**SECURITIES AND EXCHANGE COMMISSION**

17 CFR PARTS 200, 228, 229, 230, 239, 240, 243, 249, and 274

RELEASE NOS. 33-8591; 34-52056; IC-26993; FR-75

INTERNATIONAL SERIES RELEASE NO. 1294

FILE NO. S7-38-04

RIN 3235-AI11

**SECURITIES OFFERING REFORM**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission is adopting rules that will modify and advance significantly the registration, communications, and offering processes under the Securities Act of 1933. Today's rules will eliminate unnecessary and outmoded restrictions on offerings. In addition, the rules will provide more timely investment information to investors without mandating delays in the offering process that we believe would be inconsistent with the needs of issuers for timely access to capital. The rules also will continue our long-term efforts toward integrating disclosure and processes under the Securities Act and the Securities Exchange Act of 1934. The rules will further these goals by addressing communications related to registered securities offerings, delivery of information to investors, and procedural aspects of the offering and capital formation processes.

**EFFECTIVE DATE:** December 1, 2005

**FOR FURTHER INFORMATION CONTACT:** Amy M. Starr, Daniel Horwood, or Anne Nguyen, at (202) 551-3200, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549 or, with respect to questions regarding investment companies, Kieran Brown in the Division of Investment Management, at (202) 551-6784.

**SUPPLEMENTARY INFORMATION:**

We are amending Rule 30-1[1] of the Administrative Practice and Procedure, Item 512[2] of Regulation S-B,[3] Item 512[4] of Regulation S-K,[5] and Rules 134, 137, 138, 139, 153, 158, 174, 401, 405, 408, 412, 413, 415, 418, 424, 426, 430A, 439, 456, 457, 462, 473, 497, and 902[6] and eliminating Rule 434[7] under the Securities Act.[8] We are adding Rules 159, 159A, 163, 163A, 164, 168, 169, 172, 173, 430B, 430C, and 433 under the Securities Act. We are amending Forms S-1, S-3, S-4, F-1, F-3, and F-4 and eliminating Forms S-2

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1 17 CFR 200.30-1.

2 17 CFR 228.512.

3 17 CFR 228.10 et seq.

4 17 CFR 229.512.

5 17 CFR 229.10 et seq.

6 17 CFR 230.134; 17 CFR 230.137; 17 CFR 230.138; 17 CFR 230.139; 17 CFR 230.153; 17 CFR 230.158; 17 CFR 230.174; 17 CFR 230.401; 17 CFR 230.405; 17 CFR 230.408; 17 CFR 230.412; 17 CFR 230.413; 17 CFR 230.415; 17 CFR 230.418; 17 CFR 230.424; 17 CFR 230.426; 17 CFR 230.430A; 17 CFR 230.439; 17 CFR 230.456; 17 CFR 230.457; 17 CFR 230.462; 17 CFR 230.473; 17 CFR 230.497; and 17 CFR 230.902.

7 17 CFR 230.434.

8 15 U.S.C. 77a et seq.

and F-2[9] under the Securities Act; amending Rule 100[10] of Regulation FD[11]and Rule 14a-2[12] under the Securities Exchange Act of 1934;[13] amending Forms 10, 10-K, 10-Q, 10-KSB, and 20-F[14] under the Exchange Act; and amending Form N-2[15] under the Securities Act and the Investment Company Act of 1940.[16]

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9 17 CFR 239.11; 17 CFR.239.13; 17 CFR 239.25; 17 CFR 239.31; 17 CFR 239.33; 17 CFR 239.34; 17 CFR 239.12; and 17 CFR 239.32.

10 17 CFR 243.100.

11 17 CFR 243.100 through 243.103.

12 17 CFR 240.14a-2.

13 15 U.S.C. 78a et seq.

14 17 CFR 249.210; 17 CFR 249.308a; 17 CFR 249.310; 17 CFR 249.310b; and 17 CFR 249.220f.

15 17 CFR 239.14 and 17 CFR 274.11a-1.

16 15 U.S.C. 80a-1 et seq.

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## I. Introduction

### A. Overview

On November 3, 2004, we issued proposed rule and form changes under the Securities Act and the Exchange Act that would modernize the securities offering and communication processes while maintaining protection of investors under the Securities Act.[17] We received over 130 comment letters on the proposals.[18] While a large number of letters focused on only one area of the proposals,[19] a significant number of the other letters addressed many aspects of the proposals. In general, commenters strongly supported the proposals and their objectives. A number of commenters believed that the proposals struck the appropriate balance between improving the capital formation process and modernizing offering communications, while preserving investor protection and avoiding unnecessary impediments to the capital formation process. As with other rulemakings, including those of the magnitude that the proposals represented, commenters provided many thoughtful comments and useful suggestions. We are

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17 Securities Offering Reform, Release No. 33-8501 (Nov. 3, 2004)[69 FR 67392] ("Proposing Release").

18 The public comments we received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington, DC 20549 in File No. S7-38-04, or may be viewed at http://www.sec.gov/rules/proposed/s73804.shtml.

19 A large number of commenters submitted comments that addressed only issues regarding electronic road shows. See, e.g., letters from Robert Alpert; E. Price Ambler; Kenneth Arnot; Richard Barrera; Lisa Baudot; Thomas Bengtsson; Barry Bruner; Harold Candland; Nikita Chitnis; Herbert Chung; Rick Dowdle; Pat Gilbert; Ira Ginsburg; Naval Goel; Bernard Krieg; Francis Lanio; Jimmy Liu; Marvin Lutz; Peter Martin; Craig Millar; Piers Monckton; NetRoadshow Inc. ("NetRoadshow"); F. Thomas O'Halloran, Paul J. Rasplicka; Kim Redding; Eric Ribner; David Schumacher, Andre Shih; Susquehanna International Group, LLP ("SIG"); Steve Smart-O'Connor; Bob Smith, Forrest Tempel; Chris Wallis; and Adam White.

adopting the rules and amendments as proposed with certain modifications to address a number of points that commenters raised.

The rules we are adopting today continue the evolution of the offering process under the Securities Act that began as far back as 1966, when Milton Cohen noted the anomaly of the structure of the disclosure rules under the Securities Act and the Exchange Act and suggested the integration of the requirements under the two statutes.[20] Mr. Cohen's article was followed by a 1969 study led by Commissioner Francis Wheat[21] and the Commission's Advisory Committee on Corporate Disclosure in 1977.[22] These studies eventually led to the Commission's adoption of the integrated disclosure system, short-form registration under the Securities Act, and Securities Act Rule 415 permitting shelf registration of continuous offerings and delayed offerings.[23]

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20 Milton H. Cohen, Truth in Securities Revisited, 79 Harv. L. Rev. 1340 (1966). ("It is my thesis that the combined disclosure requirements of these statutes would have been quite different if the 1933 and 1934 Acts ... had been enacted in opposite order, or had been enacted as a single, integrated statute —that is, if the starting point had been a statutory scheme of continuous disclosures covering issuers of actively traded securities and the question of special disclosures in connection with public offerings had then been faced in this setting. Accordingly, it is my plea that there now be created a new coordinated disclosure system having as its basis the continuous disclosure system of the 1934 Act and treating the '1933 Act' disclosure needs on this foundation.")

21 See Disclosure to Investors – A Reappraisal of Federal Administrative Policies under the '33 and '34 Acts, Policy Study (the "Wheat Report"), www.sechistorical.org/museum/Museum_Papers/museum_Papers_Chron.php#1960 (Mar. 27, 1969).

22 See Report of the Advisory Committee on Corporate Disclosure, Cmte. Print 95-29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess., Nov. 3, 1977 (Nov. 3, 1977). In addition, beginning in 1968, the American Law Institute ("ALI") began its work on a Federal Securities Code, which was approved in 1978 by the ALI membership. The ALI Federal Securities Code included company registration as a central component. See American L. Inst., Federal Securities Code (1980).

23 See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3,

The Commission's attention to the offering and communications processes under the Securities Act continued more recently. In particular, in March 1996, members of the Commission staff delivered the Report of the Task Force on Disclosure Simplification to the Commission.[24] It recommended a number of areas where simplification and modernization of the registration and offering process could be accomplished. In July 1996, the Advisory Committee on the Capital Formation and Regulatory Processes delivered its report to the Commission.[25] Its principal recommendation was that the Securities Act registration and disclosure processes be more directly tied to the philosophy and structure of the Exchange Act through the adoption of a system of "company registration." Under company registration, the focus of Securities Act and Exchange Act registration and disclosure would move from transactions to issuers, and corollary steps would be taken to provide for disclosure and registration of individual offerings within the company registration framework.

Promptly after the Advisory Committee on the Capital Formation and Regulatory Processes delivered its report, the Commission issued a concept release regarding regulation of the securities offering process.[26] The release sought input on a number of significant issues, including:

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1982) [47 FR 11380] ("Integrated Disclosure Release"): Delayed or Continuous Offering and Sale of Securities, Release No. 33-6423 (Sept. 2, 1982) [47 FR 39799]; and Shelf Registration, Release No. 33-6499 (Nov. 17, 1983) [48 FR 52889].

24 Report of the Task Force on Disclosure Simplification, available at www.sec.gov/news/studies/smpl.htm (Mar. 5, 1996).

25 Report of the Advisory Committee on the Capital Formation and Regulatory Process (the "Advisory Committee Report"), available at www.sec.gov/news/studies/capform.htm (July 24, 1996).

26 Securities Act Concepts and Their Effects on Capital Formation, Release No.

- whether the concept of company registration should be pursued;
- whether other methods of increasing the integration of Securities Act and Exchange Act disclosure and other processes should be considered;
- whether existing or further reliance on Exchange Act filings should be accompanied by enhancements to Exchange Act reporting;
- whether companies make information about their public securities offerings available to investors in an appropriate and timely manner, including:
    - at what point in the offering process delivery of, or access to, information should be assured in connection with registered offerings under the Securities Act and whether current requirements ensure timely delivery of information to the secondary market in connection with such offerings;
    - whether prospectus supplements in shelf offerings should be made part of the registration statement;
    - whether and, if so, in what circumstances electronic access should replace actual delivery of information in connection with offerings registered under the Securities Act; and
    - whether restrictions on written offers under the Securities Act should be liberalized and what liability standards should attach to such communications;
- whether adjustments to the roles and responsibilities of traditional "gatekeepers" in the Securities Act offering process, such as underwriters and accountants, should be made in light of increases in the speed of and other evolutions in the offering process;
- whether changes should be made to address evolution in the relationships between the public and private offering processes, including:
    - whether changes in Rules 144A[27] and 144[28] under the Securities Act should be considered; and
    - whether there should be any relaxation in our prohibition against general solicitations of interest or offers in unregistered private offerings; and

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33-7314 (July 25, 1996) [61 FR 40044] (the "1996 Concept Release").

27 17 CFR 230.144A.

28 17 CFR 230.144.

- whether the review process of issuer filings under the Securities Act and the Exchange Act by the staff of the Division of Corporation Finance should be modified to limit the impact of the process on access to capital markets, at least for some category of large seasoned issuers.[29]

In 1998, the Commission proposed new rules under the Securities Act that were intended to modernize the securities offering process.[30] As we recognized in the Proposing Release, much of the comment in response to the 1998 proposals suggested that the system of regulating capital formation in the registered offering market provides a number of advantages that should be considered carefully and retained if we are to make other changes.

The rules we are adopting today are focused primarily on constructive, incremental changes in our regulatory structure and the offering process rather than the introduction of a far-reaching new system, as we believe that we can best achieve further integration of Securities Act and Exchange Act disclosure and processes by making

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29 In addition, the 1996 Concept Release sought input on a number of items suggested for consideration by the Task Force on Disclosure Simplification, including the following: allowing smaller issuers that have been reporting for one year to make delayed offerings (without altering the disclosure requirements or permitting forward incorporation by reference); eliminating "at-the-market" offering restrictions; allowing universal shelf registration for secondary offerings; allowing issuers and majority-owned subsidiaries to be named as possible issuers on a shelf registration (without designating the issuer until takedown); allowing reallocation of securities on a shelf registration statement by post-effective amendment; allowing registration by seasoned issuers without any specification of the classes registered; and allowing seasoned issuers to pay registration fees at the time of the takedown.

30 See The Regulation of Securities Offerings, Release No. 33-7606A (Nov. 13, 1998 [63 FR 67174] (the "1998 proposals"). The Commission proposed these new rules after it was granted general exemptive authority under the Securities Act. The National Securities Markets Improvement Act of 1996 (NSMIA) (Pub. L. 104-290, 110 Stat. 3416 (Oct. 11, 1996)) provided the Commission with general authority to adopt exemptive rules under the Securities Act to the extent that such exemptive action is "necessary or appropriate in the public interest and

adjustments in the current integrated disclosure and shelf registration systems. Further, consistent with our belief that investors and the securities markets will benefit from greater permissible communications by issuers while retaining appropriate liability for these communications, we have sought to address the need for timeliness of information for investors by building on existing statutory provisions and processes without mandating delays in the offering process that we believe would be inconsistent with the needs of issuers for timely access to the securities markets and capital.

We are adopting the proposed revisions to the registration, communications, and offering processes for registered transactions under the Securities Act with certain modifications. We believe the rules we are adopting, while limited in scope, properly address the areas that are in need of modernization. The adopted rules involve three main areas:

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

Today's rules reflect our view that revisions to the Securities Act registration and offering procedures are appropriate in light of significant developments in the offering and capital formation procedures and can provide enhanced protection of investors under the statute. We believe that the rule changes we adopt today will:

- facilitate greater availability of information to investors and the market with regard to all issuers;

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consistent with the protection of investors." See Securities Act Section 28 [15 U.S.C. 77z-3].

- eliminate barriers to open communications that have been made increasingly outmoded by technological advances;

- reflect the increased importance of electronic dissemination of information, including the use of the Internet;

- make the capital formation process more efficient; and

- define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

The rules we are adopting today reflect certain modifications from the proposals to address important points commenters raised. The modifications to the proposals include the following:

- the definitions of graphic communication and written communication (including as to road shows) exclude live, in real-time communications to a live audience that are transmitted graphically;

- the free writing prospectus rules address "cross-liability" concerns among offering participants arising from the use of free writing prospectuses;

- the free writing prospectus rules clarify the filing conditions applicable to media publications, descriptions of the final terms of securities and offerings, and electronic and other road shows, and modify the record retention provisions;

- the shelf registration rules address issues regarding the liability of officers, directors, and accountants and other experts arising from the new effective dates triggered by the filing of prospectus supplements;

- the definition of ineligible issuer more closely conforms the definition to other ineligibility provisions in the Securities Act;

- the rule permitting specified written notices that are not prospectuses narrows the types of information for which a preliminary prospectus will have to include a price range as a condition;

- the definition of well-known seasoned issuer enables issuers to include all registered non-convertible securities, other than common equity, issued for cash in measuring the amount of registered fixed income securities over the prior three years; and

- the prospectus delivery rule addresses concerns about potential underwriter liability due to an issuer's failure to timely file its final prospectus.

We also have endeavored to provide more guidance to market participants regarding our interpretation of the liability provisions of Securities Act Sections 12(a)(2) and 17(a)(2).[31]

### B. Background

#### 1. Advances in Technology

As we noted in the Proposing Release, significant technological advances over the last three decades have increased both the market's demand for more timely corporate disclosure and the ability of issuers to capture, process, and disseminate this information. Computers, sophisticated financial software, electronic mail, teleconferencing, videoconferencing, webcasting, and other technologies available today have replaced, to a large extent, paper, pencils, typewriters, adding machines, carbon paper, paper mail, travel, and face-to-face meetings relied on previously. The rules we are adopting today seek to recognize the integral role that technology plays in timely informing the markets and investors about important corporate information and developments.

#### 2. Exchange Act Reporting Standards

The role that a public issuer's Exchange Act reports play in investment decision making is a key component of the rules we are adopting today. Congress recognized that the ongoing dissemination of accurate information by issuers about themselves and their securities is essential to the effective operation of the trading markets. The Exchange Act and underlying rules have established a system of continuing disclosure about issuers that have offered securities to the public, or that have securities that are listed on a national securities exchange or are broadly held by the public. The Exchange Act rules require

public issuers to make periodic disclosures at annual and quarterly intervals, with other important information reported on a more current basis. The Exchange Act specifically provides for current disclosure to maintain the timeliness and adequacy of information disclosed by issuers, and we have significantly expanded our current disclosure requirements consistent with the provision in the Sarbanes-Oxley Act of 2002[32] that "[e]ach issuer reporting under Section 13(a) or 15(d) … disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer … as the Commission determines … is necessary or useful for the protection of investors and in the public interest."[33]

A public issuer's Exchange Act record provides the basic source of information to the market and to potential purchasers regarding the issuer and its management, business, financial condition, and prospects. Because an issuer's Exchange Act reports and other publicly available information form the basis for the market's evaluation of the issuer and the pricing of its securities, investors in the secondary market use that information in making their investment decisions. Similarly, during a securities offering in which an issuer uses a short-form registration statement, an issuer's Exchange Act record is very often the most significant part of the information about the issuer in the registration statement.

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31 15 U.S.C. 77l(a)(2) and 15 U.S.C. 77q(a)(2).

32 Pub. L. 107-204, 116 Stat. 745 (2002).

33 See Section 409 of the Sarbanes-Oxley Act, which added Section 13(l) to the Exchange Act (15 U.S.C. 78m(l)). See also Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15594] and Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date; Correction, Release No. 33-8400A (Aug. 4, 2004) [69 FR 48370] ("Form 8-K Releases").

With the enactment of the Sarbanes-Oxley Act and our recent rulemaking and interpretive actions, we have enhanced significantly the disclosure included in issuers' Exchange Act filings and accelerated the filing deadlines for many issuers. The following are examples of recent regulatory actions that have improved the delivery of timely, high-quality information to the securities markets by issuers under the Exchange Act:

- requiring the establishment of disclosure controls and procedures;[34]
- requiring a public issuer's top management to certify the content of periodic reports and highlight their responsibilities for and evaluation of the issuer's disclosure controls and procedures and internal control over financial reporting;[35]
- modifying the approach to current disclosure by increasing significantly the types of events that must be reported on a current basis and shortening the time for filing current reports;[36]
- approving listing standard changes intended to improve corporate governance and enhance the role of the audit committee of the issuer's board of directors with regard to financial reporting and auditor independence;[37] and
- providing further interpretive guidance regarding the content and understandability of Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) – a disclosure item we believe is at the core of a reporting issuer's periodic reports.[38]

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34 See Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 33-8124 (Aug. 28, 2002) [67 FR 57276] ("Certification Release").

35 See Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release No. 33-8238 (June 5, 2003) [68 FR 36636]; Certification Release, note 34.

36 See Form 8-K Releases, note 33.

37 See Standards Relating to Listed Company Audit Committees, Release No. 33-8220 (Apr. 9, 2003) [68 FR 18788].

38 See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003) [68 FR 75056] (the "2003 MD&A Release").

Many of the recent changes to the Exchange Act reporting framework provide greater rigor to the process that issuers must follow in preparing their financial statements and Exchange Act reports. Senior management now must certify the material adequacy of the content of periodic Exchange Act reports. Moreover, issuers, with the involvement of senior management, now must implement and evaluate disclosure controls and procedures and internal controls over financial reporting. Further, we believe the heightened role of an issuer's board of directors and its audit committee provides a structure that can contribute to improved Exchange Act reports.

As we recognized in the Proposing Release, the 1996 Concept Release and the 1998 proposals also considered the role of enhanced Exchange Act reporting as an important corollary to reform of the offering process under the Securities Act.[39] We believe that the enhancements to Exchange Act reporting described above enable us to rely on these reports to a greater degree in adopting our rules to reform the securities offering process.

## II. Well-Known Seasoned Issuers; Other Categories of Issuers

### A. Well-Known Seasoned Issuers

We are modifying the framework for communications in connection with public offerings for all issuers and the framework of the registration process for most issuers that report under the Exchange Act. As we explained in the Proposing Release, we believe that the most far-reaching revisions of our communications rules and registration

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[39] Enhanced Exchange Act reporting also was central to the recommendations of the Advisory Committee. See note 25.

processes should be considered for issuers that have a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace.[40]

Today, the largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made.

**1. Definition of Well-Known Seasoned Issuer**

We are adding a new category of issuer – a "well-known seasoned issuer" – that will be permitted to benefit to the greatest degree from the modifications to our rules we are adopting today regarding communications and the registration processes.[41] We are defining a well-known seasoned issuer as an issuer that is required to file reports pursuant to Section 13(a) or Section 15(d) the Exchange Act and satisfies the following requirements as of the date on which its status as a well-known seasoned issuer is determined:

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40 Today's rules will provide a class of well-known seasoned issuers greater flexibility in registering their securities offerings under a more streamlined registration process known as automatic shelf registration. Under the automatic shelf registration process, eligible well-known seasoned issuers can register, on a more flexible basis than is currently the case, offerings of different types of securities using Form S-3 or Form F-3 registration statements that are effective upon filing. See discussion in Section V.B.2. below under "Automatic Shelf Registration for Well-Known Seasoned Issuers."

41 Except for expanding eligibility for certain majority-owned subsidiaries, as discussed below, we are not changing the existing eligibility standards for the use of Form S-3 and Form F-3.

- the issuer must meet the registrant requirements of Form S-3 or Form F-3;[42]

- the issuer either:

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

  - as of a date within 60 days of its eligibility determination date, must have issued in the last three years, at least $1 billion aggregate principal amount of non-convertible securities, other than common equity,[43] in primary offerings for cash, not exchange, registered under the Securities Act;[44] and

- the issuer must not be an ineligible issuer.[45]

If it does not itself meet the conditions for eligibility as a well-known seasoned issuer, a majority-owned subsidiary of a well-known seasoned issuer will nonetheless be a well-known seasoned issuer in connection with the offer and sale of its own securities if:

- the securities are non-convertible securities, other than common equity, and the parent of the majority-owned subsidiary is a well-known seasoned issuer and fully and unconditionally guarantees those securities;[46]

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42 Through the form requirements, the definition requires that a well-known seasoned issuer be current and timely in its Exchange Act reporting obligations.

43 "Common equity" is defined in Securities Act Rule 405 as "any class of common stock, or an equivalent interest, including but not limited to a unit of beneficial interest in a trust or a limited partnership interest."

44 As we discuss below, these issuers generally are limited in the types of securities they may register on an automatic shelf registration statement as a well-known seasoned issuer. See Section II.A.3 below under "Well-Known Seasoned Issuers Securities Offerings."

45 See definition of "ineligible issuer" added to Securities Act Rule 405 and discussed in Section III.D.3 below under "Issuer Eligibility." Further, an issuer will not meet the definition of well-known seasoned issuer if it is an asset-backed issuer (as defined in Item 1101(b) of Regulation AB [17 CFR 229.1101(b)], an investment company registered under the Investment Company Act of 1940, or a business development company. Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act. See Section 2(a)(48) of the Investment Company Act of 1940 [15 U.S.C. 80a-2(a)(48)].

- the securities are guarantees of non-convertible securities, other than common equity, of (1) its well-known seasoned issuer parent or (2) another majority-owned subsidiary where those non-convertible securities are fully and unconditionally guaranteed by the well-known seasoned issuer parent;[47] or

- the majority-owned subsidiary is offering non-convertible investment grade securities.[48]

Overall, the issuers that will meet our thresholds for well-known seasoned issuers are the most active issuers in the U.S. public capital markets. In 2004, those issuers, which represented approximately 30% of listed issuers, accounted for about 95% of U.S. equity market capitalization. They have accounted for more than 96% of the total debt raised in registered offerings over the past eight years by issuers listed on a major exchange or equity market. These issuers, accordingly, represent the most significant amount of capital raised and traded in the United States. As a result of the active participation of these issuers in the markets and, among other things, the wide following of these issuers by market participants, the media, and institutional investors, we believe that it is appropriate to provide communications and registration flexibilities to these well-known seasoned issuers beyond that provided to other issuers, including other seasoned issuers.

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46 Whether a guarantee is full and unconditional is analyzed under the same principles as those used under Rule 3-10 of Regulation S-X [17 CFR 210.3-10] and Exchange Act Rule 12h-5 [17 CFR 240.12h-5]. In addition, the guarantee may only be of securities that have a limited duration and are not perpetual. This analysis is not different from the current analysis under Form S-3 or Form F-3 for registered guaranteed securities.

47 See amendments to Securities Act Rule 405. Unless the majority-owned subsidiary itself meets the eligibility conditions for a well-known seasoned issuer, it may, of course, only register securities as a well-known seasoned issuer on its parent's automatic shelf registration statement.

48 These offerings would be required to meet the conditions of General Instruction I.B.2 of Form S-3 or Form F-3.

### a. Market Capitalization Threshold

As we discussed in the Proposing Release, we believe that non-affiliate equity market capitalization, or "public float," of a reporting issuer can be used as a proxy for whether the issuer has a demonstrated market following.[49] We are adopting as a threshold a public float of $700 million or more. We have used market capitalization as a proxy for public float in evaluating this threshold and its implications.

To determine whether an issuer meets the $700 million threshold under the definition, the issuer will calculate its public float in the same manner that it calculates its public float for purposes of determining Form S-3 or F-3 eligibility.[50] We have revised the definition from the proposal to clarify that the non-affiliate equity market capitalization is determined on a worldwide basis, as it historically has been for purposes of eligibility to use Form F-3. In addition, for purposes of calculating public float of a non-U.S. issuer to determine eligibility as a well-known seasoned issuer and eligibility to use Form S-3 or F-3, we interpret "common equity" as defined in Securities Act Rule 405 as including a class of participating voting or non-voting preferred stock of a foreign

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49 Public float also is one of the key determinants for eligibility for current short-form registration on Form S-3 or Form F-3.

50 The determination of public float is based on a public trading market. This is the same requirement in General Instruction I.B.1 of Form S-3 and Form F-3 that a registrant have a $75 million market value and in the definition of accelerated filer in Exchange Act Rule 12b-2 [17 CFR 240.12b-2]. Therefore, an entity with $700 million of common equity securities outstanding but not trading in any public trading market would not be a well-known seasoned issuer based on market capitalization. See Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (Oct. 29, 1982) [57 FR 48970]; Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6943 (July 22, 1992) [57 FR 32461] (proposing release); Integrated Disclosure Release, note 23; and Reproposal of Comprehensive Revision to System for Registration of Securities Offerings, Release No. 33-6331 (Aug. 18, 1981) [46 FR 41902].

issuer where the issuance of the preferred stock results from requirements of the applicable foreign jurisdiction or market and where the class of preferred stock has liquidation or dividend preferences and other terms that cause it to be the substantial economic equivalent of a class of common stock.

To evaluate the implications of a $700 million public float threshold, staff in our Office of Economic Analysis ("OEA") obtained data on the 12,551 registered offerings that were conducted from 1997 to 2004 by 2,875 issuers that had public equity outstanding and were listed on a major exchange or equity market.[51] Of these offerings, 9,164 were debt offerings that raised proceeds of $1,927 billion, and 3,387 were equity offerings that raised proceeds of $567 billion. The average issuer conducted 4.2 debt offerings and 1.1 equity offerings per calendar year, although as many as 209 debt offerings have been conducted by a single issuer within a calendar year.

OEA also analyzed data on the financial market conditions under which these offerings were made. High levels of analyst coverage, institutional ownership, and trading volume are useful indicators of the scrutiny that an issuer receives from the market, although no one statistic can fully capture the extent to which an issuer is followed by the market.[52] Issuers with market capitalization in excess of $700 million that conducted offerings from 1997 to 2004 typically had an average of 12 analysts

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51 OEA compiled and analyzed the supporting data for the public float (using market capitalization) and outstanding debt thresholds.

52 See, e.g., Harrison Hong, Terrence Lim, and Jeremy C. Stein, Bad News Travels Slowly: Size, Analyst Coverage and the Profitability of Momentum Strategies, 55 Journal of Finance 265 (2000); Robert C. Merton, A Simple Model of Capital Market Equilibrium with Incomplete Information, 42 Journal of Finance 483 (1987).

following them prior to the offering.[53] This includes only sell-side analysts and is, we believe, a conservative indicator of analyst scrutiny. Institutional investors accounted for an average of 52% of equity ownership prior to offerings by issuers with market capitalization above $700 million. Those issuers had an average daily trading volume of nearly $52 million prior to offerings in this period and accounted for the following percentages of capital raised:

OFFERING PROCEEDS, BY ISSUER CAPITALIZATION
PRIMARY SEASONED OFFERINGS, 1997-2004*

$Billions (%) Proceeds from Offerings, by Issuer Capitalization

| | Market Capitalization of Issuers | |
|---|---|---|
| | >$700mm | >$0 (All Issuers) |
| Equity | $ 396 (70%) | $ 567 (100%) |
| Debt[54] | $1,849 (96%) | $1,927 (100%) |
| Total | $2,245 (90%) | $2,494 (100%) |

*Source: OEA estimates using Center for Research in Securities Prices at the University of Chicago and Securities Data Corporation data.

**b. Registered Offerings of Non-Convertible Securities Threshold**

Issuers that do not meet the public equity float test will be considered well-known seasoned issuers if they have issued for cash more than an aggregate of $1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years. These issuers also will have to satisfy the other

53 Issuers with a market capitalization of between $75 million and $200 million, in most cases, have between zero to five analysts following them, with approximately 50% having zero to two analysts following them.

54 Because the methodology includes only listed issuers, it excludes debt-only issuers (including companies that will be well-known seasoned issuers), including those that are subsidiaries of companies with listed public equity but that are not themselves listed.

conditions of the well-known seasoned issuer definition, such as the form eligibility requirement.[55] In determining compliance with this threshold:

- issuers may aggregate the amount of non-convertible securities, other than common equity, issued in registered primary offerings during the prior three years;
- issuers may include only such non-convertible securities that were issued in registered primary offerings for cash – they may not include registered exchange offers in this aggregation; and
- parent company issuers only may include in their calculation the principal amount of their full and unconditional guarantees, within the meaning of Rule 3-10 of Regulation S-X,[56] of non-convertible securities, other than common equity, of their majority-owned subsidiaries issued in registered primary offerings for cash during the three-year period.

The aggregate principal amount of non-convertible securities that may be counted toward the $1 billion issuance threshold may have been issued in any registered primary offering for cash, on any form (other than Form S-4 or Form F-4). Those non-convertible securities need not be investment grade securities to be included in the calculation. In calculating the $1 billion amount, issuers generally may include the principal amount of any debt and the greater of liquidation preference or par value of any non-convertible preferred stock that were issued in primary registered offerings for cash.[57]

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55 As we discuss below, these issuers generally are limited in the types of securities they may register on an automatic shelf registration statement as a well-known seasoned issuer. See Section II.A.3 below under "Well-Known Seasoned Issuers Securities Offerings."

56 17 CFR 210.3-10.

57 Some commenters asked for clarification on how to value certain types of debt issuances, such as debt issuances involving original issue discount or debt issued in foreign currency denominations. See, e.g., letters from the American Bar Association ("ABA") and the New York State Bar Association ("NYSBA"). We have not made any modifications to the definition in response to these comments. Issuers should use the same calculation that they use to determine the dollar amount of securities that they are registering for purposes of determining their filing fees under Securities Act Rule 457.

Issuers may not include the principal amount of securities that were offered in registered exchange offers by the issuer when determining compliance with the $1 billion non-convertible securities threshold. A substantial portion of these offerings involve registered exchange offers of substantially identical securities for securities that were sold in private offerings. In those cases, the original sale to investors in the private offering, relying upon, for example, the exemptions of Securities Act Section 4(2)[58] and Rule 144A, is not registered and is not carried out under the Securities Act's disclosure or liability standards. Moreover, in the subsequent registered exchange offers purchasers may not be able, in certain cases, to avail themselves effectively of the remedies otherwise available to purchasers in registered offerings for cash. While these exchange offers are permitted in some circumstances, the policy preference for registered offerings, in conjunction with the streamlining of the registration process we provide today, lead us to conclude that such exchange offers should not count towards the $1 billion threshold.

OEA analyzed statistics on issuers that did not meet the $700 million public equity threshold. OEA found that very few issuers that had public common equity but did not meet the $700 million public float threshold would meet the $1 billion non-convertible securities threshold. However, OEA also found that a number of issuers without any public common equity would meet the $1 billion threshold. Based on OEA's analysis, from 1997 to 2004 the issuers of fixed income securities that did not have outstanding public common equity but met the $1 billion threshold accounted for 16.7% of all of the issuers without public common equity that issued public debt, but accounted for 65% of total debt and preferred stock issued by all of such issuers. None of the debt

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[58] 15 U.S.C. 77d(2).

offerings of issuers meeting the threshold was rated below investment grade, and 86% of their debt offerings were rated A or higher by a nationally recognized security rating organization (an "NRSRO"). This group of issuers also on average had 19 basis points lower yield spread for their issues relative to issuers without public common equity that had issued less than $1 billion of fixed income securities in the past three years. We believe that this lower yield spread reflects lower default risk (higher ratings) and higher liquidity and transparency of the issuers.[59]

**2. Timing of Determination of Well-Known Seasoned Issuer Status**

Whether an issuer satisfies the eligibility requirements for being a well-known seasoned issuer generally will be determined on an approximately annual basis. We revised the timing of determination of status as a well-known seasoned issuer in response to comments.[60] As adopted, the definition uses the 60-day window period used in Form S-3 and Form F-3 and provides that the eligibility determination 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 (by post-effective amendment, incorporated Exchange Act report, or form of prospectus) to a shelf registration statement for purposes of complying with Securities Act Section 10(a)(3).[61] In the event that the issuer has not

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59 See Gordon J. Alexander, William F. Sharpe, and Jeffrey V. Bailey, Fundamentals of Investments (2001 ed.) at 530.

60 See, e.g., letters from Alston & Bird LLP ("Alston"); Davis Polk & Wardwell ("Davis Polk"); Ernst & Young LLP ("E & Y"); and the Association of the Bar of the City of New York ("NYCBA").

61 See 15 U.S.C. 77j(a)(3). Under Form S-3 and Form F-3, the Section 10(a)(3) update need not be made through a post-effective amendment. Rather, under these Forms, the Section 10(a)(3) update generally occurs when the issuer files its annual report on Form 10-K or Form 20-F containing the issuer's audited financial statements for its most recently completed fiscal year by the due date of such annual report.

filed a shelf registration statement or amended a shelf registration statement for purposes of complying with Securities Act Section 10(a)(3) for sixteen months, the determination date will be the time of filing of the issuer's most recent annual report on Form 10-K or Form 20-F. If the issuer does not accomplish its Section 10(a)(3) update or file its annual report when due, the due date will become the date of determination and, because the issuer will be neither timely nor current in its reporting obligations under the Exchange Act at that time, it will cease to be a well-known seasoned issuer. It can of course become a well-known seasoned issuer again in the future if and when it meets applicable requirements.

A well-known seasoned issuer may not be an ineligible issuer on the date of determination of well-known seasoned issuer status. The date of determination of whether an issuer is an ineligible issuer for these purposes is the same date as that used for other purposes in determining the issuer's status as a well-known seasoned issuer.

**3. Well-Known Seasoned Issuers' Securities Offerings**

An issuer that meets the definition of well-known seasoned issuer based on the $700 million public float threshold can use an automatic shelf registration statement, as discussed below, to register any offering of securities, other than those for business combination transactions.[62] An issuer that meets the definition of well-known seasoned issuer based on the amount of registered non-convertible security issuances in the prior three years also may register any such offering for cash using automatic shelf registration if it is eligible to register a primary offering of its securities on Form S-3 or Form F-3

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[62] Under the Rule, business combination transactions are those defined in Rule 165(f)(1) [17 CFR 230.165(f)(1)]. Rule 165(f)(1) defines a business combination transaction to mean any transaction specified in Rule 145(a) [17 CFR 230.145(a)]

pursuant to General Instruction I.B.1. of such forms.[63] An issuer that meets the definition of well-known seasoned issuer based on the amount of registered non-convertible security issuances in the prior three years but is not eligible to register a primary offering of securities on Form S-3 or Form F-3 pursuant to General Instruction I.B.1 of such forms may use automatic shelf registration to register only offerings for cash of non-convertible securities, other than common equity, whether or not investment grade.

**4. Comments Regarding the Definition of Well-Known Seasoned Issuer**

Commenters generally supported the addition of a class of well-known seasoned issuers who will benefit the most from the new rules.[64] Most of the comments related to the threshold for eligibility based on public equity float, the definition of "debt security" for purposes of the debt threshold calculation, the inclusion of securities issued in exchange offers, the frequency of eligibility determinations, and the inclusion or exclusion of Schedule B issuers, voluntary issuers, and asset-backed issuers.[65] A number

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or exchange offer.

63 We believe that an eligible well-known seasoned issuer that can otherwise use Form S-3 or Form F-3 for registered primary offerings because it has a $75 million public float should not have to use two different registration statements for its securities offerings for cash.

64 See, e.g., letters from Alston; The Bond Market Association ("TBMA"); Citigroup Global Corporate & Investment Bank ("Citigroup"); LaSalle Broker-Dealer Services Division of ABN-AMRO Financial Services, Inc. ("LaSalle"); NYSBA; and Reuters America LLC ("Reuters").

65 See, e.g., letters from ABA; the American Bar Association comment letter on asset-backed securities ("ABA-ABS"); Cleary Gottlieb Steen & Hamilton ("Cleary"); Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank"); the International Bar Association ("IBA"); the Securities Industry Association ("SIA"); and TBMA.

of commenters also suggested that the timing of the eligibility determination for well-known seasoned issuers be revised.[66]

Some commenters expressed the view that the $700 million threshold was too high, while others thought additional eligibility conditions should be included.[67] None of the commenters provided any empirical data supporting their views to modify the thresholds. Other commenters suggested alternative ways to measure whether an issuer should be considered a well-known seasoned issuer, including average daily trading volume or institutional ownership measures.[68] Many commenters requested that we clarify that the public float used in the calculation be the company's worldwide public float.[69] A number of commenters on the definition requested that we direct the staff to reconsider the bases for the thresholds in two to three years.[70]

Commenters on the debt threshold were most concerned about the types of securities included in the calculation and whether it was appropriate to include only debt issued in registered offerings.[71] Some commenters requested that the debt calculation be based on a broader category of fixed income securities including debt securities and non-

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66 See, e.g., letters from Alston; Davis Polk; E & Y; NYCBA; and TBMA.

67 See, e.g., letters from ABA; the American Institute for Certified Public Accountants ("AICPA"); BDO Seidman, LLP ("BDO Seidman"); Deloitte & Touche LLP ("Deloitte"); E & Y; Fried Frank; the National Association of Real Estate Investment Trusts ("NAREIT"); NYSBA; Reuters; Sullivan & Cromwell ("S & C"); and Students in Professor Samuel C. Thompson's Investment Banking Class, UCLA School of Law ("UCLA").

68 See, e.g., letters from ABA; Brinson Patrick Securities Corporation ("Brinson Patrick"); and S & C.

69 See, e.g., letters from ABA; Alston; Cleary; Fried Frank; IBA; NYSBA; and S & C.

70 See, e.g., letters from NYCBA; SIA; and UCLA.

71 See, e.g., letters from ABA; Alston; Cleary; Davis Polk; S & C; and TBMA.

convertible preferred securities.[72] Commenters suggested that non-investment grade debt be included in the calculation.[73] These commenters also suggested that securities issued in exchange offers, such as "Exxon Capital" exchange offers, be included in the debt calculation. Some commenters suggested that the debt calculation be based on all debt and non-convertible preferred stock sold, whether or not in registered offerings.[74] Finally, some commenters requested that issuers meeting the well-known seasoned issuer definition based on their debt offerings be allowed to use the automatic shelf registration procedure for registering offerings of equity securities as well as debt securities.[75]

We have retained the $700 million public float threshold and the $1 billion debt threshold. As the discussion above reflects, in reaching our determination to use the $700 million public float amount, we considered trading volume, institutional ownership, and market capitalization.

In response to comments, we have clarified that the basis for determining the public float calculation is worldwide public float of voting and non-voting common equity. In response to comments,[76] we also are providing an interpretation, as set forth above, regarding the inclusion in the calculation of certain participating preferred stock of non-U.S. issuers that is substantially economically equivalent to common equity.

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72 See, e.g., letters from ABA; Alston; Cleary; the Society of Corporate Secretaries & Governance Professionals ("SCSGP"); the Southern Company ("Southern"); and TBMA.

73 See, e.g., letters from Alston; Davis Polk; the NYCBA; S & C; and TBMA.

74 See, e.g., letters from ABA; Alston; Fried Frank; IBA; and TBMA.

75 See, e.g., letters from Alston; Fried Frank; and TBMA.

76 See letters from Cleary and Shearman & Sterling ("Shearman").

While we are not revising the dollar amount of the thresholds for public equity float or for issued debt, the definition as adopted addresses a number of the other issues that commenters raised. For example, we have expanded the $1 billion debt threshold to include any non-convertible security, other than common equity, that has been issued in a registered offering for cash during the prior three years.[77] Further, the offering of the security included in the calculation could have been registered on any form (other than Form S-4 or Form F-4) and the security need not be investment grade. In addition, a parent issuer may count the aggregate amount of its registered full and unconditional guarantees of non-convertible securities, other than common equity, of its majority-owned subsidiaries issued for cash during the three-year period.

While we have not changed the dollar amounts of the thresholds, we do agree with commenters that it would be appropriate to revisit the thresholds in a few years. We, therefore, are directing the staff of the Division of Corporation Finance and OEA to undertake a study in three years after full implementation of the rules to evaluate the operation of the definition we adopt today and any material changes in the data upon which the thresholds are based and report back to us and recommend any potential changes to the thresholds based on such new data.

Although some commenters had suggested expanding the categories of eligible issuers beyond those contained in the proposed definition,[78] and others suggested narrowing the categories of eligible issuers or otherwise imposing more stringent

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77 We have not expanded the non-convertible security threshold to include the amount of securities issued in unregistered offerings or in exchange offers.

78 See, e.g., letters from ABA; ABA-ABS; Allied Capital Corporation ("Allied"); IBA; and TBMA.

eligibility conditions,[79] we have adopted the definition as proposed in that regard. As a result, well-known seasoned issuer status is not available to voluntary filers, asset-backed issuers, or Schedule B issuers.[80] Voluntary filers are not required to file reports under the Exchange Act, and we believe that such issuers should be required to register under the Exchange Act, and thus become subject to all of the results of registration for all purposes, if they wish to avail themselves of the benefits of reporting issuer, seasoned issuer, or well-known seasoned issuer status.[81] For Schedule B issuers, we expect that the staff will continue to consider disclosure and other shelf issues affecting Schedule B issuers in the same manner that they do today. Finally, we have recently adopted rules and regulations covering the offering of and reporting by asset-backed issuers.[82] This new regulatory structure is not yet fully operational. The advantages of a reporting history under the Exchange Act that influenced our decision to create the well-known seasoned issuer category are essentially absent for asset-backed issuers.

Commenters wanted market participants to have greater certainty that issuers were eligible as well-known seasoned issuers.[83] We have modified the timing for

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79 See, e.g., letters from AICPA; BDO Seidman; Deloitte; and E & Y.

80 As noted above, the definition of well-known seasoned issuer explicitly excludes investment companies registered under the Investment Company Act of 1940 and business development companies.

81 As later discussed and consistent with our proposal, an issuer not subject to the reporting requirements of Exchange Act Section 13 or Section 15(d), but filing Exchange Act reports voluntarily, will not be a well-known seasoned issuer or a seasoned issuer. In addition, because voluntary filers are not required to report, they will not be treated as reporting issuers, for example, for purposes of Rule 138, Rule 168, or Rule 433.

82 See Asset-Backed Securities, Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506] (the "Asset-Backed Securities Adopting Release").

83 See, e.g., letters from ABA-ABS; American Securitization Forum ("ASF"); and Richard Hall.

determination of well-known seasoned issuer status to provide more certainty. We have provided generally for an approximately annual determination of well-known seasoned issuer status. We also are adopting a change to Form 10-K and Form 20-F that will modify the cover page of those forms to include a check box for issuers to indicate if they are considered well-known seasoned issuers at the time of the filing of the Form 10-K or Form 20-F.

### B. Other Categories of Issuers

We also are using existing categories of issuers, including seasoned issuers, unseasoned Exchange Act reporting issuers, and non-reporting issuers, in the new rules regarding communications and the registration process. A seasoned issuer is an issuer that is eligible to use Form S-3 or Form F-3 to register primary offerings of securities pursuant to General Instruction I.B.1 of such Forms or is registering securities in reliance on General Instruction I.B.2, I.B.5, or I.C. of Form S-3 or General Instruction I.A.5 or I.B.2 of Form F-3.[84] Majority-owned subsidiaries registering offerings of their securities on Form S-3 or Form F-3 pursuant to General Instruction I.C. of Form S-3 or I.A.5. of Form F-3 also are considered seasoned issuers.[85] As commenters requested, we are clarifying that issuers of asset-backed securities eligible for registration on Form S-3 also are considered seasoned issuers.[86]

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84 See Form S-3 and Form F-3.

85 We are expanding the majority-owned subsidiary eligibility in Form S-3 and Form F-3 to allow majority-owned subsidiaries to use the forms under the same circumstances in which majority-owned subsidiaries may be well-known seasoned issuers. For example, see General Instruction I.C. to Form S-3.

86 Asset-backed securities (as defined in Item 1101 of Regulation AB [17 CFR 229.1101]) may be offered and sold on Form S-3 if the issuer meets the requirements of General Instruction I.A.4 of Form S-3 and the transaction meets the requirements of General Instruction I.B.5 of such Form, including that the

An unseasoned issuer is an issuer that is required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. A non-reporting issuer is an issuer that is not required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act, regardless of whether it is filing such reports voluntarily.

A number of commenters suggested that the rules treat voluntary filers as seasoned issuers even though they are not required to file reports pursuant to Exchange Act Section 13 or Section 15(d).[87] As we note above with respect to eligibility for well-known seasoned issuer status, voluntary filers are not required to file reports under the Exchange Act, and we believe that such issuers should be required to register under the Exchange Act if they wish to avail themselves of the benefits accorded seasoned issuers under the rules we are adopting today.

## III. Communications Rules

### A. Communications Requirements Prior to Today's Rules and Amendments

The Securities Act restricts the types of offering communications that issuers or other parties subject to the Act's provisions (such as underwriters) may use during a registered public offering. The nature of the restrictions depends on the period during which the communications are to occur. The restrictions do not depend on the accuracy of the information contained in the communication. Before the registration statement is filed, all offers, in whatever form, are prohibited.[88] Between the filing of the registration

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asset-backed securities are investment grade.

87 See, e.g., letters from ABA; Alston; Fried Frank; and TBMA.

88 See Securities Act Section 5(c) [15 U.S.C. 77e(c)]. Securities Act Section 2(a)(3) [15 U.S.C. 77b(a)(3)] defines "offer" as any attempt or offer to dispose of, or

statement and its effectiveness, offers made in writing (including by e-mail or Internet), by radio, or by television are limited to a "statutory prospectus" that conforms to the information requirements of Securities Act Section 10.[89] As a result, the only written material that is permitted in connection with the offering of the securities during the period between filing and effectiveness of a registration statement is a preliminary prospectus meeting the requirements of Section 10, which must be filed with us. Even after the registration statement is declared effective, offering participants still may make written offers only through a statutory prospectus, except that they may use additional written offering materials if a final prospectus that meets the requirements of Securities Act Section 10(a) is sent or given prior to or with those materials.[90] Violations of these restrictions generally are referred to as "gun jumping," and we use the term "gun-jumping provisions" in this release to describe the statutory provisions of the Securities Act that set forth these restrictions.

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solicitation of an offer to buy, a security or interest in a security, for value. The term "offer" has been interpreted broadly and goes beyond the common law concept of an offer. See Diskin v. Lomasney & Co., 452 F.2d 871 (2d. Cir. 1971); SEC v. Cavanaugh, 1 F. Supp. 2d 337 (S.D.N.Y. 1998). The Commission has explained that "the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer . . ." Guidelines for the Release of Information by Issuers Whose Securities are in Registration, Release No. 33-5180 (Aug. 16, 1971) [36 FR 16506].

89 See Securities Act Section 5(b)(1) [15 U.S.C. 77e(b)(1)] and Securities Act Section 10 [15 U.S.C.77j].

90 See Securities Act Section 2(a)(10) [15 U.S.C. 77b(a)(10)] and Section 5(b)(1).

### B. Need for Modernization of Communications Requirements

#### 1. General

As we noted in the Proposing Release, the gun-jumping provisions of the Securities Act were enacted at a time when the means of communications were limited and restricting communications (without regard to accuracy) to the statutory prospectus appropriately balanced available communications and investor protection. The gun-jumping provisions were designed to make the statutorily mandated prospectus the primary means for investors to obtain information regarding a registered securities offering.

The capital markets, in the United States and around the world, have changed very significantly since those limitations were enacted. Today, issuers engage in all types of communications on an ongoing basis, including, importantly, communications mandated or encouraged by our rules under the Exchange Act, rules or listing standards of national securities exchanges, and comparable requirements in foreign jurisdictions. Modern communications technology, including the Internet, provides a powerful, versatile, and cost-effective medium to communicate quickly and broadly.[91] The changes in the Exchange Act disclosure regime and the tremendous growth in communications technology are resulting in more information being provided to the market on a more non-discriminatory, current, and ongoing basis. Thus, while investor protection remains a paramount interest, the gun-jumping provisions of the Securities Act impose substantial

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91 For example, the Internet provides a medium through which to deliver electronic documents, to broadcast radio and television programs, to issue press releases or print advertisements, to conduct telephone or videoconferences with investors, prospective investors, and other parties, and to send personal e-mails.

and increasingly unworkable restrictions on many communications that would be beneficial to investors and markets and would be consistent with investor protection.

The following factors, combined with the advances in technology described above, lead us to believe that investors and the market will benefit from access to greater permissible communications where protection for investors is maintained through the appropriate Securities Act liability standards for materially deficient disclosures in prospectuses and oral communications:

- much of our recent rulemaking is intended to encourage reporting issuers to provide additional materially accurate and complete information to the market on a more current basis.[92] The Securities Act's constraints on communications during an offering, however, have caused issuers to be concerned about the treatment of their ongoing communications and whether, if they are engaged or will soon be engaged in capital raising, their customary disclosures will be considered an impermissible offer of securities;[93]

- the multiplicity of means of communication has led us to recognize that restricting written offers to a statutory prospectus inhibits desirable methods of timely communication of information;

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92 Other recent rulemaking initiatives addressing disclosure issues include those referenced in notes 33 through 38 and those contained in Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, Release No. 33-8340 (Nov. 24, 2003) [68 FR 66992]; and Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Release No. 34-47264 (Jan. 28, 2003) [68 FR 5982] (the "Off-Balance Sheet Disclosure Release").

93 See, e.g. letter from the American Bar Association Committee on Federal Regulation of Securities to the Director of the Division of Corporation Finance, Aug. 22, 2001 (available at www.abanet.org); comment letters in File No. S7-30-98 from Gerald S. Backman, et. al.; Fried Frank; Service Employees International Union Master Trust; and S & C. See also Edward F. Greene and Linda C. Quinn,"Building on the International Convergence of the Global Markets: a Model for Securities Law Reform," presented at A Major Issues Conference: Securities Regulation in the Global Internet Economy, Washington, D.C., Nov. 14-15, 2001 (available at www.law.northwestern.edu).

- there are many more offerings of increasingly complex securities where written communications, such as detailed descriptions of securities and offerings, would enhance significantly the offering process for the benefit of investors;[94] and

- the continuing trends towards globalization of securities markets and multinationalization of issuers and offerings and corresponding increase in information and information requirements increase the need for a regulatory framework that accommodates more flexible communications.

As we discussed in the Proposing Release, in view of the many recent changes to the Exchange Act reporting system that are designed to produce more timely and extensive disclosures and greater scrutiny of, and confidence in, those reports, it is appropriate at this time to adopt communications and offering reforms.[95]

**2. Definition of Written Communication**

**a. "Written Communication" and "Graphic Communication"**

As a starting point for reform, we are defining all methods of communication, other than oral communications, as written communications for purposes of the Securities Act. While we have addressed the issue of electronic communications in a number of different contexts, at this time we are adopting rules making it clear that all electronic communications (other than telephone and other live, in real-time communications to a live audience, as discussed below) are graphic and, therefore, written communications for

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94 For example, we and the staff have already recognized the usefulness of descriptions of securities and related materials in offerings of asset-backed securities. See the Asset-Backed Securities Adopting Release, note 82.

95 We have considered communications reform in other contexts for a number of years. With our adoption of the communications reforms for business combination transactions in 1999, we reduced the regulation of offers and brought the regulatory structure closer to the practices in those offerings while ensuring continued investor protection. See Regulation of Takeovers and Security Holder Communications, Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408] (the "Regulation M-A Release"). We recently have adopted communications reforms for asset-backed securities offerings as well. See the Asset-Backed Securities Adopting Release, note 82.

purposes of the Securities Act. In this manner, we intend to encompass new technologies. Accordingly, we are adopting new definitions of "graphic communication" and "written communication" to promote consistent understanding of what constitutes such a communication in view of the technological developments since the enactment of the Securities Act and to significantly reduce remaining uncertainty regarding the permitted means for delivery of information under the Securities Act.

We are adopting the proposed revisions to the definition of "graphic communication" with some modifications. As adopted, the definition of "graphic communication" includes any form of electronic media, such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet web sites, and computers, computer networks, and other forms of computer data compilation.[96]

The definition of graphic communication does not 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.[97] Any such communication is not a graphic communication even if it is transmitted through a means of graphic communication. A basic concept of the definition we adopt today is that communications that are graphic communications when they are transmitted are treated

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[96] The forms of media that are described in the definition encompass the forms of media that are addressed in our interpretive guidance on the use of electronic media. See, e.g., Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843] (the "2000 Electronics Release"). In recognition of continuing developments in technology, the forms of electronic media described in the definition are intended to be illustrative rather than exhaustive.

[97] Written communications will not include individual telephone voice mail messages from live telephone calls but will include broadly disseminated or "blast" voice mail messages, including those that originate in graphic form. The latter is included in the definition because we believe they are not to a live audience and therefore more closely resemble graphic communications than oral

as graphic communications under the definition and communications that are live, in real-time communications to a live audience when they are transmitted are not treated as graphic communications. We believe that live, in real-time communications to a live audience, including those transmitted by graphic means, have less of the permanence of communications that originate in graphic form or that appear on the printed page. Accordingly, we believe that the distinctions in the definitions we are adopting today are appropriate updatings of the Securities Act's distinctions between oral and written communications.

As adopted, "written communication" means any communication that is written, printed, or television or radio broadcast (regardless of the transmission means), or a graphic communication. All communications that fall outside the definition are oral communications, including for purposes of Securities Act Section 12(a)(2). It also excludes live telephone calls (through whatever means by which they are transmitted, including the Internet) and, as discussed above, other live, in real-time communications to a live audience transmitted by graphic means. The definition as adopted clarifies that television or radio broadcasts will be covered regardless of the transmission means.

We thus make a clearer distinction between communications that are broadcast and those that are graphic communications. We have clarified that a television or radio broadcast in Securities Act Section 2(a)(10) and in our definition of written communication encompasses all radio or television broadcasts, regardless of the means of transmission of the signals. For example, a cable television show will be considered a television broadcast that is a written communication, and a television show or radio

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communications.

program that may be seen or heard through the Internet on a computer will also be considered a television or radio broadcast that is a written communication. A communication may fall outside the definition of graphic communication because it originates live, in real-time to a live audience but such communication (for example, a live business news program broadcast by traditional means or on cable) may be a television or radio broadcast. On the other hand, a live, in real-time communication that is transmitted by graphic means to a live audience would be an oral communication. Given the potentially unlimited and uncontrolled nature of dissemination of broadcast communications and the language of the Securities Act, we believe that this is an appropriate distinction.

The following are examples of the application of these definitions:

- a live telephone call is not a written communication;
- a live telephone call that is recorded by the recipient is not a written communication;
- e-mails, facsimiles, and electronic postings on web sites, by their nature, originate in graphic form and, therefore, are graphic communications;
- a live, in-person road show to a live audience is not a written communication;
- a live, in real-time road show to a live audience that is transmitted graphically is not a graphic communication;
- a live, in real-time road show to a live audience that is transmitted to an "overflow room" is not a graphic communication;
- a webcast or video conference that originates live and in real-time at the time of transmission and is transmitted through video conferencing facilities or is webcast in real-time to a live audience is not a graphic communication;
- the ability of a member of the audience to record a webcast or video conference that is presented live and in real-time to a live audience would not affect the status of that webcast or video conference;

- a live telephone call or video or webcast conference that is recorded by or on behalf of the originating party or parties and then transmitted, or is otherwise transmitted other than live and in real-time, will be a graphic communication and therefore a written communication;

- a live telephone call or video or webcast conference that is recorded by the recipient and then re-transmitted by the recipient is a graphic communication by the recipient when it is re-transmitted; and

- an interview with an issuer's chief executive officer conducted live as part of a television program is a written communication regardless of how the television signal is transmitted (whether over the airwaves, or through cable, satellite, or Internet) and regardless of how it is received by the recipient (whether a television set or a computer).

With respect to road shows, as explained below, we also have added a Note to Rule 433 that states that a communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not subsequently is deemed to be part of the road show.

**b. Comments Regarding Proposals**

Commenters raised several questions about the proposed definitions, particularly as the definitions affected live audio transmissions, live telephone calls, and live road shows transmitted over the Internet.[98] Commenters were concerned that the definitions of written communication and graphic communication did not explicitly address the treatment of live telephone calls, regardless of the medium of transmission, although the Proposing Release provided that live telephone calls (other than blast voice mails) would not be considered written communications.[99]

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98 See, e.g., letters from Citigroup; Cleary; Davis Polk; S & C; and SIA.

99 See, e.g., letters from Citigroup; Merrill Lynch & Co., Inc. ("Merrill Lynch"); S & C; and SIA.

We believe that the modifications that we made to the definitions of graphic communication and written communication will address commenters' issues regarding live, in real-time communications, including telephone calls, conference calls, videocasts, and live webcasts.

### C. Overview of Communications Rules

Today, we are adopting rules that relate to the following:

- regularly released factual business information;
- regularly released forward-looking information;
- communications made more than 30 days before filing a registration statement;
- communications by well-known seasoned issuers during the 30 days before filing a registration statement;
- written communications made in accordance with the safe harbor in Securities Act Rule 134; and
- written communications (other than a statutory prospectus) by any eligible issuer after filing a registration statement.

The following table provides a brief overview of the operation of the new and amended rules. While the table clearly does not include the level of detail necessary to explain the rules, we have included it to help readers in understanding the basic scope of the new communications scheme.

| | **Could it be an "offer" as defined in Section 2(a)(3)?** | **Is it a "prospectus" as defined in Section 2(a)(10)?** | **Is it a prohibited pre-filing offer for purposes of Section 5(c)?** | **Is it a prohibited prospectus for purposes of Section 5(b)(1)?** |
|---|---|---|---|---|
| **Regularly Released Factual Business Information** | Yes | No | Rule defines it as not an offer for Section 5(c) purposes | Section 5(b)(1) relates only to "prospectuses" – it is not applicable |

| | Could it be an "offer" as defined in Section 2(a)(3)? | Is it a "prospectus" as defined in Section 2(a)(10)? | Is it a prohibited pre-filing offer for purposes of Section 5(c)? | Is it a prohibited prospectus for purposes of Section 5(b)(1)? |
|---|---|---|---|---|
| **Regularly Released Forward-Looking Information** | Yes | No | Rule defines it as not an offer for Section 5(c) purposes | Section 5(b)(1) relates only to "prospectuses" – it is not applicable |
| **Communications Made More Than 30 Days Before Filing of Registration Statement** | Yes | Possibly, based on facts and circumstances | Rule defines it as not an offer for Section 5(c) purposes | Section 5(b)(1) does not apply in the pre-filing period – it is not applicable |
| **Well-Known Seasoned Issuers -- Oral Offers Made Within 30 Days of Filing of Registration Statement** | Yes | No | Is exempted from prohibition of Section 5(c) | Section 5(b)(1) does not apply in the pre-filing period – it is not applicable |
| **Well-Known Seasoned Issuers -- Written Offers Made Within 30 Days of Filing of Registration Statement** | Yes | Yes. It also is a free-writing prospectus | Is exempted from prohibition of Section 5(c) | Section 5(b)(1) does not apply in the pre-filing period – it is not applicable |
| **Well-Known Seasoned Issuers -- Free Writing Prospectuses Used Before Filing of Registration Statement** | Yes | Yes | Is exempted from prohibition of Section 5(c) | Section 5(b)(1) does not apply in the pre-filing period – it is not applicable |
| **Identifying Statements in Accordance with Rule 134** | Yes | No | Section 5(c) is not applicable, as Rule 134 relates only to the period after the filing of a registration statement | Section 5(b)(1) relates only to "prospectuses" – it is not applicable |

| | Could it be an "offer" as defined in Section 2(a)(3)? | Is it a "prospectus" as defined in Section 2(a)(10)? | Is it a prohibited pre-filing offer for purposes of Section 5(c)? | Is it a prohibited prospectus for purposes of Section 5(b)(1)? |
|---|---|---|---|---|
| **All Eligible Issuers -- Free Writing Prospectuses Used After Filing of Registration Statement** | Yes | Yes | Section 5(c) is not applicable, as it does not apply in the post-filing period | Section 5(b)(1) will be satisfied, as the free writing prospectus will be a permitted Section 10(b) prospectus |

The communications rules we are adopting recognize the value of ongoing communications as well as the importance of avoiding unnecessary restrictions on offers during a registered offering. In particular, the new and revised rules will eliminate requirements that can interrupt unnecessarily an issuer's normal and routine communications into the market while an issuer is engaging in a securities offering, and will enhance the ability of issuers and other offering participants to make written offers outside the statutory prospectus.

The new and revised rules we are adopting establish a communications framework that, in some cases, will operate along a spectrum based on the type of issuer, its reporting history, and its equity market capitalization or recent issuances of fixed income securities. Thus, under the rules we are adopting, eligible well-known seasoned issuers will have freedom generally from the gun-jumping provisions to communicate at any time, including by means of a written offer other than a statutory prospectus. Varying levels of restrictions will apply to other categories of issuers. We believe these distinctions are appropriate because the market has more familiarity with large, more seasoned issuers and, as a result of the ongoing market following of their activities, including the role of market participants and the media, these issuers' communications

have less potential for conditioning the market for the issuers' securities to be sold in a registered offering. Disclosure obligations and practices outside the offering process, including under the Exchange Act, also determine the scope of communications flexibility the rules give to issuers and other offering participants.[100]

The cumulative effect of the rules under the gun-jumping provisions is the following:

- well-known seasoned issuers are permitted to engage at any time in oral and written communications, including use at any time of a free writing prospectus,[101] subject to enumerated conditions (including, in specified cases, filing with us).[102]
- all reporting issuers are permitted, at any time, to continue to publish regularly released factual business information and forward-looking information.[103]
- non-reporting issuers are permitted, at any time, to continue to publish regularly released factual business information that is intended for use by persons other than in their capacity as investors or potential investors.[104]
- communications by issuers more than 30 days before filing a registration statement are not prohibited offers so long as they do not reference a securities offering that is or will be the subject of a registration statement.[105]
- All issuers and offering participants are permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions (including, in specified cases, filing with us).[106]

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100 See, e.g., Regulation FD, Regulation G [17 CFR 244.100 et seq.], and Form 8-K [17 CFR 249.308].

101 A "free writing prospectus" is defined in Securities Act Rule 405. This definition is discussed in Section III.D.3 below under "Definition of Free Writing Prospectus."

102 See Rule 163.

103 See Rule 168. Certain asset-backed issuers and non-reporting foreign private issuers also will be able to rely on the Rule.

104 See Rule 169.

105 See Rule 163A.

106 See Rules 164 and 433.

- a broader category of routine communications regarding issuers, offerings, and procedural matters, such as communications about the schedule for an offering or about account-opening procedures, are excluded from the definition of "prospectus."[107]

- the exemptions for research reports are expanded.[108]

As discussed below, a number of these rules include conditions of eligibility. Most of the new and amended rules, for example, are not available to blank check companies, penny stock issuers, or shell companies.[109]

The rules we are adopting today ensure that appropriate liability standards are maintained. For example, all free writing prospectuses have liability under the same provisions as apply today to oral offers and statutory prospectuses.[110] Written communications not constituting prospectuses will not be subject to disclosure liability applicable to prospectuses[111]under Securities Act Section 12(a)(2). This result will not affect their status for liability purposes under other provisions of the federal securities laws, including the anti-fraud provisions.[112]

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107 See amendments to Securities Act Rule 134.

108 See amendments to Securities Act Rules 137, 138, and 139.

109 We have adopted rules that contain a definition of shell company. See Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies, Release No. 33-8587 (July 15, 2005) ("Shell Company Release"). For purposes of the rules we are adopting today, we have excluded business combination related shell companies from the restrictions otherwise applicable to shell companies. Therefore, all references to shell companies in this release excludes business combination related shell companies.

110 These liability provisions include Securities Act Section 12(a)(2) and 17(a), Exchange Act Section 10(b) [15 U.S.C. 78j(b)], and Exchange Act Rule 10b-5 [17 CFR 240.10b-5].

111 See Securities Act Section 2(a)(10) and Rule 134.

112 See, e.g., Securities Act Section 17(a), Exchange Act Section 10(b) and Exchange Act Rule 10b-5.

### D. Communications Rules

#### 1. Permitted Continuation of Ongoing Communications During an Offering

##### a. Overview

We are adopting substantially as proposed two separate, non-exclusive safe harbors from the gun-jumping provisions for continuing ongoing business communications. The first safe harbor permits a reporting issuer's continued publication or dissemination of regularly released factual business and forward-looking information at any time, including around the time of a registered offering.[113] The second safe harbor permits a non-reporting issuer's continued publication or dissemination of regularly released factual business information that is intended for use by persons other than in their capacity as investors or potential investors.[114] The safe harbors are not exclusive and do not create a presumption that any communication that falls outside the safe harbor is an offer. Accordingly, reliance on one of the safe harbors does not affect the availability of any other exemption or exclusion under the Securities Act. Further, attempted compliance with one of the safe harbors does not act as an exclusive election. For example, attempted reliance on one of the exemptive rules or exclusions we adopt today will not preclude reliance on another available exemption or exclusion. In particular, it will not preclude reliance on the argument that under general securities law principles and our earlier interpretive guidance the communication in question is not an offer under Securities Act Section 2(a)(3).

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113 See Rule 168.

114 See Rule 169.

Investment companies registered under the Investment Company Act of 1940 and business development companies are ineligible to use the safe harbors for factual business information and forward-looking information. These issuers are subject to a separate framework governing communications with investors.[115]

### b. Exception for Regularly Released Factual Business and Forward-Looking Information – Available to Reporting Issuers

We are adopting substantially as proposed the safe harbor for reporting issuers, as well as asset-backed issuers and certain non-reporting foreign private issuers, from the gun-jumping provisions for continued publication or dissemination of communications of regularly released factual business and forward-looking information.[116] This safe harbor is a "use" safe harbor in that it applies to communications of factual business and forward-looking information that have been regularly released in the ordinary course by or on behalf of a reporting issuer.[117]

Commenters supported the proposed safe harbor with certain suggested changes to its scope.[118] Commenters suggested that the safe harbor should be available to voluntary filers, non-reporting foreign private issuers, asset-backed issuers, registered investment companies, and business development companies.[119] As adopted, the rule is

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115 See, e.g., Securities Act Rules 156, 482, and 498 [17 CFR 230.156; 17 CFR 230.482; 17 CFR 230.498]; Investment Company Act Rule 34b-1 [17 CFR 270.34b-1].

116 The safe harbor also covers communications that incorporate regularly released factual business or forward-looking information.

117 See Rule 168.

118 See, e.g., letters from ABA; Cleary; Davis Polk; Fried Frank; NYSBA; and SCSGP.

119 See, e.g., letters from ABA; ABA-ABS; Allied; Alston; the Commercial Mortgage Securities Association ("CMSA"); Davis Polk; Fried Frank; Richard Hall; NYCBA; NYSBA; and S & C.

available to non-reporting foreign private issuers meeting certain conditions and to asset-backed issuers (and to a depositor, sponsor, servicer, or affiliated depositor, whether or not the issuer) with regard to registered offerings of asset-backed securities.[120] We believe that non-reporting foreign private issuers qualifying under the safe harbors, like reporting issuers in the United States, are providing information to the markets even though they are not reporting companies in the United States. Similarly, asset-backed issuers and issuers that are affiliated depositors provide and are encouraged to provide information on an ongoing basis in a manner consistent with that covered by Rule 168. The reference to depositors, sponsors, servicers, and affiliated depositors, whether or not the issuer, is intended to permit communication of information regarding pre-existing transactions or asset pools within the safe harbor where its conditions are satisfied.

As we note above, voluntary filers are not required to report under the Exchange Act and therefore do not fall within Rule 168. Voluntary filers will have available to them the safe harbor for non-reporting issuers in new Rule 169.[121] We also note above that registered investment companies and business development companies are subject to a separate framework governing communications with investors, and we believe that it would be more appropriate to consider investment company issues in the context of a broader reconsideration of this separate framework.

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120 The eligibility conditions for non-reporting foreign private issuers will be the same as the eligibility conditions for such issuers contained in Securities Act Rules 138 and 139 as we are amending them today.

121 These issuers may, of course, continue to rely on existing Commission interpretations concerning ongoing business disclosures. See the discussion at note 122 below regarding the interpretive releases on factual business information.

### i. Factual Business Information

#### (A) Scope of the Safe Harbor

We believe it is important to provide increased certainty regarding when the gun-jumping provisions will be inapplicable to the continuing ongoing communication of specified factual business information. We are adopting Securities Act Rule 168, which provides a non-exclusive safe harbor that such a communication is not an impermissible prospectus and does not violate the prohibition on pre-filing offers.[122] We want to encourage reporting issuers and other issuers eligible to rely on the safe harbor to continue to provide this information. For purposes of Rule 168, factual business information is defined as:[123]

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122 Rule 168 is a safe harbor from the definition of "prospectus" in Securities Act Section 2(a)(10) and, therefore, prevents the application of the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The Rule also is a safe harbor from the prohibitions on pre-filing "offers" in Securities Act Section 5(c).

In general, as we recognized many years ago, ordinary factual business communications that an issuer regularly releases are not considered an offer of securities. See, e.g., the guidelines contained in the 2000 Electronics Release. note 96 at Section II.B.2; Guidelines for the Release of Information by Issuers Whose Securities are in Registration, Release No. 33-5180 (Aug. 16, 1971) [36 FR 16506]; Publication of Information Prior to or After the Filing and Effective Date of a Registration Statement Under the Securities Act of 1933, Release No. 33-5009 (Oct. 7, 1969) [34 FR 16870]; Offers and Sales by Underwriters and Dealers, Release No. 33-4697 (May 28, 1964) [29 FR 7317]; and Publication of Information Prior to or After the Effective Date of a Registration Statement, Release No. 33-3844 (Oct. 8, 1957) [22 FR 8359]. The non-exclusive safe harbors we are adopting today will not affect in any way the Securities Act analysis regarding ordinary course business communications that are not within the safe harbors and we have made that clear in the Preliminary Note to the Rule. Such communications will not be presumed to be offers, and whether they are offers will depend on the facts and circumstances.

123 Under the Rule as adopted, regularly released factual business information does not include the release of information about the registered offering or the release of information as part of the offering activities in the registered offering.

- factual information about the issuer, its business or financial developments, or other aspects of its business;
- advertisements of, or other information about, the issuer's products or services; and
- dividend notices.

This information includes without limitation in each case such factual business information contained in reports or materials filed with, furnished to, or submitted to us pursuant to the Exchange Act.[124]

**(B) Comments on the Scope of the Safe Harbor**

Some commenters suggested broadening the categories of factual business information,[125] including the suggestion that only offering-related information be excluded from the definition of factual business information.[126] We are adopting the definition of factual business information that in substantive respects is substantially as proposed. The simplification of the definition in the Rule as adopted does not narrow the information included in the definition. We believe that the purpose of the safe harbor is to permit reporting issuers to continue their ordinary course factual business communications, not to define when an offer is considered to occur in all cases. As we

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124 As we discuss below, some commenters expressed concern about the treatment of information contained in Exchange Act reports at the time they are originally filed with, furnished to, or submitted to us. See, e.g., letters from ABA and Fried Frank. We believe this modification will make clear that all covered information within Exchange Act filings will be covered by the safe harbor.

Factual business information that reporting issuers release or disseminate will continue to be subject to the provisions of Regulation FD, Regulation G, Item 10 of Regulation S-K and Regulation S-B [17 CFR 229.10 et seq. and 17 CFR 228.10 et seq.], and Item 2.02 of Form 8-K.

125 See, e.g., letters from ABA and SCSGP.

126 See, e.g., letters from Davis Polk and SCSGP.

have noted, whether or not a communication that is outside the safe harbor would be an offer is a facts and circumstances determination.

We have modified the definition from the proposal to make clear that factual business information may be communicated within the safe harbor by including it in any report or material filed with, furnished to, or submitted to us. The other conditions of the safe harbor, for example, the "regularly released," condition of course also must be satisfied. In addition, in response to commenters' concerns, we have made clear in a preliminary note that the safe harbor addresses use and relates to a communication, and, therefore, that another communication of the information in an offering-related manner will not affect the ability to rely on the safe harbor for the protected communication.

**ii. Forward-Looking Information**

**(A) Scope of the Safe Harbor**

As we stated in the Proposing Release, our view of the value of forward-looking information in the market has evolved through the years. Through the 1970's we were most concerned with the potentially misleading effect that forward-looking information could have on investors.[127] Since the 1980's, we have encouraged issuers to disclose forward-looking information and, in some situations (such as the disclosures in MD&A), required them to do so.[128] The existing safe harbors for the content of forward-looking

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127 Until the 1970's, the Commission prohibited disclosure of forward-looking information in any disclosure document. In 1979, the Commission adopted a safe harbor for release of forward-looking information. See Statement by the Commission on the Disclosure of Projections of Future Economic Performance, Release No. 33-5362 (Feb. 2, 1973) [38 FR 7220]; Safe Harbor Rule for Projections, Release No. 33-6084 (June 25, 1979) [44 FR 38810]. See also, the Wheat Report, note 21, at 94.

128 See Item 303 of Regulation S-K and Regulation S-B [17 CFR 229.303 and 17 CFR 228.303]. In our 2003 MD&A Release discussed at note 38, we issued

statements are designed to encourage the provision of forward-looking information.[129]

Where an issuer regularly releases forward-looking information in the ordinary course, we indicated in the Proposing Release that we believe that the purpose of such communication is to keep the market informed about the issuer and its future prospects and, thus, the continued release or dissemination of this information in the ordinary course is not for the purpose of offering securities or conditioning the market for new issuances of the issuer's securities. Many issuers disclose earnings forecasts and other forward-looking information publicly to provide more information to the markets and to enable them to continue to have discussions to which Regulation FD applies. We do not believe that it is beneficial to investors or the markets to force reporting issuers to

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interpretive guidance on MD&A which stated:

> In addressing prospective financial condition and operating performance, there are circumstances, particularly regarding known material trends and uncertainties, where forward-looking information is required to be disclosed. We also encourage companies to discuss prospective matters and include forward-looking information in circumstances where that information may not be required, but will provide useful material information for investors that promotes understanding…
>
> [M]aterial forward-looking information regarding known material trends and uncertainties is required to be disclosed as part of the required discussion of those matters and the analysis of their effects. In addition, forward-looking information is required in connection with the disclosure in MD&A regarding off-balance sheet arrangements.

[129] See Securities Act Section 27A [15 U.S.C. 77z-2] and Securities Act Rule 175 [17 CFR 230.175]. Section 27A provides a safe harbor for certain forward-looking statements. See also, the Off-Balance Sheet Disclosure Release at note 92 (stating that any forward-looking information required pursuant to the off-balance sheet arrangement disclosure in Items 303(a)(4) and (a)(5) of Regulation S-K and Regulation S-B would be subject to the statutory safe harbor contained in Sections 27A of the Securities Act and 21E of the Exchange Act [15 U.S.C. 78u-5]). Rule 175 provides a limited safe harbor for the content of forward-looking statements contained in documents filed with us, including in registration statements and periodic reports.

suspend their ordinary course communications of regularly released information that they would otherwise choose to make because they are raising capital in a registered offering.

We are adopting the definition substantially as proposed to provide for the use of such a communication a safe harbor from being an impermissible prospectus and from violating the prohibitions on pre-filing offers. As adopted, the safe harbor in Rule 168 will apply to the release or dissemination of communications containing some or all of the following forward-looking information if the release or dissemination satisfies the other conditions of the Rule:[130]

- projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;
- statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;
- statements about the issuer's future economic performance, including statements of the type contemplated by MD&A described in Item 303 of Regulation S-K and Regulation S-B, or Item 5 of Form 20-F; and
- assumptions underlying or relating to any of the foregoing information.

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130 The listed categories of forward-looking information in the safe harbor are essentially the same categories of statements that are defined as forward-looking statements under the safe harbor in Securities Act Section 27A(i)(1) [15 U.S.C. 77z-2(i)(1)]. The safe harbor covering the release or dissemination is available for the regular release of earnings expectations and guidance information. Rule 168 provides a safe harbor for the use of such information, not the content of the communication. An issuer's communications of forward-looking information made in reliance on the safe harbor will still have to satisfy the conditions of Securities Act Section 27A if the issuer wishes to rely on the statutory safe harbor for the content of the information.

The comments on the definition of forward-looking information related primarily to the interplay between such information and the exclusion of offering-related information from the scope of the safe harbor and the way in which newer issuers would establish a history of regular release of such information. See letter from ABA.

As with factual business information, we have clarified that any such information may be communicated by including it in a report filed with, or furnished to, or submitted to us. The safe harbor for forward-looking information also addresses "use," and the preliminary note discussed above applies.

### iii. Conditions of Safe Harbor in Rule 168

#### (A) "By or on Behalf of" the Issuer

##### (1) Definition

Under the Rule as adopted, factual business and forward-looking information will be considered released or disseminated by or on behalf of an issuer if the issuer or an agent or a representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the release or dissemination of the communication before it is made.[131] Satisfaction of this condition is separate from the "regularly released" condition. The safe harbor is not available for information released in a manner intended to circumvent either the conditions to use or the permitted manner of use of the information.

##### (2) Comments on Definition

Commenters supported the concept of "by or on behalf of" the issuer.[132] Commenters also supported placing the definition of the term in a single rule, rather than

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131 We are using a similar definition as contained in Securities Act Rule 146 [17 CFR 230.146].

As we note above, for asset-backed securities offerings, the safe harbor is available to asset-backed issuers, depositors, affiliated depositors, sponsors, and servicers. We have included a provision regarding communication by or on behalf of such persons.

132 See, e.g., letters from ABA; Cleary; S & C; and William J. Williams, Jr.

a separate definition in each safe harbor.[133] Some commenters suggested further clarifications of the definition, such as identifying the persons authorized or approved to speak on behalf of the issuer, eliminating any issuer responsibility for communications by unauthorized persons, and providing that the communication either be authorized or approved but not both.[134]

We have considered these suggestions carefully and have made some revisions to the definition of "by or on behalf of" the issuer. We have determined not to provide a single definition, instead including an appropriate definition in each relevant rule. We also have not taken the suggestions that the Rule provide that issuers are responsible only for communications made by authorized or approved speakers. The circumstances under which issuers are responsible for the acts of individuals may be determined in accordance with principles not addressed in today's rules. In addition, we have not defined further who may be considered an agent or representative of the issuer, other than to specifically exclude offering participants who are underwriters and dealers. The definition could cover legitimate representatives or agents of the issuer such as, for example, advertising agencies and public relations companies who normally release or disseminate product advertising or promotional communications containing such information on behalf of an issuer. We also have modified the definition to provide that the communication does not have to be both approved and authorized for it to be considered to be made by or on behalf of the issuer.

A few commenters suggested that the Rule not include the preliminary note that contains the "scheme to evade" language because they believed it would cause

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133 See Id.

uncertainty about the ability to rely on the safe harbors.[135] The preliminary note to the Rule is substantially the same preliminary note contained in a significant number of exemptions under the Securities Act upon which market participants have relied and we are adopting the Rule with the preliminary note regarding the "scheme to evade" language as proposed.[136]

**(B) Regularly Released Information**

**(1) Regularly Released Condition**

As we discussed in the Proposing Release, the purpose of the safe harbor is to enable a reporting issuer to continue its past ordinary course practice of releasing or disseminating publicly factual business and forward-looking information. Communications of both factual business information and forward-looking information must satisfy the same conditions regarding regular release.

We are adopting the regularly released condition substantially as proposed. Under Rule 168, information will be considered regularly released or disseminated if the issuer has previously released or disseminated the same type of information in the ordinary course of its business, and the release or dissemination is consistent in material respects in timing, manner, and form with the issuer's similar past release or dissemination of such information.[137] The method of releasing or disseminating the information, thus, also must be consistent in material respects with prior practice. These

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134 See, e.g., letters from ABA; Alston; Cleary; Davis Polk; and S & C.

135 See, e.g., letters from ABA and William J. Williams, Jr.

136 See, e.g., Regulation D [17 CFR 230.501 et seq.] and Rule 155 [17 CFR 230.155].

137 In the case of asset-backed issuers, the regularly released requirement will be tested against the previous communications of those persons included in the Rule's provisions, taken together.

conditions seek to ensure that the information is not being released to condition the market for the registered offering of the issuer's securities.

While the Rule does not establish or require any minimum time period to satisfy the regularly released element, the safe harbor requires the issuer to have some track record of releasing the particular type of information. One prior release or dissemination could establish this track record. Issuers should consider the frequency and regularity with which they have released the same type of information. For example, an issuer's release of new types of financial information or projections just before or during a registered offering will likely prevent a conclusion that the issuer regularly released that type of forward-looking or financial information in the ordinary course of its business.

**(2) Comments on Regularly Released Condition**

Commenters on the regularly released condition suggested that we further clarify the concept of regularly released information by elaborating on the meaning of timing, manner, and form.[138] Some of these commenters were concerned about the availability of the safe harbor for non-scheduled releases of information and information distributed using new or different technologies.[139] Other commenters on this point, however, desired greater flexibility with no definition of "ordinary course."[140]

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138 See, e.g., letters from Davis Polk; the Investment Company Institute ("ICI"); and TBMA.

139 See Id.

140 Some commenters also expressed concern about offshore communications. See, e.g., letters from ABA and Fried Frank. Communications that are considered not to be offers because they are made offshore and meet other criteria we have previously discussed would be treated in the same manner as they are today. See Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, Release No. 33-7516 (Mar. 27, 1998) [63 FR 14806]; Offshore Press Conferences, Meetings with Company Representatives Conducted Offshore and

We have not changed the "regularly released" language from the proposal because we do not believe that a bright-line test of "regularly released" is appropriate. We believe that it is more appropriate to provide issuers the flexibility to use the means and timing they believe is appropriate for their ongoing business communications. We would note, however, that there are circumstances in which communications made outside a predetermined schedule or not at regular intervals would be covered by the safe harbor. The Rule is not intended to cover only scheduled releases of information but also could cover communications, such as product advertising and product release information or earnings guidance changes, that are made on an unscheduled or episodic basis, provided that the issuer has previously provided such communications containing factual business and forward-looking information in that manner. Thus, for unscheduled or episodic releases, the nature of the event triggering the communication would be taken into account in determining whether the regularly released condition is satisfied. For example, if an issuer only gives guidance upon the occurrence of certain types of developments, a release of guidance when a materially similar event occurs could be materially consistent, even if not done at regular intervals. As another example, if an issuer launches a product only episodically, disclosure or advertising of a product launch still could be materially consistent.

Merely using new or different technologies will not be necessarily inconsistent in material respects under the conditions of the Rule. An issuer will have to determine

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Press-Related Materials Released Offshore, Release No. 33-7470 (Oct. 17, 1997) [62 FR 53948].

whether its use of new or different technologies to release information falls within the safe harbor, including whether the release or dissemination is consistent in material respects with how the issuer is already releasing or disseminating its communications containing factual business or forward-looking information using analogous methods. For example, whether the new or different technology makes a material difference in terms of the breadth of dissemination to investors or other reach of the communication to investors is relevant in determining whether the manner or form is consistent in material respects.

**(C) Exclusion for Offering-Related Information**

**(1) Scope of Exclusion**

We are adopting as proposed the exclusion from the safe harbor of any information about the registered offering itself. Publication of information about a registered offering outside the registration statement or a prospectus is limited to statements allowed under other exemptions or exclusions, including Rule 134 and Rule 135.[141]

As we discussed in the Proposing Release, because the safe harbor is a "use" exemption intended to facilitate continued release or dissemination of regularly released ordinary course factual business and forward-looking communications, it also excludes the release of that information as part of the offering activities in the registered offering. For example, while the safe harbor could be available for factual business information contained in an Exchange Act report at the time it is initially filed, the safe harbor will

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[141] See 17 CFR 230.135. Our other rules address communications in the offering context. For example, we are amending Rule 134 to increase the amount of communication allowed under that rule about a registered offering without it

not be available for the distribution of that information to investors or potential investors as part of offering activities, such as incorporation by reference into a prospectus that is part of a registration statement, disclosure at a road show, or disclosure in a free writing prospectus. As another example, as permitted by the "regularly released" condition, an issuer could rely on the safe harbor for the publication of an earnings release consistent with past practice, including the posting of and maintaining the release on an issuer's web site, whether or not located in a separate section of the web site for historical information. The distribution of that earnings release, however, as part of the marketing activities to potential investors will be outside the scope of the safe harbor.

**(2) Comments on Exclusion**

Commenters requested further clarification that release of a communication containing information in reliance on the safe harbor will not be affected by release of the same information in offering-related communications.[142] We have made clear in a preliminary note in the adopted Rule that the release of communications containing information outside the safe harbor will not affect the availability of the safe harbor for any other release or dissemination of a communication containing the same information that is (or was) within the scope of the safe harbor.

Some commenters requested that we define "offering-related" or "part of the offering activities."[143] We decline to do so. An issuer must determine, based upon the particular facts and circumstances, whether or not a communication contains information about the registered offering or is being used as part of the offering activities.

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being considered a prospectus.

142 See, e.g., letters from Fried Frank and SCSGP.

143 See, e.g., letters from Davis Polk and SCSGP.

Certain commenters requested that we clarify the impact Rule 168 and Rule 169 (as discussed below) would have on our guidance regarding the filing requirement for ordinary or routine business communications that refer to a business combination transaction in a non-substantive way.[144] We believe that guidance is unaffected by the adoption of the safe harbors of Rule 168 and Rule 169, regardless of whether the communication falls within the scope of such safe harbors or our other interpretive guidance regarding ongoing factual and business communications.[145]

### c. Exception for Regularly Released Factual Business Information – Available to Non-Reporting Issuers

#### i. Scope of the Safe Harbor

We are adopting substantially as proposed a non-exclusive safe harbor from the gun-jumping provisions for regularly released factual business information that, unlike Rule 168, is available to all eligible issuers, including non-reporting issuers.[146] The Rule provides a non-exclusive safe harbor for the issuer's release or dissemination of regularly released ordinary course factual business information intended for use by persons other than in their capacity as investors or potential investors, such as customers and suppliers.[147] Under the safe harbor, a non-reporting issuer's release or dissemination of

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144 See, e.g., letters from ABA; Alston; and S & C.

145 See the Regulation M-A Release, note 95, at footnote 45.

146 See Rule 169. Because Rule 168 is available to reporting issuers and some non-reporting issuers (including asset-backed issuers and certain non-reporting foreign private issuers), the principal practical relevance of Rule 169 is to other non-reporting issuers.

147 The fact that a customer also may be a potential investor in the issuer's securities or that the information may be received by other persons will not affect the availability of the safe harbor if the conditions are otherwise satisfied. For purposes of the safe harbor, the communication must be intended for use by an audience that is other than an investor audience.

factual business information that satisfies the conditions of the Rule would not be an impermissible prospectus and would not violate the prohibition on pre-filing offers.[148] As we noted in the Proposing Release, because a condition of the safe harbor involves the manner and timing of the communication, the same issuer employees or agents who historically have been responsible for providing the information for intended use by customers and suppliers must communicate the information provided in reliance on this safe harbor.

Under the safe harbor, factual business information is defined as:

- factual information about the issuer, its business or financial developments, or other aspects of its business; and
- advertisements of, or other information about, the issuer's products or services.[149]

As with the safe harbor for reporting issuers, the safe harbor requires that the information be regularly released in the ordinary course of business, released or disseminated by or on behalf of the issuer, and not include information about the registered offering or information released or disseminated as part of the offering activities in the registered offering. We have made the same modifications to these conditions and to the preliminary note to Rule 169 as in new Rule 168 for reporting issuers.

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148 Rule 169 is a safe harbor from the definition of "prospectus" in Securities Act Section 2(a)(10) and therefore disapplies the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The Rule also is a safe harbor from the prohibitions on pre-filing "offers" in Securities Act Section 5(c).

149 We have not included dividend notices within the definition because the communications covered by the Rule are those intended for use by persons other than in their capacity as investors or potential investors.

As we discussed in the Proposing Release, because non-reporting issuers generally are not releasing information in connection with securities market activities, we believe it is appropriate to limit the scope of the safe harbor to the specified regularly released ordinary course factual business information.[150] Further, we are not adopting a safe harbor for forward-looking information for non-reporting issuers because of the lack of such information or history for these issuers in the marketplace. In those circumstances, we believe that the potential for abuse in permitting a safe harbor for the continued release of forward-looking information as a way to condition the market for the issuer's securities outweighs the legitimate utility to the issuer of the safe harbor.

**ii. Comments on the Safe Harbor**

Commenters supported the proposed safe harbor and suggested certain expansions and clarifications.[151] Commenters wanted us to clarify that information that was directed to customers, suppliers, etc., would be covered by the safe harbor even if the information became available to other persons, including investors or potential investors.[152] As we discuss above, the Rule is aimed at assuring that the communication is intended for use by an audience that is other than an investor audience, not at ensuring that the communication is not received by or available to an investor or potential investor. We have modified the Rule to clarify this point. For example, a widely disseminated communication (such as a press release) intended for use by a non-investor audience and

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150 These issuers will still be able to rely on our interpretive positions for the release of factual business information. See note 122. In addition, these issuers may still be able to rely on Securities Act Rules 134 and 135 and new Securities Act Rules 163A and 164.

151 See, e.g., letters from ABA; NYCBA; NYSBA; and Reuters.

152 See, e.g., letters from ABA and NYSBA.

otherwise meeting the conditions of the safe harbor will not lose protection if it is available to or received by investors or potential investors.

We had requested comment in the Proposing Release as to whether the safe harbor also should cover forward-looking information and whether the safe harbor for forward-looking statements contained in Securities Act Section 27A should be extended to initial public offerings. We further requested comment on whether we should require projections or other forward-looking information to be included in initial public offering registration statements. In response, some commenters supported extending the Section 27A safe harbor for forward-looking statements to initial public offerings but did not support requiring projections to be included in registration statements.[153] Some commenters were concerned that, because of the relatively untested nature of companies engaging in initial public offerings, there was limited basis to assess the reasonableness of assumptions underlying the projections about the issuer's business.[154] We appreciate commenters' input on these points and, in light of the fact that these companies are generally untested, as commenters noted, we have determined not to include forward-looking statements in the Rule 169 safe harbor we are adopting today or to extend the safe harbor for forward-looking statements in Securities Act Section 27A to initial public offerings.

### 2. Other Permitted Communications Prior to Filing a Registration Statement

Beyond the continuing ongoing release of information discussed above, there is an increased amount of information disseminated to the market about issuers, including

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153 See, e.g., letters from AICPA; E & Y; KPMG LLP ("KPMG"); and PricewaterhouseCoopers LLP ("PwC").

through the Internet. We believe that the availability of this information should be encouraged, subject to appropriate standards of liability. At times when the risk of conditioning the market for a securities offering is sufficiently remote, it is important to provide issuers with greater certainty that the release of information will not be considered an impermissible offer under the Securities Act. Such an approach will avoid hindering issuer communications except where necessary for investor protection. We are, therefore, adopting rules that clarify the Securities Act application to communications that might not fall within the safe harbors for regularly released factual business and forward-looking information.

### a. 30-Day Bright-Line Exclusion From the Prohibition on Offers Prior to Filing a Registration Statement – All Issuers

#### i. Scope of Exclusion

We are adopting, substantially as proposed, Rule 163A to provide all issuers a bright-line time period, ending 30 days prior to filing a registration statement, during which issuers may communicate without risk of violating the gun-jumping provisions. Such communications will be excluded from the definition of offer for purposes of Securities Act Section 5(c).[155] As we noted in the Proposing Release, a bright-line test

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154 See, e.g., letters from AICPA and E & Y.

155 While communications made in reliance on the Rule could, depending on the particular facts, be an "offer" as defined in Securities Act Section 2(a)(3), the Rule provides that the communication is not an "offer" for purposes of Securities Act Section 5(c). See Rule 163A.

As Rule 163A provides a safe harbor from the application of Securities Act Section 5(c), it necessarily applies only prior to the filing of a registration statement. This exclusion will thus not apply to issuers offering securities off a shelf registration statement on file, whether or not effective, as to which the prohibition in Section 5(c) does not apply to the offering of the securities covered by such shelf registration statement.

will provide greater certainty in the offering process and avoid unnecessary limitations on issuer communications more than 30 days prior to the filing of the registration statement. Further, we believe that the 30-day timeframe adequately assures that these communications will not condition the market for a securities offering by providing a sufficient time period to cool any interest in the offering that might arise from the communication.[156]

As adopted, the 30-day bright-line exclusion from the gun-jumping provisions is subject to the following conditions:

- a communication made in reliance on the Rule cannot reference a securities offering that is or will be the subject of a registration statement;[157]
- a communication made in reliance on the Rule will have to be made "by or on behalf of the issuer"; and
- the issuer will have to take reasonable steps within its control to prevent further distribution or publication of the communication during the 30-day period immediately before the issuer files the registration statement.

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See also Harold Bloomenthal and Samuel Wolff, Emerging Trends in Securities Laws [2003-2004 ed.], "Securities Act Reform—Déjà Vu All Over Again," Commissioner Roel C. Campos (the "Campos Article") at §1:28.

156 We chose a 30-day timeframe because it is consistent with the timeframe in Securities Act Rule 155 regarding integration of abandoned offerings and Securities Act Rule 254 regarding pre-filing solicitations of interest in Regulation A offerings [17 CFR 230.254].

157 Securities Act Rule 155, relating to integration of abandoned offerings, permits issuers to register a securities offering immediately following the abandonment of a private offering made to accredited or sophisticated persons and not involving general solicitation and general advertising. The 30-day exclusion, on the other hand, applies to public communications made prior to a registered offering. Because Rule 155 treats any private offers made in the abandoned private offering as not part of the subsequent registered offering, issuers relying on Rule 155 in connection with a subsequently registered offering would continue to rely on Rule 155 and need not rely on the 30-day bright-line exclusion for public communications before a registration statement is filed.

We have made minor revisions to the Rule from the proposals. We have made clear that the exemption is non-exclusive. In addition, we have revised the definition of "by or on behalf of" the issuer in the same manner as in Rules 168 and 169 to explicitly exclude offering participants who are underwriters or dealers from being considered agents or representatives of the issuer for purposes of the Rule. We have narrowed the restriction on references to securities offerings to apply to a securities offering that is or will be the subject of a registration statement.

The Rule is designed to preclude issuers and offering participants from circumventing the registration requirements of the Securities Act. Because the Rule does not permit information about a securities offering that is or will be the subject of a registration statement, the communications made in reliance on the Rule are less likely to be used to condition the market for the issuer's securities. In addition, the communications are still subject to provisions addressing deficient disclosure, including the anti-fraud provisions.[158] Finally, the safe harbor is available only for communications made by or on behalf of the issuer so that other potential offering participants cannot use the exemption. Communications within the scope of Rule 163A made prior to the 30 days before filing are protected by the safe harbor. Communications made during the 30 days before the filing are outside the safe harbor. Because of these factors and the bright-line nature of the Rule, we have eliminated the proposed preliminary note that indicated that the exemption was not available for schemes to evade the registration requirements of the Securities Act because we do not believe it is necessary.

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158 Communications made in reliance on the Rule 163A safe harbor also would not be made in connection with a registered securities offering for purposes of the exclusion in Regulation FD. See Rule 100(b)(2)(iv) of Regulation FD.

The 30-day bright-line exclusion is not available for enumerated categories of offerings and for specified issuers that pose the greatest risk of abuse of that exclusion. Specifically, Rule 163A is not available to communications made in connection with:

- offerings by a blank check company;
- offerings by a shell company; or
- offerings of penny stock by an issuer.[159]

The Rule as adopted also excludes communications regarding business combination transactions from being able to rely on the exclusion, as those communications are regulated separately.[160] The Rule also is not available for communications regarding offerings made by a registered investment company or a business development company.

**ii. Comments on 30-day Bright-Line Exclusion**

Commenters expressed strong support for the Rule and suggested certain expansions and clarifications.[161] Some commenters wanted the Rule to provide an exemption from the definition of offer for all purposes under the Securities Act.[162] We do not believe that it is appropriate to exclude from the definition of offer for all purposes

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159 See Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)], Exchange Act Rule 3a51-1 [17 CFR.240.3a51-1], and amendments to Rule 405 defining "shell company. See the Shell Company Release, note 109. The Rule also excludes issuers who were or any of whose predecessors in the prior three years were blank check companies, shell companies (other than business combination related shell companies), or issuers that issued penny stock. Other than for well-known seasoned issuers, Rule 163A also excludes offerings registered on Form S-8 [17 CFR 239.16b].

160 See the Regulation M-A Release, note 95. The Rule excludes any business combination transaction, including an exchange offer.

161 See, e.g., letters from ABA; Davis Polk; Fried Frank; IBA; ICI; NYCBA; NYSBA; and Reuters.

any communications occurring more than 30 days from the date of filing the registration statement. The Rule contains no content restriction, other than a prohibition against referencing a securities offering that is or will be the subject of a registration statement. The intent of the Rule is to provide certainty that an issuer will not be considered to be "gun jumping" by engaging in communications more than 30 days before it files its registration statement, not to provide certainty that it will not be liable for material disclosure deficiencies in its communications.[163]

Commenters also suggested that we provide more guidance as to what actions will constitute "reasonable steps within the issuer's control," particularly with respect to information posted on web sites prior to 30 days before the filing of the registration statement.[164] The "reasonable steps" condition is already contained in Rule 165 for business combination transactions. We do not believe that it is appropriate to provide bright lines as to when an issuer will be considered to have taken reasonable steps within its control to prevent further dissemination of the communication.[165] As to the treatment

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162 See, e.g., letters from ABA; Alston; Cleary; and NYSBA.

163 Commenters also asked that we clarify further that information released during the 30 days before the registration statement filing in reliance on another exemption would not affect the ability of the issuer to rely on the 30-day safe harbor. See, e.g., letters from ABA; Alston; Cleary; Fried Frank; and TBMA. We have clarified that the Rule is a non-exclusive safe harbor and issuers can rely on other available exemptions, exclusions, or safe harbors from the gun-jumping provisions for the communications. Conversely, reliance on other safe harbors, exemptions, and exclusions during the 30-day period does not preclude reliance on the 30-day safe harbor.

164 See, e.g., letters from ABA; Alston; Cleary; and Fried Frank.

165 The Rule as adopted limits the exclusion to issuers. While we do not expect an issuer to be able to control the republication or accessing of previously published press releases, we expect issuers and persons acting on their behalf to be able to control their own involvement in any subsequent redistribution or publication and, therefore, believe that it is an appropriate condition to the ability to rely on the

of information posted on an issuer's web site, we do not expect that an issuer will necessarily remove the information from the web site and, provided that the information is appropriately dated, otherwise identified as historical material, and not referred to as part of the offering activities, we will not object to an issuer maintaining the information on the web site.

Commenters also suggested that registered investment companies and business development companies should be permitted to rely on Rule 163A.[166] We are not adopting this suggestion because we believe that it would be more appropriate to consider changes to our requirements as they apply to registered investment companies and business development companies in the context of a broader reconsideration of the separate framework applicable to such issuers.

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

**i. Overview**

The rules we are adopting today, when taken together, provide exemptions generally from the applicability of the gun-jumping provisions for eligible well-known seasoned issuers. The safe harbors for regularly released factual business and forward-looking information and the exemption from the prohibition on offers for purposes of Securities Act Section 5(c) for communications more than 30 days prior to filing of a registration statement are available to well-known seasoned issuers. In addition, as discussed below, the broadened exemption for routine offering-related

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exclusion. For example, if an issuer or its representative gives an interview to the press prior to the 30-day period, it will not be able to rely on the exclusion if the interview is published during the 30-day period. We have addressed the same issues in the context of free writing prospectuses discussed below.

166 See letters from ABA; Allied; and Fried Frank.

communications and the availability of an exemption for eligible issuers from the gun-jumping provisions for free writing prospectuses, in both cases after filing of a registration statement, also are available to well-known seasoned issuers. However, because the gun-jumping provisions prohibit all offers – written or oral – before the filing of a registration statement, we believe well-known seasoned issuers could be unnecessarily constrained in their capital formation activities.[167]

**ii. Exemption for Pre-Filing Offers**

To address communications made in the 30 days prior to filing a registration statement that are not otherwise excluded from the gun-jumping provisions and to complete the set of rules permitting all communications by well-known seasoned issuers under the gun-jumping provisions, we are adopting essentially as proposed an exemption from the prohibition on offers before the filing of a registration statement for offers made by or on behalf of eligible well-known seasoned issuers.[168] The exemption permits these issuers to engage in unrestricted oral and written offers before a registration statement is filed without violating the gun-jumping provisions. These communications, while exempt from the gun-jumping provisions, are still considered offers and subject to liability standards applicable to such offers.[169] The exemption is available only for

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167 See Securities Act Section 5(c).

168 See Rule 163. The exemption is not available to communications involving registered business combination transactions or communications in offerings by registered investment companies or business development companies.

169 Any written offer will be a prospectus under Securities Act Section 2(a)(10) relating to a public offering of the securities to be covered by the registration statement to be filed. All oral communications that are offers and all prospectuses will be subject to liability under Securities Act Section 12(a)(2). The communications also will be subject to other provisions addressing deficient disclosure, including Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5.

communications made "by or on behalf of" the issuer.[170] Moreover, any communication for which disclosure is required under Securities Act Section 17(b) will be deemed to be a communication that is an offer for purposes of the Rule and, if written, the communication will be a free writing prospectus of the issuer.[171] As with the other exemptions, exclusions, and safe harbor rules we are adopting today, we have made clear that the exemption is non-exclusive.

We also have modified the Rule to eliminate the preliminary note regarding the unavailability of the exemption if it is part of a scheme to avoid or evade the requirements of the gun-jumping provisions. We have not included this preliminary note in the adopted Rule because we believe that the Rule provides an exemption for the communication from the gun-jumping provisions only for well-known seasoned issuers and because the disclosure liability and anti-fraud provisions of the federal securities laws continue to apply.

In view of the automatic shelf registration process we describe below, we expect that well-known seasoned issuers usually will have a registration statement on file that it

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Communications made in reliance on the Rule also will not be considered to be in connection with a registered securities offering for purposes of the exclusion from Regulation FD. See Rule 100(b)(2)(iv) of Regulation FD**.**

The Rule is different from Securities Act Rule 254. Securities Act Rule 254 permits solicitations of interest in Regulation A offerings provided the conditions of the rule, including pre-use submission of the materials to the Commission, are satisfied, and does not treat the materials as prospectuses. Rule 163 does not require pre-filing of the communications and written offers will be prospectuses.

170 In addition, as with the other exemptions and safe harbors that are available only to the issuer, the definition of by or on behalf of the issuer explicitly excludes offering participants who are underwriters or dealers.

171 See Rule 163(d). Securities Act Section 17(b) [15 U.S.C. 77q(b)] generally requires persons who make statements describing an issuer's securities to disclose the receipt (and the amount) of consideration given, directly or indirectly, by an

can use for any of its registered offerings. Consequently, it generally will be unusual for these issuers to make offers prior to the filing of a registration statement;[172] however, we have provided this exemption from the prohibition on pre-filing offers to liberalize communications for these issuers to the appropriate extent. A written offer made by or on behalf of a well-known seasoned issuer under the exemption will, however, meet our definition of "free writing prospectus" and will need to include a legend and be filed promptly by the issuer when and if the issuer files its registration statement.[173] We also have provided in the Rule as adopted that filing is not required if the communication has previously been filed with or furnished to us (for example pursuant to Regulation FD on Form 8-K). The Rule as adopted also provides that filing is not required if filing would not be required under Rule 433 regarding free writing prospectuses, discussed below, if the communication was a free writing prospectus used after filing of the registration statement. Finally, the filing conditions of Rule 163 will be satisfied if the filing conditions of Rule 433 (other than timing of filing) are satisfied. As a result, for

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issuer, underwriter, or dealer in exchange for making the statements.

172 See the discussion in Section V.B.2 below under "Automatic Shelf Registration for Well-Known Seasoned Issuers," with regard to the availability of an "automatic shelf" registration process for these issuers.

173 The legend is similar to the one we are providing as a condition for free writing prospectuses used after a registration statement is filed. We have made minor modifications to the legend, including eliminating issuer-specific language and references to risk factors. We also have provided that the legend may include an e-mail address and web site where the prospectus can be requested or is available. See the discussion in Section III.D.3 below under "Legend Condition" with regard to the conditions for use of a "free writing prospectus." Under Rule 163 and Rule 433, all issuer free writing prospectuses must be filed unless exempt from the filing condition. Under Rule 163 as adopted, free writing prospectuses must be filed only if the issuer files a registration statement or amendment to the registration statement covering the securities offered by the free writing prospectus.

example, the accommodations provided in Rule 433 regarding media publications that are free writing prospectuses also will apply under Rule 163.[174]

Any written communication used in reliance on this exemption will be subject to the same provisions applicable to free writing prospectuses used after a registration statement is filed with regard to the ability to "cure" a failure to meet the legend or filing condition in reliance on our rules governing free writing prospectuses discussed below.[175]

**iii. Comments on Exemption for Pre-Filing Offers**

Commenters broadly supported the proposed exemption for pre-filing offers by well-known seasoned issuers.[176] One commenter thought the exemptions should be expanded to cover all seasoned issuers, not just well-known seasoned issuers.[177] Some commenters suggested that the filing condition for free writing prospectuses apply only when and if the registration statement is filed.[178] In addition, commenters wanted clarification that the availability of the exemption does not depend on the issuer filing the free writing prospectus within a particular time frame.[179] Finally, commenters requested clarification that media publications, as with other free writing prospectuses, do not need to be filed until the registration statement is filed.[180] One commenter also suggested that

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174 For example, the issuer could satisfy its filing condition under Rule 163 for a media publication for which an issuer could file an interview transcript under Rule 433 by similarly filing such a transcript, as described below.

175 See discussion in Section III.D.3 below under "Cure for Unintentional or Immaterial Failure to Include a Legend" and "Unintentional Failures to File" regarding Rules 164 and 433 with respect to the cure provisions.

176 See, e.g., letters from ABA; Cleary; NYSBA; S & C: SIA; and TBMA.

177 See letter from ABA.

178 See, e.g., letters from Fried Frank and NYSBA.

179 See, e.g., letters from ABA and Davis Polk.

180 See, e.g., letters from Davis Polk and NYSBA.

Regulation FD should not apply to offering-related information communicated in reliance on the exemption.[181]

We believe it is appropriate at this time to limit the exemption for pre-filing offers to well-known seasoned issuers only and not expand the benefits to all seasoned issuers. The level of following of well-known seasoned issuers by market participants lessens our concerns that these issuers, in general, will use the exemption to evade the registration requirements of the Securities Act. Accordingly, we are limiting this exemption to well-known seasoned issuers.

We have not made any revisions to the provisions of Rule 163 regarding the applicability of Regulation FD to offering-related information. Well-known seasoned issuers thus must comply with the provisions of Regulation FD with regard to communications made pursuant to Rule 163 to which Regulation FD would apply.[182]

In response to commenters' suggestions, we have clarified the filing condition to apply only when and if a registration statement or amendment covering the offered securities is filed. Accordingly, if no such registration statement or amendment is filed, a free writing prospectus used pursuant to Rule 163 does not have to be filed. Finally, media publications that are permissible free writing prospectuses pursuant to Rule 433 will be treated the same as other communications under Rule 163, and will therefore only be subject to filing if a registration statement is filed.

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181 See letter from ABA.

182 We note the recent cases regarding private investment in public equity (PIPE) offerings that have involved trading on the basis of inside information, including the existence of a private offering. See Hilary L. Shane, Lit. Rel. 19227 (May 18, 2005); SEC v. Hilary L. Shane, Civ. Action No. 05 CIVIL 4772 (S.D.N.Y.). See also Guillaume Pollet, Lit. Rel. 19199 (Apr. 21, 2005); SEC v. Guillaume Pollet, Civ. Action No. 05-CV-1937 (SLT/RLM) (E.D.N.Y.).

### 3. Relaxation of Restrictions on Written Offering-Related Communications

The rules we are adopting today will expand the amount and types of permitted written offering-related communications that may be made by offering participants under the gun-jumping provisions after a registration statement is filed.[183] The two main elements of these rules are expansion of information that Securities Act Rule 134 permits to be communicated and the permitted use of free writing prospectuses in connection with a registered offering.

#### a. Rule 134

Rule 134 provides a safe harbor from the gun-jumping provisions for limited public notices about an offering made after an issuer files its registration statement.[184] The Rule was intended originally to provide an "identifying statement" that could be used to locate persons that might be interested in receiving a prospectus. All issuers, including well-known seasoned issuers, are precluded from relying on Rule 134 until the issuer files a registration statement that includes a statutory prospectus.[185]

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183 As noted previously, Securities Act Section 5(b)(1) limits the means by which written offers may be made following the filing of a registration statement. Section 5(b)(1) does not include a limitation on oral offers after the filing of a registration statement.

184 The safe harbor operates by excluding such notices from the definition of prospectus under Securities Act Section 2(a)(10). See Rule 134 and Adoption of Rules 134 and 135, Release No. 33-3568 (Aug. 29, 1955) [20 FR 6523]. Rule 134 does not apply to communications relating to a registered investment company or a business development company. See Rule 134(e) [17 CFR 230.134(e)].

185 Rule 134 is not available until a preliminary prospectus, or in the case of shelf registration, a base prospectus, has been filed. This does not mean, however, that a final prospectus meeting the requirements of Securities Act Section 10(a), including a price, is required as a condition to Rule 134. Further, the prospectus required for reliance on Rule 134(d) is a statutory prospectus that satisfies the requirements of Securities Act Section 10, including a price range where required

### i. Expansion of Permitted Information

We are modifying and expanding the information permitted under Rule 134 to include information that issuers, underwriters, and investors will find helpful and to permit the types of written communications during an offering that we do not consider raise the risk of offering abuses. We are adopting a limited expansion of the information permitted in the notice about the issuer and the registered offering. The amendments to Rule 134 will:

- permit increased information about an issuer and its business, including where to contact the issuer;
- permit more information about the terms of the securities being offered;[186]
- expand the 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;[187]

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(other than a free writing prospectus), and it need not be a prospectus that satisfies Section 10(a).

If a well-known seasoned issuer makes a written communication of information of the type covered by Rule 134 prior to filing its registration statement, and that communication constitutes an offer, the communication will be a free writing prospectus and the issuer will need to look to the Rule 163 exemption of pre-filing offers from the gun-jumping provisions.

186 For example, for fixed income securities, the changes will allow greater information about final interest rates and yield information, including yield information on fixed income securities with comparable maturities and credit ratings. We believe that yield disclosure also covers disclosure of the anticipated spread over a benchmark. We also have revised the Rule to allow issuers to disclose whether securities are convertible, exercisable, or exchangeable, and the ranking of the securities. The revised Rule also allows disclosure of the permissibility or status of the investment under the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 et seq.] ("ERISA").

187 The information on marketing events, such as road shows, can include greater detail on the date, time, location, and procedures for attending or otherwise accessing the events.

- allow more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;[188]

- allow more factual information regarding procedures for directed share plans and other participation in offerings by officers, directors, and employees;

- permit the correction of inaccuracies in permissible information previously disclosed pursuant to the Rule; and

- expand the disclosure permitted regarding credit ratings to include the security rating that is reasonably expected to be assigned.

While we have expanded the amount of information regarding the terms of an offering that may be included in a Rule 134 notice, the expansion does not permit use of a Rule 134 notice to provide a detailed description of securities being offered. There is increased ability under our rules to provide such a detailed description, such as a term sheet, as a free writing prospectus, as discussed below.

Commenters suggested a number of additional items of information that they believed should be included in the Rule 134 safe harbor.[189] This additional information generally focused on more extensive information about the terms of the securities being offered. As we have noted, Rule 134 is not intended as a substitute for a detailed description of the securities, such as a term sheet, or information included in a prospectus. We have expanded the information categories from those in the proposal to

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188 For example, a broker or dealer can inform investors of the procedural aspects of an auction or a directed share program. The changes will not include written notices of allocations of securities, including those delivered electronically. These notices will be a type of written confirmation of sale and, thus, prospectuses. The rules we are adopting regarding prospectus delivery reforms, as discussed later, will apply to these notices.

189 See, e.g., letters from ABA; ABA-ABS; Alston; ASF; Citigroup; Cleary; CMSA; Fried Frank; Merrill Lynch; Morgan Stanley; NYCBA; S & C; SIA; and TBMA.

include items that provide more procedural information about the offering or the securities.[190]

**ii. Section 10 Prospectus Requirement**

We have modified the changes to Rule 134 from the proposals in one significant regard. We had proposed that Rule 134 explicitly condition the availability of the Rule on the issuer filing a statutory prospectus meeting the requirements of Securities Act Section 10 which, in the case of an initial public offering, would include a bona fide estimate of the initial offering price range and the maximum amount of securities to be offered. While commenters recognized that the registration statement had to be filed, a number of commenters were concerned that including an explicit requirement of a bona fide price range and maximum amount of securities to be offered would change current practice and would not permit a number of communications, including press releases announcing the filing of the registration statement and naming underwriters, or even lead managers, and other notices that would be appropriate before the commencement of marketing efforts.[191] These commenters noted that, in many cases, the bona fide price range is not included in registration statements for initial public offerings until a later point in time that is closer to the commencement of marketing activities for the offering.[192]

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190 Rule 134 and the other communications safe harbors are non-exclusive; therefore, if a communication falls outside of the safe harbor it still may, depending on the facts and circumstances, not be deemed an "offer."

191 See, e.g., letters from ABA; Citigroup; Cleary; Davis Polk; Fried Frank; Merrill Lynch; Morgan Stanley; NYCBA; NYSBA; and SIA.

192 See, e.g., letters from ABA and SIA.

We are modifying the Rule to provide that much of the information permitted under the Rule may be disclosed under the Rule before the inclusion of a bona fide price range in the registration statement. This modification does not mean, however, that the prospectus in an initial public offering satisfies Section 10 without the bona fide price range. Rather, the purpose of the modification is to permit notices to contain information that is not dependent on the price range or amount of securities being offered prior to inclusion of that information. In addition, information related to the pricing and rating of the security can be provided only if a price range is included where required.

The amended Rule also provides that the Rule is available for certain other information only if it also is disclosed at that time in the filed registration statement. For example, notices including information about the use of proceeds of the offering can be provided only after information about the use of proceeds is included in the filed registration statement.[193] Rule 134(d) continues to require that a price range be included where required. We are not modifying the provisions of Rule 134(d). The procedures that market participants have developed with the staff of the Division of Corporation Finance to facilitate offerings of securities using Internet facilities are not affected by the amendments to Rule 134 that we are adopting today.

**iii. Changes to Required Information**

We are modifying the information that must be included in a Rule 134 notice, as proposed. First, we are eliminating the reference in the legend to state securities laws, as we believe that other provisions of the Rule already address any state securities law

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193 The Rule also provides that identities of selling security holders and the type of underwriting can be provided if the information has been included in the registration statement.

requirements, as applicable.[194] Second, we are eliminating the requirement to specify whether the financing is a new financing or refunding, as we believe that such information is no longer necessary because it will be provided where appropriate by the issuer's disclosure of the use of the proceeds of the offering.

One commenter suggested that the Rule 134 requirement that issuers alert investors where they can obtain a copy of the statutory prospectus should include a means for receipt of a prospectus by electronic delivery.[195] Several commenters also suggested that we allow issuers to satisfy the requirement that certain Rule 134 notices be accompanied or preceded by a statutory prospectus through the inclusion of a hyperlink in the Rule 134 notice to the statutory prospectus.[196] While we are not expanding "access equals delivery" to Rule 134, we are amending Rule 134(c)(1) to allow persons providing notices relying on Rule 134 to include a uniform resource locator ("URL") address to the statutory prospectus that alerts investors where they can obtain a statutory prospectus.[197] For purposes of Rule 134, including a URL address to the statutory prospectus that is not an active hyperlink in an electronic communication does not mean that the prospectus has been delivered. However, an active hyperlink to a statutory prospectus in an electronic

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194 See paragraphs (a)(13) and (a)(16) of the amendments to Rule 134.

195 See letter from NYCBA.

196 See, e.g., letters from ABA; Alston; Cleary; and S & C.

197 Rule 134 requires in some cases that the notice must be accompanied or preceded by a written prospectus meeting the requirements of Section 10 of the Securities Act, which may be satisfied in an electronic notice by including an active hyperlink to such a prospectus. The notice itself cannot, however, include information beyond that permitted by the Rule, and, as such, the notice cannot include a hyperlink or URL for an address containing information beyond that permitted by Rule 134. See the 2000 Electronics Release, note 96, at II.B.2.

Rule 134 notice will satisfy the requirement that the prospectus accompany or precede that notice.[198]

### b. Permissible Use of Free Writing Prospectuses

#### i. Overview

After the filing of a registration statement, the gun-jumping provisions permit issuers and other offering participants to make written offers only in the form of a statutory prospectus. After effectiveness of a registration statement, written offers other than a statutory prospectus may be made only if a final prospectus meeting the requirements of Securities Act Section 10(a) is sent or given prior to or at the same time as the written offer.[199] We believe that written communications during the offering process are unnecessarily restricted, even with the substantial relaxations in restrictions on communications resulting from the rules we discuss above. The rules we are adopting permit written offers, including electronic communications, outside the statutory prospectus beyond those currently permitted by the Securities Act, if certain conditions are met. We are defining such a written offer outside of the statutory prospectus as a "free writing prospectus."[200]

Under the rules we are adopting today, a free writing prospectus that satisfies specified conditions can be used by a well-known seasoned issuer at any time.[201] Further,

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198 See example (19) under Section II.D. of Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995)[60 FR 53458] (the "1995 Electronics Release"), which states that a URL address can be included in an electronic Rule 134 notice.

199 See Securities Act Section 2(a)(10).

200 We are adding this definition to Securities Act Rule 405.

201 As we discuss above, a free writing prospectus can be used by a well-known seasoned issuer prior to filing the registration statement pursuant to Rule 163.

a free writing prospectus that satisfies the specified conditions can be used by any other eligible issuer or offering participant after a registration statement has been filed.[202] In general, the rules we are adopting will allow offering participants to use free writing prospectuses in conjunction with most registered primary and secondary offerings, although we do not treat all issuers and offerings the same.[203]

The issuer and any other offering participant in an eligible issuer's registered securities offering satisfying the conditions of our rules can use a free writing prospectus after a registration statement is filed to communicate information about a registered offering of securities.[204] This will permit affiliates, underwriters, dealers, and others acting on behalf of the parties to the transaction to use a free writing prospectus without violating the gun-jumping provisions. The conditions to the use of a free writing prospectus will depend on the nature of the issuer and the offering. A free writing

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202 The rules provide that such a free writing prospectus is a permitted prospectus for purposes of Securities Act Section 10(b) [15 U.S.C.77j(b)] and, as such, can be used without violating Securities Act Section 5(b)(1). A free writing prospectus used other than in accordance with our new rules will continue to be a prospectus.

203 The rules do not extend to business combination transactions, for which we have already adopted rules. See Securities Act Rule 162 [17 CFR 230.162], Rule 165, Rule 166, and Rule 425 [17 CFR 230.425]. Rule 162 relates to submission of tenders in registered exchange offers. Communications relating to business combinations are covered by Rule 165 and Rule 166. Rule 425 relates to the filing of certain prospectuses and communications in connection with business combination transactions. See also the Regulation M-A Release note 95; and Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 33-7759 (Oct. 22, 1999) [64 FR 61382] (exemptive rules for cross-border tender and exchange offers, business combinations, and rights offerings relating to the securities of foreign issuers). Where appropriate, we have included provisions that are intended to ensure consistency among the rules and, with respect to filing conditions, permit a single filing to satisfy the conditions under both regulatory schemes. See Rule 425 and Rule 433.

204 Prior to filing a registration statement, only a well-known seasoned issuer will be able to use a free writing prospectus. This use of a free writing prospectus by a well-known seasoned issuer is permitted by Rule 163.

prospectus can take any form and is not required to meet the informational requirements otherwise applicable to prospectuses.

### ii. Definition of Free Writing Prospectus

#### (A) Scope of Definition

We are adopting the proposed definition of "free writing prospectus." A free writing prospectus is, except as otherwise provided specifically or otherwise required by the context, a 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);
- a prospectus satisfying our rules permitting the use of 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;[205] or
- a prospectus because a final prospectus meeting the requirements of Section 10(a) was sent or given with or prior to the written communication.[206]

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205 See Rules 167 and 426 [17 CFR 230.167 and 17 CFR 230.426]. Asset-backed issuers also may use free writing prospectuses as discussed below. We have excluded free writing prospectuses used in reliance on Rule 164 and Rule 433 (including the filing requirements) from the filing requirements for ABS informational and computational materials. See the amendments to Rule 426. The content of ABS free writing prospectuses may include, but is not limited to, the same information as material used pursuant to Rule 167 and Rule 426.

206 See clause (a) of Securities Act Section 2(a)(10). After effectiveness of a registration statement, any written offer that is accompanied or preceded by a final prospectus that meets the requirements of Securities Act Section 10(a) (such as sales literature used after effectiveness) will continue to be permitted without having to satisfy the requirements of any safe harbor or other rule permitting its use or Rule 433. Such a written offer is excluded from the definition of "prospectus" under the Securities Act by reason of clause (a) of Securities Act Section 2(a)(10) if a final prospectus meeting the Section 10(a) information requirements is sent or given before or at the same time as the written offer. A base prospectus included in a shelf registration statement that omits information is not a final prospectus meeting the requirements of Section 10(a).

Further, the definition makes clear that, although a free writing prospectus will not be filed as part of a registration statement, it will still be considered to relate to a registered public offering of securities that is or will be the subject of a registration statement, regardless of the method of its use or distribution.

A written communication will be a free writing prospectus only where it constitutes an offer by an offering participant of a security under the Securities Act. Whether a particular communication constitutes such an offer will continue to be determined based on the particular facts and circumstances.[207] While the definition of "offer" is broad, not all communications relating to an offering are offers or offers by an offering participant. As a non-exclusive illustration, the gun-jumping provisions have been administered in a manner that excludes from categorization as an offer a media publication or television or radio broadcast that is based solely on information that is filed with us or available on an unrestricted basis or on other information the dissemination of which did not represent an offer by an issuer or other offering participant, where there is no other involvement or participation by an offering participant. On that basis, for example, a newspaper article about an initial public offering that is based on the filed registration statement, on a press release that is filed with or furnished to us, on a filed free writing prospectus, or on filed issuer information where the issuer and other offering participants have refused to comment and not otherwise been involved, would not be categorized as an offer under the gun-jumping provisions.

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[207] In addition, communications that are not considered offers or prospectuses for purposes of the gun-jumping provisions, such as Rule 134 notices, Rule 135 communications, regularly released factual business information and forward-looking information falling within the new safe harbors, and research reports falling within the safe harbors provided by our rules, will not be free writing

**(B) Comments on Definition**

Commenters supported the concept of free writing prospectuses.[208] Commenters suggested that we exclude offshore communications and rating agency reports from the scope of the definition.[209] We are not including any specific provision in the rules regarding offshore communications and, as such, the treatment of offshore communications under the free writing prospectus rules will be no different than the treatment of any offshore communication prior to the Rules we adopt today.[210] We also have not revised the Rule in response to commenters' request for clarification of the treatment of rating agency reports. Our treatment of NRSROs is currently the subject of rulemaking and other consideration.[211]

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prospectuses.

208 See, e.g., letters from Cleary; NYSBA; and SIA.

209 See, e.g., letters from ABA; ABA-ABS; ASF; Fried Frank; NYSBA; S & C; SIA; and TBMA. But see letter from State Street Global Advisors ("SSGA").

210 Whether an offshore communication is considered an offer in the United States subject to the federal securities laws will depend on when and how the communication is made and the availability of other exemptions, such as those for offshore press conferences. See Rule 135e [17 CFR 230.135e] and note 140 above. See also Rule 902(c)(3)(vii) [17 CFR 230.902(c)(3)(vii)].

211 In addition, as we have said previously, whether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or other offering participant depends upon whether the issuer or other offering participant has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. The courts and we have referred to the first line of inquiry as the entanglement theory and the second as the adoption theory. See the 2000 Electronics Release, note 96, at fn. 48 and accompanying text. We think these theories are equally applicable with respect to issuer or offering participant involvement regarding rating agency reports. For example, if an issuer or underwriter distributes the rating agency report in connection with an offering of the securities, it is appropriate to conclude that such party has adopted that report and should be liable for its contents. Liability under the entanglement theory depends upon the level of pre-publication involvement in the preparation of the information. See the Asset-Backed Securities Adopting Release, note 82, at part III.C.3.

### iii. Permitted Use of a Free Writing Prospectus After the Filing of a Registration Statement Under Rule 433

#### (A) Overview

We are adopting Rule 164 and Rule 433 substantially as proposed. Rule 164 will permit the use of a free writing prospectus where an eligible issuer has filed a registration statement, the other requirements of Rule 164 are met, and the conditions of Rule 433 are satisfied.[212] The Rules permitting the use of free writing prospectuses are not available for any communication that, while in technical compliance with the Rule, is part of a plan or scheme to evade the requirements of Securities Act Section 5.[213]

#### (B) Issuer Eligibility

For any offering participant to use free writing prospectuses, other than free writing prospectuses that consist only of descriptions of the securities in the offering or of the offering, the issuer may not be an ineligible issuer.[214] We have modified the consequences of ineligibility in the context of use of free writing prospectuses to permit ineligible issuers, other than blank check companies, shell companies, and penny stock issuers, to use free writing prospectuses that are limited to descriptions of the terms of the securities being offered and the offering because we believe that the permitted use of

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212 The discussion in this section relates to the use of free writing prospectuses after the filing of a registration statement. For a discussion of the use of free writing prospectuses by well-known seasoned issuers prior to filing a registration statement, see the discussion in Section III.D.2 above under "Permitted Pre-Filing Offers for Well-Known Seasoned Issuers."

213 As with certain of the safe harbors and other exemptions we are adopting today, we have included language in the Preliminary Note to Rule 164 making clear that the exemption in that Rule is non-exclusive.

214 These descriptions cannot be used in any case if the issuer is or it or any of its predecessors in the last three years was a blank check company, a shell company (other than a business combination related shell company), or a penny stock issuer.

such free writing prospectuses can provide advantages to investors that justify the risks of use of such materials by some classes of ineligible issuers. Such use would be subject to all of the other requirements of the new rules.

We have revised the definition of ineligible issuer from the proposals in response to comments. As adopted, ineligible issuers are, as of the relevant date of determination:[215]

- reporting issuers who are not current in their Exchange Act reports and other materials required to be filed during the prior 12 months (or such shorter period that the issuer was required to file such reports and materials), other than reports on Form 8-K required solely pursuant to an item specified in General Instruction I.A.3(b) of Form S-3;[216]

- in the case of asset-backed issuers, the depositor, or any issuing entities previously established, directly or indirectly by the depositor who are not current in their Exchange Act reports and other materials required to be filed during the prior 12 months (or such shorter period that the issuer was required to file such reports and materials), other than reports on Form 8-K required solely pursuant to an item specified in General Instruction I.A.4 of Form S-3;[217]

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215 We have adopted as proposed a waiver provision that will allow us to grant or deny a request to waive an issuer's ineligibility if we find good cause to provide the waiver. We are adopting rules today delegating authority to the Division of Corporation Finance to grant or deny waivers from any of the ineligibility provisions. See revisions to Rule 30-1 of the Rules of Organization and Program Management Governing Delegations of Authority to the Director of the Division of Corporation Finance [17 CFR 200.30-1].

216 The exception for reports solely for specified items of Form 8-K from the requirement that issuers be current effectively applies only for purposes of the ineligible issuer definition in the context of the use of free writing prospectuses. In the context of the determination of status as a well-known seasoned issuer, the requirement that the issuer be current at the determination date applies separately (without the Form 8-K exceptions) by virtue of the requirement that the issuer be eligible for Form S-3. (The Form 8-K exceptions in the Form S-3 requirements apply in determining whether an issuer is timely for purposes of Form S-3 eligibility, but not in determining whether it is current.)

217 The requirements for Form S-3 eligibility for asset-backed issuers include not only this condition, but also the condition that filings be timely, and extend the requirements to reports of affiliated depositors regarding the same asset class. The timeliness condition and extension to affiliated depositors do not apply here.

- issuers who are or during the prior three years were or any of their predecessors were:
    - blank check companies;
    - shell companies (other than business combination related shell companies);
    - issuers for an offering of penny stock;
- issuers who are limited partnerships offering and selling their securities other than through a firm commitment underwriting;[218]
- issuers who have filed for bankruptcy or insolvency during the past three years;[219]
- issuers who have been or are the subject of refusal or stop orders under the Securities Act during the past three years, or are the subject of a pending proceeding under Securities Act Section 8[220] or Section 8A;[221] or
- issuers who, or whose subsidiaries at the time they were subsidiaries of the issuer, have been convicted of any felony or misdemeanor described in certain provisions of the Exchange Act, have been found to have violated the anti-fraud provisions of the federal securities laws, or have been made the subject of a judicial or administrative decree or order (including a settled claim or order) prohibiting certain conduct or activities regarding the anti-fraud provisions of the federal securities laws[222] during the past three years. The definition as adopted provides

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218 These issuers are subject to our interpretations in Limited Partnership Reorganizations and Public Offerings of Limited Partnership Interests, Release No. 33-6900 (June 17, 1991) [56 FR 28979].

219 Ineligibility based on an involuntary bankruptcy filing arises on the earlier of 90 days after the date of filing of an involuntary petition (if the case was not earlier dismissed) or the conversion of the case to a voluntary proceeding under federal bankruptcy or state insolvency laws. As a result, issuers will not immediately be considered ineligible because an involuntary bankruptcy petition has been filed. In addition, ineligibility tied to bankruptcy will no longer apply after an issuer files an annual report with audited financial statements after emergence from bankruptcy.

220 15 U.S.C. 77h.

221 15 U.S.C. 77h-1.

222 The covered decrees or orders (including settlements) are prohibitions on future violations of the anti-fraud provisions of the federal securities laws, orders requiring issuers to cease and desist from violating the anti-fraud provisions of the federal securities laws, and determinations of violations of the anti-fraud provisions of the federal securities laws. The settlements include settlements in

that ineligibility of an issuer based on a settlement will be prospective only and thus arise only for settlements entered into after the effective date of the new rules.[223]

The categories of ineligible issuers include issuers that at the time of the eligibility determination are not current (with specified Form 8-K exceptions) for 12 months in their Exchange Act reporting obligations, issuers that may raise greater potential for abuse, and issuers that have violated the anti-fraud provisions of the federal securities laws. Certain of these issuers have been viewed historically as unsuited for short-form registration or ineligible for disclosure-related relief. For instance, we have repeatedly stated our belief that blank check companies, shell companies, and penny stock issuers may give rise to disclosure abuses.[224] In addition, Congress determined not to extend the safe harbors for forward-looking statements to issuers of blank check and penny stock securities, as well as issuers previously convicted of certain felonies and misdemeanors and issuers subject to a decree or order involving a violation of the anti-fraud provisions of the federal securities laws.[225]

We are adopting as proposed the exclusion of registered investment companies and business development companies from eligibility for use of Rules 164 and 433

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which the issuer or its subsidiary neither admits nor denies that it violated the anti-fraud provisions of the federal securities laws.

223 See amendments to Securities Act Rule 405.

224 See, e.g., Penny Stock Definition for Purposes of Blank Check Rule, Release No. 33-7024 (Oct. 25, 1993) [58 FR 58099] (the Commission stated that Congress found blank check companies to be common vehicles for fraud and manipulation in the penny stock market, and concluded that the Commission's disclosure-based regulation and review of such offerings protects investors); Delayed Pricing for Certain Registrants, Release No. 33-7393 (Feb. 20, 1997) [62 FR 9276] (blank check and penny stock issuers would be ineligible to use rule providing for delayed pricing because of "prior substantial abuses"); and the Shell Companies Release, note 109.

because they are already subject to separate rules permitting use of a Section 10(b) prospectus.[226] Securities Act Rule 482 permits investment companies to advertise investment performance data and other information, and Securities Act Rule 498 permits open-end management investment companies to use a profile. We also are adopting as proposed the exclusion of offerings that are business combination transactions subject to Regulation M-A. We also are excluding all offerings registered on Form S-8, except for those by well-known seasoned issuers.

We have revised the Rules from the proposal to change the time of determination of status as an ineligible issuer. We have concluded that eligibility, in most cases, should not be determined at the time of reliance on our new Rules for each free writing prospectus. We have adopted an approach to eligibility determination that generally looks to the commencement of an offering and will not result in a change of status during an offering. As adopted, eligibility determinations will be made:

- if the offering is registered pursuant to Rule 415, our shelf registration rule, the earliest time after the filing of the registration statement covering the offering at which the issuer, or in the case of an underwritten offering the issuer or another offering participant, makes a bona fide offer, including without limitation through the use of a free writing prospectus, in the offering; or
- otherwise at the time of filing of a registration statement covering the offering.

This timing of determination as to eligibility to use a free writing prospectus (with the enumerated exceptions from the prohibition) applies to all issuers, including well-known seasoned issuers. The timing of determination of whether an issuer is a well-

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225 See Securities Act Section 27A and Exchange Act Section 21E.

226 Two commenters suggested that business development companies should be permitted to rely on the rules permitting the use of a free writing prospectus. See letters from Allied and Fried Frank. A third commenter suggested that Securities

known seasoned issuer, described above, is different and is made on an approximately annual basis.

**(1) Comments on Ineligible Issuer Definition**

Commenters expressed a number of concerns about the ineligibility conditions, including those relating to prior securities law violations and settlements,[227] going concern opinions in audit reports covering financial statements,[228] and certain involuntary bankruptcy petitions.[229] Commenters also requested clarification of the time frame for which the issuer must be current in its reports for purposes of the definition.[230] Commenters did not believe that issuers should be ineligible based on disclosure of material weaknesses in internal controls over financial reporting.[231] Commenters also stated that offering participants should be able to rely on the various exemptions based on a reasonable belief that the issuer was not an ineligible issuer.[232]

With regard to the ineligibility based on securities law violations or settlements of alleged violations, commenters believed that the disqualifying violations were too broad and should be limited to violations of the anti-fraud provisions, not any provision of the

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Act Rule 482 should be conformed to Rule 433 for registered investment companies and business development companies. See letter from ABA.

227 See, e.g., letters from ABA; Alston; the Business Roundtable ("BRT"); Citigroup; Credit Suisse First Boston, LLC ("CSFB"); Davis Polk; Merrill Lynch; Morgan Stanley; NYSBA; Paul ,Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"); S & C; and SCSGP.

228 See, e.g., letters from ABA; AICPA; Davis Polk; Deloitte; E & Y; and KPMG.

229 See, e.g., letters from Davis Polk and TBMA.

230 See, e.g., letters from ABA-ABS; ASF; CMSA; Davis Polk; and TBMA.

231 See, e.g., letters from ABA; AICPA; E & Y; and KPMG.

232 See, e.g., letters from ABA-ABS and ASF.

federal securities laws.[233] Moreover, commenters stated that the disqualification based on settled allegations of violations of the securities laws should be prospective only, because the settling parties would not have known, at the time of the negotiated settlement, also to negotiate a waiver of the ineligible issuer disqualifications.[234] Commenters did not believe that the settlement of an alleged violation should be a disqualification.[235] Other commenters did not believe that a securities law violation or settlement by a subsidiary should affect the eligibility of an issuer to use the various exemptions and safe harbors that we proposed.[236]

Commenters addressing ineligibility based on bankruptcy were concerned that an involuntary bankruptcy disqualification could disadvantage issuers in their relationships with their creditors.[237] They were concerned that a creditor could cause an issuer to be an ineligible issuer by filing an involuntary bankruptcy petition against the issuer. These commenters suggested that the involuntary bankruptcy petition be a disqualification only after the lapse of a period of time or conversion of the petition to a voluntary petition, enabling issuers to attempt to resolve the issues with their creditors.

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233 See, e.g., letters from ABA; Alston; BRT; Citigroup; Richard Hall; Merrill Lynch; Morgan Stanley; the NYSBA; Paul Weiss; SCSGP; and SIA.

234 See, e.g., letters from ABA; Alston; BRT; Citigroup; Cleary; CSFB; Davis Polk; Intel Corporation ("Intel"); Morgan Stanley; NYSBA; SCSGP; S & C; SIA; and TBMA.

235 See, e.g., letters from Richard Hall; Paul Weiss; and TBMA.

236 See, e.g., letters from Alston; Morgan Stanley; NYSBA; Paul Weiss; S & C; and SIA. Some commenters were concerned that acquired subsidiaries that had securities law violations prior to the acquisition would cause the acquiring issuer to be ineligible. See, e.g., letters from Alston; Intel; NYSBA; S & C; and SCSGP.

237 See, e.g., letters from Davis Polk and TBMA.

We have revised the definition of "ineligible issuer" to address many of commenters' concerns. Under the definition we are adopting, an issuer must be current, but not necessarily timely, in its required filings under the Exchange Act for the past twelve months or such shorter period that the issuer is subject to the Exchange Act reporting requirements. We have limited the ineligibility condition for securities law violations to those involving the anti-fraud provisions and have eliminated the separate provision regarding settlements because they are subsumed within the ineligibility provision based on a settled judicial or administrative decree or order. In addition, we have provided that ineligibility based on actions of a subsidiary must have arisen at the time that the entity was a subsidiary of the issuer. We also have eliminated the ineligibility condition based on a going concern opinion covering the issuer's most recent audited financial statements. In addition to the revisions to the specific ineligibility provisions, we also have revised Rule 164 and Rule 433 to provide that persons relying on those Rules, other than issuers, must have a reasonable belief that an issuer is not ineligible.[238] We also have provided that ineligibility based on settlements will apply only to judicial or administrative decrees or orders entered into after the effective date of the new rules.

**(C) Conditions to Permitted Use of a Free Writing Prospectus**

Rule 164 as adopted provides that, after the filing of a registration statement, a free writing prospectus that meets the requirements of Rule 164 and satisfies the conditions of Rule 433 will be a permitted prospectus under Section 10(b) for purposes of

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238 In addition, we believe that the new check box on the Form 10-K and Form 20-F for issuers to indicate whether they are well-known seasoned issuers should facilitate an offering participant's ability to develop such a reasonable belief with

Securities Act Section 5(b)(1). The Rule 433 conditions on the use of free writing prospectuses relate to:

- the delivery or availability of the statutory prospectus at the time the free writing prospectus is used;
- the information contained in the free writing prospectus;
- the legend that is to be included in the free writing prospectus;
- filing of the free writing prospectus; and
- record retention for the free writing prospectus.

#### (1) Prospectus Delivery or Availability

The ability of any person participating in the offer and sale of the securities to use free writing prospectuses under Rules 164 and 433 generally is conditioned on the filing of a registration statement that includes a prospectus satisfying the requirements of Securities Act Section 10.[239] Further, in specified cases, Rule 433 conditions the use of a free writing prospectus on prior or concurrent delivery of the issuer's most recently filed statutory prospectus.

##### (a) Prospectus Delivery Conditions for Non-Reporting Issuers and Unseasoned Issuers

In an offering of securities of an eligible non-reporting issuer, including an initial public offering, or securities of an eligible unseasoned issuer, the use by an offering participant of free writing prospectuses is conditioned on:

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respect to an issuer's status as a well-known seasoned issuer.

239 Base prospectuses, preliminary prospectuses, summary prospectuses, and prospectuses subject to completion that are permitted under our rules are not prospectuses that satisfy the requirements of Securities Act Section 10(a), but they are statutory prospectuses that satisfy the requirements of Securities Act Section 10. Rule 433 makes clear that the prospectus condition may be satisfied by any Section 10 prospectus, other than a summary prospectus permitted by Securities

- filing of the registration statement for the offering; and
- the free writing prospectus being preceded or accompanied by the most recent statutory prospectus that satisfies the requirements of Section 10 if:[240]
    - the free writing prospectus is prepared by or on behalf of or used or referred to by an issuer or prepared by or on behalf of or used or referred to by other offering participants;
    - consideration has been or will be given by the issuer or an offering participant for the dissemination (in any format)[241] of any free writing prospectus (including any published article, publication, or advertisement); or
    - Securities Act Section 17(b)[242] requires disclosure that consideration has been or will be given by the issuer or an offering participant for any activity described therein in connection with the free writing prospectus.

In these cases, issuers and offering participants must assure that the most recent statutory prospectus is actually provided to anyone who might receive a free writing prospectus. Accordingly, the use of broadly disseminated free writing prospectuses in registered offerings by these types of issuers and offering participants in these offerings may not be feasible unless they are in electronic form and contain a hyperlink to the statutory prospectus. We believe that this is an appropriate result, as conditioning the use of the free writing prospectus on its being preceded or accompanied by the statutory

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Act Rule 431 [17 CFR 230.431] or a free writing prospectus.

240 For purposes of the prospectus delivery condition, Rule 433 provides that a prospectus will be deemed to accompany a free writing prospectus that is an electronic communication if the free writing prospectus contains an active hyperlink to the statutory prospectus. In initial public offerings, a preliminary prospectus that does not contain a price range does not satisfy our rules or, therefore, the requirements of Section 10.

241 "In any format" is meant to encompass all means of dissemination of the materials, including graphic, television or radio broadcast, or written.

242 The rules we are adopting provide that written materials for which Securities Act Section 17(b) requires disclosure will be treated as free writing prospectuses of the issuer or other offering participant on whose behalf the payment has been or will be made or consideration has been or will be given.

prospectus will assure that an investor has a balanced disclosure document of an issuer with no or limited reporting history against which to evaluate the free writing prospectus and to place the statements made in context. The condition that the statutory prospectus precede or accompany the free writing prospectus will not require that it be provided through the same means, so long as it is provided at the required time. Referring to its availability will not satisfy this condition.

In the following situations, for example, the most recent statutory prospectus must precede or accompany the free writing prospectus or the communication cannot be made in reliance on Rules 164 and 433:[243]

- a direct written communication by an issuer or offering participant;
- a written communication or a television or radio broadcast prepared by or on behalf of or used or referred to by an issuer or an offering participant;
- the dissemination, in any format including publication or broadcast, of any free writing prospectus (including any published article, publication, or advertisement) for which
    - consideration is or will be given by the issuer or an offering participant; or
    - Securities Act Section 17(b) requires disclosure of a payment made or consideration given by an issuer or other offering participant; or
- a paid published or broadcast advertisement by an issuer or offering participant.

Once the required statutory prospectus is provided to an investor, additional free writing prospectuses can be provided to that investor without having to provide an additional statutory prospectus, unless there is a material change in the most recent statutory prospectus from the provided prospectus.[244] For example, once an investor has

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243 See the discussion below regarding the treatment of media publications. See Section III.D.3 below under "Media Publications and Broadcasts."

244 If there are material changes in a preliminary prospectus, or preliminary

been sent a preliminary prospectus, absent a material change, the Rule permits subsequent e-mail communications to that investor by an offering participant that constitute free writing prospectuses without the user having to hyperlink to or otherwise redeliver a statutory prospectus with each communication. After effectiveness and availability of a final prospectus meeting the requirements of Securities Act Section 10(a), no earlier statutory prospectus may be provided, and such final prospectus, as revised or supplemented, must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier statutory prospectus has been previously provided to the recipient.[245]

**(b) Prospectus Availability Condition for Seasoned Issuers and Well-Known Seasoned Issuers**

In offerings of securities of eligible seasoned issuers (including asset-backed issuers eligible to use Form S-3) and eligible well-known seasoned issuers, we are adopting as proposed the provision that these issuers and other offering participants in their offerings can use a free writing prospectus after the filing of a registration statement containing a statutory prospectus.[246] For shelf offerings, this statutory prospectus can be

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prospectus supplement, the issuer and offering participants generally will recirculate the revised preliminary prospectus or supplement to potential purchasers.

245 If a final prospectus is given or sent prior to or with a written offer, under the exception in clause (a) of Securities Act Section 2(a)(10), the written offer is not a prospectus and therefore will not be a free writing prospectus and Rules 164 and 433 will not apply.

246 Under Rule 433 as adopted, the following offerings are included in this category:

(a) offerings of securities registered on Form S-3 pursuant to General Instruction I.B.1, I.B.2, I.B.5, I.C., or I.D. thereof;

(b) offerings of securities registered on Form F-3 pursuant to General Instruction I.A.5, I.B.1, I.B.2,, or I.C thereof;

a base prospectus.[247] For offerings of securities of eligible seasoned issuers (including eligible well-known seasoned issuers), the Rule does not condition use of the free writing prospectus on actual delivery of the most recent statutory prospectus. Instead, the user of the free writing prospectus must notify the recipient, through a required legend, of the filing of the registration statement and the URL for our web site where the recipient can access or hyperlink to the preliminary or base prospectus. The Rule as adopted permits the use of a generic rather than an issuer-specific legend. The legend must contain a toll-free telephone number, and may contain an e-mail address, through which the statutory prospectus may be requested.[248]

**(c) Comments on Prospectus Delivery or Availability Conditions**

Some commenters believed that the requirement that a statutory prospectus precede or accompany a free writing prospectus in offerings of securities of non-reporting or unseasoned issuers should be able to be accomplished by the availability of the

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(c) any other offering not excluded from reliance on Rule 164 and Rule 433 of a well-known seasoned issuer; and

(d) any other offering not excluded from reliance on Rule 164 and Rule 433 of an issuer eligible to use Form S-3 or Form F-3 for primary offerings pursuant to General Instruction I.B.1 of such forms.

247 See Rule 430B, described in Section V.B.1 below, which is intended, among other things, to locate within one rule the information requirements for a base prospectus in a shelf registration statement.

248 In the event that a well-known seasoned issuer does not have a registration statement on file, Rule 163 provides that an eligible well-known seasoned issuer's written offers are exempt from Section 5(c). While it will be exempt from the requirements of Section 5(c), a written offer made under the exemption in Rule 163 will fall within our definition of "free writing prospectus." Rule 163 conditions the Section 5(c) exemption for that free writing prospectus on the satisfaction of the conditions in Rule 163 including filing and legend conditions. As discussed above, the filing conditions of Rule 163 apply only if a registration statement is filed and otherwise are largely determined by those set forth under Rule 433 if the communication was a free writing prospectus used after filing a

prospectus on our Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR"),[249] while others thought it should be limited only to non-reporting companies engaging in their initial public offerings[250] or that there should be cure provisions for failure to provide timely a statutory prospectus.[251] We do not believe that it is appropriate at this time to have access or filing of a registration statement on EDGAR satisfy this delivery obligation for statutory prospectuses in all cases. In addition, as we note above, we believe that investors should have the statutory prospectus for unseasoned issuers when they evaluate free writing prospectuses involving offerings of securities of such issuers.

**(2) Information in a Free Writing Prospectus**

**(a) Information Conditions**

We are adopting substantially as proposed the provisions that will permit a free writing prospectus meeting the conditions of Rule 433 to be a Section 10(b) prospectus without having line-item disclosure requirements or otherwise requiring that the free writing prospectus contain any particular information, other than the legend. The Rule permits information in a free writing prospectus to go beyond information the substance of which is contained in the prospectus included in the registration statement. However, the information in the free writing prospectus must not conflict with the information in the registration statement, including Exchange Act reports incorporated by reference into the registration statement. We believe that exempting free writing prospectuses meeting

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registration statement.

249 See, e.g., letters from ABA; Alston; and Cleary.

250 See, e.g., letters from NYSBA and S & C.

251 See, e.g., letters from ABA; Cleary; Merrill Lynch; S & C; and SIA.

the conditions of Rule 433 from limitations on any particular content should not diminish investor protection. In that regard, we believe that the liability provisions applicable to free writing prospectuses, particularly Securities Act Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, provide protection against material misstatements in and material omissions from information contained in such free writing prospectus.

Although the proposal stated that the information in the free writing prospectus did not have to be in the registration statement, some commenters requested further clarification of the proposed condition that the free writing prospectus cannot contain information that is "inconsistent" with the information in the prospectus filed as part of the registration statement.[252] In revising the provision to preclude information that "conflicts" with that in the registration statement, we have clarified that information in the free writing prospectus may be different from or additional or supplemental to that in the registration statement, so long as it does not "conflict" with the latter.

Commenters requested clarification as to how information in the free writing prospectus would be treated in relation to other information that was filed with us or was otherwise publicly available.[253] Commenters believed that liability for free writing prospectuses should not be considered in isolation but should take into account other information that is conveyed for purposes of the total mix of information available.[254] Free writing prospectuses may incorporate or refer investors to other information, so that

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252 See, e.g., letters from ABA; Merrill Lynch; and S & C.

253 See, e.g., letters from ABA; Citigroup; Cleary; CSFB; Davis Polk; Deloitte; Goldman, Sachs & Co. ("Goldman Sachs"); ICI; Morgan Stanley; and SIA.

254 Id.

investors will be advised to consider the information presented in the free writing prospectus in context. We note that the legend that must be included in a free writing prospectus will direct investors to the filed prospectus contained in the registration statement. As we discuss below, a free writing prospectus cannot include language that deems an investor to have read or have knowledge of or rely on the content of other documents incorporated in or referred to in the free writing prospectus. Whether such other information is conveyed to the investor will be determined based on the facts and circumstances.[255]

Treating a free writing prospectus satisfying the conditions of Rule 433 as a Section 10(b) prospectus provides for additional continuing Commission oversight and enforcement authority over the contents and use of the free writing prospectus. As we discussed in the Proposing Release, we will retain the ability to halt the use of any materially false or misleading free writing prospectus in accordance with Section 10(b). Under the amendments to Securities Act Rule 418 we are adopting today, our staff will be able to request any free writing prospectus that has been used in connection with a securities offering.

**(b) Amendment to Rule 408**

Finally, we are amending Securities Act Rule 408 as proposed to make clear that not including information that is included in a free writing prospectus in a prospectus filed as part of a registration statement will not, solely by virtue of inclusion of the information in a free writing prospectus, be considered an omission of material information required to be included in the registration statement.

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255 See, e.g., Starr v. Georgeson Shareholder, Inc., 2005 U.S. App. LEXIS 11250 (2d

### (c) Legend Condition

#### (i) Discussion

We are not adopting any content requirement for free writing prospectuses other than to condition the use of a free writing prospectus on inclusion of a legend indicating where a prospectus is available for the offering to which the communication relates and recommending that potential investors read the prospectus (including Exchange Act documents incorporated by reference).[256] In addition, the legend also advises investors that they can obtain the registration statement including the prospectus and any incorporated Exchange Act documents for free through the Commission's web site at www.sec.gov, and that they may request the prospectus from the issuer, any underwriter or any dealer by calling a toll-free number.[257] The legend also indicates that the free writing prospectus relates to a registered public offering. As suggested by commenters, we are adopting a generic, rather than issuer-specific legend condition.[258] We believe this modification should assist issuers and offering participants in including a legend in a free writing prospectus without much added cost.[259]

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Cir. 2005).

256 See Rule 433(c). We have eliminated any issuer-specific information as well as the reference to risk factors.

257 Rules 163 and 433 permit offering participants to include an e-mail address at which the documents can be requested, a statement that the documents are available on the issuer's web site, and the Internet address and particular location where the documents can be found.

258 See, e.g., letters from Citigroup; Cleary; CSFB; Morgan Stanley; S & C; and SIA.

259 For example, a single toll-free telephone number could be used to request a copy of the prospectus.

### (ii) Cure for Unintentional or Immaterial Failure to Include a Legend

Rule 164 permits a user to cure an unintentional or immaterial failure to include the specified legend in any free writing prospectus, as long as a good faith and reasonable effort is made to comply with the condition and the free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend.[260] In addition, if a free writing prospectus has been transmitted to potential investors without the specified legend, the free writing prospectus must be retransmitted, with the appropriate legend by substantially the same means as and directed to substantially the same investors to whom it was originally transmitted.[261]

The legend condition is intended to identify more clearly materials as free writing prospectuses used in relation to a registered offering. We believe that this legend will put investors on notice and assist them in evaluating the content of the free writing prospectus.

### (iii) Impermissible Legends or Disclaimers

As we discussed in the Proposing Release, we understand that issuers or other users of written communications may sometimes include legends or disclaimers in offering materials that may be inappropriate. In particular, disclaimers of responsibility

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260 See Rule 164(c).

261 Rule 163 contains similar cure provisions. Some commenters were concerned that the cure provision would require the redelivery of the free writing prospectus with the correct legend to all potential purchasers. See letters from ABA and Fried Frank. While the proposal did not require that the free writing prospectus be delivered to all potential purchasers, we have revised the language to clarify that the free writing prospectus with the specified legend must be retransmitted by substantially the same means as and directed to substantially the same prospective purchasers to whom it was originally transmitted. For example, if a free writing prospectus without a legend was sent by e-mail to a distribution list, it would have to be retransmitted with the specified legend by e-mail to the same distribution

or liability that are impermissible in a statutory prospectus or registration statement also are impermissible in free writing prospectuses. Examples of impermissible legends or disclaimers, which are not exclusive, that will cause the materials not to be permissible free writing prospectuses or not to be effective as to any purchaser for liability purposes include:

- disclaimers regarding accuracy or completeness or reliance by investors;
- statements requiring investors to read or acknowledge that they have read or understand the registration statement or any disclaimers or legends;
- language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy; and
- for information that must be filed with us, statements that the information is confidential.[262]

**(3) Filing Conditions**

**(a) General Conditions**

**(i) Scope of General Conditions**

We are adopting substantially as proposed the provisions conditioning use of a free writing prospectus on the filing of that prospectus or information contained in that prospectus,[263] unless exempt from filing, in the following circumstances:[264]

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list.

262 Language indicating that the material is not a prospectus or offer would make the material not a permitted prospectus allowed pursuant to Rule 164 and thus preclude reliance on Rules 164 and 433. See also the Asset-Backed Securities Adopting Release., note 82, at III.C.1.d.

263 See Rule 433(d). Under Rule 433, Rule 134 notices and Rule 135 notices are not considered free writing prospectuses and, therefore, are not subject to the conditions to use in the Rule. This differs from Securities Act Rule 425, which is applicable to business combination transactions and covers all communications, including Rule 135 notices.

264 Under Rule 433, electronic road shows that are written communications are not

- where a free writing prospectus is prepared by or on behalf of, or used or referred to by, the issuer, known as an "issuer free writing prospectus," the issuer shall file that free-writing prospectus;

- where a free writing prospectus prepared by or on behalf of or used by an offering participant other than the issuer contains material information about the issuer or its securities that has been provided by or on behalf of an issuer, known as "issuer information," that is not already included or incorporated in the prospectus or a filed free writing prospectus, the issuer shall file the issuer information;[265]

- where a free writing prospectus used or referred to by an offering participant other than the issuer is distributed by or on behalf of such offering participant in a manner reasonably designed to lead to its broad unrestricted dissemination, the offering participant shall file the free writing prospectus; and

- where a free writing prospectus or portion thereof prepared by or on behalf of the issuer or other offering participant comprises a description of the final terms of the issuer's securities in the offering or of the offering, the issuer must file such free writing prospectus or portion thereof after such terms have been established for all classes of the offering.[266]

In most cases, there is no condition that underwriters and dealers file the free writing prospectuses that they prepare, use, or refer to. This includes information prepared by underwriters and others on the basis of or derived from, but not containing, issuer information. Such information can be, but is not limited to, information that is proprietary to the preparer.

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subject to the filing condition in certain circumstances. See Section III.D.3 below under "Electronic Road Shows."

265 This condition only provides that the issuer information contained in the offering participant's free writing prospectus be filed, not necessarily the free writing prospectus itself. In addition, this condition does not apply where a free writing prospectus prepared by or on behalf of an offering participant, other than the issuer, contains information prepared on the basis of or derived from issuer information but not issuer information.

266 The description of the final terms of the issuer's securities and of the offering will either be contained in an issuer free writing prospectus or, if contained in another party's free writing prospectus, will be issuer information.

We are adopting as proposed the exception to the general principle that underwriter free writing prospectuses do not need to be filed where a free writing prospectus is used or referred to by and distributed by or on behalf of an offering participant, other than the issuer, in a manner that is reasonably designed to lead to its broad unrestricted dissemination. Accordingly, such use of a free writing prospectus is conditioned on such person filing the free writing prospectus on or before the date of first use. For example, the filing condition applies where:

- an underwriter includes a free writing prospectus on an unrestricted web site or hyperlinks from an unrestricted web site to information that would be a free writing prospectus;[267] or
- an underwriter sends out a press release regarding the issuer or the offering that is a free writing prospectus.

Offering participants include selling security holders. A selling security holder who is unaffiliated with the issuer and who uses a free writing prospectus is treated for purposes of Rule 164 and Rule 433 as any other offering participant who may be an underwriter of the issuer's securities. If the selling security holder is an affiliate of the issuer and the selling security holder prepares, uses, or refers to a free writing prospectus, it should consider, in addition to underwriter status, whether it is acting by or on behalf of the issuer. Further, the issuer and such affiliated selling security holder should evaluate whether the selling security holder has access to material information about the issuer and whether it is including such material issuer information in that free writing prospectus.[268]

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267 Conversely, a web site with access restricted to customers or a subset of customers will not require filing, nor will an e-mail by an underwriter to its customers, regardless of the number of customers.

268 While an unaffiliated selling security holder could, depending on the facts and circumstances, be acting on behalf of an issuer or have access to material information about the issuer, those situations would be more likely to arise with

### (ii) Conditions Specific to Final Terms of the Securities or Offering

We also have adopted with modifications the provision that a description of the final terms of the securities in the offering or of the offering contained in a free writing prospectus must be filed by the issuer, regardless of whether it was prepared by or on behalf of the issuer or other offering participant prepared or used it. As modified, the provision applies to final terms of the securities in the offering and of the offering, whether or not they are the only matters included in the free writing prospectus. Terms are required to be filed only if they reflect the final terms of the securities or of the offering. The issuer has to file the description of the terms contained in the free writing prospectus within two days after the later of the date such terms became final for all classes of the offering or the date of first use.[269] We believe this filing condition is appropriate for the final terms of a security or offering contained in a free writing prospectus. Preliminary term sheets and other descriptive material containing only the terms of the securities or the offering that do not reflect final terms of securities or transactions are not subject to filing. All such written offering materials, whether or not filed, are, however, free writing prospectuses. As we note above, we have revised the Rule as adopted to permit most issuers, whether or not ineligible issuers, to use free writing prospectuses that consist only of descriptions of the terms of the issuer's securities in the offering or of the offering.[270]

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affiliates.

269 This is essentially the same timing for filing for final term sheets as we adopted for asset-backed securities. The filing condition under this provision of Rule 433 will not be satisfied by the timely filing of a prospectus supplement under Rule 424.

270 The issuers who are not permitted to use these free writing prospectuses are issuers who are, or during the prior three years were or any of their predecessors

**(iii) Asset-Backed Issuers**

Asset-backed issuers and other parties to asset-backed transactions specified in Rule 167(c) potentially have two sets of rules on which they may rely in using written offering materials. Under the special rules for asset-backed securities we adopted in December 2004, if the offering is registered on Form S-3, these persons may use ABS informational and computation materials as defined in Item 1101 of Regulation AB as permitted by Rule 167 and Rule 426. Rule 426 in particular includes filing conditions for the use of such materials using a Form 8-K. The filed materials become part of the registration statement for the offering of asset-backed securities in question.

These persons may also use free writing prospectuses as permitted by Rules 164 and 433 that we are adopting today. Use of free writing prospectuses is not limited to offerings registered on Form S-3. Free writing prospectuses are prospectuses subject to the provisions of Section 12(a)(2) of the Securities Act but are not filed as part of or included in the registration statement. The contents of free writing prospectuses are not limited to ABS informational and computational materials. Rule 433 requires filing by issuers of free writing prospectuses prepared by or on behalf of or used or referred to by, issuers or, depositors, sponsors, servicers, or affiliated depositors, whether or not the issuer, but not by underwriters or dealers, unless they contain issuer information or are distributed in a manner reasonably designed to lead to its broad unrestricted

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were, blank check companies, shell companies (other than business combination related shell companies), and penny stock issuers. Issuers registering business combination transactions also may not use these free writing prospectuses. Registered investment companies and business development companies may not use these descriptions as free writing prospectuses.

dissemination. Issuers also must file issuer information contained in other free writing prospectuses.[271]

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[271] In the case of asset-backed issuers certain information comprehended within the definition of ABS informational and computational material is analogous to the terms of securities and is therefore issuer information. For example, we would expect that the following categories of such material, which are derived from the definition of ABS informational and computational materials, are generally issuer information:

(1) factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, ERISA or other legal conclusions of counsel, and descriptive information relating to each class (e.g., principal amount, coupon, minimum denomination, price or anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar information relating to the proposed structure of the offering);

(2) factual information regarding the pool assets underlying the asset-backed securities, including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (e.g., weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;

(3) identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors, originators and providers of credit enhancement or other support, including information about any such party;

(4) static pool data, as referenced in Item 1105 of Regulation AB [17 CFR 229.1105], such as for the sponsor's and/or servicer's portfolio, prior transactions or the asset pool itself; and

(5) to the extent that the information is provided by the issuer, depositor, affiliated depositor, or sponsor, statistical information displaying for a particular class of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics, total rate of return, option adjusted spread or other financial or statistical information relating to the class or classes under specified prepayment, interest rate, loss or other hypothetical scenarios. (Where such information is prepared by an underwriter or dealer, it is not issuer information, even when derived from issuer information.)

Under Rule 426, filing is required for ABS informational and computational materials provided to prospective investors after final terms of all classes of securities in the offering have been established. Filing also is required of such materials relating to a class of securities, whether or not final terms of all classes had been established, as to which a prospective investor had indicated an interest. Filing is required by the later of the due date for filing the final prospectus with us under Rule 424(b) or two days after the date of first use.

Under Rule 433, the issuer must file a free writing prospectus or portion thereof comprising a description of final terms of securities in the offering or of the offering within two days after the later of the date final terms have been established for all classes of the offering or the date of first use. Filing is not required of descriptions of securities or of the offering that do not reflect final terms, even if a prospective investor had indicated an interest.

Under Rule 164, ineligible issuers may not use free writing prospectuses, except that most categories of ineligible issuers may use free writing prospectuses comprising only descriptions of terms of securities and offerings. Rule 164 provides that for offerings of asset-backed securities, ineligible issuers may use free writing prospectuses limited to certain categories of ABS informational and computational materials.[272] There

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[272] In asset-backed offerings by ineligible issuers, free writing prospectuses used by ineligible issuers are limited to the following information:

(1) factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, ERISA or other legal conclusions of counsel, and descriptive information relating to each class (e.g., principal amount, coupon, minimum denomination, anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar

is no such ineligible issuer restriction on the use of ABS informational and computational materials under Rules 167 and 426.

To coordinate the operation of the two available approaches to use of written offering communications, Rule 433 as adopted today provides that a free writing prospectus or portion thereof required to be filed under Rule 433 containing only ABS informational and computational materials, as defined in Item 1101(a) of Regulation AB,

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information relating to the proposed structure of the offering);

(2) factual information regarding the pool assets underlying the asset-backed securities, including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (e.g., weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;

(3) identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors, originators and providers of credit enhancement or other support, including a brief description of each such party's roles, responsibilities, background and experience;

(4) static pool data;

(5) the names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(6) the anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them); and

(7) a description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy).

may be filed under Rule 433 but within the time frame required for satisfaction of the conditions of Rule 426, and that such filing will satisfy the conditions of Rule 433.

Rule 433 as adopted today also provides that where a free writing prospectus is used in reliance on Rules 164 and 433 and the conditions of those Rules (including the special filing election for free writing prospectuses or portions thereof comprising ABS informational and computational materials) are satisfied, the conditions of Rules 167 and 426 do not need to be satisfied. It similarly provides that where ABS informational and computational materials are used in reliance on Rules 167 and 426 and the conditions of those Rules are satisfied, the conditions of Rules 164 and 433 do not need to be satisfied.

Special considerations apply with respect to providing static pool information in offerings of asset-backed securities. Rule 312 of Regulation S-T[273] provides that static pool information provided on an Internet web site can be included in the prospectus included in the registration statement if certain conditions are satisfied, including the inclusion of the specific web site address in the prospectus.

Static pool information also can be provided on an Internet web site as part of ABS informational and computational materials if certain conditions are satisfied, including provision of the specific web site address in the materials. Those materials are filed on Form 8-K and become part of the registration statement pursuant to Rule 167.

In addition, static pool information provided on an Internet web site can be included in a free writing prospectus. The web site address can be referred to in a written communication, and in the case of an electronic communication an active hyperlink can be provided. In either case the static pool information will be part of the free writing

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[273] 17 CFR 232.312.

prospectus. Where filing is required under Rule 433, the Rule provides that filing of the free writing prospectus containing the address or hyperlink satisfies the filing requirement. Where static pool information provided in a free writing prospectus is separately included in the prospectus included in the registration statement, the filing in the prospectus included in the registration statement is accomplished pursuant to Rule 312 of Regulation S-T.

**(iv) Comments on Filing Condition**

Some commenters did not believe there should be any filing requirements for free writing prospectuses.[274] Other commenters did not believe that filing should be a condition to the use of a free writing prospectus because the failure to comply with the filing requirements would give rise to a Section 5 violation with related rescission rights.[275] Some commenters requested further clarification of the cure provisions, including what constitutes "unintentional," a "good faith and reasonable effort" to comply with the filing conditions, and a "discovery" of a failure to file a free writing prospectus.[276] We have retained the filing condition and cure provisions as noted. We have not provided further elaboration of the terms in the cure provisions which also are contained in the rules affecting business combination transactions and asset-backed securities offerings.[277]

With regard to filing descriptions of the final terms of the securities in the offering or of the offerings, some commenters expressed concern that issuers and offering

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274 See, e.g., letters from ABA; Alston; and NYSBA.

275 See, e.g., letters from ABA and S & C.

276 See, e.g., letters from ABA; Citigroup; Goldman Sachs; Merrill Lynch; S & C; and SIA.

participants would not know when the terms were final to be able to file the final term sheet in a timely manner.[278] We believe that because a description of the final terms of the securities or the offering does not have to be filed until after the deal terms are final for all classes, there will not be a situation where there is uncertainty when a description of the final terms is a final term sheet. In addition, some commenters thought that only issuer prepared term sheets should have to be filed.[279] Because the final terms represent the description of the issuer's securities and of the offering, we have retained the condition that the issuer must file the final terms, regardless of who has prepared it.

Commenters also requested clarification of the interplay between new Rule 433 and the rules applicable in business combination transactions where there is a capital formation transaction occurring at the same time as a business combination transaction, whether or not related.[280] Rule 165, which is applicable to communications in connection with business combination transactions, is not available for a communication whose primary purpose or effect relates to a capital formation transaction. The rules we are adopting today applicable to registered capital formation transactions generally will apply to registered capital formation transactions even if they have some connection to or are proximate in time to a business combination transaction. As a result, if an issuer undertakes a registered capital formation transaction that is related to, or takes place at around the same time as, a business combination transaction, then the issuer can, if the conditions to the applicable rules are satisfied, rely on the rules we adopt today that apply

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277 See Rules 165(e) and 167(e).

278 See, e.g., letters from ABA-ABS; ASF; the Bond Market Association's comment letter on asset-backed securities ("BMA-ABS"); and CMSA.

279 See, e.g., letters from Cleary and Davis Polk.

to the registered capital formation transaction and Rules 165 and 166 for the business combination transaction. This is true whether the two transactions are connected (for example, the purpose of the capital formation transaction is to finance a contemporaneous business combination transaction) or independent of each other. If a communication relates to both a capital formation and business combination transaction, then the communication may be subject to both Rules 425 and 433.[281] We have revised the filing condition of Rule 433 to provide that the filing condition of the Rule will be satisfied if a filing is made pursuant to Rule 425 and the Rule 425 filing includes the Rule 433 legend and indicates on the cover page the registration statement number for the capital formation transaction and that it also is being filed pursuant to Rule 433.

Some commenters addressed issues regarding asset-backed securities offerings. Some commenters questioned the interplay between the free writing prospectus rules and rules affecting communications in asset-backed offerings, particularly as it affected the use of informational and computational materials and final term sheets.[282] These commenters were concerned about filing deadlines and the treatment of certain disclosures, such as static pool data disclosed on a website, under the definition of free

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280 See, e.g., letters from ABA and Alston.

281 In 2001, the staff of the Division of Corporation Finance provided guidance as to how to analyze communications made in connection with contemporaneous capital raising and business combination transactions in order to determine whether reliance on the provisions of Regulation M-A was appropriate. See Question C.1 (Scope of Rule 165) of Section I (Regulation M-A) from the Third Supplement, dated July 2001, of the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations. http://www.sec.gov/interps /telephone /phonesupplement3.htm. Such guidance may continue to be helpful to this analysis. Of course, the issuer or other offering participant can determine to comply with both Rule 425 and Rule 433.

282 See, e.g., letters from ABA-ABS; ASF; BMA-ABS; CMSA; and FMR.

writing prospectus.[283] As noted above, we are revising Rule 433 and have provided additional guidance as appropriate to address these issues.

**(b) Immaterial or Unintentional Failures to File**

**(i) Scope of Cure Provision**

We are adopting as proposed the ability to cure any unintentional or immaterial failure to file free writing materials.[284] Rule 164 provides that the material must be filed as soon as practicable after discovery of the failure to file.

Rule 164 provides an issuer and any other person relying on the Rule the ability to cure any immaterial or unintentional failure to file or delay in filing the free writing prospectus, without losing the ability to rely on the Rule. This cure provision is available if a good faith and reasonable effort is made to comply with the filing condition and the free writing prospectus is filed as soon as practicable after the discovery of the failure to file. As in the business combination rules, we are including the cure provision to avoid potential chilling of communications due to uncertainty over filing status.

**(ii) Comments on Cure Provision**

Some commenters requested further clarification of the cure provisions, including what constitutes "unintentional," a "good faith and reasonable effort" to comply with the filing conditions, and a "discovery" of a failure to file a free writing prospectus.[285] The filing cure provisions are the same as those contained in the asset-backed rules we adopted in 2004 and in the business combination rules, which have operated without

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283 See letter from ABA-ABS.

284 Such a "cure" provision is included in Regulation M-A. See Securities Act Rule 165(e). See also the Campos Article, note 155, at §1:30.

285 See, e.g., letters from ABA; Citigroup; Goldman Sachs; Merrill Lynch; S & C; and SIA.

further elaboration on these issues since we adopted the rules in 1999.[286] As we discuss above under Rule 163, we are not including any further clarification of what constitutes the elements of the cure provisions.[287]

**(4) Record Retention Condition**

**(a) Discussion**

We are adopting, with some modifications, the proposed record retention condition in Rule 433. As adopted, Rule 433 conditions the use of a free writing prospectus on issuers and offering participants retaining for three years any free writing prospectuses they have used from the date of the initial bona fide offering of the securities in question that have not been filed with us. This record retention condition applies to all offering participants.[288] The three-year retention period is consistent with retention periods for brokers and dealers to retain securities sale confirmations.[289]

We believe this record retention condition is appropriate for several reasons. First, it will give us the ability to review free writing prospectuses used in reliance on Rules 164 and 433 under our authority in Securities Act Section 10(b) and the amendments to Rule 418, among other rules. Second, offering participants and purchasers will benefit from the availability of the free writing prospectuses.

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286 See also Regulation D.

287 See discussion in Section III.D.2 above under "Permitted Pre-Filing Offers for Well-Known Seasoned Issuers."

288 For example, the record retention policy applies to free writing prospectuses prepared by underwriters and not containing issuer information and descriptions of the terms of securities or of the offering not reflecting final terms not required to be filed. To the extent the record retention requirements of Exchange Act Rule 17a-4 [17 CFR 240.17a-4] apply to free writing prospectuses required to be retained by broker-dealers under Rule 433, such free writing prospectuses are required to be retained in accordance with such requirements.

### (b) Immaterial or Unintentional Failure to Retain a Free Writing Prospectus

Some commenters were concerned that the lack of a cure provision for failure to retain free writing prospectuses could cause retroactive violations of Securities Act Section 5 for three years.[290] In response to these concerns, we have included a provision in Rule 164 that provides that solely for purposes of that Rule, but not any other record retention obligation of any issuer or other offering participant, 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 a good faith and reasonable effort was made to comply with the record retention condition. Whether or not there has been a good faith and reasonable effort to comply with the record retention condition will be a facts and circumstances determination. We have included this provision because we believe that there can be circumstances in which a free writing prospectus is inadvertently not retained even after a good faith and reasonable effort. We also have modified the record retention condition so that it does not apply in cases where the free writing prospectus is filed with us.

## (D) Road Shows

### (1) Definition of Electronic Road Show

Issuers and underwriters frequently conduct presentations known as "road shows" to market their offerings to the public. These road shows are a primary means by which issuers are involved directly and actively in a selling effort to investors. Historically, these presentations were conducted in person and limited to institutional investors.

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289 See Exchange Act Rule 17a-3(a)(8) [17 CFR 240.17a-3(a)(8)].

290 See, e.g., letters from ABA; Cleary; and TBMA.

Today, due to advances in electronic media, road shows also are being conducted or re-transmitted over the Internet or other electronic media and in some cases to broader audiences.

We indicated in the Proposing Release that we intended to clarify the treatment of all electronic communications, including electronic road shows, as graphic communications under the Securities Act. Under the proposed rules, all electronic road shows would have been written offers and prospectuses, but also would have been permitted subject to conditions, as free writing prospectuses.

As discussed above, we have revised the definition of graphic communication from the proposal to exclude 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 may be transmitted through graphic means. This revision applies in the context of road shows. Under the definition, a live, in real-time road show to a live audience that is transmitted graphically will not be a graphic communication, and therefore not a written communication, or a free writing prospectus. It will still, however, be an offer subject to Securities Act Section 12(a)(2) and the other liability provisions of the federal securities laws.[291] Thus, as we discuss below, information that is presented as part of the live, in real-time road show to a live audience will not be a free writing prospectus. As discussed below, we have added a note to the effect that where a communication (such as slides or other visual aids) is provided

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[291] In addition, while we have revised the definition of graphic communication to exclude certain presentations that originate live, in real-time to a live audience, we have retained in the definition of written communications the statutory concept of radio or television broadcasts, regardless of the transmission means. Thus, a communication that is a television or radio broadcast, whether or not live, would

or transmitted simultaneously as part of a live road show that is not a written communication, including a live, in real-time graphically transmitted road show, and that communication is provided or transmitted in a manner designed to make it available only as part of the road show and not separately, that communication is deemed part of the road show. Such a communication is thus deemed also not to be a written communication.[292]

Road shows that do not originate live, in real-time to a live audience and are graphically transmitted are electronic road shows that will be considered written communications and, therefore, free writing prospectuses. Under our new Rules, they are, of course, permitted if the conditions of our new Rules for free writing prospectuses are satisfied. As we noted in the Proposing Release, issuer involvement or participation in an electronic road show that is a written communication will make it an issuer free writing prospectus.[293]

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still be a written communication.

[292] In-person road shows will continue to be considered oral communications. As we note, we have excluded road shows that originate and are presented live, in real-time to a live audience from the definition of graphic communication. The exclusion for presentations to a live audience that originate live, in real-time also covers overflow rooms at live, in-person road shows. The rules we are adopting today do not affect the treatment of written communications or road shows regarding business combination transactions to which Rule 425 and Regulation M-A apply.

[293] We recognize that road shows may be used in marketing the issuer's securities in certain private placement transactions, as well. Our rules do not address these offerings, although the treatment of electronic communications in the definitions of graphic communication and written communication apply to private placement transactions. For example, in an offering made in reliance on Securities Act Rule 505 or Rule 506 of Regulation D [17 CFR 230.505 and 17 CFR 230.506], an electronic road show or other communication that is a written communication would implicate the provisions of Securities Act Rule 502 [17 CFR 230.502] regarding information that must be provided to non-accredited investors and restrictions on general solicitation and general advertising.

### (2) Treatment of Electronic Road Shows

Electronic road shows have to date proceeded in reliance on a series of no-action letters granted by the staff of the Division of Corporation Finance.[294] The rules we are adopting today permit the use of electronic road shows without many of the conditions in the electronic road show no-action letters.[295] As we discussed in the Proposing Release, the electronic road show no-action letters for registered public offerings are withdrawn as of the effective date of Rule 433.[296]

For road shows that are free writing prospectuses, the filing conditions of Rule 433 do not apply, with one exception. In the case of an issuer that is not required to file reports under Exchange Act Section 13 or Section 15(d) at the time of filing the registration statement and is registering an offering of common equity or convertible equity securities, the filing condition applies to a road show that is a free writing prospectus unless the issuer makes at least one version of a bona fide electronic road show[297] for the offering in question readily available without restriction electronically to

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294 See Division of Corporation Finance no-action letters to Private Financial Network (Mar. 12, 1997); Net Roadshow, Inc. (July 30, 1997); Bloomberg L.P. (Oct. 22, 1997); Thompson Financial Services, Inc. (Sep. 4, 1998); Activate.net Corporation (June 3, 1999); Charles Schwab & Co., Inc. (Nov. 15, 1999); and Charles Schwab & Co., Inc. (Feb. 9, 2000).

295 For example, under the rules we are adopting today for road shows that are free writing prospectuses, the road show audience does not have to be limited in any way, and the road show does not have to be the re-transmission of a live presentation in front of an audience and the electronic road show may be edited. In addition, those distributing the road show do not have to limit viewers to seeing it either within a 24-hour period or twice. They also can allow viewers to copy, print or download the road show. Multiple versions of the electronic road show are permitted. Each will be a separate free writing prospectus.

296 See discussion of Staff no-action letters in note 182 of the Proposing Release.

297 We are adding a definition of "road show" and adopting substantially as proposed the definition of "bona fide electronic road show." For purposes of Rule 433, a

any potential investor. If there is more than one version of a road show that is a written communication, the unrestrictedly available bona fide electronic road show must be available no later than the other versions.

We also have modified the filing conditions from the proposal to eliminate the specific obligation to file any material issuer information provided at an electronic road show. The filing condition for electronic road shows is as described above. We have added a note that a where a communication that is provided or transmitted simultaneously

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"road show" is an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management and includes discussion of one or more of the issuer, such management, and the securities being offered. In the case of asset-backed offerings, road shows can include presentations by management involved in the securitization or servicing by the depositor, sponsor, or servicers. For purposes of Rule 433, a "bona fide electronic road show" is a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management and, if the issuer is using or conducting more than one road show that is a written communication, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or road shows for the same offering that are written communications. To be bona fide, the version need not address all of the same subjects or provide the same information as the other versions of an electronic road show. It also need not provide an opportunity for questions and answers or other interaction, even if other versions of the electronic road show do provide such opportunities.

A few commenters asked for further guidance on which categories of information could be properly excluded from the bona fide version. See, e.g., letters from Fried Frank and TBMA. One commenter thought that the bona fide electronic road show should be identical to the other electronic road shows that were being presented. See letter from Harris*direct*. We have not further revised the definition of bona fide electronic road show in response to these comments as we believe that the definition that we are adopting provides the flexibility to offering participants to use different versions of road shows depending on the particular facts and circumstances of their offering. As we indicated in the Proposing Release and note above, the bona fide version 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

with a live road show that is not a written communication and that communication is provided or transmitted in a manner designed to make it available only as part of the road show and not separately, that communication is deemed to be part of the road show.[298] Therefore, as discussed above, if the road show is not a written communication, such a communication, such as slides or visual aids, even if it would otherwise be a graphic or other written communication is deemed to be part of the road show and thus not to be written. This provision also would cover, for example, a communication of visual aids provided in a separate feed from a live, in real-time road show to a live audience transmitted by graphic means, where the separate communication is provided or transmitted in a manner such that the separate communication can only be seen as part of the road show. If the road show is written and not required to be filed, such a simultaneous communication is also not required to be filed. This provision also would cover visual aids transmitted in a manner designed to make them available simultaneously only as part of an electronic road show. If the electronic road show is not subject to filing, neither are the visual aids. Otherwise, graphic or other written communications provided separately, for example by graphic means in a separate file designed to be available to be copied or downloaded separately, will be treated as a written communication and, if an offer, will be a free writing prospectus.

Whether or not road shows are written communications, all road shows that are offers are subject to Securities Act Section 12(a)(2) liability. In addition, all road shows that are offers that are written communications are free writing prospectuses, whether or not required to be filed.

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versions.

### (3) Comments on Electronic Road Shows

Commenters generally supported permitting electronic road shows.[299] While commenters supported the filing exclusion for electronic road shows, a significant number of commenters were concerned about the proposed rules conditions affecting electronic road shows.[300] Most of the comments related to the treatment of live, real-time road shows transmitted electronically as graphic communications.[301] These commenters believed that all live, real-time road shows, including those that are transmitted graphically to "overflow rooms," should be treated as oral communications.[302] The commenters also argued that all materials provided or made available at these live graphically transmitted road shows, including slides and other materials used but not retained by participants should be treated as oral communications and should not be required to be filed with us under Rule 433.[303] Many commenters were concerned that putting greater restrictions on these road shows would eliminate the ability of out of town investors to participate in these road shows and view PowerPoint® and similar

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298 See the Note to Rule 433(d)(8).

299 See, e.g., letters from ABA; Alston; NetRoadshow; and Thomson Financial ("Thomson").

300 See, e.g., letters from ABA; Alston; E. Price Ambler; Kenneth Arnot; Lisa Baudot; Barry C. Bruneer; Harold Candland; Matt Crouse; Rick Dowdle; Robert Evans; Goldman Sachs; Marvin D. Lutz; Merrill Lynch; NetRoadShow; F. Thomas O'Halloran; Paul J. Rasplicka; Eric Ribner; Jeffrey A. Schaffer; Alison Shatz; SIA; Bob Smith; Steve Smart; Chris D. Wallace; WR Hambrecht + Co. ("WR Hambrecht"); and Kevin Yorke.

301 See, e.g., letters from ABA; Alston; Bloomberg L.P. ("Bloomberg"); Goldman Sachs; Merrill Lynch; NetRoadShow; Jeffrey A. Schaffer; SIA; and Thomson.

302 See, e.g., letters from Alston; Morgan Stanley; S & C; and SIA.

303 See, e.g., letters from ABA; Alston; Lisa Baudot; Citigroup; Cleary; Morgan Stanley; S & C; SIA, David Thickens; Douglas Workman; and WR Hambrecht.

presentations which would, therefore, reduce the amount of information that these investors receive.[304]

We have addressed many of these comments and concerns through our modification of the definition of graphic communications, which as adopted excludes communications originating live, in real time to a live audience, even if transmitted by graphic means. The materials presented as part of these road shows, such as slides or PowerPoint® presentations will similarly not be graphic communications unless they are separately transmitted as graphic communications. As a result, live communications, such as live road shows transmitted electronically (whether to an overflow room or another city) are not graphic communications and thus not free writing prospectuses. They will be treated as oral communications and will be subject to liability under Securities Act Section 12(a)(2) and the anti-fraud provisions.

We also have revised the filing conditions applicable to electronic road shows in response to certain suggestions of commenters. Commenters generally supported the definition of "bona fide electronic road show,"[305] although two commenters suggested limiting the requirement for a bona fide electronic road show only to initial public offerings[306] and another suggested limiting it to equity but not debt offerings.[307]

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304 See, e.g., letters from ABA; Alston; E. Price Ambler; Kenneth Arnot; Lisa Baudot; Barry C. Bruneer; Harold Candland; Matt Crouse; Rick Dowdle; Robert Evans; Goldman Sachs; Marvin D. Lutz; Merrill Lynch; NetRoadShow; F. Thomas O'Halloran; Paul J. Rasplicka; Eric Ribner; Jeffrey A. Schaffer; Alison Shatz; SIA; Bob Smith; Steve Smart; Chris D. Wallace; WR Hambrecht; and Kevin Yorke.

305 See, e.g., letters from ABA; Davis Polk; and WR Hambrecht.

306 See, e.g., letters from Alston and NetRoadshow.

307 See letter from Bloomberg.

Within the category of road shows that are graphic under our rules as adopted, we have retained the concept of bona fide electronic road show only for initial public offerings of common equity or convertible equity securities. We have excluded the concept for all other registered securities offerings. We believe that it is appropriate to limit the filing condition to require a bona fide electronic road show to initial public offerings of common equity or convertible equity securities, due to the greater potential for involvement and interest of the retail investor in these types of offerings and securities of the issuer. We believe this change addresses commenters' concerns that an unrestricted bona fide electronic road show should not be required in what are essentially registered institutional offerings. Finally, we believe the note added to Rule 433(d)(8) as adopted will clarify the characterization and treatment of materials provided or transmitted as part of or simultaneously with road shows, oral or written.

Some commenters also did not support requiring the filing of any issuer information used at any road show,[308] while two commenters thought that all electronic road shows should be filed and available to anyone.[309]

We believe that our treatment of road shows, including electronic road shows, strikes the appropriate balance between the need to market an issuer's securities to institutional investors and the desires of retail and other investors to have access to issuer information, such as management presentations, that are normally available only at road

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308 See, e.g., letters from ABA; Alston; Lisa Baudot; Citigroup; Cleary; Morgan Stanley; S & C; SIA; David Thickens; and WR Hambrecht.

309 See, e.g., letter from Harris*direct* and Renaissance Capital. In addition, many commenters thought that more information should be made available to retail investors, particularly in connection with initial public offerings. See, e.g., letters from Trevor Boswell; Lyle Fell, Sr.; Eileen Fuls; Corey Gorman; Ronald Ricketts, Jr.; and Justin Swearingen.

shows that often have not been open to retail investors generally. We also believe that the Rule as adopted addresses some of the concerns that important information about an issuer or an offering can be communicated at electronic (as well as live) road shows, rather than in the statutory prospectus. In this regard, as we noted in the Proposing Release, the Report and Recommendations of the NASD/NYSE IPO Advisory Committee recommended that issuers be required to make a version of their IPO road show available electronically to unrestricted audiences.[310] While we are not requiring that road shows be made available to unrestricted audiences, issuers and underwriters are free to make road shows available to all investors and we believe that our new rules will encourage issuers to do so where retail interest justifies such unrestricted availability.

### (E) Treatment of Communications on Web Sites and Other Electronics Issues

#### (1) General

The communications rules we are adopting will enable issuers and market participants to take significantly greater advantage of the Internet and other electronic media to communicate and deliver information to investors. We have addressed previously the circumstances under which an issuer retains responsibility for information included on its web site;[311] however, the rules we are adopting today expand possibilities

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310 Report and Recommendations of a Committee Convened by the New York Stock Exchange, Inc. and NASD at the Request of the U.S. Securities and Exchange Commission, available at www.nasdr.com/pdf-text/iporeport.pdf (May 29, 2003). Consistent with the Committee's suggestion, different versions of electronic road shows for initial public offerings of common equity or convertible equity securities are permitted for different audiences under the filing exemption, so long as at least one version of a bona fide electronic road show, where applicable, is available to all potential investors.

311 In our 2000 Electronics Release, we noted that the federal securities laws apply equally to information contained on an issuer's web site as they do to other

in this regard due to the ability to communicate outside the statutory prospectus, including posting information on web sites that will be free writing prospectuses.

We are adopting Rule 433(e) as proposed to make clear that an offer of an issuer's securities that is contained on an issuer's web site or that is contained on a third party web site hyperlinked from the issuer's web site is considered a written offer of such securities made by the issuer and, unless otherwise exempt, will be a free writing prospectus of the issuer. Accordingly, the requirements of Rule 433 will apply to these free writing prospectuses.[312]

**(2) Historical Information on an Issuer Web Site**

As we discussed in the Proposing Release, we recognize the importance of an issuer's web site as a means to communicate with the public, not just with potential investors in an offering, about its business. In this regard, commenters on our 2000 Electronics Release expressed concerns regarding the possibility that historical issuer

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communications made by or attributed to the issuer. Web site content differs from traditional methods of distribution, however, in several important aspects. First, information that is placed on a web site can be continuously accessed as long as the information remains posted. Second, issuers are able to hyperlink to other documents, information, and web sites, thereby allowing instant access to such documents, information, and web sites. See 2000 Electronics Release, note 96, at II.B.

312 In this regard, if an issuer or other offering participant includes a hyperlink within a written communication offering the issuer's securities, such as an electronic free writing prospectus, to another web site or to other information, the hyperlinked information will be considered part of that written communication. For example, while a research report published or distributed by a broker or dealer around the time of an offering may not be considered an offer by the broker or dealer under Rule 139, an issuer hyperlinking to that research report will not be able to rely on Rule 139. The research report could, therefore, be a free writing prospectus of the issuer. See the 2000 Electronics Release, note 96, at II.B.2.

information on an issuer's web site that is accessed at a later time would be considered "republished" at that later date, with attendant securities law liability.[313]

We believe that the availability of historical issuer information provides investors with more readily accessible information about the issuer. We also believe that issuers in registration should be able to maintain historical information on their web site in a manner by which that information will remain accessible to the public but will not be considered to be reissued or republished for purposes of the Securities Act.

Historical information that is not an offer under the Securities Act, either because its use and content are such that it does not fall within the Securities Act definition of that term or, for example, because it falls within a safe harbor (such as those we are adopting today), will not become an offer if accessed at a later time, unless it is updated or used or referred to (by hyperlink or otherwise) in connection with the offering.[314] We believe it is appropriate, however, to provide additional certainty regarding the treatment of historical information on web sites as "offers" under the Securities Act. Accordingly, Rule 433, as adopted, includes an exception to its general standard. This exception, contained in Rule 433(e)(2), provides that historical information will not be considered a current offer of the issuer's securities and, therefore, will not be a free writing prospectus, if that historical information is:

- separately identified as such; and
- located in a separate section of the issuer's web site containing historical information.

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313 See, e.g., comment letters in File No. S7-11-00 from the American Corporate Counsel Association ("ACCA"); The Council of Infrastructure Financing Authorities; and the Florida Division of Bond Finance.

314 See discussion in Section III.D.1 above under "Permitted Continuation of Ongoing Communications During an Offering" regarding Rules 168 and 169.

The use of that historical information will become a current offer if it is:

- incorporated by reference into or otherwise included in a prospectus of the issuer for the offering; or
- otherwise used or referred to in connection with the offering.

While Rule 433(e)(2) addresses particular situations in which information retained on a web site will not be considered a free writing prospectus, other information located on or hyperlinked to a web site might similarly not be considered a current offer of the issuer's securities and, therefore, not a free writing prospectus, where it can be demonstrated that the information was published previously.[315] For example, certain information that, while not contained in a separate section of an issuer's web site, is dated or otherwise identified as historical information and is not referred to in connection with the offering activities may not be a current offer, depending on the particular facts and circumstances.

**(3) Comments on Treatment of Communications on Web Sites and Other Electronics Issues**

Commenters supported the provisions of proposed Rule 433 clarifying the treatment of information contained on or hyperlinked to web sites of issuers and offering participants.[316] Some commenters requested that the Commission provide greater explanation of what might constitute "historical" information, including whether and how

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315 See also the 2000 Electronics Release regarding retention of information on a web site during an offering. The 2000 Electronics Release contains a list of information that we believed could be retained on a web site without the information being considered an offer and we again concur that such information will not raise a concern. See the 2000 Electronics Release, note 96, at part II.B.2. Although such information may not be considered an offer and therefore not subject to liability under Section 12(a)(2), it may still be subject to the anti-fraud provisions of the federal securities laws.

information is archived.[317] Commenters also desired further clarification of the treatment under the free writing prospectus rules of information on an issuer's web site hyperlinked from a third party's web site.[318]

Rule 433(e)(2) addresses particular situations in which information on an issuer's web site will not be considered a current offer or a free writing prospectus. Whether or not other information is historical information of the issuer will depend on the facts and circumstances. Further, we have not provided additional detail regarding the nature of "archiving" information because we believe that the provision in Rule 433(e)(2) regarding separately located, identified historical information provides issuers with the necessary flexibility in operating their web sites within the federal securities laws. Finally, information that is an offer and is contained on the web site of an offering participant or contained on the web site of another person hyperlinked from the web site of an offering participant could be a free writing prospectus of that offering participant.

**(F) Media Publications or Broadcasts**

**(1) Overview**

As we discussed in the Proposing Release, we believe it is important to identify the circumstances under which information released or disseminated to the media by an issuer or offering participant in connection with a registered offering will be considered the use of a free writing prospectus under the new rules. We recognize that the financial news media are a valuable source of information about issuers to the public at large. Issuers and offering participants use the media to disseminate important information

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316 See, e.g., letters from ABA; Davis Polk; and S & C.

317 See, e.g., letters from Davis Polk; Merrill Lynch; and S & C.

318 See, e.g., letters from ABA and S & C.

about themselves, such as through the use of press releases and interviews. The media plays an integral role, therefore, in providing information about issuers to the market.

We want to encourage the role of the media as an important communicator of information and some media publications regarding an offering are not categorized as offers, under the gun-jumping provisions, by issuers or other offering participants. However, we do not want issuers and offering participants to avoid responsibility for their offering or marketing efforts by using the media. We, therefore, believe that it is appropriate to address in our new rules offers that take place using the media as a communication vehicle. Under the rules we are adopting today, where an issuer or any offering participant provides information about the issuer or the offering that constitutes an offer, whether orally or in writing, to a member of the media and where the media publication of that information is an offer by the issuer or other offering participant, we will consider the publication to be a free writing prospectus of the issuer or offering participant in question.

**(2) Application of Rule 164 and Rule 433 to Media Publications**

As we proposed, under the rules we are adopting today, the treatment of a media publication that constitutes an offer and therefore a free writing prospectus of the issuer or other offering participant will depend on whether the issuer or other offering participant prepares the publication or television or radio broadcast or pays for or provides other consideration for the publication or broadcast, or whether unaffiliated media prepares and publishes or broadcasts the communication for no consideration or payment from an issuer or offering participant.

### (a) Prospectus Delivery or Availability

#### (i) Where Media Publications Are Prepared or Consideration Paid by Issuer or Offering Participant

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. For example, in the case of a non-reporting issuer or reporting unseasoned issuer a statutory prospectus will have to precede or accompany the communication. As a consequence of this requirement, in offerings by non-reporting and unseasoned issuers, issuers and offering participants will not be able to prepare or pay for published or broadcast written advertisements, "infomercials," or broadcast spots or similar written communications about the issuer, its securities, or the offering that includes information beyond that permitted by Rule 134. Well-known seasoned and other seasoned issuers and offering participants will have to comply with the other applicable conditions for the free writing prospectus. For seasoned issuers that are not well-known seasoned issuers and offering participants, a registration statement including a statutory prospectus (which can be a base prospectus) will have to be on file with us. These conditions may also include filing with us not later than the date of first use.

#### (ii) Unaffiliated Media Publications

Where, however, the free writing prospectus is prepared and published or broadcast by persons in the media business that are unaffiliated with the issuer and

another offering participant,[319] and the preparation, publication, or broadcast is not paid for by the issuer or other offering participant, our rules include certain accommodations. In these cases, an issuer or offering participant would not have to have a statutory prospectus precede or accompany the media communication, although a filed registration statement including a statutory prospectus would be necessary, except in the case of a well-known seasoned issuer.[320] Therefore, an interview or other media publication or television or radio broadcast where an issuer or offering participant participates (but does not prepare or pay for the event or article) could be a free writing prospectus, but because of the media intervention, we conclude that its use should not be conditioned on prior or simultaneous delivery of the statutory prospectus. For example, an underwriter or issuer will be permitted to invite the press to a live road show or an electronic road show, but, in most cases, we will consider an article including information obtained at that road show to be a free writing prospectus of the issuer or underwriter and subject to the rules regarding free writing prospectuses.[321] As another example, if a chief executive officer

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319 We have revised the provision from the proposals to address concerns of issuers that are media companies. See the discussion below under "Issuers in the Media Business."

320 We believe that in a situation where a written communication is not prepared or paid for by an offering participant but rather by independent media, it still may be an offer and thus a free writing prospectus. There is less need in this situation, however, to have a statutory prospectus precede or accompany the free writing prospectus if a registration statement containing a statutory prospectus is on file with us and available. A media publication that is a free writing prospectus of a well-known seasoned issuer may also be published or broadcast prior to filing of the registration statement, as described above. In such a case, where another exemption is not available, the filing conditions would have to be satisfied by the issuer promptly after filing a registration statement covering the offering if one is filed.

321 Assuming that the road show in question is an offer, an article published based on information obtained from a road show with a limited audience could be a free writing prospectus depending on its content. An article published based solely on

of a non-reporting issuer gives an interview to a financial news magazine without payment to the magazine for the article, the publication of the article after the filing of the registration statement will be a free writing prospectus of the issuer that will be subject to the filing conditions by the issuer after publication. In that case, there will be no requirement that a statutory prospectus precede or accompany the article at the time of the publication.

**(b) Filing**

We are adopting the filing condition applicable to free writing prospectuses that are media publications or television or radio broadcasts with some modifications from the proposals in response to comments. Rule 433(f) provides that the filing condition of Rule 433(d) will be satisfied where a free writing prospectus including information about the issuer, its securities, or the offering provided, authorized, or approved by or on behalf of the issuer or an offering participant, that is prepared and published or disseminated by persons in the media business who are not affiliated with or paid by the issuer or an offering participant (with certain exceptions for issuers in the media business), is filed by the issuer or offering participant involved within four business days after the issuer or offering participant becomes aware of its publication or first broadcast.[322] Persons in the media have no filing or other responsibilities under these provisions.[323]

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information provided at a readily accessible electronic road show open to an unrestricted audience may not be an offer as discussed above where there is no other involvement by an issuer or offering participant.

322 In media publications eligible for this accommodation, the inclusion of the necessary legend in the fling of the media publication will satisfy the legend condition of Rule 433(c)(2) with regard to that media publication. See Rule 433(f)(1)(ii). Further, the free writing prospectus will have to be filed only once, regardless of the number of publications in which the information is included. In addition, the publication will only have to be filed if, as discussed above, it is an

We have made certain modifications to the filing conditions from the proposals. First, Rule 433 permits issuers and offering participants to satisfy the filing condition by filing:

- the media publication;
- all of the information provided to the media in lieu of the publication; or
- a transcript of the interview or similar materials that the issuer or other offering participant provided to the media, provided that all the information provided is filed.

We also have provided that an issuer or other offering participant does not have to file the media publication if the substance of the written communication has been previously filed with us. Finally, the issuer or offering participant may file, together with or after the media publication is filed, information that the issuer reasonably believes is necessary or appropriate to correct information included in the media publication.[324] We believe that these additional provisions will give issuers and offering participants the ability to file the publications on a timely basis, to file the underlying materials in lieu of the publication, and to file correcting materials after publication, television or radio broadcast, or other dissemination, if there is concern about the accuracy of the publication.[325]

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offer.

323 As we note above, press releases that are offers sent out by issuers are free writing prospectuses of the issuer at the time of the issuer distribution.

324 Language that, while arguably in the notice of a correction, is in fact an impermissible disclaimer (such as a disclaimer regarding liability or reliance) or waiver is not permitted.

325 The provisions of Rule 433 apply only to free writing prospectuses, which by definition must involve a written offer. Whether or not the media publication is an offer and therefore a free writing prospectus of the issuer or the other offering participant providing the information will depend as today on the facts and

### (c) Issuers in the Media Business

In response to comments about the impact the condition that the media entity is unaffiliated with the issuer has on issuers that are in the media business,[326] we have provided a limited exclusion that would permit issuers that are in the media business to be able to rely on the unaffiliated media condition if the media issuer or its affiliated media business:

- is the publisher of a bona fide newspaper, magazine, or business or financial publication of general and regular circulation or bona fide broadcaster of news including business and financial news;[327]
- has established policies and procedures for the independence of the content of the publication or broadcast from the offering activities of the issuer; and
- publishes or broadcasts the communication in the ordinary course.

### (3) Responses to Comments on Treatment of Media Publications

Among the issues commenters raised, many focused on the treatment of media reports under the proposed rules regarding free writing prospectuses.[328] They expressed

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circumstances. In addition, because the exception for free writing prospectuses is non-exclusive and does not preclude reliance on other exclusions or exemptions from the gun-jumping provisions, compliance with the conditions of Rule 433 for the use of a free writing prospectus, including filing, does not preclude reliance on the argument that the communication is not an offer.

326 See, e.g., letters from Davis Polk and NYSBA.

327 This accommodation is based on the media entity being a bona fide media entity. We are using essentially the same definition as included in Regulation Analyst Certification [17 CFR 242.500-242.505] ("Regulation AC") and the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.], except that we have not limited the publications to financial or business publications. See Rule 505(a) of Regulation AC (17 CFR 242.505(a)) and Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)) In addition, we have conditioned the accommodation on adequate policies and procedures being in place that require the media company's content decisions to be independent of the issuer's offering activities.

328 See, e.g., letters from ABA; Alston; Cleary; Fried Frank; and NYSBA.

concern as to whether the issuer or offering participants were obligated to monitor media releases and provide correcting information.[329] These commenters were concerned about the ability to satisfy the conditions of the exemption if the media reports or publicity about the issuer or its securities occurred prior to the filing of a statutory prospectus. Commenters also suggested that the filing condition be limited to the specific publication that was granted an interview or, if statements from that interview were carried by different media outlets, the issuer or offering participant should be able to file a representative statement.[330] Additionally, some commenters suggested that if the media publication was based on a press release or other specifically authorized communication, then only the press release or other authorized communication should satisfy the filing condition.[331] One commenter suggested that media publications based on publicly disseminated information should be excluded from the definition of free writing prospectuses.[332] Commenters also suggested that the filing occur after a senior officer has actual knowledge of the publication and that the filing deadline be extended to three business days.[333]

We believe that the modifications we have made to the filing conditions and other provisions of Rule 433 should address most of the commenters' concerns regarding unaffiliated media publications. We would observe first that, as discussed above, not every media publication about an offering is an offer or a free writing prospectus of the

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329 See, e.g., letters from ABA; Cleary; Fried Frank; NYSBA; and Reuters.

330 See, e.g., letters from ABA; NYSBA; and Reuters.

331 See, e.g., letters from Alston and NYSBA.

332 See letter from Davis Polk.

333 See, e.g., letters from ABA and Reuters.

issuer or other offering participant. In particular, we have administered the gun-jumping provisions so that where there is no other involvement of an issuer or other offering participant, media publications based on information filed with us or available on an unrestricted basis are not offers of the issuer or other offering participant. This should substantially eliminate the need to monitor media publications unless offering participants are directly communicating offering information or otherwise involved with the media in connection with the offering. Further, the Rule only applies to written offers prepared, published, or disseminated by the media where an issuer or offering participant provides, authorizes, or approves the information. In addition, we have made the following modifications:

- extended the filing due date to four business days after the issuer or other offering participant becomes aware of the publication or first broadcast;
- permitted the filing of information reasonably believed necessary or appropriate to correct information included in the communication;
- in lieu of filing the article, permitted the filing of the transcript of the entire interview or other materials that formed the basis for the article; and
- provided that where the substance of the information provided by or on behalf of the issuer or other offering participants contained in the publication is already filed with us no filing is required.

We also have made accommodations so that issuers in the bona fide media business will be able to rely on these provisions.

As in the case of the safe harbors for factual business information, some commenters also requested that we revise the definition of "by or on behalf of" an offering participant to include only those communications that were made by specific authorized persons and to provide that the issuer or other offering participant is not liable

for unauthorized communications.[334] For the reasons noted above, we are not modifying the definition of "by or on behalf of" to limit it to specified persons.

**(G) Liability Issues Affecting Free Writing Prospectuses**

**(1) General**

Even when filed, a free writing prospectus will not be part of a registration statement subject to liability under Securities Act Section 11, unless the issuer elects to file it as a part of the registration statement. Regardless of whether a free writing prospectus is filed, any seller offering or selling securities by means of the free writing prospectus will be subject to disclosure liability under Securities Act Section 12(a)(2). A free writing prospectus also can, of course, be the basis for liability under the anti-fraud provisions of the federal securities laws.

**(2) Filed Free Writing Prospectus Not Part of Registration Statement**

A free writing prospectus used after a registration statement is filed complying with Rule 433 will be governed by the provisions of Securities Act Section 10(b), which provides that a prospectus permitted under that section is filed as part of the registration statement, but is not subject to Section 11 liability. We are adopting as proposed the modification to the Section 10(b) filing requirement to provide that a free writing prospectus filed pursuant to Rule 433 must identify the registration statement to which it relates, but Rule 433 provides that it will not have to be filed as part of the registration statement. We believe that the modified filing condition will enhance investor protection

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334 See, e.g., letters from ABA and Alston.

because it should facilitate filing of the free writing prospectus on a timely basis and more readily identify the filed information as a free writing prospectus.[335]

**(3) Cross-Liability Issues**

As we discussed in the Proposing Release, we provided that the filing condition applied only to an issuer free writing prospectus and issuer information or to information in a free writing prospectus broadly disseminated, to address the concerns that commenters on our 1998 proposals had about cross liability under Securities Act Section 12(a)(2) for free writing materials of other offering participants.[336] As we discuss above, we are adopting the filing condition substantially as proposed so that it does not extend to a free writing prospectus prepared by an underwriter, even one including information prepared on the basis of or derived from issuer information that does not include issuer information, unless the free writing prospectus falls into the "broad dissemination" category. Free writing prospectuses sent directly to customers of an offering participant, without regard to number, are not broadly disseminated for purposes of the Rule.

Although we attempted in the proposals to address the cross-liability concerns by restricting the filing obligations only to limited situations, commenters on our proposals

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335 A free writing prospectus filed pursuant to Rule 433 will be filed as a separate filing similar to the way in which Rule 425 filings are made. A free writing prospectus will not have to be filed under Exchange Act Form 8-K. Issuers, of course, may file a free writing prospectus on Form 8-K if they wish to have the information incorporated by reference into the registration statement. The free writing prospectus also can be filed as part of the registration statement or, where permitted, included in an Exchange Act report incorporated by reference into the registration statement. In such case, the free writing prospectus would be subject to Securities Act Section 11 liability. Once a communication or other document is made part of or incorporated by reference into a registration statement, Section 11 applies to it as part of the registration statement, whether or not it is an offer.

336 See, e.g., comment letters in File No. S7-30-98 from ABA; Ford Motor Credit Company; ICI; Merrill Lynch; and S & C.

continued to express concern about cross liability for another participant's free writing prospectus, whether or not the participant used that free writing prospectus. Commenters requested clarification that use of a free writing prospectus by one offering participant will not subject other offering participants who do not use the free writing prospectus to liability under Securities Act Section 12(a)(2).[337] Some commenters recommended that the party should be considered to have offered and sold "by means of" a free writing prospectus, and liability for the free writing prospectus should arise, only if a party has used, prepared, or referred to the free writing prospectus.[338]

In response to commenters' continuing concerns about cross liability for free writing prospectuses used by an issuer and other offering participants, we have included a new provision in Rule 159A that will clarify when an offering participant, other than the issuer, is considered to offer and sell securities "by means of" a free writing prospectus. Under the new provisions of Rule 159A, an offering participant other than the issuer will not be considered to offer or sell securities to a person "by means of" a free writing prospectus unless:

- the offering participant used or referred to the free writing prospectus in offering or selling the securities to that person;
- the offering participant offered or sold the securities to that person and participated in planning for the use of that free writing prospectus by other offering participants and such free writing prospectus was used or referred to in offering or selling securities to that person by one or more of such other offering participants;[339] or

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337 See, e.g., letters from ABA; Citigroup; Cleary; CSFB; Davis Polk; Deloitte; Goldman Sachs; ICI; Morgan Stanley; SIA; and TBMA.

338 See, e.g., letters from ABA and Goldman Sachs.

339 We do not intend that the typical inter-syndicate arrangement providing for sales out of the syndicate "pot" falls within this provision, unless the arrangement contemplates use of free writing prospectuses in a manner described in the provision.

- under the conditions for use of the free writing prospectus in Rule 433, the offering participant is required to file the free writing prospectus with us pursuant to Rule 433.[340]

The Rule, as revised, also provides that a person will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed the free writing prospectus with us. As a result of these provisions, we believe that offering participants will be able to determine when they will be considered to have offered or sold securities by means of any particular free writing prospectus.

### c. Interaction of New Communications Rules with Regulation FD

#### i. Amendments to Regulation FD

As a consequence of our new rules to liberalize communications during the offering process and encourage continuing ongoing regular communications by reporting issuers, we are revisiting the exclusions from Regulation FD for communications made during a registered offering of securities.[341] The communications regime that we are adopting today contemplates that, in connection with an offering, certain material non-public issuer information can be made public through the prospectus filed as part of a registration statement or the issuer's filing of free writing prospectuses. Oral communications of an issuer made in connection with a registered offering after the registration statement is filed will continue not to be subject to any filing or public disclosure requirement. As we stated in the Proposing Release, we continue to believe

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340 The Rule does not address when an issuer offers or sells "by means of" a free writing prospectus. The Rule does address when an issuer is considered to be a seller for purposes of Securities Act Section 12(a)(2). See discussion in Section IV.B below under "Issuer as Seller."

that subjecting oral communications that occur in connection with a registered offering in a capital formation transaction to a public disclosure requirement could adversely affect the capital formation process.

We are amending Regulation FD substantially as proposed to specify the circumstances, both in terms of the type of offering and the means of communication, in which issuer communications will be excluded from the operation of that Regulation in connection with a registered securities offering.

First, as amended, Regulation FD will not apply to disclosures made in the following communications in connection with a registered securities offering that is of the type excluded from the Regulation:

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

Second, prior to our actions today, Regulation FD applied to offerings of the types described in Rule 415(a)(1)(i) through (vi).[342] Rule 415(a)(1)(i) provides for offering by

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341 See 17 CFR 243.100(b)(2).

342 The types of offerings under these provisions of Rule 415 are delayed or continuous offerings that are (1) securities to be offered or sold solely by or on behalf of selling security holders other than the issuer or its subsidiaries; (2) securities offered pursuant to dividend or interest reinvestment plans or an

selling security holders. We are amending Regulation FD to clarify that, as to offerings of the type described in Rule 415(a)(1)(i) where the registered offering also includes a registered offering, whether or not underwritten, for capital formation purposes for the account of the issuer, Regulation FD does not apply, unless the issuer's offering is included for the purpose of evading Regulation FD.[343] The amendments do not otherwise change the types of registered offerings that are excluded from, or subject to, the operation of the Regulation.

In view of our new rules to expand permissible communications, we believe it is appropriate to clarify that the communications excluded from the operation of Regulation FD are, in fact, those communications that are directly related to a registered securities offering. Communications not contained in our enumerated list of exceptions from Regulation FD – for example, the publication of regularly released factual business information or regularly released forward-looking information or pre-filing communications – are subject to Regulation FD.

**ii. Comments on Amendments to Regulation FD**

Most commenters on the proposed changes to Regulation FD supported the inclusion of the specific enumeration of communications in connection with offerings that are not subject to the provisions of Regulation FD.[344] Commenters expressed

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employee benefit plan of the issuer; (3) securities to be issued upon the exercise of outstanding options, warrants, or rights; (4) securities to be issued upon conversion of other outstanding securities; (5) securities pledged as collateral; and (6) securities registered on Form F-6.

343 This provision will cover the situation, for example, where a de minimis issuer participation is included in what is otherwise entirely a selling security holder offering for the purpose of excluding communications in the offering from the application of Regulation FD.

344 See, e.g., letters from Cleary; Fried Frank; and NYCBA.

concern that the proposed changes limited the Regulation FD exclusion only to registered offerings involving capital formation transactions.[345] Some commenters believed that the Regulation FD exclusion should cover all secondary offerings (those on behalf of selling security holders), regardless of whether conducted as part of an issuer capital raising transaction.[346]

We have clarified the modifications to Regulation FD from the proposals. We have not changed the types of offerings in which disclosures are subject to Regulation FD. The only change we are making from the current language is to provide that disclosures made in connection with registered offerings by selling security holders of the type described in Rule 415(a)(1)(i) are excluded from the application of Regulation FD if the offering also includes a registered primary offering that is a capital formation transaction for the account of the issuer.

The change to Regulation FD does not, as some commenters may have misinterpreted, mandate that all registered securities offerings be for capital formation purposes as a condition of exclusion from the operation of Regulation FD. The exclusions prior to and after the change have the general effect of excluding capital formation transactions, but there was, and after the change will be, no separate "capital formation" requirement for the exclusions. Rather, the change will provide that secondary offerings will be excluded from Regulation FD if the offering also includes a registered capital formation transaction for the account of the issuer.

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345 See, e.g., letters from ABA; Merrill Lynch; and TBMA.

346 See, e.g., letters from ABA and NYCBA.

### 4. Use of Research Reports

#### a. Current Regulatory Treatment of Research Reports

The veracity and reliability of research reports, particularly those issued by full service broker-dealers, have received significant attention in recent years. The Sarbanes-Oxley Act,[347] Regulation AC,[348] the self-regulatory organization rules we approved,[349] and the global research analyst settlement[350] have addressed many of the abuses identified with analyst research and have required structural reforms and increased disclosures.[351] As a direct result of these initiatives and actions, we expect that analyst research reports used by market participants will better disclose conflicts of interest relating to research of which investors should be aware.

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347 See Section 501 of the Sarbanes-Oxley Act [15 U.S.C. 78o-6(a)(2)].

348 Regulation AC requires, among other things, that brokers, dealers and certain persons associated with a broker or dealer include in research reports certifications by the research analyst that the views expressed in the report accurately reflect his or her personal views, and disclose whether or not the analyst received compensation or other payments in connection with his or her specific recommendation or views. See Regulation AC, note 327.

349 See Order Approving Proposed Rule Changes Relating to Research Analyst Conflicts of Interest, Release No. 34-45908 (May 10, 2002) [67 FR 34968]; Order Approving Proposed Rule Changes Relating to Research Analyst Conflicts of Interest, Release No. 34-48252 (Aug. 4, 2003)[68 FR 34968].

350 See Lit. Rel. No. 18438 (Oct. 31, 2003); Press Release 2004-120 (Aug. 26, 2004).

351 The settlement, which involved twelve brokerage firms and two individuals, requires the settling firms to, among other things, adopt changes designed to ensure that there is a structural separation between the firm's analysts and investment bankers. The firms are required to include enhanced disclosures, including disclosure of potential conflicts of interests in research reports and public disclosure of their analysts' quarterly performance. The firms also are required to pay for independent research for a five-year period and to make this research available to the firm's customers.

The National Association of Securities Dealers and the New York Stock Exchange adopted rules, among other things, requiring separating analyst compensation from investment banking influence, prohibiting analysts from

The value of research reports in continuing to provide the market and investors with information about reporting issuers cannot be disputed. Research analysts study publicly traded issuers and provide information about the securities of those issuers, often through the issuance of research reports.

We believe it is appropriate to limit the restrictions on research under the gun-jumping provisions of the Securities Act to those we believe are appropriate to avoid offering abuses. Given the ongoing flow of information into the market, particularly with respect to reporting issuers and the enhancements to the environment for research imposed by recent statutory, regulatory, and enforcement developments, we believe it is appropriate to make measured revisions to the research rules that are consistent with investor protection but that will permit dissemination of research around the time of an offering under a broader range of circumstances.

**b. Amendments to Exemptions for Research**

Rules 137, 138, and 139 under the Securities Act describe circumstances in which a broker or dealer may publish research constituting an offer around the time of a registered offering without violating the Section 5 prohibitions on pre-filing offers and impermissible prospectuses. We are adopting measured amendments that will make

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issuing research reports around the expiration of a lock-up agreement (sometimes called "booster shot" research reports), imposing quiet periods around the issuance of research reports for offering participants, prohibiting analysts from participating in "pitches" or other communications for the purpose of soliciting investment banking business, restricting prepublication review of research reports by non-research personnel, prohibiting retaliation by investment banking against analysts whose reports or public appearances may adversely affect an investment banking relationship, requiring disclosure of any compensation received from an issuer as well as client relationship with an issuer, and imposing additional registration, qualification, and continuing education requirements on research analysts.

incremental modifications to these rules.[352] As adopted, the rules will, for the first time, contain a definition of research report. The rules also expand the circumstances in which offering participants and persons who are not offering participants will have safe harbor exemptions for dissemination of research reports during a registered offering.[353]

The amendments we are adopting today are designed to ensure that appropriate investor protections are maintained. In that regard, we have maintained our current approach with respect to liability for research, which includes general anti-fraud liability,

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352 The safe harbor provisions of Securities Act Rules 137, 138, and 139 will continue to be available only to brokers and dealers. Issuers cannot use the safe harbor provisions for research reports prepared or distributed by brokers or dealers in reliance on the rules to directly or indirectly communicate with potential investors about the issuer's offering. For example, a hyperlink on an issuer's web site during its registered offering to a research report could raise concerns in this regard. Issuers using research reports in this manner could be deemed to have adopted the contents of such reports and, under our rules, the reports could be considered free writing prospectuses.

353 The amendments to the rules will continue to permit the distribution of independent research within the safe harbor provisions. Our research rules permit the distribution of independent research provided the distribution satisfies the conditions of the rules. For brokers and dealers subject to the global research analyst settlement, their ability to continue to distribute independent research during a registered securities offering depends on concluding that the independent research distribution by the broker or dealer satisfies the conditions of the research rule at the time of the distribution or is otherwise not an offer. If a broker or dealer is not able to rely on any of the research safe harbors for their own research, they similarly cannot rely on the safe harbor to distribute independent research. For example, independent research that is prepared by an entity not participating in an offering but paid for by a broker or dealer participating in an offering will be distributed by an offering participant and thus will not satisfy the requirements of Securities Act Rule 137 and cannot be used in reliance on the safe harbor. Such research may continue to be distributed by the entity not participating in the offering that prepared it without involvement by an offering participant. A research report constituting an offer and not falling within a safe harbor will be considered a free writing prospectus. Our research rules also do not supersede the requirements of any applicable rule of a self-regulatory organization regarding the timing of the distribution of research reports. See, e.g., NYSE Rule 472(f)(1) through (4) and NASD Rule 2711(f)(1) through (4).

used in reliance on these rules.[354]

### i. Definition of Research Report

Based on comments, we believe it is important to have a significant measure of consistency between Regulation AC and the research safe harbors contained in Rules 137, 138, and 139. We do not believe, however, that absolute consistency is appropriate in recognition of the differences in the purposes of the rules. Accordingly, we are adopting a definition of research report that builds on the definition of "research report" in Regulation AC, while preserving the purposes of Rules 137, 138, and 139.

#### (A) Definition

As adopted, "research report" is defined as a written communication, as defined in Securities Act Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.[355] This definition is intended to encompass all types of research reports, whether issuer-specific or industry research separately identifying the issuer.

Unlike the proposals, the definition does not require that the research report contain sufficient information on which to base an investment decision. As with the current research rules, the definition is limited to research, including information,

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354 Research reports published or distributed in reliance on Rules 138 and 139 are not offers for purposes of Securities Act Section 2(a)(10) and Section 5(c). Brokers or dealers publishing or distributing research in reliance on Rule 137 are not considered underwriters of the securities under Securities Act Section 2(a)(11). Of course, the anti-fraud provisions of the federal securities laws continue to apply to such communications. See Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 thereunder.

355 The definition of "research report" is included in each of Rules 137, 138, and 139.

opinions, or recommendations, contained in written communications.[356]

Under the definition of "research report" we are adopting today, there could be some differences in the types of communications that will constitute a research reports under the research safe harbors as compared to Regulation AC. In light of the different purposes of the rules, we believe the distinctions are appropriate and will not raise investor protection concerns. For example, for purposes of Rule 139, it is possible that particular documents, such as industry reports, will be research reports under our new definition, even if they fall outside of the definition of "research report" under Regulation AC.

The definition of research report we are adopting today retains the condition that the research be in a written communication. A publication element has been a condition of the research safe harbors since the rules were first contemplated and adopted. From the earliest Commission statements in the 1960's, the Commission did not want to discourage the ongoing publication of research reports by market professionals, provided they were provided within the scope of the restrictions of Securities Act Section 5.[357]

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356 The twelve brokerage firms that were part of the global research analyst settlement agreed to disclose, on trade confirmations and on account statements, as well as on the firms' web sites, their research ratings, along with the research ratings of the independent research providers who cover the security. We do not believe that the continued publication of these ratings on trade confirmations and on account statements, as required under the global research analyst settlement, would raise concerns about whether the ratings were offers in that they would be provided in the ordinary course, and as to confirmations, after the sale of the securities. The continued inclusion of either the firm's own ratings or those of the independent research provider on the firms' web sites during an offering could be an offer of the issuer's securities unless the safe harbors in Rules 137, 138, or 139 are available to the firm at that time.

357 As the Commission stated in 1983,

> …research reports containing information, opinions or recommendations with respect to a proposed offering, under certain circumstances, may be

The research safe harbors have always been aimed at written reports due to the Section 5 restrictions on written offers.

The research safe harbors are not intended to protect oral communications that might be offers from the liability provisions of Securities Act Section 12(a)(2).[358] Similarly, in our new definition, we are not expanding the scope of the research safe harbors to cover oral communications because we believe that the appropriate liability provisions should continue to apply to such oral communications. Whether oral communications relate to general research or are in connection with an offering may also involve distinctions that are too fine to be appropriate for the research exemptions. Whether a particular oral communication about an issuer or its securities by an offering participant is an offer will thus continue to depend on the facts and circumstances.

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considered offers to sell under Section 5(c), particularly when a broker-dealer is a participant in the distribution. In addition, research reports disseminated by participating broker-dealers in the waiting or post-effective periods which do not meet Section 10 prospectus requirements or are not accompanied by a Section 10 prospectus may violate Section 5(b)(1).

Research Reports, Release No. 33-6492 (Oct. 5, 1983)[48 FR 46801]. See Publication of Information and Delivery of Prospectus by Broker Dealers Prior to or After the Filing of a Registration Statement Under the Securities Act of 1933, Release No. 33-5010 (Oct. 7, 1969) [34 FR 18130]; Adoption of Rules Relating to Publication of Information and Delivery of Prospectus by Broker-Dealers Prior to or After the Filing of a Registration Statement under the Securities Act of 1933, Release No. 33-5101 (Nov. 19, 1970) [35 FR 18457]; Research Reports, Release No. 33-6550 (Sept. 19, 1984) [49 FR 36719]; Amendments to Clarify Safe Harbors for Broker-Dealer Research Reports, Release No. 33-7120 (Dec. 13, 1994) [59 FR 31038]; and Adoption of Amendments to Clarify Safe Harbors for Broker-Dealer Research Reports, Release No. 33-7132 (Feb. 1, 1995) [60 FR 6965]. See also the Wheat Report, note 21.

358 In this regard, we note that the title of each safe harbor refers to "certain publications." After a registration statement is filed, oral communications regarding a registered securities offering are not constrained by the gun-jumping provisions of the Securities Act.

**(B) Comments on Definition of Research Report**

While commenters supported the proposed amendments to the research safe harbors,[359] they were concerned that the proposed definition of research report would narrow the types of research that would be eligible for the safe harbors.[360] In particular, commenters requested that the research report definition not be the same as in Regulation AC requiring that the research report contain information sufficient upon which to make an investment decision.[361] Rather, the commenters requested that, as today, the research safe harbors be available for information, opinions, and recommendations about an issuer or its securities.[362] Some commenters also requested that the definition of research permit the use of oral, rather than just written, research in reliance on the safe harbors.[363]

As we discuss above, we have revised the proposed definition of research report for purposes of Rules 137, 138, and 139 to make clear that it continues to apply to information, opinions, or recommendations contained in written communications. We agree with commenters that for purposes of Rules 137, 138, and 139 a research report does not have to contain information sufficient to make an investment decision for the research safe harbors to be available and have revised the definition accordingly. We have not, however, expanded the scope of the research safe harbors to encompass oral communications.

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359 See, e.g., letters from ABA; Davis Polk; Fried Frank; NYSBA; Richard Hall; and S & C.

360 See, e.g., letters from ABA; Citigroup; Cleary; Davis Polk; Merrill Lynch; NYSBA; Prudential Equity Group, LLC ("PEG"); S & C; and SIA.

361 See, e.g., letters from ABA; NYSBA; S & C; and SIA.

362 See, e.g., letters from ABA; Cleary; Merrill Lynch; PEG; and SIA.

363 See, e.g., letters from ABA; S & C; and SIA.

### ii. Rule 137

Rule 137 provides that a broker or dealer that is not an offering participant in a registered offering but publishes or distributes research reports with respect to an issuer's securities will not be considered to be engaged in a distribution of the issuer's securities and would therefore not be an underwriter in the offering. We are expanding the exemption, as proposed, to apply to securities of any issuer, including non-reporting issuers, with exceptions for blank check companies, shell companies, and penny stock issuers. Rule 137 will continue to be available only to brokers and dealers who:

- are not participating in the registered offering of the issuer's securities;
- have not received compensation from the issuer, its affiliates, or participants in the securities distribution, among others, in connection with the research report; and
- publish or distribute the research report in the regular course of business.

Commenters supported the proposed changes to Rule 137 but requested that the rule make clear that the prohibition on consideration from the issuer would apply only to consideration paid in connection with the publication or distribution of the research report.[364] Other commenters suggested that the safe harbor be expanded to permit dealers to rely on the safe harbor for the publication and distribution of research reports after the effectiveness of the registration statement.[365]

We are adopting as proposed, and as is in current Rule 137, the provision prohibiting compensation in connection with the publication or distribution of the research report. In response to commenters' concerns regarding compensation, however, we have clarified the compensation language in Rule 137 to provide that the prohibition

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364 See, e.g., letters from Fried Frank; PEG; and S & C.

on compensation applies to compensation for the particular research report. While the safe harbor covers research reports provided after effectiveness of the registration statement, it continues to be an exemption from the definition of underwriter.

### iii. Rule 138

Rule 138 permits a broker or dealer participating in a distribution of an issuer's common stock and similar securities to publish or distribute research that is confined to that issuer's fixed income securities, and vice versa, if it publishes or distributes that research in the regular course of its business. We believe it is appropriate to permit research on a broader group of reporting issuers under Rule 138 in view of the regulatory reforms and the role of independent research. Further, we believe the current limitation on the type of issuers under this Rule is no longer necessary to protect investors.

#### (A) Amendments to Rule 138

We are amending Rule 138 substantially as proposed to expand the categories of eligible issuers. As adopted, the Rule generally will cover research reports on all reporting issuers that are current in their periodic Exchange Act reports on Forms 10-K, 10-KSB, 10-Q, 10-QSB, and 20-F at the time of reliance on the exemptions, rather than only issuers who are Form S-3 or Form F-3 eligible, as is currently the case. In addition, in response to commenters' suggestions, we are expanding the Rule as it applies to foreign private issuers to allow broker-dealers publishing or distributing research reports on non-reporting foreign private issuers that either have had equity securities traded on a designated offshore market or have a $700 million worldwide public float to rely on the

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[365] See, e.g., letters from ABA; Merrill Lynch; and PEG.

Rule.[366] Like the amendments regarding Rules 137 and 139 that we are adopting today, the Rule excludes research reports on issuers that have historically posed certain risks of abuse, including blank check companies, shell companies, and penny stock issuers.

We also are adopting as proposed the condition to the Rule 138 exemption that the broker or dealer must have previously published or distributed research reports on the types of securities that are the subject of the reports in the regular course of its business.[367] As we stated in the Proposing Release, we believe that it is appropriate to include this condition because it is important that the broker or dealer have a history of publishing or distributing a particular type of research. This condition does not mean, however, that the broker or dealer must have a history of publishing research reports about the particular issuer or its securities. If a broker or dealer begins publishing research about a different type of security around the time of a public offering of an issuer's security and does not have a history of publishing research on those types of securities, we are concerned that such publication or distribution might be a way to provide information about the publicly offered securities in order to circumvent the provisions of Section 5 and the permissible free writing rules we are adopting today.

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366 Prior to today's amendments, Rule 138 required that a foreign private issuer's securities be traded on a designated offshore securities market for at least twelve months. We are amending the Rule to specify that this requirement relates to the issuer's equity securities. Current Rule 138 covers issuers that are Form S-2 or Form F-2 eligible as well. Because we are eliminating these Forms, as discussed below, we have revised Rule 138 to eliminate the reference to those forms.

367 Prior to today's amendments, Rule 138 required that the broker or dealer publish or distribute research in the regular course of business, but did not contain a condition that the broker or dealer have published or distributed research reports on the same types of securities.

**(B) Comments on Rule 138 Amendments**

Commenters generally supported the expansion of the safe harbor to a broader class of issuers.[368] Some commenters suggested that the safe harbor also be available to research reports on voluntary filers and Schedule B issuers and that it apply to all private offerings.[369] A number of commenters requested a further change to the existing provisions of Rule 138 to eliminate the foreign private issuer eligibility condition regarding trading on a designated offshore securities market.[370] Finally, some commenters requested clarification of the condition that the broker or dealer be publishing reports on the same types of securities to be able to rely on the safe harbor, while others recommended eliminating this condition.[371]

We have adopted the amendments to Rule 138 substantially as proposed. We do not believe it is appropriate at this time to further expand the categories of eligible issuers under the Rule, other than for certain non-reporting foreign private issuers that have a significant worldwide public float. We have clarified that the broker dealer does not have to be publishing or distributing research reports about a particular issuer or its securities to rely on the Rule, only that the research reports cover the same types of securities. We have not expanded the scope of the research safe harbor to cover all private offerings.

**iv. Rule 139**

Rule 139 permits a broker or dealer participating in a distribution of securities by a seasoned issuer or by certain non-reporting foreign private issuers to publish research

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368 See, e.g., letters from ABA and S & C.

369 See, e.g., letters from ABA; Cleary; IBA; Merrill Lynch; NYSBA; and SIA.

370 See, e.g., letters from ABA; Citigroup; Goldman Sachs; and SIA.

371 See, e.g., letters from ABA; NYSBA; and SIA.

concerning the issuer or any class of its securities, if that research is in a publication distributed with reasonable regularity in the normal course of its business. Rule 139 also provides a safe harbor for industry reports covering smaller seasoned issuers, if the broker or dealer complies with restrictions on the nature of the publication and the opinion or recommendation expressed in that publication.

**(A) Issuer-Specific Reports**

**(1) Amendments Regarding Issuer-Specific Reports**

We are adopting the amendments to Rule 139 to allow reports about a specific issuer that, at the time of reliance on the Rule, is current in its Exchange Act periodic reports and:

- at the later of the time of filing its most recent registration statement on Form S-3 or Form F-3 or the time of filing of its most recent amendment to such registration statement for purposes of complying with Securities Act Section 10(a)(3), is eligible to register a primary offering of securities on Forms S-3 or F-3, based on the $75 million minimum public float eligibility provision of those forms; or

- at the time of reliance on the Rule, the issuer's registration statement covers an offering of the issuer's securities in reliance on General Instruction I.B.2 of Form S-3 or Form F-3.

As with Rule 138, we are allowing reports on a broader category of non-reporting foreign private issuers also to be covered by the Rule.[372] Research reports on penny stock issuers, blank check companies, and shell companies are excluded from Rule 139.

In the amendments we are adopting today, we are retaining the requirement that the broker or dealer publish or distribute the research report in the regular course of its business. We are not retaining the requirement of publication with reasonable regularity.

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372 As in the changes to Rule 138, we are providing that a non-reporting foreign private issuer must either have its equity securities be traded on a designated offshore securities market for at least twelve months or have a $700 million

As we stated in the Proposing Release, we do not believe that the reasonable regularity requirement has added any particular degree of investor protection and has raised concerns as to when the condition is satisfied. We are, however, requiring that the broker or dealer must, at the time of reliance on the Rule, have distributed or published at least one research report about the issuer or its securities, or have distributed or published at least one such report following discontinuing coverage. This requirement, we believe, retains the most important element of the "reasonable regularity" requirement, namely that the report initiating (or re-initiating) coverage of an issuer not benefit from an exemption under Rule 139.

As we note previously, we are not requiring any minimum time period for the broker or dealer to have distributed or published research reports, only that the particular broker or dealer have initiated or re-initiated coverage. In addition, the amendment as adopted does not require that the previously published or distributed research report cover the same securities that are the subject of the registered offering.

**(2) Comments on Issuer-Specific Reports**

Commenters supported extending the safe harbor to a broader class of issuers and recommended further extension to all reporting issuers, investment companies, and business development companies.[373] We have not extended the safe harbor to a broader class of issuers than we proposed, other than for certain non-reporting foreign private issuers with a significant public float. Commenters also requested clarification that the proposed changes would only require the publication or distribution of one prior research

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worldwide public float.

373 See, e.g., letters from ABA; Citigroup; Goldman Sachs; Morgan Stanley; NYSBA; S & C; and SIA.

report in order to be able to rely on the safe harbor.[374] As noted above, we have clarified the Rule in this regard to require only that coverage be initiated or re-initiated.

**(B) Industry-Related Reports**

**(1) Amendments Regarding Industry-Related Reports**

As adopted, industry reports under Rule 139 can cover issuers required to file reports pursuant to Exchange Act Section 13 or Section 15(d) and issuers satisfying the conditions regarding non-reporting foreign private issuers. The safe harbor for industry reports is not available if the issuer is or during the last three years was or any of its predecessors was a blank check company, shell company (other than business combination related shell company), or penny stock issuer. As adopted, the amendments extend the safe harbor for industry reports to registered offerings of any reporting issuer.

Today's amendments remove the prohibition on a broker or dealer making a more favorable recommendation than the one it made in the last publication. As in the proposals, we are not requiring that the research report include any prior recommendations regarding the issuer or its securities. We are adopting as proposed the requirement that the research reports contain similar types of information about the issuer or its securities as contained in prior reports.

We believe that the recently adopted safeguards regarding analyst recommendations make it appropriate to remove the "no more favorable" recommendation conditions in current Rule 139. We believe the Rules, as amended, are consistent with our recent actions affecting research analysts and research reports and

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374 See, e.g., letters from ABA; Citigroup; Cleary; CSFB; Merrill Lynch; Morgan Stanley; S & C; and SIA.

will result in enhanced opportunity to provide information to investors regarding issuers and their securities.

In the instruction regarding projections, we are requiring that projections be provided for substantially all the issuers listed in the comprehensive list of securities contained in the report.

**(2) Comments on Industry-Related Reports**

Commenters supported the safe harbor for industry-related reports for all reporting issuers and suggested expanding the safe harbor further to include all issuers, whether or not reporting, including voluntary filers.[375] Commenters also supported the elimination of the previous publication condition in the safe harbor.[376] Some commenters thought that the disqualification for research reports on blank check, shell companies, and penny stock issuers should remain at two years, not three, and that Rules 137 and 138 should have only a two-year disqualification.[377]

We have not expanded the coverage of the safe harbor to all issuers or to include voluntary filers. In addition, we have provided that the disqualification for blank check companies, shell companies (other than business combination related shell companies), and penny stock issuers is for three, rather than two, years to be consistent with all of the Rules we are adopting today that have similar disqualification provisions.

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375 See, e.g., letters from ABA; NYSBA; S & C; and SIA.

376 See, e.g., letters from ABA and S & C.

377 See, e.g., letters from ABA and S & C.

v. **Rule 139a**

In the Asset-Backed Securities Adopting Release, we noted that we were considering amendments to Rules 137, 138 and 139 in connection with these reform proposals and:

> To the extent these existing safe harbors are modified, we also will consider similar modifications to the ABS safe harbor. We also encourage ABS market participants to comment specifically on the proposals in that release regarding any appropriate changes to the existing safe harbors or the ABS safe harbor.[378]

In light of the modifications we are making to Rule 139 today to eliminate the requirement that in an industry report a recommendation regarding the registrant or its securities can only be included if a recommendation as favorable or more favorable had appeared in the last publication of the broker-dealer, we are eliminating paragraph (c) of Rule 139a, which contains a comparable provision for recommendations in reports on asset-backed securities.

Commenters suggested the elimination of paragraph (c) and also suggested that the "reasonable regularity" requirement in Rule 139a be eliminated. While we have eliminated the latter requirement in Rule 139, we have added a requirement that the research report not represent the initiation or reinitiation of research coverage. In Rule 139a the "reasonable regularity" requirement extends to reports on multiple issuers and transactions. We have therefore decided to retain the "reasonable regularity" requirement in Rule 139a.

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[378] See Asset-Backed Securities Adopting Release, note 82 at III.C.2.b..

### vi. Research Report Amendments in Connection with Regulation S and Rule 144A Offerings

We are concerned that the restrictions in Regulation S on directed selling efforts and offshore transactions[379] and in Rule 144A on offers to non-qualified institutional buyers ("QIBs") and general solicitation[380] have resulted in brokers and dealers unnecessarily withholding regularly published research.[381] Accordingly, we are adopting as proposed amendments providing that research reports meeting the conditions of Rule 138 and Rule 139 will not be considered offers or general solicitation or general advertising in connection with offerings relying on Rule 144A.[382] The amendments also provide that these research reports will not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.[383]

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379 Securities Act Regulation S [17 CFR 230.901 through 230.905] provides a safe harbor from the registration requirements of the Securities Act for offshore offers and sales of securities. When a broker or dealer participates in a Regulation S offering, questions arise regarding whether research activities would conflict with the prohibition against directed selling efforts or the offshore transaction condition. The concern stems from the fact that the distribution or publication of research could be viewed as conditioning the market, which would constitute directed selling efforts, or offering the securities in the United States, which is prohibited under the "offshore transaction" requirement.

380 Securities Act Rule 144A provides a safe harbor from the registration requirements of the Securities Act for resales of restricted securities to QIBs. When a broker or dealer is selling securities in reliance on Rule 144A, it is subject to the condition that it may not make offers to persons other than those it reasonably believes are QIBs. Where it distributes research about the issuer around the time of a Rule 144A transaction, questions arise regarding whether it may be viewed as making offers to persons that receive the research, including those who are not QIBs.

381 In the 1998 proposals, we expressed the interpretive view that brokers and dealers may publish and distribute research reports as described in current Rule 138 and 139 without such reports being deemed to constitute "directed selling efforts." The amendments we are adopting today codify that interpretation.

382 See amendments to Rule 138 and Rule 139.

383 See amendments to Regulation S.

We do not believe that the publication of research in reliance on Rules 138 and 139 will jeopardize the interests of investors in transactions relying on Rule 144A or Regulation S. On the other hand, limiting the ability to rely on these exemptions when research on the issuers may otherwise be available could, we believe, negatively impact information available to investors. Commenters supported the proposals to exempt research reports meeting the conditions of the safe harbor from the restrictions in Regulation S and Rule 144A.[384]

**vii. Research and Proxy Solicitations**

We are adopting with one modification from the proposal a codification of a Commission staff position[385] that the publication or distribution of research under the conditions set forth in Rules 138 and 139 is permitted in connection with a transaction that is subject to the proxy rules under the Exchange Act.[386] The new Rule provides that distribution of research in accordance with Rule 138 or Rule 139 is a solicitation to which Rules 14a-3 through 14a-15 (other than Rule 14a-9) of the proxy rules[387] does not apply. Commenters supported the proposal to codify the staff position and one requested that the exemption not be restricted to use only in connection with transactions registered under the Securities Act.[388] We are adopting Rule 14a-2(b)(5) without the requirement that the exemption be limited to transactions registered under the Securities Act.

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384 See, e.g., letters from ABA and Merrill Lynch.

385 See Division of Corporation Finance no-action letter to Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Oct. 24, 1997).

386 See Exchange Act Rule 14a-2(b)(5) [17 CFR 240.14a-2(b)(5)].

387 17 CFR 240.14a-3 through 240.14a-15.

388 See, e.g., letters from ABA and Merrill Lynch.

## IV. Liability Issues

### A. Information Conveyed by the Time of Sale for Purposes of Section 12(a)(2) and Section 17(a)(2) Liability

#### 1. Interpretation and Rule

Under the Securities Act, purchasers of an issuer's securities in a registered offering have private rights of action for materially deficient disclosure in registration statements under Section 11 and in prospectuses and oral communications under Section 12(a)(2). Section 11 liability exists for untrue statements of material facts or omissions of material facts required to be included in a registration statement or necessary to make the statements in the registration statement not misleading at the time the registration statement became effective. Under Section 12(a)(2), sellers have liability to purchasers for offers or sales by means of a prospectus or oral communication that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, based on the circumstances under which they were made, not misleading.[389] Securities Act Section 17(a) is a general anti-fraud provision which provides, among other things, that it shall be unlawful for any person in the offer and sale

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[389] Whether any particular statement or omission is material will depend on the particular facts and circumstances. Information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); see also Basic v. Levinson, 485 U.S. 224, 231 (1988). To fulfill the materiality requirement, there must be a substantial likelihood that a fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Id.

Courts have analyzed materiality under Exchange Act Section 10(b) and Exchange Act Rule 10b-5, and Securities Act Sections 11 and 12(a)(2) in a similar fashion. See, e.g., In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 n.10 (3d Cir. 1993) (noting that while there are substantial differences in the elements that a plaintiff must establish under these provisions, they all have a materiality requirement and this element is analyzed the same under all of the

of a security to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.[390]

The term "sale" under the Securities Act includes any contract of sale.[391] As we discussed in the Proposing Release, we believe that we should address the discrepancies in time between the time of the contract of sale for securities (when an investor becomes committed to purchase the securities) on the one hand, and the later time of availability of a prospectus (and perhaps other information) on the other hand. The Securities Act registration regime permits final prospectuses to become available after an investor becomes committed to purchase a security.[392] This availability, therefore, does not necessarily address the receipt by an investor of information at the time of its contractual commitment.

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provisions).

390 See Securities Act Section 17(a)(2).

391 See Securities Act Section 2(a)(3). Courts have held consistently that the date of a sale is the date of contractual commitment, not the date that a confirmation is sent or received or payment is made. See, e.g., Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 891 (2d Cir. 1972) (holding that a purchase occurs at "the time when the parties to the transaction are committed to one another"); In re Alliance Pharmaceutical Corp. Secs. Lit., 279 F. Supp. 2d 171, 186-187 (S.D.N.Y. 2003) (following the holding in Radiation Dynamics with respect to the timing of a contract of sale); Pahmer v. Greenberg, 926 F. Supp. 287, (citing Finkel v. Stratton Corp., 962 F.2d 169, 173 (2d Cir. 1992) ("[A] sale occurs for Section 12[(a)](2) purposes when the parties obligate themselves to perform what they have agreed to perform even if the formal performance of their agreement is to be after a lapse of time")); Adams v. Cavanaugh Communities Corp., 847 F. Supp. 1390, 1402 (N.D. Ill. 1994) (noting that the Seventh Circuit has followed the Radiation Dynamics decision). Also, as indicated in note 395, below, the Uniform Commercial Code no longer requires that a securities contract be in writing.

392 For example, in a shelf offering our rules permit an issuer to file a final prospectus supplement not later than the second business day after a takedown from the shelf

We provided an interpretation of Section 12(a)(2) and Section 17(a)(2) in our Proposing Release and we are reaffirming that interpretation. Securities Act Section 12(a)(2) and Section 17(a)(2) do not require that oral statements or the prospectus or other communications contain all information called for under our line-item disclosure rules or otherwise contain all material information.[393] Rather, under these provisions, the determination of liability is based on whether the communication includes a material misstatement or fails to include material information that is necessary to make the communication, under the circumstances in which it is made, not misleading. Under our interpretation, the time at which an investor has taken the action the investor must take to become committed to purchase the securities, and has therefore entered into a contract of sale, is one appropriate time[394] to apply the liability standards of Section 12(a)(2) and Section 17(a)(2).[395]

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registration statement.

393 Registration statements or final prospectuses or prospectus supplements would, as today, require inclusion of information necessary to satisfy our line-item requirements and other applicable requirements.

394 Under our interpretation, the time of contract of sale can be the time the purchaser either enters into the contract (including by virtue of acceptance by the seller of an offer to purchase) or completes the sale. The time of the contract of sale under our interpretation follows the statutory definition of sale in Securities Act Section 2(a)(3). Under Section 2(a)(3), sale includes "every contract of sale."

Our interpretation is not intended to affect any rights currently existing at any other time. Section 12(a)(2) applies to oral communications and prospectuses (including final prospectuses) at other times. Section 17(a)(2) similarly applies to statements at other times. In addition, both Securities Act Section 12(a)(2) and Section 17(a) assess liability for "offers" as well as for sales.

The 1954 amendments to the Securities Act permitting the use of a preliminary prospectus recognized that the final prospectus would not always be available to investors at the time they made their investment decisions. See 1954 Amendments to the Securities Act of 1933, Pub. L. No. 83-577 68 Stat. 683 (1954). Following the 1954 amendments, the Commission adopted a number of rules that would ensure that preliminary prospectuses were sent to investors in

We interpret Section 12(a)(2) and Section 17(a)(2) as meaning that, for purposes of assessing whether at the time of sale (including a contract of sale) a prospectus or oral communication or statement includes or represents a material misstatement or omits to state a material fact necessary in order to make the prospectus, oral communication, or statement, in light of the circumstances under which it was made, not misleading, information conveyed to the investor only after the time of sale (including a contract of sale) should not be taken into account.[396] For purposes of Section 12(a)(2) and Section 17(a)(2), whether or not information has been conveyed to an investor at or prior to the time of the contract of sale currently is a facts and circumstances determination, and our actions today do not affect that determination. Such information could include information in the issuer's registration statement and prospectuses for the offering in question, the issuer's Exchange Act reports incorporated by reference therein or information otherwise disseminated by means reasonably designed to convey such information to investors. Such information also could include information directly

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initial public offerings at least 48 hours before the confirmation of the sale of the securities could be sent. Our interpretation and rule do not affect this requirement. See Securities Act Rule 460 [17 CFR 230.460], and Exchange Act Rule 15c2-8 [17 CFR 240.15c2-8].

395 Article 8 of the Uniform Commercial Code was amended in 1994 to eliminate the requirement that a contract for the purchase of a security be reflected in a writing. See UCC, 1994 official text with comments, Article 8-113 (West 1994). The official comment to the rule states that the requirement that a contract be in writing is unsuited to the realities of the securities business. Thus, under state law oral contracts for sales of securities are permitted.

396 As we discuss above, the basis for liability under Section 12(a)(2) for statements in a prospectus (including a free writing prospectus) or oral communication, and the basis for liability under Section 17(a)(2) for the statements to which the section applies, are that the statements cannot contain any misstatement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.

communicated to investors (including, under the rules we are adopting today, through the use of free writing prospectuses).[397]

As noted above, liability under Section 12(a)(2) attaches to an oral communication or prospectus by means of which an offer or sale is made that contains a material misstatement or omits to state a material fact necessary to make the statements, in light of the circumstances in which they were made, not misleading. Liability under Section 17(a)(2) attaches to an untrue statement of a material fact or an omission to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading, by means of which money or property is obtained.

Under our interpretation, the liability determination under Section 12(a)(2) or Section 17(a)(2) as to an oral communication, prospectus, or statement, as the case may be, does not take into account information conveyed to a purchaser only after the time of sale (including the contract of sale), including information contained in any final prospectus, prospectus supplement, or Exchange Act filing that is filed or delivered subsequent to the time of sale (including the contract of sale) where the information is not otherwise conveyed at or prior to that time.[398]

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397 Direct communications can take various forms, including orally or through the use of electronic or other free writing prospectuses, under the new communications regime. See also Starr v. Georgeson Shareholder, Inc., 2005 U.S. App. LEXIS 11250 (2d Cir. 2005).

398 As we elaborate on later, this interpretation would not, of course, affect the ability of the seller and the purchaser to consider subsequently provided facts or disclosure and, among other actions, by agreement terminate their sale contract and by agreement enter into a new contract of sale with respect to the offered securities. In such case, for purposes of our interpretation and rule, the time of the contract of sale to that purchaser will be the time of the new contract of sale.

In furtherance of our interpretation discussed above, we also are adopting as proposed an interpretive rule, Rule 159, under Section 12(a)(2) and Section 17(a)(2). We intend that the effect of our interpretive rule will be the same as our interpretation. Our new Rule provides the following:

- For purposes of Section 12(a)(2) and Section 17(a)(2) only, and without affecting any other rights under those sections, for purposes of determining at the time of sale (including the time of the contract of sale), whether a prospectus, oral statement, or a statement,[399] includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading, [400] any information conveyed to the purchaser only after that time of sale will not be taken into account; and

- For purposes of Section 12(a)(2) only, a purchaser's "knowing of such untruth or omission" in respect of a sale (including a contract of sale) means knowing at the time of such sale.

We find that our interpretation and interpretive rule are in furtherance of the objectives of Section 12(a)(2) and Section 17(a) and are necessary for the protection of the rights of investors intended to be provided by those sections.

We do not believe that our interpretation or interpretive rule should result in "speed bumps" or otherwise slow down the offering process. Particularly in light of the new rules we are adopting today regarding communications, issuers and underwriters should have sufficient flexibility to convey information in a manner that does not slow the offering process. At the same time, in our view, the interpretation that liability under Section 12(a)(2) and Section 17(a)(2) should be determined based on information conveyed at the time of sale (including a contract of sale) is unassailable.

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399 These include a prospectus or oral statement in the case of Section 12(a)(2), or a statement to which Section 17(a)(2) is applicable.

400 Or, in the case of Section 17(a)(2), any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which

### 2. Comments and Guidance Regarding Our Interpretation and Rule 159

With regard to our interpretation of Securities Act Section 12(a)(2) and Securities Act Section 17(a)(2) and proposed Rule 159, commenters raised concerns in the following areas:

- the Section 12(a)(2) and Section 17(a)(2) analysis of the information conveyed;[401]
- the manner in which the time of "sale" is determined;[402]and
- the manner in which a purchaser and seller may terminate an old contract and enter into a new contract of sale based on new information.[403]

#### a. The Section 12(a)(2) and Section 17(a)(2) Analysis of the Information Conveyed

Securities Act Section 12(a)(2) and Section 17(a)(2) do not require that oral statements or the prospectus or other communication contain all information called for under our line-item disclosure rules or otherwise contain all material information. Rather, under these provisions, the determination of liability is based on whether the communication includes a material misstatement or fails to include material information that is necessary to make the communication not misleading in light of the circumstances in which the communication is made. In that regard, where in our discussion of our interpretation in the Proposing Release we referred to "materially accurate and complete information," we were referring to the standards contained in Securities Act Section 12(a)(2) and Section 17(a)(2) – a communication that contains no material misstatements,

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they were made, not misleading.

401 See, e.g., letters from ABA-ABS; BMA-ABS; Cleary; and CSFB.

402 See, e.g., letters from ABA; ABA-ABS; Alston; ASF; BMA-ABS; Citigroup; Cleary; CMSA; CSFB; Deloitte; Fried Frank; Merrill Lynch; Morgan Stanley; NYSBA; and SIA.

403 See, e.g., letters from ABA; ABA-ABS; CSFB; Morgan Stanley; and NYSBA.

and no material omissions that would cause the communication to be misleading in light of the circumstances in which it is made. Accordingly, liability for omissions under Section 12(a)(2) and Section 17(a)(2) is not based on the mere omission of required prospectus information or other material information, but on the omission of material information as a result of which the information conveyed is misleading, under the circumstances in which the communication in question is made. As a result, for example, a statement prior to the time of a contract of sale that a transaction is "the same as the XYZ transaction" or "just like the XYZ transaction" with specified modifications can, if there are no material omissions that would make that statement misleading under the circumstances in which it is made, meet the standards of Section 12(a)(2) and Section 17(a)(2). As another example, in an area cited by a number of commenters,[404] in the asset-backed securities market there are a number of forward-sale transactions where contracts of sale are entered into based on "portfolio profiles" or similar communications specifying important characteristics of asset pools within given ranges or market standards. Where the characteristics enumerated in the portfolio profiles do not exclude material elements of the pool's characteristics the omission of which would make the profiles misleading and where the final pools fall within the ranges or market standards disclosed in the portfolio profiles, this kind of disclosure prior to the time of a contract of sale can, depending on the facts and circumstances and even if all disclosure required in a statutory prospectus by our line-item requirements is not included, meet the standards of Section 12(a)(2) and Section 17(a)(2).

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[404] See, e.g., letters from ABA-ABS; ASF; BMA-ABS; CMSA; the Mortgage Bankers Association of America ("MBA").

### b. Determination of Time of Sale

Some commenters argued that the parties to the transaction should be able to determine by contract, by reference to state law, when the contract of sale is entered into, without regard to any provision of the federal securities laws,[405] including the anti-waiver provisions of Securities Act Section 14.[406] Other commenters argued that the iterative nature of their particular type of offerings meant that the parties could not identify the precise point when the purchaser became bound to acquire the securities.[407]

As we discuss above, we believe that one appropriate time to assess whether a purchaser has a claim under Section 12(a)(2), or whether there has been a violation of Section 17(a)(2), is the time of the contract of sale of the securities. State law contract principles are significant with regard to contract formation, and we are not aware of any current significant conflicts between state contract law and federal law regarding the elements of formation of a contract. Of course, a contract of sale under the federal securities laws can occur before there is an unconditional bilateral contract under state law, for example when a purchaser has taken all actions necessary to be bound but a

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405 See, e.g., letters from Cleary; CSFB; Fried Frank; Morgan Stanley; and SIA.

406 17 U.S.C. 77n.

407 See, e.g., letters from ABA-ABS; ASF; BMA-ABS; and CMSA. These comments were most prevalent in the asset-backed securities area. In this regard, the commenters stated that asset-backed securities offerings involved conditional contracts where investors agreed to purchase securities before they had all the prospectus information. These commenters stated that purchasers were given the opportunity to reassess their purchase decisions if new or changed information was provided. Investors who commented, on the other hand, did not believe that material changes or additional material disclosures made after their binding purchase decisions were adequately communicated to them, if at all, and they believed it was clear when they had entered into a contract of sale. See, e.g., letters from FMR and SSGA.

seller's obligations remain conditional under state law.[408] If such conflicts were to arise in the future, we would have to consider at that time the appropriate actions to take, if any, to preserve the important federal interests in the determination of the time of a contract of sale. Importantly, beyond the elements of formation of a contract, federal law governs any waiver of a right or claim arising under the federal securities laws.[409] Thus, contracts for sales of securities may not contain provisions that operate to waive a purchaser's substantive rights under the federal securities laws. For example, conditional contracts that bind the purchaser at an earlier date but provide that no contract of sale occurs until the final prospectus is provided would not be consistent with the definition of sale under the Securities Act nor the anti-waiver provisions of Securities Act Section 14.[410]

### c. Termination of an Old Contract and Creation or Reformation of a New Contract

We recognize that there may be circumstances where a seller wishes to convey information to a purchaser after the time of a contract of sale that had not been conveyed before that time. In the Proposing Release, we made clear our view that sellers could convey additional or changed information after the time of the contract of sale, terminate the old contract by agreement with the purchaser, and enter into a new contract of sale based on the new information. Any rights to damages with respect to material defects in

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408 See notes 391 and 394 above.

409 AES Corp. v. Dow Chemical Co., 325 F.3d 174, 179 (3d Cir. 2003) cert. denied, 540 U.S. 1068 (2003); Petro-Ventures, Inc. v. Vrable, 967 F.2d 1337 (9th Cir. 1992).

410 Any such contractual provision or any other contractual provision that operates as a waiver of substantive rights under the federal securities laws would be void, even if such provision was enforceable as a matter of state contract law.

information in respect of the original contract of sale would cease to exist as a result of the termination and formation of a new contract. Commenters expressed uncertainty regarding how this renegotiation and new contract would be effected.[411]

In light of commenters' concerns, we are providing guidance on the circumstances under which purchasers and sellers can reassess their purchase commitment based on new or changed information and enter into a new contract of sale, consistent with the purchaser's rights, including under Section 12(a)(2), under the original contract and the anti-waiver provisions of the federal securities laws. Commenters expressed uncertainty regarding the termination of a contract of sale and the creation of a new contract and the ability, consistent with the federal securities laws, including the anti-waiver provisions, to agree contractually on a procedure to terminate and reform a contract of sale and thus provide a new time of sale at the time of the reformation of the contract.[412] In our view, any such procedure must be the substantive equivalent of the termination by mutual agreement of the prior contract of sale and the entering into a new contract of sale. Any such procedure would, as pointed out above, result in a right to damages under the old contract ceasing to exist. It follows from this position that any such procedure would conflict with federal law unless:

- the investor is provided adequate disclosure of the contractual arrangement;
- the investor is provided with adequate disclosure of its rights under the existing contract at the time termination is sought;

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411 While commenters also requested elaboration on when and how information would be considered conveyed, as we made clear in the Proposing Release, we believe this remains a facts and circumstances determination. See, e.g., letters from ABA; Alston; Citigroup; Cleary; and S & C.

412 See, e.g., letters from CSFB and Morgan Stanley.

- the investor is provided with adequate disclosure of the new information that the seller seeks to convey; and

- the investor is provided with a meaningful ability to elect to terminate or not terminate the prior contract and to elect to enter into or not enter into the new contract.

Whether the investor is given such adequate disclosure and meaningful ability will depend on the particular facts and circumstances. An evaluation of the facts and circumstances would include but not be limited to the following:

- the manner and prominence of the disclosure of the contractual arrangements and the investor's rights under the old contract. Insufficient disclosure as to the provisions would not necessarily put the purchaser on notice of the arrangement and of its rights, and thus may be viewed as an unacceptable anticipatory waiver of the purchaser's substantive rights.

- the process by which the new or changed material information will be conveyed to the purchaser. As noted above, whether information is conveyed is a facts and circumstances determination. However, in our view, in the context of providing new information following a contract of sale, factors to consider in determining whether the new information has been conveyed could include whether it is identified as new or changed or is otherwise sufficiently prominent.

- the method by which the purchaser is required to make or communicate its decisions. For the contractual provision to be consistent with the anti-waiver provisions of the federal securities laws, the purchaser must knowingly terminate the prior contract if it chooses to do so. Similarly, the investor must knowingly enter into the new contract if it chooses to do so. While we are not saying that the method chosen necessarily requires an affirmative communication rather than acquiescence by silence after the lapse of a specified period of time, the concept of reaffirmation is one that earlier Commissions and Congress have struggled with since the 1940s.[413] The method chosen should give the purchaser a meaningful ability to make its contractual decisions in light of the new or changed material information.

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[413] See, e.g., Nathan D. Lobell, Revision of the Securities Act, 48 Colum. L.Rev. 313, 332 (1948); Clark Byse and Raymond J. Bradley, Proposals to Amend the Registration and Prospectus Requirements of the Securities Act of 1933, 96 U.Pa. L.Rev. 609, 635-36 (1947-1948).

In addition to our general observations, we note the following:

- any contractual provision to the effect that the seller is deemed to have communicated information to the purchaser would be a violation of the anti-waiver provisions of the federal securities laws.[414]

- a non-conditional contract that moves the time of sale forward to a different time would effectively act as a waiver of substantive rights under the federal securities laws and is a violation of the anti-waiver provisions of the federal securities laws.[415]

### 3. Rule 412 and Rule 430B

Under Securities Act Rule 412, information contained in a prospectus supplement or Exchange Act filing incorporated by reference into a registration statement may modify or supersede other previously disclosed information that was contained in a document incorporated or deemed to be incorporated by reference in that registration statement. We are revising Rule 412 essentially as proposed to make it consistent with the other rules we are adopting today. The revisions provide that information contained in a document that is deemed part of and included in or incorporated by reference into a registration statement or prospectus that is contained in the registration statement would modify or supersede the information contained in the registration statement or prospectus

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414 Moreover, a contractual provision that provides that a purchaser is deemed to have read or have constructive or actual knowledge of information or documents, generally, would act as a waiver of substantive rights under the federal securities laws and thus would be inconsistent with the anti-waiver provisions of the federal securities laws. For example, a contractual provision stating that a purchaser who has access to information is charged with knowledge of that information for purposes of Section 12(a)(2) would be impermissible. These are merely examples of language that would be inconsistent with the anti-waiver provisions of the federal securities laws and are not all-inclusive.

415 Thus, a waiver might also be deemed to occur where an underwriter e-mails the purchaser saying that the issuer filed a prospectus supplement and provides a specified period of time in which the purchaser may contact the underwriter, after which the purchaser will be deemed to have purchased the securities as of the end of the period, which would be a new date of sale.

that is part of or contained in the registration statement itself.[416] Thus, the provisions of Rule 412 regarding modified or superseded information will operate regardless of whether the new information is contained in an Exchange Act report, prospectus supplement, or prospectus that is part of or included in a registration statement.

Under Rule 430B, which we are adopting today (and in the corresponding undertakings of issuers), we have provided that subsequently provided information deemed part of and included in or incorporated by reference into a registration statement or prospectus that is part of the registration statement would not modify or supersede any information conveyed to an investor at an earlier time of sale (including the time of the contract of sale) for purposes of determining the information conveyed to an investor at or prior to that time.[417]

#### 4. Relationship of Section 12(a)(2) and Section 17(a)(2) Interpretation and Rule 159 to Section 11 Liability

Information contained in a prospectus or prospectus supplement that is part of a registration statement that is filed after the time of the contract of sale will be part of and included in a registration statement for purposes of liability under Section 11 at the time of effectiveness, which may be at or before the time of the contract of sale. The date and time that the information is part of the registration statement and the time of effectiveness relate to an investor's rights under Section 11, but do not affect any rights assessed at the

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416 See discussion in Section V.B.1 below under "Date of Inclusion of Prospectus Supplements in Registration Statements and New Effective Dates of Registration Statements."

417 We originally proposed to include this provision in Rule 412 but have determined, in response to comments, to include it instead in Rule 430B. See, e.g., letter from William J. Williams, Jr. It also is included in undertakings of issuers provided in accordance with Item 512 of Regulation S-K and Regulation S-B [17 CFR 229.512 and 17 CFR 228.512].

time of sale that the investor may have under Section 12(a)(2) or that we might enforce under Section 17(a). Thus, information that is deemed to be part of the registration statement as of the time of the contract of sale for shelf takedowns or as of effectiveness under Securities Act Rule 430A, will not, under our interpretation or Rule 159, be taken into account under Section 12(a)(2) or Section 17(a)(2), unless the information is conveyed to an investor at or prior to the time of sale (including the contract of sale). Similarly, an investor's rights under Section 11 will not be affected by information conveyed to an investor at or prior to the time of the contract of sale that is not included in or incorporated by reference into the registration statement at the time of the effectiveness of the registration statement for the securities sold to the investor.[418] The class of investors that may have a claim under Section 11 and Section 12(a)(2) may thus be different.

A free writing prospectus that is not part of a registration statement will not be subject to Section 11 liability, although it will be subject to Section 12(a)(2) and Section 17(a)(2) liability.[419] Information contained in a free writing prospectus not otherwise included in or incorporated by reference into the registration statement will not be part of the registration statement for purposes of Section 11.

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418 See discussion regarding Rule 430B in Section V.B.1 below under "Rule 430B." See also Rule 158.

419 A free writing prospectus, while considered to relate to a registered securities offering, is not included in and does not become part of the registration statement unless the issuer files it as part of the registration statement or includes it in a filing that is incorporated by reference into the registration statement. Thus, the responsibility and liability of offering participants for a particular free writing prospectus that is not incorporated or included in the registration statement can arise only under Section 12(a)(2) and Section 17(a)(2) and the other anti-fraud provisions. This is true regardless of whether the free writing prospectus contains information from the registration statement (including information that has been

### B. Issuer as Seller

We believe there currently is unwarranted uncertainty as to issuer liability under Section 12(a)(2) for issuer information in registered offerings using certain types of underwriting arrangements.[420] As a result, there is a possibility that issuers may not be held liable under Section 12(a)(2) to purchasers in the initial distribution of the securities for information contained in the issuer's prospectus included in its registration statement. This also could be the case for other communications that are offers by or on behalf of an issuer, including issuer free writing prospectuses. When an issuer registers securities to be sold in a primary offering, the registration covers the offer and sale of its securities to the public. The issuer is selling its securities to the public, although the form of underwriting of such offering, such as a firm commitment underwriting, may involve the sale first by the issuer to the underwriter and then the sale by the underwriter to the public.[421] We believe that an issuer offering or selling its securities in a registered offering pursuant to a registration statement containing a prospectus that it has prepared and filed, or by means of other communications that are offers made by or on behalf of or used or referred to by the issuer can be viewed as soliciting purchases of the issuer's registered securities.[422] Therefore, we are adopting a rule providing that under Section 12(a)(2) an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, will be a seller and will be considered to offer or sell the

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included with the consent of an expert).

420 See, e.g., Capri v. Murphy, 856 F.2d 473, 478 (2d Cir. 1988); Lone Star Ladies Investment Club v. Schlotzsky's, Inc, 238 F.3d 363, 370 (5th Cir. 2001); Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003).

421 The two transactions are parts of the same distribution of the securities to the public.

securities to a purchaser in the initial distribution of the securities as to any of the following communications:

- any preliminary prospectus or prospectus of the issuer relating to the offering required to be filed pursuant to Securities Act Rule 424 or Rule 497;
- any free writing prospectus relating to the offering prepared by or on behalf of or used or referred to by the issuer and, in the case of an issuer that is an open-end management investment company, any profile relating to the offering provided pursuant to Securities Act Rule 498;
- the portion of any other free writing prospectus (or, in the case of an issuer that is a registered investment company or business development company, any advertisement pursuant to Securities Act Rule 482) relating to the offering containing material information about the issuer or its securities provided by or on behalf of the issuer; and
- any other communication that is an offer in the offering made by the issuer to such purchaser. [423]

This definition of the issuer as a seller is not intended to affect whether any other person offers or sells a security by means of the same prospectus or oral communication for purposes of Section 12(a)(2). A communication by an underwriter or dealer participating in an offering would also not be on behalf of the issuer solely by virtue of that participation. As today, there are circumstances where the involvement of an issuer could be sufficiently extensive (for example under adoption and entanglement theories) that a communication of another person, including an offering participant, could be by an issuer.

A number of commenters were concerned that as proposed the rule was unnecessarily broad and would encompass purchasers of the issuer's securities in the

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422 See Pinter v. Dahl, 486 U.S. 622 (1988).

423 We are not addressing the status of the issuer as a seller in a registered offering of transactions by selling security holders only.

aftermarket, after the initial distribution of securities in the offering was completed.[424] These commenters were also concerned that the proposed rule would encompass oral communications made by underwriters.[425] As with certain of our other proposals, some commenters wanted to limit liability only to those situations in which the communication was made by designated persons.[426]

While we have adopted the issuer as seller provisions substantially as proposed, we have included language that clarifies that it is aimed only at liability to purchasers in the initial distribution of the securities who were offered or sold the securities by means of the particular communication.[427] Thus, the Rule, as adopted, would not cover purchasers of the issuer's securities in the aftermarket. We have also provided, as noted above, that an underwriter or dealer participating in an offering is not acting on behalf of the issuer solely by virtue of that participation.

### C. Due Diligence Interpretation

We requested comment in the Proposing Release as to whether we should re-evaluate the factors discussed in Securities Act Rule 176[428] regarding what constitutes a reasonable investigation and reasonable grounds under Securities Act Section 11(c), and requested an explanation of the changes that should be made and how each of those changes would work in the context of each type of registered securities offering. In response, commenters urged us to reintroduce the 1998 proposal to amend Rule 176 so

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424 See, e.g., letters from ABA; Alston; CMSA; Davis Polk; and NYSBA.

425 See, e.g., letters from ABA and CMSA.

426 See, e.g., letters from Alston and CMSA.

427 We also have revised the final provision to provide that it covers communications by the issuer, not communications by or on behalf of the issuer.

428 17 CFR 230.176.

that it also applies to the reasonable care standard under Section 12(a)(2).[429] Additionally, commenters asked us to reaffirm the statement from the 1998 proposals that "Section 11 requires a more diligent investigation than Section 12(a)(2)," so as to avoid any implication that our view of the matter has changed.[430] We have determined not to propose modifications to Rule 176 at this time. We believe, however, as we have stated previously, that the standard of care under Section 12(a)(2) is less demanding than that prescribed by Section 11 or, put another way, that Section 11 requires a more diligent investigation than Section 12(a)(2).[431] Moreover, we believe that any practices or factors that would be considered favorably under Section 11, including pursuant to Rule 176,

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429 See, e.g., letters from Morgan Stanley; SIA; and TBMA.

430 See, e.g., letters from ABA; SIA; and S & C.

431 See the 1998 proposals, note 30, at Section IX.D. In a brief filed in Sanders v. John Nuveen & Co., 619 F.2d 1222 (7th Cir. 1980), the Commission stated that the standard of care under Section 12(a)(2) (formerly Section 12(2)) is less demanding than that prescribed by Section 11:

> [I]t would be inconsistent with the statutory scheme to apply precisely the same standards to the scope of an underwriter's duty under Section 12[(a)](2) as the case law appropriately has applied to underwriters under Section 11. Because of the vital role played by an underwriter in the distribution of securities, and because the registration process is integral and important to the statutory scheme, we are of the view that a higher standard of care should be imposed on those actors who are critical to its proper operations. Since Congress has determined that registration is not necessary in certain defined situations, we believe that it would undermine the Congressional intent–that issuers and other persons should be relieved of registration–if the same degree of investigation were to be required to avoid potential liability whether or not a registration statement is required.

Brief for SEC in Nos. 74-2047 and 75-1260 (CA7), Sanders v. John Nuveen & Co., 554 F.2d 790 (7th Cir., 1977), p. 69, as quoted by Powell, J., dissenting to the denial of certiorari in John Nuveen & Co. v. Sanders, 450 U.S. 1005 (U.S., 1981).

also would be considered as favorably under the reasonable care standard of Section 12(a)(2).[432]

## V. Securities Act Registration Rules and Amendments

### A. Overview

As discussed above and in the Proposing Release, enhanced requirements for reporting under the Exchange Act for public issuers have been intended to improve the quality and currency of disclosure under the Exchange Act. Together with technological advances, these developments provide the basis for the rules we are adopting today to modernize many procedural aspects of securities offerings registered under the Securities Act.

Our new rules cover the registration procedures for seasoned and unseasoned issuers, and seek to streamline the registration process for most types of reporting issuers. These rules include:

- a more flexible automatic registration process for well-known seasoned issuers;
- modifications that clarify and expand how and when information can be included in registration statements;
- a clarification of the Securities Act liability treatment of information provided in a prospectus supplement and Exchange Act reports incorporated by reference;
- modification of the timing of effectiveness of shelf registration statements applicable to issuers in certain cases; and
- rules relating to non-shelf offerings of securities.

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[432] See the 1998 proposals, note 30, at Section IX.

### B. Procedural Rules

#### 1. Procedural Changes Regarding Shelf Offerings

##### a. Overview

We are adopting changes to the operation of the shelf registration system under the Securities Act. These new provisions involve:

- clarifying and codifying the information to be included in and omitted from base prospectuses in shelf registration statements;
- codifying the manner of inclusion of information in the final prospectus;
- providing for the treatment of prospectus supplements; and
- liberalizing certain of the requirements under Securities Act Rule 415, including:
- eliminating the two-year limitation for registered securities for a delayed offering;
    - eliminating the "at-the-market" offering restrictions for issuers registering primary equity offerings on Form S-3 or Form F-3;
    - eliminating the prohibition against immediate takedowns off delayed shelf registration statements; and
    - making conforming changes to Rule 424 regarding the filing of prospectus supplements.

Commenters strongly supported the proposed procedural changes to the Securities Act registration process.[433] A number of commenters on these proposed changes, while supporting the automatic shelf registration proposals for well-known seasoned issuers, believed that all seasoned issuers should be able to use certain of the elements of automatic shelf registration such as identification of selling security holders in prospectus supplements, omission of most information from base prospectuses, and addition of new securities and new registrants by automatically effective post-effective amendments.[434]

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433 See, e.g., letters from ABA; Alston; Citigroup; Cleary; Davis Polk; Fried Frank; IBA; NYCBA; NYSBA; S & C; SIA; and TBMA.

434 See, e.g., letters from ABA; Alston; Citigroup; Cleary; Davis Polk; NYCBA;

As discussed in greater detail below, we are adopting the procedural changes with some modifications.

**b. Information in a Prospectus**

**i. Mechanics**

**(A) Rule 430B**

Rule 415 provides for continuous or delayed offerings and is, therefore, the foundation for shelf registration. Primary offerings on a delayed basis may be registered by certain seasoned issuers only. A number of other delayed or continuous offerings may be undertaken or registered by any issuer, including offerings on a continuous basis of securities issued on exercise of outstanding options or warrants or conversion of other securities, offerings on a continuous basis under dividend reinvestment plans, offerings on a continuous basis under employee benefit plans, and offerings solely on behalf of selling security holders. Rule 415 also permits registration by any issuer of a continuous offering that will commence promptly and may continue for more than 30 days from the date of initial effectiveness.[435]

Many of the types of offerings contemplated by Rule 415 can be accomplished using a prospectus that is complete at the time of effectiveness of the related registration statement and therefore may not require a supplement because there may be no additional information to include in the prospectus.[436] There are a number of offerings

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NYSBA; S & C; SIA; and TBMA.

435 See Securities Act Rule 415(a)(1)(ix) [17 CFR 230.415(a)(1)(ix)].

436 The terms of the securities being offered and the plan of distribution are often complete at the time of effectiveness and not subject to change. Where the offering is not registered on Form S-3 or Form F-3, updating information in the registration statement regarding the issuer cannot be included in future periodic reports filed under the Exchange Act and incorporated by reference, and therefore

contemplated by Rule 415, however, such as a delayed offering, in which the prospectus included in the related registration statement at the time of effectiveness, usually referred to as a "base prospectus," must be supplemented to reflect the final terms of the security and offering for each particular offering of securities. In addition, in continuous or delayed offerings employing shelf registration under Rule 415, there may be circumstances where a prospectus will be supplemented other than at the time of a takedown.

Rule 424 provides the framework for the filing of each type of prospectus and prospectus supplement. There currently is no rule, however, that specifies the relationship between the base prospectus and prospectus supplements and the information that may be omitted from or included in one or the other. We are adopting with some clarifications from the proposals a new rule, Rule 430B, which we intend to achieve that purpose by codifying existing practice in most respects and liberalizing the framework for the registration process in certain areas.[437] We also are adopting Rule 430C which addresses the treatment of prospectuses and prospectus supplements for all registered offerings not covered by Rule 430B and for prospectuses not covered by Rule 430A.

Rule 430B is a shelf offering corollary to existing Rule 430A, in that it describes the type of information that primary shelf eligible and automatic shelf issuers may omit from a base prospectus in a Rule 415 offering and include instead in a prospectus

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must be included in the prospectus contained in the registration statement by a post-effective amendment. In that case, the new form of prospectus included in the amended registration statement is then complete at the new effective date and therefore also does not require a supplement.

437 We also are making conforming changes to Rule 424.

supplement, Exchange Act report incorporated by reference, or a post-effective amendment.[438]

Rule 430B covers the following types of offerings:

- offerings by well-known seasoned issuers registered on automatic shelf registration statements;
- immediate, delayed, and continuous primary offerings by primary shelf eligible issuers pursuant to Rule 415(a)(1)(x), including asset-backed issuers eligible to register their offerings on Form S-3;
- secondary offerings by certain primary shelf eligible issuers, including for the purpose of adding information regarding the identities of and amounts of securities to be sold by selling security holders; and
- offerings of mortgage-backed securities permitted by Rule 415(a)(1)(vii) that generally are registered on Form S-11.[439]

Rule 430C covers all registered offerings that are not covered by Rule 430B and prospectuses that are not covered by Rule 430A.[440]

Rule 430B generally is consistent with current requirements and practice for shelf registration statements for delayed offerings on Forms S-3 and F-3.[441] Under Rule 430B,

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438 Issuers cannot rely on Rule 430B for offerings made in reliance on other provisions of Rule 415(a). For example, issuers that are not primary shelf eligible, but that are eligible to register securities for resale on behalf of selling security holders in reliance on General Instruction I.B.3 of Form S-3 or register the issuance of securities on exercise or conversion of outstanding securities pursuant to General Instruction I.B.4 of Form S-3, would not be eligible to rely on this Rule, but would instead be subject to Rule 430C.

439 17 CFR 239.18.

440 As we discuss below, Rule 430C provides that all prospectuses and prospectus supplements filed pursuant to Rule 424 and Rule 497(b), (c), (d), and (e) (other than for offerings relying on Rule 430B or prospectuses covered by Rule 430A) are deemed part of and included in the related registration statement as of the date of first use. Rule 430C applies to prospectuses filed in offerings made in reliance on Rule 430A to the extent the prospectus or prospectus supplement is not covered by Rule 430A.

a base prospectus in a shelf registration statement must comply with the applicable form requirements but can, as has been the case before today's new rules, continue to omit information that is unknown or not reasonably available to the registrant pursuant to Rule 409.[442]

Rule 430B provides that a base prospectus that omits information as provided in the Rule will be a permitted prospectus.[443] Thus, after a registration statement is filed, offering participants can use a base prospectus that omits information in accordance with the Rule. In addition, issuers can communicate using Rule 134 notices, and issuers and other offering participants can use free writing prospectuses under Rules 164 and 433. Commenters supported proposed Rule 430B because of the level of certainty it would provide for delayed offerings off of shelf registration statements.[444]

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441 Rule 430B liberalizes current requirements in certain respects, and significantly liberalizes requirements for automatic shelf registration statements, as discussed in Section V.B.2 below under "Automatic Shelf Registration for Well-Known Seasoned Issuers."

442 See Rule 430B and Rule 409 [17 CFR 230.409]. The base prospectus still must include, for other than automatic shelf registration statements, general descriptions of the types of securities and possible plans of distribution.

443 The Rule codifies that such a prospectus will satisfy the requirements of Securities Act Section 10 for purposes of Securities Act Section 5(b)(1).

For asset-backed securities offerings made in reliance on General Instruction I.B.5 of Form S-3, because those issuers do not have to satisfy a reporting history requirement, asset-backed securities offerings often must present most of their disclosure in the base prospectus and prospectus supplements rather than incorporate such information by reference into the registration statement. Thus, for purposes of Section 10, a prospectus for an asset-backed securities offering must include the format of deal-specific information in the base prospectus or the base prospectus and a prospectus supplement. See Asset-Backed Securities Adopting Release, note 82, at Section III.A.3.b. and General Instruction V. to Form S-3.

444 See, e.g., letters from Alston; NYCBA; and NYSBA.

### (B) Means for Providing Information

A base prospectus that omits statutorily required information is not a Securities Act Section 10(a) final prospectus, and today's rules do not change that fact. To satisfy the requirements of Securities Act Section 10(a), as is the case with shelf registration statements today, an issuer must include the information omitted from the base prospectus in:

- a prospectus supplement;
- a post-effective amendment; or
- where permitted as described below, through its Exchange Act filings that are incorporated by reference into the registration statement and prospectus that is part of the registration statement and identified in a prospectus supplement.

Information included in a base prospectus or in an Exchange Act periodic report incorporated into a prospectus is included in the registration statement. Rule 430B makes clear that prospectus supplements and information in them also will be deemed to be part of and included in the registration statement.[445]

The rules we are adopting today provide primary shelf eligible issuers and well-known seasoned issuers with automatic shelf registration statements the ability to add to a prospectus, by means other than a post-effective amendment to the registration statement, more additional or omitted information than is currently the case.[446] We are adopting amendments to Forms S-3 and F-3 to permit all information required in the prospectus about the issuer and its securities to be incorporated by reference from

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445 In the 1998 proposals, we expressed our belief that prospectus supplements and the information contained in them are subject to liability under Section 11. The rules we adopt today codify that position. See 1998 proposals, note 30, at Section V.C.1.

446 Issuers still have the flexibility to file post-effective amendments to include the

Exchange Act reports.[447] Such information also can be contained in the prospectus or a prospectus supplement.[448] For example, material changes in the plan of distribution, which currently are required to be included in post-effective amendments, can be amended under our new rules by incorporated Exchange Act reports or prospectus supplements.[449] Rule 430B also requires that a prospectus supplement be prepared and filed pursuant to Rule 424 if omitted information about an offering, such as the terms of the offering, the securities, the plan of distribution, or the selling security holders, is included in an Exchange Act report incorporated by reference. The prospectus supplement filed pursuant to Rule 424 must disclose the Exchange Act report or reports containing such information. This disclosure will assist investors and the markets in locating this offering-related information and will also be consistent with the treatment of other prospectus supplements filed for these purposes.

**(C) Identification of Selling Security Holders Following Effectiveness**

**(1) Scope of Provision**

As we discussed in the Proposing Release, transfers of restricted securities can occur after a private placement is completed so that the identities of the holders of those restricted securities at the time of filing the resale registration statement may not be

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information.

447 The amendments to Forms S-3 and F-3 explicitly permit information otherwise required in the prospectus directly pursuant to Item 3 through Item 11 of Form S-3 and Item 3 through Item 5 of Form F-3 to be included in this manner.

448 The changes to Form S-3 and Form F-3 are intended to allow the disclosure requirements to be satisfied through incorporation by reference, or through a filed prospectus or prospectus supplement, not to change the timing of when the information must be included.

449 As noted above, under today's rules, prospectus supplements and the information contained in them are deemed to be part of and included in the registration

known to the issuer.[450] Filing post-effective amendments to add new or previously unidentified security holders can impose delays. To alleviate the timing concern arising from an issuer's inability to identify selling security holders prior to effectiveness, we are including provisions to allow issuers eligible to use Form S-3 or Form F-3 for primary offerings in reliance on General Instruction I.B.1 to those Forms[451] to identify selling security holders and the amounts of securities to be registered on behalf of each of them after effectiveness.

Rule 430B and amendments to Form S-3 and Form F-3, as adopted, permit eligible seasoned issuers to add the identities of the selling security holders and all information about them, as required by Item 507 of Regulation S-K,[452] to the registration statement covering the resale of their securities after effectiveness by:

- an amendment to that registration statement;
- a prospectus supplement; or

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statement.

450 Currently, the staff in the Division of Corporation Finance requires all issuers registering securities for the benefit of selling security holders to include the names of selling security holders in the registration statement either prior to effectiveness or through a post-effective amendment to the registration statement, with limited exceptions for the identities of security holders owning a de minimis amount of the issuers securities (less than 1%) or receiving the securities as a result of a donative transfer.

451 General Instruction I.B.1 to Form S-3 and Form F-3 permits reporting issuers that are current and timely in their periodic and current reporting obligations under the Exchange Act and that have $75 million in non-affiliate voting and non-voting common equity market capitalization to register securities offerings for cash on Form S-3 and Form F-3 for the benefit of the issuer or selling security holders. Blank check companies, shell companies, and penny stock issuers are not eligible to rely on this provision.

452 17 CFR 229.507.

- an Exchange Act report incorporated by reference into the registration statement (subject to filing a prospectus supplement identifying such report).[453]

We have revised this provision from the proposal to clarify that this ability to identify selling security holders after effectiveness will be available only if:

- the registration statement is an automatic shelf registration statement;[454] or
- all of the following are satisfied:
  - the resale registration statement identifies the initial offering transaction or transactions pursuant to which the securities, or securities convertible into such securities, were sold;[455]
  - the initial offering of the securities, or the securities convertible into such securities, is completed; and
  - the securities, or the securities convertible into such securities, that are the subject of the registration statement are issued and outstanding prior to initial filing of the resale registration statement.

An issuer registering the resale of securities sold in a private offering may not rely on this provision to identify after effectiveness selling security holders who will acquire the securities directly from the issuer if the securities are not yet issued in the private offering, even where the investors are contractually bound to acquire the securities.[456]

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453 As we are amending Rule 424 today, prospectus supplements may be filed in connection with selling security holders offerings, to add selling security holders omitted pursuant to Rule 430B and to provide supplemental or additional information. The filing of a prospectus supplement to include the identity of omitted selling security holders pursuant to Rule 424(b)(7) will be deemed to be a new effective date of the registration statement for Section 11 liability purposes of the issuer and underwriter. Under the Securities Act, selling security holders may be underwriters in connection with the distribution of the securities being registered for resale on their behalf.

454 See Section V.B.2 below under "Automatic Shelf Registration for Well-Known Seasoned Issuers."

455 The Rule requires disclosure of the initial offering transaction pursuant to which the sales were made, not any subsequent resale transactions.

456 These types of offerings include PIPE transactions discussed in note 182 above.

The issuer can still register the resale of the not-yet-issued securities, but it must identify the selling security holders in the registration statement at the time of filing and prior to effectiveness because the issuer will know the identities of the selling security holders who will acquire the securities from it.

We believe that it is important for issuers to be able to satisfy their contractual registration obligations to selling security holders in registering their resales, while also assuring that offerings are properly registered and the selling security holders and the securities to be sold by them are identified in the registration statement. The purpose of this provision of Rule 430B is to provide a more convenient method to identify selling security holders in registration statements, and not to change the existing responsibilities and liabilities of issuers and these selling security holders under the federal securities laws.

**(2) Comments on Identification of Selling Security Holders**

Commenters expressed support for the proposals to allow seasoned issuers the ability to identify selling shareholders after effectiveness.[457] As with many of the other proposals, some believed that this flexibility also should be extended to unseasoned issuers.[458] In addition, one commenter suggested that we eliminate the proposed requirement that the issuer identify any known selling security holders prior to effectiveness, because some selling security holders known to the issuer may not have consented to the inclusion of their names in the prospectus.[459]

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457 See, e.g., letters from Alston; ABA; and Davis Polk.

458 See, e.g., letters from ABA; NYCBA; NYSBA; and TBMA.

459 See letter from Fried Frank.

In response to commenters' suggestions, we have clarified that the initial transaction that the issuer must disclose in the resale registration statement must be the initial offering transaction in which the securities were initially sold, not a resale transaction in which any particular selling security holder may have acquired the securities. The goal of the disclosure is to clearly link the securities being registered for resale to a completed initial offering. Moreover, we have revised the instructions to Form S-3 and Form F-3 to eliminate any requirement to name any selling security holders prior to effectiveness if the conditions of Rule 430B are satisfied.

Commenters also suggested that we should allow all issuers to be able to identify selling security holders after effectiveness.[460] We have determined not to extend this flexibility to all issuers. We believe that issuers that are not eligible to file a primary offering on Form S-3 or Form F-3 are more prone, in general, to engage in transactions some of which have raised disclosure and registration issues.[461] As a result, we believe it is important to have complete selling security holder information and be able to review that information in registration statements to assure compliance with Section 5 and our disclosure rules in connection with these offerings.

**ii. Information Deemed Part of Registration Statement**

We are adopting provisions in Rule 430B that will make clear that information contained in a prospectus supplement required to be filed under Rule 424, whether in connection with a takedown or otherwise, will be deemed part of and included in the registration statement containing the base prospectus to which the prospectus supplement relates. We also are adopting new Rule 430C that has similar provisions regarding the

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460 See, e.g., letters from ABA; NYCBA; NYSBA; and TBMA.

treatment of prospectus supplements, which applies to offerings not covered by Rule 430B and prospectuses not covered by Rule 430A. As a result of Rule 430B and Rule 430C, prospectus supplements required to be filed under Rule 424 or Rule 497(b), (c), (d), or (e) will, in all cases, be deemed to be part of and included in registration statements for purposes of Securities Act Section 11.

### iii. Date of Inclusion of Prospectus Supplements in Registration Statements and New Effective Dates of Registration Statements

#### (A) Scope of Provisions

Rule 430B and Rule 430C, as adopted, deem information contained in prospectus supplements to be part of and included in the registration statement as follows:

- for a prospectus supplement required to be filed other than in connection with a takedown of securities, all information contained in that prospectus supplement will be deemed part of and included in the registration statement as of the date the prospectus supplement is first used;[462] and

- under Rule 430B only, for a prospectus supplement required to be filed in connection with a takedown of securities pursuant to Rule 424(b)(2), (b)(5), or (b)(7), all information in that prospectus supplement will be deemed part of and included in the registration statement as of the earlier of the date it is first used or the date and time of the first contract of sale of securities in the offering to which the prospectus supplement relates.[463]

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461 See note 182 above.

462 We already have made clear that the date of first use for purposes of Securities Act Rule 424 is not the date that the prospectus supplement is given to a purchaser in connection with a sale. Rather, it refers to the date that the prospectus is available to the managing underwriter, syndicate member, or any prospective purchaser. See Elimination of Certain Pricing Amendments and Revision of Prospectus Filing Procedures, Release No. 33-6714 (May 27, 1987) [52 FR 21252].

463 These new provisions determine when a prospectus supplement is deemed part of the registration statement for Securities Act Section 11 purposes. They do not affect the determination of when information is conveyed to a purchaser for Section 12(a)(2) liability purposes.

We have chosen the triggering dates for prospectus supplements to be deemed part of and included in registration statements for a number of reasons. First, under Rule 430B and Rule 430C, for a prospectus supplement filed other than in connection with a takedown, we have chosen the date of first use as the appropriate date for it to be deemed part of and included in the registration statement because that is the date on which the prospectus supplement updates the information in the registration statement.[464] Second, under Rule 430B, a prospectus supplement filed in connection with a takedown pursuant to Rule 424 will be deemed part of and included in the registration statement as of the earlier of when it is first used or the date and time of the first contract of sale of the securities to which the prospectus supplement relates. This timing, combined with the new effective date provisions discussed below, provides the appropriate timing for assessing liability under Section 11 for issuers and underwriters.

**(B) New Effective Date for Section 11 Purposes**

Rule 430B also establishes a new effective date for a shelf registration statement for Section 11 liability purposes only for the issuer and for a person that is at the time an underwriter.[465] That new effective date will be the date a prospectus supplement filed in connection with the takedown or takedowns is deemed part of the relevant registration statement.[466] For purposes of liability under Section 11 of the issuer and any underwriter

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464 See amendments to Securities Act Rule 412(a) [17 CFR 230.412(a)].

465 We also are amending Rule 158 to include conforming changes to the effective date for purposes of the last paragraph of Securities Act Section 11(a).

Under Rule 430C, the filing of prospectus supplements will not trigger new effective dates of the registration statement.

466 The new effective date will not, however, be considered the filing of a new registration statement for purposes of Form eligibility. See Securities Act Rule 401.

at the time only, the new effective date will be as to the part of the registration statement relating to the securities to which such prospectus relates. The part of the registration statement will consist of all information included in the registration statement and any prospectus relating to the offering of the securities as of the new effective date and all information included in reports and materials incorporated by reference into the registration statement and prospectus as of such date relating to the offering, and in each case, not modified or superseded pursuant to Rule 412. The part of the registration statement will include information relating to the offering in a prospectus already included in the registration statement. This includes, for example, a form of prospectus containing information relating to the offering and previously filed pursuant to Rule 424(b)(3) other than in connection with the takedown in question, where the information has not been modified or superseded. These provisions also will reconcile the effective date for shelf offerings for issuers and underwriters with a comparable date for non-shelf offerings. We believe the Rule also will eliminate the unwarranted, disparate treatment of underwriters and issuers under Section 11.[467]

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467 Currently, there can be a mismatch between issuers and underwriters in the time that liability is assessed. For example, in an offering off a shelf registration statement, an issuer could have its liability assessed as of the date of the registration statement's initial effectiveness (or post-effective amendment) or the most recent updating required under Securities Act Section 10(a)(3), while the liability of an underwriter would be assessed at the later time when it became an underwriter. In such a case, underwriters in takedowns occurring after the date of initial effectiveness (or post-effective amendment) or the Section 10(a)(3) update would be subject to liability under Section 11 for an issuer's Exchange Act reports incorporated by reference into the prospectus included in the registration statement after that date while issuers would not. Rule 430B results in most cases in the date of effectiveness of a registration statement for an issuer and underwriter in a particular offering being close in time.

At the same time, we believe that for other persons, including directors, signing officers, and experts, the filing of a form of prospectus should not result in a later Section 11 liability date than that which applied prior to our new rules.[468] Therefore, under Rule 430B, except for an effective date resulting from the filing of a form of prospectus for purposes of updating the registration statement pursuant to Section 10(a)(3) or reflecting fundamental changes in the information in the registration statement pursuant to the issuer's undertakings, the prospectus filing will not create a new effective date for directors or signing officers of the issuer. Any person signing any report or document incorporated by reference in the prospectus that is part of the registration statement or the registration statement, other than a document filed for the purposes of updating the prospectus pursuant to Section 10(a)(3) or reflecting a fundamental change, is deemed not to be a person who signed the registration statement as a result. The new effective date also does not apply to a person that becomes an underwriter after that effective date; in that case Securities Act Section 11(d) provides that the date the person became an underwriter is its effective date.[469]

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468 Prior to today's amendments, Rule 158(c) provided that, for purposes of the last paragraph of Section 11(a), a new effective date is deemed to be the latest to occur of (1) the effective date of the registration statement, (2) any post-effective amendment next preceding a particular sale of registered securities by the issuer filed to update the registration statement pursuant to Section 10(a)(3) or to reflect in the prospectus fundamental changes in the information in the registration statement or add any material information about or reflect any material changes in the plan of distribution; or (3) the date of filing of the last report of the issuer incorporated by reference into the prospectus and relied on in lieu of filing a post-effective amendment to effect a Section 10(a)(3) update to the registration statement or to reflect a fundamental change in the information in the registration statement, next preceding a particular sale by the issuer of registered securities.

469 Securities Act Section 11(d) provides in part, "If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then … such

We also are not changing the effective date for auditors who provided consent in an existing registration statement for their report on previously issued financial statements or previous reports on management's assessment of internal control over financial reporting, unless a prospectus supplement (and any Exchange Act report incorporated by reference into the prospectus and registration statement) or post-effective amendment contains new audited financial statements or other information as to which the auditor is an expert and for which a new consent is required.[470] As to any other expert, the filing of the prospectus supplement also will not trigger a new effective date, and thus will not require the filing of a consent, unless the prospectus supplement (including incorporated Exchange Act reports) includes a new report or opinion of an

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part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter."

470 New audited financial statements or other information as to which the accountant is an expert and for which a new consent is required under Securities Act Section 7 [15 U.S.C. 77g] or Securities Act Rule 436 [17 CFR 230.436] includes any financial statements filed pursuant to Article 3 of Regulation S-X [17 CFR 210.3-01 et seq.] after the date of the last consent by the accountant, including those that are restated. Examples of such audited financial statements and financial information are (1) a restatement of the issuer's or a guarantor's financial statements, (2) financial statements required under Rule 3-05 of Regulation S-X [17 CFR 210.3-05], and (3) financial statements that are required under Rule 3-14 of Regulation S-X [17 CFR 210.3-14]. In addition, a new consent is required when the accountant's report on management's assessment of the registrant's internal control over financial reporting is changed.

In the event a new consent is required, that consent may be filed by a post-effective amendment to the registration statement or by filing an Exchange Act report, such as an annual report on Form 10-K or a report on Form 8-K or Form 6-K, which is incorporated by reference into the registration statement. Under Rule 430B, a report pursuant to Rule 10-01(d) of Regulation S-X [17 CFR 210.10-01] on unaudited interim financial information by an accountant which has conducted a review of such interim financial information would not require the consent of such accountant under Rule 436. Such a report is not considered part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of Securities Act Sections 7 and 11.

expert whose consent is required pursuant to Section 7 and who will have liability pursuant to Section 11. For example, a prospectus supplement filed in connection with one or more takedowns of securities that did not include other disclosure (including through incorporated Exchange Act reports) for which the consent of an expert is required pursuant to Securities Act Section 7 and Securities Act Rule 436 will not require consents to be filed.

Including information contained in prospectus supplements in registration statements and triggering new effective dates for the issuer and underwriter will provide and preserve important investor protections under the Securities Act. We believe that these modifications are appropriate to ensure issuer liability for information included in the registration statement at the time of the prospectus supplement filing.

**(C) Comments on Prospectus Supplements and New Effective Dates**

A number of commenters addressed the provisions providing for new effective dates of registration statements at the time of filing of prospectus supplements for takedowns off shelf registration statements.[471] Commenters supporting these proposals agreed that, as to shelf registration statement takedowns, the liability of issuers under Section 11 should be brought into line with the liability of underwriters.[472] A number of commenters were concerned with the liability of auditors, other experts, and outside directors that would arise under Section 11 as of the new effective date of the registration statement.[473] While some commenters believed that the Rule should provide that a new

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471 See, e.g., letters from ABA; AICPA; Alston, BDO Seidman; Deloitte; E & Y; KPMG; PwC; and SIA.

472 See, e.g., letters from ABA and SIA.

473 See, e.g., letters from ABA; AICPA; Alston, BDO Seidman; Deloitte; E & Y; KPMG; and PwC.

auditor's consent is not required in connection with the takedown and new effective dates, others believed that unless the Rule was clear that the takedown would not be a new effective date for auditors and other experts, we should require that consents of these experts be provided at the new effective date.[474]

We have revised Rule 430B in response to commenters' concerns about new effective dates as we discuss above. We believe that these changes should provide clarity for auditors, among others, that a new effective date for them is not created and that new consents and corresponding procedures are not required as a result of Rule 430B.

**iv. Amendments to Rule 415**

**(A) Elimination of Limitation on Amount of Securities Registered**

**(1) Revised Provisions**

Prior to today's amendments, Rule 415(a)(2) limited the amount of securities that could be registered where the registration statement pertained to offerings pursuant to Rule 415(a)(1)(viii), (ix), and (x). Rule 415(a)(2) limited the amount of securities that could be registered in these offerings to an amount which, at the time the registration statement became effective, was reasonably expected to be offered and sold within two years from the initial effective date of a registration statement.

For offerings under Rule 415(a)(1)(x) and continuous offerings under Rule 415(a)(1)(ix) in each case that are registered on Form S-3 or Form F-3, we are eliminating the provision in Securities Act Rule 415(a)(2) that limits the amount of

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474 One commenter expressed concern that requiring an auditor to give a consent before a shelf takedown would impose undue delays on the offering process. See letter from ABA. The commenter noted that, although auditor "bring-down" procedures are customary in connection with a comfort letter, these procedures currently do not delay pricing.

securities registered. The two-year limitation was designed to ensure that the issuer had a bona fide intention to offer and sell securities in the proximate future.[475] We are eliminating this requirement for these offerings because we do not believe that it provides any significant investor protection.[476]

However, under the amendments to Rule 415 we are adopting today, that shelf registration statement can only be used for three years (subject to a limited extension) after the initial effective date of the registration statement.[477] Under the revised rule, new shelf registration statements must be filed every three years, with unsold securities and fees paid thereon allowed to be included on the new registration statement, where the shelf registration statement relates to:

- offerings registered on an automatic shelf registration statement; or
- offerings of securities described in Rule 415(a)(vii), (ix), or (x).[478]

Automatic shelf registration statements are immediately effective, as discussed below. In other cases, as long as the new shelf registration statement is filed within three years of the original effective date of the old registration statement the issuer may

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475 See Securities Act Section 6(a) [15 U.S.C. 77f(a)] and Proposed Revision of Regulation S-K and Guides for the Preparation and Filing of Registration Statements and Reports, Release No. 33-6276 at Part III.E (Dec. 23, 1980) [46 FR 78].

476 We are retaining the limitation for business combination transactions registered under Rule 415(a)(viii) and continuous offerings under Rule 415(a)(ix) that are not registered on Form S-3 or Form F-3.

477 The rules adopted today do not limit the amount that can be registered and provide for unused amounts to be carried forward.

478 In the Proposing Release we sought comment on whether Rule 415(a)(1)(vii), which permits shelf offerings of mortgage related securities, should be eliminated. We have decided to retain Rule 415(a)(1)(vii), but have also determined that the requirement of a new shelf registration statement every three years should apply to offerings of these securities.

continue to offer and sell securities from the old registration statement for up to six months thereafter until the new registration statement is declared effective.[479] Prior to effectiveness of the new registration statement (including at the time of filing for an automatic shelf registration statement), the issuer can amend the later registration statement to include any securities (and fees attributable to such securities) remaining unsold on the older registration statement. We believe that allowing issuers to continue to offer and sell securities off the old registration statement for an additional six months after filing the new registration statement pending effectiveness of the new registration statement, and then including any securities remaining unsold on the new registration statement, will preserve the ability of these issuers to continue to use their shelf registration statements to access the capital markets. The additional six-month time period will not impact adversely our decision to have new shelf registration statements filed every three years. In addition, continuous offerings begun prior to the end of the three years can continue on the old registration statement until the effective date of the new registration statement if they are permitted to be made under the new registration statement.

We believe that, especially with our liberalization of procedures for shelf registration, particularly automatic shelf registration as described below, the precise contents of shelf registration statements may become difficult to identify over time, and that markets will benefit from a periodic updating and consolidation requirement.[480] The

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479 The six-month extension does not apply to automatic shelf registration statements, since they will go effective immediately upon filing. See discussion in Section V.B.2 below under "Automatic Shelf Registration for Well-Known Seasoned Issuers."

480 See, for example, our revisions to Securities Act Rule 412 to permit information

new registration statement will include the disclosures then required under the applicable form and our rules.

**(2) Comments on Elimination of Limitation on Amount of Securities Registered**

Commenters supported most of the proposed changes to Rule 415.[481] Some commenters were concerned that the requirement to file a new shelf registration statement every three years could result in a blackout period between the end of the three years and effectiveness of the new registration statement, during which issuers could not continue to sell securities off their old registration statements.[482] As noted above, we are maintaining the three-year requirement, but we are allowing the issuer to continue to offer and sell securities off its old registration statement until the earlier of the effectiveness of the new registration statement or six months after the timely filing of the new registration statement. We believe that this provision will eliminate any inappropriate blackout periods.

**(B) Immediate Takedowns From a Shelf Registration Statement Filed Under Rule 415(a)(1)(x)**

We are amending Securities Act Rule 415(a)(1)(x), as proposed, to allow primary offerings on Form S-3 or Form F-3 to occur immediately after effectiveness of a shelf

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in registration statements and prospectuses to be modified or superseded by subsequently filed Exchange Act reports and prospectus supplements and our amendments to Forms S-3 and F-3 to permit most information to be included in the prospectus through incorporation by reference.

481 See, e.g., letters from Brinson Patrick; NYCBA; and NYSBA.

482 See, e.g., letters from ABA; Alston; BRT; NYCBA; S & C; and SIA. One commenter suggested a five-year, rather than a three-year, time period to file a new automatic registration statement. See letter from NYCBA.

registration statement.[483] With respect to immediate offerings from an effective registration statement, our current rules permit omission of information from the prospectus at the time of effectiveness only in reliance on Securities Act Rule 430A.[484] The changes we are adopting today affecting the treatment of prospectus supplements provides sufficient protection to investors to allow, in an immediate offering, omission of information under Rule 415 and Rule 430B.[485] Commenters on this provision expressed support for allowing immediate takedowns off of shelf registration statements in reliance on Rule 415.[486]

### (C) Eliminating "At-the-Market" Offering Restrictions for Seasoned Issuers

The restrictions on primary "at-the-market" offerings of equity securities currently set forth in Rule 415(a)(4) were adopted initially to address concerns about the integrity of trading markets.[487] As discussed in the Proposing Release, we are eliminating these restrictions for primary shelf eligible issuers because they are not necessary to provide protection to markets or investors. The market today has greater information about seasoned issuers than it did at the adoption of the "at-the-market" limitations, due to enhanced Exchange Act reporting. Further, trading markets for these issuers'

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483 See amendments to Securities Act Rule 415(a)(1)(x).

484 See Prospectus Delivery; Securities Transactions Settlement, Release No. 33-7168 (May 11, 1995) [60 FR 26604] at Section II.A.5.

485 Rule 430A continues to be available for immediate takedowns where the information omitted from a form of prospectus contained in the registration statement at the time of effectiveness omits only Rule 430A information. We are amending Rule 430A to enable the rule to be relied on by issuers using automatic shelf registration statements that go effective immediately.

486 See, e.g., letters from NYCBA and NYSBA.

487 17 CFR 230.415(a)(4). See Integrated Disclosure Release, note 23, at Section IV.B.2.d.

securities have grown significantly since that time. Requiring the involvement of underwriters and limiting the amount of securities that can be sold imposes artificial limitations on this avenue for these issuers to access capital. Under our revised Rule, an issuer that is registering a primary equity shelf offering pursuant to Rule 415(a)(1)(x) can register an "at-the-market" offering of equity securities without identifying an underwriter in its registration statement[488] and without a limitation on the amount of the offering. Issuers who are not eligible to register primary equity offerings using Rule 415(a)(1)(x) will still not be eligible to register "at-the-market" equity securities offerings. Commenters generally supported the removal of the restrictions on "at-the-market" offerings.[489]

**v. Rule 424 Amendments**

In conjunction with our other procedural rules, we are adopting certain companion modifications to Securities Act Rule 424. We are adding a separate new paragraph (b)(8) to Rule 424 for forms of final prospectuses not filed within the required timeframe under Rule 424. As we discuss below, this provision of Rule 424 will allow us to identify more readily final prospectuses not filed timely.[490] As noted above, we also are adding a separate new paragraph (b)(7) under Rule 424 for filing of prospectuses identifying selling security holders.

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488 Underwriters may, as in the case of other information, be included in the relevant prospectus supplement.

489 See, e.g., letters from Brinson Patrick; NYCBA; and NYSBA.

490 A prospectus filed under new paragraph (b)(8) will still be characterized as "required to be filed" under the paragraph originally applicable to it. For example, a form of prospectus required to be filed under paragraph (b)(2) but filed under paragraph (b)(8) will still trigger a new effective date as provided in Rule 430B.

Commenters supported the amendments to Rule 424.[491] Some commenters suggested additional revisions to Rule 424, including deleting references to paper copies[492] and defining the phrase "date it is first used.[493] We are adopting the changes to Rule 424 essentially as proposed.[494]

**vi. Elimination of Rule 434**

In the Proposing Release, we requested comment as to whether we should eliminate Rule 434 in its entirety.[495] The commenters who responded to this request believed that the Rule is superfluous and should be eliminated.[496] Because we believe that Rule 434 has been used only very rarely, and because our new rules regarding free writing prospectuses permit the use of written descriptions of the terms of the issuer's securities or of the offering, such as term sheets, under more flexible circumstances, we are eliminating Rule 434.[497]

**vii. Issuer Undertakings**

We are adopting conforming revisions to the issuer undertakings that are required in connection with a shelf registration statement. These revisions reflect the issuer's agreement regarding the inclusion of information contained in prospectus supplements in

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491 See, e.g., letters from Alston and NYSBA.

492 See, e.g., letters from Cleary and Davis Polk.

493 See, e.g., letter from NYSBA.

494 We have included in Rule 430B a provision regarding identification in prospectuses or prospectus supplements of Exchange Act reports filed to include certain omitted information in prospectuses and registration statements.

495 Rule 434 has permitted the use of term sheets in connection with certain offerings.

496 See letters from Cleary and Davis Polk.

497 We have made conforming changes to the rules that reference Rule 434.

registration statements and new effective dates of the registration statement on filing of a prospectus supplement.

**(A) Treatment of Information in Prospectus Supplements**

Item 512(a) of Regulation S-K currently requires an issuer that has registered securities pursuant to Rule 415 to undertake to file a post-effective amendment to the registration statement to:

- include in the registration statement any prospectus required by Securities Act Section 10(a)(3);
- reflect in a prospectus included in the registration statement any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereto) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement; and
- include in a prospectus included in the registration statement any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change in such information in the registration statement.[498]

Currently, shelf issuers can satisfy the first two of these obligations by filing Exchange Act periodic reports that are incorporated by reference into the registration statement. We are amending the Item 512(a) undertaking as proposed to clarify that, in shelf registration statements filed on Forms S-3 and F-3, all the disclosures required by this undertaking also may be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report, instead of only in

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498 In addition, Item 512(a)(4) contains a provision under which foreign private issuers are required include an undertaking regarding the updating of the financial and other information in a shelf prospectus in accordance with the age of financial statements provisions under Item 8.A of Form 20-F. We are not modifying this requirement. Foreign private issuers will continue to be subject to this updating requirement, by a post-effective amendment or by incorporation by reference, as currently provided for under Item 512(a)(4).

periodic reports, that an issuer files that is incorporated by reference into the registration statement.[499] As discussed below, we also are adopting as proposed the undertaking to allow automatic shelf issuers to include in this manner all other information that has been omitted from the base prospectus, subject in the case of a takedown of securities to the filing of a prospectus supplement. In the event that satisfaction of any element of the undertaking requires the filing by any of the permitted methods of a consent of an expert, that consent may be filed by post-effective amendment to Part II of the registration statement or by filing of an Exchange Act report, such as an annual report on Form 10-K or a report on Form 8-K or Form 6-K, that is incorporated by reference into the registration statement.[500]

**(B) Prospectus Supplements Deemed Part of a Registration Statement and New Effective Dates**

To reflect the issuer's understanding of and agreement to the changes described above regarding inclusion of prospectus supplements in registration statements and new effective dates, we are including a new undertaking in which the issuer will agree that, consistent with Rules 430B and 430C, information in prospectus supplements is deemed part of and included in registration statements and that, consistent with Rule 430B, new effective dates as to the issuer and underwriter will occur in respect of prospectuses related to certain shelf takedowns.[501] The new undertaking will assure that the issuer agrees that it has liability for information that is included in or deemed part of the

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499 This amendment will permit an issuer to use an incorporated Form 8-K (or incorporated Form 6-K) to satisfy this undertaking.

500 See Securities Act Rule 436.

501 See Rules 430B and 430C.

registration statement, that the liability of the issuer will be assessed as of the date such a prospectus supplement is deemed part of and included in the registration statement.[502]

Because closed-end management investment companies use Securities Act Rule 415 to make shelf offerings under certain circumstances and provide an undertaking similar to that required by Item 512(a) of Regulation S-K in their registration statements on Form N-2, we are including a new undertaking in Form N-2 similar to that which we are including in Item 512(a) of Regulation S-K.[503] We also are amending Rule 415 to clarify that investment companies filing on Form N-2 that use the Rule must provide the undertaking required by Form N-2, rather than the undertaking required in Item 512(a) of Regulation S-K.[504]

**c. Changes to Form S-3 and Form F-3**

In addition to adopting changes that will allow additional Form S-3 or Form F-3 disclosures to be included through prospectus supplements and Exchange Act reports, we are amending Form S-3 and Form F-3, as proposed, to expand the categories of majority-owned subsidiaries that will be eligible to register their non-convertible securities, other than common equity, or guarantees under General Instruction I.C. of Form S-3 or General Instruction I.A.5 of Form F-3. The permitted circumstances are the same as those provided for majority-owned subsidiaries to be well-known seasoned

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502 With regard to the liability of directors, persons signing registration statements, and experts, see the discussion in Section V.B.1. above under "Date of Inclusion of Prospectus Supplements in Registration Statements and New Effective Dates of Registration Statements."

503 Item 34.4.d and e of Form N-2. Form N-2 is the registration form used by closed-end management investment companies to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act.

504 See Rule 415(a)(3).

issuers.[505] We believe that this expansion is appropriate in that it recognizes the various types of subsidiary guarantees that may be employed in registered offerings of such non-convertible securities, other than common equity, of related entities. Whether information regarding the subsidiary will have to be included in the registration statement will depend, as today, on whether the subsidiary meets the conditions of Rule 3-10 of Regulation S-X and Exchange Act Rule 12h-5.

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

#### a. Overview

#### i. Rule Changes

In addition to the updating of the shelf registration process described above, we are adopting rules to establish a significantly more flexible version of shelf registration for offerings by well-known seasoned issuers. This version of shelf registration, which we refer to as "automatic shelf registration," involves filings on Form S-3 or Form F-3. The automatic shelf registration rules are in addition to the communications exemptions we are adopting today and will allow eligible well-known seasoned issuers substantially greater latitude in registering and marketing securities. The automatic shelf registration process will continue to enable the issuer, as with other shelf registrants, to take down securities off a shelf registration statement from time to time.[506] Automatic shelf registration is not mandatory; a well-known seasoned issuer may continue to file any

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505 See discussion in Section II.A. above under "Well-Known Seasoned Issuers."

506 As with other delayed shelf registration statements, the issuer will be considered to be in registration or offering its securities only when it offers securities in a takedown off its registration statement. See, e.g., the 2000 Electronics Release, note 96, at note 10.

other registration statement it is eligible to use or engage in any exempt offering or offerings of exempt securities available to it.[507]

For well-known seasoned issuers, we believe that the modifications we are adopting will facilitate immediate market access and promote efficient capital formation, without at the same time diminishing investor protection. Most significantly, the new rules will provide the flexibility to take advantage of market windows, to structure securities on a real-time basis to accommodate issuer needs or investor demand, and to determine or change the plan of distribution of securities as issuers elect in response to changing market conditions. We hope that providing these automatic shelf issuers more flexibility for their registered offerings, coupled with the liberalized communications rules we are adopting, will encourage these issuers to raise their necessary capital through the registration process.[508]

Under our automatic shelf registration process, eligible well-known seasoned issuers may register unspecified amounts of different specified types of securities on immediately effective Form S-3 or Form F-3 registration statements. Unlike other issuers registering primary offerings on Form S-3 or Form F-3, the automatic shelf registration

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507 Those other registration statements will not go effective immediately.

508 The flexibility permitted under the automatic shelf registration process will benefit issuers and investors by facilitating different types of offerings that issuers currently may elect to conduct on an unregistered basis. For example, this process will facilitate the registration under the Securities Act of rights offerings conducted by eligible foreign private issuers. At present, foreign private issuers frequently do not extend rights offerings to their U.S. security holders because the current registration process under the Securities Act does not accommodate the timing mechanics of rights offerings, which are typically announced and launched in a very short period of time. The ability of eligible foreign private issuers to use the automatic shelf registration process and to have a Securities Act registration statement become automatically effective so that sales in a rights offering can take place immediately after filing should encourage eligible foreign private issuers to

process allows eligible issuers to add additional classes of securities and to add eligible majority-owned subsidiaries as additional registrants after an automatic shelf registration statement is effective. They also can freely accommodate both primary and secondary offerings using automatic shelf registration. Thus, these issuers have significant latitude in determining the types and amounts of their securities or those of their eligible subsidiaries that can be offered without any potential time delay or other obstacles imposed by the registration process.

Issuers using an automatic shelf registration statement will be permitted, but not required, to pay filing fees at any time in advance of a takedown or on a "pay-as-you-go" basis at the time of each takedown off the shelf registration statement in an amount calculated for that takedown.

The rules as adopted also permit more information to be excluded from the base prospectus in an automatic shelf registration statement than from a regular shelf registration statement. The omitted information can then be included at or before the time of filing a prospectus supplement. The automatic shelf registration process, together with the loosening of the restrictions on communications, permits well-known seasoned issuers with maximum flexibility to use free writing prospectuses to structure transactions.

**ii. Comments on Automatic Shelf Registration**

Commenters strongly supported the concept of automatic shelf registration for well-known seasoned issuers.[509] Commenters also believed that automatic shelf

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extend rights offerings to U.S. security holders.

509 See, e.g., letters from ABA; Alston; BMA; Citigroup; Cleary; Davis Polk; Fried Frank; NYCBA; NYSBA; S & C; and SIA.

registration should be optional and, in addition, should allow issuers to control the timing of effectiveness of their registration statements, if they did not want immediate effectiveness.[510] A number of commenters on the procedural changes, while supporting the automatic shelf registration proposals for well-known seasoned issuers, believed that all seasoned issuers should be able to use certain of the elements of automatic shelf registration such as identification of selling security holders in prospectus supplements, omission of most information from base prospectuses, and addition of new securities and new registrants by automatically effective post-effective amendments.[511]

The rules we are adopting today continue to provide the greatest flexibility to well-known seasoned issuers. We have not expanded the automatic shelf provisions to other issuers.[512] As we discussed in the Proposing Release, we believe that limiting the benefits of automatic shelf registration to well-known seasoned issuers is appropriate, at this point, as these issuers have an established Exchange Act record and a significant following in the market. As we discuss above, we are directing the staff of the Division of Corporation Finance and OEA to undertake a study in three years after the full implementation of the rules as to the operation of the definition of well-known seasoned issuers.[513]

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510 See, e.g., letters from ABA and Cleary.

511 See, e.g., letters from ABA; Citigroup; Cleary; NYSBA; SIA; S & C; and TBMA.

512 As a result of the amendments to Rule 415 and the provisions of Rule 430B, seasoned issuers will have more flexibility in a number of respects, including in providing information in registration statements, including selling security holder information, conducting "at-the-market" offerings, and conducting immediate takedowns off of shelf registration statements.

513 See Section II.A.4 above under "Comments Regarding the Definition of Well-Known Seasoned Issuer."

We are not mandating that automatic shelf registration be used by any issuer meeting the conditions for being a well-known seasoned issuer and we are not modifying the immediate effectiveness provisions to permit a well-known seasoned issuer to defer effectiveness. Rather, well-known seasoned issuers may continue to file a registration statement on any form for which it is eligible if they either do not wish to file an automatic shelf registration statement or otherwise desire to delay the effective date of their registration statements.

**b. Automatic Shelf Registration Mechanics**

**i. Eligibility**

The automatic shelf registration procedure can be used in connection with registration statements on Form S-3 or Form F-3 for all primary and secondary offerings of securities of well-known seasoned issuers.[514] In general, securities of majority-owned subsidiaries of a well-known seasoned issuer parent can be included on the automatic shelf registration statement of the parent if the subsidiary satisfies the conditions for being considered a well-known seasoned issuer described above.[515] Under automatic shelf registration, as adopted, a registration statement can be amended by post-effective amendment to add an eligible subsidiary as an issuer.[516]

Under the rules we are adopting today, an issuer can file an automatic shelf registration statement if it meets the eligibility criteria for well-known seasoned issuer on the initial filing date. Thereafter, the issuer also must determine its eligibility at the time

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514 As today, business combination transactions, including exchange offers cannot be registered on Form S-3 or Form F-3. Automatic shelf registration is not available for Form S-4 or Form F-4.

515 See discussion in Section II.A above under "Well-Known Seasoned Issuers."

516 See discussion below at note 520.

of each amendment to its shelf registration statement for purposes of providing its update under Securities Act Section 10(a)(3) (or on the due date thereof). If an issuer is no longer eligible to use an automatic shelf registration statement at the time of its determination of eligibility, it will have to either post-effectively amend its registration statement onto the form it is then eligible to use or file a new registration statement on such a form. For example, a well-known seasoned issuer that is initially eligible for automatic shelf registration, that is not eligible at the time of its annual report filing, but that retains its eligibility to file a shelf registration statement under Rule 415 on Form S-3, can file a post-effective amendment or a new registration statement on Form S-3 that designates an amount of securities to be registered and otherwise complies with requirements for seasoned issuers that are not well-known seasoned issuers.

**ii. Information in a Registration Statement**

**(A) Information That May be Omitted From the Base Prospectus**

Our rules as adopted will allow well-known seasoned issuers using automatic shelf registration statements to omit more information from the base prospectus in an automatic shelf registration statement than is the case currently or than is the case in a regular shelf offering registration statement under new Rule 430B. A base prospectus included in an automatic shelf registration statement can, as today, omit information pursuant to Securities Act Rule 409 that is unknown and not reasonably available and, as adopted, can omit the following additional information:

- whether the offering is a primary or secondary offering;
- the description of the securities to be offered other than an identification of the name or class of the securities;
- the names of any selling security holders; and

- the disclosure regarding any plan of distribution.

Omitting this additional information from the base prospectus will not affect the information that an investor will be provided in connection with a particular sale.[517]

**(B) Mechanics for Including Information**

We believe that our new rules to broaden the means by which issuers may include information in an automatic shelf registration statement will benefit both issuers and investors. These new rules provide issuers with automatic shelf registration statements the ability to add omitted information to a prospectus by means of:

- a post-effective amendment to the registration statement;
- incorporation by reference from Exchange Act reports; or
- a prospectus or a prospectus supplement that would be deemed to be part of and included in the registration statement.[518]

Examples of the types of information that can be added in this manner for automatic shelf registration statements include:

- the public offering price;

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517 In shelf registration statements currently, base prospectuses generally do not contain certain information about particular securities offering takedowns. That information is communicated orally or through a preliminary prospectus and then reflected in a final prospectus filed pursuant to Rule 424. Under our new rules, it also will be permitted to communicate such information in free writing prospectuses. The automatic shelf expands the categories of information that may be omitted from the base prospectus. The right to omit information from a base prospectus does not affect the fact that under our interpretation and Rule 159 regarding Securities Act Sections 12(a)(2) and 17(a)(2), whether there are material misstatements or material omissions that make a communication misleading, in the circumstances in which it is made, is assessed on the basis of information conveyed at the time of sale, as discussed above.

518 The amendments permit any information required in the prospectus pursuant to Item 3 through Item 11 of Form S-3 and Item 3 through Item 5 of Form F-3 to be included in this manner by any one of these methods or a combination thereof. Rule 430B requires that the issuer file a prospectus supplement if the Exchange Act reports include the offering-related information.

- any updating information regarding the issuer (whether or not a fundamental change);
- detailed description of securities including information not contained or incorporated by reference in the base prospectus;
- the identity of underwriters and selling security holders; and
- the plan of distribution of the securities.

The principal exceptions to this complete flexibility will be that an issuer adding new types of securities[519] or new eligible issuers, including guarantors, and the securities they may issue to a registration statement must do so by post-effective amendment, which will be effective immediately upon filing.[520] New issuers and requisite officers and directors are required to be signatories to the post-effective amendment.[521]

**(C) Registration of Securities to be Offered**

An eligible well-known seasoned issuer may register on an automatic shelf registration statement an unspecified amount of securities to be offered, without indicating whether the securities are being sold in primary offerings or secondary

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519 See discussion in Section V.B.2 below under "Registration of Securities to be Offered."

520 Adding the issuer by post-effective amendment, including necessary signatures and information and filings necessary for qualification under the Trust Indenture Act of 1939 [15 U.S.C. 77aaa-bbbb] where applicable, ensures that the entity will be considered an issuer for purposes of Securities Act Section 11 for the securities covered by the registration statement. Information about the newly added subsidiary is required in the amended registration statement, either in a prospectus that is part of the registration statement or through incorporation by reference, unless the subsidiary is exempt from reporting pursuant to Exchange Act Rule 12h-5. The post-effective amendment also must include necessary opinions and consents. All disclosure items with regard to that new issuer can be incorporated by reference from the new issuer's Exchange Act filings, or be included in a prospectus supplement or a post-effective amendment.

521 See Securities Act Section 6 [15 U.S.C. 77f], and the discussion in Section V.B.2 below under "Registration of Securities to be Offered."

offerings on behalf of selling security holders. Issuers that are well-known seasoned issuers based only on their registered non-convertible security issuances can register on automatic shelf registration statements only non-convertible securities, other than common equity, unless they also are primarily eligible to use Form S-3 or Form F-3 for a primary offering because they have a public float of $75 million or more.[522] The calculation of registration fee table in the initial registration statement will not need to include a dollar amount or a specific number of securities, unless a fee based on an amount of securities is paid at the time of filing, but that table must at least list each class of security registered and indicate if the filing fee will be paid on a pay-as-you-go basis. The issuer can specify the number or dollar amount of securities in a prospectus supplement at the time it pays a fee in advance of or for each offering.[523]

The base prospectus in the initial registration statement must identify in general terms the names or classes of securities registered.[524] In addition, we are expanding the unallocated shelf procedure to allow automatic shelf issuers to register classes of securities without allocating the mix of securities registered between the issuer, its eligible subsidiaries, or selling security holders.[525] Allowing registration without

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522 See the discussion in Section II.A.3 above under "Well-Known Seasoned Issuers Securities Offerings."

523 See amendments to Securities Act Rules 413, 456(b), and 457(r) [17 CFR 230.413; 230.456(b), and 230.457(r)]. See also, Form S-3 -- General Instruction II.E and Instructions to the Calculation of Registration Fee Table.

524 One commenter suggested that the rule should not require issuers using automatic shelf registration statements to include a description of securities in the base prospectus. See letter from NYCBA. The proposal did not contemplate a detailed description and we are clarifying that only the identification of the names or classes of securities such as "debt," "common stock,""preferred stock," etc., is required.

525 See General Instruction II.E. of Form S-3 and General Instruction II.F. of Form

separately allocating the registered classes of securities will provide, we believe, greater flexibility to well-known seasoned issuers in conducting registered securities offerings.

We are adopting revisions to remove the current restriction that would prevent well-known seasoned issuers from adding classes of securities to an automatic shelf registration statement after effectiveness.[526] Under the amended rules, a well-known seasoned issuer can add new classes of securities or securities of an eligible subsidiary to an automatic shelf registration statement at any time before the sale of those securities. In order to add new classes of securities, an issuer must file a post-effective amendment, which will be immediately effective, to register an unspecified amount of securities of the new class of security.[527] This requirement will cause the registration statement to include

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F-3. Currently, an issuer offering securities on Form S-3 or Form F-3 is not required to specify the amount of each class of securities that it will offer, but it is required to separately register and designate the amount and classes of securities that may be offered and sold by eligible subsidiaries and selling security holders. Under our current rules, offerings for selling security holders are not considered delayed offerings under Rule 415(a)(1)(x) and thus must be separately registered or designated prior to effectiveness of the registration statement. Except under our new rules for well-known seasoned issuers, issuers cannot offer and sell securities of selling security holders using an unallocated shelf registration statement.

526 See amendments to Securities Act Rule 413 [17 CFR 230.413].

527 If an issuer using automatic shelf registration determines after effectiveness to add a class of debt securities or guarantees of securities to its registration statement, in addition to filing a post-effective amendment to the registration statement to register the class of debt securities or guarantees, it also needs to qualify all appropriate indentures under the Trust Indenture Act of 1939. The Division of Corporation Finance has long taken the position that the indenture covering the securities to be sold pursuant to a registration statement must be qualified when that registration statement becomes effective and not at the time of any post-effective amendment to that registration statement. See Division of Corporation Finance letter to Donald P. Spencer (available September 24, 1982). This position is consistent with the existing registration process and Securities Act Rule 413, which provides that an issuer must register an offering of additional securities through the use of a separate registration statement. In the automatic shelf registration process we are adopting today, however, an issuer is permitted

each new class of securities to be offered. An issuer can provide the disclosure about the new class of securities of the issuer in:

- a post-effective amendment to the registration statement;
- a prospectus supplement deemed part of and included in the registration statement; or
- an Exchange Act report that is incorporated by reference into the registration statement.[528]

**(D) Pay-as-You-Go Registration Fees**

**(1) Pay-as-You-Go Fee Rules**

We are adopting rules to permit, but not require, issuers using automatic shelf registration statements to pay filing fees at the time of a securities offering – commonly known as "pay-as-you-go" – or prior to that time. Under the new rules, for issuers electing to use the pay-as-you-go arrangement, the issuer will not have to pay any filing fee at the time of filing the initial registration statement.[529] We have eliminated the

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to add securities to a shelf registration statement by means of a post-effective amendment. As such, unlike in the current registration statement process, under our new rules the effectiveness of an automatic shelf registration post-effective amendment that adds securities to a shelf registration statement will be the time "when registration becomes effective as to such securit(ies)," as that term is used in Trust Indenture Act Section 309(a)(1). Accordingly, under the automatic shelf procedure, the Trust Indenture Act qualification requirement will be satisfied in the following manner: (1) for debt securities or guarantees included in the registration statement at original effectiveness, the trust indenture will be required to be included in the registration statement at the time that registration statement becomes effective; and (2) for debt securities or guarantees added to the registration statement through a post-effective amendment, the trust indenture will be required to be included in the registration statement at the time that post-effective amendment becomes effective.

528 This disclosure becomes part of the registration statement regardless of the method chosen to provide it.

529 Because an issuer can pay any filing fee, in whole or in part, in advance of a takedown, the rules as adopted provide flexibility in the timing of the fee payment. Issuers using pay-as-you-go can still deposit monies in an account for

requirement in the proposal to pay a nominal ($100) initial filing fee. The triggering event for a required fee payment is a takedown off a shelf registration statement. For each takedown, the issuer can file a prospectus supplement for the takedown that includes a calculation of registration fee table or can file a post-effective amendment including the same information. The rules provide that the issuer must pay the appropriate fee calculated in accordance with Securities Act Rule 457 within the time required to file the prospectus supplement pursuant to Rule 424, but provide an ability to cure a failure to pay the fee. The cure is available if the issuer made a good faith effort to pay the fee timely and then pays the fee within four business days of the original fee due date. The rules we are adopting today also require that the issuer file the prospectus supplement, including the fee table reflecting payment of the fee on the cover page, pursuant to Rule 424. In addition, at any time before one or more takedowns in the future (for example, in the case of a medium-term note program), the issuer can pay a filing fee in advance and file such a prospectus supplement with a fee table reflecting payment of the fee on the cover.[530]

**(2) Comments on Pay-as-You-Go Fees**

Commenters supported a pay-as-you-go filing fee approach.[531] Some commenters were concerned about the effect of an inadvertent failure to pay the filing fee in a timely

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payment of filing fees when due. As today, the fee rules applicable to the use of such account will apply. We are referring to this account as the "lockbox account." The amount of the fee will be calculated based on the fee schedule in effect when the money is withdrawn from the lockbox account. We are providing this flexibility for issuers, such as those with medium term note programs, to determine the fee payment approach most appropriate for them.

530 As we note above, issuers can use the lockbox account for the monies to be used to pay the fees.

531 See, e.g., letters from ABA; Cleary; S & C; and TBMA.

manner.[532] Commenters also believed that issuers should continue to be able to pay filing fees in advance of an offering.[533] Some commenters requested guidance on the time at which automatic shelf issuers using the pay-as-you-go system should calculate the amount of the filing fee.[534]

We have adopted the pay-as-you-go filing fee provisions substantially as proposed, but with certain modifications to address commenters' concerns. In response to commenters' concerns, we have provided a cure provision that will allow an issuer to pay a filing fee after its original payment due date if it made a good faith effort to pay timely and then paid the fee within four business days of the original fee due date. We also have clarified that automatic shelf issuers may use any of the methods available to pay their filing fees, including paying the filing fees in advance, or paying the filing fees on a pay-as-you-go basis. We have eliminated the initial fee requirement. As a result of this clarification and the cure provisions, we believe that we have addressed commenters' concerns in this area. With regard to the time when the amount of the filing fee is calculated, as today, the amount of the filing fee is calculated based on the fee schedule in effect at the time of payment (upon filing in advance, or at the time of a takedown) in accordance with the provisions of Rule 457. Thus, the fee amount may be different depending on the time of payment.[535]

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532 See, e.g., letters from Cleary and TBMA.

533 See, e.g., letters from NYSBA; S & C; and SIA.

534 See, e.g., letters from Cleary and TBMA.

535 Fees paid through the use of the lockbox account will be calculated at the time the money is withdrawn from the lockbox account to make the payment, not at the time the money is deposited into the lockbox account.

### (E) Registration under Securities Act Sections 5 and 6

As we discussed in the Proposing Release, under our new rules for automatic shelf registration, compliance with Securities Act Sections 5 and 6 is tied to the timing of the necessary filings and the content of the automatic shelf registration statement (including, as we have described, amendments, incorporated documents, and prospectus supplements). Securities Act Section 5 requires registration of each securities offering unless an exemption is available. Securities Act Section 6 governs how securities may be registered, including the filing of registration statements and the payment of filing fees. Any securities offered and sold off an effective automatic shelf registration statement will satisfy the requirements of Securities Act Section 5(c) if the registration statement, as amended if applicable, includes that class of securities and is filed prior to sale and will satisfy the requirements of Securities Act Section 5(a) if such registration statement, as amended if applicable, includes that class of securities and is effective prior to sale. The securities sold in the takedown will be registered for purposes of Securities Act Section 6 if:

- the class of securities is included in the registration statement, which is signed as required; and
- the appropriate fee is paid as provided in our rules.

### (F) Immediate Effectiveness

Under the automatic shelf registration statement rules we are adopting today, all automatic shelf registration statements and post-effective amendments thereto will become effective immediately upon filing.[536] In addition, we are adopting the proposed amendments to Securities Act Rule 401(g) to provide that an automatic shelf registration

statement will be deemed to be filed on the proper form unless we notify the issuer after filing of our objection to the use of such form.[537] Therefore, until an issuer is notified by us, it can conduct offerings with certainty that it has registered the securities on the proper form. After we notify an issuer of our objection, the issuer cannot proceed with subsequent offerings (those offerings not in progress), unless it amends the registration statement to the proper form, or otherwise resolves the issue with us. If we notify an issuer that it is ineligible to use an automatic shelf registration statement, securities sold prior to our notification will not have been sold in violation of Section 5. For ongoing offerings, the issuer, once notified by us, will promptly have to file a post-effective amendment or a new registration statement to reflect that it is not an automatic shelf registration statement. Pending effectiveness of the post-effective amendment or a new registration statement, the ongoing offering could continue if such offering is permitted by the post-effective amendment or new registration statement.

Immediate effectiveness of automatic shelf registration statements will not raise, we believe, significant investor protection concerns. As with shelf registration statements today, most, if not all, information about the issuer is included in shelf registration statements through incorporation by reference of Exchange Act reports. Such shelf registration statements permit issuers to sell securities off the shelf registration statement

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536 See Rule 462(e) and (f).

537 We are delegating our authority to object and to notify the issuer to the Division of Corporation Finance.

One commenter supported the change to Rule 401 that provides that automatic shelf registration statements will be deemed to be filed on the proper form unless we notify the issuer of our objection. See letter from Alston. Of course this provision does not affect the issuer's responsibility to assess its eligibility as a well-known seasoned issuer on the relevant determination date.

without previous staff review of each offering.[538] We expect issuers to evaluate disclosure or accounting issues in Exchange Act filings before filing registration statements, including automatic shelf registration statements, and at the time of filing incorporated Exchange Act reports. Because we believe it is important that issuers address unresolved staff comments as part of its evaluation of these issues, we are adopting, as we discuss below, substantially as proposed the requirement for accelerated filers and well-known seasoned issuers to disclose written staff comments received 180 days before an issuer's fiscal year end that the issuer believes are material and that have remained unresolved at the time of filing of the Form 10-K or Form 20-F.[539]

**(G) Duration**

An automatic shelf registration statement will become effective immediately and will cover an unspecified amount of securities. The open-ended nature of such registration statements could result in a large number of post-effective amendments. We are, therefore, adopting as proposed a requirement for issuers to file new automatic shelf registration statements every three years that will, in effect, restate their then-current registration statement and amend it, as they deem appropriate. As adopted, issuers will be prohibited from issuing securities off an automatic shelf registration statement that is more than three years old. Our rules provide, however, that, so long as eligibility for

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538 The staff of the Division of Corporation Finance will continue to review, upon request, prospectus supplements involving novel and unique securities offerings that are submitted to them prior to the offering.

539 See amendments to Form 10-K and Form 20-F. We recently began publicly releasing, not less than 45 days after the staff has completed a filing review, staff comment letters and response letters relating to disclosure filings made after August 1, 2004 that are selected for review. See SEC Press Release 2005-72 (May 9, 2005). See discussion in Section VII.B below under "Disclosure of Unresolved Staff Comments."

automatic shelf registration is maintained, the new registration statement will be effective immediately and will carry forward to the new registration statement, at the issuer's election, either any unused fees paid or unsold securities registered and fees paid attributable to such registered securities under the old registration statement. As a result, an issuer's securities offerings under the registration statement can be uninterrupted.[540]

### 3. Unseasoned Issuers and Non-Reporting Issuers

#### a. Overview

We are adopting as proposed procedural changes that will affect reporting issuers that are not seasoned issuers. These include:

- expanding the circumstances under which issuers may incorporate information from their Exchange Act reports into their Securities Act registration statements;[541] and
- eliminating Form S-2 and Form F-2.

The provisions of Rule 430C also apply to prospectuses and prospectus supplements used in offerings by non-reporting issuers and unseasoned reporting issuers.[542]

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540 We are adopting a similar requirement for non-automatic shelf issuers but are providing an additional six-month timeframe for such issuers to have their non-automatic shelf registration statements declared effective. See discussion in Section V.B.1. above under "Elimination of Limitation on Amount of Securities Registered."

541 See amendments to Form S-1 and Form F-1.

542 See discussion in Section V.B.1 above under "Information Deemed Part of Registration Statement."

### b. Amendments to Form S-1 and Form F-1 – Expanded Use of Incorporation by Reference

#### i. Eligibility

As we stated in the Proposing Release, as part of our initiatives to integrate further the Exchange Act and the Securities Act, we are adopting as proposed amendments to Form S-1 and Form F-1 to permit a reporting issuer that has filed at least one annual report and that is current in its reporting obligation under the Exchange Act to incorporate by reference into its Form S-1 or Form F-1 information from its previously filed Exchange Act reports and documents. Successor registrants can incorporate by reference if their predecessors were eligible.[543] In a change from the proposals, only the following issuers will not be able to incorporate by reference into a Form S-1 or Form F-1:

- reporting issuers who are not current in their Exchange Act reports; [544]
- issuers who are, or were or any of whose predecessors were during the past three years:
  - blank check issuers;
  - shell companies (other than business combination related shell companies); or
  - issuers for offerings of penny stock.

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543 This is the same as has been the case for Form S-2 and Form F-2. The succession will either have to be primarily for the purpose of changing the state or jurisdiction of incorporation of the issuer or because all of the predecessor issuers were eligible at the time of the succession and the issuer continues to be eligible.

544 To be current in its reporting obligations under the Exchange Act, at the time of filing the registration statement, the issuer must have filed all materials required to be filed pursuant to Exchange Act Sections 13, 14, or 15(d) during the preceding 12 calendar months (or for such shorter period that the issuer was required to file such materials).

In addition, as proposed, to enhance the availability to investors of incorporated information, the ability to incorporate by reference is conditioned on the issuer making its incorporated Exchange Act reports and other materials readily accessible on a web site maintained by or for the issuer. By conditioning the ability to incorporate by reference on the ready accessibility of an issuer's incorporated Exchange Act reports and other materials on its web site, we are providing investors the ability to obtain the information from those reports and materials at the same time that they would have been able to obtain the information if it was set forth directly in the registration statement. Issuers may satisfy this condition by including hyperlinks directly to the reports or other materials filed on EDGAR or on another third-party web site where the reports or other materials are made available in the appropriate time frame and access to the reports or other materials is free of charge to the user.[545]

**ii. Procedural Requirements**

Under the amendments we are adopting today, the prospectus in the registration statement at effectiveness must identify all previously filed Exchange Act reports and materials, such as proxy and information statements, that are incorporated by reference. There will be no permitted incorporation by reference of Exchange Act reports and materials filed after the registration statement is effective – known as "forward incorporation by reference." Under the amended Forms, an issuer eligible to incorporate by reference its Exchange Act reports and other materials into its Securities Act

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545 This manner of access is similar to that provided for disclosure of web site access to an accelerated filer's Exchange Act reports. See Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web Site Access to Reports, Release No. 33-8128 (Sept. 5, 2002) [67 FR 58480] at part II.D.3.

registration statement must include the following in the prospectus that is part of the registration statement:

- a list of the incorporated reports and materials;
- a statement that it will provide copies of any incorporated reports or materials on request;
- an indication that the reports and materials are available from us through our EDGAR system or our public reference room;
- identification of the issuer's web site address where such incorporated reports and other materials can be accessed; and
- required disclosures regarding material changes in or updates to the information that is incorporated by reference from an Exchange Act report or other material required to be filed.

**iii. Comments on Form S-1 and Form F-1 Amendments**

Commenters on this aspect of the proposals strongly supported the changes to allow issuers to incorporate by reference historical filings into Forms S-1 and F-1.[546] Some commenters suggested that Form S-1 and Form F-1 should allow forward incorporation by reference as well for filings made after effectiveness of a registration statement.[547] Some commenters did not believe that issuers should, as a condition to incorporating by reference into their Forms S-1 or F-1, be required to make their Exchange Act reports and other materials readily accessible on their web sites.[548]

As we discuss above, we have adopted the proposals substantially as proposed. We have narrowed the categories of ineligible issuers that can use incorporation by reference because the amended provisions still permit only incorporation of previously

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546 See, e.g., letters from Alston; BDO Seidman; Cleary; Davis Polk; and E & Y.

547 See, e.g., letters from ABA; Alston; Cleary; Davis Polk, and NYCBA.

548 See, e.g., letters from ABA; E & Y; and NYSBA.

filed reports. Because the purpose of the proposal was not to extend short-form registration to all reporting issuers, but to further integrate disclosures under the Securities Act and Exchange Act without impacting investor protection, we have not adopted the suggestion that Form S-1 and Form F-1 permit "forward incorporation by reference" of Exchange Act reports that are filed in the future. As adopted, we also are retaining the condition that the reports and other materials that are incorporated by reference must be readily available and accessible on a web site maintained by or for the issuer and containing issuer information.

**c. Elimination of Form S-2 and Form F-2**

As we discussed in the Proposing Release, the purposes underlying the disclosure and delivery requirements of Form S-2 and Form F-2 are to minimize duplicative reporting, while still requiring that the incorporated information be delivered with the prospectus. It appears that the premises underlying Form S-2 and Form F-2 have become outdated in view of the introduction of EDGAR, other technological developments, and the rapid dissemination of information in the market. Also, these forms have not been widely used, particularly for the purposes they were intended.[549] Expanding the types of issuers that may incorporate by reference through our amendments to Form S-1 and Form F-1, without requiring delivery of the incorporated documents (except on request), makes Form S-2 and Form F-2 superfluous. Several commenters supported the elimination of Form S-2 and Form F-2.[550] We are, therefore, rescinding Form S-2 and Form F-2.[551]

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549 According to data obtained from our internal Filing Activity Tracking System, from 2001 to 2004, a total of 10 Forms F-2 were filed by 9 different issuers and a total of 253 Forms S-2 were filed by 153 different issuers.

550 See, e.g., letters from ABA; Alston; BDO Seidman; E & Y; NYCBA; and NYSBA.

## VI. Prospectus Delivery Reforms

### A. Current Prospectus Delivery Requirements

The Securities Act requires delivery of a prospectus meeting the requirements of Securities Act Section 10(a), known as a "final prospectus," to each investor in a registered offering.[552] After the effective date of a registration statement, a written communication that offers a security for sale or confirms the sale of a security may be provided if a final prospectus is sent or given previously or at the same time. Otherwise, such a communication is a prospectus and may not be provided unless it meets the requirements of Securities Act Section 10(a).[553] A written confirmation is not designed to meet these requirements. Therefore, a final prospectus must accompany or precede a written confirmation. In addition, Securities Act Section 5(b)(2) makes it unlawful to deliver a security "unless accompanied or preceded" by a final prospectus.

Under these requirements, in the current system, if no preliminary prospectus or written selling materials are distributed, the final prospectus is the only prospectus received by investors. However, an investor's purchase commitment and the resulting contract of sale of securities to the investor in the offering generally occur before the final prospectus is required to be delivered under the Securities Act. Moreover, for sales

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551 We also are amending Forms S-4 and F-4 to delete the references to Forms S-2 and F-2.

552 Congress intended that the prospectus provide investors with "the means of understanding the intricacies of the transaction…." H.R. Rep. No. 85, 73rd Cong., 1st Sess. 8 (1933).

553 The term "prospectus," as defined in Securities Act Section 2(a)(10), includes any written communication that "offers a security for sale or confirms the sale of any security; except that . . . a communication provided after the effective date of the registration statement . . . shall not be deemed a prospectus 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" is sent or given.

occurring in the aftermarket, as a result of our rules, investors in securities of reporting issuers generally are not delivered a final prospectus.[554] Accordingly, the greatest utility of a final prospectus may be as a document that informs and memorializes the information for the aftermarket. Actual delivery to purchasers is not necessary to satisfy this purpose.[555]

We have previously adopted a number of other rules to address prospectus delivery in primary offerings and secondary market transactions. Securities Act Rule 153 addresses delivery of final prospectuses in transactions between brokers taking place over a national securities exchange. Securities Act Rule 434 was intended to ease the burden of prospectus delivery within the T+3 settlement cycle by permitting delivery of a final prospectus to be made in multiple documents at different intervals in the offering process.[556]

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554 For non-reporting issuers who are listed, as of the offering date, on a national securities exchange or automated quotation system, we require that prospectuses be delivered for 25 days after the offering date. See Securities Act Rule 174(d) [17 CFR 230.174(d)].

555 Professor Louis Loss has noted that "[a] prospectus that comes with the security does not tell the investor whether or not he or she should buy; it tells the investor whether he has acquired a security or a lawsuit." L. Loss & J. Seligman, Securities Regulation, §2-b-3 (3d ed. 2001). See also Cohen, Truth in Securities Revisited, 79 Harv. L. Rev.1340, note 20, at 1386 (criticizing the requirement that a final prospectus be delivered after an investment decision is made and noting that information essential to a transaction should, to the extent practicable, be required to be provided in time for use in an investment decision). The final prospectus also can be a basis for liability claims under Securities Act Section 12(a)(2).

Our interpretation set forth above and in the Proposing Release and Rule 159 as adopted also provide that liability under Section 12(a)(2) is assessed based on the information conveyed at the time of the contract of sale.

556 As part of our actions today, we are eliminating Rule 434 because it has been used extremely infrequently and we believe that with the new rules it is no longer necessary.

Many of our recent rulemakings to improve the content and timing of a reporting issuer's Exchange Act filings, together with the communications and procedural changes we are adopting today, are aimed at providing more information to investors at the time they commit to purchase a security. As we discussed in the Proposing Release, the increase in the flow of current information about a reporting issuer and the ability of offering participants to use free writing prospectuses in connection with offerings will give offering participants a greater ability to provide information to investors about the securities at that time. Further, rapid technological advances in the area of information delivery have resulted in greater access to information. For example, prospectuses and other filings now are available through EDGAR and other electronic sources, including the Internet, immediately upon filing.[557]

### B. Prospectus Delivery Revisions

We are adopting revisions to the prospectus delivery requirements. Our new and amended rules are intended to facilitate effective access to information, while taking into account advancements in technology and the practicalities of the offering process. These changes are intended to alleviate timing difficulties that may arise under the current securities clearance and settlement system, and also to facilitate the successful delivery of, and payment for, securities in a registered offering.

As we discussed in the Proposing Release, given that the final prospectus delivery obligations generally affect investors only after they have made their purchase commitments and that investors and the market have access to the final prospectus upon its filing, we believe that delivery obligation should be able to be satisfied through a

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[557] Paper copies also remain available through our Public Reference Room, 100 F

means other than physical delivery. Because the contract of sale has already occurred, we also believe that delivery of a written confirmation and the delivery of the final prospectus need not be linked.

Many commenters and market participants have encouraged us to adopt an "access equals delivery" model for final prospectus delivery.[558] Under such an "access equals delivery" model, investors are presumed to have access to the Internet, and issuers and intermediaries can satisfy their delivery requirements if the filings or documents are posted on a web site. The access concept is premised on the information or filings being readily available.

At this time, we believe that Internet usage has increased sufficiently to allow us to adopt a final prospectus delivery model for issuers and their intermediaries that relies on timely access to filed information and documents.[559] Issuers, brokers, and dealers can satisfy their final prospectus delivery obligations if a final prospectus is or will be on file with us within the time required by the new rules, including the cure period.

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Street, N.E., Washington, DC 20549.

558 Commenters on prospectus delivery aspects of the 2000 Electronics Release indicated support for some sort of "access equals delivery" model. See comment letters in File No. S7-11-00 from ACCA; NYCBA; SIA; and TBMA.

559 Internet usage in the United States has grown considerably since 2000 when we published our most recent interpretive guidance on the use of electronic media in securities offerings, including with regard to prospectus delivery by electronic means. For example, recent data indicates that 75% of Americans have access to the Internet in their homes, and that those numbers are increasing steadily among all age groups. See, Three out of Four Americans Have Access to the Internet, Nielsen//NetRatings, March 18, 2004; Robyn Greenspan, Senior Surfing Surges, ClickZNetwork, Nov. 20, 2003 (citing statistics from Neilsen/NetRatings and Jupiter Research). In addition, there is evidence suggesting that the "digital divide" is diminishing. See, for example, Kristen Fountain, Antennas Sprout, and a Bronx Neighborhood Goes Online, The N.Y. Times, June 10, 2004 at G8; and Steve Lohr, Libraries Wired, and Reborn, The N.Y. Times, Apr. 22, 2004 at G1.

As adopted, the new and amended rules will:

- eliminate the existing link between delivery of the final prospectus and the delivery of a written confirmation of sale;
- provide that the obligation to have a final prospectus precede or accompany a security for sale can be satisfied by filing the final prospectus with us within the relevant timeframe provided by Rule 424(b);
- permit written notices of allocations; and
- permit the prospectus delivery obligations in dealer transactions during any prospectus delivery period and in broker or dealer transactions on exchanges, facilities of exchanges, and alternative trading systems to be satisfied if the final prospectus has been or will be filed with us.

### 1. Access Equals Delivery

#### a. Rule 172

#### (i) Scope of Rule

We are adopting new Rule 172 with some refinements from the proposals to implement our access equals delivery model.[560] Under Rule 172(b), as adopted, a final prospectus will be deemed to precede or accompany a security for sale for purposes of Securities Act Section 5(b)(2) as long as the final prospectus meeting the requirements of Securities Act Section 10(a) is filed or the issuer will make a good faith and reasonable effort to file it with us as part of the registration statement within the required Rule 424 prospectus filing timeframe.[561]

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560 This prospectus delivery model is in addition to Rules 153 and 174, as we are amending those rules. See discussion in Section VI.B.3 below under "Transactions Taking Place on an Exchange or Through a Registered Trading Facility – Rule 153" and in Section VI.B.4 below under "Aftermarket Prospectus Delivery – Rule 174."

561 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).

Our "access equals delivery" model will continue to satisfy the principal statutory purposes of final prospectus delivery while recognizing the need to modernize the obligations in view of technological and market structure developments.[562]

**(ii) Comments on Rule 172**

Most commenters supported the proposals that would deem the final prospectus delivery requirements satisfied through the filing of the final prospectus with the Commission.[563] Some commenters believed that the "access equals delivery" concept should extend to delivery obligations for preliminary prospectuses in initial public offerings as well as those applicable to proxy statements and other documents.[564] One commenter was concerned that an access equals delivery method for providing information would not provide older persons with the information they needed for their investment decisions.[565]

A number of commenters were concerned about the condition to the proposed rule that the final prospectus would have to be on file with the Commission within the time frame required under Securities Act Rule 424.[566] The commenters were concerned about retroactive violations of Section 5 if underwriters or dealers sent written confirmations and then the issuer failed to file the final prospectus within the required time frame.

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562 We are not amending Exchange Act Rule 15c2-8(d), which requires broker-dealers to take reasonable steps to comply promptly with written requests for copies of the final prospectus.

563 See, e.g., letters from ABA; Alston; ASF; BRT; Cleary; Davis Polk; Fried Frank; Goldman Sachs; ICI; Intel; Lindsay Kassof; Merrill Lynch; NYCBA; NYSBA; PEG; S & C; SCSGP; SIA; and TBMA.

564 See, e.g., letters from BRT and Cleary.

565 See letter from the American Association of Retired Persons ("AARP").

566 See, e.g., letters from Citigroup; Cleary; CSFB; Fried Frank; Goldman Sachs; Merrill Lynch; Morgan Stanley; NYSBA; and PEG.

These commenters recommended including a cure provision in the Rule. Other commenters recommended eliminating this condition entirely and instead relying on Commission enforcement actions as the penalty for issuers failing to timely file final prospectuses.[567]

As we note above, we have adopted Rule 172 to continue to cover only delivery of final prospectuses. We do not currently believe that extension of access equals delivery is appropriate for preliminary prospectus delivery obligations in initial offerings because we believe that it is important for potential investors to be sent the preliminary prospectus.

We have, however, revised the Rule in response to commenters' concerns about the filing condition. As adopted, we have provided that the filing condition is satisfied if the issuer makes a good faith and reasonable effort to file the prospectus within the timeframe required by Rule 424. We have included a cure provision that allows the issuer an ability to cure an unintentional failure to file if it has made such a good faith and reasonable effort to comply with the filing condition and files the prospectus as soon as practicable after discovery of the failure to file. We believe that these revisions to the Rule will address commenters' concerns regarding retroactive violations of Section 5 due to an issuer's failure to timely file the final prospectus.[568] We also have provided new paragraph (b)(8) of Rule 424 under which the issuer will file a form of prospectus that is not timely filed. We also have provided that the filing condition does not apply to

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567 See, e.g., letters from ABA and SIA. Some commenters requested that we provide an interpretation of the applicability of the Electronic Signature in Global and National Commerce Act ("E-Sign") to the Securities Act prospectus delivery requirements. See, e.g., letters from ABA and S & C.

568 We believe that the filing condition remains a central component of the access

transactions by dealers requiring delivery of a final prospectus pursuant to Securities Act Section 4(3).

**b. Exceptions to the Rule**

We have excluded certain types of offerings from the Rule as adopted because either they do not raise the same issues as in corporate capital formation transactions or they are already subject to rules unique to their offerings. For example, in offerings made pursuant to Form S-8, the final prospectus is never filed with us and thus, these offerings do not raise the same types of issues as other capital formation transactions. Business combination transactions and exchange offers also differ from other types of offerings registered under the Securities Act because the proxy rules and tender offer rules in conjunction with state law impose informational and delivery requirements in those transactions. The information contained in the final prospectus, therefore, will be delivered regardless of the Securities Act's requirements. Moreover, it is important to retain consistency among the various rules and regulations applicable to these business combination transactions and exchange offers.[569]

Finally, registered investment companies and business development companies will not be able to rely on the Rule. These entities are subject to a separate framework governing communications with investors, and we believe that it would be more appropriate to consider any changes to our prospectus delivery requirements as they

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equals delivery construct.

569 Securities Act Rule 162 provides, however, a final prospectus delivery exemption in certain registered exchange offers subject to Exchange Act Rules 13e-4(e) [17 CFR 240.13e-4(e)] or 14d-4(b) [17 CFR 240.14d-4(b)].

apply to registered investment companies and business development companies in the context of a broader reconsideration of this framework.[570]

**c. Notification**

**(i) Rule 173**

In addition to providing access to information, prospectus delivery can serve the function of informing investors that they purchased securities in a registered transaction. This notification will provide investors the ability to trace their purchases for purposes of asserting their rights under the liability provisions of the federal securities laws. To preserve this investor protection function, we are adopting Rule 173 substantially as proposed. Rule 173 addresses each transaction involving:

- a sale by an issuer or an underwriter to a purchaser; and
- a sale in which the final prospectus delivery requirements apply.

Rule 173 provides that, in these transactions, each underwriter or dealer participating in a registered offering (or, if the sale was effected by the issuer and not by or through an underwriter or dealer, then the issuer) must provide to each purchaser from it, not later than two business days after the completion of the sale, a copy of the final prospectus or, in lieu of the final prospectus, a notice providing that the sale was made pursuant to a registration statement or in a transactions in which a final prospectus would have been required to have been delivered in the absence of Rule 172.

The Rule also provides that an investor can request a final prospectus. Under the Rule, a requested final prospectus does not have to be provided before settlement.[571]

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570 Although some commenters wanted us to expand the categories of issuers to whom Rule 172 would apply, we are not doing so at this time. See, e.g., letters from ABA; Allied; and Cleary.

Rule 173, as adopted, provides that compliance with Rule 173 is not a condition to reliance on Rule 172 to satisfy final prospectus delivery. Accordingly non-compliance with Rule 173 will not result in a violation of Securities Act Section 5. Rule 173 is, however, an important component of the prospectus delivery modifications we are adopting today.

As adopted, the same offerings excluded pursuant to Rule 172, as discussed above, also are excluded from this notification provision.[572] We also have revised Rule 173 to exclude transactions solely between brokers or dealers in reliance on Rule 153.

**(ii) Comments on Rule 173**

Commenters suggested certain clarifications to proposed Rule 173 including providing a cure provision for failure to provide the required notification,[573] eliminating required compliance with Rule 173 for aftermarket sales covered by Rule 174,[574] and providing that compliance with Rule 153 would be deemed compliance with Rule 173.[575] One commenter also requested that we confirm that the Rule 173 notification may be included in Rule 10b-10 confirmations.[576]

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571 The final prospectus also can be comprised of a set of documents which, taken together, satisfy the information requirements of Securities Act Section 10(a). See discussion in Section V.B.1 above under "Information Deemed Part of Registration Statement."

572 In addition, as a result of the operation of Rule 172 and Rule 173, if a current final prospectus is filed with us, final prospectuses will no longer be required to be delivered in connection with market-making transactions by dealers affiliated with issuers.

573 See, e.g., letter from TBMA.

574 See, e.g., letter from Goldman Sachs.

575 See, e.g., letter from Brinson Patrick.

576 17 CFR 240.10b-10. See, e.g., letter from CSFB.

We have adopted Rule 173 substantially as proposed. We have made clear that Rule 173 does not apply to transactions between dealers or brokers in reliance on Rule 153, but it continues to apply to the transaction between the broker or dealer and the underlying purchaser on whose behalf or for whose account the transaction is effected. We believe that it is important that purchasers in registered offerings are notified that they have acquired their securities in the registered transaction and so we also have not taken commenters' suggestions to eliminate compliance with the Rule for aftermarket sales. The Rule 173 notification can be sent separately or can be included in a Rule 10b-10 confirmation.

### 2. Written Confirmations and Notices of Allocations

We are adopting Rule 172(a), substantially as proposed, to provide an exemption from Securities Act Section 5(b)(1) that allows written confirmations and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus.[577] The exemption is conditioned on the registration statement being effective and the final prospectus meeting the requirements of Securities Act Section 10(a) being filed with us.[578] The exemption permits:

- written confirmations containing information limited to that called for in Exchange Act Rule 10b-10 and other information customarily included in confirmations, including any notice provided pursuant to Rule 173; and
- written communications from an offering participant to a customer or from an underwriter to dealers in the selling group notifying them of the transaction and their allocations of securities in a registered offering.

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577 See Rule 172.

578 The exemption is in Rule 172 and is subject to the same prospectus filing and cure condition, as we have modified it, as described above.

Under the exemption, for example, broker-dealers could send e-mail notices after effectiveness to inform investors in a public offering of their allocations. Under the Rule as adopted, the notices of allocations may include the name of the securities, the CUSIP number, the amount allocated to the customer, the price of the securities, and the date or expected date of settlement and incidental information**.** Similar information is permitted in notices to participating dealers. The exemption is not available for the same offerings excluded from the prospectus delivery provision of the Rule discussed above.

One commenter suggested that the notice of allocation be permitted to included CUSIP numbers and also suggested that, especially for asset-backed securities, the notice of allocation should be expanded to permit communication of demand for securities and "price talk" or a communication of information regarding expected or actual allocation of classes of securities in order to facilitate an investment decision.[579] We have included specific reference permitting inclusion of a CUSIP number. However, we believe that the other information identified in this comment, if communicated in writing, should be the subject of a free writing prospectus. It is not an appropriate subject for a notice of allocation. The notice of allocation is intended to be a notice of actual allocation of securities to the investor or participating dealer to which the notice is provided.

### 3. Transactions Taking Place on an Exchange or Through a Registered Trading Facility – Rule 153

Securities Act Rule 153 addresses delivery of final prospectuses in transactions taking place between brokers over a national securities exchange; it does not currently apply to transactions on an automated quotation system, such as the Nasdaq Stock Market. Rule 153 provides that where members of the exchange are on both sides of the

transaction and the transaction is effected on that exchange, the Section 5 obligation to deliver a final prospectus before or with a security between the brokers will be satisfied if the issuer or underwriter delivers copies of the final prospectus to the exchange.[580] Rule 153 has limited utility today because it may be relied on only for transactions between brokers on an exchange. The difficulty in prospectus delivery that Rule 153 was designed to address – the difficulty or inability to identify the ultimate buyer – has expanded since 1936 with the rise in transactions effected on markets other than national securities exchanges, such as the Nasdaq Stock Market and alternative trading systems, the growth of the book-entry system, and street name holdings.[581] In addition, the paper-based system upon which Rule 153 is premised is outmoded and unnecessary due to electronic filings of final prospectuses on EDGAR and the technological resources of market members. There currently is no significance to the paper copies of prospectuses delivered to national securities exchanges.

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579 See letter from BMA-ABS.

580 Securities Act Rule 153 defines the phrase "preceded by a prospectus" as used in Securities Act Section 5(b)(2).

581 In connection with a proposed rulemaking in 1976, we solicited comment on extending the procedures available under Securities Act Rule 153 to transactions effected on the automated quotation system of a national securities association registered under Exchange Act Section 15A [15 U.S.C. 78oA], at least initially for Form S-8 transactions. See Effective Date of Amendments to Registration Statement and Possible Expansion of Definitional Rule, Release No. 33-5768 (Nov. 22, 1976) [41 FR 52701]. Two years later, these plans were deferred for further consideration due to lack of public interest and input at the time. See Effective Date of Amendments to Registration Statement and Expansion of Definition Rule, Release No. 33-5978 (Sep. 18, 1978) [43 FR 43725]. Many trading markets allow market participants to preserve their anonymity, thus making it difficult or impossible to identify the ultimate buyer. The growth in the book-entry system and the fact that most securities are held in street name exacerbates the problem.

As we stated in the Proposing Release, we believe it is important, therefore, to amend Rule 153. Under the amendments we are adopting today, brokers or dealers effecting transactions on a registered exchange, through a trading facility of a registered national securities association, or through a registered alternative trading system will be deemed to satisfy their prospectus delivery obligations under Securities Act Section 5(b)(2) with regard to transactions in securities if:

- the issuer has filed or will file the final prospectus with us;
- securities of the same class as the securities that are the subject of the transaction are trading on that exchange or through that trading facility or alternative trading system;
- the registration statement relating to the offering is effective and not the subject of a stop order issued under Securities Act Section 8; and
- neither the issuer nor any underwriter or participating dealer is the subject of a pending proceeding under Securities Act Section 8A in connection with the offering.

These changes will eliminate the difficulties for prospectus delivery among brokers and dealers in registered resales and other sales into existing trading markets where securities of the same class already are trading. We are not requiring as part of the Rule that physical copies of the prospectus be sent to the exchange or a market maker. Further, the exchange and the market maker no longer will need to keep track of any prospectuses.[582] As with the existing rule, the amended Rule does not affect delivery obligations to purchasers other than brokers or dealers.

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582 Because we are adopting the proposed changes to Rule 153, on the effective date of the amendment our interpretation in Question 11 in the 1995 Electronics Release will no longer be effective.

We have revised our proposed amendments to Rule 153 in one respect. For purposes of Rule 153 as amended, the filing of the final prospectus, regardless of whether it occurs before or after reliance on the Rule, will satisfy the conditions of the Rule.[583]

**4. Aftermarket Prospectus Delivery – Rule 174**

Unless our rules provide otherwise, all dealers are required to deliver a final prospectus for a specified period after a registration statement becomes effective to persons who buy the securities in the aftermarket.[584] Securities Act Rule 174 exempts from this aftermarket dealer prospectus delivery obligation any transaction relating to securities of a reporting issuer. These exemptions in Rule 174 do not apply to underwriters or dealers with regard to any unsold allotment. Otherwise, if the transaction relates to securities of a non-reporting issuer that will be listed on a national securities exchange or quoted on an electronic inter-dealer quotation system, current Rule 174 sets an aftermarket delivery period of 25 days after effectiveness. For offerings of securities of non-reporting issuers that will not be so listed or quoted and offerings by blank check companies, Rule 174 sets an aftermarket prospectus delivery period of 90 days after effectiveness or after the funds are released from the escrow or trust account, as the case may be. Where a registration statement relates to offerings to be made from time to time, Rule 174 provides that there is no aftermarket delivery requirement once the initial period expires. The underlying purpose of aftermarket prospectus delivery is to assure wide dissemination of information about the issuer in the market. For reporting issuers, the

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583 We have revised the amendments to Rule 153 to address the suggestions of some commenters in this regard. See, e.g., letters from Cleary and Fried Frank.

584 See Securities Act Section 4(3).

Rule assumes that the information is already disseminated and eliminates the prospectus delivery requirement for these issuers.

We believe that, where information regarding all issuers is largely disseminated other than through physical delivery, including through EDGAR, physical delivery of a final prospectus in the aftermarket is of limited utility and necessity. We are, therefore, amending Rule 174 as proposed to provide that during the aftermarket period, dealers can rely on proposed Rule 172 to satisfy any aftermarket delivery obligations (other than for blank check companies).

Some commenters recommended that we eliminate the conditions to "access equals delivery" contained in Rule 172 for brokers or dealers involved in only aftermarket distributions.[585] Commenters also recommended elimination of all aftermarket prospectus delivery requirements for all transactions, with some suggesting that the obligation should be eliminated where the securities are listed on an exchange or quoted on the Nasdaq Stock Market.[586] While we are not eliminating the prospectus delivery obligations that currently arise under Securities Act Section 4(3) and Rule 174, we are providing for reliance on Rule 172 to satisfy those delivery obligations (other than for blank check companies).[587] Rule 173 applies in part where Securities Act Section 4(3) requires prospectus delivery and where there is no exemption from delivery under Rule 174.

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585 See, e.g., letters from ABA; Cleary; and Davis Polk.

586 See, e.g., letters from ABA; Goldman Sachs; Morgan Stanley; and SIA.

587 We also have eliminated the filing condition as a condition to satisfaction of that delivery requirement.

## VII. Additional Exchange Act Disclosure Provisions

### A. Risk Factor Disclosure

#### 1. Scope of Requirement

As we stated in the Proposing Release, many Securities Act registration statements require disclosure of the risks associated with an investment in an issuer's securities. Items 503(c) of Regulation S-K and Regulation S-B[588] describe that required disclosure as a "discussion of the most significant factors that make the offering speculative or risky." The risk factor section is intended to provide investors with a clear and concise summary of the material risks to an investment in the issuer's securities.

We are adopting substantially as proposed a new item requiring risk factor disclosure in annual reports on Forms 10-K and Exchange Act registration statements on Form 10.[589] We are not extending this requirement to Forms 10-KSB or Form 10-SB. The new item applies the standard for risk factor disclosure in Securities Act registration statements to Exchange Act registration statements and annual reports.[590] As such, risk factor disclosure under the Exchange Act will be the same type of disclosure as required in a Securities Act registration statement by Item 503, other than information about a

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588 17 CFR 229.503(c) and 17 CFR 228.503(c).

589 See amendments to Form 10-K and Form 10. Form 20-F (the form used for annual reports and Exchange Act registrations for foreign private issuers) already requires risk factor disclosure. See Item 3.D. of Form 20-F. The 1998 proposals also proposed risk factor disclosure in annual reports. The Advisory Committee Report contained similar recommendations. See the Advisory Committee Report, note 25, at Section II.B.4.

590 See Item 503(c) of Regulation S-K. We recognize that a risk factor discussion in a Form 10-K may not be necessary or appropriate in all cases, depending on the issuer.

particular securities offering.[591] We are not requiring asset-backed issuers to include risk factor disclosure in their annual reports on Form 10-K. We agree with commenters who noted that disclosure requirements in a Form 10-K for asset-backed issuers varies considerably under Regulation AB from corporate issuers.[592] These requirements, along with the fundamental structure of most asset-backed securities offerings involving stand-alone trusts, make this requirement inappropriate for asset-backed issuers.

We also are adopting as proposed the requirement that the risk factor disclosure in Forms 10 and 10-K be written in accordance with the same "plain English" standards as apply to risk factor disclosure in Securities Act registration statements.[593] The amendments as adopted also provide for quarterly updates to reflect material changes from risk factors as previously disclosed in Exchange Act reports. The amendments do not otherwise require, and we discourage, unnecessary restatement or repetition of risk factors in quarterly reports.

As we stated in the Proposing Release, the requirement to include risk factor disclosure in Forms 10 and 10-K will, we believe, further enhance the contents of

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591 We have revised the item from the proposal to eliminate the added language which caused concern that a different standard for risk disclosure would apply to annual reports on Form 10-K and registration statements on Form 10 from that required for Securities Act registration statements. We believe that the added language was redundant of the existing language of Item 503 and, therefore, unnecessary.

592 See, e.g., letters from ABA-ABS; ASF; BMA-ABS; and CMSA.

593 Securities Act Rule 421 [17 CFR 230.421] requires issuers to write and design their risk factor disclosure in registration statements using plain English principles. See also Updated Staff Legal Bulletin No. 7 (June 7, 1999), question no. 3. The plain English rules applicable to Securities Act registration statements already apply to risk factor disclosure in Exchange Act reports incorporated by reference into Securities Act registration statements.

Exchange Act reports and their value in informing investors and the markets.[594] Further, requiring risk factor disclosure in Exchange Act registration statements and annual reports will enhance the ability of reporting issuers to incorporate risk factor disclosure from these Exchange Act reports into Securities Act registration statements to satisfy the risk factor disclosure requirements.[595] Because one of our goals is to further integrate disclosures under the Securities Act and the Exchange Act, we believe it is important to establish consistent disclosure standards for risk factor disclosure.

We are adopting the proposed requirements for updated risk factor disclosure in quarterly reports because we believe that issuers who are required to file quarterly reports already need to undertake a review of changes in their operations, financial results, financial condition, and other circumstances in order to prepare the other portions of the quarterly report, including the financial statements and MD&A.[596] Therefore, we believe that issuers should be able, on a quarterly basis, to update risk factors to reflect material changes from previously disclosed risk factors.

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594 We note that many issuers have included risk factor disclosure in their Exchange Act reports for a number of years. See comment letter in File No. S7-30-98 from BRT. Issuers may already include risk factor disclosure in their Exchange Act reports for varying reasons, including to take advantage of the safe harbor for forward-looking statements in Securities Act Section 27A and the "bespeaks caution" defense developed through case law. See, e.g., In re Donald Trump Sec. Litig., 7 F.3d at 371 (3d Cir. 1993); P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 97 (2d Cir., 2004); and In re Sprint Corp. Sec. Litig., 232 F. Supp. 2d 1193 (D. Kan. Sept. 30, 2002).

595 We note that incorporation by reference of risk factors in Exchange Act reports may not fully satisfy the Securities Act disclosure obligations. For example, additional offering-related risks may need to be included in Securities Act registration statements.

596 Moreover, issuers will already have in place disclosure controls and procedures and internal controls over financial reporting that should alert them to new or changing material risks affecting the issuer.

### 2. Comments on Risk Factor Disclosure Requirement

While some commenters supported the proposal generally, others suggested modifications to the risk factor requirement.[597] For example, several commenters suggested we should require risk factors only "where appropriate."[598] Other commenters did not believe a separate risk factor section was necessary because reporting companies already included risk disclosures in various sections of their annual reports.[599] Commenters also noted that the proposed language was more extensive than Item 503(c).[600] A number of commenters thought we should extend the requirement for risk factor disclosure to small business issuers.[601] Further, at least one commenter was concerned about the proposal to require updated risk factor disclosures in quarterly reports.[602]

We have made modifications to the language in the proposals as we considered appropriate. While we are providing risk factor disclosure to be included "where appropriate," and have eliminated duplicative language, we continue to believe that a risk

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597 See, e.g., letters from ABA; AICPA; Alston; BDO Seidman; BRT; Deloitte; E & Y; KPMG; NYCBA; and PwC.

598 See, e.g., letters from ABA; Davis Polk; NYSBA; and S & C. The proposed disclosure requirement omitted the qualifier that risk factors should only be disclosed "where appropriate." In addition, commenters believed that risk factors are not appropriate for issuers of asset-backed securities. See, e.g., letters from ASF; BMA-ABS; and CMSA.

599 See, e.g., letters from BRT; Intel; and SCSGP.

600 As proposed, the risk factor disclosure would have required a discussion of the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance. See, e.g., letters from ABA; Alston; and S & C.

601 See, e.g., letters from ABA; AICPA; Alston; BDO Seidman; KPMG; NYSBA; and PwC.

602 See letter from Fried Frank.

factor section in Exchange Act annual reports and registration statements will, where appropriate, be beneficial to investors.

### B. Disclosure of Unresolved Staff Comments

As we stated in the Proposing Release, because enhanced Exchange Act reporting provides a principal element of support for, and is at the core of, the rules we are adopting today, it is important that issuers timely resolve any staff comments on their Exchange Act reports. It is possible, however, that the procedural changes we are adopting today may eliminate some of the incentives issuers have to respond to and resolve comments on their Exchange Act reports in a timely manner. In particular, with immediate effectiveness, well-known seasoned issuers will not be subject to the possibility that effectiveness of a Securities Act registration statement could be delayed while comments are being resolved. In addition, all shelf eligible issuers will have to file new registration statements only every three years. Staff in the Division of Corporation Finance has begun to review more Exchange Act reports and will continue to do so in keeping with the requirements of the Sarbanes-Oxley Act[603] as well as our view of the importance of an issuer's Exchange Act reports. Under these circumstances, and with the greater flexibility given in the rules we are adopting today to communications outside the statutory prospectus and offering procedures, we think it is appropriate for accelerated filers and well-known seasoned issuers to disclose outstanding staff comments that remain unresolved for a substantial period of time.

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603 See Section 408 of the Sarbanes-Oxley Act.

### 1. Disclosure Requirement

We are adopting substantially as proposed the requirement that all entities defined as accelerated filers and well-known seasoned issuers disclose, in their annual reports on Form 10-K or Form 20-F, written comments our staff made in connection with a review of Exchange Act reports that:

- the issuer believes are material;
- were issued more than 180 days before the end of the fiscal year covered by the annual report;[604] and
- remain unresolved as of the date of the filing of the Form 10-K or Form 20-F.[605]

The disclosure must be sufficient to disclose the substance of the comments. Staff comments that have been resolved, including those that the staff and issuer have agreed will be addressed in future Exchange Act reports, do not need to be disclosed. Issuers can provide other information, including their position regarding any such unresolved comments.

### 2. Comments on Disclosure of Outstanding Comments

Many commenters did not support the proposed disclosure of outstanding comments.[606] These commenters believed that issuers already have sufficient incentives

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604 The 180-day time period begins from the date of the first comment letter that specifically raises the issue, which may be later than the date of the initial comment letter on the filing.

605 The requirement to disclose outstanding comments applies to both domestic and foreign registrants. The term "accelerated filer," which is defined in Exchange Act Rule 12b-2 [17 CFR 240.12b-2], does not distinguish between domestic and foreign issuers. Accelerated filers who file reports on Form 20-F are not subject to accelerated deadlines because that Form, unlike Form 10-K, does not include accelerated deadlines for filing. Nevertheless, any registrant that meets the definition of accelerated filer is subject to the disclosure requirement for outstanding comments.

606 See, e.g., letters from AICPA; Alston; BDO Seidman;; BRT; Cleary; CSFB;

to comply with staff comments and that the disclosure may not provide meaningful information to investors.[607] Some commenters suggested that well-known seasoned issuers should be able to choose to either comply with the disclosure requirement or abstain from conducting an offering until the comments have been resolved.[608] One commenter was concerned about potential liability that might arise from the disclosure of the unresolved comments.[609]

For the reasons noted above, we believe that disclosure of outstanding comments is an important component of the rules that we are adopting today. Because the disclosure requirement applies only to comments issued more than 180 days before the issuer's fiscal year end that remain unresolved at the filing date, we believe that, in most circumstances, this will provide issuers with more than enough time to address and resolve issues. Moreover, we are not modifying the language from the proposal to allow issuers the choice to either disclose or refrain from offering securities in registered offerings because we believe the disclosures are important to the entire market.

### C. Disclosure of Status as Voluntary Filer Under the Exchange Act

As we noted in the Proposing Release, our filing system does not prohibit issuers that are not required to file Exchange Act reports us from filing those reports voluntarily. In most cases, voluntary filers are issuers who have, at some point, completed a registered offering under the Securities Act and have continued to file Exchange Act

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Deloitte; E & Y; KPMG; Intel; Merrill Lynch; Morgan Stanley; SCSGP; and TBMA.

607 See, e.g., letters from AICPA; BDO Seidman; and E & Y.

608 See, e.g., letters from ABA; Alston; CSFB; and NYSBA.

609 See letter from TBMA.

reports even after their reporting obligation under Exchange Act Section 15(d) has been suspended.[610]

We are adopting the proposal to include a box on the cover page of Forms 10-K, 10-KSB, and 20-F for an issuer to check if it is filing reports voluntarily. However, the box is for disclosure purposes only and an issuer's filing obligation will be unaffected by an incorrectly checked box.

We believe that it is important that investors and other market participants are aware that an issuer that is a voluntary filer is not required to continue to file Exchange Act reports and may cease to file its Exchange Act reports at any time and for any reason without notice. In addition, our communications and procedural rules we are adopting today do not treat voluntary filers as reporting issuers or seasoned issuers. As we indicated above, voluntary filers desiring treatment as reporting issuers should register a class of their securities under the Exchange Act.[611] Identification of voluntary filers will enable market participants and us to identify voluntary filers.

Commenters on voluntary filers generally thought that voluntary filers should be treated as seasoned issuers because many of them have contractual obligations to file reports.[612] Some commenters were concerned that it would be difficult for certain foreign

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610 Exchange Act Section 15(d) suspends automatically its application to any issuer that would be subject to the filing requirements of that section where, if other conditions are met, on the first day of the issuer's fiscal year, it has fewer than 300 holders of record of the class of securities that created the Section 15(d) obligation.

611 See Exchange Act Section 12(g) [15 U.S.C. 78l(g)].

612 See, e.g., letters from ABA and Alston.

private issuers to assess their voluntary filer status because of issues relating to calculating the number of U.S. holders of record.[613]

We are adopting as proposed the requirement for voluntary filers to disclose their status on the cover of Form 10-K, Form 10-KSB, and Form 20-F. To date, we have permitted voluntary filers to submit their reports to us through EDGAR. We believe it is important to be able to assess whether issuers are subject to our reporting and other requirements arising from their reporting status. We do not believe that calculation of the number of U.S. holders is a significant obstacle to unregistered foreign private issuers' determination of their voluntary filer status.

## VIII. Paperwork Reduction Act

### A. Background

The rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[614] We published a notice requesting comment on the collection of information requirements in the Proposing Release, and we submitted these requirements to the Office of Management and Budget (OMB) for review in accordance with the PRA.[615]

We did not receive any comments on the PRA analysis contained in the Proposing Release. As discussed above, we have made several changes to the proposed rules in response to comments on the proposals. These changes are designed to avoid potential unintended consequences and reduce possible additional costs or burdens pointed out by commenters. After evaluating the comments and our responsive revisions to address

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613 See, e.g., letters from ABA and Alston.

614 44 U.S.C. 3501 et seq.

615 44 U.S.C. 3507(d) and 5 CFR 1320.11.

them, we are not changing the initial PRA estimates described in the Proposing Release and submitted to OMB, other than to reflect the decreased number of free writing prospectuses that will be filed as a result of the changes to the treatment of electronic road shows, as discussed below.

The titles for all the collections of information affected by these rules are:[616]

(1) "Form 10" (OMB Control No. 3235-0064);

(2) "Form 20-F" (OMB Control No. 3235-0288);

(3) "Form 10-K" (OMB Control No. 3235-0063);

(4) "Form 10-Q" (OMB Control No. 3235-0070);

(5) "Regulation S-K" (OMB Control No. 3235-0071);

(6) "Regulation S-B" (OMB Control No. 3235-0417);

(7) "Regulation C" (OMB Control No. 3235-0074);

(8) "Form S-1" (OMB Control No. 3235-0065);

(9) "Form F-1" (OMB Control No. 3235-0258);

(10) "Form S-2" (OMB Control Number 3235-0072);

(11) "Form F-2" (OMB Control Number 3235-0257);

(12) "Form S-3" (OMB Control Number 3235-0073);

(13) "Form F-3" (OMB Control Number 3235-0256);

(14) "Form S-4" (OMB Control Number 3235-0324);

(15) "Form F-4" (OMB Control Number 3235-0325);

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616 The paperwork burden from Regulations S-K, S-B, and C are imposed through the forms that are subject to the requirements in those Regulations and reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulations S-K, S-B, and C to be a total of one hour.

(16) "Form N-2" (OMB Control Number 3235-0026);

(17) "Rule 173" (OMB Control Number 3235-0618);

(18) "Rule 163" (OMB Control Number 3235-0619); and

(19) "Rule 433" (OMB Control Number 3235-0617).

We adopted all of the existing regulations and forms pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. They set forth the disclosure requirements for annual and quarterly reports, registration statements, and prospectuses that are prepared by issuers to ensure that investors have the information they need to make informed investment decisions in registered offerings and in secondary market transactions. We also are adopting new Securities Act Rules 163, 173, and 433 and eliminating Securities Act Rule 434 and Forms S-2 and F-2.

The amendments to existing forms and regulations and new rules will modify and advance the Commission's regulatory system for offerings under the Securities Act, enhance communications between public issuers and investors, and promote investor protection. The rules involve three main areas:

- communications related to registered securities offerings;
- procedural restrictions in the offering and capital formation processes; and
- delivery of information to investors.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collections of information. The estimates of reporting and cost burdens provided in this PRA analysis address the time, effort, and financial resources necessary to provide the collections of

information and are not intended to represent the full economic cost of complying with the rules. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The information collection requirements related to registration statements and periodic reports will be mandatory. For registration statements and periodic reports, there will be no mandatory retention period for the information disclosed, and the information gathered will be made publicly available. The information collection requirements related to the communications and prospectus delivery rules will apply only to issuers and other offering participants choosing to rely on them. There will be a mandatory record retention period with respect to the communications and prospectus delivery provisions. Moreover, free writing prospectuses that are prepared by or on behalf of or used or referred to by an issuer, and free writing prospectuses that are broadly disseminated by another offering participant, will have to be filed and will be publicly available on the EDGAR filing system, whereas other free writing prospectuses prepared by or on behalf of or used or referred to by offering participants, other than the issuer, will not have to be filed.

### B. Summary of Information Collections

The rules will add the following disclosure requirements to Exchange Act periodic reports and registration statements:

- Risk factor disclosure;
- Disclosure by accelerated filers and well-known seasoned issuers, in their annual reports on Forms 10-K or 20-F, of any written staff comments regarding their Exchange Act reports issued more than 180 days before the end of the fiscal year covered by the annual report that the issuer believes to be material and that remain unresolved as of the date of the filing of the annual report; and

- "Check boxes" that will appear on the cover page of the report or registration statement to indicate whether the registrant is filing Exchange Act reports on a voluntary basis and whether the registration is a well-known seasoned issuer.[617]

The rules will impose the following new disclosure requirements and filing or notification conditions in connection with registered offerings under the Securities Act:

- A brief notice to purchasers in a registered offering providing that the sale was made pursuant to a registration statement;[618]

- A brief legend in "free writing prospectuses"[619] that refers investors to the statutory prospectus;

- "Check boxes" on registration statement cover pages indicating whether the registration statement is being used for "automatic shelf registration" or post-effective registration of additional securities or classes of securities;[620]

- Additional disclosure in the undertakings required to be included in a registration statement for securities to be offered pursuant to Rule 415;[621]

- A filing condition in connection with the use of certain free writing prospectuses;[622] and

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617 We believe that the burden associated with checking a box on the cover page of an Exchange Act report or registration statement is so minimal that we are unable to quantify the burden.

618 Under Securities Act Rule 173, this notification will be imposed, which may be satisfied through inclusion of the notification on a confirmation of sale already required to be provided in sales involving broker dealers, while Securities Act Rule 172 will eliminate the more burdensome requirement of delivery of a final prospectus.

619 "Free writing prospectuses" are written communications (other than statutory prospectuses) that constitute offers to sell or solicitations of offers to buy securities.

620 In this regard, see note 617 regarding the burden associated with checking a box on the cover page.

621 We also are requiring similar undertaking language in Form N-2, the registration statement form for closed-end management investment companies.

622 See the discussion in Section III above under "Permissible Use of Free Writing Prospectuses" under "Filing Conditions."

- Making a version of an electronic road show that is a written communication used in initial public offerings of common equity or convertible equity securities by non-reporting issuers broadly disseminated on an unrestricted basis.

The rules will decrease existing disclosure requirements by:

- Reducing the need to repeat previously disclosed information by permitting any reporting issuer that has filed at least one annual report and that is current in its reporting obligation to incorporate information by reference into its registration statement on Forms S-1 or F-1; and

- Reducing the number of registration statements filed because the automatic shelf registration rules likely will eliminate the need to file multiple registration statements.

### C. Summary of Comment Letters on the PRA Analysis

We received no comments in response to our request for comment on the PRA analysis in the Proposing Release. We have made several changes and clarifications in response to comments on the proposals that are designed to avoid or reduce possible additional costs or burdens pointed out by commenters. For example, we are not requiring that an electronic road show be filed for most offerings, except if an electronic road show that is a written communication is used in an initial public offering of common equity or convertible equity securities by a non-reporting issuer. In that case, the electronic road show does not have to be filed if a bona fide electronic road show is made readily available electronically on an unrestricted basis In addition, we have revised the definition of graphic communication so that live, in real-time presentations to a live audience will not be considered written communications and therefore not free writing prospectuses. As a result of these modifications, we believe that fewer free writing prospectuses, including those that are electronic road shows, will be filed or otherwise made available electronically on an unrestricted basis, and we have therefore revised the estimates for the total burden imposed by Rule 433.

### D. Paperwork Reduction Act Burden Estimates

For purposes of the PRA, we estimated the total annual incremental reduction in the paperwork burden for registrants to comply with the collection of information requirements to be approximately 40,393 hours of in-house issuer personnel time and the reduction in cost to be approximately $70,797,000 for the services of outside professionals.[623] The changes in the PRA burden estimates for Rule 433 (OMB Control No. 3235-0617) have the effect of reducing the estimated paperwork burden for registrants by approximately 356 hours of in-house personnel time, for a new estimate of approximately 40,749 hours, and a reduction in cost of approximately $320,800, for a new estimate of approximately $71,117,800 for the services of outside professionals. For broker-dealers, we estimated the annual incremental paperwork burden to comply with the collection of information requirements to be approximately 3,874,133 hours of in-house issuer personnel time, and we are not changing this estimate.[624] Those estimates include the time and the cost of preparing and reviewing disclosure, filing documents or otherwise publicizing information, and retaining records.

As we noted in the Proposing Release, the estimates represent the average burden for all issuers, both large and small. We expect that the burdens and costs could be greater for larger issuers and lower for smaller issuers. For Exchange Act periodic reports, we estimated that 75% of the burden of preparation is carried by the issuer internally and that 25% of the burden is carried by outside professionals retained by the

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623 For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest thousand.

624 We assume that brokers and dealers will not use outside professionals to comply with the new collection of information requirements.

issuer at an average cost of $300 per hour.[625] For Securities Act registration statements, Exchange Act registration statements, all filings by foreign private issuers, and the free writing prospectus rules, we estimated that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden is carried by outside professionals retained by the issuer at an average cost of $300 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

### 1. Exchange Act Periodic Reports and Registration Statements

For purposes of the PRA, we estimated the annual incremental paperwork burden for all issuers to prepare the disclosure required in Exchange Act periodic reports and registration statements under the rules to be approximately 43,245 hours of issuer personnel time and the cost to be approximately $4,477,000 for the services of outside professionals, as we explained more fully in the Proposing Release. Those estimates include the time and the cost of preparing and reviewing the required new disclosure. The estimates reflect our belief that, because the current disclosure requirements for Exchange Act reports (such as Management's Discussion and Analysis of Financial Condition and Results of Operations)[626] already require issuers to obtain information necessary to evaluate their material risks, and because disclosure by accelerated filers describing unresolved written staff comments on previous filings that the issuer believes to be material will be simply a summary of comments provided to the issuer by the staff

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625 In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $300 as the average cost of outside professionals that assist issuers in preparing disclosures and conducting registered offerings.

626 Item 303 of Regulation S-K [17 CFR 229.303].

of the Commission, the disclosure that issuers would have to make in their Exchange Act periodic reports and registration statements should not impose significant new burdens.

### 2. Communications and Prospectus Delivery

For purposes of the PRA, we estimate that the annual paperwork burden for issuers that choose to comply with the communications rules will be approximately 1,176 hours of issuer personnel time and a cost of approximately $1,058,288 for the services of outside professionals. These estimates reflect the burden hours and costs associated with the disclosure, filing, and record retention conditions. As noted above, we are revising the annual burden for the information collection requirements of Rule 433 as a result of the changes to the treatment of electronic road shows and we have decreased the annual paperwork burden accordingly. For the prospectus delivery rules, we estimated that the annual burden would be 3,874,133 hours total for all respondents to comply with Rule 173.

### 3. Securities Act Registration Statements

For purposes of the PRA, we estimated that the rules affecting the collection of information requirements related to Securities Act registration statements would reduce incrementally the annual paperwork burden by approximately 85,170 hours of issuer personnel time and by a cost of approximately $76,653,000 for the services of outside professionals, as we explained more fully in the Proposing Release. That estimate reflected changes to the number of filings that could result from the rules as well as the decrease in disclosure preparation time resulting from the expansion of incorporation by reference.

## IX. Cost Benefit Analysis

### A. Background

We are revising the registration, communications, and offering processes under the Securities Act. The rules involve three main areas:

- communications related to registered securities offerings;
- registration and other procedures in the offering and capital formation processes; and
- delivery of information to investors.

The overall goal of the reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets. We believe that the gun-jumping provisions of the Securities Act impose substantial and increasingly unworkable restrictions on useful communications that would be beneficial to investors and markets and consistent with investor protection. Today's rules reflect our view that revisions to the Securities Act registration and offering processes are appropriate in light of significant developments in the offering and capital formation processes and can provide enhanced protection of investors under the statute. This view is based on our belief that today's rules will:

- facilitate greater availability of information to investors and the market with regard to all issuers;
- eliminate barriers to open communications that have been made increasingly outmoded by technological advances;
- reflect the increased importance of electronic dissemination of information, including the use of the Internet;
- make the capital formation process more efficient; and

- define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

### B. Summary of Rules

The amount of flexibility granted to issuers under the revisions to the registration, communications, and offering processes is contingent on the characteristics of the issuer. We believe that the most far-reaching revisions of the communications rules and registration processes should be considered for issuers that have a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace. We believe that these issuers have an Exchange Act record, a broad following of their Exchange Act filings, and the contemplated attention directed to their Exchange Act reports by analysts and institutional investors, and the staff of the Division of Corporation Finance that will produce the greatest likelihood of Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets.

For purposes of the rules we are adopting today, we categorize issuers into tiers, consisting of non-reporting issuers, unseasoned issuers, seasoned issuers, and well-known seasoned issuers. The first three tiers of issuers are identified by pre-existing criteria under the existing federal securities laws. A non-reporting issuer is an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act.[627] An unseasoned issuer is an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. A seasoned issuer is an issuer that uses Form S-

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627 Under the rules, an issuer that is filing Exchange Act reports voluntarily, but is not required to do so, will be a non-reporting issuer for purposes of the communications and procedural rules.

3 or Form F-3 to register primary offerings of securities. Our longstanding experience with these categories of issuers provides us with a basis for determining the amount of flexibility provided by the rules we are adopting today.

The characteristics of the last tier of issuer, called well-known seasoned issuers in the rules, will be easily measurable and readily available so that issuers and market participants can determine eligibility easily. In response to comments, we are modifying the definition of well-known seasoned issuer to provide that the eligibility determination will be made as of the later of the time of filing of the issuer's most recent registration statement on Form S-3 or Form F-3 for a primary offering, the time of filing its most recent amendment for purposes of complying with Section 10(a)(3) of the Securities Act, or an amendment to a shelf registration within 16 months. If the well-known seasoned issuer has not filed an automatic shelf registration statement, the eligibility is determined at the time of filing the issuer's most recent annual report on Form 10-K or Form 20-F (or if such report has not been filed by its due date, such due date). In addition, we will require issuers to check a box on the cover of their Form 10-K or Form 20-F if they are a well-known seasoned issuer so that market participants may reasonably rely on the issuer's determination. For issuers with publicly traded equity, we believe that market capitalization provides a sufficient proxy for determining whether or not an issuer is well followed. For issuers of fixed income securities, we believe that the amount of fixed income securities sold in registered offerings for cash in the past three years provides a sufficient proxy.[628]

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[628] For further discussion of the characteristics of well-known seasoned issuers, see Section II above.

Under the rules, a well-known seasoned issuer will have the greatest flexibility. The largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large, seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made.

**1. Communications**

We are adopting communications rules that recognize the value of ongoing communications as well as the importance of avoiding unnecessary restrictions on offers during a registered offering. The rules are designed to improve investors' access to information, to promote communications between offering participants and investors, and to maintain adequate investor protection. The rules will operate in the following manner:

- There will be two separate safe harbors from the gun-jumping provisions for ongoing communications at any time:
    - a safe harbor for a reporting issuer's continued publication or dissemination at any time of regularly released factual business and forward-looking information; and
    - a safe harbor for a non-reporting issuer's continued publication or dissemination at any time of factual business information that is regularly released to persons other than investors or potential investors.
- There will be two separate exclusions from the gun-jumping provisions for communications not encompassed in the rules above that occur prior to the filing of a registration statement:
    - an exclusion from the definition of offer for purposes of Securities Act Section 5(c) for all issuers for all communications made by or on behalf of issuers 30 days prior to filing a registration statement; and

- an exemption from the prohibition on offers for purposes of Securities Act Section 5(c) before the filing of a registration statement for offers made by or on behalf of eligible well-known seasoned issuers.

- Certain written offering related communications, such as communications about the schedule for an offering or communications about account-opening procedures, will be permitted in connection with an offering and will be excluded from the definition of "prospectus."

- Issuers and other offering participants will be permitted to use free writing prospectuses after the filing of the registration statement, subject to enumerated conditions (including, in specified cases, filing with the Commission).

- The safe harbors for research reports will be expanded.

**2. Securities Act Registration Rules**

As part of the rules to modernize the regulatory regime for registered securities offerings, we are streamlining the registration process for most types of reporting issuers. The rules recognize the role that technology and improved Exchange Act reporting procedures have in informing the marketplace. The rules address the registration procedures for seasoned and unseasoned issuers. These rules include:

- modifications that clarify and expand how and when information can be included in registration statements;

- a clarification of the Securities Act liability treatment of information provided in a prospectus supplement and Exchange Act reports incorporated by reference;

- a more flexible automatic registration process for well-known seasoned issuers, including immediate effectiveness and pay-as-you-go registration fee payment; and

- rules related to non-shelf offerings of securities.

**3. Prospectus Delivery**

We are adopting an "access equals delivery" prospectus delivery model, where final prospectus delivery obligations for purposes of Securities Act Section 5(b)(2) will

be satisfied if the issuer filed the final prospectus with the Commission within the required time frame. The rules will:

- eliminate the existing link between delivery of the final prospectus and the delivery of a written confirmation of sale;
- provide that the obligation to have a final prospectus precede or accompany a security for can be satisfied by filing a final prospectus with us within the relevant timeframe provided by Rule 424(b);
- permit written notices of allocations; and
- permit the prospectus delivery obligations in dealer transactions during any prospectus delivery period and broker or dealer transactions in registered resales of securities that are trading to be satisfied if the final prospectus has been or will be filed with us.

### 4. Exchange Act Reports

A public issuer's Exchange Act record often provides the most detailed source of information to the market and to potential purchasers regarding the issuer, its business, its financial condition, and its prospects. We are adopting, substantially as proposed, several reforms to Exchange Act reporting requirements related to the reforms to the Securities Act offering process. As a result of the rules, we will:

- extend risk factor disclosure requirements to annual reports on Exchange Act Form 10-K and registration statements on Exchange Act Form 10;
- require updates for previously disclosed risk factors in quarterly reports on Exchange Act Form 10-Q;
- require accelerated filers and well-known seasoned issuers to disclose in their annual reports on Exchange Act Forms 10-K and 20-F any written staff comments on Exchange Act reports issued more than 180 days before the end of the fiscal year covered by the report that the issuer believes to be material and that remain unresolved as of the filing date of the report;
- include a box on the cover page of the Exchange Act Forms 10-K and 20-F for an issuer to check if it is a well-known seasoned issuer; and

- include a box on the cover page of Exchange Act Forms 10-K, 10-KSB, and 20-F for an issuer to check if it is filing reports voluntarily.

### C. Comments on the Proposals

Commenters supported the proposals, with many commenters noting that the proposals struck the appropriate balance between improving the capital formation process and modernizing offering communications, while preserving investor protection and avoiding unnecessary impediments to the capital formation process. We did not receive any comments on the cost-benefit analysis, other than asking generally about cost savings by underwriters and broker-dealers. Some commenters noted potential costs that certain of the proposals might impose. We considered these comments carefully and believe that we have made responsive changes in order to minimize these potential costs.

For example, a number of commenters were concerned about the final prospectus filing condition in Rule 172, due to the potential liability if written confirmations were sent and the issuer failed to file the final prospectus within the required time frame. We have included a cure provision allowing an issuer that has made a good faith and reasonable effort to file within the required time frame to file the final prospectus as soon as practicable after discovery of the failure to file. Commenters also expressed concern about the distinctions between oral and written communications and the effects on offering participants to provide information. We have revised the definition of graphic and written communications to make clearer when a communication is written and when it is oral.

### D. Benefits

As discussed, the overall goal of the reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's

capital markets. We believe that the reforms will achieve this goal and consequently result in significant benefits in a number of areas, including by increasing the flow of information available to investors during a registered offering while maintaining investor protection against misleading or inaccurate disclosures. We also anticipate that the rules will improve access to the public capital markets and possibly lower the cost of capital by, among other things, modifying, and in some cases clarifying, the federal securities laws related to communications, liability, shelf registration, and the use of electronic media during a registered offering. Finally, we believe that the rules will provide cost-saving options to issuers and underwriters.

### 1. Increased Information Flow

The primary benefit that the rules seek to achieve is an increased flow of information to investors during a registered offering. While much of the Commission's recent rulemaking is intended to encourage reporting issuers to provide materially accurate and complete information to the market on a more current basis, the Securities Act's constraints on communications during an offering cause issuers to be concerned about the treatment of their ongoing communications and whether their customary disclosures will be considered an impermissible offer of securities. As a result of the multiplicity of means of communication, restricting written offers to a statutory prospectus inhibits desirable methods of timely communication of information. The rules regarding communications, registration, and liability will operate to increase the amount of valuable information that could be provided to investors before they make investment decisions. We believe that more information will be provided on a more timely basis because the rules will eliminate regulatory barriers to the dissemination of that

information, and the markets may provide incentives for issuers, underwriters, and broker dealers to produce additional information.

Increased information flow will promote efficient capital markets because the market may be able to value securities more accurately. Under the rules, underwriters can communicate with potential investors during an offering to better gauge investor interest, thus facilitating greater discourse among investors and underwriters.

Another benefit of increasing the information flow is that investors may become better informed in making portfolio allocation decisions in accordance with their particular risk-return profiles. Moreover, the ability of offering participants to use free writing prospectuses in connection with offerings will impart a greater ability to provide information to investors about securities before they make investment decisions. For example, issuers and underwriters will be able to provide proprietary analytical material that is specifically tailored to address the particular asset allocation considerations of different investors. Today's markets include a growing number of increasingly complex securities where written communications, such as detailed term sheets, will enhance significantly the offering process for the benefit of investors. In addition, we are adopting rules to permit research to be distributed about more issuers that are making registered offerings. Having access to these reports may facilitate additional security analysis among investors.

By reducing the restrictions on the contents of written communications, we anticipate that investors will demand more information and issuers, underwriters, and other offering participants will be more willing to provide it. Significant technological advances have increased both the market's demand for more timely corporate disclosure

and the ability of issuers to capture, process, and disseminate information. The rules will enable issuers and market participants to take greater advantage of the Internet and other electronic media to communicate and deliver information to investors. As discussed in greater detail below, reducing regulatory and liability uncertainty with respect to the treatment of written communications may make issuers more comfortable in supplying information without worrying about violating the gun-jumping provisions. Accordingly, investor demand for information can be satisfied through relatively inexpensive mass dissemination of the information through electronic means.

Finally, the rules we are adopting today that provide that an electronic road show presentation must either be filed or a bona fide version must be made readily available to an unrestricted audience for initial public offerings of a non-reporting issuer's common equity or convertible equity securities provide for the availability of information in these offerings to all investors. We believe these changes will encourage more road shows and other information in these offerings to be provided to more investors.

**2. Investor Protection**

Another benefit of the rules is that they will maintain investor protection against misleading or inaccurate disclosures. Investor protection is of paramount importance in maintaining fair, orderly, and efficient capital markets. The rules regarding liability and disclosure in Exchange Act periodic reports, as well as the filing conditions and record retention conditions for unfiled free writing prospectuses, will maintain and enhance investor protection in connection with registered securities offerings.

A central premise underlying the liability rules is that communications to investors at the time of sale (including the time of the contract of sale) should not include

material misstatements or fail to include material information that is necessary to make the communication not misleading in light of the circumstances in which the communication is made. We believe that the rules will provide issuers and underwriters with greater flexibility to communicate information in a manner that does not slow the offering process unduly. At the same time, investors should be in a better position to have accurate information at the time of the sale of the securities to them (including the time of the contract of sale). These measures should encourage the disclosure of accurate information about transactions.[629]

The free writing prospectus rules will promote investor protection by requiring issuers to file issuer prepared or used free writing prospectuses and issuer information in free writing prospectuses. We believe that conditioning the use of written issuer provided or used information on filing will improve investor protection. On the one hand, the filing requirement is designed to assure that written issuer provided or used information is publicly available. On the other hand, requiring underwriters to file their proprietary analysis may cause them competitive harm. Additionally, the free writing prospectus will be a Section 10(b) prospectus under the Securities Act and, as such, will be subject to liability under Section 12(a)(2) as well as the anti-fraud provisions of the federal securities laws. As a Section 10(b) prospectus, there will be continuing Commission oversight and enforcement authority over the contents and use of the free writing

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629 Recent research has examined the effect of securities laws on stock market development in 49 countries and found strong evidence that laws facilitating private enforcement through disclosure and liability rules are positively correlated with more developed stock markets. See, La Porta, Lopez de Silanes, and Shleifer, "What Works in Securities Laws?" Forthcoming in Journal of Finance.

prospectus, including the ability to halt the use of any materially false or misleading free writing prospectus in accordance with Section 10(b).

The rules allowing automatic shelf registration statements to become effective immediately will allow the Commission to shift its resources more toward the review of issuers' Exchange Act reports. Because we believe that an issuer's Exchange Act record often provides the most detailed source of information to the market and to potential purchasers regarding the issuer, its business, its financial condition, and its prospects, we believe that investors will benefit from the staff's ability to review Exchange Act reports more frequently.

The inclusion of additional disclosures in Exchange Act periodic reports also will promote investor protection. We believe that the disclosure by issuers meeting the definition of accelerated filers and well-known seasoned issuers of unresolved written staff comments that the issuer believes to be material will benefit investors because they will be able to ascertain the nature of the staff comments and take them into account in their investment decisions. We believe that the disclosure of risk factors in plain English will help investors in assessing the risks that an issuer currently faces or may face in the future. Many issuers currently provide this risk factor disclosure in their Exchange Act reports voluntarily. However, for other issuers, investors have access to this information only if the issuer has recently conducted a registered offering under the Securities Act, in which case the issuer will be subject to risk factor disclosure requirements in its Securities Act registration statement. The rules also require disclosure of voluntary filer status. We believe it is important that the staff and the market understand when issuers

are filing Exchange Act reports voluntarily, since such issuers may cease filing these reports at any time.

### 3. Facilitating Capital Formation

We anticipate that the rules will facilitate capital formation, and possibly lower the cost of capital, by improving access to the public capital markets. The rules are designed to eliminate unnecessary regulatory impediments to capital formation and provide more flexibility to issuers to conduct registered securities offerings. The amount of flexibility accorded by the rules will depend on the characteristics of the issuer. The rules provide the most flexibility under the communications rules and the automatic shelf registration system to eligible well-known seasoned issuers. Other issuers also will benefit, albeit to a lesser degree, from the other revisions to the communications and registration process.

The rules may lower the cost of capital because they will provide significant flexibility to issuers and underwriters in marketing their securities. The communications rules will allow well-known seasoned issuers to communicate at any time regarding an offering and will allow other issuers more freedom in communicating after a registration statement is filed. For well-known seasoned issuers, automatic shelf registration will facilitate immediate market access and promote efficient capital formation, without diminishing investor protection. The automatic shelf registration process will allow eligible issuers to add additional classes of securities and eligible majority-owned subsidiaries as additional registrants after an automatic shelf registration statement is effective. The "pay-as-you-go" system will allow well-known seasoned issuers to pay at the time of each takedown off the shelf registration statement or in advance. The

automatic shelf registration rules will provide these issuers with significant latitude in determining the types and amounts of their securities or those of their eligible subsidiaries that could be offered without any potential time delay or other obstacles imposed by the registration process. The rules will provide the flexibility to take advantage of market windows, to structure securities on a real-time basis to accommodate issuer needs or investor demand, and to determine or change the plan of distribution of securities as issuers elect in response to changing market conditions.

The other rules to the shelf registration procedures and expansion of incorporation by reference also will provide flexibility to issuers to enable them to access the capital markets at a lower cost. For example, removing the current restrictions on at-the-market offerings of equity securities will allow issuers eligible to use Form S-3 or Form F-3 for primary equity offerings to offer securities directly to the marketplace, without using the underwriting or syndication process. Under the rules to expand Form S-3 eligibility to cover additional majority-owned subsidiaries, issuers will have greater flexibility to structure offerings of guaranteed securities without losing the benefits of shelf registration. In addition, the rules to expand incorporation by reference to Form S-1 and Form F-1 will enable eligible issuers to use their Exchange Act filings to satisfy their disclosure requirements without having to incur costs to replicate information in the prospectus.

Providing flexibility for registered offerings may encourage issuers to raise capital through the registration process instead of through private placements. Typically, registered securities enjoy more liquid markets than unregistered securities. Therefore, registered securities are less likely to be subject to a liquidity discount. In addition,

registered securities offerings provide a potentially larger investor base than that available to those who participate in private placements. Accordingly, issuers may incur lower transaction costs when raising capital because they will have access to a much deeper market for their securities and may have to expend fewer resources to locate investors.

The prospectus delivery rules are designed to facilitate effective access to information, while taking into account advancements in technology and the practicalities of the offering process. These changes are intended to alleviate timing difficulties that may arise under the current securities clearance and settlement system, and also to facilitate the successful delivery of, and payment for, securities in a registered offering. Given that the final prospectus delivery obligations generally affect investors only after they have made their investment decisions and that investors and the market have access to the final prospectus upon its filing, we believe that the obligation can be satisfied through a means other than physical delivery. Because the contract of sale will have already occurred by the time the final prospectus is filed, we also believe that delivery of a confirmation and the delivery of the final prospectus need not be linked. Receiving confirmations earlier in the settlement process will enable investors to review the confirmation and verify trade data closer to the time of the investment decision.

**4. Reduced Regulatory Uncertainty**

The rules modify the federal securities laws related to communications, liability, shelf registration, and the use of electronic media during a registered offering. The rules, by enhancing issuers' certainty about the regulatory treatment of and liability provisions attached to the communication of information to the marketplace, could encourage

issuers to increase the dissemination of readily available information useful to investors, such as management's plans and objectives for future operations. The 30-day bright-line exclusion and the exemption from the prohibition on offers prior to filing for well-known seasoned issuers will provide these issuers with the ability to communicate information prior to filing a registration statement without risk of violating the gun-jumping provisions.

The safe harbors for regularly released factual business information and forward-looking information will allow issuers to continue ordinary communications without fear of violating the gun-jumping provisions. At the same time, these communications could benefit all investors because there will be more current information and analysis available upon which to make investment decisions. We also are clarifying the treatment of information located on or hyperlinked to an issuer's website around the time of a registered offering, to allow for the continued availability of historical information that may be useful to investors.

The rules affecting the shelf registration procedures will codify in a single location permissible omissions from shelf registration statements and the permissible methods to include the omitted information. This will promote efficiency by providing certainty about the content of base prospectuses in shelf registration statements and the methods by which required information may be included, thereby reducing divergent practices and eliminating possible inadvertent mistakes. In addition, we believe the rules will address the disparate treatment of underwriters from a liability standpoint by establishing a new effective date for liability purposes for issuers and persons who are underwriters at that time in connection with takedowns off shelf registration statements,

as reflected in prospectus supplements filed for such takedowns. On the other hand, the new rules regarding prospectus supplement filings will not trigger a new effective date for officers or directors of the issuer or for experts, including accountants.

**5. Lower Costs**

The prospectus delivery rules and the rules related to the registered securities offering process will provide cost-saving options to issuers, underwriters, and dealers. We believe that allowing reporting issuers to incorporate by reference their previously filed Exchange Act reports and other materials into a Form S-1 or Form F-1 provides them a more cost-effective way to raise capital without the cost of duplicating the information contained in their filed reports and other materials. The rules affecting final prospectus delivery should also result in lower costs to issuers because of reduced printing costs for a smaller number of final prospectuses.

For purposes of the PRA analysis, we have estimated that the rules to the registered securities offering processes will reduce the total current annual compliance costs by approximately $87,664,000.[630] In addition, we believe that issuers and underwriters will benefit from not having to print and deliver final prospectuses. We estimate that the cost savings per prospectus will be approximately $0.75 per prospectus. For purposes of the PRA, we have estimated 232.45 million instances in which broker dealers will be able to rely on the "access equals delivery" provisions. Investors may request the final prospectus, and we estimate that they will do so 25% of the time. Therefore, we estimate the total annual cost savings will be approximately $130,753,000.

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630 For purposes of monetizing the cost of issuer personnel time, we estimate the average hourly cost of issuer personnel time to be $125.

### E. Costs

While the overall goal of the reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets, we do believe that there will be costs to the rules. These include costs for compliance with the rules, potential behavioral changes resulting from the liability rules, and certain other costs.

#### 1. Compliance Costs

One potential cost of the rules is that issuers may incur increased filing costs associated with issuer free writing prospectuses or making a version of an electronic road show publicly available.[631] These costs should be mitigated somewhat by the fact that free writing prospectuses are not required to be filed as part of the registration statement and therefore will not have to be conformed to meet all the requirements for an amendment to the registration statement. In addition, because oral communications are not written and, therefore, not free writing prospectuses, the rules should not result in significant incremental costs from existing regulations. We also are conditioning the use of free writing prospectuses on the inclusion of a legend that notifies investors that they can receive a copy of the prospectus by calling a toll-free number. Accordingly, there may be some costs for issuers and offering participants associated with establishing a toll-free number for investors, although the toll-free number does not have to be issuer specific.

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631 For example, for purposes of the PRA analysis, we estimate that the aggregate total annual paperwork burden for issuers arising from the preparation, review, and filing of free writing prospectuses or making a version of an electronic road show available under the new communications rules will be approximately $301,993.

Another potential compliance cost is the additional expenditures that issuers and offering participants may incur in storing and archiving information to satisfy the record retention conditions.[632] Parties will need to implement appropriate mechanisms to ensure that they retain for three years adequate records of any free writing prospectuses used and not filed. We have revised the proposed record retention condition so that it encompasses only free writing prospectuses that have not been filed on EDGAR, so this should ease the burden for issuers and offering participants.

The disclosures may increase the cost to issuers of preparing their Exchange Act reports. We do not expect the costs to accelerated filers and well-known seasoned issuers of including disclosure of certain unresolved staff comments to be significant because the information will be readily available to the issuer.[633]

Including risk factor disclosure may impact issuers who do not already include this disclosure in their Exchange Act reports for other reasons.[634] Because issuers already are required to prepare financial statements and other information about their business, financial condition, and prospects in their annual and quarterly reports, some of which will include these risk factors, we believe that issuers will have already analyzed the

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632 For example, as we discussed in the Proposing Release, for purposes of the PRA analysis, we estimated that the aggregate total annual paperwork burden of complying with the record retention conditions for free writing prospectuses used in reliance on Rule 433 will be approximately $948,900.

633 For example, as we discussed in the Proposing Release, for purposes of the PRA analysis, we estimated that the aggregate total annual paperwork burden of preparing, reviewing and filing the disclosure of unresolved comments in Exchange Act reports will be approximately $138,713.

634 For example, as we discussed in the Proposing Release, for purposes of the PRA analysis, we estimated that the aggregate total annual paperwork burden of preparing, reviewing and filing the disclosure of risk factors in Exchange Act reports will be approximately $9,743,417.

issues that might be addressed in the risk factor disclosure. In addition, issuers may already include risk factor disclosure in their Exchange Act reports for varying reasons, including to take advantage of the safe harbor for forward-looking statements in Securities Act Section 27A of the Securities Act [635] and the "bespeaks caution" defense developed through case law. We recognize, however, that issuers will incur costs in preparing, reviewing, filing, printing, and disseminating this information. In particular, in addition to involving in-house preparers, in-house legal and accounting staff, and senior management, issuers may consult with outside legal counsel in preparing this disclosure. We believe, however, that the potential compliance costs for the risk factor disclosure should be considered in light of the fact that requiring risk factor disclosure in Exchange Act registration statements and annual reports will enhance the ability of reporting issuers to incorporate risk factor disclosure from Exchange Act reports into Securities Act registration statements to satisfy the risk factor disclosure requirements.

Parties also may incur additional costs due to the requirement to notify investors that they have purchased in a registered offering. In addition, these same parties will incur costs to establish procedures for receiving and complying with requests for final prospectuses. We believe that providing the notice to investors will not impose a significant incremental cost because the notice can consist of a pre-printed message that is automatically delivered with or as part of the confirmation required by Exchange Act Rule 10b-10. Accordingly, we estimate that the cost for complying with Rule 173 will be approximately $0.05 per notice. We estimate the annual cost of providing the

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635 17 U.S.C. 77z-2.

notifications will be approximately $11,622,500.[636] The cost savings resulting from the elimination of the requirement to supply a final prospectus to each investor will offset the costs incurred, however.

**2. Potential for Increased Liability**

The rules to deem prospectus supplements to be part of and included in effective registration statements, and to modify, for liability purposes for the issuer and underwriters only, the effective date of shelf registration statements to link them to individual offerings or takedowns off the shelf registration statement may cause issuers to evaluate more carefully the information contained in prospectuses and the information conveyed to investors. We have sought to minimize the potential costs by limiting the rule so that it affects the issuer and underwriters only, and therefore have not changed the effective date for liability purposes for officers, directors, and experts, other than when new expertized information is included in the prospectus.

In response to commenters' concerns about cross-liability for free writing prospectuses, the rules provide greater clarity for when an offering participant would be liable for a free writing prospectus.

With respect to the risk factor disclosure, a potential cost might be that issuers may be concerned about increased liability for a material misstatement or omission in their disclosure. In view of existing liability for information in registration statements and Exchange Act reports, as well as existing safe-harbors for forward-looking information, in drafting the current rules, however, we were sensitive to potential additional costs that the disclosure requirement might impose. For example, for liability

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[636] ($0.05 per notice) multiplied by (232.45 million confirmations) = $11,622,500.

purposes, we are not treating risk factor disclosure any differently than other disclosures in Exchange Act reports that may be incorporated by reference into Securities Act registration statements. We also note that the safe harbor for forward-looking statements contained in Securities Act Section 27A and Exchange Act Section 21E may apply to this disclosure for eligible issuers. In addition, the risk factor disclosure is based on an evaluation of the material risks facing an issuer. Issuers currently disclose significant information about themselves in their Exchange Act reports, including in management's discussion and analysis of financial condition and results of operations and, as a result, already analyze their business and operations. Moreover, we note that issuers already are subject to disclosure requirements regarding this information in Securities Act registration statements.

### 3. Other Potential Costs

We are allowing registration statements by well-known seasoned issuers to become effective automatically, rather than being subject to review by the staff of the Division of Corporation Finance. As a result, registrants may not have the same incentive to remedy deficient disclosure in Exchange Act reports or in the registration statement itself than they would if their registration statements were subject to pre-effective staff review. We have sought to minimize this possibility by requiring accelerated filers and well-known seasoned issuers to disclose, on an annual basis, written staff comments on their periodic report disclosures, that were issued more than 180 days prior to the fiscal year end covered by the report, that the issuer believes to be material, and that remain unresolved at the time of the filing of the annual report.

The rules also may impose certain costs on underwriters. For example, removing the restrictions on at-the-market equity offerings by unseasoned issuers on Form S-3 or Form F-3 may affect underwriters adversely because issuers may decide not to hire an underwriter to conduct an at-the-market equity offering.

The rules permit reporting issuers with the ability to incorporate by reference historical filings into Form S-1 or Form F-1, provided that the issuer post its Exchange Act reports on a web site maintained by or for the issuer and containing issuer information. Issuers wishing to take advantage of this ability to incorporate by reference will have to make these reports readily available on a web site maintained by or for the issuer in addition to availability on EDGAR. Because most companies today maintain web sites for their businesses and other entities maintain web sites for companies, we do not believe that this cost will be significant.

We also recognize that relaxing restrictions on communications may impose a burden on investors. For example, today, for some offerings, such as those on Form S-1, much of the relevant information regarding an offering is required to be contained in one document comprising the registration statement. Under the rules, some offerings will require an investor to assemble and assimilate information from various free writing prospectuses, Exchange Act reports, and the Securities Act registration statement in order to get the relevant information regarding an offering. Investors will have to compile the information integrated into the registration statement or delivered by means outside of the prospectus. We note, however, that Securities Act Forms S-3 and F-3 have long permitted incorporation by reference from the issuer's Exchange Act reports and

investors have not complained they are unduly burdened when investing in offerings registered on these Forms.

## X. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Exchange Act Section 23(a)(2)[637] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, Securities Act Section 2(b),[638] Exchange Act Section 3(f),[639] and Investment Company Act Section 2(c)[640] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The rules are intended to modify and advance the Commission's regulatory system for offerings under the Securities Act, enhance communications between public issuers and investors, and promote investor protection. We anticipate these rules will improve investors' ability to make informed investment decisions and, therefore, lead to increased efficiency and competitiveness of the U.S. capital markets. We anticipate that this increased market efficiency and investor confidence also may encourage more efficient capital formation. Specifically, we believe that the rules will:

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637 15 U.S.C. 78w(a)(2).

638 15 U.S.C. 77b(b).

639 15 U.S.C. 78c(f).

640 15 U.S.C. 80a-2(c).

- facilitate greater availability of information to investors and the market with regard to all issuers;
- eliminate barriers to open communications that have been made increasingly outmoded by technological advances;
- reflect the increased importance of electronic dissemination of information, including the use of the Internet;
- make the capital formation process more efficient; and
- define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

To the extent that some of these reforms will be available to well-known seasoned issuers, smaller issuers may not be able to use all of the reforms. In addition, it is possible that investors will favor issuers that are able to take advantage of the reforms. We believe, however, that these potential unequal effects are justified in order to ensure that investors have appropriate access to required information about all issuers.

We requested comment on whether the rules would promote efficiency, competition, and capital formation or have an impact or burden on competition. We received no comments on this subject directly, but some comments touched on these issues. Commenters expressed strong support for the proposals to streamline the registration process by providing well-known seasoned issuers the ability to use automatic shelf registration statements.[641] They generally believed that the streamlined registration process will aid issuers in capital formation by providing them with quick access to the capital markets. In addition, one commenter believed the proposals have the potential to draw more offerings from 144A and other unregistered markets into public

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641 See note 509, above.

market, improve efficiency of U.S. public market, and possibly enhance global competitiveness of U.S. public capital markets.[642]

Two commenters believed that the proposed rules, which created an exception to the conditions to the free writing prospectus rules for publications by unaffiliated media would create a competitive disadvantage for issuers who are in the media business.[643] We have addressed these concerns by providing an exclusion for media companies and their affiliates if certain conditions are met, including that the company or its affiliate is a bona fide media publisher or broadcaster.[644]

## XI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to revisions to the rules and forms under the Securities Act and the Exchange Act that will (1) alter shelf registration procedures; (2) allow more communications between offering participants than currently permitted; and (3) enable offering participants to satisfy their prospectus delivery obligations through means other than actual physical delivery. These rules are intended to modify and advance the Commission's regulatory system for offerings under the Securities Act, enhance communications between public issuers and investors, and promote investor protection.

### A. Reasons for and Objectives of the Rules and Amendments

On November 3, 2004, we issued proposed rule and form changes under the Securities Act and the Exchange Act that would modernize the securities offering and

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642 See letter from SIA.

643 See letters from Davis Polk and NYSBA.

644 See the discussion in Section III.D.3 above under "Issuers in the Media Business."

communication processes while maintaining protection of investors under the Securities Act.[645] We are revising the registration, communications, and offering processes under the Securities Act that we believe, while limited in scope, properly address the areas that are in need of modernization. The rules involve three main areas:

- communications related to registered securities offerings;
- procedural restrictions in the offering and capital formation processes; and
- delivery of information to investors.

The overall objective of the reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets. The rules reflect our view that revisions to the Securities Act registration and offering processes are not only appropriate in light of significant developments in the offering and capital formation processes, but also are necessary for the proper protection of investors under the statute. This view is based on our belief that today's rules will:

- facilitate greater availability of information to investors and the market with regard to all issuers;
- eliminate barriers to open communications that have been made increasingly outmoded by technological advances;
- reflect the increased importance of electronic dissemination of information, including the use of the Internet;
- make the capital formation process more efficient; and
- define more clearly both the information and the timeliness of the availability of information against which a seller's statements are evaluated for liability purposes.

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645 Securities Offering Reform, Release No. 33-8501 (Nov. 3, 2004)[69 FR 67392] ("Proposing Release").

### B. Significant Issues Raised by Public Comment

The Initial Regulatory Flexibility Analysis, or IRFA, appeared in the Proposing Release.[646] We requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the rules, the nature of the impact, how to quantify the number of small entities that would be affected and how to quantify the impact of the proposals. We received no comment letters responding to that request.

### C. Small Entities Subject to the Rules

The rules will affect issuers that are small entities. Securities Act Rule 157[647] and Exchange Act Rule 0-10(a)[648] define an issuer, other than an investment company, to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year.[649] We estimate that there were approximately 2,500 public issuers, other than investment companies, that may be considered small entities as of the end of fiscal year 2004.[650]

In addition to small issuers, small broker-dealers may be affected by the rules. Paragraph (c)(1) of Rule 0-10[651] states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the

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646 See the Proposing Release at Section VII.

647 17 CFR 230.157.

648 17 CFR 240.0-10(a).

649 An investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. 17 CFR 270.0-10.

650 We estimate that there are approximately 233 investment companies that may be considered small entities. We believe the impact on these investment companies will be minimal because they generally are not covered by the new rules.

prior fiscal year as of which its audited financial statements were prepared pursuant to §240.17a-5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2003, we estimated that there were approximately 900 broker-dealers that qualified as small entities as defined above. To the extent a small broker-dealer participates in a securities offering or prepares research reports, it may be affected by the rules. Generally, we believe larger broker-dealers engage in these activities. We requested comment on whether and how these rules will affect small broker-dealers and did not receive any responses.

For purposes of the rules, we categorize issuers into tiers, consisting of non-reporting issuers, unseasoned issuers, seasoned issuers, and well-known seasoned issuers. The first three tiers of issuers are identified by pre-existing criteria under the existing federal securities laws. A non-reporting issuer is an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act.[652] An unseasoned issuer is an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. A seasoned issuer is an issuer that uses Form S-3 or Form F-3 to register offerings of securities.

Under the rules, a well-known seasoned issuer will have the greatest flexibility. The largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers,

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651 17 CFR 240.0-10(c)(1).

652 Under the rules, an issuer that is voluntarily filing Exchange Act reports, but is not required to do so, will be an unseasoned issuer for purposes of the

large, seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made.

To the extent that some of these reforms are designed for well-known seasoned issuers, smaller issuers may not benefit from all of the reforms to the registration process. We believe, however, that these potential unequal effects are justified in order to ensure that investors have access to required information about all issuers. Therefore, allowing smaller entities to take advantage of all of the reforms to the registration process may not address issues of investor protection. The reforms are not available to offerings by a blank check company, offerings by a shell company, and offerings of penny stock by an issuer. These offerings are more likely to be made by issuers that are small issuers. We have excluded these offerings from the reforms because they pose the greatest risk of abuse of the reforms.

To the extent the rules are not available to smaller issuers, the establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objectives of the rules. We believe that the rules are a cost-effective initial approach to address specific concerns related to small entities.

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communications and procedural rules and rule rules.

### D. Reporting, Record Keeping, and Other Compliance Requirements

The rules are expected to impact all issuers raising capital and selling security holder transactions that are registered under the Securities Act, as well as all issuers that file annual reports on Exchange Act Form 10-K or Form 20-F.

For smaller issuers, we are not imposing any new restrictions on communications. In fact, small issuers will be able to take advantage of the new bright-line rule permitting communications more than 30 days before filing a registration statement and the clarification that they can continue to make factual business communications and, if they are reporting companies, communications of forward-looking information. Small issuers, like larger issuers, will have to file any free writing prospectus they use. We requested comment on whether issuers that file on Form 10-KSB, who tend to be smaller issuers, should be required to disclose risk factors in their annual reports, and have decided not to extend this requirement to these issuers. Unlike larger companies that are "accelerated filers," smaller issuers will not be required to disclose outstanding staff comments in their annual reports.

The rules also will affect broker-dealers participating in a registered offering, as they will no longer be required to deliver a final prospectus, but will be able to send a notice of allocation and notice of prospectus availability. They also will be permitted to prepare and use free writing prospectuses. If a free writing is not required to be filed publicly, the broker-dealer will have to retain copies of the free writing prospectus for three years. (Such retention requirements may already exist in most cases). Finally, the broker-dealer will be permitted to issue research reports with respect to a broader class of issuers and securities than currently permitted.

### E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the rules, we considered the following alternatives:

1. Establishing different compliance or reporting requirements that take into account the resources available to small entities;

2. Clarifying, consolidating, or simplifying compliance and reporting obligations for small entities;

3. Using performance standards rather than design standards; and

4. Including smaller entities in some of the reforms.

We have considered a variety of reforms to achieve our regulatory objectives and, where possible, have taken steps to minimize the effects of the rules and amendments on small entities. For example, we are not requiring small business issuers to include disclosure of risk factors or unresolved staff comments in their Exchange Act periodic reports. We are liberalizing generally the restrictions regarding communications around the time of a Securities Act registered offering of securities. As discussed above, the flexibility will be greatest for larger, more seasoned issuers; however, the rules will provide greater flexibility for all issuers, including small entities. As we implement these changes, we will consider the available information to determine whether greater flexibility is warranted, consistent with investor protections. In this regard, we have established an Advisory Committee on Smaller Public Companies to examine these and other related issues.

## XII. Statutory Authority – Text of the Rules and Amendments

We are adopting the new rules and amendments pursuant to Sections 7, 10, 19, 27A and 28 of the Securities Act, as amended, Sections 3, 10, 12, 13, 15, 17, 21E, 23 and 36 of the Securities Exchange Act, as amended, and Sections 8, 24(a), 30, and 38 of the Investment Company Act of 1940, as amended.

**List of Subjects**

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 229, 230, 239, 240, 243, and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

**PART 200 - ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS**

**SUBPART A - ORGANIZATION AND PROGRAM MANAGEMENT**

1. The authority citation for Part 200, subpart A, continues to read, in part, as follows:

Authority: 15 U.S.C. 77s, 77o, 77sss, 78d , 78d-1, 78d-2, 78w, 78ll(d), 78mm, 79t, 80a-37, 80b-11, and 7202, unless otherwise noted.

* * * * *

2. Amend §200.30-1 to add paragraphs (a)(9) and (a)(10) to read as follows:

**§200.30-1 Delegation of authority to Director of Division of Corporation Finance.**

* * * * *

(a) * * *

(9) To determine whether to object, pursuant to Rule 401(g)(1) (§230.401(g)(1) of this chapter), and to notify issuers, pursuant to Rule 401(g)(2) (§230.401(g)(2) of this chapter), of an objection to the use of an automatic shelf registration as defined in Rule 405 (§230.405 of this chapter) or any post-effective amendment thereto that becomes effective immediately pursuant to Rule 462 (§230.462 of this chapter).

(10) To authorize the granting or denial of applications, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer as defined in Rule 405.

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## PART 228 – INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

3. The authority citation for part 228 continues to read in part as follows:

**Authority**: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-29, 80a-30, 80a-37, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

4. Amend §228.512 as follows:

a. Revise the Note after paragraph (a)(1)(iii);

b. Add paragraph (a)(4); and

c. Add paragraph (g).

The additions read as follows:

**§228.512 (Item 512) Undertakings.**

* * * * *

(a) ***

NOTES to Item 512(a)(1):

1. Small business issuers do not need to give the statements in paragraphs (a)(1)(i) and (a)(1)(ii) of this Item if the registration statement is on Form S-8 (§239.16b of this chapter), and the information required in a post-effective amendment is incorporated by reference from periodic reports filed by the small business issuer under the Exchange Act; and

2. Small business issuers do not need to give the statements in paragraphs (a)(1)(i), (a)(1)(ii), and (a)(1)(iii) of this Item if the registration statement is on Form S-3 (§239.13 of this chapter) and the information required in a post-effective amendment is incorporated by reference from periodic reports filed by the small business issuer under the Exchange Act, or is contained in a form of prospectus filed pursuant to Rule 424(b)(§230.424(b) of this chapter) that is deemed part of and included in the registration statement.

*  *  *  *  *

(4) For determining liability of the undersigned small business issuer under the Securities Act to any purchaser in the initial distribution of the securities, the undersigned small business issuer undertakes that in a primary offering of securities of the undersigned small business issuer pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned small business issuer will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

(i) Any preliminary prospectus or prospectus of the undersigned small business issuer relating to the offering required to be filed pursuant to Rule 424 (§230.424 of this chapter);

(ii) Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned small business issuer or used or referred to by the undersigned small business issuer;

(iii) The portion of any other free writing prospectus relating to the offering containing material information about the undersigned small business issuer or its securities provided by or on behalf of the undersigned small business issuer; and

(iv) Any other communication that is an offer in the offering made by the undersigned small business issuer to the purchaser.

*  *  *  *  *

(g) That, for the purpose of determining liability under the Securities Act to any purchaser:

(1) If the small business issuer is relying on Rule 430B (§230.430B of this chapter):

(i) Each prospectus filed by the undersigned small business issuer pursuant to Rule 424(b)(3) (§230.424(b)(3) of this chapter) shall be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement; and

(ii) Each prospectus required to be filed pursuant to Rule 424(b)(2), (b)(5), or (b)(7) (§230.424(b)(2), (b)(5), or (b)(7) of this chapter) as part of a registration statement in reliance on Rule 430B relating to an offering made pursuant to Rule 415(a)(1)(i), (vii), or (x) (§230.415(a)(1)(i), (vii), or (x) of this chapter) for the purpose of providing the information required by section 10(a) of the Securities Act shall be deemed to be part of and included in the registration statement as of the earlier of the date such form of prospectus is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. As provided in Rule 430B, for liability purposes of the issuer and any person that is at that date an underwriter, such date shall be deemed to be a new effective date of the registration statement relating to the securities in the registration statement to which that prospectus relates, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. Provided, however, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration

statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date; or

(2) If the small business issuer is subject to Rule 430C (§230.430C of this chapter), include the following:

Each prospectus filed pursuant to Rule 424(b)(§230.424(b) of this chapter) as part of a registration statement relating to an offering, other than registration statements relying on Rule 430B or other than prospectuses filed in reliance on Rule 430A (§230.430A of this chapter), shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. Provided, however, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such first use, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such date of first use.

## PART 229 – STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K

5. The authority citation for part 229 continues to read in part as follows:

**Authority**: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 79e, 79j, 79n, 79t, 80a-8, 80a-9, 80a-20, 80a-29, 80a-

30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

6. Amend §229.512 as follows:

a. Revise the first proviso immediately following paragraph (a)(1)(iii);

b. Redesignate the proviso immediately following paragraph (a)(1)(iii) as paragraph (C);

c. Add paragraph (a)(5); and

d. Add paragraph (a)(6).

The revision and additions read as follows:

**§229.512 (Item 512) Undertakings.**

(a) * * *

(1) * * *

(iii) * * *

Provided, however, That:

(A) Paragraphs (a)(1)(i) and (a)(1)(ii) of this section do not apply if the registration statement is on Form S-8 (§239.16b of this chapter), and the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated by reference in the registration statement; and

(B) Paragraphs (a)(1)(i), (a)(1)(ii) and (a)(1)(iii) of this section do not apply if the registration statement is on Form S-3 (§239.13 of this chapter) or Form F-3 (§239.33 of this chapter) and the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement, or is contained in a form of prospectus filed pursuant to Rule 424(b) (§230.424(b) of this chapter) that is part of the registration statement.

* * * * *

(5) That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser:

(i) If the registrant is relying on Rule 430B (§230.430B of this chapter):

(A) Each prospectus filed by the registrant pursuant to Rule 424(b)(3) (§230.424(b)(3) of this chapter) shall be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement; and

(B) Each prospectus required to be filed pursuant to Rule 424(b)(2), (b)(5), or (b)(7) (§230.424(b)(2), (b)(5), or (b)(7) of this chapter) as part of a registration statement in reliance on Rule 430B relating to an offering made pursuant to Rule 415(a)(1)(i), (vii), or (x) (§230.415(a)(1)(i), (vii), or (x) of this chapter) for the purpose of providing the information required by section 10(a) of the Securities Act of 1933 shall be deemed to be part of and included in the registration statement as of the earlier of the date such form of prospectus is first used after effectiveness or the date of the first contract of sale of

securities in the offering described in the prospectus. As provided in Rule 430B, for liability purposes of the issuer and any person that is at that date an underwriter, such date shall be deemed to be a new effective date of the registration statement relating to the securities in the registration statement to which that prospectus relates, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. Provided, however, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date; or

(ii) If the registrant is subject to Rule 430C (§230.430C of this chapter), each prospectus filed pursuant to Rule 424(b) as part of a registration statement relating to an offering, other than registration statements relying on Rule 430B or other than prospectuses filed in reliance on Rule 430A (§230.430A of this chapter), shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. Provided, however, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such first use, supersede or modify any statement that was made in the registration

statement or prospectus that was part of the registration statement or made in any such document immediately prior to such date of first use.

(6) That, for the purpose of determining liability of the registrant under the Securities Act of 1933 to any purchaser in the initial distribution of the securities:

The undersigned registrant undertakes that in a primary offering of securities of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

(i) Any preliminary prospectus or prospectus of the undersigned registrant relating to the offering required to be filed pursuant to Rule 424 (§230.424 of this chapter);

(ii) Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or used or referred to by the undersigned registrant;

(iii) The portion of any other free writing prospectus relating to the offering containing material information about the undersigned registrant or its securities provided by or on behalf of the undersigned registrant; and

(iv) Any other communication that is an offer in the offering made by the undersigned registrant to the purchaser.

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**PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

7. The authority citation for part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 79t, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

8. Revise §230.134 to read as follows:

**§230.134 Communications not deemed a prospectus.**

Except as provided in paragraphs (e) and (g) of this section, the terms "prospectus" as defined in section 2(a)(10) of the Act or "free writing prospectus" as defined in Rule 405 (§230.405) shall not include a communication limited to the statements required or permitted by this section, provided that the communication is published or transmitted to any person only after a registration statement relating to the offering that includes a prospectus satisfying the requirements of section 10 of the Act (except as otherwise permitted in paragraph (a) of this section) has been filed.

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to paragraphs (a)(4), (a)(5), (a)(6), and (a)(17), the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:

(1) Factual information about the legal identity and business location of the issuer limited to the following: the name of the issuer of the security, the address, phone

number, and e-mail address of the issuer's principal offices and contact for investors, the issuer's country of organization, and the geographic areas in which it conducts business;

(2) The title of the security or securities and the amount or amounts being offered, which title may include a designation as to whether the securities are convertible, exercisable, or exchangeable, and as to the ranking of the securities;

(3) A brief indication of the general type of business of the issuer, limited to the following:

(i) In the case of a manufacturing company, the general type of manufacturing, the principal products or classes of products manufactured, and the segments in which the company conducts business;

(ii) In the case of a public utility company, the general type of services rendered, a brief indication of the area served, and the segments in which the company conducts business;

(iii) In the case of an asset-backed issuer, the identity of key parties, such as sponsor, depositor, issuing entity, servicer or servicers, and trustee, the asset class of the transaction, and the identity of any credit enhancement or other support; and

(iv) In the case of any other type of company, a corresponding statement;

(4) The price of the security, or if the price is not known, the method of its determination or the bona fide estimate of the price range as specified by the issuer or the managing underwriter or underwriters;

(5) In the case of a fixed income security, the final maturity and interest rate provisions or, if the final maturity or interest rate provisions are not known, the probable

final maturity or interest rate provisions, as specified by the issuer or the managing underwriter or underwriters;

(6) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating as referred to in paragraph (a)(17) of this section;

(7) A brief description of the intended use of proceeds of the offering, if then disclosed in the prospectus that is part of the filed registration statement;

(8) The name, address, phone number, and e-mail address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;

(9) The type of underwriting, if then included in the disclosure in the prospectus that is part of the filed registration statement;

(10) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(11) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them);

(12) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with the issuer or an underwriter or participating dealer (including procedures regarding account-

opening and submitting indications of interest and conditional offers to buy), and procedures regarding directed share plans and other participation in offerings by officers, directors, and employees of the issuer;

(13) Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies, or similar investors under the laws of any State or Territory or the District of Columbia, and the permissibility or status of the investment under the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 et seq.];

(14) Whether, in the opinion of counsel, the security is exempt from specified taxes, or the extent to which the issuer has agreed to pay any tax with respect to the security or measured by the income therefrom;

(15) Whether the security is being offered through rights issued to security holders, and, if so, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, the actual or proposed record date, the date upon which the rights were issued or are expected to be issued, the actual or anticipated date upon which they will expire, and the approximate subscription price, or any of the foregoing;

(16) Any statement or legend required by any state law or administrative authority;

(17) With respect to the securities being offered:

(i) Any security rating assigned, or reasonably expected to be assigned, by a nationally recognized statistical rating organization as defined in Rule 15c3-1(c)(2)(vi)(F) of the Securities Exchange Act of 1934 (§240.15c3-1(c)(2)(vi)(F) of this chapter) and the

name or names of the nationally recognized statistical rating organization(s) that assigned or is or are reasonably expected to assign the rating(s); and

(ii) If registered on Form F–9 (§239.39 of this chapter), any security rating assigned, or reasonably expected to be assigned, by any other rating organization specified in the Instruction to paragraph A.(2) of General Instruction I of Form F–9;

(18) The names of selling security holders, if then disclosed in the prospectus that is part of the filed registration statement;

(19) The names of securities exchanges or other securities markets where any class of the issuer's securities are, or will be, listed;

(20) The ticker symbols, or proposed ticker symbols, of the issuer's securities;

(21) The CUSIP number as defined in Rule 17Ad-19(a)(5) of the Securities Exchange Act of 1934 (§240.17Ad-19(a)(5) of this chapter) assigned to the securities being offered; and

(22) Information disclosed in order to correct inaccuracies previously contained in a communication permissibly made pursuant to this section.

(b) Except as provided in paragraph (c) of this section, every communication used pursuant to this section shall contain the following:

(1) If the registration statement has not yet become effective, the following statement:

> A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective; and

(2) The name and address of a person or persons from whom a written prospectus for the offering meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) including as to the identified paragraphs above a price range where required by rule, may be obtained.

(c) Any of the statements or information specified in paragraph (b) of this section may, but need not, be contained in a communication which:

(1) Does no more than state from whom and include the uniform resource locator (URL) where a written prospectus meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or

(2) Is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405, which meets the requirements of section 10 of the Act, including a price range where required by rule, at the date of such preliminary communication.

(d) A communication sent or delivered to any person pursuant to this section which is accompanied or preceded by a prospectus which meets the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405), including a price range where required by rule, at the date of such communication, may solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate whether he or she might be interested in the security, if the communication contains substantially the following statement:

> No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any

such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date.

Provided, that such statement need not be included in such a communication to a dealer.

(e) A section 10 prospectus included in any communication pursuant to this section shall remain a prospectus for all purposes under the Act.

(f) The provision in paragraphs (c)(2) and (d) of this section that a prospectus that meets the requirements of section 10 of the Act precede or accompany a communication will be satisfied if such communication is an electronic communication containing an active hyperlink to such prospectus.

(g) This section does not apply to a communication relating to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

9. Revise §230.137 to read as follows:

**§230.137 Publications or distributions of research reports by brokers or dealers that are not participating in an issuer's registered distribution of securities.**

Under the following conditions, the terms "offers," "participates," or "participation" in section 2(a)(11) of the Act shall not be deemed to apply to the publication or distribution of research reports with respect to the securities of an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective:

(a) The broker or dealer (and any affiliate) that has distributed the report and, if different, the person (and any affiliate) that has published the report have not participated, are not participating, and do not propose to participate in the distribution of the securities that are or will be the subject of the registered offering.

(b) In connection with the publication or distribution of the research report, the broker or dealer (and any affiliate) that has distributed the report and, if different, the person (and any affiliate) that has published the report are not receiving and have not received consideration directly or indirectly from, and are not acting under any direct or indirect arrangement or understanding with:

(1) The issuer of the securities;

(2) A selling security holder;

(3) Any participant in the distribution of the securities that are or will be the subject of the registration statement; or

(4) Any other person interested in the securities that are or will be the subject of the registration statement.

Instruction to §230.137(b).

This paragraph (b) does not preclude payment of:

1. The regular price being paid by the broker or dealer for independent research, so long as the conditions of this paragraph (b) are satisfied; or

2. The regular subscription or purchase price for the research report.

(c) The broker or dealer publishes or distributes the research report in the regular course of its business.

(d) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:

(1) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(2) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405); or

(3) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§240.3a51-1 of this chapter).

(e) Definition of research report. For purposes of this section, research report means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

10. Revise §230.138 to read as follows:

**§230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.**

(a) Registered offerings. Under the following conditions, a broker's or dealer's publication or distribution of research reports about securities of an issuer shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker or dealer is participating or will participate in the registered offering of the issuer's securities:

(1)(i) The research report relates solely to the issuer's common stock, or debt securities, or preferred stock convertible into its common stock, and the offering involves solely the issuer's non-convertible debt securities or non-convertible, non-participating preferred stock; or

(ii) The research report relates solely to the issuer's non-convertible debt securities or non-convertible, non-participating preferred stock, and the offering involves solely the issuer's common stock, or debt securities, or preferred stock convertible into its common stock.

Instruction to paragraph (a)(1): If the issuer has filed a shelf registration statement under Rule 415(a)(1)(x) (§230.415(a)(1)(x)) or pursuant to General Instruction I.D. of Form S-3 or General Instruction I.C. of Form F-3 (§239.13 or §239.33 of this chapter) with respect to multiple classes of securities, the conditions of paragraph (a)(1) of this section must be satisfied for the offering in which the broker or dealer is participating or will participate.

(2) The issuer as of the date of reliance on this section:

(i) Is required to file reports, and has filed all periodic reports required during the preceding 12 months (or such shorter time that the issuer was required to file such reports) on Forms 10-K (§249.310 of this chapter), 10-KSB (§249.310b of this chapter), 10-Q (§249.308a of this chapter), 10-QSB (§249.308b of this chapter), and 20-F (§249.220f of this chapter) pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or

(ii) Is a foreign private issuer that:

(A) Meets all of the registrant requirements of Form F-3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2(a) of Form F-3;

(B) Either:

(1) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or

(2) Is issuing non-convertible investment grade securities meeting the provisions of General Instruction I.B.2. of Form F-3; and

(C) Either:

(1) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§230.902(b)) and has had them so traded for at least 12 months; or

(2) Has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more.

(3) The broker or dealer publishes or distributes research reports on the types of securities in question in the regular course of its business; and

(4) The issuer is not, and during the past three years neither the issuer nor any of its predecessors was:

(i) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405); or

(iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§240.3a51-1 of this chapter).

(b) Rule 144A offerings. If the conditions in paragraph (a) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§230.144A).

(c) Regulation S offerings. If the conditions in paragraph (a) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:

(1) Constitute directed selling efforts as defined in Rule 902(c) (§230.902(c)) for offerings under Regulation S (§230.901 through §230.905); or

(2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§230.902(h)) for offerings under Regulation S.

(d) Definition of research report. For purposes of this section, research report means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

11. Revise §230.139 to read as follows:

**§230.139 Publications or distributions of research reports by brokers or dealers distributing securities.**

(a) Registered offerings. Under the conditions of paragraph (a)(1) or (a)(2) of this section, a broker's or dealer's publication or distribution of a research report about an issuer or any of its securities shall be deemed for purposes of sections 2(a)(10) and 5(c) of the Act not to constitute an offer for sale or offer to sell a security that is the subject of

an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, even if the broker or dealer is participating or will participate in the registered offering of the issuer's securities:

(1) Issuer-specific research reports.

(i) The issuer either:

(A)(1) At the later of the time of filing its most recent Form S-3 (§239.13 of this chapter) or Form F-3 (§239.33 of this chapter) or the time of its most recent amendment to such registration statement for purposes of complying with section 10(a)(3) of the Act, meets the registrant requirements of such Form S-3 or Form F-3 and either at such date meets the minimum float provisions of General Instruction I.B.1 of such Forms or, at the date of reliance on this section, is offering securities meeting the requirements for the offering of investment grade securities pursuant to General Instruction I.B.2 of Form S-3 or Form F-3; and

(2) As of the date of reliance on this section, has filed all periodic reports required during the preceding 12 months on Forms 10-K (§249.310 of this chapter), 10-KSB (§249.310b of this chapter), 10-Q (§249.308a of this chapter), 10-QSB (§249.308b of this chapter), and 20-F (§249.220f of this chapter) pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); or

(B) Is a foreign private issuer that as of the date of reliance on this section:

(1) Meets all of the registrant requirements of Form F-3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2(a) of Form F-3 ;

(2) Either:

(i) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or

(ii) Is issuing non-convertible investment grade securities meeting the provisions of General Instruction I.B.2. of Form F-3; and

(3) Either:

(i) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§230.902(b)) and has had them so traded for at least 12 months; or

(ii) Has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(ii) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:

(A) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(B) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405); or

(C) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§240.3a51-1 of this chapter); and

(iii) The broker or dealer publishes or distributes research reports in the regular course of its business and such publication or distribution does not represent the initiation of publication of research reports about such issuer or its securities or reinitiation of such publication following discontinuation of publication of such research reports.

(2) Industry reports.

(i) The issuer is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 or satisfies the conditions in paragraph (a)(1)(i)(B) of this section;

(ii) The condition in paragraph (a)(1)(ii) of this section is satisfied;

(iii) The research report includes similar information with respect to a substantial number of issuers in the issuer's industry or sub-industry, or contains a comprehensive list of securities currently recommended by the broker or dealer;

(iv) The analysis regarding the issuer or its securities is given no materially greater space or prominence in the publication than that given to other securities or issuers; and

(v) The broker or dealer publishes or distributes research reports in the regular course of its business and, at the time of the publication or distribution of the research report, is including similar information about the issuer or its securities in similar reports.

(b) Rule 144A offerings. If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising, in connection with an offering relying on Rule 144A (§230.144A).

(c) Regulation S offerings. If the conditions in paragraph (a)(1) or (a)(2) of this section are satisfied, a broker's or dealer's publication or distribution of a research report shall not:

(1) Constitute directed selling efforts as defined in Rule 902(c) (§230.902(c)) for offerings under Regulation S (§§230.901 through 230.905); or

(2) Be inconsistent with the offshore transaction requirement in Rule 902(h) (§230.902(h)) for offerings under Regulation S.

(d) Definition of research report. For purposes of this section, research report means a written communication, as defined in Rule 405, that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

Instruction to §230.139.

Projections. A projection constitutes an analysis or information falling within the definition of research report. When a broker or dealer publishes or distributes projections of an issuer's sales or earnings in reliance on paragraph (a)(2) of this section, it must:

1. Have previously published or distributed projections on a regular basis in order to satisfy the "regular course of its business" condition;

2. At the time of publishing or disseminating a research report, be publishing or distributing projections with respect to that issuer; and

3. For purposes of paragraph (a)(2)(iii) of this section, include projections covering the same or similar periods with respect to either a substantial number of issuers in the issuer's industry or sub-industry or substantially all issuers represented in the comprehensive list of securities contained in the research report.

12. Amend §230.139a as follows:

a. Remove paragraph (c); and

b. Redesignate paragraphs(d) and (e) as paragraphs (c) and(d).

13. Revise §230.153 to read as follows:

**§230.153 Definition of "preceded by a prospectus" as used in section 5(b)(2) of the Act, in relation to certain transactions.**

(a) Definition of preceded by a prospectus. The term preceded by a prospectus as used in section 5(b)(2) of the Act, regarding any requirement of a broker or dealer to deliver a prospectus to a broker or dealer as a result of a transaction effected between such parties on or through a national securities exchange or facility thereof, trading facility of a national securities association, or an alternative trading system, shall mean the satisfaction of the conditions in paragraph (b) of this section.

(b) Conditions. Any requirement of a broker or dealer to deliver a prospectus for transactions covered by paragraph (a) of this section will be satisfied if:

(1) Securities of the same class as the securities that are the subject of the transaction are trading on that national securities exchange or facility thereof, trading facility of a national securities association, or alternative trading system;

(2) The registration statement relating to the offering is effective and is not the subject of any pending proceeding or examination under section 8(d) or 8(e) of the Act;

(3) Neither the issuer, nor any underwriter or participating dealer is the subject of a pending proceeding under section 8A of the Act in connection with the offering; and

(4) The issuer has filed or will file with the Commission a prospectus that satisfies the requirements of section 10(a) of the Act.

(c) Definitions.

(1) The term national securities exchange, as used in this section, shall mean a securities exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).

(2) The term trading facility, as used in this section, shall mean a trading facility sponsored and governed by the rules of a registered securities association or a national securities exchange.

(3) The term alternative trading system, as used in this section, shall mean an alternative trading system as defined in Rule 300(a) of Regulation ATS under the Securities Exchange Act of 1934 (§242.300(a) of this chapter) registered with the Commission pursuant to Rule 301 of Regulation ATS under the Securities Exchange Act of 1934 (§242.301(a) of this chapter).

14. Amend §230.158 to revise paragraph (c) to read as follows:

**§230.158 Definitions of certain terms in the last paragraph of section 11(a).**

* * * * *

(c) For purposes of the last paragraph of section 11(a) of the Act only, the effective date of the registration statement is deemed to be the date of the latest to occur of:

(1) The effective date of the registration statement;

(2) The effective date of the last post-effective amendment to the registration statement next preceding a particular sale of the issuer's registered securities to the public filed for the purposes of:

(i) Including any prospectus required by section 10(a)(3) of the Act; or

(ii) Reflecting in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement;

(3) The date of filing of the last report of the issuer incorporated by reference into the prospectus that is part of the registration statement or the date that a form of prospectus filed pursuant to Rule 424(b) or Rule 497(b), (c), (d), or (e) (§230.424(b) or §230.497(b), (c), (d), or (e)) is deemed part of and included in the registration statement, and relied upon in either case in lieu of filing a post-effective amendment for purposes of paragraphs (c)(2)(i) and (ii) of this section next preceding a particular sale of the issuer's registered securities to the public; or

(4) As to the issuer and any underwriter at that time only, the most recent effective date of the registration statement for purposes of liability under section 11 of the Act of the issuer and any such underwriter only at the time of or next preceding a particular sale of the issuer's registered securities to the public determined pursuant to Rule 430B (§230.430B).

* * * * *

15. Add §230.159 to read as follows:

**§230.159 Information available to purchaser at time of contract of sale.**

(a) For purposes of section 12(a)(2) of the Act only, and without affecting any other rights a purchaser may have, for purposes of determining whether a prospectus or oral statement included an untrue statement of a material fact or omitted to state a

material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

(b) For purposes of section 17(a)(2) of the Act only, and without affecting any other rights the Commission may have to enforce that section, for purposes of determining whether a statement includes or represents any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading at the time of sale (including, without limitation, a contract of sale), any information conveyed to the purchaser only after such time of sale (including such contract of sale) will not be taken into account.

(c) For purposes of section 12(a)(2) of the Act only, knowing of such untruth or omission in respect of a sale (including, without limitation, a contract of sale), means knowing at the time of such sale (including such contract of sale).

16. Add §230.159A to read as follows:

**§230.159A Certain definitions for purposes of section 12(a)(2) of the Act.**

(a) Definition of seller for purposes of section 12(a)(2) of the Act. For purposes of section 12(a)(2) of the Act only, in a primary offering of securities of the issuer, regardless of the underwriting method used to sell the issuer's securities, seller shall include the issuer of the securities sold to a person as part of the initial distribution of such securities, and the issuer shall be considered to offer or sell the securities to such

person, if the securities are offered or sold to such person by means of any of the following communications:

(1) Any preliminary prospectus or prospectus of the issuer relating to the offering required to be filed pursuant to Rule 424 (§230.424) or Rule 497 (§230.497);

(2) Any free writing prospectus as defined in Rule 405 (§230.405) relating to the offering prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an issuer that is an open-end management company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), any profile relating to the offering provided pursuant to Rule 498 (§230.498);

(3) The portion of any other free writing prospectus (or, in the case of an issuer that is an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)), any advertisement pursuant to Rule 482 (§230.482)) relating to the offering containing material information about the issuer or its securities provided by or on behalf of the issuer; and

(4) Any other communication that is an offer in the offering made by the issuer to such person.

Notes to paragraph (a) of Rule 159A

1. For purposes of paragraph (a) of this section, information is provided or a communication is made by or on behalf of an issuer if an issuer or an agent or representative of the issuer authorizes or approves the information or communication before its provision or use. An offering participant other than the issuer shall not be an

agent or representative of the issuer solely by virtue of its acting as an offering participant.

2. Paragraph (a) of this section shall not affect in any respect the determination of whether any person other than an issuer is a "seller" for purposes of section 12(a)(2) of the Act.

(b) Definition of by means of for purposes of section 12(a)(2) of the Act.

(1) For purposes of section 12(a)(2) of the Act only, an offering participant other than the issuer shall not be considered to offer or sell securities that are the subject of a registration statement by means of a free writing prospectus as to a purchaser unless one or more of the following circumstances shall exist:

(i) The offering participant used or referred to the free writing prospectus in offering or selling the securities to the purchaser;

(ii) The offering participant offered or sold securities to the purchaser and participated in planning for the use of the free writing prospectus by one or more other offering participants and such free writing prospectus was used or referred to in offering or selling securities to the purchaser by one or more of such other offering participants; or

(iii) The offering participant was required to file the free writing prospectus pursuant to the conditions to use in Rule 433 (§230.433).

(2) For purposes of section 12(a)(2) of the Act only, a person will not be considered to offer or sell securities by means of a free writing prospectus solely because another person has used or referred to the free writing prospectus or filed the free writing prospectus with the Commission pursuant to Rule 433.

17. Add §230.163 to read as follows:

**§230.163 Exemption from section 5(c) of the Act for certain communications by or on behalf of well-known seasoned issuers.**

Preliminary Note to §230.163

Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) In an offering by or on behalf of a well-known seasoned issuer, as defined in Rule 405 (§230.405), that will be or is at the time intended to be registered under the Act, an offer by or on behalf of such issuer is exempt from the prohibitions in section 5(c) of the Act on offers to sell, offers for sale, or offers to buy its securities before a registration statement has been filed, provided that:

(1) Any written communication that is an offer made in reliance on this exemption will be a free writing prospectus as defined in Rule 405 and a prospectus under section 2(a)(10) of the Act relating to a public offering of securities to be covered by the registration statement to be filed; and

(2) The exemption from section 5(c) of the Act provided in this section for such written communication that is an offer shall be conditioned on satisfying the conditions in paragraph (b) of this section.

(b) Conditions. (1) Legend.

(i) Every written communication that is an offer made in reliance on this exemption shall contain substantially the following legend:

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].

(ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site, and provide the Internet address and the particular location of the documents on the Web site.

(iii) An immaterial or unintentional failure to include the specified legend in a free writing prospectus required by this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:

(A) A good faith and reasonable effort was made to comply with the specified legend condition;

(B) The free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and

(C) If the free writing prospectus has been transmitted without the specified legend, the free writing prospectus is retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted.

(2) Filing condition.

(i) Subject to paragraph (b)(2)(ii) of this section, every written communication that is an offer made in reliance on this exemption shall be filed by the issuer with the Commission promptly upon the filing of the registration statement, if one is filed, or an amendment, if one is filed, covering the securities that have been offered in reliance on this exemption.

(ii) The condition that an issuer shall file a free writing prospectus with the Commission under this section shall not apply in respect of any communication that has previously been filed with, or furnished to, the Commission or that the issuer would not be required to file with the Commission pursuant to the conditions of Rule 433 (§230.433) if the communication was a free writing prospectus used after the filing of the registration statement. The condition that the issuer shall file a free writing prospectus with the Commission under this section shall be satisfied if the issuer satisfies the filing conditions (other than timing of filing which is provided in this section) that would apply under Rule 433 if the communication was a free writing prospectus used after the filing of the registration statement.

(iii) An immaterial or unintentional failure to file or delay in filing a free writing prospectus to the extent provided in this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:

(A) A good faith and reasonable effort was made to comply with the filing condition; and

(B) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(3) Ineligible offerings. The exemption in paragraph (a) of this section shall not be available to:

(i) Communications relating to business combination transactions that are subject to Rule 165 (§230.165) or Rule 166 (§230.166);

(ii) Communications by an issuer that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.); or

(ii) Communications by an issuer that is a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

(c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.

(d) For purposes of this section, a communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer is deemed to be an offer by the issuer and, if a written communication, is deemed to be a free writing prospectus of the issuer.

(e) A communication exempt from section 5(c) of the Act pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§243.100(b)(2)(iv) of this chapter).

18. Add §230.163A to read as follows:

**§230.163A Exemption from section 5(c) of the Act for certain communications made by or on behalf of issuers more than 30 days before a registration statement is filed.**

Preliminary Note to §230.163A

Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) Except as excluded pursuant to paragraph (b) of this section, in all registered offerings by issuers, any communication made by or on behalf of an issuer more than 30 days before the date of the filing of the registration statement that does not reference a securities offering that is or will be the subject of a registration statement shall not constitute an offer to sell, offer for sale, or offer to buy the securities being offered under the registration statement for purposes of section 5(c) of the Act, provided that the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.

(b) The exemption in paragraph (a) of this section shall not be available with respect to the following communications:

(1) Communications relating to business combination transactions that are subject to Rule 165 (§230.165) or Rule 166 (§230.166);

(2) Communications made in connection with offerings registered on Form S-8 (§239.16b of this chapter), other than by well-known seasoned issuers;

(3) Communications in offerings of securities of an issuer that is, or during the past three years was (or any of whose predecessors during the last three years was):

(i) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405); or

(iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§240.3a51-1 of this chapter); or

(4) Communications made by an issuer that is:

(i) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.); or

(ii) A business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

(c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.

(d) A communication exempt from section 5(c) of the Act pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§243.100(b)(2)(iv) of this chapter).

19. Add §230.164 to read as follows:

**§230.164 Post-filing free writing prospectuses in connection with certain registered offerings.**

Preliminary Notes to §230.164.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. Attempted compliance with this section does not act as an exclusive election and the person relying on this section also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) In connection with a registered offering of an issuer meeting the requirements of this section, a free writing prospectus, as defined in Rule 405 (§230.405), of the issuer or any other offering participant, including any underwriter or dealer, after the filing of the registration statement will be a section 10(b) prospectus for purposes of section 5(b)(1) of the Act provided that the conditions set forth in Rule 433 (§230.433) are satisfied.

(b) An immaterial or unintentional failure to file or delay in filing a free writing prospectus as necessary to satisfy the filing conditions contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:

(1) A good faith and reasonable effort was made to comply with the filing condition; and

(2) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(c) An immaterial or unintentional failure to include the specified legend in a free writing prospectus as necessary to satisfy the legend condition contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:

(1) A good faith and reasonable effort was made to comply with the legend condition;

(2) The free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and

(3) If the free writing prospectus has been transmitted without the specified legend, the free writing prospectus must be retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted.

(d) Solely for purposes of this section, an immaterial or unintentional failure to retain a free writing prospectus as necessary to satisfy the record retention condition contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as a good faith and reasonable effort was made to comply with the record retention condition. Nothing in this paragraph will affect, however, any other record retention provisions applicable to the issuer or any offering participant.

(e) Ineligible issuers (1) This section and Rule 433 are available only if at the eligibility determination date for the offering in question, determined pursuant to paragraph (h) of this section, the issuer is not an ineligible issuer as defined in Rule 405

(or in the case of any offering participant, other than the issuer, the participant has a reasonable belief that the issuer is not an ineligible issuer);

(2) Notwithstanding paragraph (e)(1) of this section, this section and Rule 433 are available to an ineligible issuer with respect to a free writing prospectus that contains only descriptions of the terms of the securities in the offering or the offering (or in the case of an offering of asset-backed securities, contains only information specified in paragraphs (a)(1), (2), (3), (4), (6), (7), and (8) of the definition of ABS informational and computational materials in Item 1101 of Regulation AB (§229.1101 of this chapter), unless the issuer is or during the last three years the issuer or any of its predecessors was:

(i) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(ii) A shell company, other than a business combination related shell company, as defined in Rule 405; or

(iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§240.3a51-1 of this chapter).

(f) Excluded issuers. This section and Rule 433 are not available if the issuer is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

(g) Excluded offerings. This section and Rule 433 are not available if the issuer is registering a business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1)) or the issuer, other than a well-known seasoned issuer, is registering an offering on Form S-8 (§239.16b of this chapter).

(h) For purposes of this section and Rule 433, the determination date as to whether an issuer is an ineligible issuer in respect of an offering shall be:

(1) Except as provided in paragraph (h)(2) of this section, the time of filing of the registration statement covering the offering; or

(2) If the offering is being registered pursuant to Rule 415 (§230.415), the earliest time after the filing of the registration statement covering the offering at which the issuer, or in the case of an underwritten offering the issuer or another offering participant, makes a bona fide offer, including without limitation through the use of a free writing prospectus, in the offering.

20. Add §230.168 to read as follows:

**§230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information**

Preliminary Notes to §230.168.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. This section provides a non-exclusive safe harbor for factual business information and forward-looking information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or

exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information or forward-looking information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information or forward-looking information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer (and, in the case of an asset-backed issuer, the other persons specified in paragraph (a)(3) of this section) of communications containing factual business information or forward-looking information shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied by any of the following:

(1) An issuer that is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(2) A foreign private issuer that:

(i) Meets all of the registrant requirements of Form F-3 (§239.33 of this chapter) other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a) of Form F-3;

(ii) Either:

(A) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or

(B) Is issuing non-convertible investment grade securities meeting the provisions of General Instruction I.B.2. of Form F-3; and

(iii) Either:

(A) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§230.902(b)) and has had them so traded for at least 12 months; or

(B) Has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; or

(3) An asset-backed issuer or a depositor, sponsor, or servicer (as such terms are defined in Item 1101 of Regulation AB (§229.1101 of this chapter)) or an affiliated depositor, whether or not such other person is the issuer.

(b) Definitions.

(1) Factual business information means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such factual business information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et. seq.):

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business;

(ii) Advertisements of, or other information about, the issuer's products or services; and

(iii) Dividend notices.

(2) Forward-looking information means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such forward-looking information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934:

(i) Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(ii) Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

(iii) Statements about the issuer's future economic performance, including statements of the type contemplated by the management's discussion and analysis of financial condition and results of operation described in Item 303 of Regulations S-B and S-K (§228.303 and §229.303 of this chapter) or the operating and financial review and prospects described in Item 5 of Form 20-F (§249.220f of this chapter); and

(iv) Assumptions underlying or relating to any of the information described in paragraphs (b)(2)(i), (b)(2)(ii) and (b)(2)(iii) of this section.

(3) For purposes of this section, the release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

(4) For purposes of this section, in the case of communications of a person specified in paragraph (a)(3) of this section other than the asset-backed issuer, the release or dissemination of a communication is by or on behalf of such other person if such other

person or its agent or representative, other than an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

(c) Exclusion. A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this section.

(d) Conditions to exemption. The following conditions must be satisfied:

(1) The issuer (or in the case of an asset-backed issuer, the issuer and the other persons specified in paragraph (a)(3) of this section, taken together) has previously released or disseminated information of the type described in this section in the ordinary course of its business;

(2) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations; and

(3) The issuer is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

21. Add §230.169 to read as follows:

**§230.169 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information**

Preliminary Notes to §230.169.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. This section provides a non-exclusive safe harbor for factual business information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer of communications containing factual business information shall be deemed not to constitute an offer to sell or offer for sale of a security by an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied.

(b) Definitions.

(1) Factual business information means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business; and

(ii) Advertisements of, or other information about, the issuer's products or services.

(2) For purposes of this section, the release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

(c) Exclusions. A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this section.

(d) Conditions to exemption. The following conditions must be satisfied:

(1) The issuer has previously released or disseminated information of the type described in this section in the ordinary course of its business;

(2) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations;

(3) The information is released or disseminated for intended use by 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 historically have provided such information; and

(4) The issuer is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

22. Add §230.172 to read as follows:

**§230.172 Delivery of prospectuses.**

(a) Sending confirmations and notices of allocations. After the effective date of a registration statement, the following are exempt from the provisions of section 5(b)(1) of the Act if the conditions set forth in paragraph (c) of this section are satisfied:

(1) Written confirmations of sales of securities in an offering pursuant to a registration statement that contain information limited to that called for in Rule 10b-10 under the Securities Exchange Act of 1934 (§240.10b-10 of this chapter) and other information customarily included in written confirmations of sales of securities, which may include notices provided pursuant to Rule 173 (§230.173); and

(2) Notices of allocation of securities sold or to be sold in an offering pursuant to the registration statement that may include information identifying the securities (including the CUSIP number) and otherwise may include only information regarding pricing, allocation and settlement, and information incidental thereto.

(b) Transfer of the security. Any obligation under section 5(b)(2) of the Act to have a prospectus that satisfies the requirements of section 10(a) of the Act precede or

accompany the carrying or delivery of a security in a registered offering is satisfied if the conditions in paragraph (c) of this section are met.

(c) Conditions.

(1) The registration statement relating to the offering is effective and is not the subject of any pending proceeding or examination under section 8(d) or 8(e) of the Act;

(2) Neither the issuer, nor an underwriter or participating dealer is the subject of a pending proceeding under section 8A of the Act in connection with the offering; and

(3) The issuer has filed with the Commission a prospectus with respect to the offering that satisfies the requirements of section 10(a) of the Act or the issuer will make a good faith and reasonable effort to file such a prospectus within the time required under Rule 424 (§230.424) and, in the event that the issuer fails to file timely such a prospectus, the issuer files the prospectus as soon as practicable thereafter.

(4) The condition in paragraph (c)(3) of this section shall not apply to transactions by dealers requiring delivery of a final prospectus pursuant to section 4(3) of the Act.

(d) Exclusions. This section shall not apply to any:

(1) Offering of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.);

(2) Offering of any business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48));

(3) A business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1); or

(4) Offering registered on Form S-8 (§239.16b of this chapter).

23. Add §230.173 to read as follows:

**§230.173 Notice of registration.**

(a) In a transaction that represents a sale by the issuer or an underwriter, or a sale where there is not an exclusion or exemption from the requirement to deliver a final prospectus meeting the requirements of section 10(a) of the Act pursuant to section 4(3) of the Act or Rule 174 (§230.174), each underwriter or dealer selling in such transaction shall provide to each purchaser from it, not later than two business days following the completion of such sale, a copy of the final prospectus or, in lieu of such prospectus, a notice to the effect that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of Rule 172 (§230.172).

(b) If the sale was by the issuer and was not effected by or through an underwriter or dealer, the responsibility to send a prospectus, or in lieu of such prospectus, such notice as set forth in paragraph (a) of this section, shall be the issuer's.

(c) Compliance with the requirements of this section is not a condition to reliance on Rule 172.

(d) A purchaser may request from the person responsible for sending a notice a copy of the final prospectus if one has not been sent.

(e) After the effective date of the registration statement with respect to an offering, notices as set forth in paragraph (a) of this section, are exempt from the provisions of section 5(b)(1) of the Act.

(f) Exclusions. This section shall not apply to any:

(1) Transaction solely between brokers or dealers in reliance on Rule 153 (§230.153);

(2) Offering of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.);

(3) Offering of any business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48));

(4) A business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1)); or

(5) Offering registered on Form S-8 (§239.16b of this chapter).

24. Amend §230.174 by removing the authority citations following the section and adding paragraph (h) to read as follows:

**§230.174 Delivery of prospectus by dealers; exemptions under section 4(3) of the Act.**

* * * * *

(h) Any obligation pursuant to Section 4(3) of the Act and this section to deliver a prospectus, other than pursuant to paragraph (g) of this section, may be satisfied by compliance with the provisions of Rule 172 (§230.172).

25. Amend §230.401 by removing the authority citations following the section and revising paragraph (g) to read as follows:

**§230.401 Requirements as to proper form.**

* * * * *

(g)(1) Subject to paragraph (g)(2) of this section, except for registration statements and post-effective amendments that become effective immediately pursuant to Rule 462 and Rule 464 (§230.462 and §230.464), a registration statement or any amendment thereto is deemed filed on the proper registration form unless the Commission objects to the registration form before the effective date.

(2) An automatic shelf registration statement as defined in Rule 405 (§230.405) and any post-effective amendment thereto are deemed filed on the proper registration form unless and until the Commission notifies the issuer of its objection to the use of such form. Following any such notification, the issuer must amend its automatic shelf registration statement onto the registration form it is then eligible to use, provided, however, that any continuous offering of securities pursuant to Rule 415 (§230.415) that the issuer has commenced pursuant to the registration statement before the Commission has notified the issuer of its objection to the use of such form may continue until the effective date of a new registration statement or post-effective amendment to the registration statement that the issuer has filed on the proper registration form, if the issuer files promptly after notification the new registration statement or post-effective amendment and if the offering is permitted to be made under the new registration statement or post-effective amendment.

26. Amend §230.405 as follows:

a. Add new definitions of "automatic shelf registration statement," "free writing prospectus," "ineligible issuer," "well-known seasoned issuer," and "written communication," in alphabetical order; and

b. Revise the definition of "graphic communication."

The additions and revision read as follows:

**§230.405. Definition of terms.**

* * * * *

Automatic shelf registration statement. The term automatic shelf registration statement means a registration statement filed on Form S-3 or Form F-3 (§239.13 or §239.33 of this chapter) by a well-known seasoned issuer pursuant to General Instruction I.D. or I.C. of such forms, respectively.

* * * * *

Free writing prospectus. Except as otherwise specifically provided or the context otherwise requires, a free writing prospectus is any written communication as defined in this section that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed (or, in the case of a well-known seasoned issuer, whether or not such registration statement is filed) and is made by means other than:

(1) A prospectus satisfying the requirements of section 10(a) of the Act, Rule 430 (§230.430), Rule 430A (§230.430A), Rule 430B (§230.430B), Rule 430C (§230.430C), or Rule 431 (§230.431);

(2) A written communication used in reliance on Rule 167 and Rule 426 (§230.167 and §230.426); or

(3) A written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of section 2(a)(10) of the Act.

Graphic communication. The term graphic communication, which appears in the definition of "write, written" in section 2(a)(9) of the Act and in the definition of written communication in this section, shall include all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation. Graphic communication shall not 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.

Ineligible issuer. (1) An ineligible issuer is an issuer with respect to which any of the following is true as of the relevant date of determination:

(i) Any issuer that is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that has not filed all reports and other materials required to be filed during the preceding 12 months (or for such shorter period that the issuer was required to file such reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934), other than reports on Form 8-K (§249.308 of this chapter) required solely pursuant to an item specified in General Instruction I.A.3(b) of Form S-3 (§239.13 of this chapter) (or in the case of an asset-backed issuer, to the extent the depositor or any issuing entity previously established, directly or indirectly, by the depositor (as such terms are defined in Item 1101 of Regulation AB (§229.1101 of this chapter) are or were at any time during the preceding 12 calendar months required to file reports pursuant to section 13 or 15(d) of the

Securities Exchange Act of 1934 with respect to a class of asset-backed securities involving the same asset class, such depositor and each such issuing entity must have filed all reports and other material required to be filed for such period (or such shorter period that each such entity was required to file such reports), other than reports on Form 8-K required solely pursuant to an item specified in General Instruction I.A.4 of Form S-3);

(ii) The issuer is, or during the past three years the issuer or any of its predecessors was:

(A) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(B) A shell company, other than a business combination related shell company, each as defined in this section;

(C) An issuer in an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§240.3a51-1 of this chapter);

(iii) The issuer is a limited partnership that is offering and selling its securities other than through a firm commitment underwriting;

(iv) Within the past three years, a petition under the federal bankruptcy laws or any state insolvency law was filed by or against the issuer, or a court appointed a receiver, fiscal agent or similar officer with respect to the business or property of the issuer subject to the following:

(A) In the case of an involuntary bankruptcy in which a petition was filed against the issuer, ineligibility will occur upon the earlier to occur of:

(1) 90 days following the date of the filing of the involuntary petition (if the case has not been earlier dismissed); or

(2) The conversion of the case to a voluntary proceeding under federal bankruptcy or state insolvency laws; and

(B) Ineligibility will terminate under this paragraph (1)(iv) if an issuer has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency, or receivership process;

(v) Within 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 (iv) of section 15(b)(4)(B) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(4)(B)(i) through (iv));

(vi) Within the past three years (but in the case of a decree or order agreed to in a settlement, not before December 1, 2005, the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a governmental action that:

(A) Prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws;

(B) Requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws; or

(C) Determines that the person violated the anti-fraud provisions of the federal securities laws;

(vii) The issuer has filed a registration statement that is the subject of any pending proceeding or examination under section 8 of the Act or has been the subject of any refusal order or stop order under section 8 of the Act within the past three years; or

(viii) The issuer is the subject of any pending proceeding under section 8A of the Act in connection with an offering.

(2) An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

(3) The date of determination of whether an issuer is an ineligible issuer is as follows:

(i) For purposes of determining whether an issuer is a well-known seasoned issuer, at the date specified for purposes of such determination in paragraph (2) of the definition of well-known seasoned issuer in this section; and

(ii) For purposes of determining whether an issuer or offering participant may use free writing prospectuses in respect of an offering in accordance with the provisions of Rules 164 and 433 (§230.164 and §230.433), at the date in respect of the offering specified in paragraph (h) of Rule 164.

* * * * *

Well-known seasoned issuer. A well-known seasoned issuer is an issuer that, as of the most recent determination date determined pursuant to paragraph (2) of this definition:

(1)(i) Meets all the registrant requirements of General Instruction I.A. of Form S-3 or Form F-3 (§239.13 or §239.33 of this chapter) and either:

(A) As of a date within 60 days of the determination date, has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of $700 million or more; or

(B)(1) As of a date within 60 days of the determination date, 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, registered under the Act; and

(2) Will register only non-convertible securities, other than common equity, and full and unconditional guarantees permitted pursuant to paragraph (1)(ii) of this definition unless, at the determination date, the issuer also is eligible to register a primary offering of its securities relying on General Instruction I.B.1. of Form S-3 or Form F-3.

(3) Provided that as to a parent issuer only, for purposes of calculating the aggregate principal amount of outstanding non-convertible securities under paragraph (1)(i)(B)(2) of this definition, the parent issuer may include the aggregate principal amount of non-convertible securities, other than common equity, of its majority-owned subsidiaries issued in registered primary offerings for cash, not exchange, that it has fully and unconditionally guaranteed, within the meaning of Rule 3-10 of Regulation S-X (§210.3-10 of this chapter) in the last three years; or

(ii) Is a majority-owned subsidiary of a parent that is a well-known seasoned issuer pursuant to paragraph (1)(i) of this definition and, as to the subsidiaries' securities that are being or may be offered on that parent's registration statement:

(A) The parent has provided a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the subsidiary's securities and the securities are non-convertible securities, other than common equity;

(B) The securities are guarantees of:

(1) Non-convertible securities, other than common equity, of its parent being registered; or

(2) Non-convertible securities, other than common equity, of another majority-owned subsidiary being registered where there is a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of such non-convertible securities by the parent; or

(C) The securities of the majority-owned subsidiary meet the conditions of General Instruction I.B.2 of Form S-3 or Form F-3.

(iii) Is not an ineligible issuer as defined in this section.

(iv) Is not an asset-backed issuer as defined in Item 1101 of Regulation AB (§229.1101(b) of this chapter).

(v) Is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

(2) For purposes of this definition, the determination date as to whether an issuer is a well-known seasoned issuer shall be the latest of:

(i) The time of filing of its most recent shelf registration statement; or

(ii) The time of its most recent amendment (by post-effective amendment, incorporated report filed pursuant to section 13 or 15(d) of the Securities Exchange Act

of 1934 (15 U.S.C. 78m or 78o(d) of this chapter), or form of prospectus) to a shelf registration statement for purposes of complying with section 10(a)(3) of the Act (or if such amendment has not been made within the time period required by section 10(a)(3) of the Act, the date on which such amendment is required); or

(iii) In the event that the issuer has not filed a shelf registration statement or amended a shelf registration statement for purposes of complying with section 10(a)(3) of the Act for sixteen months, the time of filing of the issuer's most recent annual report on Form 10-K (§249.310 of this chapter) or Form 20-F (§249.220f of this chapter) (or if such report has not been filed by its due date, such due date).

* * * * *

Written communication. Except as otherwise specifically provided or the context otherwise requires, a written communication is any communication that is written, printed, a radio or television broadcast, or a graphic communication as defined in this section.

Note to definition of "written communication."

A communication that is a radio or television broadcast is a written communication regardless of the means of transmission of the broadcast.

27. Amend §230.408 as follows:

a. Designate the current text as paragraph (a); and

b. Add paragraph (b).

The addition reads as follows:

**§230.408 Additional information.**

(a) * * *

(b) Notwithstanding paragraph (a) of this section, unless otherwise required to be included in the registration statement, the failure to include in a registration statement information included in a free writing prospectus will not, solely by virtue of inclusion of the information in a free writing prospectus (as defined in Rule 405 (§230.405)), be considered an omission of material information required to be included in the registration statement.

28. Amend §230.412 as follows:

a. Remove the authority citation following the section; and

b. Revise paragraph (a).

The revision reads as follows:

**§230.412 Modified or superseded documents.**

(a) Any statement contained in a document incorporated or deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus that is part of the registration statement shall be deemed to be modified or superseded for purposes of the registration statement or the prospectus that is part of the registration statement to the extent that a statement contained in the prospectus that is part of the registration statement or in any other subsequently filed document which also is or is deemed to be incorporated by reference or deemed to be part of the registration statement or prospectus that is part of the registration statement modifies or replaces such statement. Any statement contained in a document that is deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus that is part of

the registration statement after the most recent effective date or after the date of the most recent prospectus that is part of the registration statement may modify or replace existing statements contained in the registration statement or the prospectus that is part of the registration statement.

* * * * *

29. Revise §230.413 to read as follows:

**§230.413 Registration of additional securities and additional classes of securities.**

(a) Except as provided in section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a-24(f)) and in paragraph (b) of this section, where a registration statement is already in effect, the registration of additional securities shall only be effected through a separate registration statement relating to the additional securities.

(b) Notwithstanding paragraph (a) of this section, the following additional securities or additional classes of securities may be added to an automatic shelf registration statement already in effect by filing a post-effective amendment to that automatic shelf registration statement:

(1) Securities of a class different than those registered on the effective automatic shelf registration statement identified as provided in Rule 430B(a) (§230.430B(a)); or

(2) Securities of a majority-owned subsidiary that are permitted to be included in an automatic shelf registration statement, provided that the subsidiary and the securities are identified as provided in Rule 430B and the subsidiary satisfies the signature requirements of an issuer in the post-effective amendment.

30. Amend §230.415 as follows:

a. Remove the authority citations following the section;

b. Revise paragraph (a)(1)(x);

c. Revise paragraph (a)(2);

d. Revise paragraph (a)(3);

e. Revise paragraph (a)(4) including the undesignated paragraph;

f. Add paragraph (a)(5); and

g. Add paragraph (a)(6).

The revisions and addition read as follows:

**§230.415 Delayed or continuous offering and sale of securities.**

(a) * * *

(1) * * *

(x) Securities registered (or qualified to be registered) on Form S-3 or Form F-3 (§239.13 or §239.33 of this chapter) which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority-owned subsidiary of the registrant or a person of which the registrant is a majority-owned subsidiary; or

* * * * *

(2) Securities in paragraph (a)(1)(viii) of this section and securities in paragraph (a)(1)(ix) of this section that are not registered on Form S-3 or Form F-3 (§239.13 or §239.33 of this chapter) may only be registered in an amount which, at the

time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S-K (§229.512(a) of this chapter) or Item 512(a) or Item 512(g) of Regulation S-B (§228.512(a) or (g) of this chapter), except that a registrant that is an investment company filing on Form N-2 (§§239.14 and 274.11a-1 of this chapter) must furnish the undertakings required by Item 34.4 of Form N-2.

(4) In the case of a registration statement pertaining to an at the market offering of equity securities by or on behalf of the registrant, the offering must come within paragraph (a)(1)(x) of this section. As used in this paragraph, the term "at the market offering" means an offering of equity securities into an existing trading market for outstanding shares of the same class at other than a fixed price.

(5) Securities registered on an automatic shelf registration statement and securities described in paragraphs (a)(1)(vii), (ix), and (x) of this section may be offered and sold only if not more than three years have elapsed since the initial effective date of the registration statement under which they are being offered and sold, provided, however, that if a new registration statement has been filed pursuant to paragraph (a)(6) of this section:

(i) If the new registration statement is an automatic shelf registration statement, it shall be immediately effective pursuant to Rule 462(e)(§230.462(e)); or

(ii) If the new registration statement is not an automatic shelf registration statement:

(A) Securities covered by the prior registration statement may continue to be offered and sold until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the initial effective date of the prior registration statement; and

(B) A continuous offering of securities covered by the prior registration statement that commenced within three years of the initial effective date may continue until the effective date of the new registration statement if such offering is permitted under the new registration statement.

(6) Prior to the end of the three-year period described in paragraph (a)(5) of this section, an issuer may file a new registration statement covering securities described in such paragraph (a)(5) of this section, which may, if permitted, be an automatic shelf registration statement. The new registration statement and prospectus included therein must include all the information that would be required at that time in a prospectus relating to all offering(s) that it covers. Prior to the effective date of the new registration statement (including at the time of filing in the case of an automatic shelf registration statement), the issuer may include on such new registration statement any unsold securities covered by the earlier registration statement by identifying on the bottom of the facing page of the new registration statement or latest amendment thereto the amount of such unsold securities being included and any filing fee paid in connection with such unsold securities, which will continue to be applied to such unsold securities. The offering of securities on the earlier registration statement will be deemed terminated as of the date of effectiveness of the new registration statement.

* * * * *

31. Amend §230.418 as follows:

a. Revise the introductory text of paragraph (a)(3);

b. Remove the word “and” at the end of paragraph (a)(6);

c. Remove the period at the end of the paragraph (a)(7) and in its place add “; and”;

d. Add paragraph (a)(8); and

e. Revise the introductory text of paragraph (b).

The addition and revisions read as follows:

**§230.418 Supplemental information.**

(a) * * *

(3) Except in the case of a registrant eligible to use Form S-3 (§239.13 of this chapter), any engineering, management or similar reports or memoranda relating to broad aspects of the business, operations or products of the registrant, which have been prepared within the past twelve months for or by the registrant and any affiliate of the registrant or any principal underwriter, as defined in Rule 405 (§230.405), of the securities being registered except for:

* * * * *

(8) Any free writing prospectuses used in connection with the offering.

* * * * *

(b) Supplemental information described in paragraph (a) of this section shall not be required to be filed with or deemed part of and included in the registration

statement, unless otherwise required. The information shall be returned to the registrant upon request, provided that:

* * * * *

32. Amend §230.424 as follows:

a. Revise the introductory text of paragraph (b);

b. Revise paragraph (b)(2);

c. Revise paragraph (b)(7);

d. Add paragraph (b)(8) before the Instruction;

e. Remove Instruction 2;

f. Revise the heading to "Instruction 1" to read "Instruction;"

g. Add paragraph (g); and

h. Add paragraph (h).

The additions and revisions read as follows:

**§230.424 Filing of prospectuses, number of copies.**

* * * * *

(b) Ten copies of each form of prospectus purporting to comply with section 10 of the Act, except for documents constituting a prospectus pursuant to Rule 428(a) (§230.428(a)) or free writing prospectuses pursuant to Rule 164 and Rule 433 (§230.164 and §230.433), shall be filed with the Commission in the form in which it is used after the effectiveness of the registration statement and identified as required by paragraph (e) of this section; provided, however, that only a form of prospectus that contains substantive changes from or additions to a previously filed prospectus is required to be

filed; Provided, further, that this paragraph (b) shall not apply in respect of a form of prospectus contained in a registration statement and relating solely to securities offered at competitive bidding, which prospectus is intended for use prior to the opening of bids. Ten copies of the form of prospectus shall be filed or transmitted for filing as follows:

* * * * *

(2) A form of prospectus that is used in connection with a primary offering of securities pursuant to Rule 415(a)(1)(x) (§230.415(a)(1)(x)) or a primary offering of securities registered for issuance on a delayed basis pursuant to Rule 415(a)(1)(vii) or (viii) (§230.415(a)(1)(vii) or (viii)) and that, in the case of Rule 415(a)(1)(viii) discloses the public offering price, description of securities or similar matters, and in the case of Rule 415(a)(1)(vii) and (x) discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance on Rule 430B (§230.430B), shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

* * * * *

(7) A form of prospectus that identifies selling security holders and the amounts to be sold by them that was previously omitted from the registration statement and the prospectus in reliance upon Rule 430B (§230.430B) shall be filed with the Commission no later than the second business day following the earlier of the date of sale or the date of first use or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(8) A form of prospectus otherwise required to be filed pursuant to paragraph (b) of this section that is not filed within the time frames specified in paragraph (b) of this section must be filed pursuant to this paragraph as soon as practicable after the discovery of such failure to file.

Note to paragraph (b)(8) of Rule 424

A form of prospectus required to be filed pursuant to another paragraph of Rule 424(b) that is filed under Rule 424(b)(8) shall nonetheless be "required to be filed" under such other paragraph.

Instruction * * *

* * * * *

(g) A form of prospectus filed pursuant to this section that operates to reflect the payment of filing fees for an offering or offerings pursuant to Rule 456(b) (§230.456(b)) must include on its cover page the calculation of registration fee table reflecting the payment of such filing fees for the securities that are the subject of the payment.

33. Amend §230.426 by adding paragraph (c)(8).

The addition reads as follows:

**§430.426 Filing of certain prospectuses under §430.167 in connection with certain offerings of asset-backed securities**

* * * * *

(c) * * *

(8) Any free writing prospectus used in reliance on Rule 164 and Rule 433 (§230.164 and §230.433).

*  *  *  *  *

34. Amend §230.430A to add paragraph (f) immediately preceding the note to read as follows:

**§230.430A Prospectus in a registration statement at the time of effectiveness.**

*  *  *  *  *

(f) This section may apply to registration statements that are immediately effective pursuant to Rule 462(e) and (f) (§230.462(e) and (f)).

35. Add §230.430B to read as follows:

**§230.430B Prospectus in a registration statement after effective date.**

(a) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1)(vii) or (a)(1)(x) (§230.415(a)(1)(vii) or (a)(1)(x)) may omit from the information required by the form to be in the prospectus information that is unknown or not reasonably available to the issuer pursuant to Rule 409 (§230.409). In addition, a form of prospectus filed as part of an automatic shelf registration statement for offerings pursuant to Rule 415(a) (§230.415(a)), other than Rule 415(a)(1)(vii) or (viii), also may omit information as to whether the offering is a primary offering or an offering on behalf of persons other than the issuer, or a combination thereof, the plan of distribution for the securities, a description of the securities registered other than an identification of the name or class of such securities, and the identification of other issuers. Each such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act.

(b) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1)(i) by an issuer eligible to use Form S-3 or Form F-3 (§239.13 or §239.33 of this chapter) for primary offerings pursuant to General Instruction I.B.1 of such forms, may omit the information specified in paragraph (a) of this section, and may also omit the identities of selling security holders and amounts of securities to be registered on their behalf if:

(1) The registration statement is an automatic shelf registration statement as defined in Rule 405 (§230.405); or

(2) All of the following conditions are satisfied:

(i) The initial offering transaction of the securities (or securities convertible into such securities) the resale of which are being registered on behalf of each of the selling security holders, was completed;

(ii) The securities (or securities convertible into such securities) were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities;

(iii) The registration statement refers to any unnamed selling security holders in a generic manner by identifying the initial offering transaction in which the securities were sold; and

(iv) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:

(A) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(B) A shell company, other than a business combination related shell company, each as defined in Rule 405; or

(C) An issuer in an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§240.3a51-1 of this chapter).

(c) A form of prospectus that is part of a registration statement that omits information in reliance upon paragraph (a) or (b) of this section meets the requirements of section 10 of the Act for the purpose of section 5(b)(1) thereof. This provision shall not limit the information required to be contained in a form of prospectus in order to meet the requirements of section 10(a) of the Act for the purposes of section 5(b)(2) thereof or exception (a) of section 2(a)(10) thereof.

(d) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section may be included subsequently in the prospectus that is part of a registration statement by:

(1) A post-effective amendment to the registration statement;

(2) A prospectus filed pursuant to Rule 424(b) (§230.424(b)); or

(3) If the applicable form permits, including the information in the issuer's periodic or current reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement in accordance with applicable requirements, subject to the provisions of paragraph (h) of this section.

(e) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section and contained in a form of prospectus required to be filed with the Commission pursuant to Rule 424(b), other than as provided in paragraph (f) of this section, shall be deemed part of and

included in the registration statement as of the date such form of filed prospectus is first used after effectiveness.

(f)(1) Information omitted from a form of prospectus that is part of an effective registration statement in reliance on paragraph (a) or (b) of this section and is contained in a form of prospectus required to be filed with the Commission pursuant to Rule 424(b)(2), (b)(5), or (b)(7), shall be deemed to be part of and included in the registration statement on the earlier of the date such subsequent form of prospectus is first used or the date and time of the first contract of sale of securities in the offering to which such subsequent form of prospectus relates.

(2) The date on which a form of prospectus is deemed to be part of and included in the registration statement pursuant to paragraph (f)(1) of this section shall be deemed, for purposes of liability under section 11 of the Act of the issuer and any underwriter at the time only, to be a new effective date of the part of such registration statement relating to the securities to which such form of prospectus relates, such part of the registration statement consisting of all information included in the registration statement and any prospectus relating to the offering of such securities (including information relating to the offering in a prospectus already included in the registration statement) as of such date and all information relating to the offering included in reports and materials incorporated by reference into such registration statement and prospectus as of such date, and in each case not modified or superseded pursuant to Rule 412 (§230.412). The offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) If a registration statement is amended to include or is deemed to include, through incorporation by reference or otherwise, except as otherwise provided in Rule 436 (§230.436), a report or opinion of any person made on such person's authority as an expert whose consent would be required under section 7 of the Act because of being named as having prepared or certified part of the registration statement, then for purposes of this section and for liability purposes under section 11 of the Act, the part of the registration statement for which liability against such person is asserted shall be considered as having become effective with respect to such person as of the time the report or opinion is deemed to be part of the registration statement and a consent required pursuant to section 7 of the Act has been provided as contemplated by section 11 of the Act.

(4) Except for an effective date resulting from the filing of a form of prospectus filed for purposes of including information required by section 10(a)(3) of the Act or pursuant to Item 512(a)(1)(ii) of Regulation S-K or Regulation S-B (§229.512(a)(1)(ii) or §228.512(a)(1)(ii) of this chapter), the date a form of prospectus is deemed part of and included in the registration statement pursuant to this paragraph shall not be an effective date established pursuant to paragraph (f)(2) of this section as to:

(i) Any director (or person acting in such capacity) of the issuer;

(ii) Any person signing any report or document incorporated by reference into the registration statement, except for such a report or document incorporated by reference for purposes of including information required by section 10(a)(3) of the Act or pursuant to Item 512(a)(1)(ii) of Regulation S-K or Regulation S-B (such person except for such

reports being deemed not to be a person who signed the registration statement within the meaning of section 11(a) of the Act).

(5) The date a form of prospectus is deemed part of and included in the registration statement pursuant to paragraph (f)(2) of this section shall not be an effective date established pursuant to paragraph (f)(2) of this section as to:

(i) Any accountant with respect to financial statements or other financial information contained in the registration statement as of a prior effective date and for which the accountant previously provided a consent to be named as required by section 7 of the Act, unless the form of prospectus contains new audited financial statements or other financial information as to which the accountant is an expert and for which a new consent is required pursuant to section 7 of the Act or Rule 436; and

(ii) Any other person whose report or opinion as an expert or counsel has, with their consent, previously been included in the registration statement as of a prior effective date, unless the form of prospectus contains a new report or opinion for which a new consent is required pursuant to section 7 of the Act or Rule 436.

(g) Notwithstanding paragraph (e) or (f) of this section or paragraph (a) of Rule 412, no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement after the effective date of such registration statement or portion thereof in respect of an offering determined pursuant to this section will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement

that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date.

(h) Where a form of prospectus filed pursuant to Rule 424(b) relating to an offering does not include disclosure of omitted information regarding the terms of the offering, the securities, or the plan of distribution, or selling security holders for the securities that are the subject of the form of prospectus, because such omitted information has been included in periodic or current reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 incorporated or deemed incorporated by reference into the prospectus, the issuer shall file a form of prospectus identifying the periodic or current reports that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement that contain such omitted information. Such form of prospectus shall be required to be filed, depending on the nature of the incorporated information, pursuant to Rule 424(b)(2), (b)(5), or (b)(7).

(i) Issuers relying on this section shall furnish the undertakings required by Item 512(a) of Regulation S-K or Item 512(a) or (g) of Regulation S-B.

Note to Rule 430B:

The provisions of paragraph (b) of Rule 401 (§230.401(b)) shall apply to any prospectus filed for purposes of including information required by section 10(a)(3) of the Act.

36. Add §230.430C to read as follows:

**§230.430C Prospectus in a registration statement pertaining to an offering other than pursuant to Rule 430A or Rule 430B after the effective date.**

(a) In offerings made other than in reliance on Rule 430B (§230.430B) and other than for prospectuses filed in reliance on Rule 430A (§230.430A), information contained in a form of prospectus required to be filed with the Commission pursuant to Rule 424(b) (§230.424(b)) or Rule 497(b), (c), (d), or (e) (§230.497(b), (c), (d) or (e)), shall be deemed to be part of and included in the registration statement on the date it is first used after effectiveness.

(b) Notwithstanding paragraph (a) of this section or paragraph (a) of Rule 412 (§230.412), no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such first use, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such date of first use.

(c) Nothing in this section shall affect the information required to be included in an issuer's registration statement and prospectus.

(d) Issuers subject to paragraph (a) of this section shall furnish the undertakings required by Item 512(a) of Regulation S-K (§229.512(a) of this chapter), Item 512(a) and (g) of Regulation S-B (§229.512(a) and (g) of this chapter), or Item 34.4 of Form N-2 (§§239.14 and 274.11a-1 of this chapter), as applicable.

37. Add §230.433 to read as follows:

**§230.433 Conditions to permissible post-filing free writing prospectuses.**

(a) Scope of section. This section applies to any free writing prospectus with respect to securities of any issuer (except as set forth in Rule 164 (§230.164)) that are the subject of a registration statement that has been filed under the Act. Such a free writing prospectus that satisfies the conditions of this section may include information the substance of which is not included in the registration statement. Such a free writing prospectus that satisfies the conditions of this section will be a prospectus permitted under section 10(b) of the Act for purposes of sections 2(a)(10), 5(b)(1), and 5(b)(2) of the Act and will, for purposes of considering it a prospectus, be deemed to be public, without regard to its method of use or distribution, because it is related to the public offering of securities that are the subject of a filed registration statement.

(b) Permitted use of free writing prospectus. Subject to the conditions of this paragraph (b) and satisfaction of the conditions set forth in paragraphs (c) through (g) of this section, a free writing prospectus may be used under this section and Rule 164 in connection with a registered offering of securities:

(1) Eligibility and prospectus conditions for seasoned issuers and well-known seasoned issuers. Subject to the provisions of Rule 164(e), (f), and (g), the issuer or any other offering participant may use a free writing prospectus in the following offerings after a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act:

(i) Offerings of securities registered on Form S-3 (§239.33 of this chapter) pursuant to General Instruction I.B.1, I.B.2, I.B.5, I.C., or I.D. thereof;

(ii) Offerings of securities registered on Form F-3 (§239.13 of this chapter) pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C. thereof;

(iii) Any other offering not excluded from reliance on this section and Rule 164 of securities of a well-known seasoned issuer; and

(iv) Any other offering not excluded from reliance on this section and Rule 164 of securities of an issuer eligible to use Form S-3 or Form F-3 for primary offerings pursuant to General Instruction I.B.1 of such Forms.

(2) Eligibility and prospectus conditions for non-reporting and unseasoned issuers. If the issuer does not fall within the provisions of paragraph (b)(1) of this section, then, subject to the provisions of Rule 164(e), (f), and (g), any person participating in the offer or sale of the securities may use a free writing prospectus as follows:

(i) If the free writing prospectus is or was prepared by or on behalf of or used or referred to by an issuer or any other offering participant, if consideration has been or will be given by the issuer or other offering participant for the dissemination (in any format) of any free writing prospectus (including any published article, publication, or advertisement), or if section 17(b) of the Act requires disclosure that consideration has been or will be given by the issuer or other offering participant for any activity described therein in connection with the free writing prospectus, then a registration statement relating to the offering must have been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act, including a price range where required by rule, and the free writing prospectus shall be accompanied or preceded by the most recent such prospectus; provided, however, that

use of the free writing prospectus is not conditioned on providing the most recent such prospectus if a prior such prospectus has been provided and there is no material change from the prior prospectus reflected in the most recent prospectus; provided, further that after effectiveness and availability of a final prospectus meeting the requirements of section 10(a) of the Act, no such earlier prospectus may be provided in satisfaction of this condition, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier prospectus had been previously provided.

Notes to paragraph (b)(2)(i) of Rule 433.

1. The condition that a free writing prospectus shall be accompanied or preceded by the most recent prospectus satisfying the requirements of section 10 of the Act would be satisfied if a free writing prospectus that is an electronic communication contained an active hyperlink to such most recent prospectus; and

2. A communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer or other offering participant is an offer by the issuer or such other offering participant as the case may be and is, if written, a free writing prospectus of the issuer or other offering participant.

(ii) Where paragraph (b)(2)(i) of this section does not apply, a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431 satisfies the requirements of section 10 of the Act, including a price range where required by rule.

(3) Successors. A successor issuer will be considered to satisfy the applicable provisions of this paragraph (b) if:

(i) Its predecessor and it, taken together, satisfy the conditions, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(ii) All predecessors met the conditions at the time of succession and the issuer has continued to do so since the succession.

(c) Information in a free writing prospectus.

(1) A free writing prospectus used in reliance on this section may include information the substance of which is not included in the registration statement but such information shall not conflict with:

(i) Information contained in the filed registration statement, including any prospectus or prospectus supplement that is part of the registration statement (including pursuant to Rule 430B or Rule 430C) (§230.430B or §230.430C) and not superseded or modified; or

(ii) Information contained in the issuer's periodic and current reports filed or furnished to the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated by reference into the registration statement and not superseded or modified.

(2)(i) A free writing prospectus used in reliance on this section shall contain substantially the following legend:

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].

(ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site and provide the Internet address and the particular location of the documents on the Web site.

(d) Filing conditions.

(1) Except as provided in paragraphs (d)(3), (d)(4), (d)(5), (d)(6), (d)(7), (d)(8), and (f) of this section, the following shall be filed with the Commission under this section by a means reasonably calculated to result in filing no later than the date of first use. The free writing prospectus filed for purposes of this section will not be filed as part of the registration statement:

(i) The issuer shall file:

(A) Any issuer free writing prospectus, as defined in paragraph (h) of this section;

(B) Any issuer information that is contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant (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

(C) A description of the final terms of the issuer's securities in the offering or of the offering contained in a free writing prospectus or portion thereof prepared by or on behalf of the issuer or any offering participant, after such terms have been established for all classes in the offering; and

(ii) Any offering participant, other than the issuer, shall file any free writing prospectus that is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

(2) Each free writing prospectus or issuer information contained in a free writing prospectus filed under this section shall identify in the filing the Commission file number for the related registration statement or, if that file number is unknown, a description sufficient to identify the related registration statement.

(3) The condition to file a free writing prospectus under paragraph (d)(1) of this section shall not apply if the free writing prospectus does not contain substantive changes from or additions to a free writing prospectus previously filed with the Commission.

(4) The condition to file issuer information contained in a free writing prospectus of an offering participant other than the issuer shall not apply if such information is included (including through incorporation by reference) in a prospectus or free writing prospectus previously filed that relates to the offering.

(5) Notwithstanding the provisions of paragraph (d)(1) of this section:

(i) To the extent a free writing prospectus or portion thereof otherwise required to be filed contains a description of terms of the issuer's securities in the offering or of the offering that does not reflect the final terms, such free writing prospectus or portion thereof is not required to be filed; and

(ii) A free writing prospectus or portion thereof that contains only a description of the final terms of the issuer's securities in the offering or of the offerings shall be filed by the issuer within two days of the later of the date such final terms have been established for all classes of the offering and the date of first use.

(6)(i) Notwithstanding the provisions of paragraph (d) of this section, in an offering of asset-backed securities, a free writing prospectus or portion thereof required to be filed that contains only ABS informational and computational materials as defined in Item 1101(a) of Regulation AB (§229.1101 of this chapter), may be filed under this section within the timeframe permitted by Rule 426(b) (§230.426(b)) and such filing will satisfy the filing conditions under this section.

(ii) In the event that a free writing prospectus is used in reliance on this section and Rule 164 and the conditions of this section and Rule 164 (which may include the conditions of paragraph (d)(6)(i) of this section) are satisfied with respect thereto, then the use of that free writing prospectus shall not be conditioned on satisfaction of the provisions, including without limitation the filing conditions, of Rule 167 and Rule 426 (§230.167 and §230.426). In the event that ABS informational and computational materials are used in reliance on Rule 167 and Rule 426 and the conditions of those rules are satisfied with respect thereto, then the use of those materials shall not be conditioned on the satisfaction of the conditions of Rule 164 and this section.

(iii) If a free writing prospectus used in an offering of asset-backed securities in reliance on this section and Rule 164 includes the specific address of or a hyperlink to an Internet Web site containing static pool information and is filed in accordance with this paragraph (d), the static pool information relating to the asset-backed securities offering at that specific address is included in the free writing prospectus, and the filing including such address or hyperlink satisfies the filing conditions under this section.

(7) The condition to file a free writing prospectus or issuer information pursuant to this paragraph (d) for a free writing prospectus used at the same time as a communication in a business combination transaction subject to Rule 425 (§230.425) shall be satisfied if:

(i) The free writing prospectus or issuer information is filed in accordance with the provisions of Rule 425, including the filing timeframe of Rule 425;

(ii) The filed material pursuant to Rule 425 indicates on the cover page that it also is being filed pursuant to Rule 433; and

(iii) The filed material pursuant to Rule 425 contains the information specified in paragraph (c)(2) of this section.

(8) Notwithstanding any other provision of this paragraph (d):

(i) A road show for an offering that is a written communication is a free writing prospectus, provided that, except as provided in paragraph (d)(8)(ii) of this section, a written communication that is a road show shall not be required to be filed; and

(ii) In the case of a road show that is a written communication for an offering of common equity or convertible equity securities by an issuer that is, at the time of the filing of the registration statement for the offering, not required to file reports with the

Commission pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934, such a road show is required to be filed pursuant to this section unless the issuer of the securities makes at least one version of a bona fide electronic road show available without restriction by means of graphic communication to any person, including any potential investor in the securities (and if there is more than one version of a road show for the offering that is a written communication, the version available without restriction is made available no later than the other versions).

Note to paragraph (d)(8): A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written. If the road show is written and not required to be filed, such a simultaneous communication is also not required to be filed. Otherwise, a written communication that is an offer contained in a separate file from a road show, whether or not the road show is a written communication, or otherwise transmitted separately from a road show, will be a free writing prospectus subject to any applicable filing conditions of paragraph (d) of this section.

(e) Treatment of information on, or hyperlinked from, an issuer's Web site.

(1) An offer of an issuer's securities that is contained on an issuer's Web site or hyperlinked by the issuer from the issuer's Web site to a third party's Web site is a written offer of such securities by the issuer and, unless otherwise exempt or excluded

from the requirements of section 5(b)(1) of the Act, the filing conditions of paragraph (d) of this section apply to such offer.

(2) Notwithstanding paragraph (e)(1) of this section, historical issuer information that is identified as such and located in a separate section of the issuer's Web site containing historical issuer information, that has not been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering and that has not otherwise been used or referred to in connection with the offering, will not be considered a current offer of the issuer's securities and therefore will not be a free writing prospectus.

(f) Free writing prospectuses published or distributed by media. Any written offer for which an issuer or any other offering participant or any person acting on its behalf provided, authorized, or approved information that is prepared and published or disseminated by a person unaffiliated with the issuer or any other offering participant that is in the business of publishing, radio or television broadcasting or otherwise disseminating written communications would be considered at the time of publication or dissemination to be a free writing prospectus prepared by or on behalf of the issuer or such other offering participant for purposes of this section subject to the following:

(1) The conditions of paragraph (b)(2)(i) of this section will not apply and the conditions of paragraphs (c)(2) and (d) of this section will be deemed to be satisfied if:

(i) No payment is made or consideration given by or on behalf of the issuer or other offering participant for the written communication or its dissemination; and

(ii) The issuer or other offering participant in question files the written communication with the Commission, and includes in the filing the legend required by

paragraph (c)(2) of this section, within four business days after the issuer or other offering participant becomes aware of the publication, radio or television broadcast, or other dissemination of the written communication.

(2) The filing obligation under paragraph (f)(1)(ii) of this section shall be subject to the following:

(i) The issuer or other offering participant shall not be required to file a free writing prospectus if the substance of that free writing prospectus has previously been filed with the Commission;

(ii) Any filing made pursuant to paragraph (f)(1)(ii) of this section may include information that the issuer or offering participant in question reasonably believes is necessary or appropriate to correct information included in the communication; and

(iii) In lieu of filing the actual written communication as published or disseminated as required by paragraph (f)(1)(ii) of this section, the issuer or offering participant in question may file a copy of the materials provided to the media, including transcripts of interviews or similar materials, provided the copy or transcripts contain all the information provided to the media.

(3) For purposes of this paragraph (f) of this section, an issuer that is in the business of publishing or radio or television broadcasting may rely on this paragraph (f) as to any publication or radio or television broadcast that is a free writing prospectus in respect of an offering of securities of the issuer if the issuer or an affiliate:

(i) Is the publisher of a bona fide newspaper, magazine, or business or financial publication of general and regular circulation or bona fide broadcaster of news including business and financial news;

(ii) Has established policies and procedures for the independence of the content of the publications or broadcasts from the offering activities of the issuer; and

(iii) Publishes or broadcasts the communication in the ordinary course.

(g) Record retention. Issuers and offering participants shall retain all free writing prospectuses they have used, and that have not been filed pursuant to paragraph (d) or (f) of this section, for three years following the initial bona fide offering of the securities in question.

Note to paragraph (g) of §230.433.

To the extent that the record retention requirements of Rule 17a-4 of the Securities Exchange Act of 1934 (§240.17a-4 of this chapter) apply to free writing prospectuses required to be retained by a broker-dealer under this section, such free writing prospectuses are required to be retained in accordance with such requirements.

(h) Definitions. For purposes of this section:

(1) An issuer free writing prospectus means a free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an asset-backed issuer, prepared by or on behalf of a depositor, sponsor, or servicer (as defined in Item 1101 of Regulation AB) or affiliated depositor or used or referred to by any such person.

(2) Issuer information means material information about the issuer or its securities that has been provided by or on behalf of the issuer.

(3) A written communication or information is prepared or provided by or on behalf of a person if the person or an agent or representative of the person authorizes the communication or information or approves the communication or information before it is

used. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.

(4) A road show means an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and includes discussion of one or more of the issuer, such management, and the securities being offered; and

(5) A bona fide electronic road show means a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications.

Note to §230.433.

This section does not affect the operation of the provisions of clause (a) of section 2(a)(10) of the Act providing an exception from the definition of "prospectus."

38. Remove §230.434.

39. Amend §230.439 by revising paragraph (b) to read as follows:

**§230.439 Consent to use of material incorporated by reference.**

* * * * *

(b) Notwithstanding paragraph (a) of this section, any required consent may be incorporated by reference into a registration statement filed pursuant to Rule 462(b) (§230.462(b)) or a post-effective amendment filed pursuant to Rule 462(e) (§230.462(e)) from a previously filed registration statement relating to that offering, provided that the consent contained in the previously filed registration statement expressly provides for such incorporation.

40. Amend § 230.456 as follows:

a. Revise the section heading;

b. Designate the current text as paragraph (a); and

c. Add paragraph (b).

The revisions and additions read as follows:

**§ 230.456 Date of filing; timing of fee payment.**

(a) * * *

(b)(1) Notwithstanding paragraph (a) of this section, a well-known seasoned issuer that registers securities offerings on an automatic shelf registration statement, or registers additional securities or classes of securities thereon pursuant to Rule 413(b)

(§230.413(b)), may, but is not required to, defer payment of all or any part of the registration fee to the Commission required by section 6(b)(2) of the Act on the following conditions:

(i) If the issuer elects to defer payment of the registration fee, it shall pay the registration fees (pay-as-you-go registration fees) calculated in accordance with Rule 457(r) (§230.457(r)) in advance of or in connection with an offering of securities from the registration statement within the time required to file the prospectus supplement pursuant to Rule 424(b) (§230.424(b)) for the offering, provided, however, that if the issuer fails, after a good faith effort to pay the filing fee within the time required by this section, the issuer may still be considered to have paid the fee in a timely manner if it is paid within four business days of its original due date; and

(ii) The issuer reflects the amount of the pay-as-you-go registration fee paid or to be paid in accordance with paragraph (b)(1)(i) of this section by updating the "Calculation of Registration Fee" table to indicate the class and aggregate offering price of securities offered and the amount of registration fee paid or to be paid in connection with the offering or offerings either in a post-effective amendment filed at the time of the fee payment or on the cover page of a prospectus filed pursuant to Rule 424(b) (§230.424(b)).

(2) A registration statement filed relying on the pay-as-you-go registration fee payment provisions of paragraph (b)(1) of this section will be considered filed as to the securities or classes of securities identified in the registration statement for purposes of this section and section 5 of the Act when it is received by the Commission, if it complies with all other requirements of the Act and the rules with respect to it.

(3) The securities sold pursuant to a registration statement will be considered registered, for purposes of section 6(a) of the Act, if the pay-as-you-go registration fee has been paid and the post-effective amendment or prospectus including the amended "Calculation of Registration Fee" table is filed pursuant to paragraph (b)(1) of this section.

41. Amend §230.457 by adding paragraph (r) to read as follows:

**§230.457 Computation of fee.**

* * * * *

(r) Where securities are to be offered pursuant to an automatic shelf registration statement, the registration fee is to be calculated in accordance with this section. When the issuer elects to defer payment of the fees pursuant to Rule 456(b) (§230.456(b)), the "Calculation of Registration Fee" table in the registration statement must indicate that the issuer is relying on Rule 456(b) but does not need to include the number of shares or units of securities or the maximum aggregate offering price of any securities until the issuer updates the "Calculation of Registration Fee" table to reflect payment of the registration fee, including a pay-as-you-go registration fee in accordance with Rule 456(b). The registration fee shall be calculated based on the fee payment rate in effect on the date of the fee payment.

42. Amend §230.462 by adding paragraphs (e) and (f) to read as follows:

**§230.462 Immediate effectiveness of certain registration statements and post-effective amendments**

* * * * *

(e) An automatic shelf registration statement, including an automatic shelf registration statement filed in accordance with Rule 415(a)(6) (§230.415(a)(6)), and any post-effective amendment thereto, including a post-effective amendment filed to register additional classes of securities pursuant to Rule 413(b) (§230.413(b)), shall become effective upon filing with the Commission.

(f) A post-effective amendment filed pursuant to paragraph (e) of this section for purposes of adding a new issuer and its securities as permitted by Rule 413(b) (§230.413(b)) that satisfies the requirements of Form S-3 or Form F-3 (§239.13 or §239.33 of this chapter), as applicable, including the signatures required by Rule 402(e) (§230.402(e)), and contains a prospectus satisfying the requirements of Rule 430B (§230.430B), shall become effective upon filing with the Commission.

43. Amend §230.473 by revising paragraph (d) to read as follows:

**§230.473 Delaying amendments.**

* * * * *

(d) No amendments pursuant to paragraph (a) of this section may be filed with a registration statement on Form F-7, F-8 or F-80 (§239.37, §239.38 or §239.41 of this chapter); on Form F-9 or F-10 (§239.39 or §239.40 of this chapter) relating to an offering being made contemporaneously in the United States and the issuer's home jurisdiction; on Form S-8 (§239.16b of this chapter); on Form S-3 or F-3 (§239.13 or §239.33 of this chapter) relating to a dividend or interest reinvestment plan; on Form S-3 or Form F-3 relating to an automatic shelf registration statement; or on Form S-4 (§239.25 of this chapter) complying with General Instruction G of that Form.

44.. Amend § 230.497 as follows:

a. Remove paragraph (h)(2); and

b. Redesignate paragraph (h)(1) as paragraph (h).

45. Amend § 230.902 as follows:

a. Remove the word "and" at the end of paragraph (c)(3)(v)(B);

b. Remove the period at the end of paragraph (c)(3)(vi) and add in its place a semi-colon;

c. Remove the period at the end of paragraph (c)(3)(vii) and add in its place "; and"; and

d. Add paragraphs (c)(3)(viii) and (h)(4).

The amendments and additions read as follows:

**§ 230.902 Definitions.**

* * * * *

(c) Directed selling efforts. * * *

(3) * * *

(viii) Publication or distribution of a research report by a broker or dealer in accordance with Rule 138(c) (§230.138(c)) or Rule 139(b) (§230.139(b)).

* * * * *

(h) Offshore transaction.* * *

(4) Notwithstanding paragraph (h)(1) of this section, publication or distribution of a research report in accordance with Rule 138(c) (§230.138(c)) or Rule

139(b) (§230.139(b)) by a broker or dealer at or around the time of an offering in reliance on Regulation S (§§230.901 through 230.905) will not cause the transaction to fail to be an offshore transaction as defined in this section.

* * * * *

**PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

46. The general authority citation for part 230 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll(d), 78mm, 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

47. Remove the authority citation following §239.11.

48. Amend Form S-1 (referenced in §239.11) as follows:

a. Remove the sentence and check box immediately preceding the "Calculation of Registration Fee" table;

b. Add General Instruction VII.;

c. Add Item 11A to Part I;

d. Redesignate Item 12 to Part I as Item 12A; and

e. Add new Item 12 to Part I.

The additions read as follows:

**Note**: The text of Form S-1 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM S-1**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

* * * * *

**GENERAL INSTRUCTIONS**

* * * * *

**VII. Eligibility to Use Incorporation by Reference**

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 11 of this Form in accordance with Item 11A and Item 12 of this Form:

A. The registrant is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act").

B. The registrant has filed all reports and other materials required to be filed by Sections 13(a), 14, or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials).

C. The registrant has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year.

D. The registrant is not:

1. And during the past three years neither the registrant nor any of its predecessors was:

(a) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(b) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405); or

(c) A registrant for an offering of penny stock as defined in Rule 3a51-1 of the Exchange Act (§240.3a51-1 of this chapter).

2. Registering an offering that effectuates a business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1) of this chapter).

E. If a registrant is a successor registrant it shall be deemed to have satisfied conditions A., B., C., and D.2 above if:

1. Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

2. All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

F. The registrant makes its periodic and current reports filed pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 11A or Item 12 of this Form readily available and accessible on a Web site maintained by or for the registrant and containing information about the registrant.

* * * * *

**PART I – INFORMATION REQUIRED IN PROSPECTUS**

*  *  *  *  *

**Item 11A. Material Changes.**

If the registrant elects to incorporate information by reference pursuant to General Instruction VII., describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10-K or Form 10-KSB and which have not been described in a Form 10-Q, Form 10-QSB, or Form 8-K filed under the Exchange Act.

**Item 12. Incorporation of Certain Information by Reference.**

If the registrant elects to incorporate information by reference pursuant to General Instruction VII.:

(a) It must specifically incorporate by reference into the prospectus contained in the registration statement the following documents by means of a statement to that effect in the prospectus listing all such documents:

(1) The registrant's latest annual report on Form 10-K or Form 10-KSB filed pursuant to Section 13(a) or Section 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10-K or Form 10-KSB was required to have been filed; and

(2) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act or proxy or information statements filed pursuant to Section 14 of the Exchange Act since the end of the fiscal year covered by the annual report referred to in paragraph (a)(1) above.

Note to Item 12(a). Attention is directed to Rule 439 (§230.439) regarding consent to use of material incorporated by reference.

(b)(1) The registrant must state:

(i) That it will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the reports or documents that have been incorporated by reference in the prospectus contained in the registration statement but not delivered with the prospectus;

(ii) That it will provide these reports or documents upon written or oral request;

(iii) That it will provide these reports or documents at no cost to the requester;

(iv) The name, address, telephone number, and e-mail address, if any, to which the request for these reports or documents must be made; and

(v) The registrant's Web site address, including the uniform resource locator (URL) where the incorporated reports and other documents may be accessed.

Note to Item 12(b)(1). If the registrant sends any of the information that is incorporated by reference in the prospectus contained in the registration statement to security holders, it also must send any exhibits that are specifically incorporated by reference in that information.

(2) The registrant must:

(i) Identify the reports and other information that it files with the SEC; and

(ii) State that the public may read and copy any materials it files with the SEC at the SEC's Public Reference Room at 100 F Street, N.E., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If the registrant is an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements,

and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov).

* * * * *

49. Remove and reserve §239.12 and remove Form S-2 referenced in that section.

50. Amend §239.13 as follows:

a. Revise the introductory paragraph;

b. Remove the word "or" at the end of paragraph (c)(2);

c. Revise paragraph (c)(3);

d. Add paragraphs (c)(4) and (c)(5);

e. Add a note to paragraph (c);

f. Redesignate paragraph (d) as paragraph (e); and

g. Add new paragraph (d).

The revision and additions read as follows:

**§239.13 Form S-3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.**

This instruction sets forth registrant requirements and transaction requirements for the use of Form S-3. Any registrant which meets the requirements of paragraph (a) of this section ("Registrant Requirements") may use this Form for the registration of securities under the Securities Act of 1933 ("Securities Act") which are offered in any transaction specified in paragraph (b) of this section ("Transaction Requirement") provided that the requirement applicable to the specified transaction are met. With respect to majority-

owned subsidiaries, see paragraph (c) of this section. With respect to well-known seasoned issuers and majority-owned subsidiaries of well-known seasoned issuers, see paragraph (d) of this section.

* * * * *

(c) * * *

(3) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X (§210.3-10 of this chapter), of the payment obligations on the securities being registered, and the securities being registered are non-convertible securities, other than common equity;

(4) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are full and unconditional guarantees, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the parent's non-convertible securities, other than common equity, being registered; or

(5) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are guarantees of the payment obligations on the non-convertible securities, other than common equity, being registered by another majority-owned subsidiary of the parent, where the parent provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of such non-convertible securities.

Note to paragraph (c): With regard to paragraphs (c)(3), (c)(4), and (c)(5) of this section, the guarantor is the issuer of a separate security consisting of the guarantee,

which must be concurrently registered, but may be registered on the same registration statement as are the guaranteed non-convertible securities.

(d) Automatic shelf offerings by well-known seasoned issuers. Any registrant that is a well-known seasoned issuer as defined in Rule 405 (§230.405 of this chapter) at the most recent eligibility determination date specified in paragraph (2) of that definition may use this Form for registration under the Securities Act of securities offerings, other than pursuant to Rule 415(a)(1)(vii) or (viii) (§230.415(a)(1)(vii) or (viii) of this chapter), as follows:

(1) The securities to be offered are:

(i) Any securities to be offered pursuant to Rule 415, Rule 430A, or Rule 430B (§230.415, §230.430A, or §230.430B of this chapter) by:

(A) A registrant that is a well-known seasoned issuer by reason of paragraph (1)(i)(A) of the definition in Rule 405; or

(B) A registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 if the registrant also is eligible to register a primary offering of its securities pursuant to paragraph (b)(1) of this section;

(ii) Non-convertible securities, other than common equity, to be offered pursuant to Rule 415, Rule 430A, or Rule 430B by a registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 and does not fall within paragraph (b)(1) of this section;

(iii) Securities of majority-owned subsidiaries of the parent registrant to be offered pursuant to Rule 415, Rule 430A, or Rule 430B if the parent registrant is a well-

known seasoned issuer and the securities of the majority-owned subsidiary being registered meet the following requirements:

(A) Securities of a majority-owned subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405;

(B) Securities of a majority-owned subsidiary that are non-convertible securities, other than common equity, and the parent registration provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the non-convertible securities;

(C) Securities of a majority-owned subsidiary that are a guarantee of:

(1) Non-convertible securities, other than common equity, of the parent registrant being registered;

(2) Non-convertible securities, other than common equity, of another majority-owned subsidiary being registered and the parent has provided a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on such non-convertible securities.; or

(D) Securities of a majority-owned subsidiary that meet the conditions of the Transaction Requirement set forth in paragraph (b)(2) of this section (Primary offerings of non-convertible investment grade securities).

(iv) Securities to be offered for the account of any person other than the issuer ("selling security holders"), provided that the registration statement and the prospectus are not required to separately identify the selling security holders or the securities to be sold by such persons until the filing of a prospectus, prospectus supplement, post-

effective amendment to the registration statement, or periodic or current report under the Exchange Act that is incorporated by reference into the registration statement and prospectus, identifying the selling security holders and the amount of securities to be sold by each of them and, if included in a periodic or current report, a prospectus or prospectus supplement is filed, as required by Rule 430B, pursuant to Rule 424(b)(7) (§230.424(b)(7) of this chapter);

(2) The registrant pays the registration fee pursuant to Rule 456(b) and Rule 457(r) (§230.456(b) and §230.457(r) of this chapter) or in accordance with Rule 456(a) (§230.456(a) of this chapter);

(3) If the registrant is a majority-owned subsidiary, it is required to file and has filed reports pursuant to section 13 or section 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)) and satisfies the requirements of this Form with regard to incorporation by reference or information about the majority-owned subsidiary is included in the registration statement (or a post-effective amendment to the registration statement);

(4) The registrant may register additional securities or classes of its or its majority-owned subsidiaries' securities on a post-effective amendment pursuant to Rule 413(b) (§230.413(b) of this chapter); and

(5) An automatic shelf registration statement and post-effective amendment will become effective immediately pursuant to Rule 462(e) and (f) (§230.462(e) and (f) of this chapter) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission.

* * * * *

51. Amend Form S-3 (referenced in §239.13) as follows:

a. Remove the sentence and check box immediately preceding the "Calculation of Registration Fee" table;

b. Add two check boxes to the cover page immediately before "Calculation of Registration Fee" table;

c. Revise the Note to the "Calculation of Registration Fee" Table;

d. Revise the introductory paragraph to General Instruction I.;

e. Remove the word "or" at the end of General Instruction I.C.2.;

f. Revise paragraph 3., and add paragraphs 4., and 5. to General Instruction I.C.;

g. Add a note to General Instruction I.C.;

h. Add paragraph D. to General Instruction I.;

i. Revise paragraph D. of General Instruction II.;

j. Add paragraphs E., F., and G. to General Instruction II.;

k Revise the heading of General Instruction IV.;

l. Designate the current text under General Instruction IV. as paragraph A;

m. Add a heading to paragraph A to General Instruction IV.;

n. Add paragraph B. to General Instruction IV.;

o. In Item 12(c)(2)(ii) to Part I revise the phrase "450 Fifth Street, N.W.," to read "100 F Street, N.E.,"; and

p. Add paragraph (d) of Item 12 to Part I.

The revisions and additions read as follows:

**Note**: The text of Form S-3 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM S-3**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

* * * * *

If this Form is a registration statement pursuant to General Instruction I.D. or a post-effective amendment thereto that shall become effective upon filing with the Commission pursuant to Rule 462(e) under the Securities Act, check the following box. □

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.D. filed to register additional securities or additional classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box. □

* * * * *

**Notes to the "Calculation of Registration Fee" Table ("Fee Table"):**

1. Specific details relating to the fee calculation shall be furnished in notes to the Fee Table, including references to provisions of Rule 457 (§230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the Fee Table.

2. If the filing fee is calculated pursuant to Rule 457(o) under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities, and the amount of registration fee need to appear in the Fee Table. Where two or more classes of securities are being registered pursuant to General Instruction II.D., however, the Fee Table need only specify the maximum aggregate offering price for all classes; the Fee Table need not specify by each class the proposed maximum aggregate offering price (see General Instruction II.D.).

3. If the filing fee is calculated pursuant to Rule 457(r) under the Securities Act, the Fee Table must state that it registers an unspecified amount of securities of each identified class of securities and must provide that the issuer is relying on Rule 456(b) and Rule 457(r). If the Fee Table is amended in a post-effective amendment to the registration statement or in a prospectus filed in accordance with Rule 456(b)(1)(ii) (§230.456(b)(1)(ii) of this chapter) , the Fee Table must specify the aggregate offering price for all classes of securities in the referenced offering or offerings and the applicable registration fee.

4. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 457 under the Securities Act.

## GENERAL INSTRUCTIONS

### I. Eligibility Requirements for Use of Form S-3

This instruction sets forth registrant requirements and transaction requirements for the use of Form S-3. Any registrant which meets the requirements of I.A. below

("Registrant Requirements") may use this Form for the registration of securities under the Securities Act of 1933 ("Securities Act") which are offered in any transaction specified in I.B. below ("Transaction Requirement") provided that the requirement applicable to the specified transaction are met. With respect to majority-owned subsidiaries, see Instruction I.C. below. With respect to well-known seasoned issuers and majority-owned subsidiaries of well-known seasoned issuers, see Instruction I.D. below.

* * * * *

**C. Majority-owned Subsidiaries.** If a registrant is a majority-owned subsidiary, security offerings may be registered on this Form if:

* * * * *

3. the parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X (§210.3-10 of this chapter), of the payment obligations on the securities being registered, and the securities being registered are non-convertible securities, other than common equity;

4. the parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are full and unconditional guarantees, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the parent's non-convertible securities, other than common equity, being registered; or

5. the parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are guarantees of the payment obligations on the non-

convertible securities, other than common equity, being registered by another majority-owned subsidiary of the parent where the parent provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of such non-convertible securities.

Note to General Instruction I.C.: With regard to paragraphs I.C.3, I.C.4, and I.C.5 above, the guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are the non-convertible guaranteed securities.

**D. Automatic Shelf Offerings by Well-Known Seasoned Issuers.**

Any registrant that is a well-known seasoned issuer, as defined in Rule 405, at the most recent eligibility determination date specified in paragraph (2) of that definition may use this Form for registration under the Securities Act of securities offerings, other than pursuant to Rule 415(a)(1)(vii) or (viii) (§230.415(a)(1)(vii) or (viii) of this chapter), as follows:

1. The securities to be offered are:

(a) Any securities to be offered pursuant to Rule 415, Rule 430A, or Rule 430B (§230.415, §230.430A, or §230.430B of this chapter) by:

(i) A registrant that is a well-known seasoned issuer by reason of paragraph (1)(i)(A) of the definition in Rule 405; or

(ii) A registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 if the registrant also is eligible to register a primary offering of its securities pursuant to Transaction Requirement I.B.1 of this Form;

(b) Non-convertible securities, other than common equity, to be offered pursuant to Rule 415, Rule 430A, or Rule 430B by a registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 and does not fall within Transaction Requirement I.B.1 of this Form;

(c) Securities of majority-owned subsidiaries of the parent registrant to be offered pursuant to Rule 415, Rule 430A, or Rule 430B if the parent registrant is a well-known seasoned issuer and the securities of the majority-owned subsidiary being registered meet the following requirements:

(i) Securities of a majority-owned subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405;

(ii) Securities of a majority-owned subsidiary that are non-convertible securities, other than common equity, and the parent registrant provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the non-convertible securities;

(iii) Securities of a majority-owned subsidiary that are a guarantee of:

(A) Non-convertible securities, other than common equity, of the parent registrant being registered;

(B) Non-convertible securities, other than common equity, of another majority-owned subsidiary being registered and the parent registrant has provided a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on such non-convertible securities; or

(iv) Securities of a majority-owned subsidiary that meet the conditions of Transaction Requirement I.B.2. of this Form (Primary Offerings of Non-Convertible Investment Grade Securities).

(d) Securities to be offered for the account of any person other than the issuer ("selling security holders"), provided that the registration statement and the prospectus are not required to separately identify the selling security holders or the securities to be sold by such persons until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement, or periodic or current report under the Exchange Act that is incorporated by reference into the registration statement and prospectus, identifying the selling security holders and the amount of securities to be sold by each of them and, if included in a periodic or current report, a prospectus or prospectus supplement is filed, as required by Rule 430B, pursuant to Rule 424(b)(7) (§230.424(b)(7) of this chapter).

2. The registrant pays the registration fee pursuant to Rules 456(b) and 457(r) or in accordance with Rule 456(a).

3. If the registrant is a majority-owned subsidiary, it is required to file and has filed reports pursuant to Section 13 or Section 15(d) of the Exchange Act and satisfies the requirements of the Form with regard to incorporation by reference or information about the majority-owned subsidiary is included in the registration statement (or a post-effective amendment to the registration statement).

4. The registrant may register additional securities or classes of its or its majority-owned subsidiaries' securities on a post-effective amendment pursuant to Rule 413(b) (§203.413(b) of this chapter).

5. An automatic shelf registration statement and post-effective amendment will become effective immediately pursuant to Rule 462(e) and (f) (§230.462(e) and (f) of this chapter) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission.

## II. Application of General Rules and Regulations

* * * * *

**D. Non-Automatic Shelf Registration Statements.** Where two or more classes of securities being registered on this Form pursuant to General Instruction I.B.1. or I.B.2. are to be offered pursuant to Rule 415(a)(1)(x) (§230.415(a)(1)(x) of this chapter), and where this Form is not an automatic shelf registration statement, Rule 457(o) permits the registration fee to be calculated on the basis of the maximum offering price of all the securities listed in the Fee Table. In this event, while the Fee Table would list each of the classes of securities being registered and the aggregate proceeds to be raised, the Fee Table need not specify by each class information as to the amount to be registered, proposed maximum offering price per unit, and proposed maximum aggregate offering price.

**E. Automatic Shelf Registration Statements.** Where securities are being registered on this Form pursuant to General Instruction I.D., Rule 456(b) permits, but does not require, the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(r) permits, but does not require, the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in an offering or offerings off the registration statement. If a registrant elects to pay all or a portion of the registration fee on a deferred basis, the Fee Table in the initial filing must identify the

classes of securities being registered and provide that the registrant elects to rely on Rule 456(b) and Rule 457(r), but the Fee Table does not need to specify any other information. When the registrant amends the Fee Table in accordance with Rule 456(b)(1)(ii), the amended Fee Table must include either the dollar amount of securities being registered if paid in advance of or in connection with an offering or offerings or the aggregate offering price for all classes of securities referenced in the offerings and the applicable registration fee.

**F. Information in Automatic and Non-Automatic Shelf Registration Statements.** Where securities are being registered on this Form pursuant to General Instruction I.B.1, I.B.2, I.B.5, I.C., or I.D., information is only required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430A or Rule 430B. Required information about a specific transaction must be included in the prospectus in the registration statement by means of a prospectus that is deemed to be part of and included in the registration statement pursuant to Rule 430A or Rule 430B, a post-effective amendment to the registration statement, or a periodic or current report under the Exchange Act incorporated by reference into the registration statement and the prospectus and identified in a prospectus filed, as required by Rule 430B, pursuant to Rule 424(b) (§230.424(b) of this chapter).

**G. Selling Security Holder Offerings.** Where a registrant eligible to register primary offerings on this Form pursuant to General Instruction I.B.1 registers securities offerings on this Form pursuant to General Instruction I.B.1 or I.B.3 for the account of persons other than the registrant, if the offering of the securities, or securities convertible into such securities, that are being registered on behalf of the selling security holders was

completed and the securities, or securities convertible into such securities, were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities, the registrant may, as permitted by Rule 430B(b), in lieu of identifying selling security holders prior to effectiveness of the resale registration statement, refer to unnamed selling security holders in a generic manner by identifying the initial transaction in which the securities were sold. Following effectiveness, the registrant must include in a prospectus filed pursuant to Rule 424(b)(7), a post-effective amendment to the registration statement, or an Exchange Act report incorporated by reference into the prospectus that is part of the registration statement (which Exchange Act report is identified in a prospectus filed, as required by Rule 430B, pursuant to Rule 424(b)(7)) the names of previously unidentified selling security holders and amounts of securities that they intend to sell. If this Form is being filed pursuant to General Instruction I.D. by a well-known seasoned issuer to register securities being offered for the account of persons other than the issuer, the registration statement and the prospectus included in the registration statement do not need to designate the securities that will be offered for the account of such persons, identify them, or identify the initial transaction in which the securities, or securities convertible into such securities, were sold until the registrant files a post-effective amendment to the registration statement, a prospectus pursuant to Rule 424(b), or an Exchange Act report (and prospectus filed, as required by Rule 430B, pursuant to Rule 424(b)(7)) containing information for the offering on behalf of such persons.

* * * * *

**IV. Registration of Additional Securities and Additional Classes of Securities**

**A. Registration of Additional Securities Pursuant to Rule 462(b).**

* * * * *

**B. Registration of Additional Securities or Classes of Securities or Additional Registrants After Effectiveness.** A well-known seasoned issuer relying on General Instruction I.D. of this Form may register additional securities or classes of securities, pursuant to Rule 413(b) by filing a post-effective amendment to the effective registration statement. The well-known seasoned issuer may add majority-owned subsidiaries as additional registrants whose securities are eligible to be sold as part of the automatic shelf registration statement by filing a post-effective amendment identifying the additional registrants, and the registrant and the additional registrants and other persons required to sign the registration statement must sign the post-effective amendment. The post-effective amendment must consist of the facing page; any disclosure required by this Form that is necessary to update the registration statement to reflect the additional securities, additional classes of securities, or additional registrants; any required opinions and consents; and the signature page. Required information, consents, or opinions may be included in the prospectus and the registration statement through a post-effective amendment or may be provided through a document incorporated or deemed incorporated by reference into the registration statement and the prospectus that is part of the registration statement, or, as to the required information only, contained in a prospectus filed pursuant to Rule 424(b) that is deemed part of and included in the registration statement and prospectus that is part of the registration statement.

* * * * *

**PART I**

**INFORMATION REQUIRED IN PROSPECTUS**

* * * * *

**Item 12. Incorporation of Certain Information by Reference.**

* * * * *

(d) Any information required in the prospectus in response to Item 3 through Item 11 of this Form may be included in the prospectus through documents filed pursuant to Section 13(a), 14, or 15(d) of the Exchange Act that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement.

* * * * *

52. Amend Form S-4 (referenced in §239.25) as follows:

a. Revise paragraphs B.1.b., B.1.c., C.1.b., and C.1.c. to the General Instructions;

b. In Item 11(c)(2) to Part I revise the phrase "450 Fifth Street, N.W.," to read "100 F Street, N.E.,";

c. Revise the heading and introductory text of Item 12 of Part I;

d. Revise the introductory text of Item 13 of Part I;

e. In Item 13(d)(2) to Part I revise the phrase "450 Fifth Street, N.W.," to read "100 F Street, N.E.,";

f. Revise the heading and introductory text of Item 14 of Part I;

g. Revise the heading and paragraph (a) of Item 16 of Part I;

h. Revise the heading and introductory text of Item 17 of Part I;

i. Revise paragraph (b) of Item 18 of Part I; and

j. Revise paragraph (c) of Item 19 of Part I.

The revisions read as follows:

**Note**: The text of Form S-4 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM S-4**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

* * * * *

**B. Information with Respect to the Registrant.**

1. * * *

a. * * *

b. Items 12 and 13 of this Form, if the registrant meets the requirements for use of Form S-3 and elects this alternative; or

c. Item 14 of this Form, if the registrant does not meet the requirements for use of Form S-3, or if it otherwise elects to use this alternative.

* * * * *

**C. Information with Respect to the Company Being Acquired.**

1. * * *

b. Item 16 of this Form, if the company being acquired meets the requirements for use of Form S-3 and this alternative is elected; or

c. Item 17 of this Form, if the company being acquired does not meet the requirements for use of Form S-3, or if this alternative is otherwise elected.

* * * * *

**PART I**

**INFORMATION REQUIRED IN PROSPECTUS**

* * * * *

**B. INFORMATION ABOUT THE REGISTRANT**

* * * * *

**Item 12. Information with Respect to S-3 Registrants.**

If the registrant meets the requirements for use of Form S-3 and elects to comply with this Item, furnish the information required by either paragraph (a) or paragraph (b) of this Item. The information required by paragraph (b) shall be furnished if the registrant satisfies the conditions of paragraph (c) of this Item.

* * * * *

**Item 13. Incorporation of Certain Information by Reference.**

If the registrant meets the requirements for use of Form S-3 and elects to furnish information in accordance with the provisions of Item 12 of this Form:

* * * * *

**Item 14. Information with Respect to Registrants Other Than S-3 Registrants.**

If the registrant does not meet the requirements for use of Form S-3, or otherwise elects to comply with this Item in lieu of Item 10 or 12, furnish the information required by:

* * * * *

## C. INFORMATION ABOUT THE COMPANY BEING ACQUIRED

* * * * *

**Item 16. Information with Respect to S-3 Companies.**

**(**a) If the company being acquired meets the requirements for use of Form S-3 and elects to comply with this Item, furnish the information that would be required by Items 12 and 13 of this Form if securities of such company were being registered.

* * * * *

**Item 17. Information with Respect to Companies Other Than S-3 Companies.**

If the company being acquired does not meet the requirements for use of Form S-3, or compliance with this Item is otherwise elected in lieu of Item 15 or 16, furnish the information required by paragraph (a) or (b) of this Item, whichever is applicable.

* * * * *

## D. VOTING AND MANAGEMENT INFORMATION

**Item 18. Information if Proxies, Consents or Authorizations are to be Solicited.**

* * * * *

(b) If the registrant or the company being acquired meets the requirements for use of Form S-3, any information required by paragraphs (a)(5)(ii) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10-K or Form 10-KSB.

* * * * *

**Item 19. Information if Proxies, Consents or Authorizations are not to be Solicited or in an Exchange Offer.**

* * * * *

(c) If the registrant or the company being acquired meets the requirements for use of Form S-3, any information required by paragraphs (a)(5) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10-K or Form 10-KSB.

* * * * *

53. Amend Form F-1 (referenced in §239.31) as follows:

a. Remove the sentence and check box immediately preceding the "Calculation of Registration Fee" table;

b. Add General Instruction VI.;

c. Add Item 4A to Part I;

d. Redesignate Item 5 as Item 5A to Part I.; and

e. Add new Item 5 to Part I.

The additions read as follows:

**Note**: The text of Form F-1 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM F-1**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

* * * * *

**GENERAL INSTRUCTIONS**

* * * * *

## VI. Eligibility to Use Incorporation by Reference

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Item 3 and Item 4 of this Form in accordance with Item 4A and Item 5 of this Form:

A. The registrant is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act");

B. The registrant has filed all reports and other materials required to be filed by Section 13(a) or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials);

C. The registrant has filed an annual report required under Section 13(a) or 15(d) of the Exchange Act for its most recently completed fiscal year;

D. The registrant is not:

1. And during the past three years neither the registrant nor any of its predecessors was:

(a) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2) of this chapter);

(b) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405 of this chapter); or

(c) A registrant for an offering of penny stock as defined in Rule 3a51-1 of the Exchange Act (§240.3a51-1 of this chapter);

2. Registering an offering that effectuates a business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1) of this chapter);

E. If a registrant is a successor registrant it shall be deemed to have satisfied conditions A., B., C., and D.2. above if:

1. Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

2. All predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession; and

F. The registrant makes its reports filed pursuant to Sections 13 or 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 4A or Item 5 of this Form readily available and accessible on a Web site maintained by or for the registrant and containing information about the registrant.

* * * * *

**PART I**

**INFORMATION REQUIRED IN PROSPECTUS**

* * * * *

**Item 4A. Material Changes.**

(a) If the registrant elects to incorporate information by reference pursuant to General Instruction VI., describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in accordance with Item 5 of this Form and which have not

been described in a report on Form 6-K, Form 10-Q or Form 8-K filed under the Exchange Act and incorporated by reference pursuant to Item 5 of this Form.

(b)1. Include in the prospectus contained in the registration statement, if not included in the reports filed under the Exchange Act which are incorporated by reference into the prospectus contained in the registration statement pursuant to Item 5:

i. Information required by Rule 3-05 and Article 11 of Regulation S-X (§210.3-05 and §210.11 et seq. of this chapter);

ii. Restated financial statements if there has been a change in accounting principles or a correction of an error where such change or correction requires material retroactive restatement of financial statements;

iii. Restated financial statements where one or more business combinations accounted for by the pooling of interest method of accounting have been consummated subsequent to the most recent fiscal year and the acquired businesses, considered in the aggregate, are significant under Rule 11-01(b) (§210.11-01(b) of this chapter); or

iv. Any financial information required because of a material disposition of assets outside the normal course of business.

2. If the financial statements included in this registration statement in accordance with Item 5 are not sufficiently current to comply with the requirements of Item 8.A of Form 20-F, financial statements necessary to comply with that Item shall be presented:

i. Directly in the prospectus;

ii. Through incorporation by reference and delivery of a Form 6-K identified in the prospectus as containing such financial statements; or

iii. Through incorporation by reference of an amended Form 20-F, Form 40-F, or Form 10-K, in which case the prospectus shall disclose that the Form 20-F, Form 40-F, or Form 10-K has been so amended.

Instruction. Financial statements or information required to be furnished by this Item shall be reconciled pursuant to either Item 17 or Item 18 of Form 20-F, whichever is applicable to the primary financial statements.

**Item 5. Incorporation of Certain Information by Reference.**

If the registrant elects to incorporate information by reference pursuant to General Instruction VI.:

(a) It must specifically incorporate by reference into the prospectus contained in the registration statement the following documents by means of a statement to that effect in the prospectus listing all such documents:

1. The registrant's latest annual report on Form 20-F, Form 40-F or Form 10-K filed under the Exchange Act.

2. Any report on Form 10-Q or Form 8-K filed since the date of filing of the annual report. The registrant may also incorporate by reference any Form 6-K meeting the requirements of this Form.

Note to Item 5(a). Attention is directed to Rule 439 (§230.439) regarding consent to use of material incorporated by reference.

(b)1. The registrant must state:

i. That it will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the reports or documents that have

been incorporated by reference in the prospectus contained in the registration statement but not delivered with the prospectus;

ii. That it will provide these reports or documents upon written or oral request;

iii. That it will provide these reports or documents at no cost to the requester;

iv. The name, address, telephone number, and e-mail address, if any, to which the request for these reports or documents must be made; and

v. The registrant's Web site address, including the uniform resource locator (URL) where the incorporated reports and other documents may be accessed.

Note to Item 5.(b)1. If the registrant sends any of the information that is incorporated by reference in the prospectus contained in the registration statement to security holders, it also must send any exhibits that are specifically incorporated by reference in that information.

2. The registrant must:

i. Identify the reports and other information that it files with the SEC; and

ii. State that the public may read and copy any materials it files with the SEC at the SEC's Public Reference Room at 100 F Street, N.E., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If the registrant is an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov).

* * * * *

54. Remove and reserve §239.32 and remove Form F-2 referenced in that section.

55. Amend § 239.33 as follows:

a. Revise the introductory paragraph;

b. Remove the word "or" at the end of paragraph (a)(5)(ii);

c. Revise paragraph (a)(5)(iii);

d. Add paragraphs (a)(5)(iv), (a)(5)(v), and (a)(5)(vi);

e. Add a note to paragraph (a)(5); and

f. Add paragraph (c).

The revisions and additions read as follows:

**§239.33 Form F-3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.**

This instruction sets forth registrant requirements and transaction requirements for the use of Form F-3. Any foreign private issuer, as defined in Rule 405 (§230.405 of this chapter), which meets the requirements of paragraph (a) of this section (the "Registrant Requirements") may use this Form for the registration of securities under the Securities Act of 1933 (the "Securities Act") which are offered in any transaction specified in paragraph (b) of this section (the "Transaction Requirements"), provided that the requirements applicable to the specified transaction are met. With respect to majority-owned subsidiaries, see paragraph (a)(5) of this section. With respect to well-known seasoned issuers and majority-owned subsidiaries of well-known seasoned issuers, see paragraph (c) of this section.

* * * * *

(a) * * *

(5) * * *

(iii) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X (§210.3-10 of this chapter), of the payment obligations on the securities being registered, and the securities being registered are non-convertible securities, other than common equity;

(iv) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are full and unconditional guarantees, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the parent's non-convertible securities, other than common equity, being registered; or

(v) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are guarantees of the payment obligations on the non-convertible securities, other than common equity, being registered by another majority-owned subsidiary of the parent, where the parent provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of such non-convertible securities.

Note to paragraph (a)(5): In the situations described in paragraphs (a)(5)(iii), (a)(5)(iv), and (a)(5)(v) of this section, the parent or majority-owned subsidiary guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are

the guaranteed non-convertible securities. Both the parent and majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the majority-owned subsidiary will not be eligible to file annual reports on Form 20-F or Form 40-F (§249.220f or §249.240f of this chapter) after the effective date of the registration statement, then it shall disclose the information specified in Form S-3 (§239.13). Rule 3-10 of Regulation S-X specifies the financial statements required.

* * * * *

(c) Automatic shelf offerings by well-known seasoned issuers. Any registrant that is a well-known seasoned issuer as defined in Rule 405 (§230.405 of this chapter) at the most recent eligibility determination date specified in paragraph (2) of such definition may use this Form for registration under the Securities Act of securities offerings, other than pursuant to Rule 415(a)(1)(vii) or (viii) (§230.415(a)(1)(vii) or (viii) of this chapter), as follows:

(1) The securities to be offered are:

(i) Any securities to be offered pursuant to Rule 415, Rule 430A, or Rule 430B (§230.415, §230.430A, or §230.430B of this chapter) by:

(A) A registrant that is a well-known seasoned issuer by reason of paragraph (1)(i)(A) of the definition in Rule 405; or

(B) A registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 if the registrant also is eligible to register a primary offering of its securities pursuant to paragraph (b)(1) of this section;

(ii) Non-convertible securities, other than common equity, to be offered pursuant to Rule 415, Rule 430A, or Rule 430B by a registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 and does not fall within paragraph (b)(1) of this section;

(iii) Securities of majority-owned subsidiaries of the parent registrant to be offered pursuant to Rule 415, Rule 430A, or Rule 430B if the parent registrant is a well-known seasoned issuer and the securities of the majority-owned subsidiary being registered meet the following requirements:

(A) Securities of a majority-owned subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405;

(B) Securities of a majority-owned subsidiary that are non-convertible securities, other than common equity, and the parent registrant provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the non-convertible securities;

(C) Securities of a majority-owned subsidiary that are a guarantee of:

(1) Non-convertible securities, other than common equity, of the parent registrant being registered;

(2) Non-convertible securities, other than common equity, of another majority-owned subsidiary being registered and the parent registrant has provided a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on such non-convertible securities; or

(D) Securities of a majority-owned subsidiary that meet the conditions of the Transaction Requirement set forth in paragraph (b)(2) of this section (Primary offerings of non-convertible investment grade securities).

(iv) Securities to be offered for the account of any person other than the issuer ("selling security holders"), provided that the registration statement and the prospectus are not required to separately identify the selling security holders or the securities to be sold by such persons until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement, or report under the Exchange Act that is incorporated by reference into the registration statement and prospectus, identifying the selling security holders and the amount of securities to be sold by each of them and, if included in a report under the Exchange Act that is incorporated by reference, a prospectus or prospectus supplement is filed, as required by Rule 430B, pursuant to Rule 424(b)(7) (§230.424(b)(7) of this chapter).

(2) The registrant pays the registration fee pursuant to Rules 456(b) and 457(r) (§230.456(b) and §230.457(r) of this chapter) or in accordance with Rule 456(a) (§230.456(a) of this chapter);

(3) If the registrant is a majority-owned subsidiary, it is required to file and has filed reports pursuant to section 13 or section 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)) and satisfies the requirements of this Form with regard to incorporation by reference or information about the majority-owned subsidiary is included in the registration statement (or a post-effective amendment to the registration statement);

(4) The registrant may register additional securities or classes of its or its subsidiaries' securities on a post-effective amendment pursuant to Rule 413(b) (§230.413(b) of this chapter); and

(5) An automatic shelf registration statement and post-effective amendment will become effective immediately pursuant to Rule 462(e) and (f) (§230.462(e) and (f) of this chapter) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission.

56. Amend Form F-3 (referenced in §239.33) as follows:

a. Remove the sentence and check box immediately preceding the "Calculation of Registration Fee" table;

b. Add two check boxes to the cover page immediately before "Calculation of Registration Fee" table;

c. Revise the Note to the "Calculation of Registration Fee" Table;

d. Revise the introductory paragraph to General Instruction I.;

e. Remove the word "or" at the end of paragraph (ii), revise paragraph (iii) and add paragraphs (iv), (v), and (vi) to General Instruction I.A.5.;

f. Revise the note to General Instruction I.A.5.;

g. Add paragraph C. to General Instruction I.;

h. Revise paragraph C. of General Instruction II.;

i. Revise in paragraph D. to General Instruction II the phrase "(202) 942-8900." to read "(202) 551-8900." and the phrase "(202) 942-2940" to read "(202) 551-3610.";

j. Add paragraphs F., G., and H. to General Instruction II.;

k. Revise the heading of General Instruction IV. and designate the current text under General Instruction IV. as paragraph A.;

l. Add a heading to paragraph A. of General Instruction IV.;

m. Add paragraph B. to General Instruction IV.;

n. In Item 6(e)(2) of Part I revise the phrase "450 Fifth Street, N.W.," to read "100 F Street, N.E.,"; and

o. Add paragraph (f) to Item 6 of Part I.

The revisions and additions read as follows:

**Note**: The text of Form F-3 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM F-3**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

***  *  *  *  ***

If this Form is a registration statement pursuant to General Instruction I.C. or a post-effective amendment thereto that shall become effective upon filing with the Commission pursuant to Rule 462(e) under the Securities Act, check the following box.

☐

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.C. filed to register additional securities or additional

classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box. □

* * * * *

**Notes to the "Calculation of Registration Fee" Table ("Fee Table"):**

1. Specific details relating to the fee calculation shall be furnished in notes to the Fee Table, including references to provisions of Rule 457 (§230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the Fee Table.

2. If the filing fee is calculated pursuant to Rule 457(o) under the Securities Act, only the title of the class of securities to be registered, the proposed maximum aggregate offering price for that class of securities, and the amount of registration fee need to appear in the Fee Table. Where two or more classes of securities are being registered pursuant to General Instruction II.C., however, the Fee Table need only specify the maximum aggregate offering price for all classes; the Fee Table need not specify by each class the proposed maximum aggregate offering price (see General Instruction II.C.).

3. If the filing fee is calculated pursuant to Rule 457(r) of this chapter) under the Securities Act, the Fee Table must state that it registers an unspecified amount of securities of each identified class of securities and must provide that the issuer is relying on Rule 456(b) and Rule 457(r). If the Fee Table is amended in a post-effective amendment to the registration statement or in a prospectus filed in accordance with Rule 456(b)(1)(ii) (§230.456(b)(1)(ii) of this chapter), the Fee Table must specify the

aggregate offering price for all classes of securities in the referenced offering or offerings and the applicable registration fee.

4. Any difference between the dollar amount of securities registered for such offerings and the dollar amount of securities sold may be carried forward on a future registration statement pursuant to Rule 457 under the Securities Act.

## GENERAL INSTRUCTIONS

### I. Eligibility Requirements for Use of Form F-3

This instruction sets forth registrant requirements and transaction requirements for the use of Form F-3. Any foreign private issuer, as defined in Rule 405 (§230.405 of this chapter), which meets the requirements of I.A. below (the "Registrant Requirements") may use this Form for the registration of securities under the Securities Act of 1933 (the "Securities Act") which are offered in any transaction specified in I.B. below (the "Transaction Requirements"), provided that the requirements applicable to the specified Transaction are met. With respect to majority-owned subsidiaries, see Instruction I.A.5 below. With respect to well-known seasoned issuers and majority-owned subsidiaries of well-known seasoned issuers, see Instruction I.C. below.

* * * * *

### A. Registrant Requirements

* * * * *

**5. Majority-owned Subsidiaries.**

If a registrant is a majority-owned subsidiary, security offerings may be registered on this Form if:

* * * * *

(iii) the parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X (§210.3-10 of this chapter), of the payment obligations on the securities being registered, and the securities being registered are non-convertible securities, other than common equity;

(iv) the parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are full and unconditional guarantees, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on the parent's non-convertible securities, other than common equity, being registered; or

(v) the parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the securities of the registrant-subsidiary being registered are guarantees of the payment obligations on the non-convertible securities, other than common equity, being registered by another majority-owned subsidiary of the parent where the parent provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of such non-convertible securities.

Note: In the situation described in paragraphs I.A.5(iii), I.A.5(iv), and I.A.5(v) above, the parent or majority-owned subsidiary guarantor is the issuer of a separate security consisting of the guarantee, which must be concurrently registered, but may be registered on the same registration statement as are the guaranteed non-convertible securities. Both the parent or majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the majority-owned subsidiary will not be eligible to file annual reports on Form 20-F or

Form 40-F after the effective date of the registration statement, then it shall disclose the information specified in Form S-3. Rule 3-10 of Regulation S-X specifies the financial statements required.

* * * * *

**C. Automatic Shelf Offerings by Well-Known Seasoned Issuers**

Any registrant that is a well-known seasoned issuer, as defined in Rule 405, at the most recent eligibility determination date specified in paragraph (2) of that definition may use this Form for registration under the Securities Act of securities offerings, other than pursuant to Rule 415(a)(1)(vii) or (viii) (§230.415(a)(1)(vii) or (viii) of this chapter), as follows:

1. The securities to be offered are:

(a) Any securities to be offered pursuant to Rule 415, Rule 430A, or Rule 430B (§230.415, §230.430A, or §230.430B of this chapter) by:

(i) A registrant that is a well-known seasoned issuer by reason of paragraph (1)(i)(A) of the definition in Rule 405; or

(ii) A registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 if the registrant also is eligible to register a primary offering of its securities pursuant to Transaction Requirement I.B.1 of this Form;

(b) Non-convertible securities, other than common equity, to be offered pursuant to Rule 415, Rule 430A, or Rule 430B by a registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 and does not fall within General Instruction I.B.1 of this Form;

(c) Securities of majority-owned subsidiaries of the parent registrant to be offered pursuant to Rule 415, Rule 430A, or Rule 430B if the parent registrant is a well-known seasoned issuer and the securities of the majority-owned subsidiary being registered meet the following requirements:

(i) Securities of a majority-owned subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405;

(ii) Securities of a majority-owned subsidiary that are non-convertible securities, other than common equity, and the parent registrant provides a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on such non-convertible securities;

(iii) Securities of a majority-owned subsidiary that are a guarantee of:

(A) Non-convertible securities, other than common equity of the parent registrant being registered;

(B) Non-convertible securities, other than common equity, of another majority-owned subsidiary being registered and the parent has provided a full and unconditional guarantee, as defined in Rule 3-10 of Regulation S-X, of the payment obligations on such non-convertible securities; or

(iv) Securities of a majority-owned subsidiary that meet the conditions of Transaction Requirement I.B.2. of this Form (Primary Offerings of Non-Convertible Investment Grade Securities).

(d) Securities to be offered for the account of any person other than the issuer ("selling security holders"), provided that the registration statement and the prospectus

are not required to separately identify the selling security holders or the securities to be sold by such persons until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement, or report under the Exchange Act that is incorporated by reference into the registration statement and prospectus, identifying the selling security holders and the amount of securities to be sold by each of them, and if included in a report under the Exchange Act that is incorporated by reference, a prospectus or prospectus supplement is filed, as required by Rule 430B, pursuant to Rule 424(b)(7) (§230.424(b)(7) of this chapter).

2. The registrant pays the registration fee pursuant to Rules 456(b) and 457(r) or in accordance with Rule 456(a).

3. If the registrant is a majority-owned subsidiary, it is required to file and has filed reports pursuant to Section 13 or Section 15(d) of the Exchange Act and satisfies the requirements of the Form with regard to incorporation by reference or information about the majority-owned subsidiary is included in the registration statement (or a post-effective amendment to the registration statement).

4. The registrant may register additional securities or classes of its or its majority-owned subsidiaries' securities on a post-effective amendment pursuant to Rule 413(b) (§203.413(b) of this chapter).

5. An automatic shelf registration statement and post-effective amendment will become effective immediately pursuant to Rule 462(e) and (f) (§230.462(e) and (f) of this chapter) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission.

## II. Application of General Rules and Regulations

*  *  *  *  *

**C. Non-Automatic Shelf Registration Statements.**

Where two or more classes of securities being registered on this Form pursuant to General Instruction I.B.1.or I.B.2. are to be offered pursuant to Rule 415(a)(1)(x) (§230.415(a)(1)(x)), and where this Form is not an automatic shelf registration statement, Rule 457(o) permits the registration fee to be calculated on the basis of the maximum offering price of all the securities listed in the Fee Table. In this event, while the Fee Table would list each of the classes of securities being registered and the aggregate proceeds to be raised, the Fee Table need not specify by each class information as to the amount to be registered, proposed maximum offering price per unit, and proposed maximum aggregate offering price.

***  *  *  *  ***

**F. Automatic Shelf Registration Statements.** Where securities are being registered on this Form pursuant to General Instruction I.C., Rule 456(b) permits, but does not require, the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(r) permits, but does not require, the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in an offering or offerings off the registration statement. If a registrant elects to pay all or a portion of the registration fee on a deferred basis, the Fee Table in the initial filing must identify the classes of securities being registered and provide that the registrant elects to rely on Rule 456(b) and Rule 457(r), but the Fee Table does not need to specify any other information. When the registrant amends the Fee Table in accordance with Rule 456(b)(1)(ii), the amended Fee Table must include either the dollar amount of securities being registered if

paid in advance of or in connection with an offering or offerings or the aggregate offering price for all classes of securities referenced in the offerings and the applicable registration fee.

**G. Information in Automatic and Non-Automatic Shelf Registration Statements**. Where securities are being registered on this Form pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C., information is only required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430A or Rule 430B. Required information about a specific transaction must be included in the prospectus in the registration statement by means of a prospectus that is deemed to be part of and included in the registration statement pursuant to Rule 430A or Rule 430B, a post-effective amendment to the registration statement, or an Exchange Act report incorporated by reference into the registration statement and the prospectus and identified in a prospectus filed, as required by Rule 430B, pursuant to Rule 424(b) (§230.424 (b) of this chapter).

**H. Selling Security Holder Offerings.** Where a registrant eligible to register primary offerings on this Form pursuant to General Instruction I.B.1 registers securities offerings on this Form pursuant to General Instruction I.B.1 or I.B.3 for the account of persons other than the registrant, if the offering of the securities, or securities convertible into such securities, that are being registered on behalf of the selling security holders was completed and the securities, or securities convertible into such securities, were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities, the registrant may, as permitted by Rule 430B(b), in lieu of identifying selling security holders prior to effectiveness of the resale registration

statement, refer to unnamed selling security holders in a generic manner by identifying the initial transaction in which the securities were sold. Following effectiveness, the registrant must include in a prospectus filed pursuant to Rule 424(b)(7), a post-effective amendment to the registration statement, or an Exchange Act report incorporated by reference into the prospectus that is part of the registration statement (which Exchange Act report is identified in a prospectus filed, as required by Rule 430B, pursuant to Rule 424(b)(7)), the names of previously unidentified selling security holders and amounts of securities that they intend to sell. If this Form is being filed pursuant to General Instruction I.C. by a well-known seasoned issuer to register securities being offered for the account of persons other than the issuer, the registration statement and the prospectus included in the registration statement do not need to designate the securities that will be offered for the account of such persons, identify them, or identify the initial transaction in which the securities, or securities convertible into such securities, were sold until the registrant files a post-effective amendment to the registration statement, a prospectus pursuant to Rule 424(b), or an Exchange Act report (and prospectus filed, as required by Rule 430B, pursuant to Rule 424(b)(7)) containing information for the offering on behalf of such persons.

* * * * *

**IV. Registration of Additional Securities and Additional Classes of Securities**

**A. Registration of Additional Securities Pursuant to Rule 462(b).**

* * * * *

**B. Registration of Additional Securities or Classes of Securities or Additional Registrants After Effectiveness.** A well-known seasoned issuer relying on

General Instruction I.C. of this Form may register additional securities or classes of securities, pursuant to Rule 413(b) by filing a post-effective amendment to the effective registration statement. The well-known seasoned issuer may add majority-owned subsidiaries as additional registrants whose securities are eligible to be sold as part of the automatic shelf registration statement by filing a post-effective amendment identifying the additional registrants, and the registrant and the additional registrants and other persons required to sign the registration statement must sign the post-effective amendment. The post-effective amendment must consist of the facing page; any disclosure required by this Form that is necessary to update the registration statement to reflect the additional securities, additional classes of securities, or additional registrants; any required opinions and consents; and the signature page. Required information, consents or opinions may be included in the prospectus and the registration statement through a post-effective amendment or may be provided through a document incorporated or deemed incorporated by reference into the registration statement and the prospectus that is part of the registration statement, or, as to the required information only, contained in a prospectus filed pursuant to Rule 424(b) that is deemed part of and included in the registration statement and prospectus that is part of the registration statement.

* * * * *

**PART I**

**INFORMATION REQUIRED IN PROSPECTUS**

* * * * *

**Item 6. Incorporation of Certain Information by Reference.**

*  *  *  *  *

(f) Any information required in the prospectus in response to Item 3 through Item 5 of this Form may be included in the prospectus through documents filed pursuant to Sections 13(a), 14, or 15(d) of the Exchange Act that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement.

*  *  *  *  *

57. Amend Form F-4 (referenced in §239.34) as follows:

a. Revise paragraph B.1.(b), B.1.(c), C.1.(b), and C.1.(c) to the General Instructions;

b. Revise, in paragraph D.4. to the General Instructions the phrase "(202) 942-8900." to read "(202) 551-8900." and the phrase "(202) 942-2940." to read "(202) 551-3610.";

c. Redesignate the second paragraph (b) of Item 11 in Part I as paragraph (c);

d. Revise in newly redesignated paragraph (c)(2) of Item 11 in Part I the phrase "450 Fifth Street, N.W.," to read "100 F Street, N.E.,";

e. In Item 12 to Part I, revise the heading and introductory text, the introductory text of paragraph (b)(2), and paragraph (b)(3)(vii);

f. Revise Instructions 1. and 3. of paragraph (c) of Item 13 in Part I;

g. Revise in Item 13(c)(2) in Part I., the phrase "450 Fifth Street, N.W.," to read "100 F Street, N.E.,";

h. Revise the heading and introductory text of Item 14 in Part I;

i. Revise the heading and text of Item 16 in Part I;

j. Revise the heading and introductory text of Item 17 in Part I;

k. Revise paragraph (b) of Item 18 in Part I; and

h. Revise the heading and paragraph (c) of Item 19 in Part I.

The revisions read as follows:

**Note**: The text of Form F-4 does not and this amendment will not appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM F-4**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

* * * * *

**GENERAL INSTRUCTIONS**

* * * * *

**B. Information with Respect to the Registrant.**

* * * * *

1. * * *

(b) Items 12 and 13 of this Form, if the registrant meets the requirements for use of Form F-3 and elects this alternative; or

(c) Item 14 of this Form, if the registrant does not meet the requirements for use of Form F-3, or if it otherwise elects this alternative.

* * * * *

**C. Information with Respect to the Company Being Acquired.**

1. * * *

(b) Item 16 of this Form, if the company being acquired meets the requirements for use of Form F-3 and this alternative is elected; or

(c) Item 17 of this Form, if the company being acquired does not meet the requirements for use of Form F-3, or if this alternative is otherwise elected.

* * * * *

**PART I**

**INFORMATION REQUIRED IN THE PROSPECTUS**

* * * * *

**B. INFORMATION ABOUT THE REGISTRANT**

* * * * *

**Item 12. Information with Respect to F-3 Registrants.**

If the registrant meets the requirements for use of Form F-3 or Form S-3 and elects to comply with this Item, furnish the information required by either paragraph (a) or (b) of this Item. However, the registrant shall not provide prospectus information in the manner allowed by paragraph (a) of this Item if the financial statements incorporated by reference pursuant to Item 13 reflect:

* * * * *

(b) * * *

(2) Include financial statements and information as required by Item 18 of Form 20-F, except that financial statements of the registrant may comply with Item 17 of

Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-3. In addition, provide:

* * * * *

(3) * * *

(vii) Financial statements required by Item 18 of Form 20-F, except that financial statements of the registrant may comply with Item 17 of Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-3, and financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued (Schedules required under Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form, but need not be provided with respect to the company being acquired if information is being furnished pursuant to Item 17(a) of this Form); and

* * * * *

**Item 13. Incorporation of Certain Information by Reference.**

* * * * *

Instructions.

1. All annual reports incorporated by reference pursuant to Item 13 of this Form shall contain financial statements that comply with Item 18 of Form 20-F, except that financial statements of the registrants may comply with Item 17 of Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-3.* * * * *

* * * * *

3. The registrant may incorporate by reference and deliver with the prospectus any Form 6-K, Form 10-Q or Form 8-K containing information eligible to be incorporated by reference into Form F-1. See Rules 4-01(a)(2) and 10-01 of Regulation S-X and Item 18 of Form 20-F.

* * * * *

**Item 14. Information with Respect to Registrants Other Than F-3 Registrants.**

If the foreign registrant does not meet the requirements for use of Form F-3, or otherwise elects to comply with this Item in lieu of Items 10 and 11 or Items 12 and 13, furnish the following information:

* * * * *

**C. INFORMATION ABOUT THE COMPANY BEING ACQUIRED**

* * * * *

**Item 16. Information with Respect to F-3 Companies.**

If the company being acquired meets the requirements for use of Form F-3 and compliance with this Item is elected, furnish the information that would be required by Items 12 and 13 of this Form if securities of such company were being registered.

* * * * *

**Item 17. Information with Respect to Foreign Companies Other Than F-3 Companies.**

If the company being acquired does not meet the requirements for use of Form F-3, or compliance with this Item is otherwise elected in lieu of Item 15 or 16, furnish the information required by paragraph (a) or (b) of this Item, whichever is applicable.

* * * * *

### D. VOTING AND MANAGEMENT INFORMATION

**Item 18. Information if Proxies, Consents or Authorizations Are to be Solicited.**

* * * * *

(b) If the registrant or the company being acquired meets the requirements for use of Form F-3, any information required by paragraphs (a)(5)(ii) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 20-F.

**Item 19. Information if Proxies, Consents or Authorizations Are Not to Be Solicited or in an Exchange Offer.**

* * * * *

(c) If the registrant or the company being acquired meets the requirements for use of Form F-3, any information required by paragraphs (a)(5)(ii) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 20-F.

* * * * *

## PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

58. The authority citation for part 240 continues to read in part as follows:

**Authority**: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p,

78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

59. Amend §240.14a-2 as follows:

a. Remove the authority citation following the section; and

b. Add paragraph (b)(5).

The addition reads as follows:

**§240.14a-2 Solicitations to which §240.14a-3 to §240.14a-15 apply**

* * * * *

(b) * * *

(5) Publication or distribution by a broker or a dealer of a research report in accordance with Rule 138 (§230.138 of this chapter) or Rule 139 (§230.139 of this chapter) during a transaction in which the broker or dealer or its affiliate participates or acts in an advisory role.

**PART 243 – REGULATION FD**

60. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29, unless otherwise noted.

61. Amend §243.100 by revising paragraph (b)(2)(iv) to read as follows:

**§243.100 General rule regarding selective disclosure.**

* * * * *

(b) * * *

(2) * * *

(iv) In connection with a securities offering registered under the Securities Act, other than an offering of the type described in any of Rule 415(a)(1)(i) through (vi) under the Securities Act (§230.415(a)(1)(i) through (vi) of this chapter) (except an offering of the type described in Rule 415(a)(1)(i) under the Securities Act (§230.415(a)(1)(i) of this chapter) also involving a registered offering, whether or not underwritten, for capital formation purposes for the account of the issuer (unless the issuer's offering is being registered for the purpose of evading the requirements of this section)), if the disclosure is by any of the following means:

(A) A registration statement filed under the Securities Act, including a prospectus contained therein;

(B) A free writing prospectus used after filing of the registration statement for the offering or a communication falling within the exception to the definition of prospectus contained in clause (a) of section 2(a)(10) of the Securities Act;

(C) Any other Section 10(b) prospectus;

(D) A notice permitted by Rule 135 under the Securities Act (§230.135 of this chapter);

(E) A communication permitted by Rule 134 under the Securities Act (§230.134 of this chapter); or

(F) An oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the Securities Act.

**PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934**

62. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

63. Amend Form 10 (referenced in §249.210) by adding Item 1A. to read as follows:

**Note**: The text of Form 10 does not, and this amendment will not, appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM 10**

* * * * *

**Item 1A. Risk Factors.**

Set forth, under the caption "Risk Factors," where appropriate, the risk factors described in Item 503(c) of Regulation S-K (§229.503(c) of this chapter) applicable to the registrant. Provide any discussion of risk factors in plain English in accordance with Rule 421(d) of the Securities Act of 1933 (§230.421(d) of this chapter).

* * * * *

64. Amend Form 20-F (referenced in §249.220f) as follows:

a. Add two check boxes to the cover page before the paragraph that starts "Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months* * *";

b. Revise in paragraph (a) of General Instruction D the phrase "(202) 942-8900." to read "(202) 551-8900." and the phrase "(202) 942-2940." to read "(202) 551-3610.";

c. Revise in paragraph (c) to General Instruction D the phrase "450 Fifth Street, N.W.," to read "100 F Street, N.E.,";

d. Revise paragraph (c) to General Instruction E; and

e. Add Item 4A. to Part I.

The revision and additions read as follows:

**Note**: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM 20-F**

* * * * *

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.

Yes……. No…….

If this report is an annual or transition report, indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934.

Yes……. No…….

Note – Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 from their obligations under those Sections.

* * * * *

**GENERAL INSTRUCTIONS**

* * * * *

**E. Which Items to Respond to in Registration Statements and Annual Reports.**

* * * * *

(c) Financial Statements. An Exchange Act registration statement or annual report filed on this Form must contain the financial statements and related information specified in Item 17 of this Form. We encourage you to provide the financial statements and related information specified in Item 18 of this Form in lieu of Item 17, but the Item 18 statements and information are not required. In certain circumstances, Forms F-1, F-3 or F-4 for the registration of securities under the Securities Act require that you provide the financial statements and related information specified in Item 18 in your annual report on Form 20-F. Consult those Securities Act forms for the specific requirements and consider the potential advantages of complying with Item 18 instead of Item 17 of this

Form. Note that Items 17 and 18 may require you to file financial statements of other entities in certain circumstances. These circumstances are described in Regulation S-X.

The financial statements must be audited in accordance with U.S. generally accepted auditing standards, and the auditor must comply with the U.S. standards for auditor independence. If you have any questions about these requirements, contact the Office of Chief Accountant in the Division of Corporation Finance at (202) 551-3400.

* * * * *

Part I

* * * * *

**Item 4. * * ***

**Item 4A. Unresolved Staff Comments**

If the registrant is an accelerated filer as defined in Rule 12b-2 of the Exchange Act (§240.12b-2 of this chapter) or is a well-known seasoned issuer as defined in Rule 405 of the Securities Act (§230.405 of this chapter) and has received written comments from the Commission staff regarding its periodic reports 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, disclose the substance of any such unresolved comments that the registrant believes are material. Such disclosure may provide other information including the position of the registrant with respect to any such comment.

* * * * *

65. Amend Form 10-Q (referenced in §249.308a) by adding Item 1A to Part II to read as follows:

**Note**: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM 10-Q**

* * * * *

**PART II. OTHER INFORMATION**

* * * * *

**Item 1. * * ***

**Item 1A. Risk Factors.**

Set forth any material changes from risk factors as previously disclosed in the registrant's Form 10-K (§249.310) in response to Item 1A. to Part I of Form 10-K.

* * * * *

66. Amend Form 10-K (referenced in §249.310) as follows:

a. In General Instruction J., redesignate paragraphs (1)(b) through (1)(m) as paragraph (1)(c) through (1)(n), and add new paragraph (b);

b. Add two check boxes to the cover page before the paragraph that starts "Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months* * *"; and

c. Add Items 1A. and 1.B. to Part I.

The additions read as follows:

**Note**: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM 10-K**

* * * * *

**GENERAL INSTRUCTIONS**

* * * * *

**J. Use of this Form by Asset-Backed Issuers.**

(1) Items that May be Omitted. * * *

(a) * * *

(b) Item 1A. Risk Factors;

* * * * *

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.

Yes _____. No_____.

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.

Yes_____. No_____.

Note – Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Exchange Act from their obligations under those Sections.

* * * * *

**PART I**

* * * * *

**Item 1.** * * *

**Item 1A. Risk Factors.**

Set forth, under the caption "Risk Factors," where appropriate, the risk factors described in Item 503(c) of Regulation S-K (§229.503(c) of this chapter) applicable to the registrant. Provide any discussion of risk factors in plain English in accordance with Rule 421(d) of the Securities Act of 1933 (§230.421(d) of this chapter).

**Item 1B. Unresolved Staff Comments.**

If the registrant is an accelerated filer as defined in Rule 12b-2 of the Exchange Act (§240.12b-2 of this chapter) or is a well-known seasoned issuer as defined in Rule 405 of the Securities Act (§230.405 of this chapter) and has received written comments from the Commission staff regarding its periodic or current reports under the Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved, disclose the substance of any such unresolved comments that the registrant believes are material. Such disclosure may provide other information including the position of the registrant with respect to any such comment.

* * * * *

67. Amend Form 10-KSB (referenced in §249.310b) by adding a check box to the cover page before the paragraph that starts "Check whether the issuer (1) filed all reports required to be filed by Section 13 or 15(d) of the Exchange Act during the past 12 months* * *" to read as follows:

**Note**: The text of Form 10-KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**Washington, D.C. 20549**

**FORM 10-KSB**

* * * * *

Check whether the issuer is not required to file reports pursuant to Section 13 or 15(d) of the Exchange Act. [ ]

Note – Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Exchange Act from their obligations under those Sections.

* * * * *

## PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

## PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

68. The authority citation for Part 274 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

* * * * *

69. Amend Form N-2 (referenced in §239.14 and §274.11a-1) as follows:

a. Revise in the third paragraph of the Instructions after the Calculation of Registration Fee table the phrase "450 5th Street, N.W.," to read "100 F Street, N.E.,";

b. Revise in Item 18.15, the phrase "1-202-942-8090," to read "1-202-551-8090,";

c. Remove the period at the end of paragraph 4.a(3) to Item 34 and in its place add a semi-colon;

d. Remove the word "and" at the end of paragraph 4.b to Item 34;

e. Remove the period at the end of the paragraph 4.c to Item 34 and in its place add a semi-colon; and

f. Add paragraphs 4.d and 4.e to Item 34.

The additions read as follows:

**Note**: The text of Form N-2 does not, and this amendment will not, appear in the Code of Federal Regulations.

**FORM N-2**

* * * * *

**Item 34. Undertakings**

* * * * *

4. * * *

d. that, for the purpose of determining liability under the 1933 Act to any purchaser, if the Registrant is subject to Rule 430C [17 CFR 230.430C]: Each prospectus filed pursuant to Rule 497(b), (c), (d) or (e) under the 1933 Act [17 CFR 230.497(b), (c), (d), or (e)] as part of a registration statement relating to an offering, other than prospectuses filed in reliance on Rule 430A under the 1933 Act [17 CFR 230.430A], shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. Provided, however, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such first use, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such date of first use.

e. that for the purpose of determining liability of the Registrant under the 1933 Act to any purchaser in the initial distribution of securities:

The undersigned Registrant undertakes that in a primary offering of securities of the undersigned Registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned Registrant will be a seller to the purchaser and will be considered to offer or sell such securities to the purchaser:

(1) any preliminary prospectus or prospectus of the undersigned Registrant relating to the offering required to be filed pursuant to Rule 497 under the 1933 Act [17 CFR 230.497];

(2) the portion of any advertisement pursuant to Rule 482 under the 1933 Act [17 CFR 230.482] relating to the offering containing material information about the undersigned Registrant or its securities provided by or on behalf of the undersigned Registrant; and

(3) any other communication that is an offer in the offering made by the undersigned Registrant to the purchaser.

* * * * *

By the Commission.

Jill M. Peterson
Assistant Secretary

Dated: July 19, 2005