

Client Alert

SEC Proposes Major Securities Offering Reforms

The SEC has proposed significant modifications to the securities offering and registration processes under the Securities Act of 1933.¹ These proposals represent incremental changes to the existing rules governing the offering process, rather than the sweeping changes represented by the SEC's 1998 "Aircraft Carrier" proposals, which ultimately were not adopted. The new proposals take advantage of technological developments, such as the Internet, that have increased the accessibility of issuer disclosures to investors and the public generally, as well as the availability of expanded and more timely Exchange Act disclosures by issuers resulting from implementation of the Sarbanes-Oxley Act and SEC-initiated reforms. The proposed rules focus on:

- communications related to registered offerings, relaxing the prohibition on "gun-jumping" communications;
- registration and other procedures in the offering process, including providing for automatic shelf registration for offerings by "well-known seasoned issuers";
- delivery of information to investors, including delivery through access and notice; and
- additional disclosure under the Securities Exchange Act of 1934, including requiring risk factor disclosure in annual reports on Form 10-K.

Categories Of Issuers

Application of the proposed communications rules and registration processes would depend on the nature of the issuer. The SEC has proposed "well-known seasoned issuers" as a new category of issuers who would be eligible for the greatest flexibility under the proposed rules. Application of some of the proposed rules also would turn on whether the issuer is characterized as a "seasoned issuer", "unseasoned issuer", "non-reporting issuer" or "ineligible issuer".

A "**well-known seasoned issuer**" is a "seasoned issuer" that:

- either (a) has a minimum of \$700 million of public common equity float, or (b) is registering only debt securities and has issued \$1 billion of debt securities in registered offerings during the past three years; and
- is not an "ineligible issuer" or an asset-backed issuer.

In certain circumstances, a majority-owned subsidiary of a well-known seasoned issuer could itself qualify as a well-known seasoned issuer.

¹ Securities and Exchange Commission Release Nos. 33-8501; 34-50624; IC-26649; File No. S7-38-04. A copy of the Release is available on the SEC's website at www.sec.gov/rules/proposed/33-8501.pdf.

A “**seasoned issuer**” is an issuer eligible to use Form S-3 or Form F-3 to register a primary offering of securities.

An “**unseasoned issuer**” is an issuer that (1) is required to file periodic reports under the Exchange Act, but is not eligible to use Form S-3 or Form F-3 to register a primary offering of securities or (2) is voluntarily filing periodic reports under the Exchange Act.

A “**non-reporting issuer**” is an issuer that is not required to, and does not voluntarily, file periodic reports under the Exchange Act (*e.g.*, a company before its IPO registration statement becomes effective).

An “**ineligible issuer**” is an issuer that:

- is a reporting issuer that is not current in its Exchange Act reports;
- is (or was, or whose predecessor was, in the past three years) a blank check issuer, a shell company or a penny stock issuer;
- is a limited partnership offering and selling its securities by means other than a firm commitment underwriting;
- has received a “going concern” opinion from its auditor for the most recent fiscal year;
- has filed for bankruptcy or insolvency during the past three years;
- is (or who has been in the past three years) the subject of a refusal or stop order under the Securities Act; or
- has, or any of whose subsidiaries has, been found to have violated the federal securities laws, has entered into a settlement with any government agency involving allegations of violations of federal securities laws, or has been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the federal securities laws during the past three years.

Generally, the SEC’s proposals would treat foreign private issuers in the same way as U.S. companies.

Communications Proposals

Under existing provisions of the Securities Act:

- Prior to the filing of a registration statement, all offers (whether written or oral) of securities are prohibited (and offers include a broad range of communications in addition to formal offers in respect of securities).
- In the period between the filing of a registration statement and its effectiveness, oral offers can be made, but the only written material permitted in connection with the offering is a preliminary prospectus filed with the SEC.

- Following the effectiveness of a registration statement, written offers are permitted so long as they are accompanied or preceded by delivery of a final prospectus meeting the requirements of Section 10(a) of the Securities Act.

These provisions have generally been interpreted to restrict certain communications by issuers and other participants during the course of an offering (referred to as “gun-jumping”). The SEC’s communications proposals would relax these restrictions and encourage increased communication by issuers and other participants in an offering.

The cumulative effect of the communications proposals would be the following:

- Well-known seasoned issuers could, at any time, make oral and written communications, subject to certain conditions discussed below (including, in specified cases, filing with the SEC).
- Reporting issuers could, at any time, continue to publish regularly released factual business information and forward-looking information.
- Non-reporting issuers could, at any time, continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors.
- Communications by issuers more than 30 days before filing a registration statement would not be considered prohibited offers, so long as they did not reference a securities offering.
- Issuers and other offering participants could use “free writing prospectuses” (described below) after filing a registration statement, subject to certain conditions discussed below (including, in specified cases, filing with the SEC).
- A broader category of routine communications regarding issuers, offerings and procedural matters would be excluded from the definition of “prospectus”.
- The exemptions for research reports would be expanded.

Continuing Ongoing Business Communications

The proposals would establish a safe harbor from the gun-jumping restrictions for a reporting issuer’s continued publication of regularly released factual business information and forward-looking information, subject to certain conditions. The safe harbor would apply at any time, including around the time of a registered offering.

Factual business information means:

- factual information about the issuer or some aspect of its business;
- advertisements of, or other information about, the issuer’s products or services;
- factual information about the issuer’s business or financial developments;
- dividend notices; and
- factual information in the issuer’s Exchange Act reports.

Forward-looking information means:

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

Information about the registered offering or information released as part of the offering would be excluded from the safe harbor. To qualify for the safe harbor, the factual business information or forward-looking information would have to be released or disseminated by or on behalf of the issuer. This means the issuer or an agent or representative has authorized the communication and approved the communication before its use. Finally, the information must satisfy the following two conditions:

- the issuer has previously released or disseminated information of the type described in the ordinary course of business; and
- the information is released or disseminated in the ordinary course of the issuer's business and the timing, manner and form in which the information is released or disseminated is materially consistent with similar past disclosures.

A similar, but narrower, safe harbor is proposed for communication of regularly released factual business information by a non-reporting issuer.²

30-Day Bright Line Exclusion

Any communication made by or on behalf of any issuer that does not reference a securities offering and is made more than 30 days before the filing of the registration statement would not be prohibited gun-jumping under the SEC's proposed rules. The issuer would have to take reasonable steps within its control to prevent further distribution or publication of the information during the 30-day period before the registration statement is filed. The 30-day bright line exclusion would not apply to communications in certain offerings already subject to separate regulatory regimes, such as business combinations and offerings registered on Form S-8.

Expansion of Rule 134

Rule 134 under the Securities Act currently provides a safe harbor³ from gun-jumping provisions for limited communications about an offering following the filing, but prior to effectiveness, of a

² The safe harbor for non-reporting issuers would not apply to forward-looking information and would require, as an additional condition, that the information is released or disseminated to persons other than in their capacity as investors or potential investors, such as customers and suppliers.

registration statement. The SEC is proposing to expand Rule 134 to allow for the dissemination of more information about:

- the issuer and its business, including where to contact the issuer;
- the terms of the securities being offered;
- the offering itself, including underwriter information, the mechanics of and procedures for transactions in connection with the offering process, the anticipated schedule of the offering and a description of marketing events;
- procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities; and
- the credit ratings of the issuer or its securities, including the security rating that is reasonably expected to be assigned.

The proposals would not, however, permit the use of a detailed term sheet as part of a Rule 134 notice, although such term sheets may qualify as free writing prospectuses.

Free Writing Prospectuses

The SEC is proposing to permit written offers, including electronic communications, outside of a statutory prospectus beyond what is currently permitted by the Securities Act. These written offers would be considered “free writing prospectuses”.⁴ A free writing prospectus could be used, subject to satisfying certain conditions:⁵

- by a well-known seasoned issuer, at any time;
- by any issuer, at any time after a registration statement is filed;
- by other participants in an offering (including an offering by a well-known seasoned issuer), at any time after a registration statement is filed.

The proposed rules define a free writing prospectus as any “written communication” that:

- constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering; and

³ The proposals would not change the current treatment of communications under Rule 134 as excluded from the definition of the term “prospectus” under Securities Act Section 2(a)(10). Communications under Rule 134 would also be excluded from the definition of the term “free writing prospectus”.

⁴ Free writing prospectuses would continue to be subject to liability under Securities Act Sections 12(a)(2) and 17(a) and Exchange Act Section 10(b) and Rule 10b-5.

⁵ A free writing prospectus satisfying the conditions and used after the filing of a registration statement would be a permitted Section 10(b) prospectus for purposes of Sections 2(a)(10), 5(b)(1) and 5(b)(2) of the Securities Act. A free writing prospectus not used in accordance with the proposed rules would still be a prospectus for purposes of Section 12(a)(2) of the Securities Act and its use would violate Section 5.

- is not (1) a final prospectus or a preliminary or summary prospectus or a prospectus subject to completion permitted by SEC rules or (2) a prospectus under Section 2(a)(10)(a) of the Securities Act because, at or prior to that time, a final prospectus was sent or given.

“Written communication” means any communication that is written, printed, broadcast or in electronic format (other than live telephone calls).

To use a free writing prospectus, the following conditions must be met:

Filing condition. The proposed rules would condition use of a free writing prospectus on filing⁶ of that prospectus or information contained in that prospectus with the SEC in the following circumstances:

- where a free writing prospectus is prepared by or on behalf of the issuer, known as an “issuer free writing prospectus”, and used by any person, the issuer must file that free-writing prospectus;
- where a free writing prospectus is prepared by a party participating in the offering other than the issuer and contains material information about the issuer or its securities that has been provided by or on behalf of an issuer, known as “issuer information”, and that issuer information is not already contained or incorporated in the registration statement or a filed free writing prospectus, the issuer must file that information;
- where a free writing prospectus is prepared by a party other than the issuer and is distributed in a manner reasonably designed by such party to lead to its broad unrestricted dissemination, that party must file the free writing prospectus, unless it has already been filed; and
- where a free writing prospectus is prepared by an issuer or a party participating in the offering and contains only a description of the terms of the issuer’s securities, the issuer must file the free writing prospectus that contains the final terms of the issuer’s securities.

A free writing prospectus filing would have to identify the registration statement to which it relates, but need not be filed as part of the registration statement. Filings would need to be made on or before the date of first use, except for final terms of securities, which would have to be filed within two days after the later of the date such terms became final or the date of first use. The proposed rules would permit issuers and other persons to cure unintentional failures to file free writing materials.

Prospectus delivery/availability condition. A free writing prospectus may be used in an offering:

- by well-known seasoned issuers or seasoned issuers, by including a legend notifying recipients where they can access or hyperlink to the preliminary or base prospectus; or

⁶ While all free writing prospectuses would be subject to liability under Section 12(a)(2) of the Securities Act and the anti-fraud provisions of the securities laws, a free writing prospectus that is filed as part of the registration statement also would be subject to liability under Section 11 of the Securities Act.

- by unseasoned or non-reporting issuers, by delivering a preliminary prospectus before or with the free writing prospectus (merely referring to the availability of the preliminary prospectus would not satisfy the condition).

Legend. A free writing prospectus must include a legend stating, among other things, where the statutory prospectus is available and that the communication is an offer pursuant to a free writing prospectus. The proposed rules include a cure provision for an unintentional failure to include the legend in a free writing prospectus.

Record retention. Issuers and offering participants would be required to retain any free writing prospectus they have used for three years following the initial bona fide offering of the securities in question.

Ineligible issuers. Free writing prospectuses are not available to ineligible issuers, registered investment companies or business development companies, or to any issuer in connection with exchange offers and business combination transactions.

Electronic Road Shows

The SEC's proposals would substantially liberalize existing electronic road show procedures. Electronic road shows would be written communications under the SEC's proposed definitions. They would also be considered written offers, prospectuses and free writing prospectuses. Thus, electronic road shows generally would be permitted under the same terms and conditions applicable to other free writing prospectuses. Electronic road shows and their scripts, however, would not be subject to the filing condition (except for issuer information not previously included in the registration statement or in a free writing prospectus) if the issuer:

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

Communications on Websites

The SEC's proposals make it clear that an offer of an issuer's securities on an issuer's website, or hyperlinked by an issuer from the issuer's website to a third party's website, is a written offer of those securities by the issuer and, unless another exemption is available, is a free writing prospectus of the issuer subject to the free writing prospectus filing conditions. Historical information on an issuer's website would not be considered a current offer if that information is identified as historical and is segregated on the website from offering material. Incorporating by reference or otherwise including historical information in a prospectus for the offering would constitute a current offer.

Media Publications

Generally, a media communication for which an issuer or any person participating in the offering provided information that is (1) disseminated by the media and (2) would be a free writing

prospectus if disseminated by the issuer or an offering participant would be deemed to be a free writing prospectus prepared by or on behalf of the issuer or an offering participant.

If the issuer or offering participant prepared or paid for a published article, broadcast or advertisement (*e.g.*, a written ad or infomercial), the issuer would have to comply with the rules applicable to use of a free writing prospectus by the issuer. However, more lenient rules would apply if the free writing prospectus is prepared by unaffiliated persons in the media business and no payment is made or consideration given by or on behalf of the issuer or a person participating in the offer. In that case, a statutory prospectus need not precede or accompany the media communication, but a registration statement would need to have been filed and a statutory prospectus available. The issuer or offering participant would have to file the free writing prospectus within one business day after first publication or first broadcast.

Permitted Pre-Filing Offers for Well-Known Seasoned Issuers

The SEC proposes to provide a general exemption from the gun-jumping provisions for oral or written offers by or on behalf of well-known seasoned issuers in the period before a registration statement is filed.⁷ This is in addition to the safe harbors for regularly released factual business and forward-looking information, the 30-day bright line exclusion, the broadened Rule 134 exemption for offering-related communications and the provisions applicable to free writing prospectuses. To qualify for the exemption, written offers would need to include the same type of legend as for a free writing prospectus and would need to be filed with the SEC promptly upon filing of the registration statement (the filing requirement also includes a cure provision for unintentional failures to file). Any such written offer would also be considered a free writing prospectus. This exemption would not be available for:

- communications regarding business combination transactions;
- communications made in connection with offerings registered on Form S-8; or
- communications in offerings by ineligible issuers.

Interaction of Communications Proposals with Regulation FD

The SEC's proposals would amend Regulation FD so that it would not apply to disclosures made in the following communications in connection with a registered securities offering:

- 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 and satisfying the requirements of the free writing prospectus rules, or a communication falling

⁷ These offers would be exempt from Securities Act Section 5(c). Written offers would still be prospectuses under Securities Act Section 2(a)(10). All such offers would be subject to liability under Securities Act Sections 12(a)(2) and 17(a) and Exchange Act Section 10(b) and Rule 10b-5. Communications subject to this exemption would not be excluded from Regulation FD as communications in connection with a securities offering. The exemption would not be available if the communications are part of a plan or scheme to evade the requirements of Securities Act Section 5.

within the exception to the definition of prospectus contained in Securities Act Section 2(a)(10)(a);

- any other Section 10(b) prospectus;
- a notice permitted by Securities Act Rule 135;
- a communication permitted by Securities Act Rule 134; and
- an oral communication made in connection with the registered offering after filing of the registration statement for the offering under the Securities Act.

In addition, proposed amendments to Regulation FD would narrow the types of registered offerings eligible for exclusion from Regulation FD to those involving capital formation for the account of the issuer and underwritten offerings that are both an issuer capital formation and a selling securityholder offering.

Research Reports

The proposals would expand current exemptions under Securities Act Rules 137, 138 and 139 that permit brokers and dealers to publish research constituting an offer around the time of a registered offering. The proposed rules contain a definition of “research report” generally similar to that contained in Regulation AC and expand the circumstances in which offering and non-offering participants could disseminate research reports during a registered offering.

Liability Issues

The SEC’s proposals provide interpretive guidance concerning the timing of statutory liability under the Securities Act as well as new rules and rule revisions related to those interpretations. The SEC is seeking to address the discrepancy between the time of the contract of sale for securities (when an investor makes the investment decision) and the later time of availability of the final prospectus. The proposals state that the time at which an investor enters into a contract of sale, and therefore becomes committed to purchase securities, is one appropriate time to apply the liability standards of Securities Act Section 12(a)(2) and Section 17(a)(2) for material misstatements and omissions in a prospectus, oral statement or statement. Accordingly, for purposes of liability under Sections 12(a)(2) and 17(a)(2), information provided to an investor at or prior to the time of sale (*e.g.*, in a preliminary prospectus) would not include modifications, corrections or additions that are made available subsequent to the time of sale (*e.g.*, in a final prospectus, prospectus supplement or subsequent Exchange Act filing).

A different rule would apply for purposes of liability under Securities Act Section 11 which applies at the time the registration statement is declared effective. In this case, information contained in a prospectus or prospectus supplement that is filed after the time of the contract of sale will be considered to be part of and included in a registration statement at the time of effectiveness, which may be at or before the time of the contract of sale.

The proposals include a rule addressing the SEC’s belief that there exists uncertainty as to issuer liability under Section 12(a)(2) for issuer information in registered offerings using certain types of underwriting arrangements. The proposed rules provide that an issuer in a primary offering of

securities, regardless of the form of underwriting arrangement, would be considered to be a seller for purposes of Section 12(a)(2) as to any communications made by or on behalf of the issuer.

Changes To Shelf Registration Process

Information That May be Omitted from the Base Prospectus

The SEC's proposals would codify in a single rule the information that may be omitted from a base prospectus in a shelf registration statement for registered primary securities offerings, other than business combination transactions and exchange offers. Proposed Rule 430B would permit a base prospectus to omit information that is unknown or not reasonably available to an issuer at the time the registration statement becomes effective. This change is intended to be largely consistent with current requirements and practice for shelf registration statements for delayed offerings.

The proposed rules would also allow seasoned issuers to add to a prospectus additional or omitted information without using a post-effective amendment to the applicable registration statement. In this way, issuers may supplement information in the registration statement without the potential delay associated with the SEC review process. The proposals would permit information required in the prospectus to be incorporated by reference from Exchange Act reports or be contained in a prospectus supplement instead of a post-effective amendment to the registration statement.⁸ For example, material changes in the plan of distribution could be added by incorporated Exchange Act reports or by prospectus supplements.

The proposed rules would also provide that the identities of selling securityholders could be disclosed after the effective date of a registration statement either by a post-effective amendment to the registration statement or a prospectus supplement. Currently, selling securityholders must be identified in the base prospectus or in a post-effective amendment. The ability to identify selling securityholders after effectiveness would be available only if:

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

The proposed changes would alleviate timing concerns arising from an issuer's inability to identify selling securityholders prior to effectiveness of a registration statement and avoid delays.

⁸ Proposed Rule 430B would make clear that information contained in a prospectus supplement would be deemed part of the registration statement. For prospectus supplements filed other than in connection with a shelf takedown, all information contained in the prospectus supplement would be deemed part of the registration statement as of the date the prospectus supplement is first used. For prospectus supplements filed in connection with a shelf takedown, all information in that prospectus supplement would be deemed part of the registration statement as of the earlier of the date it is first used or the date of the first contract of sale of securities in the offering to which the prospectus supplement relates. A new effective date for the shelf registration statement would be established for liability purposes only.

Liberalization of Requirements under Rule 415

The proposed rules would require that in order to maintain a shelf registration statement, an issuer must file a new shelf registration statement every three years. This would replace the requirement that issuers register only securities they intend to offer within two years from the time of filing. Unsold securities and unused fees would be carried forward to any new registration statements. The proposed rules would eliminate the “convenience shelf” doctrine and permit takedowns immediately after the effectiveness of a shelf registration statement. Restrictions on “at-the-market” offerings of equity securities, including those with respect to volume limitations and identification of underwriters in the registration statement, would also be eliminated.

Automatic Shelf Registrations

The proposed rules would permit well-known seasoned issuers to use more flexible “automatic shelf registrations” for all primary and secondary offerings, other than those in connection with business combination transactions or exchange offers. All automatic shelf registration statements and related post-effective amendments would become effective automatically upon filing, without staff review. Well-known seasoned issuers could register unspecified amounts of different specified types of securities and add additional classes of securities and additional registrants (*i.e.*, eligible majority-owned subsidiaries) after an automatic shelf registration statement is filed and effective. Automatic shelf issuers would not be required to allocate the securities between primary and secondary offerings or between the issuer, its eligible subsidiaries or selling securityholders. Companies using an automatic shelf registration statement would be permitted to pay filing fees in advance or on a “pay-as-you-go” basis at the time of each takedown off the shelf.

More information may be excluded from the base prospectus in an automatic shelf registration statement than from a regular shelf registration statement. This includes whether the offering is a primary or secondary offering, the names of any selling securityholders and any plan of distribution for the offered securities. Omitted information, such as the public offering price, detailed description of securities (including information not contained or incorporated by reference in the base prospectus), the identity of underwriters and selling securityholders and the plan of distribution, may be incorporated by reference from Exchange Act reports or contained in a prospectus supplement that would be deemed to be part of and included in the registration statement. New types of securities or new eligible issuers, including guarantors, and the securities they intend to issue, however, may be added only by a post-effective amendment.

Prospectus Delivery

The SEC believes that Internet usage has increased sufficiently to propose a prospectus delivery model for issuers and their intermediaries that relies on timely access to filed information and documents.

Access Equals Delivery

The SEC is proposing new Securities Act Rule 172, under which a final prospectus would be deemed to precede or accompany a security for purposes of Securities Act Section 5(b)(2) as long as the following conditions are satisfied:

- the registration statement relating to the offering is effective and is not the subject of a stop order issued under the Securities Act;
- the final prospectus meeting the requirements of Securities Act Section 10(a) is on file with the SEC or will be filed with the SEC within the time frame required by Rule 424; and
- neither the issuer nor any underwriter or participating dealer is the subject of a pending cease and desist proceeding under the Securities Act in connection with the offering.

Under this “access equals delivery” model, investors are presumed to have access to the Internet, and issuers and intermediaries satisfy their delivery requirements if the filings or documents are available on either the issuer’s or the SEC’s website. Offerings made pursuant to Form S-8, business combination transactions and exchange offers, and offerings by registered investment companies and business development companies would be excluded from Rule 172, because they either do not raise the same issues as in corporate capital formation transactions or are already subject to rules unique to their specific types of offerings.

Notice of Registration

Under proposed Securities Act Rule 173, underwriters, brokers and dealers participating in a registered offering (and the issuer if no underwriters, brokers or dealers are used) must send to each purchaser from it, not later than two business days after the completion of the sale, a copy of the final prospectus or, in lieu of the final prospectus, a notice to the effect that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to be delivered in the absence of proposed Rule 172. An investor may request a copy of the final prospectus; however, a requested final prospectus need not be delivered before settlement. Under the SEC’s proposals, compliance with proposed Rule 173 would not be a condition to the exemption from final prospectus delivery obligations under proposed Rule 172 and non-compliance with Rule 173 would not result in a violation of Securities Act Section 5. The same types of offerings excluded from application of the deemed prospectus delivery rules under proposed Rule 172 would not be eligible for the exemption under proposed Rule 173.

Confirmations and Notices of Allocations

The SEC’s proposed rules would also eliminate the link between delivery of the final prospectus and the delivery of a confirmation of sale under the current rules. Proposed Rule 172 would create an exemption from Securities Act Section 5(b)(1) to allow certain written confirmations and notices of allocations in registered offerings to be sent without being accompanied or preceded by a final prospectus, provided that the same conditions applicable to the deemed prospectus delivery rules described above are satisfied. The proposed rules would permit:

- written confirmations of sales pursuant to a registered offering containing information limited to that called for by Exchange Act Rule 10b-10 and other information customarily included in confirmations of sales; and
- written notices of allocations of securities sold or to be sold in a registered offering (for example, from a broker-dealer to a customer or from an underwriter to participating dealers).

The same types of offerings excluded from the application of the deemed prospectus delivery rules under proposed Rule 172 would not be eligible for the exemption from Section 5(b)(1).

Broker Transactions on an Exchange and Aftermarket Transactions

The SEC's proposals would amend Securities Act Rules 153 and 174 to permit brokers and dealers to rely on proposed Rule 172 to satisfy the prospectus delivery obligations in broker transactions on a national securities exchange, registered trading facility or alternative trading system, or aftermarket sales by dealers during any required prospectus delivery period. The conditions described above for proposed Rule 172 would have to be satisfied and, in the case of amended Rule 153, securities of the same class would have to be trading on that national securities exchange, registered trading facility or alternative trading system.

Additional Exchange Act Disclosure

Risk Factors in Periodic Reports

The SEC's proposals would require disclosure in annual reports on Form 10-K and registration statements on Form 10 of the same types of risk factors as are currently required in Securities Act registration statements (other than offering-specific risks). This would include the most significant factors with respect to the issuer's business, operations, industry or financial position that may have a negative impact on the issuer's future financial performance. Under the proposals, these risk factors must be in plain English and updated in quarterly reports on Form 10-Q to reflect any material changes from risks previously disclosed in Exchange Act reports; however, they would not otherwise require restatement or repetition. The SEC believes that inclusion of risk factors in Exchange Act reports would facilitate incorporation by reference into Securities Act registration statements to satisfy the Securities Act risk factor disclosure requirements.

Unresolved Staff Comments in Annual Reports

The proposals would also require all "accelerated filers" to disclose in their annual reports on Forms 10-K and 20-F, written comments made by the SEC's staff in connection with their review of Exchange Act reports that:

- the issuer believes are material;
- were issued more than 180 days before the end of the fiscal year covered by the Form 10-K or 20-F; and
- remain unresolved as of the date of the Form 10-K or 20-F filing.

Staff comments that have been resolved, including those that the staff and the issuer have agreed would be addressed in future Exchange Act filings, need not be disclosed. Issuers would also be able to include their position regarding such unresolved comments.

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The SEC's release includes a series of questions intended to focus public comments on specific aspects of the proposals. The SEC requests that comments on the proposed rules be received on or before January 31, 2005. Information on submitting comments to the SEC can be found on the SEC's website at www.sec.gov/rules/submitcomments.htm.

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For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, on our website at www.chadbourne.com/publications/sub_Publications.html. Our client alerts are for general informational purposes and should not be regarded as legal advice. If you have any questions regarding the proposed securities offering reforms, please contact any of the following:

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