

Client Alert

SEC Issues FAQs on Securities Offering Reform Transition

On September 13, 2005, the SEC issued Securities Offering Reform Transition Questions and Answers (the “FAQs”).¹ The FAQs represent the views of the staff of the Division of Corporation Finance with respect to questions received regarding issuers transitioning to compliance with the new securities registration and public offering process rules that become effective on December 1, 2005.²

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

- **Use of New Communication Rules.** The SEC staff clarified that an issuer may rely on the new communication rules³ for its communications made on or after December 1, 2005, regardless of the time an offering is commenced. In determining whether an issuer is an “ineligible issuer” for purposes of utilizing free writing prospectuses pursuant to Rules 164 and 433, an issuer’s status will be determined at the time of commencement of the offering, even if prior to December 1.
- **Inclusion of New Undertakings.** The new undertakings in Item 512 of Regulation S-K, as modified by the new rules, must be included in all registration statements and amendments filed on or after December 1, 2005. Issuers who have a filed registration statement prior to December 1 need not file an amendment after December 1 for the sole purpose of including the new undertakings.
- **Automatic Shelf Registration Statements.** Beginning December 1, 2005 a well-known seasoned issuer (“WKSI”) will be able to use automatic shelf registration statements that are effective upon filing with the SEC without any staff review. A WKSI with a shelf registration statement on Form S-3 or Form F-3 that is effective prior to December 1, 2005 may not convert that registration statement to an automatic shelf registration statement simply by filing a post-effective amendment. Instead, the issuer must file a new registration statement on Form S-3 or Form F-3 designated as an automatic shelf registration statement. The issuer may, however,

¹ The FAQs are available on the SEC’s website at www.sec.gov/divisions/corpfin/transitionfaq.htm.

² 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. 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/sub_Publications.html.

³ The new communication rules are Rules 134, 163, 163A, 164, 168, 169, and 433. These rules generally relax existing prohibitions against “gun jumping” communications and increase the type and frequency of permitted communications by issuers during an offering.

carry forward unused filing fees for unsold securities from prior effective registration statements. WKSIIs are not required to file an automatic shelf registration statement, and instead may continue to use an existing shelf registration statement.

- ***Duration of Shelf Registration Statements.*** The three-year period for shelf registration statements provided for in the new rules (which require the filing of a new shelf registration statement every three years) will begin on December 1, 2005 for any shelf registration statement that is effective before December 1, and on the effective date for any shelf registration statement that becomes effective on or after December 1.
- ***Use of New Rules Regarding Prospectus Supplements.*** An issuer with a resale registration statement on Form S-3 or Form F-3 that is effective prior to December 1, 2005 may rely on new Rule 430B to file prospectus supplements on or after December 1, rather than filing post-effective amendments, to replace or add selling security holders (provided that the other conditions in Rule 430B regarding naming selling security holders by prospectus supplement are satisfied) or to make material amendments to the plan of distribution.
- ***Ability to Conduct “At-the-Market” Offerings.*** An issuer that has a shelf registration statement on Form S-3 or Form F-3 that is effective prior to December 1, 2005 may conduct an “at-the-market” offering as provided for by the revised provisions of Rule 415(a)(4), so long as the registration statement discloses that it may be used for “at-the-market” offerings and meets the conditions of the revised provisions of Rule 415(a)(4) for such offerings. An issuer otherwise eligible to engage in “at-the-market” offerings under the new rules, but whose shelf registration statement does not provide for “at-the-market” offerings, may file a prospectus supplement after December 1 to amend the plan of distribution section of the shelf registration statement to provide for “at-the-market” offerings and then immediately commence such an offering.
- ***Phase-In Schedule for New Exchange Act Disclosure.*** The new rules relating to disclosure of risk factors, unresolved SEC staff comments, WKSI status and voluntary issuer status in an issuer’s Exchange Act reports will apply beginning with the Form 10-K for the issuer’s first fiscal year ending on or after December 1, 2005. Risk factor disclosure required in an issuer’s Form 10-Q must be included only after the issuer files a Form 10-K for its first fiscal year ending on or after December 1, 2005.

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For Additional Information

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