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The SEC Adopts Securities Offering Reform

August 5, 2005

On June 29, 2005, the Securities and Exchange Commission adopted final rules that modify significantly the registration, communications and offering processes under the Securities Act of 1933 (the "*Reforms*").[1] The new rules will take effect on December 1, 2005. The Reforms are primarily designed to:

- liberalize the flow of information from issuers to investors before and during offering periods;
- streamline the Securities Act registration process, especially for large reporting issuers referred to as "well-known seasoned issuers" or "WKSIs";
- implement a new "access equals delivery" model for final prospectuses based upon electronic availability instead of physical delivery; and
- alter, in certain respects, the liability framework under the Securities Act by expressly premising liabilities for material misstatements or omissions solely on the information conveyed to an investor at the time the investor becomes committed to purchase securities, whether orally or in writing.

The Reforms are largely consistent with the SEC's proposals introduced in late 2004.[2]

This memorandum consists of a summary highlighting central aspects of the Reforms, followed by a more detailed and technical discussion of the new rules.

1 *See* SEC Release No. 33-8591 (July 19, 2005) (the "*Adopting Release*").

2 *See* SEC Release No. 33-8501 (November 3, 2004) (the "*Proposing Release*").

SUMMARY

Communications Reforms

To liberalize existing Securities Act restrictions that limit communications around the time of a registered offering, the Reforms will:

- establish a "bright line" test so that issuers can make communications that do not reference a planned securities offering more than 30 days prior to filing a registration statement without risk of violating "gun-jumping" restrictions under the Securities Act;
- create new safe harbors that permit reporting issuers to continue to publish or disseminate regularly released factual business and forward-looking information and permit non-reporting issuers to continue to publish or disseminate factual business information that has been regularly released to persons other than in their capacities as investors or potential investors;
- permit WKSIs to make oral and written offers before a registration statement is filed;
- expand the Securities Act Rule 134 communications safe harbor that is currently available for "tombstone" advertisements and other limited public notices by permitting these communications to include more information about the issuer and the registered offering;
- permit communications constituting written offers, which are called "free writing prospectuses" in the Reforms, to be made in connection with registered offerings in addition to the traditional statutory prospectus; and
- expand the existing safe harbors that permit publication of research around the time of registered offerings.

The Reforms also modify the existing exception in Regulation FD for information disclosed in connection with registered securities offerings.

Securities Act Registration Process Reforms

The Reforms will streamline the current Securities Act registration process in certain significant respects. Among other things, the Reforms will allow WKSIs to file "automatic shelf registration statements" that become effective immediately upon filing. These registration statements will not be subject to review and comment by the SEC staff prior to effectiveness. A WKSI will not be required to specify in the initial registration statement the amount of securities to be offered, the allocation of the registered securities between securities to be offered on a primary and secondary basis, the identity of selling securityholders or the plan of distribution. In addition, a WKSI will be permitted to pay the requisite SEC filing fees on a "pay-as-you-go" basis.

The Reforms will also:

- clarify and expand the information that may be omitted from the base prospectus included in a shelf registration statement;

- modify the manner by which information may be included in a shelf registration statement and establish additional dates – closer to the time of a takedown – upon which a shelf registration statement will be deemed, for issuer and underwriter liability purposes, to become effective;

- remove current limitations on the amount of certain primary securities that may be registered on a shelf registration statement;

- permit takedowns from a shelf registration statement immediately following effectiveness, thereby eliminating the "convenience shelf" issue;

- eliminate existing limitations on using a shelf registration statement for primary "at-the-market" offerings of equity securities;

- expand the use of Forms S-3 and F-3 to allow registration by majority-owned subsidiaries of guarantees of non-convertible debt securities issued by their parents or by other majority-owned subsidiaries of their parents; and

- allow limited, "backward-looking," incorporation by reference into Forms S-1 and F-1 and eliminate Forms S-2 and F-2.

Prospectus Delivery Reforms

The Reforms will implement a new "access equals delivery" model for final prospectuses. The final prospectus delivery obligations of issuers, brokers and dealers will generally be satisfied by the filing of the final prospectus with the SEC, rather than by delivery of copies to investors, so long as investors are sent a notice (which could be part of a written confirmation of sale) informing them that sales were made pursuant to a registration statement or in a transaction otherwise subject to the prospectus delivery requirements.

Exchange Act Disclosure Reforms

The Reforms will require issuers, other than asset-backed issuers, to include "risk factor" disclosure, where appropriate, in their annual reports on Form 10-K filed under the Securities Exchange Act of 1934[3] and, in the case of companies reporting on Form 10-Q, to reflect in their quarterly reports on Form 10-Q any material changes from the risks disclosed in prior annual or quarterly reports.

The Reforms will also require "accelerated filers" [4] and WKSIs (*i.e.*, most Form S-3 or F-3-eligible issuers) to disclose in their annual reports on Form 10-K or 20-F the substance of any unresolved written comments regarding their periodic filings under the Exchange Act received from the SEC

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[3] Annual reports filed on Form 20-F are already required to include risk factor disclosure.

[4] An "accelerated filer" is a reporting company that, as of the end of its fiscal year has (1) an aggregate market value of voting and non-voting common equity held by non-affiliates of at least $75 million (computed as of the last business day of the company's most recently completed second fiscal quarter), (2) been a reporting company for at least 12 months and (3) previously filed at least one annual report.

staff more than 180 days before the end of their fiscal year if the issuer believes such unresolved comments are material.

Liability Issues under the Reforms

The Reforms codify in new Securities Act Rule 159 the SEC's interpretation, which was presented in the Proposing Release, that the liability provisions of Section 12(a)(2) and Section 17(a)(2) of the Securities Act require that information be conveyed to an investor prior to or at the time of the contract of sale, including a commitment pursuant to an oral contract, in order to be taken into account for purposes of assessing whether the information available to the investor includes or represents a material misstatement or omission. Under this interpretation, information conveyed to an investor only after the time of sale is to be disregarded in determining liability unless a new contract of sale is established after the investor is conveyed the additional information. Accordingly, previously undisclosed information in the final prospectus that corrects a material misstatement or omission in the preliminary prospectus will not be taken into account for purposes of liability under Section 12(a)(2) and Section 17(a)(2) if an investor has become committed to purchase the securities prior to the time the information is conveyed to the investor.

Under the Reforms, a seller and a purchaser may by agreement terminate a prior sale contract and enter into a new sale contract for the offered securities on the basis of new information, in which case the time of the contract of sale with that purchaser will be the time of the new contract of sale. The SEC emphasizes in the Adopting Release that any such termination must provide the purchaser with adequate disclosure of the contractual arrangement, the purchaser's rights under the existing contract at the time termination is sought and the new information the seller seeks to convey, and with the meaningful ability to elect to terminate or not terminate the prior contract and to enter or not enter into the new contract. Whether the investor is given such adequate disclosure and the meaningful ability to elect whether or not to terminate the prior contract will depend on the particular facts and circumstances. However, the SEC notes in the Adopting Release that contractual provisions deeming information to have been communicated to an investor or a non-conditional contract that moves the time of sale forward to a different time would violate the anti-waiver provisions of the federal securities laws.

Rule 159 may increase pressure on offering participants to finalize documents earlier in the offering process (and possibly increase the use of preliminary prospectus supplements in shelf takedowns) to avoid situations where the final prospectus contains material information not included in the preliminary prospectus. We expect that a practice will develop among issuers and other offering participants to address the application of Rule 159 to complex transactions where significant information regarding an offering is not known prior to pricing.

The Reforms relating to the registration process address the means by which issuers may include information in a shelf registration statement. In particular, the Reforms provide that a prospectus supplement filed in connection with a shelf takedown will be deemed to be part of, and included in, the shelf registration statement and that a new effective date for the shelf registration statement for Section 11 liability purposes for issuers and underwriters will be established at the time of each such takedown. Accordingly, in a shelf takedown context, Section 11 liability for the issuer and for any person that is at that time an underwriter will attach to the registration statement as of the time of filing the final prospectus supplement. For other persons, including directors, signing officers and

experts, the Reforms will not alter the dates at which Section 11 liability attaches. Section 11 liability is separate from, and in addition to, any liability under Section 12(a)(2) and Section 17(a)(2), which will be determined based on the disclosure available to the investor at the time of the contract of sale, which may occur prior to the availability of the final prospectus supplement.

KEY DEFINED TERMS USED IN THE REFORMS

The Reforms introduce a number of new terms and concepts:

"Well-Known Seasoned Issuer"

The Reforms divide issuers into four categories for purposes of the communications and registration process changes. The greatest beneficiaries of the Reforms will be companies that qualify as WKSIs. Among other privileges, WKSIs will be permitted to use automatic shelf registration to register securities offerings in contexts other than business combinations and exchange offers.

A WKSI is an issuer that is required to file reports pursuant to Section 13(a) or 15(d) of the Exchange Act and satisfies the following requirements:

- satisfies the registrant requirements of Form S-3 or Form F-3, which include being current and timely in all Exchange Act reporting requirements for the preceding 12 calendar months;
- as of a date within 60 days of the eligibility determination, **either** (1) has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of $700 million or more **or** (2) has 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,[5] registered under the Securities Act; and
- is not an "ineligible issuer" (described below).

The determination of whether an issuer qualifies as a WKSI will be made as of the later of the time of filing of the issuer's most recent shelf registration statement or the time of its most recent amendment to update the information contained in a shelf registration statement. If no such statement or amendment has been filed within the preceding sixteen months, the eligibility determination will be made as of the time of filing of the issuer's most recent annual report on Form 10-K or Form 20-F. In addition, a majority-owned subsidiary of a WKSI will be considered to be a WKSI in respect of offerings of (1) non-convertible securities, other than common equity, guaranteed by its WKSI parent; (2) guarantees of non-convertible securities, other than common equity, of its WKSI parent or another majority-owned subsidiary where the securities are guaranteed by the WKSI parent; and (3) non-convertible investment grade securities of such subsidiary. An issuer that meets the WKSI definition based on the amount of registered non-convertible securities other than

[5] Under the Reforms, securities registered under the Securities Act in back-end exchange offers for securities that previously had been issued in Rule 144A offerings are explicitly excluded from the calculation of whether the issuer has within in the last three years issued at least $1 billion aggregate principal amount of non-convertible securities other than common equity in primary offerings for cash.

common equity issued in the prior three years and is also eligible to register a primary offering of its common equity securities on Form S-3 or F-3 (*i.e.,* has common equity with a public float of at least $75 million) may use automatic shelf registration to register offerings of any type of security (including common equity). However, an issuer that meets the WKSI definition based on the amount of registered non-convertible securities other than common equity issued in the prior three years and is not eligible to register a primary offering of its common equity securities on Form S-3 or F-3 may use automatic shelf registration to register only offerings for cash of non-convertible securities other than common equity.

Asset–backed issuers, registered investment companies and business development companies are excluded from the WKSI category regardless of whether they might otherwise meet the defining criteria.

Other Categories of Issuers

Issuers that do not qualify as WKSIs are divided into three other categories—"seasoned issuers," "unseasoned issuers" and "non-reporting issuers."

Seasoned Issuer

A "seasoned issuer" is an issuer that does not qualify as a WKSI, but that is eligible to use Form S-3 or F-3 to register a primary offering of securities. Majority-owned subsidiaries eligible to use Form S-3 or F-3 to register primary offerings of their securities are also seasoned issuers.

Unseasoned Issuer

An "unseasoned issuer" is an issuer that is required to file Exchange Act reports but that does not satisfy the requirements for use of Form S-3 or F-3 for a primary offering of its securities.

Non-reporting issuer

A "non-reporting issuer" is an issuer that is not required to file Exchange Act reports, regardless of whether it is filing such reports voluntarily. This category includes high yield debt issuers that file Exchange Act reports after the year in which the exchange registration statement became effective only because they are contractually obligated to do so by the terms of an indenture.

"Ineligible Issuer"

Under the Reforms, an issuer will be an "ineligible issuer" if:

- the issuer is not current in its Exchange Act reporting obligations;
- the issuer is, or was in the preceding three years, a blank check company, a shell company (other than a business combination-related shell company) or an issuer for an offering of penny stock;
- the issuer is a limited partnership which is offering and selling its securities other than through a firm commitment underwriting;

- the issuer has in the preceding three years filed for bankruptcy or insolvency or, in certain circumstances, had an involuntary bankruptcy petition filed against it;

- the issuer is or has been during the past three years the subject of a refusal or stop order or is the subject of a pending cease-and-desist or stop order proceeding under the Securities Act; or

- the issuer, or its subsidiary at the time it was a subsidiary of the issuer, has been convicted of certain enumerated criminal offenses, has been found to have violated, or been made the subject of a judicial or administrative decree or order (including a settled claim or order) regarding, the anti-fraud provisions of the federal securities laws during the past three years.

Notably, the definition as adopted provides that ineligibility of an issuer based on a settlement of anti-fraud claims will be prospective and will only result from settlements entered into after the December 1, 2005 effective date of the Reforms. Given the importance of avoiding becoming an "ineligible issuer," an issuer that would qualify as a WKSI will want to ensure, to the extent possible, that any companies it acquires do not have pending SEC investigations that could result in a disqualifying settlement post-acquisition. Settlements entered into by a company before it is acquired will not result in ineligible issuer status for the acquiror. Furthermore, since the Reforms are not yet effective and are prospective with respect to settlements, companies that have pending investigations may benefit by settling these matters before the effective date of the Reforms to avoid potential loss of WKSI status.

Ineligible issuers may not qualify as WKSIs and will have limited ability to use free writing prospectuses (described below).

An issuer registering an offering relating to a business combination transaction will be considered to be an ineligible issuer solely for purposes of that offering. The Reforms also generally do not apply to investment companies and business development companies.

COMMUNICATIONS REFORMS

The Securities Act restricts the types of communications that issuers and offering participants (such as underwriters) may make during registered offerings. Historically, these restrictions have focused principally on the timing of the communications and only secondarily and in certain circumstances on their content. Consequently, issuers and offering participants have been constrained from communicating even factually accurate information at specified times during the offering process. Under the current regulatory regime, all offers, in whatever form, are prohibited before the registration statement is filed. The term "offer" is broadly interpreted to include publicity that may have the effect of conditioning the market or of arousing public interest in the issuer or its securities. The only written offer that is currently permitted during the period between filing and effectiveness of the registration statement is generally a preliminary prospectus, which must be filed with the SEC. After the registration statement is declared effective, offering participants at present may generally make written offers only through a statutory prospectus, although they may use additional written offering materials if a final statutory prospectus precedes or accompanies those materials.

The communications-related Reforms, while expanding and clarifying the definition of "written communication," will liberalize these restrictions on a wide range of communications. The extent of

the relaxation in the communications restrictions will vary depending upon the category of issuer, with WKSIs receiving the greatest latitude to communicate around the time of a registered offering.

"Written Communication"

The Reforms define "written communication" to include any communication that is written, printed, a radio or television broadcast or a "graphic communication." "Graphic communication" is, in turn, defined to include all forms of electronic media, including e-mail, audiotapes, videotapes, facsimiles, CD-ROM, Internet websites and substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voicemail systems, computers, computer networks and other forms of computer data compilation. Graphic communications do not, however, include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication although it is transmitted through graphic means.

30-Day Exclusion From Prohibition on Offers Prior to Filing a Registration Statement

New Securities Act Rule 163A will establish a safe harbor from the Securities Act's gun-jumping restrictions for information communicated by or on behalf of an issuer more than 30 days before the filing of a registration statement. Under the Reforms, these communications will not constitute offers for purposes of the prohibition on pre-filing offers in Section 5(c) of the Securities Act. To qualify for the safe harbor, the communications may not reference a securities offering and the issuer must take reasonable steps to prevent further distribution or publication of the communications during the 30 days immediately preceding the filing of the registration statement.

For purposes of the 30-day exclusion and the other Reforms, information will be considered released or disseminated "by or on behalf of an issuer" if the issuer (or its agent or representative) authorized or approved its use before its release or dissemination. Offering participants that are underwriters or dealers will not automatically be considered to be agents or representatives of the issuer for purposes of Rule 163A.

Because it is not typically possible to control what may be written (and when) in the press once an interview is given or other communication is made and because the requirement to take reasonable steps to prevent further distribution or publication is subjective, IPO issuers in particular will want to continue to take a cautious approach with the press.

The Rule 163A 30-day safe harbor will not be available for communications regarding business combination transactions or offerings by non-WKSIs registered on Form S-8 or to offerings made by registered investment companies, business development companies, blank check companies, penny stock issuers or shell companies.

Permitted Continuation of Ongoing Communications During an Offering

The Reforms will also introduce new safe harbors from existing restrictions under the Securities Act relating to gun-jumping and the making of written offers outside the context of the statutory prospectus for continuing ongoing communications of certain information during a registered

offering.[6] Communications falling within these safe harbors will be deemed not to be offers under Section 5(c) of the Securities Act.

Safe Harbor for Reporting Issuers for Regularly Released Factual Business and Forward-Looking Information

New Securities Act Rule 168 will establish a safe harbor available to reporting issuers for regularly released or disseminated factual business information and forward-looking information prior to or during a registered offering.

The Reforms define "factual business information" as:

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

The Reforms define "forward-looking information" as:

- projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure and other financial items;
- statements about management's plans and objectives for future operations, including plans and objectives relating to the products or services of the issuer;
- statements about the issuer's future economic performance; and
- assumptions underlying or relating to any of the foregoing.[7]

To qualify for the Rule 168 safe harbor, factual business information or forward-looking information must not include information about the registered offering or information released or disseminated

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[6] These safe harbors are non-exclusive but are not available for any communication that is part of a plan or scheme to evade the requirements of Section 5 of the Securities Act.

[7] The Reforms define "forward-looking information" using essentially the same categories of statements that are defined as "forward-looking statements" in the statutory safe harbor established by the Private Securities Litigation Reform Act of 1995. In order to receive the protections of this statutory safe harbor for forward-looking information, an issuer's communications of forward-looking information in reliance on Rule 168 must satisfy the conditions of the statutory safe harbor that either (1) the statement is identified as forward-looking and is accompanied by meaningful cautionary statements or (2) the plaintiff cannot prove that the individual who made or approved of the statement had actual knowledge that it was false or misleading.

as part of the offering activities in the registered offering. In addition, the safe harbor will be available only when:

- the issuer has previously released or disseminated the same type of information in the ordinary course of its business; and

- the timing, manner and form in which the information is released or disseminated is materially consistent with similar past disclosures.

The Reforms will not establish any minimum time period during which the same type of information must previously have been released or disseminated by the issuer. However, the safe harbor will require the issuer to have a track record of releasing the particular type of information, and the Adopting Release instructs issuers to consider the frequency and regularity with which they have released the same type of information in assessing the availability of the safe harbor. The Adopting Release notes that, depending on its unscheduled or episodic nature, information may meet the "regularly released" requirement even if it is not released on a predetermined schedule or at regular intervals.

Safe Harbor for Non-Reporting Issuers for Regularly Released Factual Business Information

New Securities Act Rule 169 will establish a safe harbor available to non-reporting issuers for regularly released or disseminated factual business information (but **not** forward-looking information) prior to or during a registered offering. To qualify for the Rule 169 safe harbor, the factual business information must not include information about the registered offering or information released or disseminated as part of the offering activities in the registered offering. In contrast to Rule 168, the definition of factual business information for purposes of Rule 169 will not include dividend notices.

As with the safe harbor for reporting issuers, the safe harbor for non-reporting issuers will be available only when the issuer has previously released or disseminated the same type of information in the ordinary course of its business and the information is released or disseminated in a manner that is materially consistent with similar past disclosures. The safe harbor for non-reporting issuers will also require, however, that the factual business information be intended for release or dissemination to persons (such as customers and suppliers) other than in their capacities as investors or potential investors in the issuer's securities by the issuer's employees or agents who regularly and historically have provided such information to such persons. Accordingly, the Rule 169 safe harbor will not protect information released by a non-reporting issuer at an investor conference. Although the Rule 168 and Rule 169 safe harbors are not meant to be exclusive, because the SEC specifically declined to extend the safe harbor for regularly released forward-looking information to IPO issuers, we would expect that these issuers and their counsel will continue to vigorously scrutinize releases by these issuers that include information about management's plans and objectives.

Exemption for Oral and Written Offers by Well-Known Seasoned Issuers Before the Filing of a Registration Statement

New Securities Act Rule 163 will permit WKSIs to make oral or written offers outside the context of a statutory prospectus prior to the filing of a registration statement. These offers will not violate the

Securities Act restrictions relating to gun-jumping and the making of pre-filing written offers by means other than a statutory prospectus.

A written offer eligible for the Rule 163 exemption will be a "free writing prospectus" (discussed below), which must contain an SEC-mandated legend[8] and must generally be filed with the SEC promptly upon the filing of the registration statement or post-effective amendment covering the offered securities. These pre-filing offers will still be subject to the liability and anti-fraud standards applicable to offers and, unlike most post-filing communications made in connection with a registered securities offering, will be subject to the disclosure requirements of Regulation FD.

The Rule 163 exemption will not be available for communications regarding business combination transactions or communications in offerings by registered investment companies or business development companies.

Expansion of Rule 134 Safe Harbor for Limited Public Notices

Rule 134 currently provides a safe harbor from the Securities Act communications restrictions for "tombstone" advertisements and other limited public notices about an offering after an issuer files a registration statement. The type of information that may be contained in any such notice, however, has historically been narrowly circumscribed.

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[8] New Securities Act Rule 163, which is available only to WKSIs, will generally require that a pre-filing free writing prospectus contain a prominent legend in the following form:

> "The issuer may file a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the company will arrange to send you the prospectus after filing if you request it by calling toll-free 1-8[xx-xxx-xxxx]."

New Securities Act Rule 433, which is applicable after a registration statement is filed, will generally require that a free writing prospectus contain a prominent legend in the following form:

> "The issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the issuer, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1-8[xx-xxx-xxxx]."

Each of these legends may also indicate that the documents are also available by accessing the issuer's website and provide the Internet address and the particular location of the documents on the website, although issuers may be hesitant to include such a statement to the extent that a reference to the company website might present a risk that other information on the website could be regarded as offering-related.

The Reforms will considerably expand the information permitted in a Rule 134 notice to include:

- increased information about an issuer and its business, including where to contact the issuer;
- more information about the terms of the securities being offered (although not a detailed term sheet);
- an expanded scope of permissible factual information about the offering itself, including underwriter information, more 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;
- more information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;
- more information about procedures for directed share plans and other participation in offerings by officers, directors and employees;
- corrections of inaccuracies in permissible information previously disclosed pursuant to Rule 134; and
- expanded disclosure regarding credit ratings to include the security rating reasonably expected to be assigned.

The Reforms applicable to Rule 134 notices eliminate the reference to state securities laws in the SEC-mandated legend and the requirement to specify whether the financing is a new financing or a refunding. Notices under the Rule 134 safe harbor must continue to exclude detailed descriptions of the securities being offered, although this information may be delivered under certain circumstances as a free writing prospectus. The Reforms exclude Rule 134 notices from the definition of free writing prospectuses.

Free Writing Prospectuses

The Reforms expand the scope of permitted written communications related to registered offerings to include certain written offers other than statutory prospectuses, subject to the conditions described below. A qualifying written communication will be known as a "free writing prospectus."[9] Free writing prospectuses will be subject to liability under Section 12(a)(2) and Exchange Act Rule 10b-5 but will not be subject to liability under Section 11 because, unlike prospectus supplements, they will not be deemed to become part of registration statements.

[9] A written offer that does not constitute a statutory prospectus or a free writing prospectus generally continue to be prohibited by Section 5 of the Securities Act.

Definition of "Free Writing Prospectus"

The Reforms define a free writing prospectus as any written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement and is **not**:

- a prospectus satisfying the requirements of Securities Act Section 10(a) or SEC rules permitting preliminary or summary prospectuses or prospectuses subject to completion;
- a communication made in reliance on the special rules for asset-backed issuers permitting the use of ABS informational and computational materials; or
- a communication given together with or after delivery of a final statutory prospectus.

Moreover, communications that under the Reforms will not be considered offers or prospectuses for purposes of the Securities Act restrictions relating to gun-jumping and the making of written offers outside the context of a statutory prospectus (including, but not limited to, notices permitted under Rule 134 and Rule 135, regularly released factual business information and forward-looking information falling within the new Rule 168 and 169 safe harbors and research reports falling within the expanded Rule 137, 138 and 139 safe harbors) will **not** be free writing prospectuses.

Permitted Use of a Free Writing Prospectus After the Filing of a Registration Statement

New Securities Act Rule 164 will permit the use of a free writing prospectus after the filing of a registration statement.

In the case of non-reporting or unseasoned issuers, a statutory prospectus that satisfies the requirements of Section 10 (which, in the case of a preliminary prospectus for an IPO, requires the inclusion of a price range) must generally accompany or precede the free writing prospectus. However, if a free writing prospectus is prepared by a person in the media that is not affiliated with, or paid by, the non-reporting or unseasoned issuer or an offering participant, a statutory prospectus need not accompany or precede the free writing prospectus, but the non-reporting or unseasoned issuer must have filed a statutory prospectus with the SEC.

In the case of WKSIs and other seasoned issuers, issuers and offering participants will be permitted to use a free writing prospectus if a statutory prospectus (which, in a shelf offering, may be the base prospectus) has been filed with the SEC. In addition, as noted above, Rule 163 will permit WKSIs (but not other offering participants) to use free writing prospectuses prior to filing the registration statement.

Filing the Free Writing Prospectus

Permitted use of a free writing prospectus will under certain circumstances be conditioned on filing the free writing prospectus or information contained in the free writing prospectus with the SEC, generally by no later than the date of first use. An issuer will be required to file:

- any free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer (an "issuer free writing prospectus");

- any material information about the issuer or its securities that has been provided by or on behalf of the issuer ("issuer information") contained in a free writing prospectus prepared by or on behalf of or used by any offering participant other than the issuer (but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from that issuer information); and

- any free writing prospectus prepared by or on behalf of the issuer or any other offering participant that contains a description of the final terms of the issuer's securities in the offering, after such terms have been established for all classes in the offering (preliminary term sheets would not be subject to filing).

Underwriters and other offering participants generally will not be required to file free writing prospectuses that they prepare. However, underwriters and other offering participants will be required to file any free writing prospectus that they distribute in a manner reasonably designed to lead to its broad, unrestricted dissemination, such as by publication on an unrestricted website or by distribution as a press release, but not where the communication is restricted to customers of the underwriter, regardless of the number of customers.

The requirement to file a free writing prospectus will not apply if the free writing prospectus is substantially the same as, and does not contain substantive changes from or additions to, a free writing prospectus already filed. Similarly, the requirement for the issuer to file issuer information contained in a free writing prospectus prepared by a person other than the issuer will not apply if the information is included (directly or by means of incorporation by reference) in a prospectus or free writing prospectus previously filed that relates to the offering.

Except as described below with respect to free writing prospectuses published or distributed by an unaffiliated member of the media, free writing prospectuses subject to a filing requirement must be filed no later than the date of first use, except for final term sheets, which must be filed by the earlier of the date of first use or two days after the date such terms become final. Rule 164 permits an issuer or any other person relying on the Rule to cure any unintentional or immaterial failure to file free writing material if such material is filed as soon as practicable after discovery of the failure to file.

A filed free writing prospectus will **not** become part of the registration statement. Amended Securities Act Rule 408 clarifies that the inclusion in a free writing prospectus of information not required to be included in the registration statement will not necessarily be considered an omission of material information required to be included in the registration statement.

Although the Adopting Release does not provide any guidance on the point, we have been advised by the SEC staff that they are considering whether a free writing prospectus or issuer information filed by an issuer with the SEC will be required to adhere to the stricter requirements that govern the use of non-GAAP financial measures in other SEC filings.

Informational Requirements for the Free Writing Prospectus

The Reforms will impose no informational requirements for a free writing prospectus other than a specified legend.[10] However, Securities Act Rule 433 will require that a free writing prospectus not contain information that conflicts with the relevant statutory prospectus.

Record Retention Condition

Under Rule 433, issuers and offering participants will be required to retain for three years all free writing prospectuses used by them from the date of the initial *bona fide* offering of the securities in question if such materials have not been filed with the SEC. Solely for purposes of Rule 164, an immaterial or unintentional failure to retain a free writing prospectus will not result in a violation of Securities Act Section 5(b)(1) or the loss of the ability to rely on the exemption, so long as the issuer or offering participant made a good faith and reasonable effort to comply with the record retention condition.

Electronic Road Shows

Rule 433 provides that road shows that do not originate live, in real-time to a live audience and are graphically transmitted ("electronic road shows")[11] are written communications and, therefore, free writing prospectuses. Notwithstanding the otherwise applicable requirements relating to the filing of free writing prospectuses, an electronic road show will **not** need to be filed with the SEC unless (1) the road show relates to an initial public offering of common or convertible equity securities and (2) the issuer does not make at least one version of the *bona fide* electronic road show used in the initial public offering readily available on an unrestricted basis to all investors beginning no later than the time of transmission of any version of such electronic road show. The *bona fide* version of the electronic road show made available must only cover the same general areas regarding the issuer, its management and the securities being offered and need not address all the same subjects or provide the same information as other versions of the road show.

A live road show (including a live road show that is transmitted graphically in real-time) will continue to be considered an oral communication and, as such, will not constitute a free writing prospectus. Slides or other visual aids used as part of a live road show and not made available separately will be deemed to be part of the live road show and will not be deemed to be a written communication.

Whether or not a road show constitutes a written communication or is required to be filed, it may give rise to liability under Section 12(a)(2) and Rule 10b-5.

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10 *See* Note 8.

11 Upon the effectiveness of the Reforms, the electronic road show no-action letters for registered public offerings will be withdrawn.

Free Writing Prospectuses Published or Distributed by the Media

Under the Reforms, any written communication about an issuer or its securities that constitutes an offer and is published or disseminated by a member of the media to whom an issuer or any offering participant, whether orally or in writing, provides information about the issuer or the offering will be considered a free writing prospectus of the issuer or offering participant in question. If the free writing prospectus is prepared and disseminated by media persons not affiliated with or paid by the issuer or an offering participant, notwithstanding the otherwise applicable requirements relating to the use and filing of free writing prospectuses, the free writing prospectus need not be accompanied or preceded by a statutory prospectus and the issuer or offering participant involved with the publication will not need to file the publication or the issuer information used in the publication with the SEC until four business days after the issuer or offering participant becomes aware of its publication or first broadcast. Issuers and offering participants may satisfy this filing requirement by filing (1) the media publication, (2) all of the information provided to the media or (3) a transcript of the interview or similar materials that the issuer or other offering participant provided to the media. The publication also need not be filed if its substance has been previously filed with the SEC. In addition, an issuer or offering participant may file any additional information that the issuer reasonably believes is necessary or appropriate to correct information included in the filed media publication. If an issuer or offering participant prepares, pays for, or gives consideration for the preparation, publication or dissemination of or uses or refers to a published article, television or radio broadcast, or advertisement, the issuer or other offering participant will have to satisfy the conditions to the use of any other free writing prospectus of that offering participant at the time of the publication or broadcast.

Website Communications

An offer of an issuer's securities on its website (or hyperlinked from the website) will be considered to be a written offer by the issuer and, unless otherwise exempt, will be subject to the filing conditions applicable to free writing prospectuses. However, the Reforms provide that historical issuer information that is identified as such and located in a separate section of an issuer's website containing historical issuer information will not be considered a current offer of the issuer's securities and will not constitute a free writing prospectus unless the information has been included in a prospectus of the issuer for the offering or is otherwise used or identified in connection with the offering.

Modification of Regulation FD for Disclosures Made In Connection With a Registered Securities Offering

Regulation FD requires that whenever an issuer or a person acting on an issuer's behalf intentionally discloses material nonpublic information to securities market professionals or holders of the issuer's securities who may trade on the basis of the information, the issuer must make simultaneous public disclosure of that information. (In the case of inadvertent disclosure of material nonpublic information, the issuer must make prompt public disclosure of that information.) With limited

exceptions, Regulation FD has previously not applied to any disclosures made in connection with a registered securities offering.[12]

Under the Reforms, only the following offering-related communications will continue to be exempt from Regulation FD:

- a registration statement filed under the Securities Act, including a prospectus that is part of the registration statement;
- a free writing prospectus (such as an electronic road show) used after filing of the registration statement for the offering or a communication not deemed to be a prospectus because it was sent or given after the effective date of the registration statement;
- any other statutory prospectus;
- a notice permitted under Rule 134 or Rule 135; and
- an oral communication (such as a live road show) made in connection with the registered securities offering after filing of the registration statement.

Expanded Safe Harbors for Research

Currently, Securities Act Rules 137, 138 and 139 allow certain research reports to be distributed during offering periods without these reports being considered impermissible offers under the Securities Act. Rule 139 permits issuer-specific research reports about Form S-3 or F-3 eligible issuers (and certain other larger foreign private issuers) to continue to be published if the reports have been distributed with "reasonable regularity" in the normal course of a broker's or dealer's business. Rule 138, in effect, allows research reports on debt or debt-like securities during the pendency of offerings of equity or equity-equivalent securities, and *vice versa*, while Rule 137 permits research reports by a broker or dealer not participating in an offering. Rule 139 also allows industry-specific research reports issued with reasonable regularity if, among other conditions, the opinion or recommendation published during the offering period is no more favorable than the last published recommendation of the broker or dealer with respect to the issuer. These safe harbors do not cover oral communications by research analysts.

Amendments to Rule 137 will expand the exemption for research published in the regular course of business by a broker or dealer that is not an offering participant, and is not receiving compensation

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[12] The existing Regulation FD exception for disclosures made in connection with a registered offering does not apply in the context of certain offerings that are generally of an ongoing and continuous nature, including secondary offerings, dividend or interest reinvestment plans, employee benefit plans, the exercise of outstanding options, warrants or rights, the conversion of outstanding securities, pledges of securities as collateral and issuances of American depositary shares. The Reforms do not change the types of offerings that are subject to Regulation FD, although they clarify that communications relating to a secondary offering will be within the exception from the application of Regulation FD if the offering also includes a registered capital formation transaction for the account of the issuer.

from the issuer or an offering participant in connection with the research, to apply to securities of any issuer, including non-reporting issuers.

Amendments to Rule 138 will expand the exemption for research by a broker or dealer that is a participant in a distribution of an issuer's equity or equity-equivalent securities to publish or distribute research that is confined to that issuer's debt or debt-like preferred securities, and *vice versa*, if the broker or dealer publishes or distributes the research in the regular course of its business. As amended, the Rule 138 exemption will apply to research reports on all reporting issuers that are current in their periodic Exchange Act reports. Rule 138 is currently limited to issuers that qualify for Forms S-2/F-2 or Forms S-3/F-3. The amendments also expand the scope of Rule 138 to permit research on non-reporting foreign private issuers that either (1) have equity securities that have been traded on a designated offshore market for at least twelve months or (2) have a $700 million worldwide public float. The amendments add a new condition that the broker or dealer have previously published or distributed research reports on the types of securities that are the subject of the report in the regular course of its business.

Amendments to Rule 139 will expand coverage to non-reporting foreign private issuers now covered by amended Rule 138 (discussed above) and will alter the exemption for research by a broker or dealer that is a participant in a distribution of securities by specified categories of larger issuers. In the case of issuer-specific reports, Rule 139 will remove the requirement that the publication be distributed with reasonable regularity. However, the broker or dealer must publish the report in the regular course of its business and must have previously distributed or published research reports about the issuer or its securities (*i.e.,* not be initiating coverage). In the case of industry-related reports, Rule 139 will expand the exemption to apply to research reports on all reporting issuers that are current in their periodic Exchange Act reports. Rule 139 will also remove the prohibition on a broker or dealer making a more favorable recommendation than the one it made in the last publication. However, the research report must contain information about the issuer or its securities similar to the type of information contained in prior reports.

The Reforms provide assurance that research reports meeting the conditions of Rule 138 and 139 will not be considered to be offers, general solicitation or general advertising in connection with Rule 144A offerings and will not constitute directed selling effort or be inconsistent with the offshore transaction requirements applicable to Regulation S offerings.

SECURITIES ACT REGISTRATION PROCESS REFORMS

Automatic Shelf Registration for WKSIs

The Reforms will allow eligible WKSIs to file "automatic shelf registration statements" that become effective immediately upon filing without any prior SEC staff review. An automatic shelf registration statement will be available for all primary or secondary offerings of securities registered by eligible WKSIs on Form S-3 or F-3. WKSIs will be permitted to register on an automatic shelf registration statement an unspecified amount of securities without allocating the registered securities among the issuer, its eligible subsidiaries and selling security holders.

WKSIs desiring to add to an automatic shelf registration statement new types of securities or new issuers, including guarantors, will be able to do so by a post-effective amendment that any new

issuer and its directors and requisite officers will be required to sign. Post-effective amendments to automatic shelf registration statements, like the automatic shelf registration statements themselves, will become effective immediately upon filing.

WKSIs using automatic shelf registration statements will be permitted to pay filing fees at the time of a securities offering – "pay-as-you-go" – and will not be required to pay any initial filing fee upon filing an automatic shelf registration statement. A takedown off of a shelf registration statement would then trigger an obligation to pay the applicable filing fee. The issuer must include the registration fee table in a prospectus supplement or a post-effective amendment. An issuer may cure a failure to pay a fee by making a good faith effort to pay the fee on a timely basis and actually paying the filing fee within four business days of the original fee due date.

Procedural Changes Regarding Shelf Offerings

The Reforms will streamline the shelf registration process under the Securities Act.

Information in the Base Prospectus

New Securities Act Rule 430B codifies the types of information that issuers eligible to use automatic shelf registration statements or otherwise eligible to use Form S-3 or F-3 to register primary offerings of common equity securities may omit from a base prospectus for delayed offerings on Form S-3 or F-3.

Under Rule 430B, the base prospectus may continue to omit information that is "unknown or not reasonably available" to the issuer. In addition, a base prospectus filed as part of an automatic shelf registration statement may omit information as to whether the offering is a primary or secondary offering, the description of the securities to be offered (other than the identification of the names or classes of the securities), the plan of distribution and the identification of other issuers. A base prospectus filed as part of an automatic shelf registration statement may also omit the identities of selling security holders and the amounts to be registered on their behalf. A base prospectus filed as part of a shelf registration statement filed by an issuer eligible to use Form S-3 or F-3 for primary offerings of common equity securities that is not filed as part of an automatic shelf registration statement may also omit the identities of selling security holders and the amounts of securities to be registered on their behalf if (1) the resale registration statement identifies the initial offering transaction or transactions pursuant to which the securities, or securities convertible into such securities, were sold; (2) the initial offering of the securities, or the securities convertible into such securities, is completed; and (3) the securities, or the securities convertible into such securities, are issued and outstanding prior to the original date of filing of the resale registration statement.

Information omitted from a base prospectus may be included in the registration statement by prospectus supplement, Exchange Act report incorporated by reference or post-effective amendment. Amendments to Forms S-3 and F-3 will permit issuers eligible to use such forms to incorporate by reference from Exchange Act reports all information required in the prospectus about the issuer and its securities (*e.g.*, material changes in the plan of distribution).

Amendments to Rule 415

The Reforms include amendments to Rule 415 that will:

- remove the current limitations on the amount of certain primary securities that may be registered on Form S-3 or F-3 (*i.e.*, the amount reasonably expected to be offered and sold within two years). These limitations remain in effect for securities not registered on Form S-3 or F-3 to be offered on a continuous basis;

- permit takedowns from a shelf registration statement immediately following effectiveness, thereby eliminating the "convenience shelf" issue; and

- eliminate the existing limitations that require primary "at-the-market" offerings registered on a shelf registration statement to be sold through underwriters named in the base prospectus which is part of the registration statement and, where voting securities are being offered, place a volume limitation on the amount of securities that may be so registered.

Under the amendments to Rule 415, however, shelf registration statements on Form S-3 or F-3 may only be used for three years following the initial effective date, at which point a new registration statement must be filed. Continuous offerings begun by non-WKSI issuers prior to the end of the three years will nevertheless be permitted to continue on the old registration statement for an additional six months after the new registration statement is filed and prior to effectiveness of such new registration statement. (New registration statements filed by WKSIs will become effective automatically upon filing.)

Amendments to Rule 424

New provisions of Rule 424 will require identification of final prospectuses not filed within the required timeframe and will require that prospectuses identifying selling security holders and prospectuses disclosing the public offering price or the terms of securities be filed with the SEC no later that the second business day after the earlier of the date of their first use or the date of the determination of the offering price. When the terms of the securities or the plan of distribution or other information related to an offering are included in an Exchange Act report incorporated by reference, a prospectus supplement filed pursuant to Rule 424 will be required to specify the Exchange Act report or reports containing such information.

Expanded Availability of Forms S-3 and F-3 for Majority-Owned Subsidiaries

Amendments to Forms S-3 and F-3 will expand the categories of majority-owned subsidiaries that are eligible to register non-convertible debt securities or guarantees on Forms S-3 and F-3 by allowing registration of offerings of guarantees by majority-owned subsidiaries of non-convertible debt securities of other majority-owned subsidiaries or of the parent.

Amendments to Forms S-1 and F-1 and Elimination of Forms S-2 and F-2

Amendments to Forms S-1 and F-1 will, for the first time, permit a reporting issuer that has filed at least one annual report and that is current in its Exchange Act reporting obligations to incorporate

by reference into its Form S-1 or F-1 its previously filed Exchange Act reports and documents. The prospectus in the registration statement at effectiveness must specifically identify the incorporated documents, and the ability to incorporate by reference will be conditioned upon the issuer making its Exchange Act reports and other documents readily available on its website. "Forward incorporation" (*i.e.,* picking up subsequently filed documents), which is allowed with Forms S-3 and F-3, will not be permitted for Forms S-1 and F-1.

The Reforms will eliminate Forms S-2 and F-2, which permitted certain reporting issuers not qualifying to use Forms S-3 or F-3 to incorporate their Exchange Act reports and documents by reference into the registration statement but required that such incorporated reports or documents be delivered with the prospectus. These Forms were rarely used in practice and, in light of the amendments to Forms S-1 and F-1, would have been of even less utility.

Amendments to Issuer Undertakings Required by Item 512 of Regulation S-K

The Reforms include amendments to the issuer undertakings required to be included in a registration statement by Item 512 of Regulation S-K that will:

- clarify that, in shelf registration statements filed on Form S-3 or F-3, all the disclosures required by the issuer undertakings also may be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report that the issuer files that is incorporated by reference in the registration statement;

- require the issuer's undertaking that, for purposes of determining liability under the Securities Act, information in filed prospectus supplements are deemed part of and included in the registration statement and new effective dates as to the issuer and underwriters are deemed to occur; and

- require the issuer's undertaking that, for purposes of determining liability of the issuer under the Securities Act, any of the communications described in Rule 159A (discussed below) would be considered an offer or sale of securities.

PROSPECTUS DELIVERY REFORMS

The Reforms will implement a new "access equals delivery" model for the delivery of final prospectuses, but not preliminary prospectuses. Under the new regime, investors will be presumed to have access to the Internet to obtain filed prospectuses from the SEC's on-line EDGAR System.

New Securities Act Rule 172 will provide (1) an exemption to permit written confirmations of sales of securities and notices of allocation to be sent to investors without being preceded or accompanied by a final prospectus and (2) that any obligation to have a prospectus precede or accompany the delivery of a security in a registered offering is satisfied, in each case, if:

- the registration statement is effective and is not the subject of a stop order under the Securities Act;

- neither the issuer or any underwriter or participating dealer is the subject of a pending cease-and-desist proceeding under the Securities Act in connection with the offering; and

- the issuer has filed the final prospectus with the SEC or will make a good faith effort to file the prospectus within the time required under Rule 424 and, in the event the issuer fails to timely file the final prospectus, files the prospectus as soon as practicable thereafter.[13]

The requirement that the final prospectus be filed does not apply to transactions by dealers requiring delivery of a final prospectus pursuant to Section 4(3) of the Securities Act.

New Securities Act Rule 173 will provide that, for each transaction involving a sale by an issuer or an underwriter to a purchaser or sale in which the final prospectus delivery requirements apply, the purchaser may be sent, in lieu of the final prospectus, a notice that the sale was made pursuant to a registration statement or in a transaction otherwise subject to the prospectus delivery requirements. Purchasers will be permitted, however, to request a copy of the final prospectus.

Both Rules 172 and 173 will exclude business combination transactions, exchange offers and offerings registered on Form S-8 and offerings by registered investment companies or business development companies.

EXCHANGE ACT DISCLOSURE REFORMS

Risk Factors

As a complement to the Reforms relating to registered offerings under the Securities Act, the Reforms will require issuers to include "risk factor" disclosures, where appropriate, in their annual reports on Form 10-K filed under the Exchange Act.[14] In addition, companies reporting on Form 10-Q will be required to reflect any material changes from these previously disclosed risks in their quarterly reports on Form 10-Q. This risk factor disclosure will be of the same type as would otherwise be made in a Securities Act registration statement, excluding transaction-specific risk factors.

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[13] Similarly, under Rule 153, brokers or dealers will be deemed to satisfy any requirement under Section 5(b)(2) to deliver a prospectus to a broker-dealer as a result of a transaction effected on an exchange or through any trading facility or alternative trading system registered with the SEC if (1) securities of the same class are already trading on the market or through the trading facility or alternative trading system; (2) the registration statement is effective and is not the subject of any stop order under the Securities Act; (3) neither the issuer or any underwriter or participating dealer is the subject of a pending cease-and-desist proceeding under the Securities Act in connection with the offering; and (4) the issuer has filed or will file the final prospectus with the SEC.

[14] Annual reports filed on Form 20-F are already required to include risk factor disclosure.

Unresolved SEC Staff Comments

If an accelerated filer or WKSI has received written comments from the SEC staff regarding its periodic filings under the Exchange Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved at the time of filing of the annual report, the Reforms will require that the accelerated filer disclose in its annual report on Form 10-K or 20-F the substance of any such unresolved comments that the accelerated filer believes are material. The disclosure may include the position of the company with respect to the comments.

Voluntary Filer Status

The Reforms will also provide for the inclusion of a box on the cover page of Forms 10-K and 20-F for an issuer to check if it is filing reports voluntarily. This box is intended, in part, to alert investors and other market participants that an issuer is a voluntary filer and, as such, could cease to file its Exchange Act reports at any time. This disclosure will be for informational purposes only, and an issuer's filing obligations would not be affected by an incorrectly checked box. The Reforms will also modify the cover pages of Forms 10-K and 20-F to include a box for the issuer to check if it qualifies for WKSI status at the time the annual report is filed.

LIABILITY ISSUES UNDER THE REFORMS

Under the Securities Act, purchasers of an issuer's securities in a registered offering have private rights of action under Section 11 for materially deficient disclosure in registration statements and under Section 12(a)(2) for materially deficient disclosure in prospectuses and oral communications. Section 17(a) is a general anti-fraud provision that governs offers and sales of securities.

SEC Interpretation Regarding Liability Under Section 12(a)(2) and Section 17(a)(2)

The Reforms codify in new Securities Act Rule 159 the SEC's interpretation, which was presented in the Proposing Release, that the liability provisions of Section 12(a)(2) and Section 17(a)(2) of the Securities Act require that information be conveyed to an investor prior to or at the time of the contract of sale, including a commitment pursuant to an oral contract, in order to be taken into account for purposes of assessing whether the information available to the investor includes or represents a material misstatement or omission. Under this interpretation, information conveyed to an investor only after the time of sale is to be disregarded in determining liability unless a new contract of sale is established after the investor is conveyed the additional information. Accordingly, previously undisclosed information in the final prospectus that corrects a material misstatement or omission in the preliminary prospectus will not be taken into account for purposes of liability under Section 12(a)(2) and Section 17(a)(2) if an investor has become committed to purchase the securities prior to the time the information is conveyed to the investor.

Under the Reforms, a seller and a purchaser may by agreement terminate a prior sale contract and enter into a new sale contract for the offered securities on the basis of new information, in which case the time of the contract of sale with that purchaser will be the time of the new contract of sale. The SEC emphasizes in the Adopting Release that any such termination must provide the purchaser with adequate disclosure of the contractual arrangement, the purchaser's rights under the existing contract at the time termination is sought and the new information the seller seeks to convey, and

with the meaningful ability to elect to terminate or not terminate the prior contract and to enter or not enter into the new contract. Whether the investor is given such adequate disclosure and the meaningful ability to elect whether or not to terminate the prior contract will depend on the particular facts and circumstances. However, the SEC notes in the Adopting Release that contractual provisions deeming information to have been communicated to an investor or a non-conditional contract that moves the time of sale forward to a different time would violate the anti-waiver provisions of the federal securities laws.

Liability Under Section 12(a)(2) for Free Writing Prospectuses

The Reforms relating to the use of free writing prospectuses also give rise to important issues regarding the Section 12(a)(2) liability of issuers and other offering participants. Issuers and underwriters might no longer all use the same written offering documents. Under new Securities Act Rule 159A, an issuer may be subject to liability under Section 12(a)(2) in a primary offering for any statutory prospectus relating to the offering, any free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer and issuer information included in any other free writing prospectus, as well as any other communication that is an offer made by or on behalf of the issuer. Under Rule 159A, an offering participant other than the issuer will not be liable to a person for the contents of a free writing prospectus unless:

- the offering participant used or referred to the free writing prospectus in offering or selling securities to that person;

- the offering participant offered or sold securities to that person and participated in planning for the use of that free writing prospectus by one or more other offering participants and the free writing prospectus was used or referred to in offering or selling securities to that person by one or more other offering participants; or

- the offering participant is required to file the free writing prospectus with the SEC pursuant to the conditions to use in Rule 433.

Relationship of Reforms and SEC Interpretation to Liability Under Section 11

Under Section 11, liability attaches at the time the registration statement or any post-effective amendment becomes effective. The Reforms address the times at which prospectus supplements are deemed to be included in registration statements and establish new effective dates for shelf registration statements for liability purposes for shelf takedowns.

Under the Reforms, a new effective date for a shelf registration statement will be established for liability purposes for a shelf takedown for the issuer and any person that is at that time an underwriter on the date a prospectus supplement filed in connection with the takedown is deemed part of the registration statement. For other persons, including directors, signing officers and experts, the Reforms will not alter the dates at which Section 11 liability attaches.

Accordingly, in a shelf takedown, Section 11 liability will attach to a registration statement that is deemed to include the final prospectus supplement, whereas liability under Section 12(a)(2) and

Section 17(a)(2) will be determined based on the disclosure conveyed to the investor at the time of the contract of sale, which may be prior to the availability of a final prospectus supplement.

A free writing prospectus that is not part of a registration statement will not be subject to liability under Section 11, but will be subject to liability under Section 12(a)(2) and Section 17(a)(2).

Issuer as the Seller for Purposes of Section 12(a)(2) Liability in a Primary Offering

In the past, questions have arisen as to whether an issuer selling securities in an offering underwritten on a firm commitment basis can have Section 12(a)(2) liability for material misstatements and omissions as a seller to an ultimate purchaser given that the underwriters, rather than the issuer, are actually selling the securities to the purchaser. New Securities Act Rule 159A will provide that the liability Section 12(a)(2) imposes on sellers will extend to the issuer of the securities with regard to, and the issuer shall be considered to offer or sell the securities by means of, any of the following communications made by or on behalf of the issuer in connection with primary offerings of securities by the issuer, regardless of the underwriting method used to sell the issuer's securities:

- any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424 or 497;
- any free writing prospectus prepared by or on behalf of the issuer and, in the case of an issuer that is an open-end management investment company, any profile provided pursuant to Rule 498;
- the portion of any other free writing prospectus relating to the offering containing material information about the issuer or its securities provided by or on behalf of the issuer;
- information about the issuer or its securities provided by or on behalf of the issuer and included in any other free writing prospectus or, in the case of an issuer that is a registered investment company or a business development company, in any advertisement pursuant to Rule 482; and
- any other communication that is an offer made by or on behalf of the issuer.

A communication by an underwriter or dealer participating in an offering will not be considered to be on behalf of the issuer solely by virtue of that participation but, depending on the facts and circumstances, may be a communication on behalf of an issuer to the extent it contains issuer information.

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This memorandum is for general information purposes only and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate developments, can be obtained from our website, *www.simpsonthacher.com*.