PROSKAUER ROSE LLP®

Client Alert

A report for clients and friends of the firm

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SEC Adopts Sweeping Offering Reform Rules

The Securities and Exchange Commission has adopted extensive new rules (the "Offering Reform Rules") designed to streamline registration procedures and relax restrictions on communications in connection with registered public offerings. The Offering Reform Rules also affect disclosures made by domestic issuers in their Forms 10-K and 10-Q and by foreign issuers in their Forms 20-F.

Summary

On July 19, 2005, the SEC adopted final rules (Rel. 33-8591) implementing its November 3, 2004 proposals to reform the public offering process under the Securities Act of 1933 (the "'33 Act"). The Offering Reform Rules principally relate to three areas:

- the liberalization of communications during public offerings;
- registration and other procedures in offerings; and
- delivery of information to investors, including the timeliness of delivery.

The Offering Reform Rules in large part build upon the current regulatory framework for registration and codify existing SEC views. In two important respects, however, the Offering Reform Rules introduce significant new concepts—the free writing prospectus and automatic shelf registration for the largest, most well-known issuers. These two concepts will permit the market to have a greater role in shaping the capital-raising process. Other aspects of the Offering Reform Rules, such as the adoption of the access-equals-delivery rule for final prospectuses, are designed to simplify existing systems in light of modern methods of communication. Finally, some of the new rules will affect disclosures made by reporting companies in their periodic reports outside of the capital-raising process by requiring disclosure of, among other things, risk factors in Annual Reports on Form 10-K.

The Offering Reform Rules will become effective on December 1, 2005. The Offering Reform Rules are extensive and complex; the adopting release is almost 500 pages long. Accordingly, this client alert is only a brief summary of the Offering Reform Rules.

Background

To understand the Offering Reform Rules, one first must understand the provisions of Section 5 of the '33 Act. The basics, in simplified form, are:

> *The Pre-filing Period.* Before a registration statement is filed,[1] no "offers," written or oral, are permitted.[2]
>
> *The Waiting Period.* After a registration statement is filed but before it becomes effective, written offers constituting prospectuses must be in the form of a "preliminary prospectus," "prospectus subject to completion" or "statutory prospectus" that satisfies the provisions of Section 10 of the '33 Act. Oral offers are permitted.[3]
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> *The Quiet Period.* After the registration statement becomes effective, written offers and delivery of the registered securities must be preceded or accompanied by a final prospectus that satisfies

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1 Determining when the pre-filing period begins requires a facts and circumstances analysis. For example, beginning substantive discussions with a prospective underwriter may trigger the commencement of the period.

2 Publication of specified limited information about a proposed offer before a registration statement is filed is permitted by current Rule 135, which will still be applicable.

3 Statements published after a registration statement is filed and conforming with Rule 134 could be offers but are not prospectuses. As revised by the Offering Reform Rules, Rule 134 will continue in effect.

the provisions of Section 10(a) of the '33 Act. Moreover, with respect to certain offerings, during a specified period (the so-called "quiet period"), dealers selling the security must deliver a final prospectus to their customers in connection with the sales.

A violation of Section 5 can delay an offering as the result of an SEC staff-imposed cooling-off period and can result in civil or criminal liability. In addition, the liability provisions of Sections 12(a)(2) and 17(a)(2) of the '33 Act (relating to misstatements or omissions) apply to both written and oral offers, as well as to sales.

In the Offering Reform Rules, the SEC has attempted to clarify the meaning of key terms—offer, written communication, graphic communication, prospectus and related terms—in a manner intended to facilitate capital formation without sacrificing investor protection. The Offering Reform Rules also amend the safe harbor rules for analysts' research reports issued during a registered offering (Rules 137, 138 and 139 (the "130 Series Rules") and certain related rules). This client alert only addresses the 130 Series Rules as they directly affect issuers.

Classification of Issuers

The benefits of the Offering Reform Rules that are available to a company depend upon the class of issuer into which the company falls.

Well-Known Seasoned Issuers

Well-known seasoned issuers will benefit the most from the Offering Reform Rules. A well-known seasoned issuer (other than a voluntary filer or an asset-backed securities issuer) is an issuer that:

Form Eligibility—is eligible to register a primary offering of its securities on Form S-3 or Form F-3 (for foreign private issuers);

Market Capitalization—as of a date within 60 days of its eligibility determination date, has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more, or has issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash registered under the '33 Act;[4] and

Not Ineligible—is neither an ineligible issuer (described below) nor engaged in an ineligible offering (*e.g.*, a business combination or asset-backed securities transaction).

Majority-owned subsidiaries of well-known seasoned issuers also may qualify as well-known seasoned issuers if certain conditions are satisfied.

Seasoned Issuers

A seasoned issuer is an issuer (including an issuer of mortgage-backed securities) eligible to register securities on Form S-3 or Form F-3 for a primary offering. If certain conditions are satisfied, a majority-owned subsidiary of a seasoned issuer may qualify as a seasoned issuer.

Unseasoned Issuers

An unseasoned issuer is an issuer required to file reports pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "'34 Act") that does not qualify as a well-known seasoned issuer or a seasoned issuer. Unseasoned issuers will not benefit from most of the provisions of the Offering Reform Rules described under the caption "Other Provisions of Benefit to Eligible Issuers" below.

Non-Reporting Issuers

A non-reporting issuer is an issuer that is not required to file reports pursuant to Section 13(a) or 15(d) of the '34 Act; *i.e.*, generally, an issuer engaging in an IPO. A "voluntary filer" is deemed to be a non-reporting issuer. Non-reporting issuers will not benefit from any of the provisions of the Offering Reform Rules described under the caption "Other Provisions of Benefit to Eligible Issuers" below.

Ineligible Issuers

Ineligible issuers include SEC reporting issuers that have not filed all required reports and CEO and CFO certifications required to be included in those reports; issuers that are, or within the past three years were, "blank check companies," "shell companies" or issuers of "penny stock," all as defined in SEC rules; limited partnerships offering securities by other than firm commitment underwritings; registered investment companies and business development companies; issuers that have been subject to bankruptcy or insolvency proceedings within the past three years, unless the issuer has filed an annual report containing audited financial statements after emerging from such proceeding; issuers

[4] An issuer that meets the definition of well-known seasoned issuer, based on the $700 million public float threshold, can use an automatic shelf registration statement (described below) to register any offering of securities, other than those for business combination transactions. An issuer that meets the definition of well-known seasoned issuer, based on the amount of registered non-convertible security issuances in the prior three years, also may register any such offering for cash using an automatic shelf registration statement if it is eligible to register a primary offering of its securities on Form S-3 or Form F-3. An issuer that meets the definition of well-known seasoned issuer, based on the aggregate amount of registered non-convertible security issuances in the prior three years but is not eligible to register a primary offering of securities on Form S-3 or Form F-3, may use an automatic shelf registration to register only offerings for cash of non-convertible securities, other than common equity, whether or not investment grade.

(including any entity that was, at the time, a subsidiary of such issuer) that within the past three years were convicted of a felony or misdemeanor for specified crimes; issuers (including any entity that was at the time a subsidiary of such issuer) that within the past three years (but in the case of an order or decree agreed to in a settlement, not before December 1, 2005) were the subject of a decree or order arising out of specified proceedings for violation of securities laws involving fraud by the issuer or its subsidiary; or issuers registering securities for a business combination transaction. Unless the SEC determines otherwise, ineligible issuers generally will not benefit from the Offering Reform Rules, other than the liberalization of Rule 134 (discussed below) relating to certain limited communications that are not deemed to be prospectuses.

"Gun-Jumping" Provisions

General

The term "offer" is defined in Section 2(a)(3) of the '33 Act to include any "attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security, for value." The SEC and the courts have interpreted this term broadly. Publicity efforts before the filing of a registration statement that have the effect of conditioning the market for the issuer's securities or arousing public interest in the issuer or its securities—so-called "gun-jumping"—constitute offers in violation of Section 5.

The SEC observed in the proposing release for the Offering Reform Rules that even "regularly released factual business information" and "regularly released forward-looking information" or a communication made more than 30 days before a registration statement is filed, although not prospectuses, could be offers, as defined in Section 2(a)(3) of the '33 Act, and thus could be subject to liability under the '33 Act. Moreover, these communications could constitute prohibited prospectuses for purposes of Section 5(b)(1) of the '33 Act, which prohibits the use of a prospectus that does not satisfy the conditions of Section 10 of the '33 Act after a registration statement has been filed and before it becomes effective (*i.e.*, a prospectus that is not a "statutory prospectus"). In view of the system of continuing disclosure about issuers that is required under the '34 Act and technological innovations resulting in more rapid information dissemination, the SEC noted that the existing gun-jumping rules were overly restrictive and were inconsistent with current capital formation processes. As a result, the Offering Reform Rules significantly amend the gun-jumping rules.

Communications

The Offering Reform Rules, insofar as they relate to gun-jumping provisions, provide that:

- well-known seasoned issuers are permitted to engage at any time in oral and written communications, including use, at any time, of a free writing prospectus (as described under *"Prospectuses"* below), subject to certain conditions (including, in specified cases, filing with the SEC);[5]

- well-known seasoned issuers, seasoned issuers, unseasoned issuers and certain non-reporting foreign private issuers are permitted, at any time, to continue to publish regularly released factual business information (as described below) and forward-looking information (as described below);[6]

- non-reporting issuers are permitted, at any time, to continue to publish regularly released factual business information intended for use by persons other than in their capacity as investors or potential investors (e.g., customers and suppliers);[7]

- communications by issuers (other than ineligible issuers) more than 30 days before filing a registration statement[8] are not prohibited offers so long as the communications: (i) do not reference a securities offering that is or will be the subject of a registration statement; (ii) are made by or on behalf of the issuer (a communication made by a prospective underwriter or other offering participant is not deemed to be made "on behalf of the issuer"); and (iii) the issuer (other than a well-known seasoned issuer) must take reasonable steps to prevent further distribution of the communication during the 30-day period prior to the filing of the registration statement;[9]

- issuers (other than ineligible issuers) and offering participants (*e.g.*, underwriters and dealers) are permitted to use free writing prospectuses after the filing of the registration statement, subject to certain

[5] See Rule 163.

[6] See Rule 168.

[7] See Rule 169.

[8] As Rule 163A provides a safe harbor from the application of Section 5(c), it applies only prior to the filing of a registration statement. This exclusion thus will not apply to issuers offering securities off a shelf registration statement on file, whether or not effective, because the prohibition in Section 5(c) does not apply to the offering of the securities covered by such a shelf registration statement.

[9] See Rule 163A. Rule 433(e)(2) provides that historical information on an issuer's web site that is not updated, included in a prospectus or used or referred to (by hyperlink or otherwise) in connection with the registered offering would not constitute an offer, particularly if that information is identified as such and segregated in a separate section of the web site.

conditions (including, in specified cases, filing with the SEC);[10]

- a broader category of routine communications regarding issuers, offerings and procedural matters, such as communications about the schedule for an offering or about account-opening procedures, are excluded from the definition of "prospectus;"[11] and

- the exemptions for research reports are expanded.[12]

The term "factual business information" is defined in Rule 168 as any of the following types of information, if the issuer has previously released such type of information and the current release of information is consistent with these past releases:

business information—factual information about the issuer, its business or financial developments or other aspects of its business;

advertisements—advertisements of, or other information about, the issuer's products or services;

dividends—dividend notices; and

'34 Act reports—factual information set forth in the issuer's '34 Act reports.

The safe harbor for regularly released forward-looking information is not available to non-reporting issuers (including voluntary filers), other than non-reporting foreign private issuers meeting certain conditions. The safe harbor for regularly released forward-looking information is also available to issuers of asset-backed securities with regard to the issuance of such securities. This safe harbor permits eligible issuers to release this type of information at any time during the offering process and is in addition to the safe harbors from the anti-fraud provisions of the Federal securities laws for forward-looking information.[13]

The term "forward-looking information" is defined in Rule 168 as any of the following types of information, if the issuer has previously released such type of information and the current release of information is consistent with these past releases:

projections—projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

plans—statements about the issuer's management's plans and objectives for future operations, including plans or objectives relating to products or services;

future performance—statements about the issuer's future economic performance, including statements contemplated by the MD&A requirements; and

assumptions—assumptions underlying or relating to any of the foregoing.

Ordinary course business-related communications outside of the safe harbor will not be presumed to be offers but nonetheless might be, depending on the facts and circumstances. Also, communication of business or forward-looking information that does not satisfy the conditions of the safe harbor still may not constitute an "offer" or, in appropriate circumstances, may constitute a permissible "free writing prospectus," rather than an illegal offer or a prohibited prospectus.

Communication of material, non-public factual business information and forward-looking information will continue to be subject to the SEC's "fair disclosure" regulation, Regulation FD, and, unless a safe harbor is available, the anti-fraud provisions of the Federal securities laws. In addition, there is uncertainty as to whether the SEC staff will require that these types of information, particularly forward-looking information, be included as part of the registration statement, and thus subject to Section 11 liability (relating to material omissions from or misstatements in a registration statement), as well as possible liability under Sections 12(a)(2) and 17(a)(2).

Prospectuses

General

The term "prospectus" is defined in Section 2(a)(10) of the '33 Act as "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security," with an exception for communications after the effective date of a registration statement that are preceded or accompanied by a prospectus that satisfies the provisions of Section 10(a) of the '33 Act.

If a final prospectus has been filed, the Offering Reform Rules exclude certain routine communications from the

[10] See Rules 164 and 433.

[11] See Rule 134.

[12] See Rules 137, 138 and 139.

[13] See Section 27A of the '33 Act, Section 21E of the '34 Act, Rule 175 and related SEC rules and pronouncements.

definition of prospectus or do not require them to comply with Section 5(b)(1) of the '33 Act. These routine communications include:

> *confirmations of sale*—confirmations of sale containing only the information required by '34 Act Rule 10b-10 and certain other routine information;
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> *allocations*—notices of allocations of securities; and
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> *pricing and settlement*—pricing and settlement information.

The information permitted in notices pursuant to Rule 134, which are communications not deemed a prospectus after a registration statement has been filed,[14] has been expanded. The expanded information permitted in these notices includes:

> *business*—increased factual information about the issuer and its business, including the address and other contact information about the issuer;
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> *securities*—more information about the securities being offered but not a detailed description of the securities such as would be included in a final term sheet (although a final term sheet could be communicated as a "free writing prospectus");
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> *offering*—more factual information about the offering, including its mechanics and scheduling, underwriter information and marketing activities, and providing a URL address for the statutory prospectus;
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> *customer accounts*—procedures regarding customer account opening and submitting indications of interest and conditional offers to buy; and
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> *security ratings*—additional information about security ratings.

Free Writing Prospectuses

Definition

The Offering Reform Rules provide that a "free writing prospectus" is a prospectus that, if used by a well-known seasoned issuer before the filing of a registration statement, satisfies the conditions of Rules 163 and 433 and, if used by an eligible issuer after a registration statement is filed, satisfies the conditions of Rules 164 and 433. These conditions relate generally to the types of transactions for which free writing prospectuses may be used and record retention, filing and legend requirements, all of which are summarized below. The conditions to the use of a free writing prospectus also depend on the classification of the issuer. A free writing prospectus is not part of the registration statement and thus not subject to liability under Section 11 of the '33 Act (relating to material omissions from or misstatements in a registration statement) but is subject to liability under the provisions of Sections 12(a)(2) and 17(a)(2) of the '33 Act.

The following are not free writing prospectuses and thus need not be filed with the SEC:

> *historical information and regularly released information*—historical information on an issuer's web site, regularly released "factual business information" and "forward-looking information," as discussed above under "Communications;"
>
> *certain permitted notices*—notices permitted by Rule 134 or Rule 135 and the routine types of information discussed above; and
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> *research reports*—research reports permitted under the 130 Series Rules.

Underwriters and other offering participants can use free writing prospectuses after a registration statement is filed. In the case of an offering by a non-reporting issuer, the free writing prospectus generally must be preceded or accompanied by a statutory prospectus, a requirement that may be satisfied electronically by an active hyperlink to the statutory prospectus. This necessity of delivering the statutory prospectus may limit the ability of non-reporting issuers to utilize a free writing prospectus other than in an electronic format and will require those non-reporting issuers that do so to accurately record the identity of persons receiving free writing prospectuses. In the case of offerings by reporting issuers, such a prospectus (other than a summary prospectus, which will not satisfy this requirement) must be "available" (*i.e.*, on file with the SEC).

In order to qualify as a free writing prospectus, a communication must be written. "Written communications" are all communications other than oral communications, including written, printed and broadcast communications and graphic communications. "Graphic communications" include all electronic communications, including audio tapes, video tapes, CD-ROMs, electronic mail, Internet web sites, computers, computer networks and other forms of computer data compilation. However, live, real-time communications

[14] The liberalization provided by the amendments to Rule 134 is not available to registered investment companies and business development companies.

to a live audience, including road shows, whether by telephone, Internet or some other medium, are oral communications.

An interview or other media publication or television or radio broadcast where an issuer or offering participant participates (but does not prepare or pay for the article or broadcast) could be a free writing prospectus, but does not require prior or simultaneous delivery of the statutory prospectus. In general, an article that includes information obtained at a road show will be a free writing prospectus of the issuer or underwriter. The publication in a magazine of an article based on an interview with an officer of a non-reporting issuer (without payment to the magazine for the article) after the filing of the registration statement will be a free writing prospectus of the issuer. In that case, there is no requirement that a statutory prospectus precede or accompany the article at the time of the publication.

Since oral offers are permitted after a registration statement is filed, it is necessary to determine whether a road show constitutes a written communication, including a graphic communication, or an oral communication. Historically, road shows have been considered oral communications if certain conditions were satisfied. The Offering Reform Rules define a road show as an offer (other than a statutory prospectus or portion thereof) that contains a presentation regarding the offering by the issuer's management and includes a discussion of the issuer, its management and the securities offered.

Under the Offering Reform Rules, depending on the circumstances, a road show can be either a written communication and thus a prospectus (possibly a free writing prospectus) or a permissible oral communication. For a road show to be deemed an oral communication (and therefore not a free writing prospectus), it must be a live, real-time communication to a live audience, including a road show that is transmitted graphically and involves no distribution of written communications. The Offering Reform Rules provide that information presented at such a live road show (including slides and PowerPoint presentations) is not required to be filed with the SEC, except that materials distributed to and retained by attendees (including copies of slides and PowerPoint presentations) are free writing prospectuses that must be filed. Road shows that qualify as oral communications are nonetheless offers subject to the provisions of Sections 12(a)(2) and 17(a)(2) of the '33 Act and the other liability provisions of the federal securities laws.

Road shows that do not originate live, in real-time, to a live audience and that are graphically transmitted are electronic road shows that will be considered written communications and therefore free writing prospectuses. Issuer involvement or participation in an electronic road show that is a written communication will make it an issuer free writing prospectus. For a road show with media coverage not to be deemed a free writing prospectus, it must be a live, open access electronic road show. A *bona fide* electronic road show is defined as a road show that is a written communication transmitted by graphic means and, if more than one road show that is a written communication is being used, includes discussion of the same general information as such other road shows. Road shows that are free writing prospectuses are not required to be filed with the SEC, except, in the case of an issuer not required to file reports under the '34 Act offering common equity or convertible equity securities, such an issuer must file unless it makes at least one version of a *bona fide* electronic road show readily available without restriction electronically to any potential investor.

Eligible issuers and offering participants will not be required to deliver "preliminary" or "final prospectuses" if certain conditions are satisfied, including the issuer having filed (or making a good faith and reasonable effort to file) the prospectus with the SEC on EDGAR within the time period required under Rule 424,[15] and the offering participants (or the issuer, if there are no offering participants), within two business days after the sale, having sent a notice to the purchasers that the sale was made pursuant to a registration statement.[16] The purchaser then may request a copy of the final prospectus, but it need not be delivered before settlement. This is the so-called "Access Equals Delivery Rule."[17] A final prospectus that is only filed will not be considered to have been sent or given for purposes of the exception under Section 2(10) of the '33 Act. Therefore, non-reporting issuers and unseasoned issuers may only make written offers after the effective date of a registration statement if the offer is preceded or accompanied by a paper or electronic copy of the final prospectus. Accordingly, in order to comply with this provision, non-reporting and unseasoned issuers will be required to accurately record the identity of offerees.

[15] See Rule 172.

[16] See Rule 173. Compliance with Rule 173 is not a condition to reliance on Rule 172 to satisfy final prospectus delivery and, therefore, non-compliance with Rule 173 will not result in the violation of Section 5 of the '33 Act.

[17] The Access Equals Delivery Rule does not relieve offering participants of their obligations under '34 Act Rule 15c2-8 to deliver copies of preliminary prospectuses in connection with IPOs, although such delivery could be accomplished electronically. The Access Equals Delivery Rule is not available to registered investment companies or business development companies or for offerings of securities registered on Form S-8, business combination transactions or exchange offers.

Filing Requirements

The Offering Reform Rules include some complex filing requirements for registration statements, post-effective amendments and prospectuses, including free writing prospectuses. Except in the case of road shows (which are discussed above), an issuer must file: a free writing prospectus prepared by it or on its behalf; the information provided by an issuer for use in another offering participant's free writing prospectus, unless included in the registration statement or a previously filed free writing prospectus; any free writing prospectus prepared by an offering participant that the issuer disseminates; and any free writing prospectus that includes the final terms of the issuer's securities. A free writing prospectus prepared by an offering participant other than the issuer, which is distributed in a manner designed by that person to achieve broad unrestricted distribution, must be filed by that person. Free writing prospectuses provided only to an underwriter's or other offering participant's sales force or customers (no matter how numerous) are not considered to lead to a broad distribution and do not have to be filed.

Timing. Depending upon the circumstances, the Offering Reform Rules impose different timing requirements for filing free writing prospectuses[18] as follows:

> *Issuers.* A free writing prospectus must be filed by issuers on or before the date of first use, except for final terms of securities. However, free writing prospectuses used by well-known seasoned issuers during the 30 days preceding the filing of a registration statement must be filed when the registration statement is filed.
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> *Final Terms of Securities.* A free writing prospectus containing the final terms of securities must be filed by the issuer within two business days after the later of the date on which such terms become final and the date when it is first used. A free writing prospectus describing non-final terms of securities is not required to be filed. Additionally, communications in compliance with Rule 134 that contain non-final terms of securities are not prospectuses.
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> *Media.* Media publications prepared and published or disseminated by a person unaffiliated with the issuer or an offering participant that are not paid for by the issuer or an offering participant for which an issuer has filing responsibility by virtue of its preparation, authorization or approval of the information disseminated, must be filed by the issuer within four business days after the issuer or offering participant becomes aware of its first publication or broadcast.
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> *Others.* Offering participants that distribute a free writing prospectus in a manner designed by that person to achieve broad, unrestricted distribution, such as through an unrestricted web site or through the media, must file such prospectus on or before the date of first use.

The SEC may request a copy of any free writing prospectus not required to be filed in order to monitor its use.[19]

Legend Requirement. Although there are no specific content requirements for a free writing prospectus, it must include the legend required by Rule 433[20] to the effect that the communication is a free writing prospectus used in connection with a registered offering.

Safe Harbors for Immaterial or Unintentional Failures to File or Include a Specified Legend. The Offering Reform Rules contain various safe harbors, or cure provisions, for immaterial and unintentional failures to file free writing prospectuses or to include a legend on free writing prospectuses. These safe harbors can be summarized as follows:

> *Legends.* There must be a good faith, reasonable attempt to comply with the legend requirement; the free writing prospectus must be amended to include the required generic legend; and, as amended, as soon as practicable, it must be transmitted to potential investors to whom it was transmitted without the legend.
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> *Failure to File.* There must be a good faith, reasonable attempt to file the free writing prospectus, and it must be filed promptly after discovery of the failure to file.

Safe Harbor for Omission of Information. Rule 408 has been amended to provide that a failure to include information disclosed in a free writing prospectus in a prospectus that is part of the registration statement will not, solely by reason of including that information in the free writing prospectus, be considered an omission of material information required to be included in the registration statement, although the civil liability provisions of Section 12(a)(2) and the anti-fraud provisions of the '33 Act will apply. Nevertheless, the SEC staff could insist that information in a free writing

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[18] Filing a prospectus pursuant to Rule 424 will not satisfy the free writing prospectus filing requirements.

[19] See Rule 418.

[20] Disclaimers of responsibility or liability that are inappropriate in a statutory prospectus or registration statement also are impermissible in free writing prospectuses, including disclaimers of accuracy or completeness; statements requiring investors to read or acknowledge that they have read any disclaimers or legends or the registration statement; and language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation of an offer to buy.

prospectus be made part of the registration statement and thus subject to Section 11 liability.

Document Retention. Free writing prospectuses, including electronic road shows and non-final term sheets, must be retained for three years by issuers or offering participants, as the case may be, regardless of whether the free writing prospectus contained issuer information. Free writing prospectuses that have been filed with the SEC are not subject to this retention requirement. However, an immaterial or unintentional failure to retain a free writing prospectus will not result in a violation of Section 5(b)(1) of the '33 Act or the loss of the ability to rely on the exemption, so long as a good faith and reasonable effort was made to comply.

Relation to Regulation FD

The SEC's fair disclosure regulation currently provides that certain oral or written communications of material non-public information in connection with certain registered offerings of securities are not subject to Regulation FD's public dissemination requirements. The Offering Reform Rules amend Regulation FD to exclude the following communications from the application of Regulation FD:

Registration Statements—a registration statement filed under the '33 Act, including a prospectus "contained therein;"

Free Writing Prospectuses—a free writing prospectus satisfying the conditions of new Rule 433 used after the registration statement is filed;

Section 2(a)(10) Exception—communications deemed not a prospectus by Section 2(a)(10);

Section 10(b) Prospectuses—any other statutory prospectus;

Certain Notices—communications permitted by Rule 134 or 135; and

Oral Communications—oral communications made in connection with a registered offering after the registration statement is filed.

These communications will be excluded from the application of Regulation FD if they are used in connection with most securities offerings registered under the '33 Act, including the following:

Capital Formation—capital formation transactions for the account of the issuer, whether or not underwritten, and which may include secondary offerings by selling security holders; and

Business Combinations—registered business combination transactions.

Automatic Shelf Registration

Well-known seasoned issuers, but not other issuers, may use "automatic shelf registration" procedures. These procedures differ from current "universal shelf registration" procedures in that:

Automatic Effectiveness. Automatic shelf registration statements and amendments thereto will be effective on filing and will be effective for three years, provided the issuer remains a well-known seasoned issuer at the time the registration statement is updated in accordance with Section 10(a)(3) of the '33 Act.

"Pay As You Go." Well-known seasoned issuers may pay registration fees as they sell securities "off the shelf," rather than at the time of the initial filing of the registration statement, provided that the registration fee calculation table is included in the prospectus filed under Rule 424(b).

Amounts of Securities. Well-known seasoned issuers will not be required to specify the amount of securities of each class that they register and may include outstanding securities to be offered by selling security holders without initially identifying them or the amount of securities they intend to sell, which was impermissible under prior "universal shelf registration" rules that require a separate registration statement for these secondary offerings.

Changes in Classes of Securities and Registrants. Well-known seasoned issuers may add additional classes of securities and subsidiary registrants by post-effective amendment if certain conditions are satisfied, including signatures by the appropriate officers and directors of the subsidiary registrant.

The automatic shelf registration process will provide well-known seasoned issuers with the flexibility rapidly to take advantage of market windows, to structure and sell securities to accommodate issuer needs or investor demand, and to determine or change the plan of distribution in response to changing market conditions. For well-known seasoned issuers, the automatic shelf registration process and the virtually unlimited ability to use free writing prospectuses are tantamount to company registration, whereby the focus of registration and disclosure moves from transactions to issuers.

Other Provisions of Benefit to Eligible Issuers

The Offering Reform Rules include a number of other provisions that benefit well-known seasoned issuers, seasoned issuers and unseasoned issuers, including the following:

Omissions from Prospectuses. The Offering Reform Rules specify the types of information that may be omitted from the base prospectuses for certain types of shelf offerings by well-known seasoned issuers and seasoned issuers, including identities of selling security holders if the prior private offering to them is complete and the private transaction is identified in the prospectus. Selling security holders in "PIPES" offerings still must be identified when the registration statement is filed.

Two Year Limit on Amount of Securities. The rule limiting shelf offerings to the amount of securities expected to be sold within two years has been eliminated, although registration statements for automatic shelf offerings and certain other shelf offerings will be effective only for three years. An issuer may file a new shelf registration statement prior to the end of the three-year period, in which case it may continue to sell securities under the old registration statement until the earlier of the effective date of the new registration statement and, except in the case of a well-known seasoned issuer, six months after the timely filing of the new registration statement. Since a well-known seasoned issuer can utilize an automatic shelf registration that is automatically effective and that is not subject to review by the SEC, it does not require the six-month extension referred to in the preceding sentence.

At the Market Offerings. Restrictions on at the market offerings have been eliminated.

Convenience Shelf. Immediate take downs off the shelf (a "convenience shelf") are no longer prohibited.

Plan of Distribution. Information about material changes in a plan of distribution may be included in a prospectus supplement or incorporated by reference from a Form 8-K, rather than included in a post-effective amendment.

Incorporation by Reference. All issuer information required by Forms S-3 or F-3 may be incorporated by reference to '34 Act reports. Unseasoned issuers (and other issuers) ineligible to use Forms S-3 or F-3 may incorporate previously filed '34 Act reports in Form S-1 or, for foreign private issuers, Form F-1 registration statements to satisfy the disclosure requirements of those Forms, but "forward incorporation" will not be permitted. Forms S-2 and F-2 have been rescinded.

Subsidiaries. The categories of majority-owned subsidiaries eligible to use Forms S-3 and F-3 have been expanded.

Research Reports

The amendments to the 130 Series Rules, as they apply to research reports, have been coordinated with the SEC's Regulation AC ("Analyst Certification") and the terms of the so-called "Global Settlement" among various regulators and a number of investment banking firms. These amended rules, as they relate to research reports and certain related relief under Rule 144A, Regulation S and the SEC proxy rules, are addressed in this client alert only with respect to their direct effects on issuers.

Issuers cannot rely on the 130 Series Rules. Thus, if an issuer communication were hyperlinked to a research report, that report, depending upon the circumstances, would become either an issuer free writing prospectus or an impermissible prospectus.

Other Provisions of Benefit to Offering Participants

Underwriters, selling dealer group members and other offering participants also may benefit from the proposed relaxation of restrictions on communications during the offering process, including the following:

Free Writing Prospectuses. A free writing prospectus prepared by an underwriter, even one including information prepared on the basis of or derived from issuer information that does not include issuer information, does not have to be filed, unless the free writing prospectus falls into the "broad dissemination" category. Free writing prospectuses sent directly to customers of an offering participant, without regard to number, are not broadly disseminated for purposes of the Offering Reform Rules. Research reports that do not satisfy the provisions of the 130 Series Rules may constitute free writing prospectuses.

Road Shows. Electronic road shows that do not qualify as "live" road shows or *bona fide* electronic road shows constitute free writing prospectuses and will not have to comply with current SEC staff "no action" positions with respect to road shows. Those no action positions will be withdrawn upon the effectiveness of new Rule 433.

Access Equals Delivery. Under the Access Equals Delivery Rule, issuers and other offering participants generally will not have to deliver final prospectuses and often may not have to deliver preliminary prospectuses.

Amendments to Rule 153. Rule 153 has been amended to provide that brokers and dealers effecting transactions on an exchange or through a trading facility (including Nasdaq and "alternative trading systems") registered with the SEC will satisfy their final prospectus delivery obligations if the final prospectus has been filed with the SEC and securities of the same class as those sold in the offering are traded on the exchange or through the facility.

Confirmations. Offering participants generally will not have to deliver paper or electronic copies of final prospectuses with confirmations.

Communications with Customers. Offering participants may freely provide their customers with pricing information, allocation information and other non-issuer information without violating Section 5.

Liability Exposure

Sections 12(a)(2) and 17(a)(2)

The Offering Reform Rules impose liability under Sections 12(a)(2) and 17(a)(2) (relating to misstatements or omissions) on communications currently thought by many not to be subject to such liability. Since the culpability standard under these sections is negligence, this represents a significant shift in liability.

New Rules 159 and 412 (dealing with superseded information) provide that liability under Sections 12(a)(2) and 17(a)(2) will be determined based upon the information conveyed to an investor before or at the time of sale, including the time that the investor enters into a contract to purchase, not at the time that information is subsequently conveyed to the investor or filed with the SEC. In other words, disclosure that first appears in a final prospectus will not be sufficient to cure a defective preliminary prospectus if an investor used that preliminary prospectus to make its investment decision. The undertakings required by Item 512 of Regulation S-K and Regulation S-B have been amended to complement this and the other liability-related Offering Reform Rules discussed in this client alert.

Free writing prospectuses could constitute offers subject to the liability provisions of Sections 12(a)(2) and 17(a)(2).

The Offering Reform Rules make the issuer a "seller" for purposes of Section 12(a)(2), in circumstances where it currently is not thought by many to be a seller, *e.g.*, in a registered primary offering where the issuer "sells" to the underwriters, not to the ultimate purchasers.

In response to concerns about cross liability for free writing prospectuses used by an issuer and other offering participants, new Rule 159A provides that an offering participant other than the issuer will not be considered to offer or sell securities to a person "by means of" a free writing prospectus unless:

- the offering participant used or referred to the free writing prospectus in offering or selling the securities to that person;

- the offering participant offered or sold the securities to that person and participated in planning for the use of that free writing prospectus by other offering participants and such free writing prospectus was used or referred to in offering or selling securities to that person by one or more of such other offering participants; or

- under the conditions for use of the free writing prospectus in Rule 433, the offering participant is required to file the free writing prospectus with the SEC.

Rule 159A also provides that a person will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed the free writing prospectus with the SEC.

Section 11

Section 11 liability is only imposed on materially misleading information or omissions that are part of a registration statement. The Offering Reform Rules impose Section 11 liability on information in documents currently not considered by many to be part of a registration statement. Importantly, however, free writing prospectuses, even if filed with the SEC, generally are not subject to Section 11 liability, as they usually will not be part of the registration statement.

Prospectus supplements, including prospectus supplements used in connection with shelf take downs, are deemed to be part of the registration statement for purposes of Section 11. Each take down off the shelf triggers a new registration statement effective date for purposes of an issuer's Section 11 liability, which will then correspond to the current effective date for the underwriters' liability. This also results in a new effective date for purposes of the liability cutoff provisions of Rule 158. However, this does not result in a new effective date for purposes of Section 11 liability of directors, signing officers and experts, or for registration form eligibility, and generally does not require that experts' consents be updated.

Exchange Act Reports Amendments

As a result of the relaxation of '33 Act restrictions on communications, as well as other '33 Act reforms, the Offering Reform Rules provide for increased disclosure in '34 Act filings, including the following:

Risk Factors. All reporting issuers, except small business issuers, but including foreign private issuers, will be required to include risk factor disclosure, in "plain English," in their annual reports on Form 10-K (Form

20-F in the case of foreign private issuers) and domestic issuers will be required to update those risk factors in their quarterly reports on Form 10-Q. This requirement could transform what Congress (and the SEC) envisioned as defensive disclosure into liability exposure for negligently failing to update a risk factor.

SEC Comments. "Accelerated filers," as that term is defined by the SEC, including foreign private issuers and well-known seasoned issuers, will be required to disclose all unresolved SEC staff comments on the issuer's '34 Act reports issued more than 180 days before the filing of the latest annual report or Section 10(a)(3) post-effective amendment that the issuer believes are material. How disagreements with the staff as to the materiality of a comment will be resolved remains to be seen. Issuers can include a statement of their position on any unresolved staff comments. Staff comments that have been resolved and "future comments," which have been agreed to be addressed in future reports, need not be disclosed.

Voluntary Filing Status. Voluntary filers, including foreign private issuers, must disclose their status as such in their annual reports filed with the SEC.

Conclusion

The Offering Reform Rules clarify, modernize and streamline the capital raising process in a number of respects. The Offering Reform Rules significantly expand the type and amount of permissible information that issuers and offering participants may communicate during an offering. The Offering Reform Rules also continue the long-standing process of integrating disclosure under the '33 Act and the '34 Act. As a result of the increased ability of issuers to incorporate by reference their '34 Act reports into offering documents, together with the SEC's declared intent and requirement under the Sarbanes-Oxley Act to review '34 Act reports more frequently, issuers would be well advised to prepare those reports with the utmost care. In light of the recent, highly publicized settlements involving investment banking firms, such as in the Enron and WorldCom cases, this increased reliance in securities offerings on disclosures in issuers' '34 Act filings, together with the immediate effectiveness of automatic shelf registrations, may lead to the development by underwriters of new due diligence procedures. These due diligence procedures may involve investment bankers monitoring issuers and their '34 Act reports on a continuing basis and not merely in the context of an impending offering.

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