

SEC Proposes Significant Revisions to Communications, Registration and Offering Procedures for Securities Offerings

The Securities and Exchange Commission (SEC) has proposed significant changes to its rules regarding offerings of securities registered under the Securities Act of 1933 (Securities Act). The proposals are intended to modernize the SEC's rules, including, in particular, to permit issuers greater flexibility in communicating with investors. In addition, the SEC has proposed certain changes to the disclosure requirements for filings under the Securities Exchange Act of 1934 (Exchange Act), intended to further integrate the requirements under the Securities Act and under the Exchange Act. Comments on the proposed rules are due on or before January 31, 2005.

Goals of the Proposals

In 1998, the SEC proposed far-reaching revisions to its rules under the Securities Act, referred to as the "Aircraft Carrier" proposals. The Aircraft Carrier proposals met significant criticism and were ultimately shelved. However, certain aspects of the proposals were well received, and the SEC has revived limited portions of them with its current proposals. As stated in the proposing release, the SEC intends the new rules to:

- facilitate greater availability of information to investors and the market with regard to all issuers,
- eliminate barriers to open communications that have been made increasingly outmoded by technological advances,
- reflect the increased importance of electronic dissemination of information, including use of the Internet,
- make the capital formation process more efficient, and
- clarify disclosure liability.

Overview

The proposed rules involve three main areas relating to the Securities Act. The SEC proposes to:

- liberalize the rules governing communications before and during registered securities offerings, particularly for certain very large issuers. The proposals include several new "safe harbors" for specific types of communications during different periods of the offering process.
- clarify certain aspects of the liability provisions of the Securities Act. Most significantly, the SEC set forth its interpretation, which it proposes to codify in a new rule, concerning the information that forms the basis for a claim under certain provisions of the Securities Act.

- streamline registration procedures, including liberalizing the use of shelf registrations; providing an “automatic” shelf registration process for the largest issuers; permitting a wider range of issuers to incorporate previously filed information into Securities Act registration statements; and reforming prospectus delivery procedures.

In addition, the proposals would require Exchange Act filings to include risk factor disclosure, as well as, in certain cases, disclosure of unresolved comments from the SEC on prior filings.

Classification of Issuers

In a number of respects, the proposals would apply more liberal rules to larger issuers. To accomplish this, the SEC proposes two new categories of issuers – “well-known seasoned issuers” and “ineligible issuers” – and to make greater use of (though without specifically defining) three existing categories.

Well-known seasoned issuer would be defined as an issuer that:

- has timely filed its periodic reports under the Exchange Act for at least the last 12 months,
- is eligible to use Form S-3 or Form F-3 for a primary offering,
- either (i) has a public float (market value of its common equity held by non-affiliates) of at least \$700 million or (ii) if registering only debt securities, has issued at least \$1 billion aggregate amount of debt securities in registered debt offerings during the prior three years, and
- is neither an ineligible issuer nor an asset-backed issuer.

Certain majority-owned subsidiaries of a well-known seasoned issuer may also be considered well-known seasoned issuers.

The timing of the determinations is somewhat unclear. According to the release, an issuer would determine whether it meets the eligibility requirements for timely filing of Exchange Act reports and eligibility for Form S-3 or Form F-3 at the time of the filing of a registration statement as well as each time the registration statement is updated as required by Section 10(a)(3) of the Securities Act (which generally occurs annually upon the filing of each Form 10-K), and would determine its public float as of the last business day of its most recently completed second quarter prior to the date of its filing of its Form 10-K or Form 20-F. The release does not indicate when the three years for debt issuances is determined. However, the text of the rule as proposed seems to apply the latter date to all of the eligibility determinations, including the timely filing and Form S-3/F-3 eligibility.

Seasoned issuer would be an issuer that is eligible to use Form S-3 but does not meet the requirements to be a well-known seasoned issuer.

Unseasoned issuer would be an issuer that is required to file, or voluntarily files, reports under the Exchange Act but is not eligible to use Form S-3.

Non-reporting issuer would be an issuer that does not file reports under the Exchange Act.

Ineligible issuer would be defined as an issuer that:

- is required to file reports under the Exchange Act and is not current on filing such reports,

- is, or in the last three years was, a blank check company, a shell company (defined as the SEC recently proposed in its proposed rules on filings and offerings by shell companies), or a penny stock issuer,
- is a limited partnership offering and selling its securities other than through a firm commitment underwriting,
- has received a “going concern” audit opinion for its most recent fiscal year,
- has entered into bankruptcy proceedings in the past three years, unless it has filed an annual report subsequent to emerging from such proceedings,
- has been convicted in the last three years of certain felonies or misdemeanors, or similar crimes under foreign laws,
- has entered into in the last three years a settlement (including a settlement in which the issuer neither admitted nor denied wrongdoing), or was the subject of a judicial or administrative decree, regarding violations of the securities laws,
- has been subject in the last three years to a refusal or stop order under the Securities Act, or is subject to a pending proceeding for a stop order or a cease and desist order with respect to an offering, or
- is an investment company or a business development company.

Except with respect to investment companies or business development companies, the SEC would have authority to waive ineligibility for any specific issuer.

Written Communications

The proposals also use two new definitions of types of written communications. First, since determining what constitutes a “written” communication has become more difficult with the spread of various forms of electronic communications, the SEC proposes to define all communications other than oral communications (which include live telephone calls) as written communications. This would include communications via electronic media such as audio and video tapes, e-mail, Web sites and computer networks. Written communications would also include messages widely distributed by voice mail, since the SEC believes those are more similar to writings than they are to individual oral communications.

Second, the rules would introduce the concept of a “free writing prospectus,” defined as any written communication that constitutes an offer to sell, or a solicitation of an offer to buy, securities in a registered offering that is used after the filing with the SEC of the registration statement (or prior to such filing, in the case of an offering of securities of a well-known seasoned issuer) and that is other than (i) a statutory prospectus or (ii) a communication that is made after the recipient has been provided, or that is accompanied by, a final prospectus. As discussed below, issuers and others would be permitted to use free writing prospectuses subject to certain conditions depending on the nature of the issuer.

Communications Proposals

Current rules under the Securities Act, often referred to as “gun-jumping provisions,” significantly restrict the information an issuer may disclose during the public offering process, and are often unclear and difficult to apply. Under the current rules:

- Prior to the filing of a registration statement, all offers, in whatever form (including oral), are prohibited. The term “offer” has been interpreted very broadly and can include a communication that does not specifically refer to an offering of securities if it is designed to condition the market for the issuer’s securities. Further, it is unclear for what length of time prior to the filing of a registration statement the SEC might consider that a communication could be a prohibited offer. As a result, the restrictions during the pre-filing period are often unclear.
- Between the initial filing of a registration statement and its effectiveness, the only written material permitted in connection with an offer (including by e-mail or Internet) is a preliminary prospectus meeting the requirements of Section 10(b) of the Securities Act (referred to as a “statutory prospectus”), except for a limited notice permitted under Rule 134.
- After effectiveness of a registration statement, all writings – known as “free writing” – are permitted if the recipient has previously been provided, or if the writing is accompanied by, a final prospectus.

With recent SEC rules requiring greater and faster issuer disclosure, growing expectations of investors for information and technological advances facilitating disclosure, the SEC has recognized that these gun-jumping provisions have hindered information flow more than protected the offering process. The new proposals provide a series of changes to increase the availability of information in connection with the offering process: safe harbors for release of information that has historically been undertaken by issuers on a periodic basis; the bright line definition of certain time periods during which disclosures will not be considered gun-jumping; extensive free writing provisions that expressly permit a flow of supplemental information during the offering period; and expansion of the contents of presently permitted “tombstone advertisements” under Rule 134.

Safe Harbors for Communications During Any Offering Period – Factual Business Information and Forward-Looking Information

Factual business information – could be communicated by any issuer at any time. All issuers would be free to publish or disseminate, at any time, factual business information of the type the issuer has previously released in the ordinary course. “Factual business information” would be limited to (i) factual information about the issuer or its business, (ii) advertisements for and other information about its products or services, (iii) factual information about its business or financial developments and (iv) for reporting issuers only, dividend notices and information in its Exchange Act filings.

Forward-looking information – could be communicated by reporting issuers at any time. Reporting issuers could also publish or disseminate, at any time, forward-looking information of the type the issuer has previously released in the ordinary course. “Forward-looking information” would be limited to financial projections, statements about the issuer’s plans and objectives for future operations or about its future economic performance and assumptions relating to such projections or statements. Because non-reporting issuers do not generally release such information, the SEC believes the potential is higher that non-reporting issuers would abuse a safe harbor to condition the market for their securities; accordingly, the SEC does not propose to extend this safe harbor to non-reporting issuers.

Conditions of use. Both safe harbors would be available only to information released by or on behalf of the issuer. Information released by another party – such as an underwriter – would not be eligible for the safe harbor. Further, the safe harbor would require that the information be released in a manner consistent with past disclosures; for non-reporting issuers, the information could be released only to persons, such as customers and suppliers, other than in their capacities as investors or potential investors, and only by employees or agents who historically provided such information. Neither factual business information nor forward-looking information would include information about the offering or released as part of the offering process. The safe harbors also would not be available for communications that are in “technical compliance” with the rules but are part of a plan or scheme to evade the registration requirements of the Securities Act.

Pre-filing – Safe Harbors for Communications More than 30 Days Pre-filing and for Pre-filing Offers by Well-Known Seasoned Issuers

Most communications permitted more than 30 days prior to filing. Under the proposals, any communication made more than 30 days before the filing of a registration statement would not be considered an offer of the securities offered under the registration statement, provided that the communication did not reference a securities offering and the issuer took reasonable steps to prevent further distribution or publication of the information during the 30-days immediately before filing of the registration statement. The safe harbor would be available only for communications made by or on behalf of the issuer; would not be available for communications relating to business combination transactions (which are subject to a separate set of existing rules) or in offerings by ineligible issuers; and would not be available for communications that are part of a plan or scheme to evade the registration requirements of the Securities Act.

The requirement that the issuer take reasonable precautions to prevent publication during the 30-day period may undercut the usefulness of this safe harbor for at least certain kinds of communications. For example, the SEC stated that, if a representative of an issuer (such as its CEO) gave an interview before the 30-day period, the issuer would not be able to rely on the safe harbor if the interview was published within the 30-day period.

Safe harbor for pre-filing offers by well-known seasoned issuers. The safe harbors discussed above would still leave in effect the present restrictions on communications other than of factual business information or, for reporting issuers, forward-looking information, during the 30 days prior to the filing of a registration statement. As a result of the proposed changes in the shelf registration rules discussed below, the SEC expects that most well-known seasoned issuers would have a shelf registration statement on file at all times and thus would rarely desire to make offers prior to filing. However, for those possibly rare instances, the SEC has proposed an additional safe harbor that would permit well-known seasoned issuers to make offers, both oral and written, before a registration statement is filed. As with the pre-filing safe harbors, this safe harbor would be available only for communications made by or on behalf of the issuer; would not be available for communications relating to business combination transactions or in offerings by ineligible issuers; and would not be available for communications that are part of a plan or scheme to evade the registration requirements of the Securities Act.

Although pre-filing communications by well-known seasoned issuers would thus be exempt from the gun-jumping provisions, whether such communications would be considered offers would be determined, as under current rules, based on the facts and circumstances. Any such offers would be subject to the liability and anti-fraud standards applicable to any offers, as well as Regulation FD. Written pre-filing offers would be considered free writing prospectuses.

Post-Filing – Use of Free Writing Prospectus and Expansion of Rule 134

Free writing prospectus permitted for most issuers. The SEC proposes to significantly relax the restrictions on communications after filing and prior to effectiveness by permitting the use of free writing prospectuses. Issuers and others participating in an offering would be permitted to use free writing prospectuses after the registration statement is filed, subject to the following conditions:

Availability and Delivery of Prospectus.

- If the issuer is a non-reporting issuer or an unseasoned issuer, the rules generally would require that the free writing prospectus be accompanied or preceded by the most recent statutory prospectus. Once a statutory prospectus has been provided to a person, the issuer or other offering participants could provide additional free writing prospectuses without providing additional statutory prospectuses, even if the prospectus provided is no longer the most recent, unless there had been material changes from the version provided or a final prospectus is available.
- The proposal would not require that the prospectus be provided through the same medium as is the free writing prospectus. However, it must be actually provided – merely referring to its availability would not be sufficient. An electronic free writing prospectus could satisfy the delivery requirement by including a hyperlink to the most recent preliminary prospectus.
- If the free writing prospectus had not been prepared by the issuer or another person participating in the offering, and neither the issuer nor any other offering participant had given or will give any consideration for the publication, prior or contemporaneous delivery of the prospectus would not be required. In that case, the issuer need only have filed a statutory prospectus as part of the registration statement.
- If the issuer is a seasoned issuer (including a well-known seasoned issuer), delivery of the prospectus would not be required. In that case, an issuer or offering participant may use a free writing prospectus at any time after the issuer has filed a statutory prospectus as part of the registration statement.
- If the issuer is a well-known seasoned issuer, it (but not another offering participant) would also be able to use free writing prospectuses prior to filing a statutory prospectus.

Exclusions. Free writing prospectuses would not be available for offerings by ineligible issuers, or in connection with exchange offers or business combination transactions subject to Regulation M-A, and the exemption would not be available for communications that are part of a plan or scheme to evade the registration requirements of the Securities Act.

Information in free writing prospectuses and legends. A free writing prospectus would not be subject to any “line item” informational requirements, although it may not contain information inconsistent with information in the issuer’s prospectus or Exchange Act reports. The proposing release also states that a free writing prospectus could not contain (i) disclaimers regarding the accuracy of the information, (ii) a requirement that investors read or acknowledge they have read any disclaimers or legends or the registration statement or (iii) statements that the free writing prospectus is not a prospectus nor an offer to sell or a solicitation of an offer to buy (it is, however, unclear how this is provided for in the proposed rule). The free writing prospectus would be required to contain a legend indicating where a statutory prospectus is available (or will be available, in the case of a free writing prospectus used by a well-known seasoned issuer prior to filing of the registration

statement), recommending that potential investors read the prospectus, including any Exchange Act documents incorporated by reference and any risk factors, and stating that the communication constitutes a written offer pursuant to a free writing prospectus.

Filing. An issuer would be required to file all free writing prospectuses prepared by it or on its behalf (an “issuer free writing prospectus”), as well as any prepared by any other person that the issuer uses or that contain only a description of the final terms of the securities. An issuer would also be required to file any material information contained in a free writing prospectus used by any person if that information was provided by or on behalf of the issuer (“issuer information”) and had not previously been included in a prospectus or filed free writing prospectus relating to the same offering. Any other offering participant would be required to file a free writing prospectus that is distributed by it in a manner designed to lead to its broad unrestricted dissemination, unless previously filed. Free writing prospectuses would not be part of the registration statement, but would be available to the public on the SEC’s EDGAR system.

Generally, the free writing prospectus would be required to be filed on or before the date of first use. A well-known seasoned issuer that uses a free writing prospectus prior to the filing of the registration statement to which the free writing prospectus relates would file the free writing prospectus on the same day that the registration statement is filed. A free writing prospectus that contains only a description of the final terms of the securities would be filed within two days after the later of the date the terms are final and the date of first use. Unintentional failures to file could be cured if the material is filed as soon as practicable after the discovery of the failure to file.

Issuer Web sites. An offer on or hyperlinked from an issuer’s Web site would be a written offer and a free writing prospectus. However, historical materials contained on a Web site would not be considered an offer if identified as such, appropriately segregated and not incorporated by reference in a prospectus for the offering or otherwise used in connection with the offering.

Road shows. Electronic road shows (but not road shows not transmitted by any electronic or other written means) would be considered free writing prospectuses. However, road show materials would not be required to be filed if the issuer makes at least one version of a *bona fide* road show readily available electronically to any potential investor, no later than when any other version is used, and the issuer files any material issuer information used at the electronic road show that has not previously been filed.

Media publications. Media publications for which the issuer or any offering participant provided information would be considered free writing prospectuses. However, if no consideration is paid by the issuer or any other offering participant for the publication, the restrictions on use prior to filing of the registration statement and the requirements for prospectus delivery would not apply, and the publication itself would not need to bear the legend. The issuer or another offering participant would be required to file the publication, with the legend, within one business day after its publication. Since the prospectus delivery requirements would apply if such consideration is paid, unseasoned and non-reporting issuers would effectively be precluded from using advertisements, and seasoned issuers (other than well-known seasoned issuers) could use advertisements only after filing the registration statement.

Record keeping. Issuers and offering participants would be required to keep records of free writing prospectuses they used for three years from the date of the offering.

Expansion of Rule 134. Rule 134 currently provides that a public notice about a proposed offering that is published after a registration statement is filed and that contains only specified, and very limited, information

is not considered a prospectus (and thus may be made without violation of the gun-jumping rules). The proposed rule would expand the information permitted in a Rule 134 notice to include:

- expanded contact information for the issuer, including phone numbers and e-mail addresses, as well as information about the geographic areas and operating segments in which the issuer does business,
- for offerings of debt securities, information concerning maturity and interest rates (however, the notice would not be permitted to include a detailed term sheet for the offered securities, although such a term sheet could be delivered as a free writing prospectus, as discussed below),
- information concerning the anticipated offering schedule, including the schedule and location of marketing events such as road shows and procedures for attending the events,
- information about the underwriters (not just the managing underwriters, as under the current rule), the underwriting procedures and procedures for account opening and for submitting indications of interest and conditional offers to buy the offered securities,
- any security rating reasonably expected to be assigned (under the current rule, only a rating that has been assigned can be included in a Rule 134 notice),
- the names of selling security holders, if included in the prospectus on file at the time of the notice, and
- the exchanges where any class of the issuer's securities are or will be listed and the ticker symbols for those securities.

The proposed rule would also streamline the legend that is currently required in a Rule 134 notice and eliminate certain other required information.

Narrowing of Regulation FD Exclusion

Regulation FD requires U.S. issuers to make widely available certain information that the issuer has disclosed to select persons. However, Regulation FD currently does not apply to communications directly related to a registered offering (other than certain shelf registrations). The proposed rules would narrow this exclusion, placing under Regulation FD (and thus requiring disclosure pursuant to Regulation FD) communications within the proposed safe harbors for factual business information, forward-looking information and information communicated prior to filing. In addition, the SEC proposes to place under Regulation FD communications with respect to offerings that are not for "capital formation purposes for the account of the issuer," although underwritten offerings for both the issuer and selling security holders would continue to be excluded from the application of Regulation FD.

Expanded Use of Research Reports

The SEC has long recognized the value that analyst research reports provide to the market and investors, and recently promulgated rules to require disclosure of conflicts of interest and otherwise enhance the usefulness of research reports. Since the SEC believes those rules should curb abusive conduct by analysts, the SEC now proposes to relax certain of the current restrictions on research as written offers. The proposed rules would provide the following:

- A broker or dealer that is not an offering participant, does not receive compensation from any offering participant and publishes research reports in the ordinary course of its business would be permitted to freely publish or distribute research without being considered an underwriter.
- A broker or dealer that is an offering participant could publish research on a reporting issuer or a large foreign issuer publicly traded abroad if such research is confined to (i) non-convertible debt or preferred securities, if the offering is of common stock or securities convertible into common stock, or (ii) common stock or securities convertible into common stock, if the offering is of non-convertible debt or preferred securities, and in either case the broker or dealer publishes or distributes research reports in the ordinary course of its business on such type of securities.
- A broker or dealer participating in an offering by a seasoned issuer or a large foreign issuer publicly traded abroad could publish any research on the issuer or any class of its securities, if that research is in a publication distributed in the normal course of its business and the broker or dealer has previously distributed research reports regarding the issuer or its securities.
- A broker or dealer participating in an offering by any reporting issuer could issue industry-wide research reports, provided such reports contain information similar to prior reports.

Publications of the types listed in the last three bullets above would not constitute general solicitations in connection with a Rule 144A offering or directed selling efforts in connection with an offering under Regulation S.

The proposed rules relating to research reports would not apply to offerings by blank check companies, shell companies or issuers of penny stocks.

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). The Securities Act also contains a general anti-fraud provision.

Although free writing prospectuses would be filed, they would not be considered part of the registration statement. Accordingly, they would not be subject to liability under Section 11. They would, however, be subject to liability under Section 12(a)(2) of the Securities Act and the anti-fraud provisions.

Under prior case law, liability under these provisions has generally been based on the final prospectus. This creates an anomaly, because investors typically make investment decisions before they receive the final prospectus. In the release, the SEC set forth its interpretation that, for purposes of Section 12(a)(2) and the anti-fraud provisions, information provided to an investor after the investor enters into a contract of sale, and therefore becomes committed to purchase the securities, should not be taken into account. The SEC also proposed to codify this interpretation in a new rule.

Although the SEC's interpretation would address the anomaly in the current regime, it raises a number of concerns. The time at which a contract of sale is entered into is often unclear. Moreover, current underwriting practices essentially require that the underwriters accept offers to buy before the final prospectuses are available. It is unclear how underwriters can provide the information in the final prospectus on a timely basis;

yet, on the other hand, underwriters will be reluctant to accept the potential for liability on anything other than the final prospectus. Further, even if delivered, it is unlikely that many investors will insist on the time necessary to review and evaluate the final changes, making the usefulness of the proposal to investors unclear.

Registration Proposals

The proposed rule also would provide additional flexibility for certain offerings under the Securities Act.

Shelf Registration Information and Limitations

Offerings under shelf registration statements are sold in takedowns from the shelf, the form of which is unknown at the time the registration statement becomes effective and that varies from time to time. The issuer will generally file a base prospectus that omits certain information (such as the terms of the security or the identity of selling security holders) and will later file a prospectus supplement or post-effective amendment to supply the required information when it becomes known. The proposed rule would clarify that required information which is unknown or not reasonably available at the time of the registration statement may be omitted from such a base prospectus. In such a case, the base prospectus as filed, with the permitted omissions, would be considered a statutory prospectus, thus enabling issuers to use Rule 134 notices and free writing prospectuses.

The base prospectus would not be considered a final prospectus if it omitted required information. The issuer would be required to provide such information by prospectus supplement. Information in a prospectus supplement would be deemed part of the registration statement containing the base prospectus. Alternatively, the proposed rule would permit the information to be contained in Exchange Act reports and incorporated by reference into the prospectus.

Current rules require that changes in the plan of distribution be reflected in a post-effective amendment. The proposal would allow such changes to be made via a supplement for primary offerings on Form S-3 or F-3.

Under current rules, selling security holders generally must be named in the registration statement or in a post-effective amendment, and cannot be added or changed by a supplement. Under the proposals, seasoned issuers could identify selling security holders by a supplement if the registration statement identified the private transaction pursuant to which the securities were sold and the transaction was completed and the securities issued prior to the initial filing of the registration statement.

Currently, the amount of securities registered on a shelf registration statement is limited to an amount that is intended to be offered or sold within two years from the effective date of the registration statement. The SEC proposes to eliminate this requirement. In its place, the proposal would require that a new shelf registration statement be filed every three years (including for automatic shelf registrations, discussed below), with unsold securities and unused fees carried forward to the new registration statement. Offerings begun on an old registration statement could be completed even if completion occurs after the effective date of the new registration statement.

The current rules also place restrictions on primary “at-the-market” offerings of equity securities, including volume limits and a requirement that the underwriter be identified in the registration statement. The proposal would eliminate such restrictions.

Automatic Shelf Registrations for Well-Known Seasoned Issuers

The proposed rule would allow well-known seasoned issuers to file an “automatic shelf registration,” a significantly more flexible version of the normal shelf registration. Automatic shelf registrations would still consist of a general base prospectus and the provision of additional information as necessary to complete the prospectus. The base prospectus for an automatic shelf registration would be permitted to omit more information than would a normal base prospectus, including whether the offering is primary or secondary, the identity of selling security holders and the plan of distribution. The information could be added by incorporation by reference to Exchange Act reports or by prospectus supplement, subject to certain exceptions (such as the registration of new types of securities or addition of new subsidiaries as co-issuers) that must be effected by amendment.

Most significantly, while the issuer would be required to specify classes of securities to be registered (as under current practice, this could be done in general terms and the mix of securities offered would not have to be specified beforehand), the issuer would not need to register a specific amount of securities. Instead, the amount of securities to be offered could be specified as the issuer files supplements for specific offerings. Filing fees could be paid in advance or on a “pay-as-you-go” basis.

Automatic shelf registrations and post-effective amendments would be effective immediately upon filing.

As a result of these proposals, the SEC anticipates that a well-known seasoned issuer would file a single broad-based automatic shelf registration, with amendments or replacements as needed, and conduct substantially all of its offerings through takedowns under that registration statement. This would provide such issuers a significant improvement in their ability to quickly access capital markets through registered offerings, which the SEC hopes will encourage such issuers to use the registration process rather than alternatives such as Rule 144A offerings.

Changes for Unseasoned and Non-Reporting Issuers

The SEC also proposes to permit a reporting issuer, if it is not an ineligible issuer, has filed at least one annual report, is current in its Exchange Act reports and makes such reports readily accessible on its Web site, to incorporate by reference, into a Form S-1 or Form F-1 registration statement, information from previously (but not subsequently) filed Exchange Act reports. Because this would largely duplicate the requirements for Forms S-2 and F-2, those forms would be eliminated.

Prospectus Delivery Reforms

Under current rules, after effectiveness of a registration statement, the issuer or underwriter delivers to each investor in a registered offering a written confirmation of a sale. The confirmation must be accompanied or preceded by the final prospectus. As noted above, however, investors’ investment decisions are generally made prior to delivery of the final prospectus.

Accordingly, the final prospectus is often not useful except to memorialize information for the aftermarket. Since physical delivery of the final prospectus is not necessary to accomplish that function, the SEC proposes to allow delivery of the final prospectus under an “access equals delivery” model. Under this rule, written confirmations (containing no more than the information typically included in confirmations) and notices of

allocations (containing only information identifying the securities, pricing, allocation and settlement) could be sent if the issuer has filed the final prospectus (to which the investor would thus have access, via the SEC's EDGAR system), including a prospectus that omits certain pricing information, or, for shelf offerings, has filed or will file the prospectus supplement within the time required. The underwriter, or the issuer if it effects the sale directly, would be required to send to each purchaser, within two days after completion of the sale, a notice that the sale was made pursuant to the registration statement. This would allow, for example, a broker-dealer to send notices of allocations by e-mail, since no final prospectus would have to precede the e-mail. Registered investment companies and business development companies would not be permitted to take advantage of the "access equals delivery" model.

Additional Exchange Act Disclosure Proposals

Currently, risk factor disclosure is required in Securities Act registration statements but not in Exchange Act reports. The proposed rules would require risk factor disclosure in annual reports on Form 10-K and Exchange Act registration statements on Form 10. Quarterly reports on Form 10-Q would not need to repeat the risk factor disclosure, but would update the previously filed risk factor disclosure for any material changes. These rules would codify a practice many issuers have been following in the last several years.

The proposed rules would also require an accelerated filer to disclose, in its Form 10-K or 20-F, any written SEC comments to its Exchange Act reports that the issuer believes are material, that were issued more than 180 days before the end of the fiscal year covered by the Form 10-K or 20-F and that remain unresolved at the time of filing of the Form 10-K or 20-F. (The scope of this proposal is unclear. Although the proposals limit this requirement to accelerated filers, they propose to apply the requirement to Form 20-F; however, foreign issuers that file Form 20-F are not included in the definition of accelerated filer.) An issuer would be required to disclose the substance of the comment and may, but would not be required to, disclose its position on the comment.

Finally, the proposed rules would add a box on the front page of Form 10-K and Form 10-KSB that, if applicable, an issuer would check to indicate that it is not required to file Exchange Act reports but is filing voluntarily.

For Further Information

These proposals have broad implications for how issuers raise money publicly, most notably for larger issuers. If you have any questions regarding the proposed rules, including how they may affect your company, or would like to discuss submitting comments to the SEC, please contact one of the members of the **Securities Practice Group** listed below or the lawyer in the firm with whom you are regularly in contact.

Duane Morris

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