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ALERT

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The following is a summary of SEC Release No. 33-8591: the Securities and Exchange Commission's Securities Offering Reform Final Rules.

The way issuers raise capital has changed over the course of the past several years, and, in response, the SEC has adopted final rules that modernize and liberalize the securities laws so that issuers raising capital may do so in an efficient manner through registered offerings, while maintaining a high level of investor protection through an issuer's dissemination of complete and timely information regarding its business and its securities. As such, the final rules are predicated upon the relatively new information capabilities - in terms of the speed of dissemination to a widespread audience - that are available today, that were not available when the currently effective rules were enacted. The new rules complement the SEC's increased focus on their review of reports filed pursuant to the Securities Exchange Act of 1934 (the "Exchange Act"). The new rules generally modify three main areas of the currently effective securities rules: communications related to registered securities offerings; registration and other procedures in the offering and capital formation processes; and delivery of information to investors. The new rules will become effective on December 1, 2005.

Categories of Issuers

The new rules offer differing amounts of flexibility to different categories of issuers with respect to communications and registration procedures.

Well-known seasoned issuers ("WKSIs") tend to have more extensive and more reliable information available about them than do other issuers, and therefore, they are given the greatest flexibility with respect to communications and offerings. **WKSIs** are issuers that:

- are required to file Exchange Act reports;

- are current in their SEC reporting obligations and have been timely in their reports for the preceding twelve months;
- are eligible to use Form S-3 or F-3; and
- have as of a date within 60 days of its eligibility determination date either (i) a worldwide market capitalization held by non-affiliates of at least $700 million, in which case it qualifies as a **WKSI** in all cases, or (ii) issued at least $1 billion of non-convertible securities, other than common equity, in primary registered offerings for cash, not exchange, during the past three years, in which case it qualifies as a **WKSI** only with respect to offerings of non-convertible securities other than common equity, unless it has a market capitalization held by non-affiliates of at least $75 million.

Whether an issuer is a **WKSI** generally is determined on an annual basis, and is made as of the later of the time of the filing of the issuer's most recent shelf registration statement or the time of its most recent amendment (by post-effective amendment, incorporated Exchange Act report or form of prospectus) to a shelf registration; or if the issuer hasn't filed a shelf registration statement or amendment for sixteen months, as of the date of its 10-K filing, when due.

Issuers in the other general categories: **seasoned issuers** (those eligible to use Form S-3 or F-3, but who do not meet the other **WKSI** requirements); **unseasoned Exchange Act reporting issuers** (those required to file Exchange Act reports, but that do not qualify to file on Form S-3 or F-3); and **non-reporting issuers** (those not required to file Exchange Act reports - i.e. those involved in an IPO), generally are afforded respectively less flexibility with respect to communications and offerings. **Voluntary Exchange Act report filers** are treated as unseasoned reporting issuers for purposes of the new rules. Under the new rules, issuers that file Exchange Act reports voluntarily need to disclose that fact on the front cover of their filings to alert the public that they might discontinue their reporting and that they are not eligible to use automatic shelf procedures.

Communications Related to Registered Securities Offerings

Currently, the securities laws provide tight restrictions on written and oral communications during various stages of registered public offerings ("gun-jumping" provisions). Under the new rules:

- all forms of communications, other than direct oral communications (regardless of the medium, including a telephone or the internet) are defined as written communications for purposes of the Securities Act of 1933 (the "Securities Act"). The intention is to capture under the heading "writing" future communication technology that is not of an oral nature as well as print, television and radio;
- **WKSIs** are permitted to use oral and written communications at any time before, after or during a securities offering, subject to certain filing requirements since such communications have less potential for conditioning the market for the issuers' securities;
- two safe harbors are created under the new rules for continuing, ongoing business communications:
  - **seasoned issuers and unseasoned Exchange Act reporting issuers** are permitted to publish regularly released factual business information (factual information about the issuer, its business or financial developments, or other aspects of its business; advertisements of, or other information about, the issuer's products or services; and dividend notices) and forward-looking information;
  - **non-reporting issuers** are permitted to publish regularly released factual business information, as described above other than with regard to dividends (but not forward looking statements) intended for everyone other than in their capacity as investors (e.g. to customers and suppliers);
- communications made more than 30 days before the filing of a registration statement by or on behalf of any issuer is permitted, so long as it does not reference the offering that is the subject of the registration statement;

- Trap for the unwary: **non-WKSI issuers** need to take reasonable precautions to prevent further dissemination of the communication during the 30-day period prior to filing - if precautions are not taken, a cooling-off period might be required;

- the basic information about the issuer and its securities as well as procedural and other basic information about an offering allowed to be given under a Rule 134 notice after a registration statement is filed (which need not necessarily include a *bona fide* price range) is expanded to include a broader range of information, but still does not permit a detailed term sheet or a hyperlink to any other prohibited information, although the detailed term sheet is permitted if the requirements for a free writing prospectus are met;
- broader categories of routine communications are excluded from the definition of "prospectus" (e.g. the schedule for an offering or account opening procedures); and
- exemptions for research reports have been expanded to allow offering and non-offering brokers and dealers, under certain circumstances, to publish research during an offering without violating the securities laws.

Free Writing Prospectuses

A free writing prospectus is any written communication that constitutes an offer to sell securities that are or will be the subject of a registration statement that is not a prospectus satisfying the requirements of Securities Act. The new rules generally permit a responsible level of communication with investors regulated by the accuracy of the content. After a registration statement is filed, all offering participants, including issuers and underwriters, are permitted to use free writing prospectuses. Depending on the nature and the provider of a free writing prospectus, it generally needs to be filed with the SEC at or prior to the time it is distributed. The filing requirement for free writing prospectuses applies to **WKSIs** only when and if a registration statement or amendment covering the offered securities is filed.

- **Seasoned issuers**, and in some cases **WKSIs**, are required to include a generic legend on their free writing prospectuses referencing, among other things, the statutory prospectus, the SEC's website and a toll-free number where a statutory prospectus may be obtained. In cases where legends are not available (for example, in certain media), the legend may be included in the copy filed with the SEC, and therefore, advertisements and broadcasts are feasible for these types of issuers.
- **Non-WKSI seasoned issuers** are permitted to use free writing prospectuses so long as they have a statutory prospectus on file with the SEC.
- **Non-reporting issuers** and **unseasoned reporting issuers** are required to deliver a statutory prospectus (that, in the case of an IPO, includes a price range) prior to or with a free writing prospectus (a hyperlink will be sufficient). Therefore, commercials, advertisements and broadcasts generally are not feasible for offerings by issuers of this type, but advertisements in an email with a link to a statutory prospectus are permitted.
- Materials prepared and published by the media and not paid for by the issuer, are treated as a free writing prospectus, but do not need to be preceded or accompanied by a statutory prospectus. Materials published by the media and paid for, or prepared by, the issuer or an offering participant are treated as a free writing prospectus and will be subject to its filing requirements.

Electronic Road Shows

Although, under the new rules, graphically transmitted electronic road shows that do not originate live, in real-time to a live audience, fall under the definition of free writing prospectuses, in order to encourage their

use, the SEC is not requiring an issuer to file the script of the road show (except in the context of an IPO, unless the issuer concurrently makes a version of a *bona fide* road show available electronically to any potential investor). The *bona fide* electronic road show should cover the same general areas, but need not provide all of the same information, as an issuer's other electronic road shows. Live road shows as well as graphically transmitted electronic road shows that originate live, in real-time to a live audience are considered oral communications, and the ability of the audience members to record the webcast or video conference would not affect the status of that communication. Also, if a road show is not subject to filing, neither are the visual aides that accompany that road show, if they are designed to be made available only as a part of the road show.

Regulation FD

Regulation FD is also amended by the new rules, and generally does not apply to disclosures made in a free writing prospectus used after the filing of a registration statement. Additionally, disclosures made in connection with registered offerings by selling security holders are excluded from the application of Regulation FD if the offering also includes a registered primary offering that is a capital formation transaction for the account of the issuer.

Liability Issues

Under the new rules, for purposes of liability under Section 12(a)(2) and Section 17(a)(2) of the Securities Act, the determination of whether a material misstatement or omission exists is made based upon the information provided to an investor at the time of its investment decision (i.e. at the time of the contract for sale). For purposes of Section 12(a)(2), a person's knowing of such untruth or omission means its knowledge as of the time of the sale as well. For shelf offerings, the effective date for disclosure liability purposes, for an issuer and an underwriter, occurs at each shelf takedown, at the earlier of the date of the first use of a prospectus supplement or the time of sale.

It is intended that appropriate liability associated with the expanded communications will be maintained as well. For example, under the new rules, free writing prospectuses have the same liability as that which currently applies to oral offers and statutory prospectuses; written communications not constituting prospectuses will not be subject to disclosure liability applicable to prospectuses, but will still be subject to the anti-fraud provisions of the federal securities laws.

Additionally, the new rules address cross-liability and clarify under what circumstances an offering participant may have liability for statements made or prepared by other offering participants as well as the timing of liability for officers, directors, accountants and other experts.

Revisions to Registration and other Procedures in the Offering and Capital Formation Processes

Revisions to the Shelf registration process:

The new rules modify shelf registration generally to make the process more efficient. The new rules:

- codify the information that is to be included in and omitted from base prospectuses and final prospectuses in shelf registration statements, including an amendment to Forms S-3 and F-3 that allows all issuer and securities information to be incorporated by reference from Exchange Act reports and including a rule that allows **WKSI** and **seasoned issuers** to identify selling stockholders, under certain circumstances, in the resale of restricted securities after the effectiveness of an automatic shelf registration statement in an amendment, prospectus supplement or Exchange Act report incorporat-

ed by reference;

- clarify that prospectus supplements are deemed to be part of and included in the registration statement containing the base prospectus and that issuers are permitted to use prospectus supplements rather than post-effective amendments to make material changes to the plan of distribution;
- eliminate certain current shelf registration requirements, including the elimination of the two year limitation for a delayed offering, the elimination of at-the-market offering restrictions (such as volume limits and identifying underwriters in the registration statement) and the elimination of the prohibition against immediate takedowns off of shelf registration statements.
  - As long as a new non-automatic shelf registration statement is filed within three years of the original effective date of an old shelf registration statement, the issuer may continue to offer and sell securities from the old registration statement for up to six months thereafter, until the new registration statement is declared effective. A new automatic shelf registration statement will need to be filed every three years (without any six-month extension).

Automatic shelf registration for WKSIs:

Under the automatic shelf registration process, eligible **WKSIs** can register unspecified amounts of different classes of securities (defined very broadly, e.g., debt, equity, warrants, units and preferred stock) on an optional automatically effective Form S-3 or F-3, and such issuers are able to add additional classes of securities and eligible majority-owned subsidiaries as additional registrants after an automatic shelf registration statement has already become effective through a post-effective amendment. All automatic shelf registration statements and their post-effective amendments become effective automatically upon filing, without SEC review. An issuer's eligibility for filing an automatic shelf registration statement is determined at the date of the initial filing of the registration statement, and at the time of the filing of each amendment to the registration statement.

Under the new rules, automatic shelf registration also has the following advantages:

- eligible **WKSIs** can accommodate freely both primary and secondary offerings using an automatic shelf registration;
- filing fees may be paid in advance or at the time of a shelf takedown (on a "pay-as-you-go" basis), calculated based on the fee schedule in effect as of the time of payment;
- an automatic shelf registration base prospectus may omit more information than is permitted for a regular shelf registration base prospectus, and the omitted information will then be included in a post-effective amendment, in a prospectus supplement deemed part of and included in, or in an Exchange Act report incorporated by reference into, the registration statement.

In summary, the differences between the base prospectus of regular shelf filers and automatic shelf filers is that regular filers' base prospectuses need to have a plan of distribution (that could be changed by prospectus supplement instead of post-effective amendment), a description of securities and a list of known selling stockholders, if applicable, and base prospectuses of automatic filers need not have a plan of distribution, description of securities, other than a very minimal description, nor an allocation of primary or secondary securities (or selling stockholders).

Additional changes to the registration process for unseasoned issuers and non-reporting issuers:

The new rules expand situations where issuers may incorporate by reference from their historical

Exchange Act reports (for example, eligible issuers may incorporate by reference from their Exchange Act reports onto Forms S-1 and F-1 if their Exchange Act reports and other documents are current and made readily accessible on their websites) and eliminate the now-superfluous Forms S-2 and F-2.

Delivery of Information to Investors: Access to electronic documents.

- **Access equals delivery:** A prospectus is deemed to precede or accompany a security for sale as long as a final prospectus has been filed with the SEC as part of the registration statement (via EDGAR), or if the issuer makes a good faith and reasonable effort to file the prospectus within the Rule 424 time frame and files it as soon as practicable thereafter. Issuers will no longer need to deliver paper copies of prospectuses to investors in order to satisfy their Securities Act prospectus delivery obligations. In lieu of a prospectus, a notice may be sent to each purchaser, and the purchaser must be given the opportunity to request a final prospectus. Also, dealers can rely on the access equals delivery rule with respect to after market delivery obligations, other than for blank check companies. Furthermore, confirmations and notices of allocations could be sent (by email) after the effectiveness of a registration statement without being accompanied or preceded by a final prospectus.
- The "access equals delivery" rule does not apply to the preliminary prospectus delivery obligations in an initial offering.
- In the free writing prospectus context, with respect to the obligation to deliver a statutory prospectus, access will equal delivery for **seasoned issuers**, but **non-seasoned issuers** will still be required to deliver (or provide a hyperlink for) a statutory prospectus with or before the delivery of a free writing prospectus.

Additional Exchange Act disclosure proposals

Additional Exchange Act disclosure final rules include the following:

- extending risk factor disclosure to Exchange Act filings, including annual reports and updates, if necessary, in quarterly filings; and
- requiring all accelerated filers to disclose in their annual reports SEC comments made in connection with their review of an issuer's Exchange Act reports that the issuer believes are material that were issued more than 180 days before the end of the fiscal year covered by the annual report, and which remain unresolved as of the date of the annual report.

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Issuers who are, or were, in bankruptcy, blank check companies, penny stock issuers or shell companies, among certain other issuers, will not be eligible to take advantage of the flexibility provided by the new rules in communications, offering, and delivery as described above. Additionally, the new rules generally do not apply to business combination transactions, registered investment companies or business development companies. The SEC release also separately describes how the rules outlined above will apply specifically to issuers of asset-backed securities.

Should you have any questions about the matters addressed in this Alert,
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