Securities Offering Reform Questions and Answers
November 30, 2005

These questions and answers represent the views of the staff of the Division of Corporation Finance with respect to questions we have received regarding the new rules and forms adopted by the Securities and Exchange Commission in the Securities Offering Reform rulemaking. The questions and answers are not rules, regulations, or statements of the Commission. Further, the Commission has neither approved nor disapproved these questions and answers.

The answers to each of the questions below assume an issuer's eligibility to use the form, the offering type, or the rule that is discussed.

Free Writing Prospectuses

Question 1

Q: If an offering participant, other than the issuer, unintentionally distributes a free writing prospectus in a broad, unrestricted manner, must that offering participant file the free writing prospectus?

A: Yes. Rule 433(d)(1)(ii) requires an offering participant, other than the issuer, to file any free writing prospectus that is used or referred to by that offering participant and distributed by or on behalf of that offering participant in a manner reasonably designed to lead to its broad unrestricted dissemination. This filing requirement applies whether or not the distribution is intentional.

Question 2

Q: If an issuer uses a free writing prospectus at a time when EDGAR does not accept filings, when can the issuer file the free writing prospectus and still be in compliance with Rule 433?

A: The issuer should file the free writing prospectus on EDGAR within the time frame provided in the Rule, even if the filing is not "accepted" by EDGAR until a later time. For example, if an issuer first uses a free writing prospectus at 10:00 p.m. on a Monday night, the issuer is required to file the free writing prospectus no later than that Monday, as Rule 433(d)(1) requires the filing to be made "no later than the date of first use." The issuer in this example would, therefore, be required to file the free writing prospectus on EDGAR no later than that Monday. Even if the issuer filed on that Monday after the closing of the EDGAR system for the acceptance of filings for that day, this filing would satisfy the timely filing condition of Rule 433(d)(1).

Question 3

Q: If an issuer free writing prospectus contains both descriptions of certain terms of the securities and other information, when must the issuer file the free writing prospectus?

A: The issuer can consider separately the filing requirements for the terms of the securities and the other information that is contained in the free writing prospectus.

With regard to the "other information," the issuer must file the issuer free writing prospectus, other than the description of certain terms of the securities, no later than the date of first use.

With regard to the terms of the securities, the issuer must file the description of the terms of the securities only if that description represents the final terms of the securities. If the description represents the final terms of the securities, the issuer must file that description of the final terms within two days after the later of:

- the date of first use of that description; and
- the date the final terms have been established for all classes of securities in the offering.

Question 4

Q: After the filing of the registration statement for an offering, if the issuer's CEO participates in a live interview with unaffiliated and uncompensated media that is broadcast on radio or television, would that interview be an issuer free writing prospectus that the issuer must file?

A: Yes, if the interview constitutes an offer. In that case, the CEO's interview on a live television or radio program conducted by unaffiliated and uncompensated media would be a written offer and would be treated the same as any other unaffiliated, uncompensated media publication or broadcast. The issuer would have to satisfy it's filing obligation with regard to the interview within four business days after the broadcast.

Question 5

Q: After the filing of the registration statement for an offering, if the issuer's CEO participates in an interview with unaffiliated and uncompensated media that is published and the substance of the information in the interview is contained in the registration statement, does the issuer have to file the interview as an issuer free writing prospectus?

A: No, even if the interview with the unaffiliated and uncompensated media constitutes an offer. If the CEO interview is an offer, it will be an issuer free writing prospectus, but it does not have to be filed as a free writing prospectus. Rule 433(f)(2) contains an exception from the filing conditions for unaffiliated and uncompensated media publications and broadcasts if the substance of the free writing prospectus has been filed previously with the Commission. Of course, the issuer will be responsible for determining whether the substance of the information has been filed previously.

Question 6

Q: After the filing of the registration statement for an issuer's initial public offering, but before that registration statement becomes effective, can the issuer's CEO participate in a broadcast that is a paid "infomercial"?

A: While there is an exclusion from the requirement that the statutory prospectus must precede or accompany a media broadcast in an initial public offering, that exclusion is available only if no payment is made or consideration given by or on behalf of the issuer or such other offering participant for the written communication or its dissemination, and the other conditions to the exclusion are satisfied. Because the "no payment" condition is not satisfied, the requirement that the statutory prospectus precede or accompany the communication applies and cannot be satisfied for a broadcast. Therefore, Rule 164 and Rule 433 would not be available for that communication.

Question 7

Q: For issuer free writing prospectuses, must the free writing prospectus be filed even if the information in the free writing prospectus is contained in the prospectus in the filed registration statement?

A: Yes, except for the Rule 433(f)(2) exclusion for media publications or broadcasts that is discussed in Questions 4 through 6. Further, the Rule 433(d)(4) exception from the condition for an issuer to file issuer information would not be available in this situation, as that exception applies only to free writing prospectuses of offering participants other than the issuer where the information is contained in a previously filed prospectus or free writing prospectus relating to the offering.

Question 8

Q: For issuer free writing prospectuses, must the issuer file the free writing prospectus if the free writing prospectus does not contain substantive changes from or additions to a previously filed free writing prospectus that relates to the offering?

A: No. Rule 433(d)(3) provides an exception from the filing requirement in this situation. See also the Rule 433(d)(4) exception discussed in Question 7.

Question 9

Q. If an issuer and underwriter agree that the underwriter will not use a free writing prospectus without the consent of the issuer, will the issuer's consent to that underwriter's use of a free writing prospectus mean that the issuer has authorized or approved the communication for purposes of determining whether it is an issuer free writing prospectus?

A: The consent given by the issuer to the use of an underwriter free writing prospectus under these circumstances is not, in and of itself, authorization or approval. In this regard, "authorized or approved" refers to the substance, not the use, of the free writing prospectus. If the issuer's actions amount to adoption of or entanglement with the free writing prospectus, then the issuer would have approved or authorized the underwriter free writing prospectus.

Question 10

Q: Does Regulation G apply to free writing prospectuses?

A: The application of Regulation G depends on the Exchange Act reporting status of the issuer; it does not depend on the nature of the communication in which the non-GAAP financial measure is included. Regulation G applies whenever an issuer that is required to file reports pursuant to Section 13(a) or 15(d) of the Exchange Act publicly discloses or releases material information that includes a non-GAAP financial measure. As such, Regulation G does not apply in the case of an issuer not so required to file reports, including non-reporting issuers conducting an initial public offering and voluntary filers. With regard to voluntary filers, see also Question 33 in the Division of Corporation Finance's Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures (June 13, 2003).

Question 11

Q: Does Item 10(e) of Regulation S-K apply to filed free writing prospectuses?

A: Regulation S-K applies to registration statements filed under the Securities Act, as well as registration statements, periodic and current reports and other documents required to be filed under the Exchange Act. A filed free writing prospectus is not filed as part of the issuer's registration statement, unless the issuer files it on Form 8-K or otherwise includes it or incorporates it by reference into the registration statement. Therefore, Item 10(e) of Regulation S-K does not apply to a filed free writing prospectus unless the free writing prospectus is included in or incorporated by reference into the issuer's registration statement or included in an Exchange Act filing.

Question 12

Q: During a company's IPO, an underwriter sends a free writing prospectus to its clients. A member of the media then receives the free writing prospectus from a client of that firm and not from the underwriter, and writes an article containing information derived from information in the underwriter's free writing prospectus. Will the article be a free writing prospectus of the underwriter?

A: The media provisions of the free writing prospectus rules apply to articles based on information provided by or on behalf of the issuer or other offering participants to the media. If a free writing prospectus (or the information contained therein) is not provided to the media by an issuer or other offering participant or any person acting on behalf of either of them, a media publication based on that free writing prospectus (or information) would not be a free writing prospectus of the issuer or other offering participant. The staff may request information about the role, if any, that the underwriter or issuer played with regard to the provision of the free writing prospectus (or information contained therein) or the publication, at least in certain circumstances where it is not clear. If the issuer or underwriter, or a person acting on their behalf, provided, authorized, or approved the publication, the free writing prospectus rules might apply to the publication.

Well-Known Seasoned Issuer Definition

Question 13

Q. An issuer that has not previously filed a shelf registration statement believes that it meets the test for well-known seasoned issuer status and decides to file an automatic shelf registration statement. What is this issuer's initial determination date for well-known seasoned issuer status for purposes of determining its eligibility to file an automatic shelf registration statement?

A. The issuer's initial determination date for well-known seasoned issuer status will be the time it files the automatic shelf registration statement.

Question 14

Q: An issuer with an effective shelf registration statement believes that it meets the test for well-known seasoned issuer status and decides to file an automatic shelf registration statement. What is this issuer's initial determination date for well-known seasoned issuer status for purposes of determining its eligibility to file an automatic shelf registration statement?

A: The issuer's initial determination date for well-known seasoned issuer status will be the time it files the automatic shelf registration statement.

Question 15

Q: If a well-known seasoned issuer files an automatic shelf registration statement, is its status as a well-known seasoned issuer re-evaluated when it files its Form 10-K or Form 20-F for the fiscal year in which the automatic shelf registration statement is filed and becomes effective? For example, if an issuer with a December 31 fiscal year end files an automatic shelf registration statement on August 15, 2006 and files its Form 10-K for its 2006 fiscal year on February 28, 2007, must it re-evaluate its well-known seasoned issuer status on the date it files that Form 10-K?

A: Yes. For purposes of Securities Act Section 10(a)(3), Item 512(b) of Regulation S-K provides that "each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 … that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein …" As such, the issuer in the example must re-evaluate its well-known seasoned issuer status when it files its Form 10-K on February 28, 2007. Further, for fiscal years ending after December 1, 2005, issuers will be required to indicate their well-known seasoned issuer status on their Form 10-K or Form 20-F. Where an issuer that was a well-known seasoned issuer and has an effective automatic shelf registration statement determines that it no longer is a well-known seasoned issuer at the time it files its annual report (or on the due date of such report), that issuer should amend its automatic shelf registration statement on the form that it is then eligible to use.

Question 16

Q: Can a Canadian issuer filing annual reports on Form 40-F under the Multi-Jurisdictional Disclosure System be a "well-known seasoned issuer" under the definition in Rule 405?

A: No. An issuer must be a well-known seasoned issuer for all purposes, including under Rule 163 and Rule 430B and for purposes of automatic shelf registration. Automatic shelf registration contemplates that the assessment of eligibility of "well-known seasoned issuer" status will be made annually. As adopted, only issuers filing annual reports on Form 10-K or Form 20-F are able to assess their eligibility under the eligibility determination date provisions. As such, the date of determination of eligibility as a well-known seasoned issuer cannot be based on the date of filing of a Form 40-F.

The Commission's intent to limit well-known seasoned issuer status only to those issuers filing annual reports on Form 10-K and Form 20-F is further evidenced by, among other things, the fact that Form 40-F was not revised to include either a well-known seasoned issuer check box or to require the disclosure of unresolved

staff comments (each of which the Commission included in amended Form 10-K and Form 20-F).

Ineligible Issuers

Question 17

Q: The definition of "ineligible issuer" in Securities Act Rule 405 includes an issuer where "[w]ithin the past three years, the issuer or any entity that at the time was a subsidiary of the issuer was convicted of any felony or misdemeanor described in paragraphs (i) through (v) of Section 15(b)(4)(B) of the Securities Exchange Act of 1934." How is a conviction by a foreign court treated under this provision?

A: A conviction by a foreign court as to the activities described in the relevant clauses of Section 15(b)(4)(B) of the Exchange Act would trigger ineligibility under the definition.

Automatic Shelf Registration Statements

Question 18

Q: In Part II of an automatic shelf registration statement, what information should be included under "Other Expenses of Issuance and Distribution"?

A: As with unallocated shelf registration statements, the information included under "Other Expenses of Issuance and Distribution" should include only that information that is known at the time of filing the registration statement.

Question 19

Q: How should the issuer complete the calculation of registration fee table on the face of an automatic shelf registration statement?

A: The calculation of registration fee table should:

- list each type of security being registered; and
- either:
  - state whether a filing fee is being paid with the filing (in which case the dollar amount of the fee should be set forth, as in the case of an unallocated shelf registration statement today); or
  - indicate "$0" in the filing fee table and state that the filing fee will be paid subsequently in advance or on a pay-as-you-go basis.

Question 20

Q. If an automatic shelf registration statement originally registers one or more classes of securities and an additional class of securities subsequently is added to that automatic registration statement by post-effective amendment, when must the Exhibit 5 legality opinion for the additional class of securities and for the securities sold in a particular offering be filed?

A. A form of Exhibit 5 legality opinion must be filed at the time a class of securities is first included in an automatic shelf registration statement, whether the class of securities is first included as part of the initial registration statement or in a post-effective amendment to the automatic shelf registration statement. The signed opinion covering the specific securities sold in an offering must be filed as part of the registration statement or incorporated by reference into the registration statement no later than the time of the offering of such securities.

Question 21

Q: If a well-known seasoned issuer files an automatic shelf registration statement and during that year, before its Section 10(a)(3) update is due, the issuer loses its status as a well-known seasoned issuer, what is the impact on the effectiveness and use of that automatic registration statement?

A: An issuer's loss of eligibility to use a registration form after effectiveness and before its Section 10(a)(3) update will not affect its ability to use that registration statement until the time of its Section 10(a)(3) update. If the issuer is no longer eligible as a well-known seasoned issuer at the time of its Section 10(a)(3) update, the rules would require the issuer to amend its automatic shelf registration statement onto the form it is then eligible to use to sell the securities.

Rule 172

Question 22

Q: Are the provisions of Rule 172 available to dealers that are participants in the underwriting or just those dealers who are not participants in the underwriting?

A: The provisions of Rule 172 are available both to dealers who are not participants in the underwriting and to dealers who are participants in the underwriting, including dealers selling an unsold allotment. A dealer may not rely on Rule 174 to not deliver a prospectus where the dealer is participating in the offering or is selling an unsold allotment. Where Section 4(3) requires delivery of a prospectus, the dealer may rely on Rule 172 to satisfy its delivery obligation, except in the case of offerings of blank check companies.

Question 23

Q: Section 2(a)(10) of the Securities Act sets forth the definition of "prospectus." Clause (a) of Section 2(a)(10) provides an exception from the definition of "prospectus" for a communication that is sent or given after the effective date of the registration statement if "it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of Section 10 at the time of such communication was sent or given to the person to whom the communication was made." Is Rule 172 available to satisfy the condition to the exception in clause (a) of Section 2(a)(10) that the Section 10(a) prospectus be "sent or given to the person to whom the communication was made"?

A: No. Rule 172 provides that a final Section 10(a) prospectus will be deemed to precede or accompany the carrying or delivery of a security for sale for purposes of Securities Act Section 5(b)(2) and provides a conditional exemption from Securities Act Section 5(b)(1) for written confirmations and notices of allocations. Rule 172 does not provide a means to satisfy the "sent or given" language in clause (a) of Section 2(a)(10). As the Commission stated in Footnote 561 of the Securities Offering Reform adopting release, "a final prospectus only filed as provided in Rule 172 will not be considered to be sent or given prior to or with a written offer within the meaning of clause (a) of Securities Act Section 2(a)(10)."

Rule 173

Question 24

Q: Rule 173 requires that each underwriter or dealer participating in a registered offering must provide to each purchaser from it a copy of the final prospectus or, in lieu of the final prospectus, a notice that the sale was made pursuant to a registration statement, within two business days following the "completion of such sale." In the context of Rule 173, does "completion of such sale" mean the date of settlement?

A: For purposes of Rule 173, "completion of such sale" means the date of settlement. The date of sale under Securities Act Section 2(a)(3) may be earlier than the date of the "completion of such sale" for purposes of Rule 173.

Rule 3-10 of Regulation S-X

Question 25

Q: How does Rule 3-10(g)(1)(ii) of Regulation S-X (which refers to the principal amount of securities being registered) apply in the context of an automatic shelf registration statement for an unspecified amount of securities?

A: As with a Form S-3 or Form F-3 unallocated shelf registration statement that includes subsidiary issuers or subsidiary guarantors, in the context of an automatic shelf registration statement, the determination of the principal amount of securities being registered for purposes of Rule 3-10(g)(1)(ii) of Regulation S-X would be based on the principal amount of the guaranteed securities being sold in the particular offering.