

Securities Act Rules

Rules 100 Through 241

General Rules and Regulations Under the Securities Act of 1933

A Red Box® Service Publication



Wolters Kluwer

- (i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
 - (ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or
 - (iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).
- (b) *Rule 144A Offerings.* If the conditions in paragraph (a) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§ 230.144A).
- (c) *Regulation S Offerings.* If the conditions in paragraph (a) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:
- (1) Constitute directed selling efforts as defined in Rule 902(c) (§ 230.902(c)) for offerings under Regulation S (§ 230.901 through § 230.905); or
 - (2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§ 230.902(h)) for offerings under Regulation S.
- (d) *Definition of Research Report.* For purposes of this section, *research report* means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

Rule 139. Publications or Distributions of Research Reports By Brokers or Dealers Distributing Securities.

(a) *Registered Offerings.* Under the conditions of paragraph (a)(1) or (2) of this section, a broker's or dealer's publication or distribution of a research report about an issuer or any of its securities shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security that is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker or dealer is participating or will participate in the registered offering of the issuer's securities. For purposes of the Fair Access to Investment Research Act of 2017 [Pub. L. 115-66, 131 Stat. 1196 (2017)], a safe harbor has been established for covered investment fund research reports, and the specific terms of that safe harbor are set forth in § 230.139b.

(1) *Issuer-Specific Research Reports.*

(i) The issuer either:

(A)(I) At the later of the time of filing its most recent Form S-3 (§ 239.13 of this chapter) or Form F-3 (§ 239.33 of this chapter) or the time of its most recent amendment to such registration statement for purposes of complying with section 10(a)(3) of the Act or, if no Form S-3 or Form F-3 has been filed, at the date of reliance on this section, meets the registrant requirements of such Form S-3 or Form F-3 and:

(i) At such date, meets the minimum float provisions of General Instruction I.B.1 of such Forms; or

(ii) At the date of reliance on this section, is, or if a registration statement has not been filed, will be, offering non-convertible securities, other than common equity, and meets the requirements for the General Instruction I.B.2. of Form S-3 or Form F-3 (referenced in 17 CFR 239.13 and 17 CFR 239.33 of this chapter); or

(iii) At the date of reliance on this section is a well-known seasoned issuer as defined in Rule 405 (§ 230.405), other than a majority-owned subsidiary that is a well-known seasoned issuer by virtue of paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405; and

(2) As of the date of reliance on this section, has filed all periodic reports required during the preceding 12 months on Forms 10-K (§ 249.310 of this chapter), 10-Q (§ 249.308a of this chapter), and 20-F (§ 249.220f of this chapter) pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or

(B) Is a foreign private issuer that as of the date of reliance on this section:

(1) Meets all of the registrant requirements of Form F-3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2(a) of Form F-3;

(2) Either:

(i) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or

(ii) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and

(3) Either:

(i) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§ 230.902(b)) and has had them so traded for at least 12 months; or

(ii) Has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more;

(ii) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:

(A) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(B) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or

(C) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter); and

(iii) The broker or dealer publishes or distributes research reports in the regular course of its business and such publication or distribution does not represent the initiation of publication of research reports about such issuer or its securities or reinitiation of such publication following discontinuation of publication of such research reports.

(2) *Industry Reports.*

(i) The issuer is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 or satisfies the conditions in paragraph (a)(1)(i)(B) of this section;

(ii) The condition in paragraph (a)(1)(ii) of this section is satisfied;

(iii) The research report includes similar information with respect to a substantial number of issuers in the issuer's industry or sub-industry, or contains a comprehensive list of securities currently recommended by the broker or dealer;

(iv) The analysis regarding the issuer or its securities is given no materially greater space or prominence in the publication than that given to other securities or issuers; and

(v) The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research report, is including similar information about the issuer or its securities in similar reports.

(b) *Rule 144A Offerings.* If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§ 230.144A).

(c) *Regulation S Offerings.* If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:

(1) Constitute directed selling efforts as defined in Rule 902(c) (§ 230.902(c)) for offerings under Regulation S (§§ 230.901 through 230.905); or

(2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§ 230.902(h)) for offerings under Regulation S.

(d) *Definition of Research Report.* For purposes of this section, *research report* means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

Instruction to § 230.139.

Projections. A projection constitutes an analysis or information falling within the definition of research report. When a broker or dealer publishes or distributes projections of an issuer's sales or earnings in reliance on paragraph (a)(2) of this section, it must:

1. Have previously published or distributed projections on a regular basis in order to satisfy the "regular course of its business" condition;

2. At the time of publishing or disseminating a research report, be publishing or distributing projections with respect to that issuer; and

3. For purposes of paragraph (a)(2)(iii) of this section, include projections covering the same or similar periods with respect to either a substantial number of issuers in the issuer's industry or sub-industry or substantially all issuers represented in the comprehensive list of securities contained in the research report.

Rule 139a. Publications By Brokers or Dealers Distributing Asset-Backed Securities.

The publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to asset-backed securities meeting the criteria of Form SF-3 (§ 239.45 of this chapter) ("SF-3 ABS") shall not be deemed to constitute an offer for sale or offer to sell SF-3 ABS registered or proposed to be registered for purposes of sections 2(a)(10) and 5(c) of the Act (15 U.S.C. 77b(a)(10) and 77e(c)) (the "registered securities"), even if such broker or dealer is or will be a participant in the distribution of the registered securities, if the following conditions are met:

(a) The broker or dealer shall have previously published or distributed with reasonable regularity information, opinions or recommendations relating to SF-3 ABS backed directly (or, with respect to securitizations of other securities, indirectly) by

substantially similar collateral as that directly or indirectly backing SF-3 ABS that is the subject of the information, opinion or recommendation that is proposed to be published or distributed.

(b) If the registered securities are proposed to be offered, offered or part of an unsold allotment or subscription, the information, opinion or recommendation shall not:

(1) Identify the registered securities;

(2) Give greater prominence to specific structural or collateral-related attributes of the registered securities than it gives to the same attributes of other asset-backed securities that it mentions; or

(3) Contain any *ABS informational and computational material* (as defined in § 229.1101 of this chapter) relating to the registered securities.

(c) Sufficient information is available from one or more public sources to provide a reasonable basis for the view expressed by the broker or dealer with respect to the asset-backed securities that are the subject of the information, opinion or recommendation.

(d) If the material published by the broker or dealer identifies asset-backed securities backed directly or indirectly by substantially similar collateral as that directly or indirectly backing the registered securities and specifically recommends that such asset-backed securities be preferred over other asset-backed securities backed by different types of collateral, then the material shall explain in reasonable detail the reasons for such preference.

Rule 139b. Publications or Distributions of Covered Investment Fund Research Reports By Brokers or Dealers Distributing Securities.

(a) *Registered Offerings.* Under the conditions of paragraph (a)(1) or (2) of this section, the publication or distribution of a covered investment fund research report by a broker or dealer that is not an investment adviser to the covered investment fund and is not an affiliated person of the investment adviser to the covered investment fund shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security that is the subject of an offering pursuant to a registration statement of the covered investment fund that is effective, even if the broker or dealer is participating or may participate in the registered offering of the covered investment fund's securities. This section does not affect the availability of any other exemption or exclusion from sections 2(a)(10) or 5(c) of the Act available to the broker or dealer.

(1) *Issuer-Specific Research Reports.*

(i) At the date of reliance on this section:

(A) The covered investment fund:

(1) Has been subject to the reporting requirements of section 30 of the Investment Company Act of 1940 (the "Investment Company Act") (15 U.S.C. 80a-29) for a period of at least 12 calendar months and has filed in a timely manner all of the reports required, as applicable, to be filed for the immediately preceding 12 calendar months on Forms N-CSR (§§ 249.331 and 274.128 of this chapter), N-PORT (§ 274.150 of this chapter), N-MFP (§ 274.201 of this chapter), and N-CEN (§§ 249.330 and 274.101 of this chapter) pursuant to section 30 of the Investment Company Act; or

(2) If the covered investment fund is not a registered investment company under the Investment Company Act, has been subject to the reporting requirements of section 13

or section 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78m or 78o(d)) for a period of at least 12 calendar months and has filed in a timely manner all of the reports required to be filed for the immediately preceding 12 calendar months on Forms 10-K (§ 249.310 of this chapter) and 10-Q (§ 249.308a of this chapter), or 20-F (§ 249.220f of this chapter) pursuant to section 13 or section 15(d) of the Exchange Act; and

(B) At the time of the broker's or dealer's initial publication or distribution of a research report on the covered investment fund (or reinitiation [*sic*] thereof), and at least quarterly thereafter;

(1) If the covered investment fund is of the type defined in paragraph (c)(2)(i) of this section, the aggregate market value of voting and non-voting common equity held by affiliates and non-affiliates equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 (§ 239.13 of this chapter);

(2) If the covered investment fund is of the type defined in paragraph (c)(2)(ii) of this section, the aggregate market value of voting and non-voting common equity held by non-affiliates equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 (§ 239.13 of this chapter); or

(3) If the covered investment fund is a registered open-end investment company (other than an exchange-traded fund) its net asset value (inclusive of shares held by affiliates and non-affiliates) equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 (§ 239.13 of this chapter); and

(ii) The broker or dealer publishes or distributes research reports in the regular course of its business and, in the case of a research report regarding a covered investment fund that does not have a class of securities in substantially continuous distribution, such publication or distribution does not represent the initiation of publication of research reports about such covered investment fund or its securities or reinitiation of such publication following discontinuation of publication of such research reports.

(2) Industry Reports.

(i) The covered investment fund is subject to the reporting requirements of section 30 of the Investment Company Act or, if the covered investment fund is not a registered investment company under the Investment Company Act, is subject to the reporting requirements of section 13 or section 15(d) of the Exchange Act;

(ii) The covered investment fund research report:

(A) Includes similar information with respect to a substantial number of covered investment fund issuers of the issuer's type (*e.g.*, money market fund, bond fund, balanced fund, etc.), or investment focus (*e.g.*, primarily invested in the same industry or sub-industry, or the same country or geographic region); or

(B) Contains a comprehensive list of covered investment fund securities currently recommended by the broker or dealer (other than securities of a covered investment fund that is an affiliate of the broker or dealer, or for which the broker or dealer serves as investment adviser (or for which the broker or dealer is an affiliated person of the investment adviser));

(iii) The analysis regarding the covered investment fund issuer or its securities is given no materially greater space or prominence in the publication than that given to other covered investment fund issuers or securities; and

(iv) The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research

report (in the case of a research report regarding a covered investment fund that does not have a class of securities in substantially continuous distribution), is including similar information about the issuer or its securities in similar reports.

(3) *Disclosure of Standardized Performance.* In the case of a research report about a covered investment fund that is a registered open-end management investment company or a trust account (or series or class thereof), any quotation of the issuer's performance must be presented in accordance with the conditions of paragraphs (d), (e), and (g) of § 230.482. In the case of a research report about a covered investment fund that is a registered closed-end investment company, any quotation of the issuer's performance must be presented in a manner that is in accordance with instructions to item 4.1(g) of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), provided, however, that other historical measures of performance may also be included if any other measurement is set out with no greater prominence than the measurement that is in accordance with the instructions to item 4.1(g) of Form N-2.

(b) *Self-Regulatory Organization Rules.* A self-regulatory organization shall not maintain or enforce any rule that would prohibit the ability of a member to publish or distribute a covered investment fund research report solely because the member is also participating in a registered offering or other distribution of any securities of such covered investment fund; or to participate in a registered offering or other distribution of securities of a covered investment fund solely because the member has published or distributed a covered investment fund research report about such covered investment fund or its securities. For purposes of section 19(b) of the Exchange Act (15 U.S.C. 78s(b)), this paragraph (b) shall be deemed a rule under that Act.

(c) *Definitions.* For purposes of this section:

(1) *Affiliated person* has the meaning given the term in section 2(a) of the Investment Company Act.

(2) *Covered investment fund* means:

(i) An investment company (or a series or class thereof) registered under, or that has filed an election to be treated as a business development company under, the Investment Company Act and that has filed a registration statement under the Act for the public offering of a class of its securities, which registration statement has been declared effective by the Commission; or

(ii) A trust or other person:

(A) Issuing securities in an offering registered under the Act and which class of securities is listed for trading on a national securities exchange;

(B) The assets of which consist primarily of commodities, currencies, or derivative instruments that reference commodities or currencies, or interests in the foregoing; and

(C) That provides in its registration statement under the Act that a class of its securities are purchased or redeemed, subject to conditions or limitations, for a ratable share of its assets.

(3) *Covered investment fund research report* means a research report published or distributed by a broker or dealer about a covered investment fund or any securities issued by the covered investment fund, but does not include a research report to the extent that the research report is published or distributed by the covered investment fund or any affiliate of the covered investment fund, or any research report published or distributed by any broker or dealer that is an investment adviser (or any affiliated person of an investment adviser) for the covered investment fund.

Rule 135e legend

Rule 135e provides a safe harbor for announcements, press releases and other press-related materials in connection with an offering structured pursuant to Regulation S. Inserting the legends below will have the effect of the press release **not** constituting general solicitation, general advertising or directed selling efforts.

The following legend should be inserted at the top of the press release in all-capital letters:

NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN
WHOLE OR IN PART IN OR INTO THE UNITED STATES, CANADA
OR JAPAN.

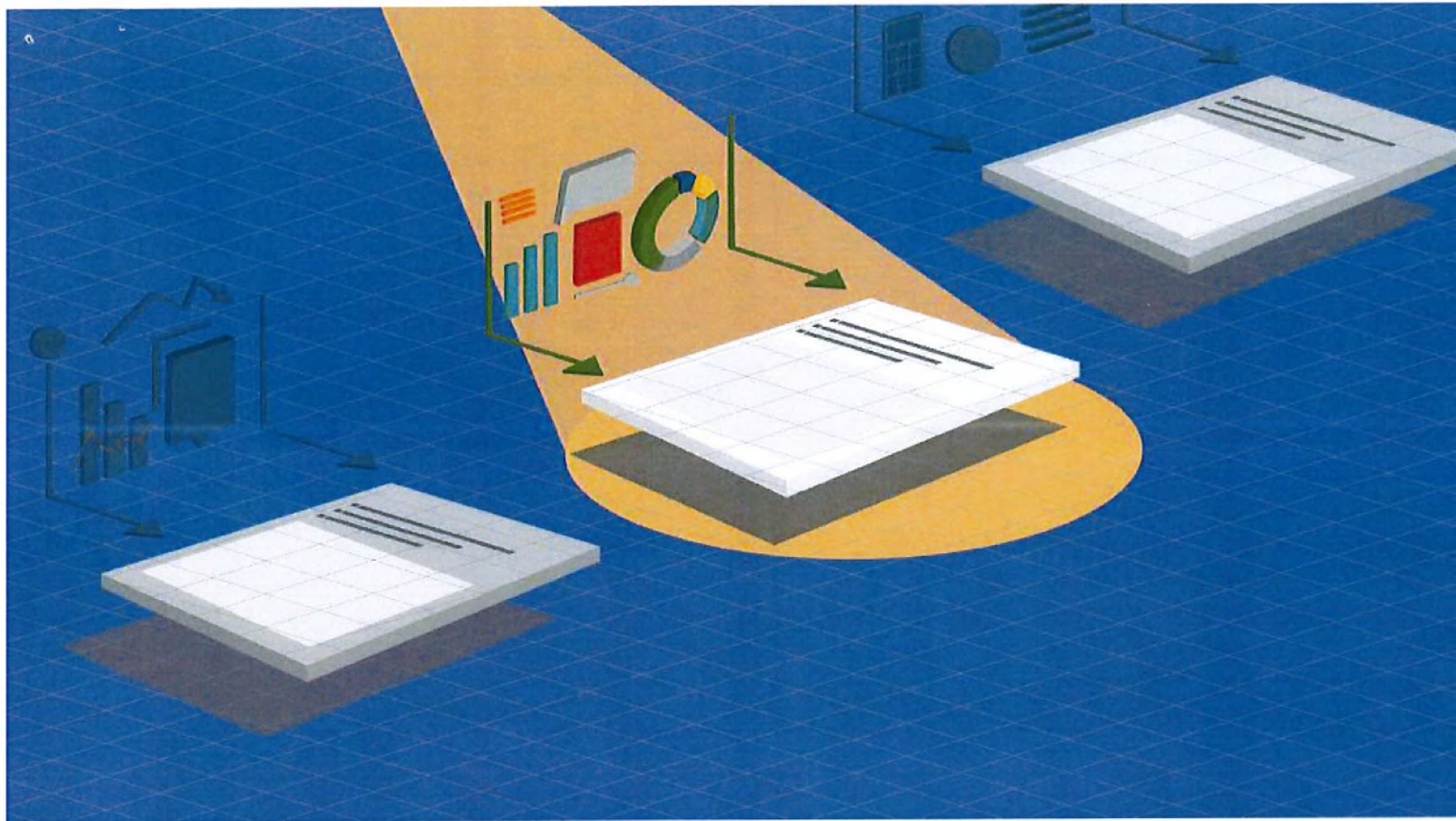
The following legend should be inserted at the end of the press release in addition to any legends or rubrics that might be required by local law or practice:

This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States.

The first legend should always include Canada, **unless** a Canadian lawyer has been consulted. There is a practice developing of including further jurisdictions, such as Australia, South Africa and New Zealand. There is also practice of including a sweep-up clause (such as “and any other jurisdiction where such activity would be unlawful”). You should **not** use a sweep-up clause: it is of **no** help to the person who is distributing the press release.

The second legend should be inserted in announcements or press releases as its own, stand-alone paragraph. It should **not** be combined with other legends.

In the case of an advertisement in a non-U.S. publication, such as the Financial Times, the first legend can be omitted.



RULE 139 OF THE US SECURITIES ACT RESEARCH REPORTS

Peter Castellon of Proskauer Rose (UK) LLP and Mark Bergman of Paul, Weiss, Rifkind, Wharton & Garrison LLP discuss research reports and the safe harbour under Rule 139 of the US Securities Act.

As anyone familiar with the registration requirements of the US Securities Act of 1933 (Securities Act) knows, issuers and others involved in securities offerings with a US component need to be mindful of the restrictions on publicity at or around the time of the offering. These concerns flow from broad interpretations by the US Securities and Exchange Commission (SEC) of the types of communications and other offering activities in, or directed to, the US that might constitute offers.

If these communications or offering activities do constitute offers, they might be considered impermissible “gun-jumping” in the context of a public offering (that is, an offer that is made before the filing of a registration statement), or impermissible general solicitation and general advertising in the context of certain private placements, under Section 5 of the Securities Act.

This article focuses on the safe harbour in Rule 139 under the Securities Act (Rule 139) for research reports covering an issuer, its securities or the issuer’s industry that are published by investment banks participating in a distribution of the issuer’s securities and cover securities subject to the offering (*see box “What are research reports?”*). For ease of reference, since the terminology used in the relevant regulations is US-centric, this article refers to the financial institution publishing a research report as an investment bank.

HISTORY OF RULE 139

Rule 139 was introduced to offset the broad application of the Securities Act’s gun-jumping prohibitions by providing certain safe harbours for communications conducted around the time of a registered public offering (*see box “Safe harbours”*).

In 1995, the SEC adopted amendments to Rule 139 that clarified that the safe harbour protections would be available for initial public offerings (IPOs) by sizable foreign private issuers that satisfy the alternative offshore trading history test; that is, the issuer’s securities must have been traded for at least 12 months on a designated offshore market.

In 2005, as part of reforms of the offering process, the SEC adopted further amendments to Rule 139. These amendments expanded the class of non-SEC reporting foreign private issuers with respect to which the Rule 139 provisions would be applicable to include non-SEC reporting foreign private issuers whose equity securities have traded on a designated offshore securities market for at least 12 months or that have a worldwide float of at least \$700 million. The amendments also confirmed that in

What are research reports?

In addition to providing underwriting services for offerings, investment banks provide ongoing research about an issuer's securities in the form of research reports. These reports track the issuer's performance in the market and give investors information that they can use to decide whether to buy, sell or hold the issuer's securities. In this way, research reports help to increase the liquidity of an issuer's securities. However, issuers need to be wary of gun-jumping issues; that is, violating the publicity restrictions that the US Securities and Exchange Commission imposes during the offering process.

Rule 139 under the US Securities Act of 1933 defines research reports as any written communication that includes information, opinions or recommendations with respect to, or analyses of, securities or issuers, whether or not the information is reasonably sufficient on which to base an investment decision. The US Jumpstart Our Business Startups Act of 2012 includes oral as well as written communications in the definition of a research report.

unregistered offerings conducted under Rule 144A under the Securities Act (Rule 144A), research reports meeting the conditions of Rule 139 would not be considered general solicitation or general advertising, and would not be considered directed selling efforts for the purposes of Regulation S under the Securities Act (Regulation S) (see "Rule 144A and Regulation S" below).

KEY ELEMENTS OF RULE 139

Rule 139 permits an investment bank participating in a distribution of securities of a well-known seasoned issuer (WKSI), a seasoned issuer or certain foreign private issuers to publish issuer-specific or industry-related research reports concerning the issuer or any class of its securities, if the research is included in a publication distributed in the regular course of its business. Industry-related research reports may also cover reporting issuers; that is, issuers that are required to file periodic reports with the SEC under the US Securities Exchange Act of 1934 (Exchange Act).

A WKSI is an issuer that:

- Is eligible to use SEC Form S-3 or Form F-3 for the registration of a primary offering of securities; that is, the issuer has a class of securities registered pursuant to Section 12(b) of the Exchange Act or is otherwise required to file reports under Section 15(d) of the Exchange Act.
- Has a worldwide public float of at least \$700 million or has sold at least \$1

billion in aggregate principal amount of registered, non-convertible securities (other than common equity) in primary offerings for cash.

The term "seasoned issuer" is not expressly defined in the relevant rules but is generally understood to meet the requirements of a WKSI except for the \$700 million public float requirement. All other issuers with SEC filing obligations would simply be reporting issuers.

These research reports are deemed not to constitute an offer for sale or offer to sell for the purposes of Sections 2(a)(10) and 5(c) of the Securities Act if certain requirements are met. The Rule 139 safe harbour is not available if the issuer is, or any predecessor of the issuer was during the preceding three years, a blank check company, a shell company (other than a business combination-related shell company) or a penny stock issuer.

Issuer-specific reports

Reports about a specific issuer can cover only:

- Reporting issuers with at least a one-year reporting history that are current in their Exchange Act periodic reports and are eligible to register a primary offering of securities on Forms S-3 or F-3, based on the \$75 million minimum public float or investment grade securities provisions of those forms.
- Certain non-SEC reporting foreign private issuers that satisfy the requirements of Rule 139(a)(1)(i)(B).

Accordingly, an investment bank publishing research on non-SEC reporting foreign private issuers may take advantage of Rule 139 for issuer-specific reports provided that the issuers meet the following requirements:

- The eligibility requirements of Form F-3; that is, they have not defaulted under debt securities.
- They have either \$75 million in worldwide common equity public float or are issuing non-convertible investment grade securities (see box "Fallen angels").
- They have had equity securities trading on a designated offshore securities market for at least 12 months or have \$700 million in worldwide common equity public float (see box "Designated offshore securities markets"). The SEC assumes that those issuers will have home country reporting obligations even though they are not SEC reporting companies.

The investment bank must publish or distribute the research report in the regular

Fallen angels

Regardless of the exchange on which a foreign private issuer has listed its equity securities, it must have a free float of at least \$75 million to be eligible for Rule 139 under the US Securities Act of 1933 (Rule 139). Questions may arise as to what to do if the free float temporarily falls below \$75 million. As long as this is triggered by events affecting the wider market, the issuer is otherwise Rule 139-compliant and it continues to have broad research coverage, an investment bank may from time to time feel comfortable continuing research coverage as if Rule 139 continued to be available. The research would not strictly fall within the safe harbour, but investment banks have concluded that this would not constitute general solicitation or directed selling efforts.

course of its business and must, at the time of use, also have distributed or published at least one research report about the issuer or its securities, or have distributed or published at least one such research report following any discontinuation of coverage. Rule 139 does not impose a minimum time period to have distributed or published research reports about the issuer and does not require that the previously published or distributed research report cover the same securities that are the subject of the current offering.

Industry-related reports

Industry-related research reports can cover any reporting issuer or non-reporting foreign private issuer that satisfies the conditions of Rule 139(a)(1)(i)(B) (*see above*). Investment banks are not precluded from making more favourable recommendations than the one made in the last publication and the report does not need to include any previous recommendations.

However, the following conditions must be met to comply with Rule 139:

- The investment bank must publish or distribute industry research reports in the regular course of its business.
- At the time of the publication or distribution of the industry research report, the report must include a similar type of information about the issuer or its securities as is contained in similar reports.
- The industry research report must include similar information with respect to a substantial number of issuers in the relevant issuer's industry or sub-industry, or contain a comprehensive list of securities currently recommended by the investment bank.
- The analysis regarding the issuer or its securities must not be given materially greater space or prominence in the publication than that given to other issuers or securities.

In addition, if projections are provided in an industry report, the investment bank must:

- Have previously published or distributed projections on a regular basis in order to satisfy the "regular course of business" condition.

Safe harbours

Research reports prepared and distributed by investment banks during a public offering are the type of communications that could potentially be treated as offers to sell securities in violation of the US Securities Act of 1933 (Securities Act) if they are published before the filing of a registration statement, known as gun-jumping.

Rules 137, 138 and 139 under the Securities Act provide safe harbours to allow investment banks to publish and distribute research reports without the reports being treated as offers, as long as certain conditions are met:

- Rule 137 provides that an investment bank that is not an offering participant in a registered offering but publishes or distributes research in the regular course of business will not be considered to be engaging in a distribution of the issuer's securities and, therefore, will not be treated as an underwriter for the purposes of the offering.
- Rule 138 permits an investment bank participating in a distribution of the securities of a reporting issuer or a foreign private issuer to publish or distribute research that is limited to that issuer's securities other than the offered securities.
- Rule 139 deals with research reports about an issuer, that issuer's securities and the industry, which are published by investment banks participating in a distribution of a qualifying issuer's securities and cover the securities that are the subject of the offering.

- At the time of publishing or disseminating the industry research report, be publishing or distributing projections with respect to that issuer.
- Include projections covering the same or similar periods with respect to either a substantial number of the issuers in the issuer's industry or sub-industry, or substantially all issuers represented in the comprehensive list of securities contained in the industry research report.

RULE 144A AND REGULATION S

Rule 139 safe harbours historically have not been available for research reports that are published and distributed around the time of offerings carried out under Rule 144A and Regulation S. Rule 144A is a non-exclusive safe harbour from the registration requirements of the Securities Act for sales of securities to qualified institutional buyers (QIBs). Regulation S provides a non-exclusive safe harbour for offerings made outside the US by both US and foreign issuers.

However, recognising the value of research in creating an efficient market, the SEC clarified, as part of its securities offering reform in 2005, that research reports meeting the conditions

of Rule 139 would not be considered offers under Section 5 of the Securities Act or general solicitation and general advertising in connection with offerings made in reliance on Rule 144A. These research reports would also not constitute directed selling efforts or be inconsistent with the offshore transaction requirements for the purposes of Regulation S.

However, as is the case with registered offerings generally and offerings conducted by emerging growth companies (EGCs) (*see "Emerging growth companies" below*), the flexibility provided for Rule 144A offerings has been affected by the provisions of the global research settlement (*see box "Global research settlement"*), as well as liability concerns.

In addition, it is widely accepted that an investment bank that publishes Rule 139-compliant research would not engage in general solicitation in connection with an offering to QIBs that is structured to comply with "Section 4(1½)" or Section 4(a)(2) of the Securities Act (*see feature article "US private placements: when Rule 144A is unavailable", www.practicallaw.com/7-615-3385*).

REGULATION M

Regulation M of the Exchange Act may also have implications for the publication and

Designated offshore securities markets

Rule 902(b) of Regulation S under the US Securities Act of 1933 defines "designated offshore securities markets" and lists the following exchanges which met the definition at the time the rule was published:

- Alberta Stock Exchange.
- Australian Stock Exchange Limited.
- Bermuda Stock Exchange.
- Copenhagen Stock Exchange.
- Euronext Amsterdam.
- Euronext Brussels.
- Euronext Paris.
- Frankfurt Stock Exchange.
- Helsinki Stock Exchange.
- The Stock Exchange of Hong Kong.
- Irish Stock Exchange.
- Istanbul Stock Exchange.
- Johannesburg Stock Exchange.
- London Stock Exchange.
- Bourse de Luxembourg.
- Mexico Stock Exchange.
- Milan Stock Exchange.
- Montreal Stock Exchange.
- Oslo Stock Exchange.
- Stock Exchange of Singapore.
- Stockholm Stock Exchange.
- SWX Swiss Exchange.
- Tokyo Stock Exchange.
- Toronto Stock Exchange.
- Vancouver Stock Exchange.
- Warsaw Stock Exchange.

Since then, the following exchanges have been added to the list:

- Aequis Neo Exchange.
- Athens Exchange.
- Bahamas International Securities Exchange.
- Channel Islands Stock Exchange.
- CNSX Markets.
- Egyptian Exchange.
- Korea Exchange.
- Kuala Lumpur Stock Exchange.
- Madrid Stock Exchange.
- Malta Stock Exchange.
- Panama Stock Exchange.
- Prague Stock Exchange.
- Taiwan Stock Exchange.
- Tel Aviv Stock Exchange.
- Vienna Stock Exchange.

distribution of research reports. It contains certain restrictions in connection with sales and purchases of securities in order to prevent market manipulation by an issuer, its affiliates and broker dealers.

The publication of a research report could constitute a prohibited attempt to induce someone to bid for or purchase a security being offered in a distribution if it is made during the

applicable restricted period. Regulation M provides an exception for research reports that meet the conditions of Rule 139. In addition, the restrictions imposed by Regulation M do not apply to distributions of:

- Actively traded securities.
- Investment grade, non-convertible and non-convertible preferred debt securities.
- Investment grade, asset-backed securities.

WHEN RULE 139 IS NOT AVAILABLE

If Rule 139 is not available, an investment bank participating as an underwriter in an offering has various options, including postponing the publication of the research report, prevailing on the issuer to postpone the offering, or withdrawing as an underwriter

Global research settlement

On 28 April 2003, certain enforcement actions initiated by the US Securities and Exchange Commission (SEC), self-regulatory organisations and other regulators against a number of investment banks to address conflicts of interest between their research and investment banking functions were settled. This is known as the global research settlement.

The global research settlement required investment banks to modify several of their practices, including separating their research and investment banking departments, and prohibiting any communication between those departments.

The SEC has confirmed that the enactment of the US Jumpstart Our Business Startups Act of 2012 does not affect the global settlement agreement. Therefore, any restrictions applicable to an investment bank because of the global settlement agreement, including the need to create and enforce firewalls between research and investment banking personnel, will continue to apply unless the bank procures a court order amending the terms of the global research settlement in respect of that bank.

As part of US Treasury Department's review of the US capital markets, in October 2017 it recommended a holistic review of the global research settlement and research analyst rules to determine which provisions should be retained, amended or removed, in order to harmonise a single set of rules for financial institutions (www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf).

for the offering. Where it has published a research report, the investment bank would generally want some period of time to elapse between publication and an offering of shares of the issuer. For example, some investment banks wait 30 to 40 days before conducting an offering to QIBs.

For post-offering publication of research, an investment bank that participated in an offering would generally want a period of time to elapse between the offering and publication of research covering the issuer. For example, many investment banks would wait 40 days after an offering to QIBs.

Since Rule 139 is a non-exclusive safe harbour, some investment banks may conclude that they are not engaging in gun-jumping, general solicitation and general advertising, or directed selling efforts, even if the conditions of Rule 139 are not strictly met.

If an investment bank has published a non-compliant research report, it could conduct the offering outside the US. In order to rely on this approach, most investment banks would go further than just structuring the transaction under Rule 903 of Regulation S. They tend to avoid US jurisdictional means by

not offering securities to onshore investment advisers of offshore funds, which would otherwise be allowed under Rule 903. This assumes that the research report was not, in fact, initiated to obtain the mandate for the transaction or to condition the market for the offering.

Concerns may be raised that withholding research would alert the market that an offering is imminent. In this case, non-compliant research could be kept out of the US. This approach is sometimes used by local or regional investment banks that post or email the research to non-US customers or publish the research on a website that is only accessible by non-US customers.

Investment banks may take the position that where an issuer is covered by a sufficient number of analysts, initiating new coverage should not make a difference to investors. For example, if an issuer is covered by five institutions in the English language, initiating coverage, perhaps as part of a wider sector-based initiative or because the institution has hired a new analyst, should not be interpreted as a solicitation for an offering that takes place shortly before or after the publication of the research report. Again, this is as long as the research was not,

in fact, published to obtain the mandate for the transaction or to condition the market for the transaction.

Investment banks may also take the position that they had no reasonable expectation of a mandate at the time of publication and, therefore, the publication should not be considered a solicitation. In addition, some investment banks may take the position that they have information barriers between their research teams and their bankers, and that, as long as the barriers work, the research should not be viewed as a solicitation.

While these approaches are taken by some investment banks from time to time, few investment banks would initiate research when they are mandated for an offering.

EMERGING GROWTH COMPANIES

The US Jumpstart Our Business Startups Act of 2012 (JOBS Act) created a new category of issuers known as EGCs (see *Briefing "Accessing the US markets: a warmer climate for foreign issuers"*, www.practicallaw.com/4-519-6377). EGCs are defined in the Securities Act and the Exchange Act as issuers with total annual gross revenues of less than \$1 billion during their most recently completed fiscal year.

Rule 139 was not amended to cover EGCs, however, the JOBS Act provides a safe harbour for EGCs by adding an exception from the definition of "offer" in Section 2(a)(3) of the Securities Act (Section 2(a)(3)) for research reports prepared by investment banks covering EGCs that are engaged in a public offering of common equity securities.

Under Section 2(a)(3), the publication or distribution of a written or oral research report about an EGC, at any time before or during a public offering of the EGC's securities (including its IPO), by an investment bank involved in the offering will not constitute an offer of securities for the purposes of Section 2(10) or Section 5(c) of the Securities Act.

The SEC and the US Financial Industry Regulatory Authority (FINRA) are prohibited from maintaining or adopting any rule restricting the publication of research on an EGC within any time period after an IPO or before the expiration of any related lock-up arrangement. Section 2(a)(3), unlike Rule 139,

is available for the initiation or re-initiation of research reports.

Investment banks preparing and distributing research reports about EGCs which avail themselves of Section 2(a)(3) should still remain mindful of certain other limitations on the distribution of research reports during offerings conducted in the US; in particular, those arising from the global research settlement and certain FINRA rules (see box "Global research settlement").

Owing to general concerns about liability, in practice, investment banks may elect not to rely on Section 2(a)(3) and to continue to impose research quiet periods, which typically last until the 25th calendar day following the IPO effective date. These quiet periods prohibit the publication of any research reports by investment banks participating in the offering in an effort to ensure that investors base their investment decision mainly on the information found in the registration statement.

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Memo regarding research on publicly listed parent of IPO candidate

CONSIDERATIONS FOR RESEARCH REPORTS ON [NAME OF PARENT]

Because of the importance of [*name of IPO candidate*] to the overall [*name of parent*] group, any research reports prepared by IPO syndicate members on [*name of parent*] (the “Parent Company”) should comply with the following guidelines.

- Any mention of [*name of IPO candidate*] should be in the context of information of interest to shareholders of the Parent Company, *not* in the context of information of interest to potential investors in the IPO of [*name of IPO candidate*].
- Research reports should *not* provide a valuation of [*name of IPO candidate*].
- Research reports should *not* discuss the IPO, except to the extent information on the IPO has been made public by Parent Company or [*name of IPO candidate*].
- If [*name of IPO candidate*] is mentioned in a research report, it should not receive prominent attention, and, in no event, should the proportion of the research report taken up by a discussion of [*name of IPO candidate*] exceed the proportion of the Parent Company group that [*name of IPO candidate*] represents.
- Research reports on the Parent Company that mention [*name of IPO candidate*] should comply with Rule 139.

Notes:

If an IPO candidate has a publicly listed parent company, this memo should be sent to syndicate members early in the transaction. Do *not* wait to include this in the research guidelines. Also, if a syndicate member does not cover the parent company, consider the possibility of that syndicate member initiating coverage during the course of the transaction.

DISTRIBUTION OF RESEARCH REPORTS

As long as [*the issuer*] (the “**Issuer**”) has not defaulted under any debt securities, has a public float of at least \$75 million and has been listed on [*designated offshore securities market*] for at least one year, [*the underwriters*] may publish ordinary course or maintenance research on the Issuer.

Ordinary course research or maintenance research means research reports that are published or distributed by a broker or dealer in the regular course of its business and such publication or distribution does **not** represent the initiation of publication of research reports about an issuer or its securities or the re-initiation of such publication following discontinuation of publication of such research reports.

Ordinary course research in this context also includes industry reports, if they meet the following requirements:

- They include similar information with respect to a substantial number of companies in the issuer’s industry or sub-industry or contain a comprehensive list of securities recommended by the broker or dealer in question.
- The analysis regarding the issuer or its securities is given no materially greater space or prominence in the publication than that given to other securities or issuers.
- The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research report in question, is including similar information about the Issuer or its securities in similar reports.

[*The underwriters*] may **not** distribute any other kind of research report regarding the Issuer. This restriction will apply until 40 days from the date the price of the offering is announced.