

Understanding the New Securities Offering Reform Rules

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Introduction

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Securities Offering Reform

Release 33-8591 (www.sec.gov/rules/final/33-8591.pdf)

Approved: June 29, 2005

Effective: December 1, 2005

Transition: To come from the SEC

Understanding the New Securities Offering Reform Rules

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Securities Update

SEC Adopts Securities Act Reform

August 24, 2005

On June 29, 2005, the Securities and Exchange Commission adopted significant modifications to the securities registration and offering processes under the Securities Act of 1933. Release Nos. 33-8591; 34-52056; IC-26993. The new rules were adopted substantially as proposed in Release Nos. 33-8501; 34-50624; IC-26649. The modifications are critically important to any company that accesses the public securities markets and to the investment banking firms that underwrite public offerings.

The new rules will result in significant changes in the way substantially all issuers conduct their registered securities offerings and eliminate unnecessary and outmoded restrictions on the capital raising process. In addition, the new rules require public companies to provide more timely investment information to investors. Finally, the new rules continue the SEC's efforts towards integrating the disclosure processes under the Securities Act and the Securities Exchange Act of 1934.

The new rules do not affect the regulatory framework applicable to business combinations and exchange offers, to registered investment companies and, unfortunately, the new rules do not address private placements and other exempt offerings. In addition, the new rules generally do not apply to blank check companies, shell companies and blind pool offerings.

Effectiveness Date

The new rules will be effective on December 1, 2005.

Transition

The adopting release for the new rules does not describe how existing public companies are to transition to the new regulatory regime. We understand that the staff of the SEC is working on transition guidance which we expect will be issued in the near future.

Summary of the Rule Changes

While addressing numerous topics, the Securities Act reform rule changes focus on three main areas:

- Communications related to registered securities offerings;
- Registration and other procedures in the securities offering and capital raising process; and
- Delivery of information to investors, including deemed delivery of prospectuses through access and notice rather than physical delivery, and timeliness of that delivery.

The SEC believes that the rule changes will:

- Facilitate greater availability of information to investors and the market with respect to all issuers;
- Eliminate barriers to open communication that have been made increasingly outmoded by technological advances;
- Reflect the increased importance of electronic dissemination of information, including the use of the internet;

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Summary

- Creates flexibility in three main areas
 - Communications related to registered securities offerings
 - Registration process
 - Delivery of information to investors

Summary

- Communications related to registered securities offerings
 - Free-writing prospectuses can be used by all issuers
 - Substantially frees up communications that occur more than 30 days before a registration statement is filed
 - Electronic road shows will be permitted on an expanded and simplified basis

Summary

- Registration process
 - Well-known seasoned issuers
 - Automatic effectiveness of shelf registration statements
 - Pay-as-you-go filing fees
 - Use of free-writing prospectuses before filing a registration statement

Summary

- Delivery of information to investors
 - Access equals delivery with regard to delivery of a final prospectus

Definitions

- Categories of issuers
 - Non-reporting issuer
 - Not required to file reports with the SEC
 - Unseasoned issuer
 - Reporting issuer not eligible to use short form registration
 - Seasoned issuer
 - Eligible to use short form registration

Definitions

- Categories of issuer (cont.)
 - Well-known seasoned issuer
 - Eligible to use short form registration
 - Either has
 - Public float of at least \$700 million, or
 - \$1 billion aggregate principal amount of registered non-convertible securities issued for cash in last three years
 - Not an ineligible issuer

Definitions

- Categories of issuer (cont.)
 - Majority-owned subsidiary will be considered a well-known seasoned issuer if
 - Subsidiary meets definition
 - Well-known seasoned issuer parent fully and unconditionally guarantees the securities being issued and the securities have a limited duration
 - Subsidiary guarantees securities of well-known seasoned issuer parent or a sister entity where those securities are fully and unconditionally guaranteed by well-known seasoned issuer parent
 - Subsidiary is offering non-convertible investment grade securities

Definitions

- Categories of issuer (cont.)
 - Well-known seasoned issuer status determined as a day within 60 days of the later of the filing of
 - Shelf registration statement
 - Amendment for purposes of complying with Section 10(a)(3)

Definitions

- Ineligible issuers
 - Reporting issuers that are not current in their Exchange Act reports
 - Issuers that are or during the last three years were
 - Blank check issuers
 - Shell companies
 - Penny stock issuers
 - Have filed for bankruptcy
 - Subject of refusal or stop orders under the Securities Act
 - Convicted of any specified felony or misdemeanor provisions of the Exchange Act, found to have violated the antifraud provisions of the federal securities laws or been made the subject of a judicial or administrative decree or order prohibiting specified conduct regarding the anti-fraud provisions of the federal securities laws

Definitions

- Ineligible issuer (cont.)
 - Issuers that are finite life limited partnerships and are not selling securities in a firm commitment underwriting

Definitions

- Written communication
 - Any communication that is written, printed, broadcast on television or radio or is a graphic communication
 - Does not include
 - Oral communications
 - Live, real-time communications to a live audience
- Graphic communication
 - Any form of electronic media, such as audiotapes, videotapes, facsimiles, CD-ROMs, email, internet websites and computers, computer networks and other forms of computer data compilation

Definitions

- Factual business information
 - Factual information about the issuer, its business or financial developments, or other aspects of its business
 - Advertisements of, or other information about, the issuer's products or services
 - Dividend notices (for reporting issuers only)

Definitions

- Forward-looking information
 - Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items
 - Statements about management's plans and objectives for future operations
 - Statements about future economic performance
 - Assumptions underlying or relating to any of these items

Definitions

- Research reports
 - Written communication that includes information, opinions or recommendations with respect to, or an analysis of, a security of an issuer

Simplified Registration Process

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Offers by WKSIs Permitted Prior to Filing Registration Statement (Rule 163)

- Both oral and written offers permitted
- Written offer must be a permitted free writing prospectus
 - Written offer must have required legend
 - Immaterial or unintentional failure to include legend does not result in violation of section 5, subject to cure provisions
 - Must be filed with SEC promptly upon filing of registration statement
- Rule 163 exemption for pre-filing offers does not apply to business combinations
- Does not apply to investment companies or business development companies
- Regulation FD applies to communications covered by this rule

Automatic Shelf Registration for WKSIs

- Registration statement becomes immediately effective upon filing
- WKSI with public float of \$700 million or more may register debt or equity
- WKSI that has issued \$1 billion in registered debt offerings over last three years and is S-3 or F-3 eligible may also register debt or equity
- WKSI that has issued \$1 billion in registered debt offerings over last three years may only register non-convertible securities, other than common equity

Automatic Shelf Registration for WKSIs

- Majority-owned subsidiaries of WKSIs may register securities if the securities are
 - Securities of the majority owned sub that is itself a WKSI
 - Non-convertible securities of the subsidiary that are guaranteed by WKSI parent
 - Guarantees of non-convertible securities of WKSI parent (or other subsidiary of WKSI parent)
 - Non-convertible investment grade securities

Automatic Shelf Registration for WKSIs

- Securities to be offered by selling securityholders may also be included in automatic registration statement filed by WKSI
- May not be used to register securities offered in a business combination transaction
- Registration statement need not specify number of securities or maximum aggregate offering price nor specify which securities are to be sold by issuer and which are to be sold by selling securityholders
- Only the class or classes of securities to be offered (e.g. common stock, preferred stock, debt securities) must be disclosed

Automatic Shelf Registration for WKSIs

- May file post-effective amendment (which also becomes effective automatically) to add a class of securities or to add otherwise eligible majority owned subsidiaries as registrants
- Automatic shelf registration statement deemed filed on the proper form unless and until SEC gives notice of objection Rule 401(g)(2)
- Indentures must still be qualified at time of effectiveness of registration statement or post-effective amendment
- Consideration of corporate authorization (resolutions, offering committees, etc.)

Pay-As-You-Go Filing Fees

- WKSIs filing automatic registration statements may, but not required to, defer payment of filing fees
- Instead may pay applicable fees in advance of or in connection with a takedown
- Must be paid within time required to file prospectus supplement pursuant to Rule 424(b)
- Failure to pay, after good faith effort, may be cured by payment within four business days
- Payment indicated by updating “Calculation of Registration Fee” either with a post-effective amendment or adding a cover page to prospectus supplement

Contents of Automatic Shelf Registration Statement

- New Rule 430B extends principle of Rule 430A which permitted omission of pricing related information in prospectus
- Under Rule 430B, the form of prospectus filed as part of an automatic shelf registration statement may omit the following:
 - Whether offering is primary or secondary offering or a combination
 - The plan of distribution
 - The description of the securities other than identifying the class of securities
 - The identification of other issuers

Contents of Automatic Shelf Registration Statement

- All of the omitted information may be included subsequently in:
 - A post effective amendment
 - A Rule 424(b) prospectus, or
 - '34 Act reports incorporated by reference (but still must file a prospectus supplement identifying the '34 Act reports that contain the omitted information)
- Section 11 liability for omitted information for issuer and underwriter

Identification of Selling Securityholders (Resale Shelf)

- Rule 430B also permits omission of names of selling securityholders for resale shelf registration statements that are not automatic shelf registration statements if:
 - Issuer is eligible to use Form S-3 or F-3 for primary offering
 - The initial offering (i.e. the private placement) is completed
 - The securities are issued and outstanding
 - The selling securityholders are referred to generically by identifying the initial offering transaction (i.e. the private placement) and
 - The issuer is not a blank check company, shell company or penny stock issuer
- Section 11 liability for omitted information for issuer and underwriter

Incorporation by Reference for Form S-1 Issuers

- “Backward” incorporation of ‘34 Act documents now permitted to satisfy most “line-item” disclosures
- Still may not incorporate future ‘34 Act filings
- Issuer must have filed at least one Form 10-K and otherwise be current (but not necessarily timely) in ‘34 Act filings for last 12 months
- Issuer may not be a blank check company, shell company or penny stock issuer

Incorporation by Reference for Form S-1 Issuers

- Incorporated '34 Act documents must be readily available on website maintained by or for issuer (unlike Form S-2, which has been eliminated, issuer need not deliver incorporated documents)
- Streamlines offering documents for many follow-on offerings and for issuers that have lost Form S-3 eligibility

Rule 415 Changes

- “Convenience shelf” rule eliminated; may now register securities on Form S-3 or F-3 to be offered on an immediate, continuous or delayed basis
- Amount to be registered no longer limited by amount reasonably expected to be offered and sold within two years (limit retained for securities offered in business combinations and for continuous offerings not registered on Form S-3 or F-3)

Rule 415 Changes

- But, registration statement only good for three years; must file a new one every three years
- If new registration statement an automatic shelf, will be immediately effective, if not, may continue to use old registration statement for up to 180 days
- Unsold securities and any filing fees previously paid carry over

Rule 424 Changes

- Information omitted in accordance with new Rule 430B may be included in Rule 424(b) prospectus
- Same timing requirements – not later than 2nd business day after earlier of pricing or first use

Rule 424 Changes

- New paragraph 424(b)(7) to be used to identify selling securityholders omitted pursuant to Rule 430B
 - To be filed not later than 2nd business day after earlier of date of sale or first use
- New paragraph 424(b)(8) to be used for late 424(b) filings
 - Enables SEC to more easily monitor late filings

New Undertakings

- Acknowledgement that information omitted pursuant to Rule 430B or Rule 430C will be deemed part of the registration statement and that issuer will have Section 11 liability for such information
- Acknowledgement that issuer is a “seller” for purposes of Section 12 as to:
 - Any prospectus required to be filed under Rule 424
 - Any free writing prospectus prepared by or used by the issuer
 - Portions of any other free writing prospectus containing information provided by issuer
 - Any other communication that is an “offer” made by the issuer

Prospectus Delivery

- “Access equals delivery” model adopted subject to conditions (Rule 172)
- Requirement under Section 5 to have a prospectus precede or accompany delivery of a security satisfied by filing the prospectus if
 - Registration statement effective and not subject to any pending SEC proceeding and
 - Neither the issuer, nor any underwriter or participating dealer is subject to an SEC proceeding in connection with the offering

Prospectus Delivery

- Not available to investment companies, business development companies or in connection with business combinations or offerings on Form S-8

Prospectus Delivery

- Must deliver notice in lieu of prospectus, if prospectus not delivered (Rule 173)
- Not later than two business days after completion of sale, underwriter or dealer shall provide a copy of final prospectus or a notice that sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required but for Rule 172

Prospectus Delivery

- Notice alerts purchaser of rights under Section 11 and 12 as would delivery of prospectus
- If no underwriter or dealer involved, issuer responsible to send prospectus or notice
- Purchaser may still request copy of prospectus

Communications Rules

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Communications Requirements Prior to Securities Reform

- Pre-filing - All offers, in whatever form, are prohibited
- Between filing and effectiveness - offers made in writing (including by e-mail or Internet), by radio, or by television are limited to a "statutory prospectus"
- After effectiveness - Written offers may be made through a statutory prospectus and through additional written offering materials if a final "statutory" prospectus is sent or given prior to or with those materials
- Violations of these restrictions generally are referred to as "gun jumping"

Written Communication - Rule 405

- Important because Securities Act treats written and oral communications differently
- Generally, all methods of communication, other than oral communications, are written communications for purposes of the Securities Act.
- All electronic communications (other than telephone and other live, in real-time communications to a live audience) are graphic and, therefore, written communications for purposes of the Securities Act

Written Communication - Rule 405

- “Graphic communication” does not include a communication that, at the time of the communication, originates live, in real-time, to a live audience and does not originate in recorded form or otherwise as a graphic communication, even if its is transmitted through a means of graphic communication.
- Communications that are graphic communications when they are transmitted are treated as graphic communications and communications that are live, in real-time communications to a live audience when they are transmitted are not treated as graphic communications

Overview of Communications Rules

- WKSIs are permitted to engage at any time in oral and written communications, including use at any time of a free writing prospectus, subject to enumerated conditions (including, in specified cases, filing with the SEC) (Rules 163, 164 and 433)
- All reporting issuers, certain asset-backed issuers and non-reporting foreign private issuers are permitted, at any time, to continue to publish regularly released factual business information and forward-looking information (Rule 168)
- Non-reporting issuers are permitted, at any time, to continue to publish regularly released factual business information that is intended for use by persons other than in their capacity as investors or potential investors (Rule 169)

Overview of Communications Rules

- Communications by issuers more than 30 days before filing a registration statement are not prohibited offers so long as they do not reference a securities offering that is or will be the subject of a registration statement (Rule 163A)
- All issuers and offering participants are permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions (including, in specified cases, filing with the SEC). (Rules 164 and 433)

Overview of Communications Rules

- A broader category of routine communications regarding issuers, offerings, and procedural matters, such as communications about the schedule for an offering or about account-opening procedures, are excluded from the definition of "prospectus." (Rule 134)
- The exemptions for research reports are expanded (Rules 137, 138 and 139)

Regularly Released Factual Business and Forward-Looking Information – Rule 168

- To whom is it available
 - Reporting issuers, asset-backed issuers and certain non-reporting foreign private issuers. Not available to voluntary filers are not required to report under the Exchange Act. Not available to investment companies
- Exemption
 - The regular release or dissemination by or on behalf of an issuer of communications containing factual business information or forward-looking information will not be deemed to constitute an offer

Regularly Released Factual Business and Forward-Looking Information – Rule 168

- Regularly released
 - Information will be considered regularly released or disseminated if the issuer has previously released or disseminated the same type of information in the ordinary course of its business, and the release or dissemination is consistent in material respects in timing, manner, and form with the issuer's similar past release or dissemination of such information.
- By or on behalf of' the issuer
 - The issuer or a representative, other than an underwriter, authorizes the release of the communication before it is made.

Regularly Released Factual Business and Forward-Looking Information – Rule 168

- Factual business information
 - Factual information about the issuer, its business or finances
 - Ads or other information about products or services;
 - Dividend notices
- Forward-looking information
 - Projections of revenue, income, cap ex, dividends and other financial items
 - Statements about management's strategy, including plans relating products
 - Statements about future economic performance, and assumptions underlying or relating to any of the foregoing information.

Regularly Released Factual Business and Forward-Looking Information – Rule 168

- Exclusion for Offering-Related Information
 - Publication of information about a registered offering outside the registration statement or a prospectus is limited to statements allowed under other exemptions or exclusions, including Rule 134 and Rule 135.
 - Communication of factual business information could have been exempt under the safe harbor at the time of its release but might not be exempt if distributed to investors or potential investors as part of offering activities

Regularly Released Factual Business Information- – Rule 169

- To whom is it available
 - Any issuer
- Exemption
 - Substantially the same as Rule 168
- Regularly released
 - Same as Rule 168
- By or on behalf of the issuer
 - Same as Rule 168

Regularly Released Factual Business Information – Rule 169

- Factual business information
 - Same as Rule 168 except that it does not include dividend notices.
- Forward-looking information
 - Not covered
- Exclusion for Offering-Related Information
 - Similar to Rule 168
- Conditions
 - The information is released or disseminated for intended use by persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who historically have provided such information

30-Day Bright-Line Exclusion – Rule 163A

- To whom is it available
 - Any issuer
- Exemption
 - Any communication made by or on behalf of an issuer more than 30 days before the date of the filing of a registration statement that does not reference a securities offering that is or will be the subject of a registration statement will not constitute an offer, provided that the issuer takes reasonable steps to prevent further distribution of the communication during the 30 days immediately preceding the date of filing the registration statement.

30-Day Bright-Line Exclusion – Rule 163A

- By or on behalf of the issuer
 - Same as Rule 168
- Made more than 30 days before the filing
 - Communications made during the 30 days before the filing are outside the safe harbor
- Does not reference a securities offering
 - There are no other limitations on what may be contained in the communication
- Reasonable steps to prevent further distribution
 - Issuer need not remove information from its website if dated, properly noted as historical and not referred to as part of the offering process

Permitted Pre-Filing Offers for WKSIs – Rule 163

- To whom is it available
 - WKSIs only
- Exemption
 - An offer by or on behalf of a WKSI in connection with an offering that will be or is at the time intended to be registered under the Securities Act is exempt from the prohibitions on pre-filing offers
 - Any written communication will be a “free writing prospectus”
- By or on behalf of the issuer
 - The issuer or a representative, other than an underwriter, authorizes the release of the communication before it is made.

Permitted Pre-Filing Offers for WKSIs – Rule 163

- Conditions
 - Legend - Written communications must contain a legend to the effect that (i) the issuer may file a registration statement for the offering to which the communication relates, (ii) investors should read the registration statement and other SEC filed documents and (iii) how the documents can be obtained
 - Filing condition - Written communications must be filed with SEC promptly upon the filing of the registration statement unless the written communication has been previously filed

Limited public notices after filing - Rule 134

- Rule 134 provides a safe harbor from the gun-jumping provisions for limited public notices about an offering made after filing
- Currently, under Rule 134, the press release is limited to specified information
- Rule 134 has been revised to allow the press release to contain additional information
- Conditions.
 - Information related to the pricing and rating of the security can be provided only if a price range is included where required.
 - Certain other information may be included only if it also is disclosed at that time in the filed registration statement. (e.g., use of proceeds, names of selling securityholders)

Permissible Use of Free Writing Prospectuses - Generally

- Written offers (“free writing prospectuses”) may be made, including by electronic communications, outside the statutory prospectus if certain conditions are met.
- The conditions to the use of a free writing prospectus will depend on the nature of the issuer and the offering.
- A free writing prospectus can take any form and is not required to meet the informational requirements otherwise applicable to prospectuses.

Permissible Use of Free Writing Prospectuses - Generally

- Definition of Free Writing Prospectus
 - A “free writing prospectus” is a 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 and is not:
 - a prospectus satisfying the requirements of Section 10(a)
 - a prospectus satisfying SEC rules permitting the use of preliminary or summary prospectuses or prospectuses subject to completion
 - a communication made in reliance on the special rules for asset-backed issuers
 - a prospectus because a final statutory prospectus was sent or given with or prior to the written communication

Free Writing Prospectus After Filing – Rules 164 and 433

- Eligible Issuers
 - All issuers, other than
 - Reporting issuers that have not filed all required reports during the preceding 12 months
 - Limited partnerships that are offering securities other than in a firm commitment underwriting
 - Issuers that within the past three years were the subject of bankruptcy or similar proceedings
 - Issuers that within the past three years were convicted of certain crimes
 - Issuers that within the past three years were the subject of orders with respect to violations of the anti-fraud provisions of the federal securities laws
 - Investment companies, business development companies, blank check companies and shell companies
 - Certain ineligible issuers may still rely on this exemption with respect to a free writing prospectus that contains only descriptions of the terms of the securities in the offering or the offering

Free Writing Prospectus After Filing – Rules 164 and 433

- Conditions
 - Prospectus delivery or availability
 - *Eligible Non-Reporting Issuers (including IPOs) and Eligible Unseasoned Issuers* - Generally, the free writing prospectus must be preceded or accompanied by the most recent statutory prospectus
 - *Seasoned Issuers and WKSIs* - A legend must reference the filing of the registration statement and the URL where the registration statement can be accessed or hyperlink to the preliminary or base prospectus and a toll-free telephone number through which the statutory prospectus may be requested
 - Information in a free writing prospectus
 - Information in a free writing prospectus may go beyond information the substance of which is contained in the prospectus
 - It may not conflict with the information in the registration statement, including incorporated Exchange Act reports

Free Writing Prospectus After Filing – Rules 164 and 433

■ Legend

- The free writing prospectuses must contain a legend
 - Indicating where a prospectus is available
 - Recommending that potential investors read the prospectus (including incorporated documents)
 - advising investors that they can obtain the registration statement for free through the SEC's web site and that they may request the prospectus from the issuer, any underwriter or any dealer by calling a toll-free number
 - indicating that the free writing prospectus relates to a registered public offering.
- The free writing prospectus may not contain legends or disclaimers of responsibility or liability that are impermissible in a statutory prospectus or registration statement

Free Writing Prospectus After Filing – Rules 164 and 433

- Filing of the free writing prospectus
 - Generally, a free writing prospectus must be filed with the SEC unless exempt from filing
 - Where a free writing prospectus is prepared by or on behalf of, or used or referred to by, the issuer, the issuer must file the free-writing prospectus;
 - Where a free writing prospectus prepared by or on behalf of, or used by an offering participant other than the issuer, contains material information about the issuer or its securities that has been provided by or on behalf of an issuer that is not already included or incorporated in the prospectus or a filed free writing prospectus, the issuer must file the information

Free Writing Prospectus After Filing – Rules 164 and 433

- Where a free writing prospectus used or referred to by an offering participant other than the issuer is distributed by or on behalf of such offering participant in a manner reasonably designed to lead to its broad unrestricted dissemination, the offering participant must file the free writing prospectus.
- Where a free writing prospectus or portion thereof prepared by or on behalf of the issuer or other offering participant comprises a description of the final terms of the issuer's securities in the offering or of the offering, the issuer must file the free writing prospectus or portion thereof after the terms have been established for all classes of the offering

Free Writing Prospectus After Filing – Rules 164 and 433

- Record Retention Condition
 - Issuers and offering participants must retain for three years any free writing prospectuses they have used from the date of the initial bona fide offering of the securities in question

Road Shows – Rule 433

- A live, in real-time road show to a live audience that is transmitted graphically (except by television or radio) will not be a graphic communication, and therefore not a written communication, or a free writing prospectus.
- Information that is presented as part of the live, in real-time road show to a live audience (even if transmitted graphically) will not be a free writing prospectus.
- Road shows that do not originate live, in real-time to a live audience and are graphically transmitted are electronic road shows that will be considered written communications and, therefore, free writing prospectuses.

Road Shows – Rule 433

- Whether or not road shows are written communications, all road shows that are offers are subject to Securities Act Section 12(a)(2) liability
- All road shows that are offers that are written communications are free writing prospectuses, whether or not required to be filed
- Filing
 - For road shows that are free writing prospectuses, the filing conditions of Rule 433 generally do not apply
 - In the case of a non-reporting issuer that is registering an offering of common equity or convertible equity securities, the filing conditions apply unless the issuer makes at least one version of a bona fide electronic road show readily available without restriction electronically to any potential investor

Treatment of Communications on Web Sites and Other Electronics Issues – Rule 433(e)

- An offer of an issuer's securities that is contained on an issuer's web site or that is contained on a third party web site hyperlinked from the issuer's web site is considered a written offer of such securities made by the issuer and, unless otherwise exempt, will be a free writing prospectus of the issuer.
- Historical information that is not an offer, either because it does not offer a security or because it falls within a safe harbor, will not become an offer if accessed at a later time, unless it is updated or used or referred to (by hyperlink or otherwise) in connection with the offering.

Treatment of Communications on Web Sites and Other Electronics Issues – Rule 433(e)

- Historical information will not be considered a current offer of the issuer's securities if the historical information is:
 - Separately identified as such; and
 - Located in a separate section of the issuer's web site containing historical information.
- The use of the historical information will become a current offer if it is:
 - Incorporated by reference into or otherwise included in a prospectus of the issuer; or
 - Otherwise used or referred to in connection with the offering.

Media Publications or Broadcasts - Rule 433(f)

- Media publications may constitute an offer and therefore a free writing prospectus of the issuer or other offering participant depending on whether the issuer or other offering participant prepares the publication or television or radio broadcast or pays for or provides other consideration for the publication or broadcast

Media Publications or Broadcasts - Rule 433(f)

- Where Media Publications Are Prepared or Consideration Paid by Issuer or Offering Participant
 - If an issuer or offering participant prepares, pays for, or gives consideration for the article, broadcast, or advertisement, the rules applicable to free writing prospectus will apply.
- Unaffiliated Media Publications
 - Where the information is prepared and published or broadcast by persons in the media business that are unaffiliated with the issuer and other offering participants, and no consideration is paid, an issuer or offering participant would not have to have a statutory prospectus precede or accompany the media communication, although a filed registration statement including a statutory prospectus would be necessary, except in the case of a WKSJ

Media Publications or Broadcasts - Rule 433(f)

- An underwriter or issuer will be permitted to invite the press to a live road show or an electronic road show
- In most cases, an article including information obtained at that road show will be considered to be a free writing prospectus of the issuer or underwriter and subject to the rules regarding free writing prospectuses.

Media Publications or Broadcasts - Rule 433(f)

- If a chief executive officer of a non-reporting issuer gives an interview to a financial news magazine without payment to the magazine for the article, the publication of the article after the filing of the registration statement will be a free writing prospectus of the issuer that will be subject to the filing conditions by the issuer after publication
- There will be no requirement that a statutory prospectus precede or accompany the article at the time of the publication.

Media Publications or Broadcasts - Rule 433(f)

- Filing
 - Where no affiliation, free writing prospectus must be filed by the issuer or offering participant within four business days after the issuer or offering participant becomes aware of its publication or first broadcast.
 - Persons in the media have no filing or other responsibilities.

Media Publications or Broadcasts - Rule 433(f)

- The required legend need not appear in the media publication but must be contained in the version filed with the SEC.
- Issuers or offering participants must file either:
 - The media publication;
 - All of the information provided to the media in lieu of the publication; or
 - A transcript of the interview or similar materials that the issuer or other offering participant provided to the media, provided that all the information provided is filed.

Media Publications or Broadcasts - Rule 433(f)

- The issuer or other offering participant does not have to file the media publication if the substance of the written communication has been previously filed with the SEC
- The issuer or offering participant may file, together with or after the media publication is filed, information that the issuer reasonably believes is necessary or appropriate to correct information included in the media publication

Liability Issues Affecting Free Writing Prospectuses

- A free writing prospectus will not be part of a registration statement subject to liability under Section 11, unless the issuer elects to file it as a part of the registration statement.
- Regardless of whether a free writing prospectus is filed, any seller offering or selling securities by means of the free writing prospectus will be subject to disclosure liability under Section 12(a)(2).
- A free writing prospectus also can be the basis for liability under the anti-fraud provisions of the federal securities laws.

Liability Issues Affecting Free Writing Prospectuses

- Under Rule 159A, an offering participant other than the issuer will not be considered to offer or sell securities to a person "by means of" a free writing prospectus unless:
 - The offering participant used or referred to the free writing prospectus in offering or selling the securities to that person;
 - The offering participant offered or sold the securities to that person and participated in planning for the use of that free writing prospectus by other offering participants and such free writing prospectus was used or referred to in offering or selling securities to that person by one or more of such other offering participants;
 - Under the conditions for use of the free writing prospectus in Rule 433, the offering participant is required to file the free writing prospectus with the SEC pursuant to Rule 433

Liability Issues Affecting Free Writing Prospectuses

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

Interaction of New Communications Rules With Regulation FD

- Historically, Regulation FD did not apply to disclosures made in connection with registered securities offerings (other than certain specified offerings)
- As amended, Regulation FD will not apply to disclosures made in the following communications in connection with a registered securities offering that is of the type excluded from the Regulation:
 - A registration statement filed under the Securities Act, including a prospectus contained therein;
 - A free writing prospectus used after filing of the registration statement for the offering or a communication accompanied by a prospectus after effectiveness;
 - Any other Section 10(b) prospectus;
 - A notice permitted by Rule 135;
 - A communication permitted by Rule 134; or
 - An oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the Securities Act.

Interaction of New Communications Rules With Regulation FD

- Communications excluded from the operation of Regulation FD are only those communications that are directly related to a registered securities offering
- Communications not contained in the enumerated list of exceptions from Regulation FD (e.g., the publication of regularly released factual business information or regularly released forward-looking information or pre-filing communications) are subject to Regulation FD

Use of Research Reports

- Current Regulatory Treatment of Research Reports
 - Rules 137, 138, and 139 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 prohibitions on pre-filing offers and impermissible prospectuses. Research reports published or distributed in reliance on Rules 138 and 139 are not “offers”. Brokers or dealers publishing or distributing research in reliance on Rule 137 are not considered “underwriters”

Use of Research Reports

- Definition of Research Report
 - “Research report” is defined as a written communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision

Use of Research Reports – Rule 137

- A broker or dealer that is not an offering participant in a registered offering but publishes or distributes research reports with respect to an issuer's securities will not be considered to be engaged in a distribution of the issuer's securities and would therefore not be an underwriter in the offering
- Rule 137 has been expanded to apply to securities of any issuer, including non-reporting issuers, with exceptions for blank check companies, shell companies, and penny stock issuers
- Rule 137 is available only to brokers and dealers who:
 - Are not participating in the registered offering of the issuer's securities
 - Have not received compensation from the issuer or participants in the securities distribution in connection with the research report and
 - Publish or distribute the research report in the regular course of business

Use of Research Reports – Rule 138

- Rule 138 permits a broker or dealer participating in a distribution of an issuer's common stock and similar securities to publish or distribute research that is confined to that issuer's fixed income securities, and vice versa, if it publishes or distributes that research in the regular course of its business.
- Rule 138 has been expanded to cover all reporting issuers that are current in their periodic reporting (other than Forms 8-K)
- Rule 138 has also been expanded to apply to a broader category of foreign private issuers
- Rule 138 has also been revised to require that the broker or dealer must have previously published or distributed research reports on the types of securities that are the subject of the reports in the regular course of its business, though not necessarily on the specific issuer or security of the issuer

Use of Research Reports – Rule 139

- Rule 139 permits a broker or dealer participating in a distribution of securities by a seasoned issuer or by certain non-reporting foreign private issuers to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed with reasonable regularity in the normal course of its business.
- Rule 139 also provides a safe harbor for industry reports covering smaller seasoned issuers, if the broker or dealer complies with restrictions on the nature of the publication and the opinion or recommendation expressed in that publication.
- Rule 139 now allows reports about a specific issuer that, at the time of reliance on the Rule, is current in its periodic reporting and either is eligible to register a primary offering of securities on Forms S-3 or F-3, based on the \$75 million minimum public float eligibility provision of those forms or the registration statement relates to an offering of non-convertible investment grade debt securities.
- The category of non-reporting foreign private issuers is also being expanded.

Use of Research Reports – Rule 139

- There is still a requirement that the broker or dealer publish or distribute the research report in the regular course of its business but it no longer has to do so with reasonable regularity. However, the broker or dealer must, at the time of reliance on the Rule, have distributed or published at least one research report about the issuer or its securities, or have distributed or published at least one such report following discontinuing coverage.
- There is no minimum time period for the broker or dealer to have distributed or published research reports, only that the particular broker or dealer have initiated or re-initiated coverage.
- Rule 139 does not require that the previously published or distributed research report cover the same securities that are the subject of the registered offering.

Use of Research Reports – Rule 139

- Industry reports under Rule 139 can now cover all reporting issuers
- Rule 139 no longer prohibits a broker or dealer making a more favorable recommendation than the one it made in the last publication
- Rule 139 no longer requires that the research report include any prior recommendations regarding the issuer or its securities
- Rule 139 requires that the research reports contain similar types of information about the issuer or its securities as contained in prior reports. If projection are included, they must be included for substantially all the issuers listed in the comprehensive list of securities contained in the report.

Use of Research Reports

- Research Report Amendments in Connection With Regulation S and Rule 144A Offerings
 - Rules 138 and 139 have been amended to clarify that research reports meeting the conditions of those rules will not be considered offers or general solicitation or general advertising in connection with offerings relying on Rule 144A or directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S

Liability

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Liability – Section 12(a)(2)

- Sellers are subject to liability to purchasers for offers or sales by means of a prospectus or oral communication that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, based on the circumstances under which they were made, misleading, so long as the purchasers were not aware of the material misstatement or omission

Liability – Section 17(a)(2)

- Makes it unlawful for any person in the offer or sale of securities to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading

Liability – Rule 159

- New Rule 159 provides that for purposes of Section 12(a)(2) and Section 17(a)(2) of the Securities Act, only information conveyed to the purchaser at or prior to the time of sale will be taken into account
- Rule 159 also provides that for purposes of 12(a)(2) only, a purchaser's knowing of such untruth or omission in respect of a sale means knowing at the time of such sale

Liability – “Time of Sale”

- “Sale” is defined in Section 2(3) of the Securities Act to include a “contract of sale”
- Under Rule 159, seller/issuer liability attaches when the purchaser becomes committed to purchase a security – i.e., enters into a contract of sale
 - SEC pointed out that a contract of sale under the federal securities laws can occur before there is an unconditional bilateral contract under state law, such as when a purchaser has taken all actions necessary to be bound, but a seller’s obligations remains conditional under state law
 - Contracts cannot contain provisions that operate to have a purchaser waive rights under the federal securities laws, such as providing that a binding contract does not exist until the purchaser receives a final prospectus

Liability – 12(a)(2)/17(a)(2) Information

- Rule 159 and Sections 12(a)(2) and 17(a)(2) do not require that all information called for by the line item disclosure in a prospectus be conveyed to the purchaser prior to the time of sale
- Determination of liability is based on whether the communication contains a material misstatement or fails to include material information that is necessary to make the communication not misleading in light of the circumstances under which the communication is made

Liability – Contract Termination/Reformation

- In contrast to existing practice, if material information arises after the date of sale, or a misstatement of a material fact or the omission to state a material fact is discovered after the date of sale, the misstatement or omission will no longer be cured by corrections in the final prospectus – rather the contract of sale can be terminated, the material information conveyed to the investor and a new contract entered into

Liability – Contract Termination/Reformation

- To terminate a contract, the investor must be provided with:
 - Adequate disclosure of the contractual arrangement;
 - Adequate disclosure of its rights under the existing contract at the time termination is sought;
 - Adequate disclosure of the new information that the seller seeks to convey; and
 - A meaningful ability to elect to terminate or not terminate the prior contract and to elect to enter into or not enter into a new contract

Liability – Contract Termination/Reformation

- Whether an investor is given adequate disclosure and a meaningful ability to terminate/enter into a new contract of sale is a facts and circumstances question that would include an evaluation of:
 - The manner and prominence of the disclosure of the contractual arrangements and the investor's rights under the old contract;
 - The process by which the new or changed material information will be conveyed to the investor; and
 - The method by which the investor is required to make or communicate its decision.

Liability – Rule 159A

- Among other things, Rule 159A provides that in a primary offering of securities an issuer is a “seller” for purposes of Section 12(a)(2) of the Securities Act regardless of the form of underwriting arrangement in the initial distribution of securities as to:
 - Any prospectus of the issuer relating to the offering required to be filed under Rule 424 or 497
 - Any free-writing prospectus relating to the offering prepared by or on behalf of our used or referred to by the issuer;
 - The portion of any other free-writing prospectus relating to an offering containing material information about the issuer or its securities provided by or on behalf of the issuer; and
 - Any other communication that is an offer in the offering made by the issuer to such purchaser.

Liability – Free-Writing Prospectuses

- Free-writing prospectuses are subject to liability under Sections 12(a)(2) and 17(a)(2) of the Securities Act and Section 10(b) and Rule 10b-5 under the Exchange Act
- Free-writing prospectuses are not subject to liability under Section 11 of the Securities Act, unless the issuer otherwise makes it part of the registration statement

Liability – Section 11

- Section 11 of the Securities Act imposes liability for material misstatements in or omissions from a registration statement at the date of its effectiveness (in the case of issuers, directors and officers signing the registration statement) and with respect to an underwriter, the date that such person becomes an underwriter
- The timing differences set out in Section 11 creates the possibility that underwriters would have liability under Section 11 for information for which the issuer does not have liability
- Under the existing regulatory regime, prospectus supplements are not considered part of a registration statement

Liability – Rules 430B and 430C

- Rule 430B and Rule 430C deem information contained in prospectus supplements to be part of and included in the registration statement:
 - For a prospectus supplement required to be filed other than in connection with a takedown of securities, as of the date the prospectus supplement is first used
 - Under Rule 430B only, for a prospectus supplement required to be filed in connection with a takedown of securities, as of the earlier of the date it is first used or the date and time of the first contract of sale of securities in the offering to which the prospectus supplement relates
 - This does not affect the determination of when information is conveyed to a purchaser for Section 12(a)(2) purposes

Liability – New Effective Date for Section 11 Purposes

- With respect to the issuer and a person that is at the time an underwriter, Rule 430B establishes as a new effective date for the registration statement the date a prospectus supplement filed in connection with a takedown is deemed part of the registration statement
- The filing of a prospectus supplement in connection with a takedown will not set a new effective date for the registration statement with respect to directors, officers signing the registration statement or experts (including auditors) (unless the prospectus supplement is also filed for purposes of updated the registration statement pursuant to Section 10(a)(3) of the Securities Act)

Liability – Rule 159A

- Rule 159A also provides that an offering participant (other than the issuer) will not be considered to offer or sell securities by means of a free-writing prospectus unless:
 - The offering participant used or referred to the free-writing prospectus in offering or selling the securities;
 - The offering participant offered or sold the securities and participated in planning for the use of the free-writing prospectus by other offering participants and such free-writing prospectus was used or referred to in offering or selling securities by one or more of the other offering participants; or
 - The offering participant is required to file the free-writing prospectus with the SEC.

New Rules for ABS Issuers

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Application of New Rules to ABS Issuers

- In January 2005, Regulation AB and other rules for asset-backed securities adopted
- Offering process rules also affect ABS and to some extent alter the ABS rules
- Main areas to consider:
 - Categorization of ABS issuers
 - Free-writing materials and term sheets
 - Liability timing issues and their effect on ABS practice

Categories of ABS Issuers

- ABS issuers are not well-known seasoned issuers and thus will not benefit from automatic shelf registration and many of the other liberalized communication and registration procedures
- In view of the staff, “[t]he advantages of a reporting history under the Exchange Act that influenced our decision to create the well-known seasoned issuer category are essentially absent” for ABS issuers
- SEC may reconsider the categorization of ABS issuers: the Division of Corporation Finance will undertake a study in three years to evaluate the operation of the well-known seasoned issuer definition

Categories of ABS Issuers

- Because ABS issuers are not “well-known seasoned issuers,” they will not benefit from the following new liberalized procedures:
 - Automatic shelf registration of unspecified amounts of different types of securities;
 - Pay-as-you go registration for shelf offerings; and
 - Broader exemption under Rule 163 to engage in unrestricted oral and written offers, including free-writing prospectuses, before a registration statement is filed without risk of gun-jumping

Categories of ABS Issuers

- ABS issuers offering securities on Form S-3 will be “seasoned issuers”
- ABS issuers offering securities on Form S-1 will generally be “non-reporting issuers”
- Form S-1 filers may also qualify as “unseasoned issuers” if the issuer is required to file Exchange Act reports but does not satisfy the requirements for Form S-3
- ABS issuers that fail to file all Exchange Act reports and other materials required to be filed during the preceding 12 months (other than specified reports on Form 8-K) will become “ineligible issuers”
 - Lose most of flexibility to communicate without risk of gun-jumping
 - As in Regulation AB, Exchange Act compliance extends to the ABS issuer as well as the depositor or any issuing entity established by the depositor with respect to a class of asset-backed securities involving the same asset class

Categories of ABS Issuers

- More flexible communications permitted for ABS issuers that are seasoned issuers, unseasoned issuers or non-reporting issuers:
 - Broader safe harbor under Rule 168 for regularly released factual business and forward looking information by an ABS issuer or a depositor, sponsor, servicer or affiliated depositor, whether or not the issuer;
 - 30-day bright-line time period under Rule 163A during which issuers may communicate without risk of gun-jumping; and
 - Ability under Rule 433 for seasoned, unseasoned and non-reporting issuers to use free-writing prospectuses if a registration statement has been filed and the other conditions are met

Free-Writing Materials and Term Sheets

- ABS Term Sheets
 - ABS issuers historically benefitted from a series of no-action letters whereby written offering materials outside of the prospectus — term sheets — were permitted in connection with S-3 offerings
 - This concept was codified in the new ABS rules as “ABS informational and computational materials,” which must be filed on Form 8-K and incorporated by reference into the registration statement

Free-Writing Materials and Term Sheets

- Under the new offering process rules, ABS issuers and other parties to ABS transactions may rely on either set of rules in using written offering materials:
 - 1) if the offering is on Form S-3, the Regulation AB rules for “ABS informational and computational materials” as permitted by Rules 167 and 426; or
 - 2) for an offering on Form S-1 or Form S-3, a free-writing prospectus under Rules 164 and 433

Understanding the New Securities Offering Reform Rules

Free-Writing Materials and Term Sheets

<i>ABS Informational and Computational Material</i>	<i>Free-writing Prospectus</i>
Only available under effective shelf registration	Registration statement does not have to be effective and does not have to be a shelf (but red must accompany or proceed if not S-3)
Information limited to items specified in Rule 1101(a) of Regulation AB	May include any information not inconsistent with the registration statement
Filed materials become part of the registration statement, which triggers Section 11 liability	Free-writing materials are prospectuses, with Section 12(a)(2) liability, but not Section 11
All materials have to be filed (except for abandoned structures), though they can generally be aggregated and filed all at once	Must be filed if used by the issuer (including depositor, sponsor, servicer or affiliated depositors), but underwriters do not have to file, unless the FWP contains "issuer information" or is very broadly disseminated
Requires legend that directs investors to all relevant documents on file with SEC	Requires legend as to availability of prospectus and registration statement and advisability of reviewing prospectus
File by the later of the due date for filing the final prospectus or two days after first use	File on or prior to date of first use

Liability Timing Issues

- Like other issuers, under Rule 159 ABS issuers will be liable under Section 12(a)(2) for information conveyed to investors by or on behalf of the issuer at or prior to the time of contract of sale without update by the final prospectus
- The liability timing proposals may lead to more elaborate ABS term sheets or more frequent use of preliminary prospectuses because ABS issuers will not be able to rely on their Exchange Act reports for new ABS offerings

Liability Timing Issues

- Commenters in the ABS industry expressed concern that Rule 159 would not fit well with the iterative nature of ABS transactions where contracts of sale are entered into based on various portfolio profiles
- Adopting release reiterates that a seller can convey additional information to a purchaser after the time of a contract of sale if the old contract is terminated and the parties enter into a new contract of sale based on the new information
- ABS industry will need to develop procedures to ensure that investors are given adequate disclosure of the new information and a meaningful ability to elect to terminate the prior sale contract and to elect to enter into a new contract
- The adopting release makes it clear that deemed agreements and contractual provisions to alter the time of sale will not be effective

Other Items/Closing

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Other Items

- Treatment of Information on a Website
 - Information on an issuer's website or hyperlinked from an issuer's website may be a written offer by the issuer
 - Historical information properly identified as such and located in a separate section of the website will not be considered a current offer
 - Date all information

Other Items

- Base Prospectus Requirements
 - Seasoned issuers and well-known seasoned issuers may omit from a base prospectus in delayed offering information about the issuer or the securities being offered
 - Omitted information can be included in an Exchange Act report or a prospectus supplement
 - If included in an Exchange Act report, a prospectus supplement will need to be filed to identify the Exchange Act report that contains the required information
 - Material changes to a plan of distribution can now be made in a prospectus supplement

Other Items

- Identification of Selling Securityholders
 - Seasoned issuers can identify selling security holders and all information about them after effectiveness of the registration statement if
 - Registration statement is an automatically effective shelf registration statement; or
 - The resale registration statement identifies the specific private transaction in which the securities were sold, the initial private offering is completed and the securities were issued and outstanding prior to the filing of the resale registration statement

Other Items

- Disclosures in Exchange Act reports
 - If an issuer is a well-known seasoned issuer
 - Risk factors in an annual report
 - Material changes in risk factors in a quarterly report
 - Issuer's status as a voluntary filer
 - Substance of material written staff comments that were issued more than 180 days before the end of the fiscal year to which the annual report relates, if they are unresolved at the time of filing, by accelerated filers and well-known seasoned issuers

Other Items

- Rule 415 changes
 - Eliminate the current requirement on registration of an amount that the issuer expects to sell in two years
 - Require that shelf registration statements only be used for three years
 - Eliminate “convenience shelf position to allow takedowns immediately after effectiveness
 - Eliminate the current “at-the-market offering” restrictions

Other Items

- Rule 424 changes
 - Added a new subparagraph to identify the filing of prospectuses that are not timely filed
 - Added a new subparagraph for the filing of prospectuses identifying selling securityholders
- Rule 434 on Term Sheets Eliminated

Other Items

- New undertakings
 - Updating requirements can be met by including the information in a prospectus supplement that is filed and deemed part of the registration statement
 - Issuer must agree that information in filed prospectus supplements is deemed to be part of and included in the related registration statement and that, for liability purposes, new effective dates for those registration statements are deemed to occur upon the earlier of the date they are first used or the date of the first sale of the securities to which they relate
- Form S-2/F-2 eliminated