining whether the substance of the information has been filed previously.

#### **Media FWPs must be provided to the media by or on behalf of the issuer or offering participant**

The new Rules for media FWPs do not apply where someone other than the issuer or underwriter (or someone acting on their behalf) gives the FWP to the media.

### **FAQ #12**

#### **Remember that a media FWP must be provided to the media by or on behalf of the issuer or underwriter**

Q: During a company's IPO, an underwriter sends a free writing prospectus to its clients. A member of the media then receives the free writing prospectus from a client of that firm and not from the underwriter, and writes an article containing information derived from information in the underwriter's free writing prospectus. Will the article be a free writing prospectus of the underwriter?

A: The media provisions of the free writing prospectus rules apply to articles based on information provided by or on behalf of the issuer or other offering participants to the media. If a free writing prospectus (or the information

contained therein) is not provided to the media by an issuer or other offering participant or any person acting on behalf of either of them, a media publication based on that free writing prospectus (or information) would not be a free writing prospectus of the issuer or other offering participant. The staff may request information about the role, if any, that the underwriter or issuer played with regard to the provision of the free writing prospectus (or information contained therein) or the publication, at least in certain circumstances where it is not clear. If the issuer or underwriter, or a person acting on their behalf, provided, authorized, or approved the publication, the free writing prospectus rules might apply to the publication.

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<sup>7</sup> An unaffiliated media FWP must also be legended and retained. See the "Legend" and "Retention" conditions described in Note 5 to this Client Alert.