

## Client Alert

# Recent SEC Interpretations and Rulemaking

### Additional FAQs on Securities Offering Reform

On November 30, 2005, the SEC's Division of Corporation Finance issued its Securities Offering Reform Questions and Answers (the "FAQs")<sup>1</sup> with respect to questions received regarding the new securities offering reforms that became effective on December 1, 2005.<sup>2</sup>

Some highlights of the topics addressed by the SEC staff in the FAQs:

- **Well-Known Seasoned Issuer Status.** The SEC staff clarified that the initial determination of eligibility for well-known seasoned issuer ("WKSI") status is made at the time the issuer files an automatic shelf registration statement, whether or not it has an existing effective shelf registration statement. Thereafter, the issuer must re-evaluate its status as a WKSI annually when it files its annual report on Form 10-K, because under Item 512(b) of Regulation S-K, each annual report that is incorporated by reference into a registration statement is deemed a new registration relating to the securities offered therein. If an issuer with an automatic shelf registration statement determines that it is no longer a WKSI at the time it files its annual report, the issuer must amend its registration statement on the form that it is then eligible to use. The staff also stated that if an issuer loses its WKSI status after filing an automatic shelf registration statement but before its Form 10-K is due, the issuer may continue to use the automatic shelf registration until its Form 10-K is filed.
- **Legality Opinions and Automatic Shelf Registration.** A form of the Exhibit 5 legality opinion must be filed at the time a class of securities is first included in an automatic shelf registration statement, whether included initially or by post-effective amendment. The signed legality opinion covering the specific securities sold in an offering must be filed as part of the post-effective amendment to the registration statement or incorporated by reference into the registration statement no later than the time of the offering of the securities.
- **Non-GAAP Financial Measures and Free Writing Prospectuses.** The SEC staff clarified that Regulation G relating to the use of non-GAAP financial measures applies to all non-GAAP materials publicly disclosed by an issuer that is required to file reports pursuant to Section 13(a) or 15(d) of the Exchange Act, including free writing prospectuses. However, the staff noted that Item 10(e) of Regulation S-K relating to non-GAAP financial measures in SEC filings does not apply to free writing prospectuses unless the free writing prospectus is included within an Exchange Act filing, such as a Form 8-K, or is included in or incorporated by reference into a registration statement.

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<sup>1</sup> The FAQs are available on the SEC's website at [www.sec.gov/divisions/corpfin/faqs/securities\\_offering\\_reform\\_qa.pdf](http://www.sec.gov/divisions/corpfin/faqs/securities_offering_reform_qa.pdf).

<sup>2</sup> SEC Release Nos. 33-8591; 34-52056; IC-26993; File No. S7-38-04. A copy of the Release is available on the SEC's website at [www.sec.gov/rules/final/33-8591.pdf](http://www.sec.gov/rules/final/33-8591.pdf). For a summary of the new rules, see our *Client Alert*, "SEC Adopts Major Securities Offering Reforms", available on our website at [www.chadbourne.com/publications/](http://www.chadbourne.com/publications/).

- ***Issuer's Consent to Underwriter's Use of a Free Writing Prospectus.*** If an underwriter agrees not to use a free writing prospectus without the issuer's prior consent, the issuer's consent to the use of a free writing prospectus is not, in and of itself, authorization or approval of the free writing prospectus, unless the issuer's actions amount to adoption or entanglement with the free writing prospectus.
- ***Timely Filing of Free Writing Prospectuses.*** A free writing prospectus required to be filed on the "date of first use" will be considered timely if filed on the date of first use, even if the filing is not accepted by the EDGAR system on that date. For example, if an issuer uses a free writing prospectus at 10:00 p.m. on Monday, under Rule 433(d)(1) of the Securities Act, the free writing prospectus must be filed on that Monday. However, even though the issuer files the free writing prospectus on EDGAR after the close of EDGAR for the acceptance of filings for that day (5:30 p.m., Eastern Time), if the filing is made before the shut-down of the EDGAR system for that day (10:00 p.m., Eastern Time), it would be deemed a timely filing under Rule 433(d)(1). This means that any free writing prospectus that is first used *after* 10:00 p.m. will still need to be filed *before* 10:00 p.m. to be timely filed. Note that filings made on EDGAR between 5:30 p.m. and 10:00 p.m. are not publicly disseminated until the following business day.

The SEC staff also clarified that an issuer can separately consider the filing deadlines for a free writing prospectus that contains both a description of certain terms of the securities and other information.

With regard to the terms of the securities, the issuer must file the description of the terms of the securities only if the description represents the final terms of the securities. If the description represents the final terms, it must be filed within two days after the later of the date of first use and the date the final terms have been established for all classes of securities in the offering.

With regard to the other information, the issuer must file the free writing prospectus (other than the description of certain terms of the securities) no later than the date of first use.

- ***Media Publications and Broadcasts.*** The SEC staff clarified the circumstances under which an issuer would be required to file a free writing prospectus if the issuer's CEO participates in an interview with "unaffiliated and uncompensated media" after the registration statement is filed. If the substance of the interview was previously filed in the registration statement, then it falls under an exception to the filing requirement, and the free writing prospectus is not required to be filed, even if the interview constitutes an offer. However, if the substance of the interview is not contained in the registration statement and it would be considered an offer, then it must be filed by the issuer within four days after the initial broadcast.
- ***Unintentional Distribution of Free Writing Prospectuses by Non-Issuer Offering Participants.*** Under Rule 433 of the Securities Act any offering participant, and not only the issuer, that uses or refers to a free writing prospectus and distributes it in a broad, unrestricted manner, or in a manner that could reasonably lead to its broad dissemination, must file the free writing prospectus with the SEC; the SEC staff clarified that this rule is applicable whether the distribution is intentional or unintentional.

## New Accelerated Filer Category and Revised Periodic Report Filing Deadlines

On December 14, 2005, the SEC adopted final rules<sup>3</sup> creating a new category of “large accelerated filers” and amending Exchange Act periodic report filing deadlines so that:

- only large accelerated filers would be required to file annual reports on Form 10-K within 60 days after fiscal year end, beginning with the first fiscal year ending on or after December 15, 2006 (delaying the transition from the 75-day deadline to the 60-day deadline by one year for large accelerated filers and eliminating the 60-day deadline for accelerated filers entirely); and
- both large accelerated filers and accelerated filers would be required to file quarterly reports on Form 10-Q within 40 days after quarter end (eliminating the 35-day deadline for Forms 10-Q).

Large accelerated filers are “accelerated filers” that have a “public float”<sup>4</sup> of \$700 million or more as of the last business day of the issuer’s most recently completed second fiscal quarter. Under current rules, an accelerated filer is an issuer that meets the following conditions at its fiscal year end:

- has a public float of \$75 million or more as of the end of the most recent second fiscal quarter;
- has been subject to Exchange Act reporting requirements for at least 12 calendar months;
- has filed at least one annual report on Form 10-K; and
- is not eligible to use Forms 10-KSB and 10-QSB (for small business issuers).

With the addition of the large accelerated filer category, reporting companies would be divided into three categories:

- ***Non-accelerated filers*** - filers with a public float of less than \$75 million or otherwise not eligible to use Form S-3 or F-3 or voluntary filers;
- ***Accelerated filers*** - filers that meet the accelerated filer conditions with a public float of at least \$75 million but less than \$700 million; and
- ***Large accelerated filers*** - filers that meet the accelerated filer conditions with a public float of at least \$700 million.

The new rules have no effect on the filing deadlines for non-accelerated filers or for foreign private issuers.

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<sup>3</sup> See SEC Release Nos. 33-8644; 34-52989; File No. S7-08-05. A copy of the Release is available on the SEC’s website at [www.sec.gov/rules/final/33-8644.pdf](http://www.sec.gov/rules/final/33-8644.pdf).

<sup>4</sup> Public float is the aggregate worldwide market value of an issuer’s voting and non-voting common equity held by its non-affiliates.

The following table sets forth the revised periodic reporting deadlines under the new rules:

Category of Filer	Deadlines for Reports Beginning with Annual Report for Fiscal Years Ending On or After December 15, 2005 and Before December 15, 2006		Deadlines for Reports Beginning with Annual Report for First Fiscal Year Ending On or After December 15, 2006	
	10-K Deadline	10-Q Deadline	10-K Deadline	10-Q Deadline
Large Accelerated Filer (\$700MM or more)	75 days	40 days	60 days	40 days
Accelerated Filer (between \$75MM and \$700MM)	75 days	40 days	75 days	40 days
Non-accelerated Filer (less than \$75MM)	90 days	45 days	90 days	45 days

In addition, the new rules would make it easier for accelerated filers and large accelerated filers to exit accelerated filer or large accelerated filer status promptly. An accelerated filer could begin filing annual and quarterly reports on a non-accelerated filer basis beginning with the annual report for the fiscal year in which its public float drops below \$50 million, and a large accelerated filer could begin filing annual and quarterly reports on an accelerated filer basis beginning with the annual report for the fiscal year in which its public float drops below \$500 million. Note that even though the public float test is determined as of the last business day of the most recently completed second fiscal quarter, an issuer's status as a large accelerated filer, accelerated filer or non-accelerated filer is not determined until the end of the issuer's fiscal year and would not affect the filing deadlines for any quarterly reports filed before the end of that fiscal year.

The new rules became effective on December 27, 2005, and the revised filing deadlines are effective for large accelerated filers and accelerated filers beginning with fiscal years ending on or after December 15, 2005.

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**For Additional Information**

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