CHADBOURNE & PARKE LLP

Client Alert

SEC Adopts Major Securities Offering Reforms

The SEC has adopted significant modifications to the securities offering and registration processes under the Securities Act of 1933.[1] The new rules, to be effective December 1, 2005, focus on:

- communications related to registered offerings, relaxing the prohibitions on "gun-jumping" communications;
- registration and other procedures in the offering process, including providing for automatic effectiveness of shelf registrations 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 risk factor disclosure in annual reports on Form 10-K.

The new rules reflect technological developments, such as the Internet, that have enhanced the accessibility of issuer disclosures to investors, as well as the expanded and more timely Exchange Act disclosures by issuers resulting from implementation of the Sarbanes-Oxley Act of 2002 and SEC-initiated reforms. While the SEC made some modifications in response to comments, the new rules are substantially the same as those proposed in November 2004.

The new rules generally treat foreign private issuers in the same way as U.S. companies.

Categories of Issuers

Application of the new communications rules and registration processes depends on the nature of the issuer. The SEC has defined "well-known seasoned issuer" as a new category of issuer eligible for the greatest flexibility under the rules. Application of some of the new rules also turns 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 non-convertible securities (other than common equity) and has issued at least $1 billion of non-convertible securities (other than common equity) in registered primary offerings for cash during the past three years; and
- is not an "ineligible issuer", an asset-backed issuer, a registered investment company or a business development company.

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[1] Securities and Exchange Commission Release Nos. 33-8591; 34-52056; IC-26993; File No. S7-38-04 (available July 19, 2005). A copy of the Release is available on the SEC's website at www.sec.gov/rules/final/33-8591.pdf.

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

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 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.

A "**non-reporting issuer**" is an issuer that is not required to file periodic reports under the Exchange Act (*e.g.*, a company before its IPO registration statement becomes effective), regardless of whether it files such reports voluntarily.

An "**ineligible issuer**" is an issuer that:

- is a reporting issuer that is not current in its Exchange Act reports, other than Forms 8-K for items eligible for the safe harbor;
- is (or was, or whose predecessor was, during the past three years) a blank check company, 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 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 is the subject of a pending proceeding for a refusal, stop or cease-and-desist order under the Securities Act; or
- has, or any of whose subsidiaries has, been made the subject of a judicial or administrative decree or order, including settlements after the effective date of the new rules, prohibiting certain conduct or activities regarding the anti-fraud provisions of the federal securities laws or determining that the issuer or subsidiary violated the anti-fraud provisions of the federal securities laws during the past three years.

Communications Rules

Under 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 new communications rules relax these restrictions and encourage increased communication by issuers and other participants in an offering.

The cumulative effect of the new rules is the following:

- Well-known seasoned issuers may, at any time, make oral and written communications, subject to certain conditions discussed below (including, in specified cases, filing with the SEC).
- Reporting issuers may, at any time, continue to publish regularly released factual business information and forward-looking information.
- Non-reporting issuers may, at any time, 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.
- 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 registered.
- Issuers and other offering participants may 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 are excluded from the definition of "prospectus".
- The exemptions for research reports are expanded.

Continuing Ongoing Business Communications – Rule 168

New Rule 168 establishes 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 applies at any time, including around the time of a registered offering.

Factual business information means:

- 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; and
- factual business 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 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 is excluded from the safe harbor. To qualify for the safe harbor, the factual business information or forward-looking information has 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 following conditions must be satisfied:

- the issuer has previously released or disseminated information of the type described in the ordinary course of business;
- the timing, manner and form in which the information is released or disseminated is consistent in all material respects with similar past releases or disseminations; and
- the issuer is not a registered investment company or a business development company.

A similar, but narrower, safe harbor has been adopted as new Rule 169 for communication of regularly released factual business information by a non-reporting issuer, including voluntary filers.[2]

30-Day Bright Line Exclusion – Rule 163A

Any communication made by or on behalf of any issuer that does not reference a securities offering that is or will be registered and is made more than 30 days before the filing of the registration statement is not prohibited gun-jumping under the new 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 does 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 harbor[3] from gun-jumping provisions for limited communications about an offering following the filing, but prior to effectiveness, of a

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

[3] The new rules do 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 are also excluded from the definition of the term "free writing prospectus".

registration statement. The SEC has expanded 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;
- procedures for directed share plans and other participation in the offering by officers, directors and employees;
- corrections of inaccuracies in prior Rule 134 disclosures; and
- the credit ratings of the issuer or its securities, including the security rating that is reasonably expected to be assigned.

The new rules do 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 – Rules 163 and 433

The new rules permit written offers, including electronic communications, outside of a statutory prospectus beyond what is currently permitted by the Securities Act. These written offers are considered "free writing prospectuses".[4] A free writing prospectus may 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 new 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

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[4] Free writing prospectuses 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 is a permitted Securities Act 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 rules would still be a prospectus for purposes of Section 12(a)(2) of the Securities Act and its use would violate Securities Act Section 5.

- is not (1) a final prospectus, (2) a preliminary or summary prospectus or a prospectus subject to completion permitted by SEC rules, (3) a communication made in reliance on the SEC rules for asset-backed issuers permitting the use of ABS informational and computational methods or (4) 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 and live, real-time communications to a live audience, even if transmitted electronically).

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

Filing condition. The new rules condition use of a free writing prospectus on filing[6] 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 or used or referred to by the issuer, known as an "issuer free writing prospectus", the issuer must file that free-writing prospectus;
- where a free writing prospectus is prepared by or on behalf of or used 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 used or referred to by a party participating in the offering other than the issuer and is distributed by or on behalf of the party in a manner reasonably designed by the 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 or on behalf of an issuer or a party participating in the offering and contains a description of the terms of the issuer's securities being offered or of the offering, the issuer must file a description of the final terms of the issuer's securities being offered or of the offering after such terms have been established for all classes in the offering.

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

[6] While all free writing prospectuses are 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 is also subject to liability under Section 11 of the Securities Act.

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
- by unseasoned or non-reporting issuers, by delivering a preliminary prospectus before or with the free writing prospectus, including by means of a hyperlink to the statutory prospectus for electronic free writing prospectuses (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. The new rules include a cure provision for an unintentional failure to include the legend in a free writing prospectus.

Record retention. Issuers and offering participants are required to retain any free writing prospectus they have used that has not been filed with the SEC for three years following the initial bona fide offering of the securities in question.

Ineligible issuers. Ineligible issuers may use free writing prospectuses that are limited to descriptions of the terms of the securities being offered and the offering. However, free writing prospectuses are not available to blank check companies, shell companies, penny stock 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 new rules substantially liberalize existing electronic road show procedures. Electronic road shows are written communications under the new definitions and are also considered written offers, prospectuses and free writing prospectuses. One exception is live, real-time road shows to live audiences, even if transmitted electronically, which are not considered free writing prospectuses, but are oral communications subject to the liability provisions of the securities laws. Electronic road shows that are free writing prospectuses generally are permitted under the same terms and conditions applicable to other free writing prospectuses. Electronic road shows and their scripts, however, are not subject to the filing condition applicable generally to free writing prospectuses, with one exception: filing is required for electronic road shows for initial public offerings of equity securities and non-convertible securities, unless at least one version of a bona fide electronic road show is readily available electronically without restrictions to any potential investor at the same time as the electronic road show.

Communications on Websites

The SEC views 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, as a written offer of those securities by the issuer and, unless another exemption is available, a free writing prospectus of the issuer subject to the free writing prospectus filing conditions. Historical information on an issuer's website is not considered a current offer if that information is identified as historical and is located in a separate section of the website containing historical information. Incorporating by reference or otherwise

including historical information in a prospectus for the offering or otherwise using or referring to historical information in connection with the offering constitutes a current offer.

Media Publications

Generally, a media communication for which an issuer or any person participating in the offering provides information that (1) is disseminated by the media and (2) would be a free writing prospectus if disseminated by the issuer or an offering participant, is 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 must comply with the rules applicable to use of a free writing prospectus by the issuer.

More lenient rules 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 must have been filed and a statutory prospectus available, except in the case of a well-known seasoned issuer. The issuer or offering participant must file the free writing prospectus within four business days after first publication or first broadcast. The new rules permit the filing of (1) the media publication, (2) all of the information provided to the media or (3) a transcript of the interview or similar materials provided to the media to satisfy the filing requirement.

Permitted Pre-Filing Offers for Well-Known Seasoned Issuers – Rule 163

New Rule 163 provides 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 must include a legend similar to that required for a free writing prospectus and must 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 is considered a free writing prospectus. No filing is required for any communication previously filed with or furnished to the SEC or any communication which would not be required to be filed with the SEC under Rule 433 if the communication had been a free writing prospectus used after the filing of a registration statement. This exemption is not available for:

- communications regarding business combination transactions; or

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[7] These offers are exempt from Securities Act Section 5(c). Written offers are prospectuses under Securities Act Section 2(a)(10). All such offers are 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 are not excluded from Regulation FD as communications in connection with a securities offering.

- communications in offerings by registered investment companies or business development companies.

Interaction of Communications Amendments with Regulation FD

The SEC rules amended Regulation FD so that it does 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 or a communication falling within the exception to the definition of prospectus contained in Securities Act Section 2(a)(10)(a);
- any other Securities Act Section 10(b) prospectus;
- a notice permitted by Rule 135;
- a communication permitted by Rule 134; and
- an oral communication made in connection with a registered offering after filing of the registration statement for the offering under the Securities Act.

In addition, the amendments to Regulation FD 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 new rules expand current exemptions under Rules 137, 138 and 139 that permit brokers and dealers to publish research constituting an offer around the time of a registered offering. The rules contain a definition of "research report" for purposes of Rules 137, 138 and 139 that is generally consistent with that contained in Regulation AC and expand the circumstances in which offering and non-offering participants may disseminate research reports during a registered offering.

Liability Issues

The SEC rules 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. 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 new rules 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 communication or statement. Accordingly, liability under Sections 12(a)(2) and 17(a)(2) will be based on information provided to an investor at or prior to the time of sale (*e.g.*, in a preliminary prospectus), without taking into account 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 applies for purposes of liability under Securities Act Section 11 which attaches 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.

To address 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 new rules provide that an issuer in a primary offering of securities, regardless of the form of underwriting arrangement, is 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 The Offering Process

Information That May be Omitted from the Base Prospectus – Rule 430B

The new SEC rules 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. Rule 430B permits 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 new rules 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 new rules 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 may be added by incorporated Exchange Act reports or by prospectus supplements.

The new rules also provide that the identities of selling securityholders may be disclosed after the effective date of a registration statement by a post-effective amendment to the registration statement, a prospectus supplement or an Exchange Act report incorporated by reference into the registration statement. Currently, selling securityholders must be identified in the base prospectus or in a post-effective amendment. The ability to identify selling securityholders after effectiveness

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8 Rule 430B makes clear that information contained in a prospectus supplement is 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 is 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 is 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 for the issuer and any underwriter at that time (but not for directors, signing officers and experts, including auditors).

would be available only if (1) the registration statement is an automatic shelf registration statement (as discussed below), or (2) all of the following are satisfied:

- the resale registration statement identifies the initial private offering transaction or transactions pursuant to which the securities were sold;
- the initial private offering of the securities is completed;
- the securities that are the subject of the registration statement are issued and are outstanding prior to initial filing of the resale registration statement; and
- the issuer is not, and during the past three years neither the issuer nor any of its predecessors was, (a) a blank check company, (b) a shell company or (c) a penny stock issuer.

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

Liberalization of Requirements under Rule 415

The new rules require that in order to maintain a shelf registration statement, an issuer must file a new shelf registration statement every three years. This replaces the requirement that issuers register only securities they intend to offer within two years from the time of filing. Unsold securities and unused fees may be carried forward to any new registration statements.[9] The new rules 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, have also been eliminated.

Automatic Shelf Registrations – Amended Rule 415

The new rules 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 will become effective automatically upon filing, without SEC staff review. Well-known seasoned issuers may 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 are not 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 may pay filing fees in advance or on a "pay-as-you-go" basis at the time of each takedown off the shelf.

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[9] As long as the new shelf registration statement is filed within three years of the original effective date of the old registration statement (other than in the case of automatic shelf registration statements), an issuer may continue to offer and sell securities from the old registration statement until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the initial effective date of the old registration statement.

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 description of the securities to be offered other than an identification of the name or class of the securities, the names of any selling securityholders and any plan of distribution for the offered securities. Omitted information, such as the public offering price, any updating information regarding the issuer (whether or not a fundamental change), 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 filed Exchange Act reports or contained in a prospectus supplement that are 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.

Incorporation by Reference in Forms S-1 and F-1

Forms S-1 and F-1 have been amended to permit a reporting issuer to incorporate from previously filed Exchange Act reports most of the information required in those Forms if the issuer:

- has filed at least one annual report;
- is current in its Exchange Act reports; and
- is not, and during the past three years neither the issuer nor any of its predecessors was, (a) a blank check company, (b) a shell company or (c) a penny stock issuer.

As a result of these amendments, the SEC has eliminated Forms S-2 and F-2. These amendments do not affect the inability to incorporate by reference future Exchange Act reports to update a Form S-1 or F-1.

Prospectus Delivery

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

Access Equals Delivery – Rule 172

Under new Rule 172, 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 the issuer will make a good faith and reasonable effort to file the final prospectus with the SEC within the time frame required by Rule 424 (the new rules also include a cure provision for an unintentional failure to file); 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 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 are 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 – Rule 173

Under new 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 Rule 172. An investor may request a copy of the final prospectus; however, a requested final prospectus need not be delivered before settlement. Compliance with Rule 173 is not a condition to the exemption from final prospectus delivery obligations under Rule 172 and non-compliance with Rule 173 will 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 Rule 172 are not eligible for the exemption under Rule 173.

Confirmations and Notices of Allocations – Rule 172

The new rules also eliminate the link between delivery of the final prospectus and the delivery of a confirmation of sale. New Rule 172 creates 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 rules 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 Rule 172 are not eligible for the exemption from Section 5(b)(1).

Broker Transactions on an Exchange and Aftermarket Transactions – Amended Rules 153 and 174

The SEC amended Rules 153 and 174 to permit brokers and dealers to rely on Rule 172 to satisfy the prospectus delivery obligations in broker transactions on a national securities exchange, trading

facility of a registered national securities association or registered alternative trading system, or after-market sales by dealers during any required prospectus delivery period (other than offerings by blank check companies). The conditions described above for Rule 172 must be satisfied and, in the case of amended Rule 153, securities of the same class must be trading on that national securities exchange, trading facility or registered alternative trading system.

Additional Exchange Act Disclosure

Risk Factors in Periodic Reports

The new SEC rules require disclosure in annual reports on Form 10-K and registration statements on Form 10 (but not Forms 10-KSB and 10-SB) of the same types of risk factors as are required in Securities Act registration statements (other than offering-specific risks). This includes 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. The 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.

Unresolved Staff Comments in Annual Reports

The new rules require all "accelerated filers" to disclose in their annual reports on Forms 10-K and 20-F, written comments made by the SEC 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 will be addressed in future Exchange Act filings, need not be disclosed. Issuers may also disclose other information, including their position regarding any unresolved comments.

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July 29, 2005

For Additional Information

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