SECURITIES PUBLIC OFFERING REFORM

In its July 19, 2005 release, the Securities and Exchange Commission ("SEC") announced the adoption of significant modifications to the registration and public offering process under the Securities Act of 1933. The new regulatory framework involves the adoption of several new rules and the modification of many others. To a large degree, these rules (the "final rules") are consistent with the rule proposals that the SEC announced in its November 2004 release. The final rules, which become effective on December 1, 2005, relate to three main areas of the securities offering process, namely:

- communications related to registered securities offerings;
- registration and other procedures in the offering and capital formation processes; and
- delivery of information to investors, including delivery through access and notice, and timeliness of that delivery.

The summary that follows highlights the key reforms that the final rules make to the registered offering process.

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CATEGORIES OF ISSUERS

The final rules modify the framework for communications in connection with public offerings for all issuers and the framework of the registration process for most issuers that report under the Exchange Act. For purposes of applying the offering reforms, the final rules divide issuers into the following categories based on issuer type, reporting history, and equity market capitalization or historical debt issuance:

- **Well-Known Seasoned Issuer ("WKSI")** is defined as an issuer that is required to file reports pursuant to Section 13(a) and Section 15(d) of the Exchange Act and that satisfies the following requirements as of the date on which its status as a WKSI is determined:
  
  (a) the issuer must meet the registrant requirements of Form S-3 or Form F-3;
  
  (b) the issuer either:

  (i) as of a date within 60 days of its eligibility determination date must have an outstanding minimum $700 million in worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates; or

  (ii) as of a date within 60 days of its eligibility determination date, must have issued in the last three years, at least $1 billion aggregate principal amount of non-convertible securities other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act; and

  (c) the issuer must not be an Ineligible Issuer.

In certain circumstances, a majority-owned subsidiary of a WKSI will be a WKSI in connection with the offer and sale of its own securities.

- **Seasoned Issuer** is an issuer that is eligible to use Form S-3 and Form F-3 to register primary offerings of securities. Issuers of asset-backed securities eligible for registration on Form S-3 also are deemed Seasoned Issuers.\(^3\)

- **Unseasoned Issuer** is an issuer that is required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities.

\(^3\) Asset-backed issuers offering securities on Form S-1 are treated as non-reporting issuers.
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- **Non-Reporting Issuer** is an issuer that is not required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act, regardless of whether it is filing such reports voluntarily.

- **Ineligible Issuer** includes the following types of issuers:
  
  (a) reporting issuers, including asset-backed issuers, who are not current in their Exchange Act reports and other materials required to be filed during the prior twelve months;
  
  (b) any issuer who is a limited partnership offering and selling its securities other than through a firm commitment underwriting;
  
  (c) any issuer that has been in bankruptcy during the prior three years;
  
  (d) any issuer that has been subject to refusal or stop orders during the past three years or are the subject of a pending proceeding under Securities Act Sections 8 or 8A;
  
  (e) any issuer, or any issuer whose subsidiary at the time it was a subsidiary of the issuer, that has been convicted of any felony or misdemeanor in connection with violations of certain provisions of the Exchange Act or violated the anti-fraud provisions of the federal securities laws; and
  
  (f) any issuer who is or during the prior three years was or any of their predecessors were (i) blank check companies, (ii) shell companies, or (iii) issuers for an offering of penny stock.

The SEC adopted the most extensive modifications of the communications and the registration process as related to WKSIs in recognition of the fact that communications of WKSIs are subject to intense scrutiny by investors, the financial press, analysts and others who evaluate disclosure when it is made. Consequently, WKSIs will enjoy the greatest benefits under the final rules in these two areas.

**COMMUNICATIONS RULES**

A. **Introduction and Overview**

The SEC substantially reformed the “gun-jumping” provisions of the Securities Act to allow investors and the market to benefit from the significant advances in communications technology in recent years. Today, when modern technology provides a powerful, versatile and cost-effective medium for distributing information quickly and broadly within the capital markets, the gun-jumping provisions impose substantial and increasingly unworkable restrictions on many communications that would be beneficial to investors and markets and would be consistent with investor protection.

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4 The determination of Ineligible Issuer status will be made as of the date of the commencement of the offering, even if the offering commenced before December 1, 2005.
The existing gun-jumping rules base restrictions on communications on the timing of the communication without regard to the accuracy of the information contained in the communication. All offers, regardless of form, have been prohibited before the registration statement is filed. Offers made in writing, by radio or by television between the filing of the registration statement and its effectiveness have been limited to a “statutory prospectus” that conforms to the information requirements of Section 10 of the Securities Act. Thus, the only written form of communication related to the offering that has been permitted between filing the registration statement and its effectiveness has been a preliminary prospectus that complies with Section 10 of the Securities Act and must be filed with the SEC. Offering participants have been permitted to use additional offering materials after the registration statement becomes effective provided the materials are accompanied or preceded by a final prospectus that meets the requirements of Section 10(a) of the Securities Act.

The final rules amend the existing gun-jumping rules in four principal areas of communications by:

- creating safe harbors that permit ongoing communication during an offering period of “regularly released” factual business information by both reporting and non-reporting companies and the dissemination of forward-looking information by reporting companies;
- creating a bright-line rule that permits issuer communications until 30 days prior to the filing of a registration statement;
- reducing the restrictions on written offering-related communications by expanding the information permitted to be communicated under Rule 134 (the “Tombstone Rule”) and permitting the use of free writing prospectuses in connection with a registered offering; and
- expanding the circumstances in which offering participants and persons who are not offering participants will have safe harbor exemptions for dissemination of research reports during a registered offering.

The final rules also define written and graphic communication for purposes of clarifying the meanings of these terms in light of the advances in technology since the terms were defined in the Securities Act. The final rules broadly define all communication, other than oral communication, as written communications for purposes of the Securities Act. Written communication is defined as any communication that is written, printed, a television or radio broadcast, or a graphic communication. A graphic communication is any form of electronic media, and includes audiotapes, videotapes, faxes, CD-ROM, electronic mail, Internet websites, and computers, computer networks, and other forms of computer data compilation. It follows that all electronic communications, except telephone and other live, in real-time communications to a live audience, fall under the definition of graphic communications and therefore, also the definition of written communications for purposes of the Securities Act.

Subsequent to the adoption of the final rules the SEC staff clarified that an issuer’s ability to rely on the new communication rules depends on the date the communication first occurs, rather than the time of the
commencement of the offering. Accordingly, if an offering commences before December 1, 2005, but the communication occurs on or after that date, the issuer may rely on the final rules.

B. Permitted Continuation of Ongoing Communications during an Offering

1. Reporting Issuers - Dissemination of Regularly Released and Forward Looking Information.

Rule 168 creates a safe harbor for reporting issuers, asset-backed issuers, and certain non-reporting foreign private issuers from the gun-jumping provisions for continued dissemination of communications of regularly released factual business and forward-looking information. The rule provides that such communication is not an impermissible prospectus and therefore, the prohibition in Section 5(b)(1) of the Securities Act regarding the use of a prospectus that is not a statutory prospectus is not applicable.

Three conditions must be satisfied to qualify for the safe harbor exemption: (1) the communication must be “by or on behalf of the issuer,” meaning that the issuer, an agent or a representative of the issuer, other than an offering participant who is an underwriter or dealer, must authorize the release of the communication before it is made; (2) the information must be “regularly released;” and (3) the information cannot be related to the registered offering itself.6


Rule 169 creates a similar safe harbor for Non-Reporting Issuers, including voluntary filers, which allows an issuer to disseminate regularly released, ordinary course factual business information intended for use by persons other than in their capacity as investors or potential investors. The same three conditions required for the Rule 168 safe harbor apply to the Rule 169 safe harbor. One noteworthy distinction between the two safe harbors is that Rule 169 does not permit Non-Reporting Issuers to release forward-looking information.

C. Other Permitted Communications Prior to Filing a Registration Statement

1. 30-Day Bright-Line Exclusion.

Rule 163A is a bright-line rule that permits issuer communications more than 30 days prior to filing a registration statement. Communications made during this period are excluded from the definition of “offer” for purposes of Section 5(c) of the Securities Act, and therefore, issuers may communicate without risk of violating the gun-jumping provisions. The applicability of the exclusion is subject to the following conditions:

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6 Because the safe harbor is a “use” exemption, this exclusion also applies to the distribution of information contained in an Exchange Act report as part of offering activities, such as incorporation by reference into a prospectus that is part of a registration statement, disclosure at a road show, or disclosure in a free writing prospectus.
(1) the communication cannot reference a securities offering that is or will be the subject of a registration statement; (2) the communication must be made “by or on behalf of the issuer;” and (3) the issuer must take reasonable steps to prevent further distribution or publication of the communication during the 30-day period immediately before the issuer files the registration statement.

The safe harbor is not available for certain categories of offerings and issuers. Specifically, Rule 163A does not apply to communications made in connection with offerings by blank check companies, shell companies or offerings of penny stock by an issuer. The rule also is not available for communications regarding business combination transactions or offerings made by a registered investment company or business development company.

2. **Permitted Pre-Filing Offers for Well-Known Seasoned Issuers.**

Rule 163 permits WKSIs to engage in unrestricted oral and written offers before a registration statement is filed, including within the 30-day period prior to filing the registration statement, without violating the gun-jumping provisions. These communications, however, are considered offers and subject to liability standards applicable to such offers, as well as Regulation FD. The communication must be “by or on behalf of the issuer” to qualify for the exemption, with underwriters and dealers explicitly excluded from being considered agents or representatives of an issuer. A written offer that is exempt under Rule 163 will be considered a “free writing prospectus” and must include a legend and be filed by the WKSI when and if the registration statement is filed.

D. **Relaxation of Restrictions on Written Offering-Related Communications**

The final rules expand the amount and types of permitted written offering-related communications that may be made by offering participants under the gun-jumping provisions after a registration statement is filed. The most notable expansions relate to the communications permitted under Rule 134 of the Securities Act and the use of free writing prospectuses in connection with a registered offering.

1. **Rule 134.**

As expanded under the final rules, Rule 134 now:

- permits increased information about an issuer and its business, including issuer contact information;
- permits more information about the terms of the securities being offered;
- expands the scope of permissible factual information about the offering itself, including underwriting information, details about 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;
allows more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;
• allows more factual information regarding procedures for directed share plans and other participation in offerings by officers, directors and employees;
• permits the correction of inaccuracies in permissible information previously disclosed pursuant to the Rule; and
• expands the disclosure permitted regarding credit ratings to include the security rating that is reasonably expected to be assigned.

The final rules do not go so far as to permit issuers to use the Rule 134 notice to describe in detail the securities being offered; however, such descriptions may be permitted in the form of a free writing prospectus, which is explained below.

2. Free Writing Prospectuses.

The final rules introduce the concept of a free writing prospectus, which is an offer to sell or a solicitation of an offer to buy registered securities that does not satisfy the requirements of a “statutory prospectus” under Section 10(a) of the Securities Act. The free writing prospectus can take any form and is not required to meet the informational requirements otherwise applicable to prospectuses. A free writing prospectus will not be filed as part of a registration statement, but it will be considered related to a registered public offering of securities and therefore, is subject to liability under Section 11 of the Securities Act. Communications that would not be considered offers, such as Rule 134 notices, Rule 135 communications, and factual and forward-looking information falling under the new safe harbors, do not qualify as free writing prospectuses.

a. Permissible Use. Whether the use of a free writing prospectus is permitted depends upon the nature of the issuer and the offering. Generally, eligibility is determined at the time of commencement of the offering. Issuers that fall under subsections (a) through (e) of the definition of “Ineligible Issuer” set forth above under “Categories of Issuers,” may use free writing prospectuses, but they may contain only descriptions of the securities and the terms of the offering. Ineligible Issuers that fall under subsection (f) may not use free writing prospectuses. The free writing prospectus can be used by a WKSI at any time subject to certain conditions and by any other eligible issuer or offering participant after a registration statement has been filed.6

b. Conditions of Use. Use of a free writing prospectus is permitted only if the conditions set forth in Rule 433 are met. These conditions relate to (i) delivery or availability of the statutory prospectus

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6 An offering participant includes affiliates, underwriters, dealers and others acting on behalf of the parties to the transaction.
at the time the free writing is used; (ii) the contents of the free writing prospectus; (iii) the legend that is to be included in the free writing prospectus; (iv) filing of the free writing prospectus; and (v) record retention for the free writing prospectus.

(i) Delivery or Availability of Statutory Prospectus. Delivery of a preliminary prospectus is not required when a WKSI or a Seasoned Issuer uses a free writing prospectus after filing a registration statement, as long as the registration statement contains a qualifying preliminary prospectus or a qualifying base prospectus in the case of a shelf registration statement.

Non-reporting and Unseasoned Issuers may use free writing prospectuses after filing a registration statement, but generally, a preliminary prospectus must accompany or precede the free writing prospectus. The preceding or accompanying prospectus need not be delivered by the same means as the free writing prospectus so long as it is delivered at the required time. Once the statutory prospectus is delivered, additional free writing prospectuses may be provided to the investor without delivery of a statutory prospectus provided no material changes have been made to the statutory prospectus since it was delivered to the investor.

(ii) Contents of the Free Writing Prospectus. Rule 433 permits the information contained in the free writing prospectus to exceed that contained in the prospectus included in the registration statement. However, the information in the free writing prospectus must not conflict with the registration statement, including Exchange Act reports incorporated by reference into the registration statement. The only content required in a free writing prospectus is the legend discussed below. Nevertheless, under Section 12(a)(2) of the Securities Act and the anti-fraud provisions of the federal securities laws, liability will attach for material misstatements and material omissions in the free writing prospectus.

(iii) Legend. Under Rule 433 a free writing prospectus must contain a legend that:

- states where a prospectus is available for the offering;
- recommends that potential investors read the prospectus, including Exchange Act reports incorporated by reference;
- advises investors that they can obtain the registration statement including the prospectus and any incorporated Exchange Act reports for free through the SEC’s web site, and that they may request the prospectus from the issuer or any underwriter or dealer by calling a toll-free number; and
- states that the free writing prospectus relates to a registered public offering.

If a user unintentionally omits or makes an immaterial error in the legend in a free writing prospectus, the omission or error may be cured as long as good faith and reasonable effort is made to comply with the condition and the amendment is made as soon as practicable after discovery of the omission or error.
The SEC has identified the following information as examples of impermissible legends or disclaimers, the inclusion of which will cause the materials to be deemed impermissible free writing prospectuses or not to be effective as to any purchaser for liability purposes:

- disclaimers regarding accuracy or completeness or reliance on investors;
- statements requiring investors to read or acknowledge that they have read or understand the registration statement or any disclaimers or legends;
- language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy; and
- for information that must be filed with the SEC, statements that the information is confidential.

(iv) **Filing.** Use of a free writing prospectus is conditioned upon the issuer filing that prospectus or the information contained therein in the following circumstances:7

- where the free writing prospectus is prepared by or on behalf of, or used or referred to by, the issuer;
- where the free writing prospectus is prepared by or on behalf of an offering participant other than the issuer and that contains material information about the issuer or its securities that has been provided by or on behalf of an issuer (“issuer information”) that is not already included in the prospectus or a filed free writing prospectus; and
- where a free writing prospectus or portion thereof prepared by or on behalf of the issuer or other offering participant comprises a description of the final terms of the issuer’s securities.

Additionally, where a free writing prospectus, which is prepared by an offering participant other than the issuer, is distributed by or on behalf of such offering participant in a manner reasonably designed to lead to its broad unrestricted dissemination, the offering participant must file the free writing prospectus.

Asset-backed issuers may rely on Rule 164 of the final rules with respect to their use of written offering materials, in addition to the special rules that the SEC adopted for asset-backed issuers in December 2004.

(v) **Record Retention.** The use of a free writing prospectus is conditioned upon issuers and offering participants retaining for three years any free writing prospectuses they have used from the date of the initial bona fide offering of the securities in question that have not been filed with the SEC.

   c. **Road Shows.** In the past, issuers have relied upon a series of no-action letters issued by the SEC’s Division of Corporation of Finance with respect to their use of electronic road shows. The SEC is

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7 Rule 134 notices and Rule 135 notices are not considered free writing prospectuses under Rule 433 and therefore, are not subject to these conditions.
withdrawing those no-action letters, effective as of the effective date of Rule 433, in light of the final rules. An electronic communication that originates live, in real-time to a live audience and does not originate in recorded form is not a “graphic communication” or “written communication” under the final rules and therefore, is not a free writing prospectus. All other types of electronic road shows are considered free writing prospectuses and subject to the free writing prospectus rules discussed above, except that the filing conditions of Rule 433 generally do not apply. However, the filing conditions do apply if the issuer is not required to file reports under Section 13 or Section 15(d) of the Exchange Act at the time of filing the registration statement and is registering an offering of common equity or convertible equity securities, unless the issuer makes at least one version of a bona fide electronic road show for the offering readily available electronically to any potential investor.

d. Treatment of Communications on Web Sites and Other Electronics Issues. The final rules adopt Rule 433(e), which makes clear that an offer of an issuer’s securities contained on an issuer’s web site or on a third party web site hyperlinked from the issuer’s web site is considered a written offer of such securities made by the issuer and, unless otherwise exempt, is a free writing prospectus to which the requirements of Rule 433 apply.

Historical information contained on the issuer’s web site will not be considered a current offer of the issuer’s securities, and therefore, will not be a free writing prospectus if the information is (i) separately identified as such and (ii) located in a separate section of the issuer’s web site containing historical information. The historical information will become a current offer only if it is (i) incorporated by reference into or otherwise included in a prospectus of the issuer for the offering or (ii) otherwise used or referred to in connection with the offering.

e. Media Publications or Broadcasts. The treatment of a media publication as an offer, and therefore as a free writing prospectus depends on who prepares or approves the publication or broadcast. Media coverage constitutes a free writing prospectus and is subject to Rules 164 and 433 if the issuer or other offering participant prepares, pays for or gives consideration for the preparation, publication or dissemination of the article or other media coverage or uses or refers to the article or media coverage.

A statutory prospectus need not precede or accompany a media communication that constitutes a free writing prospectus when such communication is prepared and published or broadcast by media, who are unaffiliated with the issuer and other offering participants, and the preparation, publication or broadcast is not paid for by the issuer or other offering participants. However, the issuer must file the free writing prospectus with the SEC within four business days after the issuer or offering participant becomes aware of its publication or broadcast.

3. Regulation FD.
The SEC found it necessary to amend Regulation FD in light of changes adopted in the final rules regarding communications during a registered offering. Regulation FD no longer will apply to disclosures made in the following communications in connection with an offering that is of the type excluded from the Regulation:

- a registration statement filed under the Securities Act, including any 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 clause (a) of Section 2(a)(10) of the Securities Act;
- any other Section 10(b) prospectus;
- a notice permitted by Securities Act Rule 135;
- a communication permitted by Securities Act Rule 134; or
- an oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the Securities Act.

An additional amendment to Regulation FD clarifies that the Regulation does not apply to disclosures made in connection with a registered shelf offering by selling security holders if the offering includes a registered primary offering for the account of the issuer.

E. Research Reports

The final rules adopt measured amendments that make incremental changes to Rules 137, 138 and 139 under the Securities Act, which describe circumstances in which a broker or dealer may publish research constituting an offer around the time of a registered offering without violating Section 5 of the Securities Act. The amendments to these rules expand the circumstances in which offering participants and persons who are not offering participants will have safe harbor exemptions for dissemination of research reports during the offering. In addition, the final rules define research report.

1. Definition.

Research report is defined under the final rules as a written communication that includes information, opinions, or recommendations with respect to the securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

2. Rule 137.
Currently under Rule 137, a broker or dealer that is not an offering participant in a registered offering but publishes or distributes research reports with respect to an issuer’s securities is not considered to be engaged in a distribution of the issuer’s securities, and thus, is not an underwriter of the offering. The final rules expand this exemption to apply to the securities of any issuer, including Non-Reporting Issuers other than blank check companies, shell companies and penny stock issuers.

3. **Rule 138.**

Rule 138 permits a broker or dealer participating in a distribution of an issuer’s common stock and similar securities to publish or distribute research that is confined to that issuer’s fixed income securities, and vice versa, if it publishes or distributes that research in the regular course of business. The final rules expand the scope of Rule 138 by permitting the publication or distribution of research reports by all reporting issuers that are current in their periodic Exchange Act reports, not just issuers who are Form S-3 or Form F-3 eligible, as the Rule currently provides. In addition, the final rules expand Rule 138 to cover larger non-reporting foreign private issuers provided the broker or dealer has a history of publishing research reports about the particular issuer or its securities.

4. **Rule 139.**

Rule 139 currently permits a broker or dealer participating in a distribution of securities by a Seasoned Issuer or by certain non-reporting foreign private issuers to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed with reasonable regularity in the ordinary course of business. Rule 139 also provides a safe harbor for industry reports covering smaller Seasoned Issuers if the broker or dealer complies with certain restrictions.

a. **Issuer-Specific Reports.** The final rules amend Rule 139 to permit reports on specific issuers that are current on their Exchange Act reports and:

- are eligible to register a primary offering of securities on Form S-3 or Form F-3 based on the $75 million minimum public float eligibility provision of those forms; or
- whose registration statement covers an offering of non-convertible, investment-grade securities.

Rule 139, as amended, no longer requires that the research be published with reasonable regularity; however, the broker or dealer must have distributed or published at least one research report about the issuer or its securities.
b. **Industry-Related Reports.** The amendments remove the prohibition on brokers and dealers from making a more favorable recommendation than the one it made in the last publication.\(^8\) Additionally, research reports need not contain any prior recommendations regarding the issuer or its securities, but they must contain similar types of information about the issuer or its securities as contained in prior reports.

5. **Regulation S and Rule 144A Offerings.**

The final rules adopt amendments that provide that research reports meeting the conditions of Rule 138 and Rule 139 are not considered offers, general solicitation or general advertising in connection with offerings relying on Rule 144A. Furthermore, the research reports will not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.

6. **Proxy Solicitation.**

The final rules adopt Rule 14a-2(b)(5), which provides that distribution of research in accordance with Rule 138 and Rule 139 is a solicitation to which Rules 14a-3 through 14a-15 (except Rule 14a-9) do not apply.

**LIABILITY ISSUES**

The final rules adopt Rule 159, which codifies the SEC’s interpretation of liability under Sections 12(a)(2) and 17(a)(2) of the Securities Act with respect to information conveyed at or before the time of sale. The SEC interprets these Sections to mean that for purposes of assessing whether at the time of sale (including a contract for sale) a prospectus or oral communication or statement includes or represents a material misstatement or omits to state a material fact necessary in order to make the prospectus, oral communication, or statement, in light of the circumstances under which it was made, not misleading, information conveyed to the investor only after the time of sale should not be taken into account. Under this interpretation, when an investment decision is made prior to the availability of a final prospectus, preliminary prospectuses, free-writing prospectuses and other information delivered or otherwise made available to investors prior to the contract of sale are subject to liability under Sections 12(a)(2) and 17(a)(2) for any material misstatements or omissions in disclosures to investors.

A. **Section 12(a)(2) and Section 17(a)(2) Liability**

1. **Rule 412 and Rule 430B.**

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\(^8\) The amendments also eliminate paragraph (c) of Rule 139a, which contains the comparable provision for reports related to asset-backed securities.
Rule 412 (the incorporation by reference rule) was amended to make it consistent with the other changes adopted in the final rules. As amended, it provides that information contained in a document that is part of or incorporated by reference into a registration statement or prospectus that is contained in the registration statement would modify or supersede the information contained in the registrations statement or prospectus that is part of the registration statement itself. Additionally, Rule 430B, which was adopted in the final rules, provides that subsequently provided information deemed part of and included in or incorporated by reference into a registration statement or prospectus that is part of the registration statement would not modify or supersede any information conveyed to an investor at an earlier time of sale for purposes of Section 12(a)(2) and Section 17(a)(2) liability.

a. **Section 11 Liability**. Prospectus supplements are considered part of the registration statement for purposes of Section 11 liability under the final rules, and each filing of a prospectus supplement will establish a new registration statement effective date. Under Rule 159, information that is considered part of the registration statement as of the time of the contract of sale for shelf takedowns or as of effectiveness under Rule 430A of the Securities Act will not be taken into account under Sections 12(a)(2) or 17(a)(2) unless the information is conveyed to an investor at or before the time of sale. Similarly, an investor’s rights under Section 11 will not be affected by information conveyed to an investor at or before the time of the contract or sale that is not included in or incorporated by reference into the registration statement at the time of effectiveness of the registration statement.

**B. Issuer as Seller**

The final rules adopt Rule 159A to clarify uncertainty created by recent case law regarding an issuer’s liability under Section 12(a)(2). The rule provides that an issuer in a primary offering of securities, regardless of the underwriting arrangement, is a seller and will be considered as offering or selling the securities to a purchaser in the initial distribution of the securities when certain communications are made by or on behalf of the issuer. Rule 159A does not apply to purchasers of the issuer’s securities in the aftermarket. Furthermore, under Rule 159A an underwriter or dealer participating in an offering is not acting on behalf of the issuer solely by virtue of that participation.

**SECURITIES ACT REGISTRATION RULES AND AMENDMENTS**

The new rules and amendments adopted in the final rules attempt to modernize many procedural aspects of securities offerings registered under the Securities Act. The final rules (i) create a more flexible automatic registration process for WKSIs, (ii) clarify and expand how and when information can be included in a registration statement, (iii) clarify the Securities Act liability treatment of information provided in a prospectus supplement and Exchange Act reports incorporated by reference, (iv) modify the timing of effectiveness of shelf registration statements applicable to issuers in certain cases, and (v) address non-shelf offerings of securities.
A. Procedural Rules

1. Procedural Changes to Shelf Offering Rules.

   a. Information in a Prospectus. The final rules adopt new Rule 430B, which is a shelf offering corollary to existing Rule 430A, in that it describes the type of information that primary shelf eligible and automatic shelf issuers may omit from a base prospectus in a Rule 415 offering and include instead in a prospectus supplement, Exchange Act report incorporated by reference, or a post-effective amendment.9 Prospectus supplements are considered part of and included in the registration statement for purposes of Rule 430B. In addition, the final rules adopt Rule 430C, which addresses the treatment of prospectuses and prospectus supplements for all registered offerings not covered by Rule 430B and prospectuses not covered by Rule 430A.

   The final rules adopt amendments to Form S-3 and Form F-3 to permit all information required in the prospectus about the issuer and its securities to be incorporated by reference from Exchange Act reports or included in the prospectus or prospectus supplement. The prospectus supplement must be prepared and filed in accordance with Rule 424 if omitted information about an offering is included in an Exchange Act report incorporated by reference.

   The final rules allow issuers eligible to use Form S-3 or Form F-3 for primary offerings to identify selling security holders and the amounts of securities to be registered on behalf of each of them after effectiveness, which the SEC hopes will alleviate the timing concerns that arise from an issuer’s inability to identify selling security holders prior to effectiveness. Eligible Seasoned Issuers may add the identities of the selling security holders and all information about them, as required by Regulation S-K, to the registration statement after effectiveness by a post-effective amendment, a prospectus supplement or incorporation by reference to an Exchange Act report if the following conditions are satisfied:

   • the registration statement is an automatic shelf registration statement; or
   • all of the following apply:
     1. the resale registration statement identifies the initial offering transaction pursuant to which the securities were sold;
     2. the initial offering is completed; and
     3. the securities were issued and outstanding prior to initial filing of the resale registration statement.

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9 Issuers with a resale registration statement that became effective prior to December 1, 2005 may rely on Rule 430B and file prospectus supplements pursuant to Rule 424(b) to make material amendments to the plan of distribution or to add or replace selling security holders provided that the prospectus supplement is filed on or after December 1, 2005 and with respect to adding or replacing selling security holders, the other conditions of Rule 430B are satisfied.
It follows that this provision does not apply when the securities are not yet issued in the resale of securities sold in a private offering, even if the investors are contractually bound to acquire the securities. This, however, does not prevent the issuer from registering the resale of the not-yet-issued securities, but the issuer must identify the selling security holders in the registration statement prior to effectiveness.

(i) **Date of Inclusion and New Effective Dates.** The date of inclusion of the information contained in prospectus supplements will be considered part of and included in the registration statement under Rules 430B and 430C as follows:

- with respect to a prospectus supplement filed other than in connection with a takedown of securities, the date of inclusion is when the prospectus supplement is first used;\(^{10}\) and
- with respect to a prospectus supplement filed in connection with a takedown of securities, the date of inclusion is the earlier of the date it is first used or the date and time of the first contract of sale of securities in the offering.

For Section 11 liability purposes only, Rule 430B (but not Rule 430C) triggers a new effective date for registration statements with respect to issuers and current underwriters.\(^ {11}\) This new effective date for a shelf registration statement is the date a prospectus supplement filed in connection with a takedown is deemed part of the registration statement.

(ii) **Amendments to Rule 415.** The final rules eliminate the provision in Rule 415(a)(2) of the Securities Act that limits the amount of securities registered to the amount intended to be offered or sold within two years of the effective date of the registration statement. However, the amendments impose a new three-year time limit from the initial effective date on the use of a shelf registration statement.\(^ {12}\) The issuer may continue to offer and sell securities from the old registration statement for up to 180-days after the three-year time period expires until the new registration statement is declared effective, provided the new registration statement is filed within the three-year period.

A further amendment to Rule 415 adopted under the final rules permits primary offerings on Form S-3 or Form F-3 to occur immediately after effectiveness of the shelf registration statement. Additionally, the final rules eliminate the restrictions on primary “at-the-market” offerings of equity securities currently set forth in Rule 415(a)(4). As amended, issuers no longer need to identify the underwriter in the registration statement, nor must they limit the amount of the offering. A registration statement that becomes effective

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\(^{10}\) The date of first use for purposes of Rule 424 is not the date that the prospectus supplement is given to an investor in connection with a sale, but rather the date that the prospectus is made available to the managing underwriter, syndicate member or any prospective purchaser.

\(^{11}\) The new effective date provision in the final rules does not result in a new effective date with respect to directors, signing officers or experts of the issuers for Section 11 liability purposes.

\(^{12}\) Under Rule 415(a)(5), if the registration statement became effective before December 1, 2005, the three-year period begins to run on December 1, 2005, regardless of the length of time it had been effective as of that date.
prior to December 1, 2005 and does not contain a plan of distribution including “at-the-market” offerings may be amended after December 1, 2005 by a prospectus supplement to provide for “at-the-market” offerings in accordance with the revised provisions of Rule 415(a)(4).

(iii) Amendments to Rule 424. The final rules add paragraph (b)(8) to Rule 424 in conjunction with the other procedural rule amendments to allow the SEC to identify more readily the untimely filing of final prospectuses. The final rules also eliminate in its entirety Rule 434.

(iv) Issuer Undertakings. Conforming amendments also were made to the rules regarding issuer undertakings. Item 512(a) of Regulation S-K was amended to clarify that, in shelf registrations on Form S-3 and Form F-3, all the required disclosures may be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report, rather than only in periodic reports. Consequently, issuers may incorporate Form 8-K (or Form 6-K) to satisfy the undertakings required in Item 512(a).

A new undertaking was created by the final rules that requires an issuer to acknowledge its liability for information that is included in or deemed part of the registration statement and that liability will be assessed as of the date such a prospectus supplement is deemed part of and included in the registration statement.

The new undertakings required by the final rules must be included in all registration statements or first amendments to the registration statements filed on or after December 1, 2005. However, previously filed Exchange Act documents and reports that are incorporated by reference and update a registration statement for purposes of Section 10(a)(3) of the Securities Act are not amendments for purposes of Item 512 of Regulation S-K, and therefore need not be amended to include the new undertakings. Furthermore, an issuer need not take any action to include the new undertakings in a registration statement filed before December 1, 2005, regardless of whether it was effective on that date, unless the issuer files a pre-effective or post-effective amendment on or after December 1, 2005. If, however, an issuer whose registration statement became effective before December 1, 2005, wishes to include the new undertakings, it may do so in one of two ways. The issuer may either (1) file a new registration statement containing the undertakings and use Rule 429 to combine the new registration statement with the prior one or (2) file a post-effective amendment that includes the new undertakings to the effective registration statement.

b. Changes to Form S-3 and Form F-3. The final rules amend Form S-3 and Form F-3 to expand the categories of majority-owned subsidiaries that will be eligible to register their non-convertible securities.

2. Automatic Shelf Registration for Well-Known Seasoned Issuers.

The final rules establish a significantly more flexible version of the shelf registration, referred to as “automatic shelf registration,” for offerings on Form S-3 or Form F-3 by WKSIs. The changes are aimed at
providing issuers with the flexibility to take advantage of market windows, to structure securities on a real-time basis to accommodate issuer needs or investor demand, and to determine or change the plan of distribution of securities as issuers elect in response to changing market conditions.

a. **Eligibility.** A WKSI may use the automatic shelf registration process for all primary and secondary offerings of securities on Form S-3 or Form F-3, with the exception of offerings in connection with a business combination transaction or exchange offer. An issuer’s status as a WKSI is determined as of the initial filing date of the automatic shelf registration. Subsequently, eligibility must be determined at the time of each amendment to its shelf registration statement for purposes of providing its update under Section 10(a)(3) of the Securities Act.

b. **Information in a Registration Statement.** The final rules permit a WKSI using automatic shelf registration to omit more information from the base prospectus than is permitted under the current rules or under new Rule 430B. In addition to the information currently allowed to be omitted pursuant to Rule 409 of the Securities Act, the final rules permit issuers to omit the following:

- 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 security holders; and
- the disclosure regarding any plan of distribution.

Omitted information, such as the public offering price, information regarding the issuer, descriptions of the securities, the identity of underwriters and selling security holders, and the plan of distribution, can be added to the automatic shelf registration statement by post effective amendment, incorporation by reference or a prospectus supplement. In contrast, an issuer may only add new types of securities or new eligible issuers to the registration statement by means of a post-effective amendment, which will be effective immediately upon filing.

Eligible WKSI may register on an automatic shelf registration statement an unspecified amount of securities, without indicating whether the securities are to be sold in a primary or secondary offering. The base prospectus must, however, identify in general terms the names or classes of securities registered. The final rules allow automatic shelf issuers to register classes of securities without allocating the mix of securities registered between the issuer, its eligible subsidiaries, or selling security holders in an effort to provide WKSI with greater flexibility in conducting registered offerings. The final rules also remove the current restriction that would prevent a WKSI from adding classes of securities to an automatic shelf registration after effectiveness.

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13 Certain conditions apply to issuers that are WKSI based solely on their registered non-convertible security issuances.
The final rules permit automatic shelf issuers to pay filing fees at the time of a securities offering (referred to as “pay-as-you-go”) or prior to that time. Under the pay-as-you-go system, an issuer will not have to pay any filing fee upon filing the initial registration statement. Payment of the required fees is triggered upon takedown off a shelf registration statement.

All automatic shelf registration statements and post-effective amendments thereto become immediately effective under the final rules. Furthermore, the final rules amend Rule 401(g) of the Securities Act to provide that an automatic shelf registration will be deemed to be filed on the proper form unless the issuer is notified to the contrary by the SEC.

Similar to the amendment made to Rule 415(a)(2) with respect to non-automatic shelf issuers, the final rules require that a new automatic shelf registration statement be filed every three years. The principal difference in the two provisions is that a new automatic shelf registration statement is immediately effective upon filing provided the issuer maintains its eligibility to use the automatic shelf registration statement.

The SEC staff has clarified that a WKSI who has an effective Form S-3 or Form F-3 as of December 1, 2005 that was not an automatic shelf registration statement when it became effective may not amend the registration statement to become an automatic shelf registration statement under the final rules. However, a continuous offering registered on an effective Form S-3 may be included on a subsequently filed automatic shelf registration under the final rules.14

3. Unseasoned Issuers and Non-Reporting Issuers.

The final rules amend Form S-1 and Form F-1 to permit a reporting issuer that has filed at least one annual report and is current in its reporting obligations under the Exchange Act to incorporate by reference into its Form S-1 or Form F-1 information from its previously filed Exchange Act reports and documents. The availability of this provision is conditioned upon the issuer making its incorporated Exchange Act reports and documents readily accessible on a web site maintained by or for the issuer. Issuers excepted from taking advantage of this rule are blank check issuers, shell companies (other than business combination related shell companies) and issuers for offerings of penny stock.

The final rules set forth specific statements and disclosures that are required in the prospectus in the registration statement at effectiveness, including a statement identifying all previously filed Exchange Act reports and materials that are incorporated by reference.

Finally, the SEC believes that Form S-2 and Form F-2 have become outdated in light of the introduction of EDGAR, other technological developments, and the rapid dissemination of information in the

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14 Eligible continuous offerings include, without limitation, unallocated shelf offerings, dividend reinvestment programs with direct stock purchase plans, and offerings of securities by selling security holders.
market. Furthermore, the expansion of the types of issuers that may incorporate by reference through the amendments made to Form S-1 and Form F-1, makes Form S-2 and Form F-2 superfluous. Accordingly, the final rules rescind Form S-2 and Form F-2.

**PROSPECTUS DELIVERY REFORMS**

**A. Current Prospectus Delivery Requirements**

Currently the Securities Act requires that a final prospectus accompany or precede a written confirmation of sale, and Section 5(b)(2) requires that a final prospectus accompany or precede delivery of a security. If no preliminary prospectus or written offering materials are distributed, the only prospectus received by an investor is the final prospectus, which generally is delivered after investors have already committed to purchase securities. The final rules adopt an “access equals delivery” model to facilitate effective access to information. This model presumes that investors have access to the Internet, and therefore, issuers and intermediaries can satisfy their delivery obligations if the filings or documents are posted on a website.

1. **Access Equals Delivery.**

   The final rules adopt Rule 172, which provides that a final prospectus will be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) of the Securities Act as long as the final prospectus meeting the requirements of Section 10(a) is filed or the issuer will make a good faith and reasonable effort to file it as part of the registration statement within the timeframe required by Rule 424.

   Certain types of offerings are excluded from the application of Rule 172 either because they do not raise the same issues as in corporate capital formation transactions or they are already subject to rules unique to their offerings. Examples of excluded offerings include offerings made pursuant to Form S-8, business combination transactions, and exchange offers. Similarly, registered investment companies and business development companies may not rely on the Rule because such entities are subject to a separate framework governing communications with investors.

   The final rules also adopt Rule 173, which provides that in any transaction involving a sale by an issuer or underwriter to a purchaser and in which the final prospectus delivery requirements apply, each underwriter or dealer participating in the registered offering must provide each purchaser, no later than two business days after completion of the sale, a copy of the final prospectus or a notice providing that the sale was made pursuant to a registration statement. Under the Rule, an investor may request a final prospectus, but delivery of the prospectus does not have to occur before settlement. Compliance with Rule 173 is not a condition to reliance on Rule 172, nor will failure to comply with Rule 173 result in a violation of Section 5 of the Securities Act.
2. **Written Confirmations and Notices of Allocations.**

Paragraph (a) of new Rule 172 creates an exemption from Section 5(b)(1) of the Securities Act, allowing written confirmations and notices of allocations to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus.

3. **Transaction Taking Place on an Exchange or Through a Registered Trading Facility.**

The final rules amend Rule 153 to provide that brokers or dealers effecting transactions on a registered exchange, through a trading facility of a registered national securities association or through a registered alternative trading system will be deemed to satisfy their prospectus delivery obligations under Section 5(b)(2) of the Securities Act if:

- the issuer has filed or will file the final prospectus;
- securities of the same class are trading on that exchange, through a trading facility of a registered national securities association or through a registered alternative trading system;
- the registration statement is effective and not the subject of a stop order; and
- neither the issuer nor any underwriter or participating dealer is the subject of a pending proceeding under Section 8A of the Securities Act.

Physical copies of the prospectus no longer must be sent to the exchange or a market maker, and accordingly, neither exchanges nor market makers need to keep track of any prospectuses.

4. **Aftermarket Prospectus Delivery.**

Amendments to Rule 174 adopted by the final rules permit dealers (other than blank check companies) to rely on Rule 172 to satisfy any aftermarket delivery obligations. As currently is the case, Rule 174 does not apply to underwriters and dealers with regard to any unsold allotment.

**ADDITIONAL EXCHANGE ACT DISCLOSURE PROVISIONS**

**A. Risk Factor Disclosure**

The final rules adopt a new item under Regulation S-K that requires risk factor disclosure in annual reports on Forms 10-K and Exchange Act registration statements on Form 10.¹⁵ The item also requires that the disclosure be updated quarterly to reflect material changes.

¹⁵ This requirement does not apply to asset-backed issuers’ annual reports on Form 10-K, nor does the requirement extend to Form 10-KSB or Form 10-SB.
B. Disclosure of Unresolved Staff Comments

The final rules require that all entities defined as accelerated filers and WKSIs disclose in their annual reports on Form 10-K or Form 20-F, written comments the SEC staff made in connection with a review of Exchange Act reports that (i) the issuer believes are material, (ii) were issued more than 180 days before the end of the fiscal year covered by the annual report, and (iii) remain unresolved as of the date of filing of the Form 10-K or Form 20-F.

C. Disclosure of Status as Voluntary Filer under the Exchange Act

The final rules add a new box to the cover page of Forms 10-K, 10-KSB, and 20-F for an issuer to check if it is filing reports voluntarily.16

D. Timing of Compliance with New Disclosure Requirements

Under the final rules, the new required disclosures on Forms 10-K, 10-KSB, and 20-F apply to issuers with fiscal years ending on or after December 1, 2005. An issuer whose fiscal year end is prior to December 1, 2005, but whose annual report will be filed after December 1, 2005 does not have to comply with the new requirements of the final rules until the issuer is required to file its annual report for 2006. Additionally, an issuer need not include the new risk factor disclosure in Form 10-Q until after the issuer is first required to include risk factor disclosure in its Form 10-K.

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16 The box is for disclosure purposes only and an incorrectly checked box will not affect an issuer’s filing obligations.
The Cozen O’Connor Securities Group

The Cozen O’Connor Securities Practice Group, consisting of 15 lawyers from the firm’s Philadelphia, West Conshohocken, and Washington, D.C. offices, offers expertise in a broad range of securities matters, including transactional, regulatory and compliance matters, litigation in federal and state courts, as well as before administrative agencies, and criminal defense. The Securities Practice Group is involved in all types of public and private equity and debt offerings, structuring M & A transactions, assisting our public clients comply with ongoing securities law obligations, and representing broker-dealers in a full range of regulatory issues. Cozen O’Connor's securities attorneys, several of whom held significant positions at the Securities and Exchange Commission and continue to maintain frequent contact with the SEC, take pride in leading our diverse clientele through the labyrinth of federal and state securities law issues in an efficient and cost-effective manner. The Securities Practice Group works closely with many other practice groups in the firm, including those that concentrate in the areas of corporate, banking, public finance, real estate, and tax law, to provide our clients with integrated solutions to their legal issues.

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