SEC PROPOSES SECURITIES OFFERING REFORM

On November 3, 2004, the Securities and Exchange Commission (the "SEC") proposed rules that would significantly modify the registration, communications and offering processes under the Securities Act of 1933 (the "Securities Act").[1] The proposed rules are intended to modernize the offering process to recognize the evolution of the securities markets and the proliferation of new technologies, including the Internet. They are part of the continuing efforts by the SEC to integrate the disclosure and other processes under the Securities Act and the Securities Exchange Act of 1934 (the "Exchange Act").

The rules propose reforms in three main areas:

- communications related to registered securities offerings;
- registration and other procedures in the offering process, including the provision of a new automatic shelf registration process for large companies and a simplified shelf registration process for other companies; and
- delivery of information to investors, including "delivery" through access and notice, and the timeliness of that delivery.

The rules also propose additional disclosures in annual reports on Form 10-K, including the addition of a "risk factors" section. The rules were enthusiastically supported by all five SEC commissioners at an open meeting held on October 26, 2004. The SEC will accept comments on the rules through January 31, 2005.

I. Executive Summary

A. Categories of Issuers

The proposed rules distinguish among four new categories of issuers: "*well-known seasoned issuers*," "*seasoned issuers*," "*unseasoned issuers*" and "*non-reporting issuers.*" The most extensive changes are proposed for well-known seasoned issuers, generally defined as Form S-3-eligible issuers, with at least $700 million of common equity market capitalization held by non-affiliates or $1 billion aggregate amount of debt securities registered during the past three years.

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[1] See SEC Release Nos. 33-8501, 34-50624 and IC-26649 (November 3, 2004), available at www.sec.gov/rules/proposed.shtml.

B. Communications Proposals

The proposed rules would add a number of safe harbors that permit certain communications in connection with an offering of securities without violating the "gun-jumping" provisions of the Securities Act. See Appendix A for a chart summarizing these communications proposals.

- *Regularly Released Factual Business Information.* The proposed rules would permit all issuers, at any time, to continue to publish regularly released factual business information, as long as the released information is materially consistent in timing, manner and form with the issuer's past releases and does not include information about the offering. Such information, if released by non-reporting issuers, must be regularly released to persons other than in their capacity as investors or potential investors.
- *Regularly Released Forward-Looking Information*. The proposed rules would similarly permit reporting issuers (but not non-reporting issuers), at any time, to continue to publish regularly released forward-looking information.
- *Communications 30 Days Prior to Filing a Registration Statement.* Communications, whether oral or written, by all issuers more than 30 days prior to filing a registration statement would not be considered prohibited offers as long as they do not reference a securities offering.
- *Communications by Well-Known Seasoned Issuers Within 30 Days Prior to Filing a Registration Statement.* Communications by well-known seasoned issuers would be permitted even during the thirty-day period prior to filing. However, any such written communications would be required to be filed with the SEC promptly upon the filing of the registration statement.
- *Rule 134 Notices.* The proposals would expand the safe harbor for post-filing notices under Rule 134 to permit increased information about the issuer, the securities being offered, the offering and procedures for participating in the offering.
- *Free Writing Prospectuses*. Under the proposed rules, issuers and other offering participants would be permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions. A "free writing prospectus" would be broadly defined to include almost any communication (other than an oral communication), whether written, printed or broadcast, that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement. For non-reporting and unseasoned issuers, free writing prospectuses could only be used if they were accompanied or preceded by a preliminary prospectus; as a result, as a practical matter, these issuers can only broadly disseminate a free writing prospectus electronically, which would have to contain a hyperlink to the required prospectus. Seasoned issuers would only have to include a legend that notified the recipient where he could access the prospectus. Any free writing prospectus prepared by or on behalf of an issuer or containing issuer-provided information would need to be filed with the SEC.

- *Media Publications.* Information provided to a member of the press or other media by an issuer or offering participant that gets published would qualify as a free writing prospectus that would be permitted if the various requirements are satisfied. Where information constituting an offer was prepared by members of the media unaffiliated with and not paid for by the issuer or participant, a preliminary prospectus would not be required to precede or accompany the communication.
- *Electronic Road Shows.* The proposed rules would relax many of the current restrictions on electronic road shows, which would fall within the definition of free writing prospectus. Under the proposed rules, a road show would not need to be filed with the SEC if the issuer makes at least one version of the road show electronically available to any potential investor and files with the SEC any other issuer free writing prospectus or other material issuer information used at the road show.

Research Reports. The proposed amendments would expand the circumstances under Rules 137, 138 and 139 under which brokers and dealers may publish research during a registered offering. Rule 137 would be extended to permit brokers and dealers that are not offering participants to publish research even regarding non-reporting issuers. The proposed amendments to Rule 138 would permit a broker or dealer participating in an offering of equity securities to publish research on the issuer's debt securities, and vice versa, if the issuer was a reporting issuer current in its periodic Exchange Act reports. Rule 139 would be amended to permit participating brokers and dealers to continue to publish research on S-3-eligible companies and industry reports that included information regarding any reporting issuer.

Ineligible Issuers. Certain issuers and offerings would not be eligible to use free writing prospectuses or the other proposed communications safe harbors and exemptions. Ineligible issuers would include reporting issuers that are not current in their Exchange Act reporting obligations, blank check issuers, shell companies and penny stock issuers. Ineligible offerings would include offerings by registered investment companies or business development companies and offerings that are exchange offers or business combination transactions that are subject to Regulation M-A.

C. Liability Issues

Consistent with the SEC's current interpretation, the proposed rules would codify that liability for sales under Section 12(a)(2) and Section 17(a)(2) under the Securities Act is determined based on the information conveyed at the time of the contract of sale, when investors make their investment decision. Thus, information provided after such time, including any modifications contained in a final prospectus, would not be taken into account in determining liability.

Liability under Section 11 is judged based on the information provided at the time of effectiveness of the registration statement. This would include information provided in the final prospectus under Rule 430A and in a prospectus supplement under proposed Rule 430B, which is deemed to be part of the registration statement as of the effective date.

D. Shelf Registration Statements

The proposed rules would liberalize many of the requirements for shelf registration statements and would further create an automatic shelf registration process for well-known seasoned issuers.

Liberalized Shelf Registration Requirements. Under the proposals, information required in the prospectus about the issuer and its securities could be included in a prospectus supplement or incorporated by reference from Exchange Act reports. Even material changes in the plan of distribution, which currently are required to be included in a post-effective amendment, could be included in a prospectus supplement or incorporated by reference.

The proposals would also allow seasoned issuers eligible to use Form S-3 or Form F-3 for primary offerings to identify selling security holders in a prospectus supplement if the securities were outstanding prior to the initial filing of the registration statement and the registration statement described the transaction pursuant to which the securities were initially issued.

The information included in a prospectus supplement would be deemed part of the registration statement, with a new effective date established for purposes of Section 11 liability.

The proposed amendments would eliminate the current provision that limits the amount of securities registered in a primary offering to an amount intended to be offered or sold within two years from the registration statement effective date. Under the proposed amendments, however, shelf registration statements could only be used for three years after its initial effective date; issuers would be required to file new shelf registration statements every three years in order to maintain their effectiveness.

Automatic Shelf Registration for Well-Known Seasoned Issuers. The proposals introduce a significantly more flexible "automatic" shelf registration for offerings on Form S-3 or Form F-3 by well-known seasoned issuers. An automatic shelf registration statement could be used for all primary and secondary offerings of securities of well-known seasoned issuers, other than those in connection with business combination transactions or exchange offers. This automatic shelf registration process would include the following features that would provide well-known seasoned issuers with greater flexibility to take advantage of market windows:

- *Ability to Omit Certain Information.* Under the proposed automatic shelf registration, a base prospectus included in a shelf registration statement could omit information such as whether the offering is a primary or secondary offering, the names of any selling security holders and any plan of distribution for the offering securities. Moreover, information such as the public offering price, a detailed description of the securities offered and the names of the underwriters could be included in the prospectus supplement. However, new types of securities and new issuers must be added through a post-effective amendment.

- *Registration of Securities to be Offered*. Under the proposal, an eligible issuer may register on an automatic shelf registration statement an unspecified amount of different classes of securities to be offered, without allocating the mix of securities registered among the issuer, its eligible subsidiaries or selling security holders.
- *Pay-as-You-Go Registration Fees.* The proposals would permit issuers using automatic shelf registration statements to pay filing fees at the time of a securities offering.
- *Automatic Effectiveness.* Shelf registration statements and post-effective amendments would become effective automatically upon filing, without SEC staff review.

Amendments to Forms S-1 and F-1 – Backwards Incorporation by Reference. Under proposed amendments to Forms S-1 and F-1, an issuer that has filed at least one annual report and has timely met its reporting obligations for the previous 12 months would be permitted to incorporate by reference into its Form S-1 or Form F-1 information from previously filed Exchange Act reports.

E. Prospectus Delivery Reforms

Access Equals Delivery Model. Under the proposals, the SEC would adopt an "access equals delivery" model for prospectus delivery, under which a final prospectus would be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) under the Securities Act as long as a final prospectus meeting the requirements of Section 10(a) is filed with the SEC by the required filing date.

Notification. Under the proposed rules, the underwriters would be able to send to each purchaser, in lieu of the final prospectus, a notice informing them that they purchased securities in the transaction.

Confirmations and Notices of Allocations. A proposed exemption would also allow written confirmations and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus.

Broker Transactions. Rule 153, which permits brokers and dealers effecting transactions on an exchange to satisfy their prospectus delivery obligations through delivery of the final prospectus to the exchange, would be extended to cover transactions through any registered trading facility.

F. Additional Exchange Act Disclosure Proposals

The proposed rules would require issuers to include risk factor disclosure in their annual reports on Form 10-K and update this disclosure in their quarterly reports. Accelerated filers would be required to disclose in their annual reports any material unresolved SEC comments that were issued more than 180 days prior to fiscal year end. The proposed rules would also require each filer to note whether it is a voluntary filer on a box on the cover page of its Form 10-K.

II. Categories of Issuers

A. Well-Known Seasoned Issuers

The SEC, recognizing the vast amount of information available to investors, has proposed the most extensive revisions of the communications rules and registration processes for the most widely followed companies. The SEC proposes a new category of issuer called a "*well-known seasoned issuer*" (frequently referred to as "*Wiksees*"), defined as an issuer that:

- is required to file reports pursuant to Section 13(a) or Section 15(d) of the Exchange Act;
- is current in its reporting obligations under the Exchange Act and has been timely in satisfying those obligations for the preceding 12 calendar months;
- is eligible to register a primary offering of its securities on Form S-3 or Form F-3;
- either (1) has at least $700 million of common equity market capitalization held by non-affiliates or (2) has issued $1 billion aggregate amount of debt securities in registered offerings during the past three years and registers only debt securities in the proposed offering; and
- is not an "ineligible issuer."[2]

Under certain conditions, majority-owned subsidiaries of well-known seasoned issuers may also be considered well-known seasoned issuers.

Commentary:

- Whether an issuer satisfies the requirements for current and timely filing of Exchange Act reports and the eligibility requirements of Form S-3 or F-3 would be determined at the time of filing of the relevant registration statement and thereafter at the time of the annual update of that registration statement pursuant to Section 10(a)(3) under the Securities Act upon the filing of the issuer's annual report on Form 10-K or 20-F, as applicable. Issuers would measure their non-affiliate equity market capitalization and the aggregate amount of their debt issuances as of the last business day of their most recently completed second fiscal quarter (the same date for determining "accelerated filer" status).

B. Other Categories of Issuers

The rules also propose other new categories of issuers: A "*seasoned issuer*" would be an issuer that is eligible to use Form S-3 or Form F-3 to register primary offerings of its securities. An

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[2] See the discussion of "ineligible issuers" below.

"*unseasoned issuer*" would be an issuer that is required to file Exchange Act reports but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. A "*non-reporting issuer*" would be an issuer that is not required to file Exchange Act reports and does not file such reports voluntarily.

Commentary:

- A company that files Exchange Act reports voluntarily (a "*voluntary filer*"), such as because it is required to do so under the terms of an indenture but is not required to do so under the Exchange Act, would be treated as an unseasoned issuer under the proposed rules.

III. Communications Proposals

A. Overview

Section 5 of the Securities Act restricts communications made in connection with an offering of securities. Prior to the filing of a registration statement with the SEC (the "pre-filing period"), all offers, in whatever form, are prohibited. Following the filing of the registration statement until it is declared effective by the SEC (the "waiting period"), oral offers may be made, but offers made in any written form (including by email or the Internet) or by radio or by television can only be made by means of a statutory prospectus that meets the applicable requirements (a "preliminary prospectus").[3] Following the effectiveness of the registration statement (the "post-effective period"), additional written materials may be provided if a final prospectus that satisfies the statutory requirements has preceded or accompanied such materials. Violations of these rules are generally referred to as "gun-jumping."

Commentary:

- These communications restrictions, which were designed to make the statutory prospectus the primary source of information for investors regarding an offering, have proven unduly restrictive in today's communications environment. With the encouragement of the SEC and the stock exchanges, issuers now engage in many types of communications on an ongoing basis, which are disseminated rapidly through the media and the Internet. The new communications proposals are designed to provide issuers with more flexibility, encouraging the continued flow of current information to investors, while maintaining the necessary safeguards for their protection.

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[3] The broad definition of "prospectus" under the Securities Act generally precludes any written communication during the waiting period other than the preliminary prospectus itself containing the requisite information.

The rules distinguish between well-known seasoned issuers, whose communications have less potential for conditioning the market, and other issuers. Under the proposed rules:

- Well-known seasoned issuers would, at any time, be permitted to engage in oral and written communications, including use of a free writing prospectus, subject to enumerated conditions (including, in specified cases, filing such communications with the SEC).
- Unseasoned issuers would, at any time, be permitted to continue to publish regularly released factual business information and forward-looking information.
- Non-reporting issuers would, at any time, be permitted to continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors.
- Communications by issuers more than 30 days before filing a registration statement would not be considered prohibited offers as long as they do not reference a securities offering.
- Issuers and other offering participants would be permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions (including, in specified cases, filing such communications with the SEC).
- 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, would be excluded from the definition of "prospectus."
- The exemptions for research reports would be expanded.

See Appendix A for a chart summarizing these proposed rules.

B. Proposed Definition of Written Communications

In order to eliminate confusion regarding the meaning of written communications under current regulations, the SEC proposes to broadly define all communications, other than oral communications, as written communications for purposes of the Securities Act. "*Written communication*" would be defined to include any communication that is written, printed or broadcast or is a graphic communication. Every electronic communication (such as an audiotape, videotape, facsimile, CD-ROM, email and Internet website) would be defined as a "*graphic communication*" and thus considered a written communication. Direct oral communications, such as live telephone calls (including those carried over the Internet) and individual voice-mail messages, would not be written communications and would continue to be exempt from filing and public disclosure requirements.[4]

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[4] See below for a discussion of obligations under Regulation FD.

Commentary:

- Written communications, therefore, would include Internet communications, emails and other electronic and web-based communications. Electronic road shows would be written communications within the scope of the definition.
- Broadly disseminated or "blast" voice-mail messages would be considered written communications, even though individual telephone voice-mail messages would not. The SEC views "blast" voice-mail messages more like broadcasts than oral communications.

C. Regularly Released Factual Business and Forward-Looking Information

1. Reporting Issuers

To eliminate confusion as to the permissibility of communications of business information, proposed Rule 168 would provide reporting issuers with a safe harbor for the continued dissemination of regularly released factual business information and forward-looking information. Such communications would be excluded from the definition of "prospectus" under Section 2(a)(10) of the Securities Act and therefore would be permitted during the waiting period. These communications also would be excluded from the prohibition against pre-filing offers.

"*Factual business information"* would be defined as:

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

The proposed rule would similarly provide a safe harbor for the continued release or dissemination of "*forward-looking business information*" in the ordinary course. Such information would include:

- projections of the issuer's revenues, income, earnings per share, capital expenditures, dividends, capital structure or other financial items;
- statements about management's plans and objectives for future operations, including those that relate to the products or services of the issuer;
- statements about the issuer's future economic performance, including statements of the type contemplated by MD&A; and
- assumptions underlying the foregoing information.

In order for its communications to qualify for this safe harbor, the reporting issuer would have to satisfy three conditions: (1) the information must be released by or on behalf of the issuer; (2) the information must be regularly released; and (3) the information cannot include information about the registered offering itself.

Commentary:

- The release of the information would be considered "by or on behalf of the issuer" if the issuer, an agent of the issuer or a representative of the issuer authorized and approved its use beforehand.
- Information would be considered "regularly released" if the issuer, in the ordinary course of its business, has previously released and currently releases the information, and the information in the release is materially consistent in timing, manner and form with the issuer's past releases. Thus, even the manner in which the information is released must be consistent with prior practice. The proposal does not establish any minimum time period to satisfy this requirement, but the safe harbor would require the issuer to be able to establish a track record of releasing the particular type of information.
- Thus, participation in investor conferences by companies that have a track record of previous participation should be permitted, if the information meets the above standards.
- The proposed safe harbor would exclude information related to the registered offering or released as part of the offering activities in the offering. Accordingly, the publication of information consistent with past practice would be within the safe harbor, but the use of that information as part of marketing activities to potential investors by an underwriter connected to the registered offering would be outside its scope.

2. Non-Reporting Issuers

Proposed Rule 169 would provide a similar safe harbor for the release by non-reporting issuers of regularly released factual business information, provided that such information is not provided to persons receiving the information in their capacity as investors or potential investors. The safe harbor is intended to permit the continued release of this information to persons, such as customers and suppliers, to whom the issuer has previously provided such information.

However, unlike the safe harbor for reporting issuers, proposed Rule 169 does *not* extend to forward-looking information. The SEC believes that permitting non-reporting issuers to disseminate forward-looking information would create an unacceptable potential for abuse as a way to condition the market for an offering of its securities.

D. Permitted Communications in Pre-Filing Period

1. 30 Days Prior to Filing a Registration Statement

Proposed Rule 163A would provide prospective issuers with a bright-line safe harbor period ending 30 days prior to filing a registration statement, during which they could communicate without risk of violating the gun-jumping provisions. Under the proposal, any communication, whether oral or written, made more than 30 days prior to filing is excluded from the definition of "offer" for purposes of Section 5(c) of the Securities Act. This safe harbor would be available to both reporting and non-reporting issuers.

Commentary:

- This safe harbor, which applies only prior to the filing of a registration statement, would not help issuers who have a shelf registration statement on file, even if not declared effective.

The proposed 30-day exclusion would be subject to three conditions: (1) the communication could not reference a securities offering; (2) the communication would have to be made by or on behalf of the issuer; and (3) the issuer would have to take reasonable steps within its control to prevent further distribution or publication of the communication during the 30-day period before filing the registration statement. According to the SEC, while issuers are not expected to control the republication by third parties or accessing through third party sources of previously published press communications, issuers and persons acting on their behalf are expected to control their own involvement in any subsequent redistribution or republication.

Commentary:

- If an issuer gives an interview to the press prior to the 30-day period, it would not be able to rely on the exclusion if the interview was published during the 30-day period. The SEC expects issuers to obtain assurances from the media regarding when the interview will be published.

- Communications that are exempted under Rules 168 and 169 discussed above would not be required to comply with this restriction on republication under proposed Rule 163A.

The proposed rule would not be available to communications made in connection with offerings by a blank check company, by a shell company or of penny stock. Communications regarding business combination transactions and offerings made by a registered investment company, which are subject to separate regulation, are also excluded from the safe harbor. For reporting issuers, the communications would still be subject to Regulation FD and the anti-fraud provisions of the federal securities laws.

2. Permitted Pre-Filing Offers by Well-Known Seasoned Issuers

The proposal goes further with respect to well-known seasoned issuers. Proposed Rule 163 would exempt *all* offers made by well-known seasoned issuers from the prohibition on pre-filing offers in Section 5(c) of the Securities Act, even if made within thirty days of filing a registration statement. However, these communications, while exempt from the gun-jumping provisions, would still be considered offers and, accordingly, would remain subject to the liability and anti-fraud provisions of the securities laws, as well as Regulation FD. Written offers deemed to be exempt by reason of Rule 163 would need to contain a legend referring to the possible filing of a registration statement relating to the offering and be filed with the SEC promptly upon the filing of the registration statement.

Commentary:

- We expect that most well-known seasoned issuers will take advantage of the liberalized "automatic shelf" registration process discussed below and, thus, would not be able to avail themselves of this exception.
- Because of the proposed filing requirement, well-known seasoned issuers contemplating the filing of a registration statement will need to review all written communications issued during the 30-day period prior to filing to determine whether such communications must be filed under Rule 163 or if they fall within another exemption.

E. Relaxation of Restrictions on Written Offers After Filing of Registration Statement

The proposed rules would also relax restrictions on written offers made after a registration statement is filed. The two main elements of these proposals are the expansion of information permitted under the Rule 134 safe harbor and the permitted use of "free writing prospectuses" in connection with a registered offering.

1. Expansion of Information Permitted by Rule 134

Rule 134 currently provides a safe harbor for limited public notices about an offering made by an issuer after filing a registration statement. The safe harbor excludes such notices from the definition of prospectus under Section 2(a)(10) of the Securities Act. The proposals would:

- permit increased information about an issuer and its business;
- permit more information about the terms of the securities being offered (such as greater information about final interest rates and yield information for fixed income securities);
- expand the scope of permissible factual information about the offering itself (such as the mechanics of and procedures for transactions and the anticipated schedule of the offering, and a description of marketing events such as road shows);

- allow more factual information about procedures for account opening and for submitting indications of interest and conditional offers to buy; and
- expand the permissible disclosure regarding credit ratings to include the security rating that is reasonably expected to be assigned.

The proposed expansion would not, however, permit use of a Rule 134 notice to provide a detailed term sheet for the securities being offered.[5] The amendments also propose to eliminate the current requirements that a Rule 134 notice contain a state securities law legend and specify whether the financing is a new financing or refunding.

Commentary:

- The rule would specifically require that the filed registration statement include a prospectus satisfying the requirements of Section 10 of the Securities Act, including specifying a price range where required. Thus, an initial filing of a registration statement for an initial public offering that does not contain an estimated price range would not permit the use of notices under this proposed expansion of Rule 134.

2. Permissible Use of Free Writing Prospectuses

The proposals would permit written communications that constitute offers outside the statutory prospectus (defined as a "*free writing prospectus*") beyond those currently permitted (such as after delivery of a final prospectus), under certain conditions. Prior to filing a registration statement, only a well-known seasoned issuer would be able to use a free writing prospectus through proposed Rule 163, as discussed above. Under proposed Rule 164, after a registration statement is filed, the issuer and any other offering participant could use a free writing prospectus to communicate information about a registered offering of securities. "Offering participants" include affiliates, underwriters, dealers and others acting on behalf of the parties to the transaction. A free writing prospectus would not be part of a registration statement subject to liability under Section 11 of the Securities Act. Permitted free writing prospectuses under Rule 164 must satisfy the filing and other conditions specified in Rule 433, discussed below.

The proposed definition of "free writing prospectus" includes any written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement (or, in the case of a well-known seasoned issuer taking advantage of proposed Rule 163, even if no registration statement is filed). A communication would be a free writing prospectus only if it constitutes an offer of a security under the Securities Act, which would be determined based on the particular facts and circumstances. Communications that would not be considered offers or prospectuses for purposes of the gun-

[5] It may be possible to deliver such a term sheet as a free writing prospectus, as discussed below.

jumping restrictions, including Rule 134 notices, Rule 135 communications, factual and forward-looking information and certain other communications falling within the proposed safe harbors, would not be free writing prospectuses. Similarly, written offers that are accompanied or preceded by a final prospectus (which offers are excluded from the definition of prospectus) would not be free writing prospectuses and thus would be permitted without having to satisfy Rules 164 and 433.

3. Media Publications and Free Writing Prospectuses

Information provided to a member of the press or other media by an issuer or offering participant that gets published could nonetheless qualify as a permitted free writing prospectus. If the information constituted an offer, but dissemination of the information in writing by the issuer or participant would have constituted a free writing prospectus, publication by the press or media would be considered a free writing prospectus made by or on behalf of the issuer or participant.

If the issuer or offering participant prepared or paid for a published article, broadcast or advertisement, the issuer would have to satisfy the conditions to the use of a free writing prospectus at the time of the publication or broadcast. As discussed below, for non-reporting issuers, a preliminary prospectus would have to precede or accompany the communication; for seasoned issuers, a registration statement containing a preliminary prospectus must have been previously filed with the SEC. However, where information constituting an offer was prepared by members of the media unaffiliated with and not paid for by the issuer or participant, a preliminary prospectus would not be required to precede or accompany the communication.

Commentary:

- An executive of a non-reporting issuer could give an interview to an unaffiliated financial news magazine prior to the distribution of a preliminary prospectus, provided that there was no payment to the magazine. The resulting article would be a free writing prospectus that would have to be filed with the SEC by the issuer after publication, but there would not be any requirement that a preliminary prospectus precede or accompany the article at the time of publication.

4. Conditions for Use of a Free Writing Prospectus

Proposed Rule 164 would permit the use of a free writing prospectus when an eligible issuer has filed a registration statement and the conditions of proposed Rule 433 are satisfied, including prospectus delivery or availability, eligibility, filing, information, legend and record retention conditions.

a. Prospectus Delivery and/or Availability

i. Non-Reporting and Unseasoned Issuers

Non-reporting and unseasoned issuers would be required to satisfy the most stringent conditions to use free writing prospectuses. Like all issuers other than well-known seasoned issuers, a registration statement must have been filed. In addition, if the free writing prospectus was prepared by or on behalf of an issuer or offering participant, or if consideration was given by the issuer or offering participant for the publication or broadcast of any free writing prospectus, the free writing prospectus could be used only if preceded or accompanied by the most recent preliminary prospectus. The preliminary prospectus would not have to be sent by the same means (paper or electronic) as the free writing prospectus, but merely referring to its availability would not satisfy this condition.

Commentary:

- Practically speaking, this means that non-reporting and unseasoned issuers cannot broadly disseminate a free writing prospectus, other than by doing so electronically and including a hyperlink to the statutory prospectus, which is permitted under the proposed rule.

Once the required preliminary prospectus was provided to an investor, additional free writing prospectuses could be provided to the investor without providing an additional statutory prospectus, unless there were material changes in the most recent prospectus. Thus, for example, once an investor had been sent a preliminary prospectus, absent a material change, the proposed rule would permit subsequent email communications by an offering participant that constitute free writing prospectuses without the participant having to hyperlink to or otherwise redeliver a statutory prospectus with each communication.

Free writing prospectuses prepared by the media unaffiliated with the issuer and to whom consideration is not paid by the issuer would be permitted without delivery of the statutory prospectus. Thus, a media interview that the issuer or offering participant participates in but does not prepare or pay for would not be conditioned on the delivery of a preliminary prospectus, though such prospectus would need to have been filed. In addition, the issuer must file the free writing prospectus with the SEC within one business day following its publication or broadcast.

ii. Seasoned and Well-Known Seasoned Issuers

Seasoned issuers and well-known seasoned issuers would be able to use a free writing prospectus after filing a registration statement containing a preliminary prospectus, without the need to deliver a preliminary prospectus. However, the free writing prospectus would have to contain a legend notifying the recipient of where he can access or hyperlink to the preliminary prospectus. As discussed above, under proposed Rule 163 well-known seasoned issuers (but not offering participants) may use free writing prospectuses even prior to filing a registration statement.

b. Ineligible Issuers

Certain issuers and offerings would not be eligible to use free writing prospectuses or any of the communications safe harbors and exemptions. As proposed, the SEC could waive an issuer's ineligibility if it finds good cause to do so. Ineligible issuers and offerings would include the following:

- reporting issuers that are not current in their Exchange Act reports or not compliant with their Exchange Act reporting obligations;
- issuers that are (or were in the past three years) blank check issuers;
- issuers that are (or were in the past three years) shell companies;
- issuers that are (or were in the past three years) penny stock issuers;
- issuers that are limited partnerships offering and selling their securities other than in a firm commitment underwriting;
- issuers that have received a "going concern" opinion from their auditors for their most recent fiscal year;
- issuers that have filed for bankruptcy or insolvency during the past three years;
- issuers that have been or are the subject of refusal or stop orders under the Securities Act;
- issuers that have been found to have violated the federal securities laws, have entered into a settlement[6] with any government agency involving violations of federal securities laws, or have been the subject of a judicial or administrative order prohibiting certain conduct or activities regarding the federal securities laws during the past three years;
- offerings by registered investment companies or business development companies; and
- offerings that are exchange offers or business combination transactions that are subject to Regulation M-A.

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[6] "Settlement" would include settlements in which the issuer or its subsidiary neither admits nor denies violating the federal securities laws.

c. Free Writing Prospectus Filing Requirements

i. General Conditions

The use of a free writing prospectus would be conditioned on the filing of that prospectus, as described below.[7] Under proposed Rule 433(d), the issuer must file:

- any free writing prospectus prepared by or on behalf of the issuer (an "*issuer free writing prospectus*"), whether used by the issuer or another person;
- any free writing prospectus of any person used by the issuer;
- any free writing prospectus that is prepared by a party other than the issuer participating in the offering and that contains material information about the issuer or its securities that has been provided by or on behalf of an issuer ("*issuer information*") and is not already contained or incorporated in the registration statement or a filed free writing prospectus; and
- any free writing prospectus prepared by any person that contains only a description of the final terms of the issuer's securities.

In addition, when a person other than the issuer prepares and distributes a free writing prospectus in a manner reasonably designed by such person to lead to its *broad unrestricted dissemination*, such person must file the free writing prospectus, unless the free writing prospectus has already been filed.

The filing of the free writing prospectus generally must be made on or before the date of first use, except in the case of final terms of securities. A free writing prospectus that contains only a description of the securities offered would need to be filed only if it reflected the final terms of the securities being offered. In that case, the issuer would have to file the free writing prospectus within two days of the later of the date such terms become final and the date of first use.

In the case of media publications where no payment is made, the issuer or other participant would be required to file such written communication within one business day of publication. The media would not be required to file any free writing prospectuses.

Commentary:

- The proposed rules distinguish between a free writing prospectus that *contains* issuer information, which must be filed by the issuer as described in the third bullet point above, and a free writing prospectus prepared by a party participating in the offering other than the issuer that includes only information prepared by

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[7] Under proposed Rule 433, notices under Rule 134 and Rule 135 would not be considered free writing prospectuses and therefore would not be subject to these conditions.

that person "*on the basis*" of the issuer information. The SEC has explained that this provision is intended to capture situations in which the underwriter uses information provided by the issuer about the issuer or its business as a starting point to prepare its own analysis. This, of course, may raise difficult line-drawing issues.

- Under the above proposals, underwriter free writing prospectuses that do not contain issuer information would generally not need to be filed, unless they were distributed in a manner that was reasonably designed to achieve "broad unrestricted dissemination." Such broad unrestricted dissemination would include posting or hyperlinking the information on an unrestricted website or releasing it to the media, but would not include the underwriter sending the information to its customers, regardless of their number.

ii. Electronic Road Shows

In an effort to encourage issuers to make electronic road shows available to all investors, the SEC would permit such road shows without many of the limitations set forth in a series of SEC no-action letters that issuers and underwriters have previously relied upon.[8] Under the proposals, electronic road shows (whether transmitted electronically via the Internet, videos, email, CD-ROM or other medium), as graphic communications, would fall within the definition of written communications. Accordingly, under the proposed rules, an electronic road show would be a permissible free writing prospectus if the conditions in proposed Rule 433 are satisfied.[9]

Under the proposed rule, neither an electronic road show nor its script would need to be filed (except for material issuer information not previously included in the registration statement) if the issuer:

- makes at least one version of a "bona fide electronic road show" readily available electronically to any potential investor at the same time as the electronic road show; and
- files any issuer free writing prospectus or material issuer information used at an electronic road show (other than the road show itself).

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[8] For example, the road show audience would not have to be limited. Those distributing the road show would not have to limit viewers to seeing it either within a 24-hour period or twice. Viewers could be allowed to copy, print or download the road show, and multiple versions of the electronic road show would be permitted. See staff no-action letters to Private Financial Network (Mar. 12, 1997); Net Roadshow, Inc. (July 30, 1997); Bloomberg L.P. (Oct. 22, 1997); Thompson Financial Services, Inc. (Sep. 4, 1998); Activate.net Corporation (June 3, 1999); Charles Schwab & Co., Inc. (Nov. 15, 1999); and Charles Schwab & Co., Inc. (Feb. 9, 2000).

[9] In addition to the legend requirements discussed above, electronic road shows involving a non-reporting or unseasoned issuer must be preceded or accompanied by a statutory prospectus, which would need to be hyperlinked to the road show.

"*Bona fide* electronic road show" would be defined as a version of an electronic road show that contains a presentation by members of an issuer's management and that, when the issuer is using more than one version of an electronic road show, covers the same *general* areas regarding the issuer, its management and the securities being offered as the other versions. It need not provide an opportunity for questions and answers, even if other versions of the electronic road show do provide such opportunities.

Commentary:

- The SEC expects that the road shows themselves, rather than just a transcript, would be made available on the issuer's website, though the SEC filing, due to technological limitations, by necessity must comprise the transcript.
- As a result of the expected proliferation of electronic road shows beyond institutional investors to all potential investors and the filing requirements, issuers and underwriters may face heightened liability concerns regarding road show content.

iii. Unintentional Failure to File

Proposed Rule 164 would allow an issuer and others to cure any immaterial or unintentional failure to file or delay in filing the free writing prospectus. This cure provision would be available if a good faith and reasonable effort was made to comply with the filing condition and the free writing prospectus was filed as soon as practicable after the discovery of the failure to file.

iv. Filed Free Writing Prospectus Not Part of Registration Statement

A free writing prospectus filed pursuant to proposed Rule 433 must identify the registration statement to which it relates but would not have to be filed as part of the registration statement. Therefore, a free writing prospectus would not be subject to liability under Section 11 of the Securities Act, although it would be subject to liability under Section 12(a)(2) of the Securities Act and the anti-fraud provisions of the federal securities laws.

d. Information in a Free Writing Prospectus; Legend Requirement

The proposed rule would permit information in a free writing prospectus to go beyond the information contained in the prospectus that is included in the registration statement. However, under Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, liability would attach to material misstatements and material omissions in the free writing prospectus. No specific content would be required except the inclusion of a legend, which, under proposed Rule 433, would have to:

- indicate where a prospectus is available;
- recommend that potential investors read the prospectus, including Exchange Act documents incorporated by reference and risk factors;

- state that the communication constitutes a written offer pursuant to a free writing prospectus;
- advise investors that they can obtain the registration statement, including the prospectus and any incorporated Exchange Act documents, for free through the SEC's website and that they may request the prospectus from the issuer, any underwriter or dealer by calling a toll-free number; and
- indicate that the free writing prospectus is part of a public offering.

Because, in most cases, the legend would not be included in published articles, it would be required as part of the filing of the article as a free writing prospectus. The proposed rule also contains cure provisions in the event the legend was unintentionally omitted.

The SEC has warned against the inclusion of inappropriate legends and disclaimers. The use of any such legend or disclaimer in free writing materials would cause the materials to fail to satisfy the proposed exclusion. Examples of impermissible legends or disclaimers include:

- disclaimers regarding 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 or an offer to buy.

e. Record Retention Condition

Issuers and offering participants would be required to retain, for three years, any free writing prospectuses they have used from the date of the initial offering of the securities in question. This record retention condition would apply regardless of whether the free writing prospectus was, or was required to be, filed.

Commentary:

- For example, the record retention policy would apply to free writing prospectuses prepared by underwriters and not containing issuer information, electronic road shows and term sheets not reflecting final terms, all of which are not required to be filed.

f. Treatment of Communications on Websites

Under proposed Rule 433, an offer of an issuer's securities that is contained on an issuer's website (or hyperlinked by the issuer from the issuer's website to a third party website) would be considered a written offer and, unless otherwise exempt, would be a free writing prospectus of the issuer.

Historical issuer information contained on the issuer's website would not be considered an offer if it is identified as historical issuer information and located in a separate "archive" section of the website. This exclusion in proposed Rule 433 for historical archived information would cover information that could be demonstrated to be previously published (for example, by being dated). However, if the historical archived information were incorporated into or otherwise included in a prospectus or used in connection with the offering, it would become an offer and no longer fall under the exclusion.

F. Regulation FD

The proposed rules would limit the exemption from Regulation FD of communications in connection with a registered securities offering to the following:

- a registration statement filed under the Securities Act, including any prospectus contained in such registration statement;
- a free writing prospectus used after the filing of the registration statement for the offering and satisfying the requirements of proposed Rule 433;
- a communication falling within the exception to the definition of prospectus contained in clause (a) of Section 2(a)(10) under the Securities Act;
- any other Section 10(b) prospectus;
- a notice permitted by Rule 135;
- a communication permitted by Rule 134; and
- an oral communication made in connection with a registered offering after the filing of a registration statement in connection with such offering under the Securities Act.

Thus, for example, the publication of regularly released factual business information, the publication of regularly released forward-looking information and pre-filing communications would remain subject to Regulation FD.

Certain securities offerings would not be eligible for this exclusion from Regulation FD. The proposals would narrow the types of registered offerings eligible for the exclusion to (1) primary offerings and (2) underwritten offerings that include both primary and secondary offerings. The existing exclusion from Regulation FD for registered business combination transactions would not be affected by the proposed amendments.

G. Use of Research Reports

Currently, Rules 137, 138 and 139 under the Securities Act describe circumstances in which a broker or dealer may publish research constituting an offer around the time of a registered offering without violating the Section 5 prohibition on pre-filing offers and impermissible prospectuses. The proposed amendments would modify these rules, expanding the

circumstances in which offering and non-offering participants, other than the issuer, could disseminate research reports during a registered offering.

The safe harbor provisions of Securities Act Rules 137, 138 and 139 would continue to be available only to brokers and dealers. Issuers could not use the safe harbor provisions or research reports prepared or distributed by brokers or dealers in reliance on the rules to directly or indirectly communicate with potential investors about an offering. For example, an issuer with a hyperlink to a research report on its website during a registered offering could be deemed to have adopted the contents of such report. Under the proposals, the report would be considered a free writing prospectus.

Commentary:

- If the rule is adopted in its current form, this would require many issuers, who include links to all research reports on their websites, to change their practice. The research reports could be maintained only if the conditions in proposed Rule 433 are satisfied.

The proposals will not change the SEC's current approach with respect to liability for research used in reliance on Rules 137, 138 and 139.[10]

1. Definition of Research Report

The proposals would add, for the first time, a definition of research report. A "*research report*" would be defined as a written communication that includes an analysis of a security of an issuer and provides information reasonably sufficient upon which to base an investment decision. This definition is intended to encompass all types of research reports, whether issuer-specific reports or industry compendiums that separately identify the issuer. Because of the proposed broad definition of written communications, the definition of research reports would also include media broadcasts.

2. Rule 137

Under Rule 137, a broker or dealer that is not an offering participant in a registered offering but who publishes or distributes research in the regular course of business is not considered to be an underwriter in the offering. The proposals would extend the current exemption under Rule 137 to apply to securities of any issuer, including non-reporting issuers, other than blank check companies, shell companies and penny stock issuers.

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[10] Research reports distributed in reliance on Rules 138 and 139 are not offers for purposes of Securities Act Section 2(a)(10) and Section 5(c). Brokers or dealers distributing research in reliance on Rule 137 are not considered underwriters of the securities.

3. Rule 138

Under Rule 138, a broker or dealer participating in an offering of an issuer's equity securities is permitted to publish research related solely to debt securities, and vice versa, if it publishes the research in the regular course of its business. The proposed amendments to Rule 138 would expand the categories of eligible issuers to all reporting issuers that are current in their periodic Exchange Act reports, rather than only issuers who are Form S-3 or Form F-3 eligible, as is currently the case.

The proposed amendments would require that, to be eligible for the exemption under Rule 138, the broker or dealer must have previously published, in the regular course of its business, research reports on the types of securities that are the subject of the reports in question.

4. Rule 139

Under current Rule 139, a broker or dealer participating in a distribution of securities by a seasoned issuer or a foreign private issuer satisfying certain "float" and other requirements and publicly traded abroad may publish research concerning the issuer or any class of its securities if that research is contained in a publication distributed with reasonable regularity in the normal course of its business. Research on smaller seasoned issuers is permitted if additional restrictions are complied with.

Issuer-Specific Reports. The proposed amendments to Rule 139 would allow the publication of reports about specific issuers with at least a one-year reporting history who are current and timely in their Exchange Act reports and who are eligible to register a primary offering of securities on Form S-3 or F-3. The requirement that the broker or dealer publish the research report in the regular course of its business would be retained, but not the requirement that the research be published with reasonable regularity. At the time of reliance on the exemption, the broker or dealer must have published research reports about the issuer or its securities. Thus, a report initiating coverage would be precluded.

Industry-Related Reports. The proposed amendments would extend the safe harbor for industry reports published by participating brokers and dealers to registered offerings of any reporting issuer, not only reporting issuers eligible to register their securities on Form S-3 or Form F-3. Under the amendments, a broker or dealer would no longer be prohibited from making a more favorable recommendation than the one it made in the previous publication. The research reports would not have to include any prior recommendations, but they would have to contain similar types of information about the issuer or its securities as contained in prior reports.

5. Research Reports in Connection with Regulation S and Rule 144A Offerings

Regulation S provides a safe harbor from the registration requirements of the Securities Act for offshore offers and sales of securities. Regulation S restricts directed selling efforts and offshore transactions. The proposed amendments to Regulation S would provide that research reports distributed by a broker or dealer acting as an underwriter in connection with a Regulation S

offering would not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.

Rule 144A provides a safe harbor from the registration requirements of the Securities Act for resales of restricted securities to "qualified institutional buyers" ("QIBs"), restricting offers to non-QIBs and general solicitation. The proposed amendments would provide that research reports meeting the conditions of Rule 138 or 139 would not be considered offers, general solicitation or general advertising in connection with offerings relying on Rule 144A.

6. Research and Proxy Solicitations

Proposed Exchange Act Rule 14a-2(b)(5) would codify an SEC staff position that the distribution of research under Rules 138 and 139 is permitted in connection with a registered securities offering that is subject to the proxy rules under the Exchange Act. Distribution of research in accordance with Rule 138 or 139 would be a solicitation to which Rules 14a-3 through 14a-15 (other than Rule 14a-9) of the proxy rules would not apply.

IV. Liability Issues

Under the Securities Act, purchasers of an issuer's securities in a registered offering have private rights of action for materially deficient disclosure in registration statements under Section 11 and in prospectuses and oral communications under Section 12(a)(2). Liability under Section 11 is judged as of the time the registration statement became effective. Section 17(a) under the Securities Act is a general anti-fraud provision that similarly prohibits the offer and sale of a security through materially deficient disclosure.

A. Liability Under Section 12(a)(2) and Section 17(a)(2) for Information Conveyed at the Time of Sale

The SEC interprets Section 12(a)(2) and Section 17(a)(2) to mean that liability for sales under such sections is determined based on the information conveyed at the time of the contract of sale, when investors make their investment decision. Thus, information provided after such time, including any modifications or additions contained in a final prospectus, would not be taken into account in determining liability. This interpretation would be codified in proposed Rule 159, with conforming changes made to Rule 412 regarding subsequent information incorporated by reference.

The proposed rule would not limit any ability to proceed under those sections based on statements made in offers. Section 12(a)(2) would continue to apply to material deficiencies in oral communications and prospectuses, including final prospectuses. Section 17(a)(2) would similarly apply to statements.

Commentary:

- Despite this emphasis in the proposed rules on the information conveyed at the time of the investment decision, the staff of the SEC has publicly stated that it is merely codifying current caselaw. The staff does not believe, even under current law, that, for purposes of Section 12(a)(2) and 17(a)(2) liability, materially deficient information can be corrected in the final prospectus.

B. Relationship of Proposed Rule to Section 11 Liability

As stated above, liability under Section 11 is judged based on the information provided at the time of effectiveness of the registration statement, which may be at or before the time of the contract of sale. This would include information provided in the final prospectus under Rule 430A and deemed to be part of the registration statement as of its effective date. Similarly, as described below, proposed Rule 430B would establish a new effective date for a shelf registration statement for liability purposes in connection with a takedown. Thus, information may be deemed part of the registration statement for purposes of Section 11 liability, but would not be taken into account under Section 12(a)(2) or Section 17(a)(2) unless the information was conveyed to the investor at or prior to the time of the contract of sale.

C. Issuer as Seller

Due to uncertainty created by recent caselaw regarding an issuer's liability under Section 12(a)(2) in a firm commitment underwriting, proposed Rule 159A provides that an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, would be considered to offer or sell the securities to the purchaser and therefore would be a seller for purposes of Section 12(a)(2) as to any communications made by or on behalf of the issuer. These communications would include registration statements, prospectuses and prospectus supplements relating to the offering and free writing prospectuses and other communications made by or on behalf of the issuer.

A communication by an underwriter or dealer participating in an offering would not be on behalf of the issuer solely by virtue of its participation. However, depending on the facts and circumstances, a communication by an underwriter or dealer could be a communication on behalf of an issuer to the extent it contained issuer information.

V. Securities Act Registration Proposals

A. Procedural Changes Regarding Shelf Offerings

1. Mechanics

The SEC proposes to codify in a single rule liberalized prospectus requirements for shelf registration statements for all registered primary securities offerings, other than business combination transactions and exchange offers. Under the proposals, information required in the

prospectus about the issuer and its securities could be included in a prospectus supplement or incorporated by reference from Exchange Act reports. Even material changes in the plan of distribution, which currently are required to be included in a post-effective amendment, could be included in a prospectus supplement or incorporated by reference. The rule would clarify that this information would be deemed part of the registration statement.

Commentary:

- Proposed Rule 430B, like current Rule 409, only permits the omission of information that is "unknown or not reasonably available" to the issuer. Thus, the base prospectus included in the registration statement must include a plan of distribution section, even if it will be amended at the time of a takedown in the prospectus supplement.

The proposals would also allow seasoned issuers eligible to use Form S-3 or Form F-3 for primary offerings to identify selling security holders after effectiveness. The identities of the selling security holders and the required information about them could be added to the registration statement after effectiveness by either a post-effective amendment or a prospectus supplement if:

- the resale registration statement identified the specific private transaction pursuant to which the securities were initially sold; and
- the private transaction was completed, and the securities that were the subject of the registration statement were issued in the private transaction and were outstanding prior to initial filing of the resale registration statement.

Accordingly, if the securities were not yet issued in the private offering, the issuer could not rely on this provision, even if the investors were contractually bound to acquire the securities. The issuer could still register the resale of these securities, but it would have to identify the selling security holders in the registration statement prior to effectiveness.

2. Information Deemed Part of Registration Statement

Under proposed Rule 430B, information contained in a prospectus supplement, whether filed in connection with a takedown or another offering under Rule 415, would be deemed part of the registration statement containing the base prospectus to which the prospectus supplement relates. As a result, a prospectus supplement would be considered part of the registration statement for purposes of Section 11 liability.

3. Date of Inclusion of Prospectus Supplement and New Effective Dates of Registration Statement

Under proposed Rules 430B and 430C, information contained in a prospectus supplement would be deemed included in the registration statement as follows:

- for a prospectus supplement filed other than in connection with a takedown under proposed Rule 430B or 430C, all information contained in such prospectus supplement would be deemed part of the registration statement as of the date the prospectus supplement is first used; and
- for a prospectus supplement filed in connection with a takedown under proposed Rule 430B, all information in that prospectus supplement would be deemed part of the registration statement as of the *earlier* of the date it is first used or the time of the first contract of sale of securities in the offering to which the prospectus supplement relates.

The staff has previously stated that the date of first use is not the date that the prospectus supplement is given to a potential purchaser in connection with a sale. It is the date that the prospectus is available to the managing underwriter, a syndicate member or any prospective purchaser.[11]

As noted above, proposed Rule 430B would establish a new effective date for a shelf registration statement for liability purposes under Section 11 for a takedown. The new effective date would be the date a prospectus supplement filed in connection with the takedown was deemed part of the relevant registration statement. The new effective date would be for liability purposes only and would not constitute the filing of a new registration statement or an updating of the registration statement and prospectus for purposes of determining Form eligibility or the filing of consents of experts. Moreover, this new effective date for a takedown would not affect information that was in the registration statement at the time of any prior sale. Therefore, the rights of an investor in a prior sale (with a previous effective date) would remain unaffected by subsequently filed prospectus supplements or Exchange Act reports. In addition, it would not affect the determination of when information was conveyed to a purchaser for Section 12(a)(2) liability purposes.

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[11] See SEC Release No. 33-6714 (May 27, 1987).

4. Proposed Amendments to Rule 415

The proposed amendments would eliminate the current provision in Rule 415 that limits the amount of securities registered in a primary offering to an amount intended to be offered or sold within two years from the registration statement effective date. Under the proposed amendments, however, a shelf registration statement could be used only for three years after its initial effective date. Thus, a new shelf registration statement would have to be filed every three years, with the dollar amount of any unsold securities carried forward to the new registration statement.

Commentary:

- Continuous offerings begun prior to the end of the three-year period could continue on the old registration statement until the effective date of the new registration statement, at which point the offerings could continue on the new registration statement.

The proposed amendment to Rule 415 would no longer prohibit primary offerings on Form S-3 or Form F-3 immediately following effectiveness of a shelf registration statement. The proposals would also eliminate the restrictions on primary "at-the-market" offerings of equity securities currently set forth in Rule 415(a)(4).

5. Rule 424 Amendments

In connection with these procedural changes, two modifications are being proposed to Rule 424. A proposed amendment to Instruction 2 would require that any prospectus supplement filed pursuant to Rule 434 (which permits the use of term sheets) be filed at the same time as other prospectus supplements for shelf registration takedowns. In addition, in offerings in which information related to the offering is included in Exchange Act reports incorporated by reference, the prospectus supplement filed pursuant to Rule 424 would need to disclose on its cover page the Exchange Act report containing such information.

6. Issuer Undertakings

Conforming revisions are also being made to the issuer undertakings required in shelf registration statements. Under a proposed revision to the Item 512(a) undertaking, for shelf registration statements filed on Forms S-3 and F-3 for primary offerings of securities in reliance on Rule 415(a)(1)(x), the required disclosures can be contained in any filed prospectus supplement, instead of only in periodic reports. Therefore an issuer would be permitted to use an incorporated Form 8-K (or Form 6-K) to satisfy this undertaking.

Commentary:

- Foreign private issuers would still be required under Item 512(a)(4) to undertake to update their financial and other information in a shelf registration statement, either through a post-effective amendment or by incorporation by reference.

A new undertaking would be added in which the issuer acknowledges liability for information deemed part of the registration statement and the new effective dates deemed for such purposes, under proposed Rules 430B and 430C described above.

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

B. Automatic Shelf Registration for Well-Known Seasoned Issuers

In addition to the proposed improvements in the shelf registration process described above, the proposals introduce a significantly more flexible "automatic shelf registration" for offerings on Form S-3 or Form F-3 by well-known seasoned issuers. This automatic shelf registration would provide well-known seasoned issuers with the flexibility to take advantage of market windows, to structure securities on a real-time basis to accommodate issuer needs or investor demand and to determine or change the plan of distribution of securities in response to changing market conditions.

1. Eligibility

An automatic shelf registration statement could be used for all primary and secondary offerings of securities of eligible well-known seasoned issuers, other than those in connection with business combination transactions or exchange offers. Under the proposal, an issuer could file an automatic shelf registration statement if it met the eligibility criteria on the initial filing date and would reassess its eligibility at the time of each updated prospectus required by Section 10(a)(3) upon the filing of the issuer's Form 10-K or Form 20-F for the prior fiscal year.

If an issuer were no longer eligible to use an automatic shelf registration statement at the time of its Section 10(a)(3) update, it could either (a) post-effectively amend its registration statement onto the form it was then eligible to use or (b) file a new registration statement on such a form.

2. Information That May be Omitted from the Base Prospectus

Currently, pursuant to Rule 409, a base prospectus included in a shelf registration statement can omit information that is unknown and not reasonably available at the time of effectiveness. Under the proposed automatic shelf registration, a base prospectus could omit the following additional information:

- whether the offering is a primary or secondary offering;
- the names of any selling security holders; and

- any plan of distribution for the offering securities.

Information such as the public offering price, a detailed description of the securities offered and the names of the underwriters could be included in the prospectus supplement. However, new types of securities and new issuers would have to be added through a post-effective amendment. The officers and directors of the new registrant would be required to be signatories to the post-effective amendment, which would also need to include any necessary legal opinions and accounting and other consents.

3. Registration of Securities to be Offered

Under the proposal, an eligible issuer may register on an automatic shelf registration statement an unspecified amount of securities to be offered, without indicating whether the securities would be sold in primary offerings or secondary offerings. Well-known seasoned issuers that satisfy the definition based only on their aggregate registered debt issuances could register only non-convertible debt obligations.

The base prospectus in the initial registration statement would identify and describe, to the extent the information was available at that time, the classes of securities registered. As under current practice with shelf registration, the descriptions would not need to contain detailed information as to particular security terms and conditions. The proposal would expand the unallocated shelf procedure to allow automatic shelf issuers to register classes of securities without allocating the mix of securities registered among the issuer, its eligible subsidiaries or selling security holders.

Under the proposals, a well-known seasoned issuer could add new classes of securities or securities of an eligible subsidiary to an automatic shelf registration statement at any time before the sale of those securities. In order to add a new class of securities, an issuer would file a post-effective amendment to register an unspecified amount of securities of the new class. An issuer could provide the disclosure about the new class of securities in the post-effective amendment to, in a prospectus supplement deemed part of, or in an Exchange Act report that was incorporated by reference into, the registration statement.

Commentary:

- If an issuer using an automatic shelf registration files a post-effective amendment to add a class of debt securities, it also would need to qualify the indenture under the Trust Indenture Act of 1939. Although the SEC has required that the indenture be qualified when the registration statement becomes effective (*i.e.,* not at the time of any post-effective amendment), under the proposed rules the effectiveness of an automatic shelf registration post-effective amendment that adds securities to a shelf registration statement would be the time "when registration becomes effective as to such securit(ies)." As such, the indenture would be required to be included in the registration statement only at the time that post-effective amendment became effective.

4. Pay-as-You-Go Registration Fees

The proposals would permit issuers using automatic shelf registration statements to pay filing fees at the time of a securities offering ("pay-as-you-go"). The issuer would be required at the time of filing the initial registration statement to pay a small initial filing fee, which would be applied against fees payable in connection with the first takedown of the registration statement. Rule 424 would be amended to require an issuer using automatic shelf registration and the pay-as-you-go registration fee procedures to include on the cover page of a prospectus supplement a fee table calculating the registration fee.

5. Automatic Effectiveness

Under the proposal, shelf registration statements and post-effective amendments would become effective automatically upon filing, without SEC staff review. In addition, a proposed amendment to Rule 401(g) would provide that an automatic shelf registration statement would be deemed to be filed on the proper form unless the issuer receives notification of an SEC objection. After being notified, the issuer could not proceed with subsequent offerings (those offerings not in progress) unless it amended the registration statement to the proper form or otherwise resolved the issue.

6. Duration

As with non-automatic shelf registrations, issuers would be required to file new automatic shelf registration statements every three years in order to maintain their effectiveness. The new automatic shelf registration statements would, in effect, restate the then-current registration statements and amend them, as appropriate. As long as eligibility for automatic shelf registration is maintained, the new registration statement would become effective immediately and would carry forward the securities registered and the balance of any fee paid.

C. Amendments to Forms S-1 and F-1 – Expanded Use of Incorporation by Reference

1. Eligibility

Under proposed amendments to Forms S-1 and F-1, an eligible reporting issuer that has filed at least one annual report and has timely met its reporting obligations for the previous 12 months would be permitted to incorporate by reference into its Form S-1 or Form F-1 information from previously filed Exchange Act reports. In addition, the issuer would have to make its Exchange Act reports readily accessible on its website to be able to incorporate such information by reference.

2. Proposed Procedural Requirements

Under the proposal, the prospectus in the Form S-1 or F-1 registration statement at effectiveness would identify all Exchange Act reports and documents, such as proxy and information statements, that are incorporated by reference. Exchange Act reports filed after the registration

statement became effective, or not identified in the registration statement (known as "forward incorporation"), could not be incorporated by reference. Material changes in the information that is incorporated by reference from an Exchange Act report must be included in the Form S-1 or F-1 itself.

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

This expansion of the types of issuers that may incorporate Exchange Act reports by reference would make Forms S-2 and F-2 superfluous. Therefore, the proposals eliminate these two forms.

VI. Prospectus Delivery Reforms

A. Access Equals Delivery Model

Under the current system, final prospectuses are generally delivered to investors only after they have made their investment decisions. Under the proposals, the SEC would adopt an "access equals delivery" model for prospectus delivery, based on the assumption that investors have access to the Internet, thereby permitting issuers and intermediaries to satisfy their delivery requirements if the filings or documents are posted on a website.

Under proposed Rule 172, a final prospectus would be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) under the Securities Act as long as a final prospectus meeting the requirements of Section 10(a) is filed with the SEC by the filing date required by Rule 424. Broker-dealers would still be required, under Exchange Act Rule 15c2-8(d), to take reasonable steps to comply promptly with written requests for copies of the final prospectus.

Commentary:

- However, written offers prepared or paid for by non-reporting and unseasoned issuers after a final prospectus becomes available must be preceded or accompanied by the final prospectus. For those issuers, filing under proposed Rule 172 would not satisfy the requirement to provide a final prospectus under proposed Rule 433.

Certain types of offerings are excluded from the proposed rule. For example, offerings made pursuant to Form S-8, where the final prospectus is not filed, are excluded. Business combination transactions and exchange offers, which may be subject to different informational and delivery requirements under the proxy rules, tender offer rules and state law, are also excluded. Registered investment companies and business development companies would not be able to rely on the proposed rule.

B. Notification

In addition to providing access to information, prospectus delivery can be used to inform investors that they purchased securities in a registered transaction. Accordingly, under proposed Rule 173, for each sale in which the final prospectus delivery requirements apply, each underwriter, broker or dealer participating in a registered offering would be able to send to each purchaser, in lieu of the final prospectus, a notice providing that the sale was made pursuant to a registration statement or a final prospectus pursuant to a registration statement. The notice would have to be sent not later than two business days after completion of the sale.

An investor also could request a final prospectus under the proposed rule. The requested final prospectus would not have to be provided before settlement, and non-compliance with proposed Rule 173 would not result in a violation of Section 5 under the Securities Act.

C. Confirmations and Notices of Allocations

A proposed exemption from Securities Act Section 5(b)(1) would allow written confirmations and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus. The exemption would require that the registration statement be effective and that the final prospectus meeting the requirements of Section 10(a) be timely filed.

The exemption would permit:

- confirmations containing information limited to that called for in Exchange Act Rule 10b-10 and other information customarily included in confirmations; and
- written communications from a broker-dealer to a customer, or from an underwriter to participating dealers in the selling group, notifying them of the basic terms of the transaction or their allocations of securities in a registered offering.

The exemption would not be available for the offerings excluded from proposed Rule 172 discussed above.

D. Transactions Taking Place on an Exchange or Through a Registered Trading Facility

With regard to transactions taking place between brokers over a national securities exchange, Rule 153 currently provides that where members of the exchange are on both sides of the transaction and the transaction is effected on that exchange, the Section 5 delivery obligation of a final prospectus may be satisfied through the delivery of copies of the final prospectus to the exchange.

The proposed amendment to Rule 153 would extend this exemption to permit brokers or dealers effecting transactions on an exchange *or* through any registered trading facility to satisfy their prospectus delivery obligations if:

- the final prospectus is on file or will be on file by the applicable prospectus filing date;
- securities of the same class are trading on an exchange or through any registered trading facility; and
- the registration statement relating to the offering is effective and not the subject of a stop order.

The rules would not require physical copies of the prospectus to be sent to the exchange or market maker, and the exchange and the market maker no longer would need to keep track of any prospectuses.

E. Aftermarket Prospectus Delivery

Currently, for a specified period after a registration statement becomes effective, all dealers are required to deliver a final prospectus to persons who buy the securities in the secondary market, unless an exemption applies. A proposed revision to Rule 174 would permit dealers to rely on proposed Rule 172 to satisfy any such secondary market delivery obligations (other than for blank check companies). This rule, however, would not apply to underwriters or dealers acting with respect to any unsold allotment.

VII. Additional Exchange Act Disclosure Proposals

A. Risk Factor Disclosure

The proposals would require issuers to include risk factor disclosure in their annual reports on Form 10-K and registration statements on Form 10. (Form 20-F, the annual report form used by foreign private issuers, already requires risk factor disclosure.) Issuers would be required to update their risk factor disclosure in their quarterly reports to reflect any material changes from previously disclosed risks. No restatement or repetition of risk factors would be required in quarterly reports.

B. Disclosure of Unresolved Staff Comments

The proposed procedural changes would eliminate some of the incentives issuers have to resolve SEC comments on their Exchange Act reports in a timely manner.[12] To balance these changes, the proposals would add a disclosure requirement to incentivize accelerated filers to timely resolve any outstanding comments.

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[12] For example, with automatic shelf registration, well-known seasoned issuers would not be subject to the possibility that effectiveness of a Securities Act registration statement could be delayed while SEC comments are resolved.

The proposals would require all accelerated filers to disclose, in their annual reports on Form 10-K or 20-F, material written staff comments made in connection with review of Exchange Act reports, that were issued more than 180 days before the end of the fiscal year covered by the annual report and remain unresolved as of the Form 10-K or 20-F filing date.

C. Disclosure of Status as Voluntary Filer Under the Exchange Act

As noted above, the communications and procedural proposals do not permit voluntary filers to become seasoned issuers. To better enable the SEC to monitor voluntary filers' compliance with these rules, the proposed rules would require each filer to note whether or not it is a voluntary filer in a box on the cover page of Forms 10-K, 10-KSB and 20-F.

VIII. Application of Proposals to Asset-Backed Securities

Under the proposed rules, asset-backed securities ("ABS") issuers offering securities registered on Form S-1 would be non-reporting issuers. ABS issuers offering securities registered on Form S-3 would be considered seasoned issuers, but could not be well-known seasoned issuers. As a result, automatic shelf registration would not be available to issuers of ABS. The general content of ABS registration statements under current practice would not change under the proposed rules.

As proposed, the changes in communications restrictions would generally apply to ABS offerings, including the safe harbor exclusions from the definition of offer for purposes of the gun-jumping provisions. For example, the proposed exemption for regularly released information for reporting issuers would apply to information conveyed to investors in outstanding ABS, such as static pool information provided with respect to pools underlying outstanding ABS, where the conditions of the proposed rules are satisfied.

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If you wish to obtain additional information regarding these proposed securities reform regulations, please contact John S. D'Alimonte, Steven J. Gartner, Jeffrey S. Hochman, Jeffrey R. Poss or the attorney with whom you regularly work.

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January 5, 2005

Appendix A

Permitted Communications Under Proposed Safe Harbor

<table>
<tr><th></th><th>More Than 30 Days Before Filing of Registration Statement</th><th>During 30-Day Period Before Filing of Registration Statement</th><th>Waiting Period (Between Filing and Effectiveness)</th><th>Post-Effective Period</th></tr>
<tr><td rowspan="4">Non-Reporting Issuers</td><td colspan="4">• Regularly released factual business information permitted, except to persons in their capacity as investors or potential investors (Rule 169)</td></tr>
<tr><td colspan="2">• Notice of registered offering (current Rule 135)</td><td>• Statutory preliminary prospectus</td><td>• Statutory final prospectus</td></tr>
<tr><td colspan="2" rowspan="2">• Bright-line safe harbor for communications by the issuer that do not reference a securities offering (Rule 163A)</td><td colspan="2" rowspan="2">• Oral offers permitted (current law)
• Expanded notices under Rule 134
• Free writing prospectuses if accompanied or preceded by a statutory prospectus (Rules 164 and 433(b)(1))
• Media publications (if not paid for) without delivery of prospectus (Rules 164 and 433(b)(1))</td></tr>
<tr></tr>
<tr><td>Unseasoned Issuers*</td><td colspan="4">• Regularly released factual business information and forward-looking information permitted (Rule 168)</td></tr>
<tr><td>Seasoned Issuers*</td><td colspan="2"></td><td colspan="2">• Free writing prospectuses after a statutory prospectus is filed (Rules 164 and 433(b)(2))</td></tr>
<tr><td>Well-Known Seasoned Issuers*</td><td colspan="2">• Oral and written offers by the issuer permitted (Rule 163)</td><td colspan="2"></td></tr>
</table>

* Communications described with respect to the issuer(s) listed above are also permitted with respect to this category of issuer.