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Part II

Securities and Exchange Commission

17 CFR Parts 228, 229, et al.
Securities Offering Reform; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230, 239, 240, 243, and 274

[Release Nos. 33–8501; 34–50624; IC–26649; International Series Release No. 1282; File No. S7–38–04]

RIN 3235–AI11

Securities Offering Reform

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing rules that would modify and advance significantly the registration, communications, and offering processes under the Securities Act of 1933. Today's proposals would eliminate unnecessary and outmoded restrictions on offerings. In addition, the proposals would 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 proposals also would continue our long-term efforts toward integrating disclosure and processes under the Securities Act and the Securities Exchange Act of 1934. The proposals would accomplish these goals by addressing communications related to registered securities offerings, delivery of information to investors, and procedural restrictions in the offering and capital formation processes.

DATES: Comments should be received on or before January 31, 2005.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–38–04 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number S7–38–04. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Amy M. Starr, Consuelo Hitchcock, Andrew Thorpe, Daniel Horwood, or Anne Nguyen, at (202) 824–5300, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0402 or, with respect to questions regarding investment companies, Kieran Brown in the Division of Investment Management, at (202) 942–0721.

SUPPLEMENTARY INFORMATION: We are proposing to amend Item 512 [1] of Regulation S–B,[2] Item 512 [3] of Regulation S–K,[4] and Rules 134, 137, 138, 139, 153, 158, 174, 401, 405, 408, 412, 413, 415, 418, 424, 430A, 434, 439, 456, 457, 462, 473, and 902 [5] under the Securities Act.[6] We also propose to add Rules 159, 159A, 163, 163A, 164, 168, 169, 172, 173, 430B, 430C, and 433 under the Securities Act. We further propose to amend Forms S–1, S–3, S–4, F–1, F–3, and F–4 and eliminate Forms S–2 and F–2 [7] under the Securities Act; to amend Rule 100 [8] of Regulation FD [9] and Rule 14a–2 [10] under the Securities Exchange Act of 1934; [11] to amend Forms 10, 10–K, 10–Q, 10–KSB, and 20–F [12] under the Exchange Act; and to amend Form N–2 under the Securities Act and the Investment Company Act of 1940.[13]

Table of Contents

[1] 17 CFR 228.512.

[2] 17 CFR 228.10 *et seq.*

[3] 17 CFR 229.512.

[4] 17 CFR 229.10 *et seq.*

[5] 17 CFR 230.134; 17 CFR 230.137; 17 CFR 230.138; 17 CFR 230.139; 17 CFR 230.153; 17 CFR 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 430A; 17 CFR 230.434; 17 CFR 230.439; 17 CFR 230.456; 17 CFR 230.457; 17 CFR 230.462; 17 CFR 230.473; and 17 CFR 230.902.

[6] 15 U.S.C. 77a *et seq.*

[7] 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.

[8] 17 CFR 243.100.

[9] 17 CFR 243.100 through 243.103.

[10] 17 CFR 240.14a–2.

[11] 15 U.S.C. 78a *et seq.*

[12] 17 CFR 249.210; 17 CFR 249.308a; 17 CFR 249.310; 17 CFR 249.310b; and 17 CFR 249.220f.

[13] 17 CFR 239.14 and 17 CFR 274.11a–1.

I. Introduction

A. Overview of Today's Proposals

In 1998, the Commission proposed new rules under the Securities Act that were intended to modernize the securities offering process to recognize the evolution of the securities markets and securities products since the Securities Act's adoption and to enable market participants to capitalize on new technologies.[14] The underlying premise of those proposals—the need to modernize the securities offering and communications processes—was supported by commenters at the time. However, commenters indicated dissatisfaction with a number of the specifics in the 1998 proposals. We believe that the objectives of the 1998 proposals in reforming the offering process continue to be supported, and merit our attention still.

The 1998 proposals were a step in an evaluation 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.[15] Mr. Cohen's

[14] See *The Regulation of Securities Offerings,* Release No. 33–7606A (Nov. 13, 1998 [63 FR 67174] (the ''1998 proposals'').

The National Securities Markets Improvement Act of 1996 (NSMIA) 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 consistent with the protection of investors.'' See Securities Act Section 28 [15 U.S.C. 77z–3]. This authority permitted a number of the proposals put forth in our 1998 proposals to go beyond previous modernization efforts.

[15] 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.'')

article was followed by a 1969 study led by Commissioner Francis Wheat [16] and the Commission's Advisory Committee on Corporate Disclosure in 1977.[17] 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.[18]

The Commission's attention to the offering and communications processes under the Securities Act has 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.[19] 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.[20] 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.[21] The release sought input on a number of significant issues, including:

- 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 the liability standards that 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 [22] and 144 [23] 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
- 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.[24]

While many of the issues cited above remain valid matters for consideration, much of the comment in response to our 1998 proposals suggested that the existing system of regulating capital formation in the registered offering market provides a number of advantages that should be carefully considered and retained if we are to make other changes. In putting forward proposed rules today, we have 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 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 current rules 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 proposing revisions to 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. Our proposals involve three main areas:

- Communications related to registered securities offerings;
- Registration and other procedures in the offering and capital formation processes; and

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[16] *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).

[17] 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).

[18] *See Adoption of Integrated Disclosure System,* Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380], *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].

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

[20] *Report of the Advisory Committee on the Capital Formation and Regulatory Process,* (the ''Advisory Committee Report'') *www.sec.gov/news/studies/* capform.htm (July 24, 1996).

[21] *Securities Act Concepts and Their Effects on Capital Formation,* Release No. 33–7314 (July 25, 1996) [61 FR 40044] (the ''1996 Concept Release'').

[22] 17 CFR 230.144A.

[23] 17 CFR 230.144.

[24] 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 a year to make delayed offerings (without altering the disclosure requirements for 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.

• Delivery of information to investors, including delivery through access and notice, and timeliness of that delivery.[25]

Today's proposals 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 proposals would:

• 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. Background

1. Advances in Technology

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. Our evaluation of the securities offering process and procedural enhancements seeks 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

A necessary starting point in considering reforms to the securities offering process is the role that a public issuer's Exchange Act reports play in investment decision making. 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 requirement consistent with the mandate in the Sarbanes-Oxley Act of 2002[26] 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.''[27]

A public issuer's Exchange Act record provides the basic source of information to the market and to potential purchasers regarding the issuer, its management, its business, its financial condition, and its 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 often is the largest part of the information about the issuer in the registration statement.

With the enactment of the Sarbanes-Oxley Act and our recent rulemaking and interpretive actions, we have enhanced significantly the amount of 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;[28]

• 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;[29]

• 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;[30]

• Shortening the timeframe for filing annual reports and quarterly reports by accelerated filers;[31]

• 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;[32] 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.[33]

Many of the recent changes to the Exchange Act reporting framework provide greater structure and rigor to the process that issuers must follow in preparing their financial statements and Exchange Act reports. Senior management must now 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.

[25] While we continue to consider possible modifications to our regulatory framework regarding private offerings and the relationship between the public and private offering processes, we do not address these areas in today's proposals.

[26] Pub. L. 107–204, 116 Stat. 745 (2002).

[27] 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'').

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

[29] 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 28.

[30] See Form 8–K Releases note 27.

[31] 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].

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

[33] 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'').

Further, we believe the heightened role of an issuer's board of directors and its audit committee will instill greater confidence in the integrity of the contents of an issuer's Exchange Act reports.

The 1996 Concept Release and the 1998 proposals considered the role of enhanced Exchange Act reporting as an important corollary to reform of the offering process under the Securities Act.[34] We believe that the enhancements to Exchange Act reporting described above enable us to rely on these reports to a greater degree as a cornerstone of our proposals to reform the securities offering process.

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

A. Well-Known Seasoned Issuers

Our proposals today modify the framework for communications in connection with public offerings for all issuers and the framework of the registration process for most issuers that report under the Exchange Act. However, we believe that the most far-reaching revisions of our 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.[35] 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 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.

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.

We therefore propose to add a new category of issuer ''a ''well-known seasoned issuer'' ''that has these characteristics and would be permitted to benefit to the greatest degree from proposed modifications to our rules regarding communications and the registration processes.[36] We are proposing to define 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: [37]

- The issuer must be current in its reporting obligations under the Exchange Act and timely in satisfying those obligations for the preceding 12 calendar months;
- The issuer must be eligible to register a primary offering of its securities on Form S–3 or Form F–3;
- The issuer either:
- Must have outstanding a minimum $700 million of common equity market capitalization held by non-affiliates; or
- Must have issued $1 billion aggregate amount of debt securities in registered offerings during the past three years and register only debt securities; and
- Neither the offering nor the issuer may be of a type that falls within the category of ineligible issuers or offerings.[38]

A majority-owned subsidiary of a well-known seasoned issuer also may be considered a well-known seasoned issuer in connection with the offer and sale of its own securities if:

- The majority-owned subsidiary itself meets the conditions for eligibility;
- A parent of the majority-owned subsidiary is a well-known seasoned issuer and fully and unconditionally guarantees the subsidiary's non-convertible obligations; [39]
- The majority-owned subsidiary guarantees the obligations of (1) its parent or (2) another majority-owned subsidiary where there is also a full and unconditional guarantee of the same obligation by a parent that is a well-known seasoned issuer and the obligations are non-convertible; or
- The majority-owned subsidiary's non-convertible obligations are fully and unconditionally guaranteed by another majority-owned subsidiary that itself is a well-known seasoned issuer.[40]

Whether an issuer satisfies the requirements for current and timely filing of Exchange Act reports and the general eligibility requirements of Form S–3 or F–3 would be determined at the time of filing of its registration statement and, thereafter, at the time of the update of that registration statement required by Securities Act Section 10(a)(3).[41] For purposes of determining their status as well-known seasoned issuers, issuers would measure their non-affiliate equity market capitalization, or ''public float'', and the aggregate amount of their debt issuances as of the last business day of their most recently completed second fiscal quarter prior to the date of filing the Form 10–K or Form 20–F.[42]

We believe that the public float of a reporting issuer can be used as a proxy for whether the issuer has a demonstrated market following.[43] The threshold we propose is that an issuer have a public float of $700 million or

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[34] Enhanced Exchange Act reporting was also central to the recommendations of the Advisory Committee. See note 20.

[35] Our proposals would 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 could 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.''

[36] Our proposals would not change the existing eligibility standards for the use of Form S–3 and Form F–3.

[37] See proposed amendments to Securities Act Rule 405. As later discussed, an issuer that files Exchange Act reports voluntarily would not be a well-known seasoned issuer or a seasoned issuer. Rather, those voluntary filers would be considered unseasoned issuers for purposes of our proposals. In addition, asset-backed issuers would not be well-known seasoned issuers.

[38] See proposed definition of ''ineligible issuers'' in Securities Act Rule 405 as discussed in Section III.D.3 below under ''Ineligible Issuers.''

[39] Whether a guarantee is full and unconditional would be 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 an obligation that has a limited duration and is not perpetual. This analysis is not different from the current analysis under Form S–3 or Form F–3.

[40] See proposed amendment to Securities Act Rule 405.

[41] The Section 10(a)(3) update generally occurs when the issuer files its Form 10–K containing the issuer's audited financial statements for its most recently completed fiscal year. See 15 U.S.C. 77j(a)(3).

[42] Form 10–K and Form 20–F currently require that the aggregate market value of the voting and non-voting common equity held by non-affiliates be computed as of the last business day of the registrant's most recently completed second fiscal quarter. This is the same date as when issuers would determine their non-affiliate equity market capitalization for assessing their status as ''accelerated filers'' under Rule 12b–2 [17 CFR 240.12b–2]. This is different than the non-affiliate equity market capitalization used in determining eligibility to use Form S–3 and Form F–3 for primary offerings in reliance on General Instruction I.B.1 of Form S–3 or Form F–3 that is computed as of a day within 60 days of the date of filing (or the date of the Section 10(a)(3) update to the registration statement). We believe it is appropriate to use the same computation for purposes of eligibility as a well-known seasoned issuer.

[43] Public float is also one of the key determinants for eligibility for current short-form registration on Forms S–3 and F–3.

more. We have used market capitalization as a proxy for public float in evaluating this threshold and its implications.

To evaluate the implications of a $700 million public float threshold, staff in our Office of Economic Analysis (''OEA'') obtained data on the 9690 registered offerings that were conducted during 1997–2003 by 2784 issuers that had public equity outstanding and were listed on a major exchange or equity market.[44] Of these offerings, 6998 were debt offerings that raised proceeds of $1272 billion, and 2692 were equity offerings that raised proceeds of $477 billion. The average issuer conducted 3.8 debt offerings and 1.1 equity offerings per calendar year, although as many as 157 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 well-followed by the market.[45] Issuers with market capitalization in excess of $700 million that conducted offerings in 1997–2003 typically have had an average of 10 analysts following them prior to the offering.[46] This includes only sell-side analysts and is, we believe, a conservative indicator of analyst scrutiny. Institutional investors accounted for an average of 56% of equity ownership prior to offerings by issuers with market capitalization above $700 million. Those issuers had an average daily trading volume of nearly $25 million prior to offerings in this period and accounted for the following percentages of capital raised:

OFFERING PROCEEDS, BY ISSUER CAPITALIZATION PRIMARY SEASONED OFFERINGS, 1997–2003*

[$Billions (%) proceeds from offerings, by issuer capitalization]

	Market capitalization of issuers	
	>$700mm	>$0 (All issuers)
Equity	$373 (78%)	$477 (100%)
Debt	1232 (97%)	1272 (100%)
Total	1606 (92%)	1749 (100%)

* Source: Office of Economic Analysis estimates using Center for Research in Securities Prices at the University of Chicago (''CRSP'') and Securities Data Corporation (''SDC'') data. The issuers in this table do not reflect issuers meeting the well-known seasoned issuer threshold based on the $1 billion threshold discussed below.

Issuers that do not meet the public equity float test would be considered well-known seasoned issuers solely for purposes of debt offerings if they have sold more than an aggregate of $1 billion in debt through registered offerings over the prior three years. These issuers also would have to satisfy the other conditions of the well-known seasoned issuer definition, such as the reporting history requirement.[47]

We have chosen the $1 billion threshold for issuers of public debt based on an evaluation of statistics on issuers that do not have public equity outstanding. The relevant statistics for these issuers are different from those for issuers that have securities traded on major equity markets.

The issuers of debt that meet the $1 billion threshold account for 23% of the issuers that issued public debt during the period 1997–2003. These issuers account for 72% of debt issued during the same period. None of these issuers' debt offerings were rated below investment grade, and 84% 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 44 basis points lower yield spread for their issues relative to issuers that had not issued any debt 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.[48]

Overall, the issuers that would meet our proposed thresholds for well-known seasoned issuers are thus the most active issuers in the U.S. public capital markets. In 2003, those issuers, which represented approximately 30% of listed issuers, accounted for about 95% of U.S. equity market capitalization. They have accounted for 87% of the total debt raised in registered offerings over the past seven years. These issuers accordingly represent the most significant amount of capital raised and traded in the U.S. 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 greater communications and registration flexibilities to these well-known seasoned issuers beyond that provided to other issuers, including other seasoned issuers.

B. Other Categories of Issuers

We also would use existing categories of issuers, including seasoned issuers, unseasoned Exchange Act reporting issuers, and non-reporting issuers, in our proposals, discussed below, regarding communications and the registration process. A seasoned issuer would be an issuer that is eligible to use Form S–3 or Form F–3 to register primary offerings of securities—securities to be sold by or on its behalf, on behalf of its subsidiary, or on behalf of a person of which it is the subsidiary.[49] Majority-owned subsidiaries eligible to use Form S–3 or Form F–3 for offerings of their securities

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

[45] 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).

[46] Issuers with a market capitalization of between $75 million and $200 million, in most cases, have between zero to four analysts following them with approximately 50% having zero to one analysts following them. These issuers, therefore, have significantly less analyst coverage than well-known seasoned issuers.

[47] These issuers would only be eligible to register non-convertible obligations on an automatic shelf registration statement. See discussion in Section V.B.2 below under ''Automatic Shelf Registration for Well-Known Seasoned Issuers.''

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

[49] Eligibility to register primary offerings of securities on Form S–3 or Form F–3 is based on public float or issuance of investment grade securities. See General Instruction I.B.1 and I.B.2 to Form S–3 and Form F–3.

also would be considered seasoned issuers.[50]

An unseasoned issuer would be 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. Under the proposal, an issuer that is filing Exchange Act reports voluntarily would be treated as a reporting unseasoned issuer. A non-reporting issuer would be an issuer that is not required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act and is not filing such reports voluntarily.

Request for Comment

- Should we raise the proposed public float test of $700 million (*e.g.,* to $800 million)? If so, why?
- Alternatively, should we lower the public float test (*e.g.,* to $500 million, $400 million, or $300 million)? If so, why? If we were to lower the threshold, how can we ensure that the issuers meeting that threshold would be sufficiently well followed? If we were to lower the threshold, what other characteristics not present in issuers with a lower public float would need to be present to ensure that an issuer would be well followed?
- Is a public float threshold the proper standard, or should we use another standard, such as percentage of institutional ownership, average daily trading volume, asset size, or any combination of these? If so, how would the standard compare to the public float threshold and how could it be readily determined and verified?
- Should we use the same public float calculation as we use for purposes of the cover page of the Form 10–K and Form 20–F? Would another calculation date for the public float be more appropriate? Is there another readily available information source for public floats of issuers that provides the information other than annually?
- Should we have a requirement for the staff to evaluate the eligibility thresholds for well-known seasoned issuers on a periodic basis? If so, how often should we evaluate the thresholds and what factors should we consider? Alternatively, should the definition provide for automatic adjustments in the public float and aggregate debt requirement based on factors such as, for example, analyst coverage, institutional ownership, or average daily trading volume for equity, or changes in debt rating for debt issuers? If yes, how often should adjustments occur, what factors should trigger an adjustment, and why?
- Should eligibility to use the proposals available to well-known seasoned issuers be calculated on the basis of trading conducted on any national securities exchange, any particular national securities exchange, the Nasdaq Stock Market, or any particular portion of the Nasdaq Stock Market (*e.g.,* the National Market System or the SmallCap Market)? If yes, should there be any limitation on the trading location or platform?
- Besides the amount of registered debt sold by the issuer over a three-year period, are there any other bases upon which to determine that issuers eligible based on debt issuances are well-known seasoned issuers? Should investment grade debt ratings be part of the basis for eligibility?
- Is the eligibility threshold of $1 billion of registered debt over the prior three years the appropriate threshold? If not, should the threshold be higher? Should it be lower?
- Should an issuer be eligible to be a well-known seasoned issuer based on debt issuances if it has both publicly held debt and equity securities?
- Should offering participants be required to recalculate an issuer's eligibility at the time of use of a free writing prospectus or should the eligibility determination be done once a year for all purposes?
- Should we permit majority-owned subsidiaries to be considered well-known seasoned issuers under the proposed tests? Should we limit the definition only to wholly-owned subsidiaries? We are proposing conforming changes to Forms S–3 and F–3. Is this appropriate or necessary?
- Our proposed $700 million public float requirement is higher than the current $75 million public float level generally required for short-form and delayed shelf registration. The public float threshold for short-form and delayed shelf registration has not been revised since 1992.[51] While our proposals do not alter that public float threshold for short-form registration, should that threshold be revised upward in light of the length of time since it was last revised, the changes that have occurred in the markets since then, and the underlying rationale that the firms eligible to use short form registration should be sufficiently well-followed? If so, what threshold would be appropriate? Provide empirical data supporting any proposed threshold.
- One disqualification from an issuer being considered a well-known seasoned issuers is that it is an ''ineligible issuer'', as we propose to define that term. Should well-known seasoned issuers, who otherwise satisfy the eligibility conditions, be disqualified from being a well-known seasoned issuer for all purposes of our proposals if it is an ineligible issuer under the definition? If not, why not?
- Do the categories of seasoned, unseasoned, and non-reporting issuers appropriately describe the issuers that fall into these categories? If not, why not and what would be a more appropriate categorization?

III. Communications Proposals

A. Current Communications Requirements

The Securities Act restricts the types of offering communications that an issuer 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.[52] Between the filing of the registration 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.[53] As a result, the only written material that is permitted in connection with the offering of the securities during the period between filing and

[50] We propose to expand 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 would be well-known seasoned issuers. For example, see General Instruction I.C. to Form S–3.

[51] *See Simplification of Registration Procedures for Primary Securities Offerings*, Release No. 33–6943 (July 16, 1992) [57 FR 32461].

[52] 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 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].

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

effectiveness of a registration statement is a preliminary prospectus meeting the requirements of Section 10, which must be filed with the Commission. Even after the registration statement is declared effective, offering participants may still 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.[54] Violations of these restrictions are often generally referred to as ''gun-jumping'', and we use the term ''gun-jumping provisions'' to describe the statutory provisions of the Securities Act that set forth these restrictions.

B. Need for Modernization of Communications Requirements

1. General

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. They 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 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. Modern communications technology, including the Internet, provides a powerful, versatile, and cost-effective medium to communicate quickly and broadly.[55] 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 the investor protection concerns remain, the gun-jumping provisions of the Securities Act impose substantial and increasingly unworkable restrictions on communications that would be beneficial to investors and markets and consistent with investor protection.

The following factors, combined with the advances in technology described above, lead us to believe that investors and the market would benefit from access to greater permissible communications where protection for investors in connection with these communications is retained through the appropriate liability standards under the Securities Act 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.[56] The Securities Act's constraints on communications during an offering have, however, 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; [57]
- 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;
- There are many more offerings of increasingly complex securities where written communications, such as term sheets, would enhance significantly the offering process for the benefit of investors; [58] and
- The continuing trends towards globalization of securities markets and multinationalization of issuers and offerings increase the need for a regulatory framework that accommodates more flexible communications.

When we first proposed a broad relaxation of the gun-jumping provisions during an offering in 1998, the majority of commenters favored the proposals.[59] Commenters raised concerns regarding certain other elements of those proposals, however, and we did not go forward with those proposals. 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 revisit the concept of communications and offering reforms.[60]

2. Definition of Written Communication

As a starting point for reform, we propose to define 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 proposing a rule making it clear that all electronic communications (other than telephone as noted below) are graphic and, therefore, written communications for purposes of the Securities Act. In this manner, we intend to encompass new technologies without needing to revisit our rules in the future.

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

[55] 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.

[56] Other recent rulemaking initiatives addressing disclosure issues include those referenced in notes 27 through 33 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'').

[57] 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 Harris Shriver & Jacobson (''Fried Frank''); Service Employees International Union; and Sullivan & Cromwell. 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, DC, Nov. 14–15, 2001 (available at *www.law.northwestern.edu*).

[58] The staff and the Commission have recognized the usefulness of term sheets in some structured finance offerings. See, *e.g.*, Staff no-action letters to Greenwood Trust Co., Discover Master Card Trust I (Apr. 5, 1996); Public Securities Ass'n (Mar. 9, 1995); Public Securities Ass'n (Feb. 17, 1995); Public Securities Ass'n (May 27, 1994); and Kidder Peabody Acceptance Corporation I (May 20, 1994). See also, *Asset-Backed Securities*, Release No. 33–8419 (May 3, 2004) (the ''Asset-Backed Securities Proposing Release''); and Securities Act Rule 434 (17 CFR 230.434).

[59] Commenters on the 1998 proposals suggested that both investors and sellers would benefit from loosened restrictions on communications prior to and during an offering, as sellers would be able to use a variety of sales documents and investors would get more timely access to information. See, *e.g.*, comment letters in File No. S7–30–98 from the American Bar Association (''ABA''); American College of Investment Counsel (''ACIC''); American Corporate Counsel Association (''ACCA''); Business Roundtable; Merrill Lynch; and Sullivan & Cromwell.

[60] We have been considering communications reform in other contexts for a number of years. We have recently proposed communications reforms for asset-backed offerings, as well. See the Asset-Backed Securities Proposing Release, note 58. With our adoption of the communications reforms for business combinations 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'').

Accordingly, we are proposing new definitions of ''written communication'' and ''graphic communication'' to ensure consistent understanding of what constitutes such a communication in view of the technological developments since the enactment of the Securities Act and to eliminate any remaining uncertainty regarding the permitted means for delivery of information under the Securities Act.

Under the proposals, ''written communication'' would mean any communication that is written, printed, broadcast, or a graphic communication. The definition would not cover oral communications, such as live telephone calls (whatever the medium by which they are carried, including the Internet)[61] and other direct oral communications.

We are proposing to amend the definition of ''graphic communication'' contained in Securities Act Rule 405 to provide that it 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.[62] Because written communications would, therefore, include Internet communications, e-mails and other electronic and web-based communications, electronic postings on web sites—including electronic road shows—would be written communications within the scope of the definition.[63]

Request for Comment

- Does the proposed definition of graphic communication provide a workable framework within which to analyze electronic communications?
- Are there communications not covered by the proposed definitions that should be considered written or graphic? Should we provide that only interactive communications, such as those allowing face-to-face or telephonic interactions, would still be considered oral?
- Although the analysis required for any particular communication would be fact-specific, should we provide further guidance or examples regarding the use of specific technologies? If so, which technologies should we address at this time?

C. Overview of Communications Proposals

In this section of the release, we will discuss proposals 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 by any issuer (other than the statutory prospectus) after filing a registration statement.

The following table provides a brief overview of the operation of these proposals. While the table clearly does not include the level of detail necessary to explain the proposals, we have included it to help readers in commenting on the proposals.

	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 in 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 would define it as not an offer for Section 5(c) purposes.	Section 5(b)(1) relates only to ''prospectuses''—it would not be applicable.
Regularly Released Forward-Looking Information.	Yes	No	Rule would define it as not an offer for Section 5(c) purposes.	Section 5(b)(1) relates only to ''prospectuses''—it would not be applicable.
Communications Made More Than 30 Days Before Filing of Registration Statement.	Yes	No	Rule would define it as not an offer for Section 5(c) purposes.	Section 5(b)(1) does not apply in the pre-filing period—it would not be applicable.
Well-Known Seasoned Issuers—Oral Offers Made Within 30 Days of Filing of Registration Statement.	Yes	No	Would be exempted from prohibition of Section 5(c).	Section 5(b)(1) would not be applicable.
Well-Known Seasoned Issuers—Free Writing Prospectuses Used Before Filing of Registration Statement.	Yes	Yes	Would be exempted from prohibition of Section 5(c).	Section 5(b)(1) does not apply in the pre-filing period—it would not be 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 would not be applicable.

[61] Written communications would not include individual telephone voice mail messages but would include broadly disseminated or ''blast'' voice mail messages. The latter would be included in the definition because we believe they are more like broadcasts than oral communications.

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

[63] All electronic road shows in registered offerings would be considered written communications, regardless of the audience, but under our proposals would be permissible, subject to conditions. See discussion in Section III.D.3 below under ''Electronic Road Shows''.

	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 in 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) would not be applicable, as it does not apply in the post-filing period.	Section 5(b)(1) would be satisfied, as the free writing prospectus would be a permitted Section 10(b) prospectus.

We are proposing communications rules that recognize the value of ongoing communications as well as the importance of avoiding unnecessary restrictions on offers during a registered offering. In particular, the proposals would 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 would enhance the ability of issuers and other offering participants to make written offers outside the statutory prospectus.

Our proposals contemplate a communications framework that, in some cases, would operate along a spectrum based on the type of issuer, its reporting history, and its equity market capitalization or historical debt issuance. Thus, eligible well-known seasoned issuers would have freedom generally from the gun-jumping provisions to communicate around the time of a registered offering, including by means of a written offer other than a statutory prospectus. Varying levels of restrictions would 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 would 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 proposals would give to issuers and other offering participants.[64]

The cumulative effect of the proposals under the gun-jumping provisions would be the following:

- Well-known seasoned issuers would be permitted to engage at any time in oral and written communications, including use at any time of a free writing prospectus,[65] subject to enumerated conditions (including, in specified cases, filing with the Commission).[66]
- All reporting issuers would, at any time, be permitted to continue to publish regularly released factual business information and forward-looking information.[67]
- Non-reporting issuers would, at any time, be permitted to continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors.[68]
- Communications by issuers more than 30 days before filing a registration statement would not be considered prohibited offers so long as they did not reference a securities offering.[69]
- Issuers and other offering participants would 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).[70]
- 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, would be excluded from the definition of ''prospectus''.[71]
- The exemptions for research reports would be expanded.[72]

As discussed below, a number of these new proposals would include conditions of eligibility. Most of the proposals, for example, would not be available to blank check companies, penny stock issuers, or shell companies.[73]

Commenters on the 1998 proposals were concerned that increased liability would diminish the utility of the proposed communications reform. Today's proposals would address this concern by ensuring that appropriate liability is maintained for the communications. For example, all free writing prospectuses would have liability under the same provisions as apply today to oral offers and statutory prospectuses.[74] Written communications not constituting prospectuses would not be subject to disclosure liability applicable to prospectuses [75] under Securities Act Section 12(a)(2). This result would not affect their status for liability purposes under other provisions of the federal securities laws, including the anti-fraud provisions.[76]

D. Proposed Rules

1. Permitted Continuation of Ongoing Communications During an Offering

We are proposing two separate safe harbors from the gun-jumping provisions for continuing ongoing business communications.[77] The first safe harbor would permit 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.[78] The second safe harbor would permit a non-reporting issuer's publication or dissemination of factual business information that had been regularly released to persons other than

[64] See, *e.g.*, Regulation FD [17 CFR 243.100 *et seq.*], Regulation G [17 CFR 244.100 *et seq.*], and Form 8–K [17 CFR 249.308].

[65] A ''free writing prospectus'' is proposed to be defined in Securities Act Rule 405. This proposed definition is discussed in Section III.D.3 below under ''Definition of Free Writing Prospectus.''

[66] *See* proposed Rule 163.

[67] *See* proposed Rule 168.

[68] *See* proposed Rule 169.

[69] *See* proposed Rule 163A.

[70] *See* proposed Rules 164 and 433.

[71] *See* proposed amendments to Securities Act Rule 134.

[72] *See* proposed amendments to Securities Act Rules 137, 138, and 139.

[73] We recently proposed to define shell companies. *See Use of Form S–8 and Form 8–K by Shell Companies,* Release No. 33–8407 (April 15, 2004) (the ''Shell Companies Release''). For purposes of today's proposals, such as proposed Rules 163A, 164, 168, 169 and amendments to Securities Act Rule 405, we propose using the definition of shell company proposed in the Shell Companies Release.

[74] These liability provisions include Securities Act Section 12(a)(2) and 17(a) [15 U.S.C. 77*l*(a)(2) and 77q(a)], Exchange Act Section 10(b) [15 U.S.C. 78j(b)], and Exchange Act Rule 10b–5 [17 CFR 240.10b–5].

[75] *See* Securities Act Section 2(a)(10).

[76] *See, e.g.,* Securities Act Section 17(a), Exchange Act Section 10(b) and Exchange Act Rule 10b–5.

[77] These safe harbor provisions would operate by excluding such communications from the definition of offer for purposes of Securities Act Sections 2(a)(10) and 5 (c). *See* proposed Rules 168 and 169.

[78] *See* proposed Rule 168.

in their capacity as investors or potential investors.[79]

Investment companies registered under the Investment Company Act of 1940 and business development companies would be ineligible to use the proposed safe harbors for factual business information and forward-looking information.[80] These issuers are subject to a separate framework governing communications with investors.[81]

a. Regularly Released Factual Business and Forward Looking Information—Reporting Issuers

Our proposals applicable to reporting issuers would provide a safe harbor from the gun-jumping provisions for continued publication or dissemination of regularly released factual business and forward-looking information. Our proposed safe harbor would apply to factual business and forward-looking information that has been regularly released in the ordinary course by or on behalf of a reporting issuer.[82]

i. Factual Business Information

We believe it is important to provide certainty regarding when the gun-jumping provisions would be inapplicable to the continuing ongoing communication of factual business information. We are proposing Securities Act Rule 168, which would provide for such a communication a safe harbor from being an impermissible prospectus and from violating the prohibition on pre-filing offers.[83] We want to encourage reporting issuers to continue to provide this information. For purposes of these proposals, factual business information would be defined as:[84]

- Factual information about the issuer or some aspect of its business;
- Advertisements of, or other information about, the issuer's products or services;
- Factual information about business or financial developments with respect to the issuer;
- Dividend notices; and
- Factual information set forth in the issuer's Exchange Act reports.[85]

ii. Forward-Looking Information

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.[86] Beginning in the 1980's we have encouraged issuers to disclose forward-looking information and, in some situations (such as the disclosures in MD&A),[87] required them to do so.[88] The existing safe harbors for the content of forward-looking statements are designed to encourage the provision of forward-looking information.[89]

Where an issuer regularly releases forward-looking information in the ordinary course, 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. We understand that issuers increasingly have been disclosing 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.[90] We do not believe that it is beneficial to investors or the markets to force reporting issuers to suspend their ordinary course communications of this information because they are raising capital in a registered offering.

Our proposals would 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. Under our proposals, the safe harbor would apply to the release or dissemination of the following forward-looking information if the release or dissemination satisfies the other conditions of the Rule:[91]

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[79] *See* proposed Rule 169.

[80] 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)] defining ''business development company'').

[81] *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].

[82] *See* proposed Rule 168.

[83] Our proposed Rule 168 would be a safe harbor from the definition of ''prospectus'' in Securities Act Section 2(a)(10) and would, therefore, prevent 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 proposed Rule would also be 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 62; *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—After the Effective Date of a Registration Statement, Release No. 33–3844 (Oct. 8, 1957) [22 FR 8359]. The safe harbors we are proposing today, if adopted, would not affect in any way the Securities Act analysis regarding ordinary course business communications that are not within the proposed safe harbors. Such communications would not be presumed to be offers, and whether they were offers would depend on the facts and circumstances.

[84] Regularly released factual business information would not include information about the registered offering or information released as part of the offering activities in the registered offering.

[85] Factual business information that reporting issuers release or disseminate would continue to be subject to the provisions of Regulation FD, Regulation G, Item 10 of Regulation S–K and Regulation S–B, and Item 2.02 of Form 8–K. *See* Regulation FD [17 CFR 243.100 *et seq.*]; Regulation G [17 CFR 244.100 *et seq.*]; Item 10 of Regulation S–K and S–B [17 CFR 229.10 *et seq.* and 17 CFR 228.10 *et seq.*]; and Form 8–K [17 CFR 249.308]. These are essentially the same categories of information discussed in the releases discussed in note 83.

[86] Until the 1970s, 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 16 at 94.

[87] *See* Item 303 of Regulation S–K and Regulation S–B [17 CFR 229.303 and 17 CFR 228.303].

[88] In our 2003 MD&A Release discussed at note 33, we issued interpretive guidance on management's discussion and analysis which stated:

In addressing prospective financial condition and operating performance, there are circumstances, particularly regarding known material trends and uncertainities, 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.

[89] 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 56 (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.

[90] As with factual business information, Regulation FD, Regulation G, Item 10 of Regulation S–K and Regulation S–B, and Item 2.02 of Form 8–K would continue to apply to the release or dissemination of forward-looking information by reporting issuers. See note 86.

[91] Our proposed Rule 168 would be a safe harbor from the definition of ''prospectus'' in Securities

• 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.

Given our expressed intention through Item 2.02 of Form 8–K to make such earnings expectations and guidance information public,[92] we believe it is appropriate to include these communications within the scope of the proposed safe harbor if the issuer satisfies the safe harbor's other conditions.

iii. Conditions of Safe Harbors

(A) ''By or on Behalf of'' the Issuer

As proposed, factual business and forward-looking information would be considered released or disseminated by or on behalf of an issuer if the issuer, an agent of the issuer, or a representative of the issuer authorized and approved its use before its release or dissemination.[93] Satisfaction of this condition is separate from the ''regularly released'' condition. The proposed safe harbor would not be available for information released in a manner intended to circumvent either the conditions to use or the permitted manner of use of the information.

Request for Comment

• Is the definition of ''by or on behalf of an issuer'' clear? If not, why not?

• Should we provide more specificity limiting the approval or authorization to specific persons acting for the issuer, whether as an employee, agent, or representative? For example, should we specify that the approval and authorization must be made by persons who regularly provide such approval and authorization? In addressing this question, discuss whether there should be different formulations depending on the applicable contexts for determining whether information is provided or actions are taken ''by or on behalf of'' a person.

• The ''by or on behalf of'' condition is included in many of our proposed rules, should we include a general definition of ''by or on behalf of'' in Securities Act Rule 405?

• Is it clear when communications are made ''by or on behalf'' of an issuer? If not, what additional conditions should we include?

(B) Regularly Released Information

The purpose of the proposed 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.

As proposed, 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, releases or disseminated the information in the ordinary course of its business, and the release or dissemination is materially consistent in timing, manner and form with the issuer's similar past releases or disseminations of such information. The method of releasing or disseminating the information, thus, must also be consistent with prior practice. These 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 proposal does not establish any minimum time period to satisfy the regularly released element, the safe harbor would require the issuer to have a track record of releasing the particular type of information. 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 would likely prevent a conclusion that the issuer regularly released that type of forward-looking information in the ordinary course of its business. As another example, if an issuer has consistently released certain forward-looking information on a quarterly basis through ordinary course press releases, it could not satisfy the condition if it instituted a stepped-up media campaign just before or during an offering to release that type of forward-looking information on a different basis or with different timing.

(C) Non-Offering Related Information

The proposed safe harbor would exclude from its operation any information about the registered offering itself. Publication of information about an offering outside the registration statement would be limited to statements allowed under Rule 134, Rule 135, or other exemptions or safe harbors, or contained in a permissible free writing prospectus, as discussed below.[94]

Because the proposed safe harbor is intended to facilitate continued release or dissemination of regularly released ordinary course factual business and forward-looking communications, it also excludes information released as part of the offering activities in the registered offering. For example, the safe harbor would be unavailable for the text of an Exchange Act report that is incorporated by reference into a registration statement, a copy of a prior release that originally had been regularly released in accordance with the safe harbor but was specifically provided to investors or potential investors as part of offering activities, or disclosure of information at a road show. As another example, as permitted by the ''regularly released condition,'' an issuer would be able to rely on the proposed 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 use of that earnings release (or its contents), however, as part of the marketing activities to potential investors by an underwriter or dealer

Act Section 2(a)(10) and would therefore disapply the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The proposed Rule would also be a safe harbor from the prohibitions on pre-filing ''offers'' in Securities Act Section 5(c).

These 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 proposed safe harbor covering the release or dissemination would be available for the regular release of earnings expectations and guidance information. At least one commenter on the 1998 proposals requested clarification of this point. *See, e.g.*, comment letter in File No. S7–30–98 from the Association for Investment Management and Research. Proposed Rule 168 would provide 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 proposed safe harbor would still have to satisfy the conditions of Securities Act Section 27A if the issuer wished to rely on the statutory safe harbor for the content of the information.

[92] *See* Exchange Act Form 8–K. In addition, through the operation of Regulation FD, forward-looking information, such as company earnings guidance, provided to persons enumerated in that Regulation must be made public.

[93] We are using the same definition as contained in Securities Act Rule 146 [17 CFR 230.146].

[94] Our other proposals address communications in the offering context. For example, we are proposing amendments to Rule 134 to increase the amount of communication allowed under that rule about a registered offering without it being considered a prospectus.

participating in distribution of the issuer's securities in the registered offering would be outside the scope of the proposed safe harbor.[95]

Commenters on the 1998 proposals, which contained similar provisions, were concerned about staff practice with regard to requiring disclosures of forward-looking information in an issuer's registration statements if such information was provided publicly. Public statements by issuers would not necessarily require that the disclosed information be included in registration statements.[96]

Request for Comment

- Does the safe harbor provide sufficient certainty for issuers as to when particular types of communications can be made? If not, how could additional certainty be provided without opening the door to risks of abuse?
- Are there other categories of factual business information or forward-looking information that should be added to the list of permitted communications within the safe harbor? Should any of the proposed categories be deleted?
- Should we require a particular history, or length of time that the issuer has been regularly releasing this information as a condition to reliance on the exemption? For example, six months; one year; or a different period? What would be an appropriate period?
- Should there be any limitation on the availability of the safe harbor for issuers that have been determined to have not complied with Regulation FD, Regulation G, or any Form 8–K requirements for earnings releases?
- Would reporting issuers involved in registered offerings be reluctant to release ordinary course forward-looking information despite the proposed safe harbors? More or less reluctant than they are today? What other changes could we make to eliminate this reluctance?
- Should there be a specified history of releasing information for only certain categories of forward-looking information, such as financial projections?
- Is the proposal regarding forward-looking information appropriate? Are the risks of this information conditioning the market greater than with the release of factual business information? If so, how? Should there be additional restrictions in this safe harbor?
- Should there be a distinction between releasing such information in the pre-filing and post-filing periods?
- Should the safe harbor identify the specific conditions under which communications would constitute ordinary course communications?
- Should we consider defining what ''part of the offering activities'' means for purposes of the safe harbors?
- As we note above, a voluntary filer would fall into the category of unseasoned issuers because it is not required to file periodic or current reports under the Exchange Act. Should voluntary filers be permitted to rely on the safe harbor available to reporting issuers even though they are not required to file Exchange Act reports?
- Should registered investment companies and business development companies be eligible to use the proposed safe harbors for factual business information and forward-looking information?

b. Regularly Released Factual Business Information—Non-Reporting Issuers

We are proposing a narrower safe harbor from the gun-jumping provisions for a non-reporting issuer's regularly released factual business information.[97] The proposal would provide a safe harbor for a non-reporting issuer's release or dissemination of regularly released ordinary course factual business information to persons receiving the information other than in their capacity as investors or potential investors, such as customers and suppliers.[98] Because a condition of the proposed Rule involves the manner and timing of the communication, the same issuer employees who have historically been responsible for providing the information to, for example, customers and suppliers, should communicate the information provided in reliance on this safe harbor. As proposed, non-reporting issuers' release or dissemination of factual business information that satisfy the conditions of the proposed Rule would have a safe harbor from being an impermissible prospectus and from violating the prohibition on pre-filing offers.[99]

Under the proposed safe harbor, factual business communications would be defined as:

- Factual information about the issuer or some aspect of its business;
- Advertisements of, or other information about, the issuer's products or services; and
- Factual information about business or financial developments with respect to the issuer.

As with the safe harbor for reporting issuers, the safe harbor requires that the information be regularly released in the ordinary course, disseminated by or on behalf of the issuer, and not include information about the registered offering or information released as part of the offering activities in the registered offering.

Because non-reporting issuers generally are not releasing information in connection with securities market activities, we believe it is appropriate to restrict the scope of the safe harbor to limited regularly released ordinary course factual business information.[100] Further, we are not proposing 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.

Request for Comment

- We request comment on the same issues regarding the regularly released concept as in the safe harbor for reporting issuers.
- Should the factual business information safe harbor permit some related forward-looking information so long as the information is not projections?
- In initial public offerings by non-reporting issuers, should we consider using our authority, including our exemptive authority in Section 27A, to propose a projections and forward-looking information safe harbor from liability for the forward-looking statements that would be similar to the liability safe harbor for forward-looking statements contained in Securities Act Section 27A?

[95] In those situations, the earnings release would be considered a free writing prospectus as used by the underwriter or dealer, as discussed below.

[96] The same is true for any public release of information pursuant to Regulation FD and Item 2.02 of Form 8–K. See Regulation S–K [17 CFR 229.10 *et seq.*] and Securities Act Rule 408. See also Exchange Act Rule 12b–20 [17 CFR 240.12b–20]. The information may be required to be included in the registration statement pursuant to some other disclosure obligation.

[97] See proposed Rule 169.

[98] The fact that a customer also may be a potential investor in the issuer's securities would not affect the availability of the safe harbor if the conditions are otherwise satisfied.

[99] Our proposed Rule 169 would be a safe harbor from the definition of ''prospectus'' in Securities Act Section 2(a)(10) and would therefore disapply the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The proposed Rule would also be a safe harbor from the prohibitions on pre-filing ''offers'' in Securities Act Section 5(c).

[100] These issuers would still be able to rely on Securities Act Rules 134 and 135 [17 CFR 230.134 and 230.135] and proposed Rules 163A and 164.

• If we determine to propose a safe harbor of this type for initial public offerings, what kinds of conditions should we consider for its use?

• As a condition for this safe harbor or one for initial public offerings, should we require the issuer to file projections or other forward-looking information as part of the registration statement? Should the projections be required to follow Item 10 of Regulation S–K or S–B as applicable? Should projections be required to be accompanied by an accountant's report on the projections or forecasts? [101]

• Would a liability safe harbor for initial public offerings cause issuers to provide more projections publicly? Would there be concerns about the quality of these projections in light of the safe harbor?

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 through the Internet. We believe that information availability 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 would not be considered impermissible offers under the Securities Act. Such an approach would avoid hindering issuer communications except where necessary for investor protection. We are, therefore, proposing rules that would be aimed at communications that might not fall within the proposed 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

The proposed rule would 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 would be excluded from the definition of offer for purposes of Securities Act Section 5(c).[102] A bright-line test would 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 would 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.[103]

As proposed, the 30-day bright line exclusion from the gun-jumping provisions would be subject to the following conditions:

• Communications made in reliance on the proposed rule could not reference a securities offering; [104]

• Communications made in reliance on the proposed rule would have to be made ''by or on behalf of the issuer''; [105] and

• The issuer would have to take reasonable steps within its control to prevent further distribution or publication of the information during the 30-day period immediately before the issuer files the registration statement.

We included a similar exclusion in our 1998 proposals. Commenters generally agreed that a bright-line exclusion would be helpful, although they expressed some concerns. Some commenters were concerned that issuers might make misleading statements in connection with a proposed registered offering prior to the 30-day period and claim protection of the exclusion.[106] We believe that our proposals address those concerns in a number of ways. First, the proposals would not permit information about a securities offering so that the communications are less likely to be used to condition the market for the issuer's securities. Second, for all reporting issuers, the communications would still be subject to Regulation FD

[101] In this regard, see Sections 210 and 316 of the AICPA Guide for Prospective Financial Statements.

[102] While communications made in reliance on the proposed rule could, depending on the particular facts, be an ''offer'' as defined in Securities Act Section 2(a)(3), the proposal would provide that the communication would not be an ''offer'' for purposes of Securities Act Section 5(c). See proposed Rule 163A. During the 30-day period immediately prior to registration, issuers would have available, in addition to the other exemptions proposed in this release, communications permitted under Securities Act Rule 135. Rule 135 permits an issuer or a selling security holder (and persons acting on behalf of either of them) to publish a notice of a proposed registered offering of securities containing limited information, without the notice being considered an offer of the securities. As we note above, the 30-day exclusion is available only to the issuer for communications made by it or on its behalf.

For all issuers, the exemption would only apply prior to the filing of a registration statement. This exclusion would thus not apply to issuers with shelf registration statements on file, whether or not effective, to whom the prohibition on all offers in the gun-jumping provisions would not apply.

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.

[103] As we discuss below, the issuer would have to take reasonable steps to avoid redissemination of such information during the 30-day period. We also chose to propose a 30-day timeframe because it is consistent with the timeframe in Securities Act Rule 155 regarding integration of abandoned offering [17 CFR 230.155] and Securities Act Rule 254 regarding pre-filing solicitations of interest in Regulation A offerings [17 CFR 230.254].

[104] 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 proposed 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.

[105] As with proposed Rules 168 and 169, communications could be made under this proposed rule only if the issuer authorized and approved the communication before its use. Other communications, such as those by an underwriter or prospective underwriter, would not be covered by the proposed rule. For a further discussion of the ''by or on behalf of the issuer'' condition, see the discussion at Section III.D.1 above under '' 'By or on Behalf of the Issuer''.

[106] See, *e.g.*, comment letters in File No. S7–30–98 from the American Association of Retired Persons (''AARP'') and the Consumer Federation of America.

Some commenters believed the 30-day period was too short, see, comment letters in File No. S7–30–98 from the North American Securities Administrators Association, Inc. (''NASAA''), while some commenters viewed it as too long, see, *e.g.*, comment letter in File No. S7–30–98 from the American College of Investment Counsel (''ACIC''). As we note above, our proposals are consistent with the 30-day time period we adopted for Rule 155, relating to integration of abandoned offerings.

Commenters also addressed the inclusion in the 1998 proposals of the condition that the issuer take reasonable steps to prevent further distribution of information during the 30-day period immediately before the issuer files a registration statement. These commenters expressed concern that such a condition added uncertainty to the exemption. See, *e.g.*, comment letters in File No. S7–30–98 letters from the Bond Market Association (''TBMA''); American Federation of Labor and Congress of Industrial Organizations (''AFL-CIO''); Fried, Frank, Harris, Shriver & Jacobson (''Fried Frank''); Pennsylvania Securities Commission; and Service Employees International Union Master Trust. The 1998 proposals would have permitted other offering participants, in addition to the issuer, to rely on the exclusion. Our proposals would limit the exclusion to issuers. While we would not expect an issuer to be able to control the republication or accessing of previously published press releases, we would 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 exclusion. As another example, if an issuer or its representative gave an interview to the press prior to the 30-day period, it would not be able to rely on the exclusion if the interview was published during the 30-day period. We have proposed to address the same issues in the context of free writing prospectuses discussed below.

and other disclosure requirements, as well as the anti-fraud provisions.[107] Third, the proposed safe harbor would be available only for communications made by or on behalf of the issuer so that other potential offering participants could not use the exemption to condition the market for the issuer's securities.

We propose to preclude reliance on the 30-day bright-line exclusion for enumerated categories of offerings and issuers that pose the greatest risk of abuse of that exclusion. Specifically, our proposed rule excluding communications made more than 30 days before filing of the registration statement from the definition of offer would not be 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.[108]

We also would exclude communications regarding business combination transactions from being able to rely on the proposed exclusion, as those communications are regulated separately.[109] The proposed rule would also not be available for communications regarding offerings made by a registered investment company or a business development company.[110]

Request for Comment

- Should we restrict the ability to rely on the exclusion only to the issuer or should we allow other offering participants to rely on the exclusion? If so, why?
- Is the 30-day timeframe sufficient? Should it be longer? Should it be shorter?
- Would issuers engage in communications using the exclusion prior to the 30-day period before registration?
- Would issuers be able to establish appropriate procedures to ensure compliance with the ''reasonable steps'' requirement?
- Does the concept of ''reasonable steps'' in the proposed rule provide sufficient guidance to issuers? If not, what additional restrictions or provisions should be included?
- If the issuer puts information on its web site or another web site prior to the 30-day period and the information remains on the web site, thus being available during the 30-day period prior to the registration statement being filed, should the issuer be able to rely on the proposed 30-day exclusion for such information?
- Is it clear when communications made in reliance on the 30-day exemption are made ''by or on behalf'' of an issuer? If not, what additional conditions should we include?
- Are the classes of ineligible issuers and offerings appropriate? Should the exclusion not be available to any other type of issuers or offerings?
- Should the exclusion apply to offerings registered on Form S–8?
- Should the exclusion be available for non-reporting issuers? Would there be greater potential for abuse with this category of issuers?
- Should there be a restriction on inclusion of securities offering-related information in view of Securities Act Rule 135?
- Should we limit the condition restricting any reference to securities offering only to references to registered securities offerings?
- Should communications in offerings relying on Rule 155 be permitted during the 30-day period without further conditions?
- Should Regulation FD continue to apply to these communications, as we propose? If not, why not?

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

As noted above, our proposals taken together are intended to provide exemptions generally from the applicability of the gun-jumping provisions for eligible well-known seasoned issuers. The proposed safe harbors for regularly released factual business and forward-looking information and the exemption from the definition of offer for communications more than 30 days prior to filing of a registration statement would also apply to well-known seasoned issuers. In addition, as discussed below, the proposed broadened exemption for routine offering-related communications and the proposed 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 would be available to well-known seasoned issuers. However, the gun-jumping provisions prohibit all offers—written or oral—before the filing of a registration statement.[111] To address communications made in the 30 days prior to filing a registration statement not otherwise excluded from the gun-jumping provisions and to complete the set of proposals permitting all communications by well-known seasoned issuers under the gun-jumping provisions, we are proposing 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.[112] The proposed exemption would permit these issuers to engage in unrestricted oral and written offers before a registration statement is filed without violating the gun-jumping provisions. As proposed, these communications, while exempt from the gun-jumping provisions, would still be considered offers and subject to liability standards applicable to such offers.[113] In addition, while ''offers,'' all such communications would still be subject to Regulation FD.[114] The anti-fraud provisions of the federal securities laws would also continue to apply to these communications. The exemption would be available only for communications made ''by or on behalf of'' the issuer. We have included as a condition to

[107] Communications made in reliance on the proposed rule would not be in connection with a registered securities offering for purposes of the exclusion in Regulation FD. See Rule 100(b)(2)(iv) of Regulation FD [17 CFR 243.100(b)(2)(iv)].

[108] See Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)], Exchange Act Rule 3a51–1 [17 CFR.240.3a51–1], and proposed amendments to Rule 405 defining ''shell company.'' The proposed rule also would exclude issuers whose predecessors in the prior three years were blank check companies, shell companies, or issuers that issued penny stock and other issuers falling into the category of ''ineligible issuers'' discussed in Section III.D.3. below under ''Ineligible Issuers.'' The proposed rule also would exclude offerings registered on Form S–8.

[109] See the Regulation M–A Release, note 60. The proposal would exclude any business combination transaction as 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)] or exchange offer.

[110] Registered investment companies and business development companies are subject to separate rules regarding their communications.

[111] See Securities Act Section 5(c).

[112] See proposed Rule 163.

[113] Any written offer would be a prospectus under Section 2(a)(10) of the Securities Act relating to a public offering of the securities to be covered by the registration statement to be filed. All oral communications and prospectuses would be subject to liability under Section 12(a)(2). The offers would also be subject to liability under other provisions relating to offers, including Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b–5 under the Exchange Act.

The proposed rule is different from Securities Act Rule 254 [17 CFR 230.254]. 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. Proposed Rule 163 would not require pre-filing of the communications and written offers would be prospectuses.

[114] Communications made in reliance on the proposed rule would 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 [17 CFR 240.100(b)(2)(iv)].

reliance on this exemption that communications cannot be used as part of a scheme to avoid or evade the requirements of the gun-jumping provisions.

In view of the proposed ''automatic shelf'' registration process we describe below, we expect that well-known seasoned issuers usually would have a registration statement on file that it could use for any of its registered offerings.[115] Consequently, it would be rare for these issuers to make offers prior to the filing of a registration statement;[116] however, to liberalize communications for these issuers to the appropriate extent, it is appropriate to provide this exemption from the prohibition on pre-filing offers. A written offer made under the proposed exemption would, however, meet our proposed definition of ''free writing prospectus''[117] and would need to include a legend and be filed promptly upon the issuer filing its registration statement.[118] Any written communication used in reliance on this proposed exemption would be subject to the same cure and record retention provisions as those applicable to free writing prospectuses used after a registration statement is filed in reliance on our proposed rules governing free writing prospectuses discussed below.[119]

Request for Comment

- Should we permit any written or oral offer to be made by a well-known seasoned issuer before a registration statement is filed?
- In addition to provisions that would allow issuers to cure an omission of the legend, should there be cure provisions in the event that the issuer failed to file the written offer when the registration statement was filed?
- Should the requirement for filing written offers made in reliance on the proposed exemption apply to written offers that only contain a description of the securities being offered?
- Should communications made in reliance on the proposed rule be subject to Regulation FD, as we propose? If not, why not? Or should there be specific exceptions? If so, what type of communications should be excluded?
- Should there be other exclusions from the filing requirement?
- Should the filing obligation apply if the issuer fails to file a registration statement covering the securities offered within a particular time period after the offer? If so, how long?

3. Relaxation of Restrictions on Written Offering Related Communications

Our proposals would 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.[120] The two main elements of these proposals 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.[121] 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.[122] All issuers, including well-known seasoned issuers, are precluded from relying on Rule 134 until the issuer files a registration statement.[123]

i. Expansion of Permitted Information

We are proposing to modify and expand the information permitted under Rule 134 to include information that issuers, underwriters, and investors would find helpful and to permit the types of written communications during an offering that we would not consider to be prospectuses. We propose a limited expansion of the information permitted in the notice about the issuer and the registered offering. The proposed amendments to Rule 134 would:

- 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;[124]
- 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;[125]
- Allow more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;[126] and

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[115] As with any other delayed shelf registration statement, issuers using an automatic shelf registration statement would be considered to be offering securities off the shelf registration statement at the time of each takedown of securities.

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

[117] See Section III.D.3 below under ''Definition of Free Writing Prospectus'' for a discussion of the definition and the circumstances under which media publications (in any form) would be free writing prospectuses.

[118] The legend would be similar to the one we are proposing for free writing prospectuses. See the discussion in Section III.D.3 below under ''Legend Condition'' with regard to the requirements for use of a ''free writing prospectus.'' Under our proposals, all issuer free writing prospectuses would need to be filed.

[119] See discussion in Section III.D.3 below under ''Unintentional Failures to File'' and ''Record Retention Condition'' regarding proposed Rules 164 and 433 with respect to the cure and record retention provisions.

[120] 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.

[121] The safe harbor operates by excluding such notices from the definition of prospectus under Securities Act Section 2(a)(10). See Rule 134 [17 CFR 230.134] and *Adoption of Rules 134 and 135*, Release No. 33–3568 (Aug. 29, 1955) [20 FR 6523]. Currently, Rule 134 does not apply to notices relating to a registered investment company or business development company, and under our proposed amendments, this would continue to be the case. 17 CFR 230.134(e).

[122] Rule 134 is available only after the issuer files a registration statement that includes a statutory prospectus. Because a purpose of Rule 134 is to facilitate the dissemination of the full information required in the prospectus, Rule 134 would not be available until a preliminary prospectus, or in the case of shelf registration, a base prospectus, is available. As our proposal makes clear, to satisfy the requirements of Securities Act Section 10 in an initial public offering, a prospectus must include *bona fide* estimates of the offering price range and the maximum amount of securities to be offered. This would not mean, however, that a final prospectus meeting the requirements of Securities Act Section 10(a) including a price would be required as a condition to Rule 134. Further, the prospectus required for reliance on Rule 134(d) is a statutory prospectus, and it need not be a prospectus that satisfies Section 10(a).

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. The notice cannot, however, otherwise include a hyperlink or uniform resource locator (''URL'') for an address containing information beyond that permitted by Rule 134. See the 2000 Electronics Release note 62 at II.B.2.

[123] If a well-known seasoned issuer communicated information of the type covered by Rule 134 in writing prior to filing its registration statement, such that the communication constituted an offer, it would have to rely on proposed Rule 163 excepting pre-filing offers from the gun-jumping provisions, and the communication would be a free writing prospectus.

[124] For example, for fixed income securities, the proposed changes would allow greater information about final interest rates and yield information, including yield information on fixed income securities with comparable maturities and credit ratings.

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

[126] For example, a broker or dealer could inform investors of the procedural aspects of an auction or

Continued

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

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

ii. Changes to Required Information

We also are proposing to modify the information that must be included in a Rule 134 notice. First, we are proposing to eliminate the reference in the legend to state securities laws, as we believe that other provisions of the Rule already address any state securities law requirements, as applicable.[127] Second, we are proposing to eliminate the requirement to specify whether the financing is a new financing or refunding, as we believe that such information is no longer necessary because such information would, with regard to non-reporting or unseasoned issuers, be provided by the issuer's disclosure of the use of the proceeds of the offering in the filed preliminary prospectus.[128]

Request for Comment

• Is there information that we propose to permit under Rule 134 that should be prohibited or limited because it will further the use of ''selling'' documents that are not prospectuses?

• Is there other information that we should permit under Rule 134? For example, is there information about the issuer or the offering that should be included in Rule 134 but is not part of these proposals? If so, address whether the additional information might transform the notice into a selling document.

• Should the Rule permit more information about the underwriters or the syndicate, such as information about the allocation of shares among the members of the underwriting syndicate?

• Should we permit more information about allocations and auction mechanics?

• Should we revise the information requirements of Rule 134 with regard to solicitations of offers to buy or indications of interest? If so, would it be appropriate to require a communication containing such a solicitation to describe how and when offers to buy would be accepted, including the methods and timing of notification of the registration statement's effective date, the purchase price of the securities, and how indications of interest would become offers to buy?

• Where Rule 134 requires that a notice be accompanied or preceded by a prospectus, should we permit notification of the location of the prospectus to satisfy this requirement? Should we permit this for a certain class of issuers such as well-known seasoned issuers? Other seasoned issuers?

b. Permissible Use of Free Writing Prospectuses

i. Overview

As discussed above, even after the filing of a registration statement, under the gun-jumping provisions issuers and other offering participants currently may 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 if prior to or at the same time as the written offer a final prospectus meeting the requirements of Securities Act Section 10(a) is sent or given.[129] We believe that written communications during the offering process are unnecessarily restricted and that this would be the case even if the substantial relaxations in restrictions on communications that would result from the proposals that we describe above were adopted.

We are proposing to permit written communications that constitute offers, including electronic communications, outside the statutory prospectus beyond those currently permitted by the Securities Act, if certain conditions are met. We are proposing to define such a written offer outside of the statutory prospectus, beyond those currently permitted by the Securities Act, as a ''free writing prospectus.'' [130]

Our proposals would not affect the statutory framework allowing written offers after effectiveness if prior to or at the same time as the written offer is made a final prospectus meeting the requirements of Section 10(a) is sent or given. Those written offers would not be prospectuses and therefore would not be free writing prospectuses.[131]

As proposed, a free writing prospectus that satisfies specified conditions could be used by a well-known seasoned issuer at any time. Further, as proposed, a free writing prospectus that satisfies specified conditions could be used by any other issuer or offering participant after a registration statement has been filed and, in some cases, as discussed below, if a statutory prospectus precedes or accompanies the free writing prospectus or if a statutory prospectus is available.[132] A free writing prospectus used after a registration statement is filed and that satisfies specified conditions could be used without violation of the gun-jumping provisions.[133] A free writing prospectus could take any form and would not be required to meet the informational requirements otherwise applicable to prospectuses.[134] In general, our proposals would allow offering participants to use free writing prospectuses in conjunction with most registered capital formation transactions, although we do not treat all issuers and offerings the same.[135]

The issuer and any other offering participant satisfying the conditions of our proposed rules could use a free writing prospectus after a registration

a directed share program. The proposed changes would not include written notices of allocations of securities, including those delivered electronically. These notices would be a type of written confirmation of sale and, thus, prospectuses. Our proposals regarding prospectus delivery reforms, as discussed later, would apply to these notices.

[127] See paragraphs (a)(11) and (a)(14) of our proposed amendments to Rule 134.

[128] For seasoned issuers and well-known seasoned issuers, evaluation of an issuer's capital resource needs would be included in its MD&A discussion in its periodic reports.

[129] See Securities Act Section 2(a)(10).

[130] We are proposing to include this definition in Securities Act Rule 405.

[131] See Securities Act Section 2(a)(10).

[132] As we discuss above, a free writing prospectus used by a well-known seasoned issuer prior to filing pursuant to proposed Rule 163 would be a prospectus for purposes of Securities Act Section 2(a)(10).

[133] Our proposals would 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, could be used without violating Securities Act Section 5(b)(1).

[134] As we discuss in more detail below, we are proposing to permit a free writing prospectus used after a registration statement is filed meeting the conditions of proposed Rule 433 to be a Securities Act Section 10(b) prospectus without requiring that the free writing prospectus contain any particular information, including information contained in the prospectus that is part of the registration statement, other than a legend.

[135] Our proposals relate only to capital formation transactions and 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 [17 CFR 230.165], Rule 166 [17 CFR 230.166], 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 60; and *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings,* Release No. 33–7759 (Oct. 22, 1999) (exemptive rules for cross-border tender and exchange offers, business combinations, and rights offerings relating to the securities of foreign issuers).

statement is filed to communicate information about a registered offering of securities.[136] This would 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. A free writing prospectus would not be part of a registration statement subject to liability under Securities Act Section 11, unless the issuer elected to file it as a part of the registration statement. We propose to condition the use of free writing prospectuses prepared by an issuer or containing information provided by an issuer on filing, as a free writing prospectus, but not as part of the registration statement. We generally would not condition the use of free writing prospectuses prepared by other persons, such as underwriters, not containing such information on filing. Regardless of whether a free writing prospectus is filed, any person using the free writing prospectus would be subject to liability for prospectuses under Securities Act Section 12(a)(2) and liability under the anti-fraud provisions of the federal securities laws.[137]

ii. Definition of Free Writing Prospectus

(A) General

We are proposing to define ''free writing prospectus'' to include, except as otherwise provided specifically or otherwise required by the context, any written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement that is not a prospectus satisfying the requirements of Securities Act Section 10(a) or our rules permitting the use of preliminary or summary prospectuses or prospectuses subject to completion, or that, by virtue of the exception in clause (a) of Section 2(a)(10), is not a prospectus because, at or prior to that time, a final prospectus meeting the requirements of Section 10(a) was sent or given.[138] The proposed definition would make clear that, although a free writing prospectus would not be filed as part of a registration statement, regardless of the method of its use or distribution, it would still be considered to be used in connection with a public offering of securities that is or would be the subject of a registration statement.[139]

A communication would be a free writing prospectus only where it constituted an offer of a security under the Securities Act. Whether a particular communication constituted such an offer would, as today, be determined based on the particular facts and circumstances. Communications that would not be 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 our proposed safe harbors, and research reports falling within the safe harbors provided by our rules, would not be free writing prospectuses.[140]

(B) Media Publications

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 would be considered the use of a free writing prospectus under our proposals. 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 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.

While we want to encourage the continued role of the media as an important communicator of information, we do not want issuers and offering participants to use the media to avoid our current or proposed communications rules. Under our proposals, if an issuer or any offering participant provided information about the issuer or the offering that constituted an offer, whether orally or in writing, to a member of the press or other media that was published (in any form), where dissemination in writing by the issuer or offering participant would constitute a free writing prospectus, we would consider the publication to be a free writing prospectus that would have been made by or on behalf of the issuer or offering participant. If the communication occurred after the filing of the registration statement, it would be subject to the requirements of proposed Rule 433.[141]

The treatment of a media publication that constituted a free writing prospectus under our proposed rules would depend on whether the issuer or other offering participant prepared the publication or broadcast or paid for or provided other consideration for the publication or broadcast, or whether independent media prepared and published or broadcast the communication for no consideration or payment from an issuer or offering participant. If an issuer or offering participant prepared, paid, or gave consideration for, a published article, broadcast, or advertisement, the issuer would have to satisfy the conditions to the use of a free writing prospectus at the time of the publication or broadcast. For example, in the case of a non-reporting issuer a statutory prospectus would have to precede or accompany the communication.[142] As a consequence of this requirement, in offerings by non-reporting and unseasoned issuers, issuers and offering participants would not be able to

[136] Prior to filing a registration statement, only a well-known seasoned issuer would be able to use a free writing prospectus in reliance on proposed Rule 163.

[137] After effectiveness of a registration statement free writing prospectuses would not be the exclusive means by which participants could make a written offer outside of the statutory prospectus. Under current requirements which our proposals would not affect, 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) would continue to be permitted without having to satisfy the requirements of any safe harbor or other rule permitting its use or proposed Rule 433. This is because 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).

[138] The definition would include free writing prospectuses used pursuant to proposed Rule 433 and Rule 163 because these would not be summary prospectuses.

[139] Under our proposal, a free writing prospectus used after a registration statement is filed that satisfies the conditions in proposed Rule 433 would be a permitted prospectus for purposes of Securities Act Section 10(b). A free writing prospectus used other than in accordance with our proposed rules would continue to be a prospectus for Section 12(a)(2) and the anti-fraud provisions of the federal securities laws, and its use would violate Section 5.

[140] Written communications of a well-known seasoned issuer that are exempt pursuant to proposed Rule 163 would be within the definition of free writing prospectus. A free writing prospectus used in reliance on Rule 163 would not be a Section 10(b) prospectus because it would be used prior to the filing of a registration statement.

[141] Except in the case of a well-known seasoned issuer, if the communication occurred prior to the filing of the registration statement, it would violate Section 5 unless it fell within one of the existing or proposed safe harbors or exemptions.

[142] Base prospectuses, preliminary prospectuses and prospectuses subject to completion that are permitted under our rules are statutory prospectuses that satisfy the requirements of Securities Act section 10 but are not prospectuses that satisfy the requirements of Securities Act section 10(a). Where a final prospectus satisfying the requirements of Securities Act section 10(a) is sent or delivered prior to or with written offering materials, that communication would fall within the exception from the definition of prospectus in clause (a) of Securities Act section 2(a)(10).

publish or broadcast written advertisements, ''infomercials,'' or broadcast spots about the issuer, its securities, or the offering that included information beyond that permitted by Rule 134. For seasoned issuers, the most recent statutory prospectus would have to be on file with us and the issuer or offering participant would have to file the free writing prospectus with us not later than the date of first use.

Where, however, the free writing prospectus is prepared by persons in the media business that are unaffiliated [143] with and not paid for by the issuer or offering participants, our proposed rules would make certain accommodations that would, we believe, permit the publication by the media under the gun-jumping provisions.[144] In those cases, the statutory prospectus would not be required to precede or accompany the media communication, although a filed registration statement and availability of a statutory prospectus would be conditions. Therefore, an interview or other media publication or broadcast where an issuer or offering participant participates (but does not prepare or pay for the event) could be a free writing prospectus, but because of the media intervention, we are prepared to conclude that its use should not be conditioned on prior or simultaneous delivery of the statutory prospectus. In addition, any such free writing prospectus would be subject to filing by the issuer or offering participant involved within one business day after first publication or first broadcast. Persons in the media would have no filing or other obligations under these provisions. For example, unlike today, an underwriter or issuer would be permitted to invite the press to a live road show or an electronic road show, but we would 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 proposed rules.[145] As another example, if a chief executive of a non-reporting issuer gave 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 would be a free writing prospectus of the issuer that would have to be filed by the issuer after publication. In that case, there would be no requirement that a statutory prospectus precede or accompany the article at the time of the publication.

Request for Comment

- Does the proposed definition cover all the types of communications that issuers and other persons participating in the offer and sale of the issuer's securities would use outside the statutory prospectus?
- Do our proposals regarding information provided to the media by or on behalf of the issuer or other offering participants provide enough guidance for issuers and other offering participants to determine when such a communication is a free writing prospectus?
- Should the free writing prospectus be considered part of the registration statement?
- Should the issuer have to approve every free writing prospectus before its use?

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

Proposed Rule 164 would permit the use of a free writing prospectus where an eligible issuer has filed a registration statement and the conditions of proposed Rule 433 are satisfied.[146] The proposed rules permitting the use of free writing prospectuses would not be available for any communication that, while in technical compliance with the rule, was part of a plan or scheme to evade the requirements of Section 5 of the Act.

(A) Conditions to Permitted Use of a Free Writing Prospectus

Proposed Rule 164 provides that, after the filing of a registration statement, a free writing prospectus that satisfies the conditions of proposed Rule 433 would be a permitted prospectus under Section 10(b) for purposes of Securities Act Section 5(b)(1). Proposed Rule 433 sets out eligibility, information, legend, filing, and record retention conditions for the use of free writing prospectuses after the filing of the registration statement.

(1) Prospectus Delivery and/or Availability

The ability of any person participating in the offer and sale of the securities to use free writing prospectuses under proposed Rules 164 and 433 would be conditioned on availability of the issuer's most recently filed statutory prospectus (other than a summary prospectus) satisfying the requirements of Securities Act Section 10 and, in certain cases, on prior or concurrent delivery of the issuer's most recently filed statutory prospectus.

(a) Non-Reporting Issuers and Unseasoned Issuers

In offerings of securities of an eligible non-reporting issuer, including initial public offerings, or offerings of securities of an eligible unseasoned issuer, use by offering participants of free writing prospectuses would be conditioned on filing of the registration statement for the offering. If the free writing prospectus was prepared by or on behalf of an issuer or offering participant, if consideration was or would be given by the issuer or an offering participant for the publication or broadcast (in any format) of any free writing prospectus (including any published article, publication or advertisement), or if Securities Act Section 17(b) [147] required disclosure that consideration was or would be given by the issuer or an offering participant for any activity described therein, then the use of the free writing prospectus would be conditioned on its being accompanied or preceded by the most recent statutory prospectus that satisfied the requirements of Section 10.[148] If a final prospectus satisfying the requirements of Section 10(a) is sent or given with or prior to the written offer, proposed Rules 164 and 433 would not apply, but the written offer is not a prospectus under the exception in clause (a) of Section 2(a)(10) and would be permitted.

The result of this framework would be that these categories of issuers and offering participants would have to

[143] The term ''affiliate'' is defined in Securities Act Rule 405.

[144] See discussion in Section III.D.3. below under ''Permissible Use of Free Writing Prospectuses.''

[145] Unlike an article published based on information obtained from a road show with a limited audience, an article published based on information provided at a readily accessible electronic road show open to an unrestricted audience would not be treated as a free writing prospectus of the issuer or offering participant due to the unrestricted and available nature of the electronic road show. See discussion in Section III.D.3 below under ''Electronic Road Shows.''

[146] 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''.

[147] For purposes of Rule 433, as well as for proposed Rule 163, communications for which disclosure would be required under Securities Act Section 17(b) would be deemed a free writing prospectus. In these situations, we believe that an issuer's or offering participant's payment for or other consideration given for publications covered by Section 17(b) would raise the same types of concerns as an issuer or offering participant paid interview.

[149] Proposed Rule 433 would provide that a prospectus would be deemed to accompany an electronic free writing prospectus if the latter contained a hyperlink to the former. 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.

assure that the most recent statutory prospectus was actually provided to people who might receive a free writing prospectus. Thus, in the following situations, for example, use of the free writing prospectus would be conditioned on the most recent statutory prospectus preceding or accompanying the free writing prospectus or the communication could not be made in reliance on proposed Rules 164 and 433:

- A direct written communication by an issuer or offering participant;
- An interview in print or broadcast given or prepared by an issuer, its officers, directors or representatives or an offering participant, the publication or broadcast (in any format) of any free writing prospectus (including any published article, publication or advertisement) for which consideration was or would be given by the issuer or an offering participant, or for which Securities Act Section 17(b) required disclosure of a payment made or consideration given by an issuer or other offering participant;
- A press release disseminated by an issuer or offering participant and rebroadcast by the media; or
- A paid advertisement, in any format, by an issuer or offering participant.[149]

In these situations, following effectiveness of a registration statement, if a final prospectus meeting the requirements of Section 10(a) was previously or at the same time sent or given to each person to whom the written offer was made, proposed Rules 164 and 433 would not apply, but, as is currently the case, a written offer is permitted.

As we discuss above, in cases where a free writing prospectus is prepared by a person in the media business that is not affiliated with or paid by the issuer or an offering participant, the statutory prospectus would not be required to precede or accompany the media communication.[150] The issuer or other offering participant would be required to file the article within one business day following publication or broadcast.

In offerings of securities of eligible non-reporting or unseasoned issuers, where a free writing prospectus was prepared by or on behalf of, or paid for by, an issuer or offering participant, or Securities Act Section 17(b) required disclosure that a payment was made or consideration was given for distribution or publication of the free writing prospectus,[151] we believe it is important to deliver the preliminary prospectus to the recipient of the free writing prospectus. Conditioning use of the free writing prospectus on the fact that a statutory prospectus precede or accompany the free writing 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. Although unseasoned issuers are reporting issuers, we believe that there is less reason to assume that the issuer would be well followed and thoroughly scrutinized or that plentiful issuer information would exist. The existing statutory provisions of Section 2(a)(10) would produce substantially the same result after effectiveness by requiring that the final prospectus meeting Securities Act Section 10(a) be sent or given prior to or at the same time as a written offer.

The condition that the statutory prospectus accompany or precede the free writing prospectus would not require that it be provided through the same medium, so long as it was provided at the required time. Although the prospectus would not have to be sent by the same means (paper or electronic) as the free writing prospectus, merely referring to its availability would not satisfy this condition.

Once the required statutory prospectus was sent or given to an investor, additional free writing prospectuses could be provided without having to send or give an additional statutory prospectus, unless there were material changes in the most recent statutory prospectus from the provided prospectus.[152] For example, once an investor had been sent a preliminary prospectus, absent a material change, the proposed rule would permit subsequent e-mail communications 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 must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier statutory prospectus had been previously provided to the recipient.[153]

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.

(b) Seasoned Issuers and Well-Known Seasoned Issuers

In offerings of securities of eligible seasoned issuers and eligible well-known seasoned issuers, we propose that issuers and other offering participants could use a free writing prospectus after the filing of a registration statement containing a statutory prospectus. For shelf offerings, this preliminary prospectus could be a base prospectus that satisfied our requirements.[154] For offerings of securities of eligible seasoned issuers, we would not propose to condition use of the free writing prospectus on actual delivery of the preliminary prospectus. Instead, we would propose that the user of the free writing prospectus notify the recipient, through a required legend, of where the recipient can access or hyperlink to the preliminary or base prospectus by providing the URL for the prospectus.[155]

In addition, in offerings of securities of eligible well-known seasoned issuers, we are proposing that free writing

[149] We understand that using broadly disseminated free writing prospectuses in this category 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 because additional assurance should exist that free writing prospectuses prepared by or paid for by non-reporting or unseasoned issuers or offering participants are considered by investors in the context of the statutory prospectus.

[150] See discussion in Section III.D.3. above under ''Media Publications.''

[151] Our proposals would provide that materials for which Securities Act Section 17(b) [15 U.S.C. 77q(b)] requires disclosure would be treated as free writing prospectuses of the issuer or other offering participant on whose behalf the payment was made or consideration given.

[152] If there were material changes in a preliminary prospectus, or preliminary prospectus supplement, the issuer and offering participants would generally recirculate the revised preliminary prospectus or supplement to potential purchasers.

[153] 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 would not be a free writing prospectus and proposed Rules 164 and 433 would not apply.

[154] See proposed Rule 430B, described below, which is intended, among other things, to locate within one rule the information requirements for a base prospectus in a shelf registration statement.

[155] Our existing rules do not require delivery of preliminary prospectuses in offerings involving reporting issuers. Thus, notification of availability of the preliminary or base prospectus on our Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system would allow recipients of the free writing prospectus the opportunity to evaluate the free writing prospectus against the filed materials.

prospectuses may be used by issuers at any time before or after the filing of a registration statement, and by any other offering participants after the filing of a registration statement containing a preliminary or base prospectus that satisfies our requirements, as detailed above.[156]

Instead of relying on Rules 164 and 433, the issuer or offering participant can, as is currently the case, make a written offer in reliance on the exception to the definition of prospectus contained in clause (a) of Securities Act Section 2(a)(10) if a final prospectus meeting the requirements of Securities Act Section 10(a) is previously sent or given to the person receiving the written offer. If the provisions of Section 2(a)(10) are followed, the written offer is not a prospectus.

Request for Comment

- Should the proposed rule make the proposed distinctions among the types of issuers?
- Should the proposed rule's distinction in methods of providing the preliminary prospectus apply to different issuers?
- For initial public offerings or offerings by unseasoned issuers, should the proposed rules provide as a condition to use of a free writing prospectus that a copy of the prospectus be delivered at or before access to a free writing prospectus, or should it suffice that the preliminary prospectus has been filed with us before then and is available?
- For all other issuers, should availability of a prospectus on file with us be sufficient when a free writing prospectus is used or should there be a delivery obligation?
- Rule 434 permits the use of term sheets together with prospectuses in certain types of offerings. Should we retain Rule 434 in light of the free writing prospectus proposals? If so, how and when would the rule be used and for what types of offerings?
- Should the proposed rule include additional limitations or restrictions for free writing prospectuses that are broadcast over television or radio?

(2) Ineligible Issuers

For any offering participant to use free writing prospectuses the issuer may not be an ineligible issuer.[157] As proposed, ineligible issuers are:[158]

- Reporting issuers who are not current in their Exchange Act reports;
- Issuers who are (or were, or their predecessors were, in the past three years) blank check issuers;
- Issuers who are (or were, or their predecessors were, in the past three years) shell companies;
- Issuers who are (or were, or their predecessors were, in the past three years) penny stock issuers;
- Issuers who are limited partnerships offering and selling their securities other than in a firm commitment underwriting;[159]
- Issuers who have received a ''going concern'' opinion from their auditors for the most recent fiscal year;
- Issuers who have filed for bankruptcy or insolvency during the past three years;
- Issuers who have been or are the subject of refusal or stop orders under the Securities Act; or
- Issuers who, or whose subsidiaries, have been found to have violated the federal securities laws, have entered into a settlement with any government agency involving allegations of violations of federal securities laws, or have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the federal securities laws[160] during the past three years.[161]

The proposed new rule also would not apply to offerings by registered investment companies or business development companies or offerings that are exchange offers or business combination transactions that are subject to Regulation M–A.

The categories of ineligible issuers include issuers that are not compliant with their Exchange Act reporting obligations, issuers that may raise greater potential for abuse, and issuers that have violated the federal securities laws previously. 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 penny stock and blank check offerings and shell companies may give rise to disclosure abuses.[162] In addition, Congress determined not to extend the safe harbors for forward-looking statements to issuers of blank check and penny stock securities offerings, as well as issuers previously convicted of certain felonies and misdemeanors and issuers subject to a decree or order involving a violation of the securities laws.[163]

We propose to exclude registered investment companies and business development companies from eligibility for use of proposed Rules 164 and 433 because they are already subject to separate rules permitting use of a Section 10(b) prospectus. Securities Act Rule 482[164] permits investment companies to advertise investment performance data and other information, and Securities Act Rule 498[165] permits open-end management investment companies to use a profile.

Request for Comment

- Should other categories of issuers also be precluded from reliance on our communications and automatic shelf registration proposals? For example, is there any reason we should disqualify offerings by certain types of entities, such as limited partnerships or limited liability companies?
- On the other hand, should any of the offerings we propose to disqualify instead be permitted to use our proposed communications and automatic shelf registration process if

[156] In the event that a well-known seasoned issuer did not have a registration statement on file, proposed Rule 163 would provide that an eligible well-known seasoned issuer's written offers would be exempt from Section 5(c). While it would be exempt from the requirements of Section 5(c), a written offer made under the exemption in proposed Rule 163 would fall within our proposed definition of ''free writing prospectus.'' Rule 163 would condition the Section 5(c) exemption for that free writing prospectus on the satisfaction of the conditions in the Rule including filing, legend, and record retention conditions.

[157] Issuers or offerings falling within the described categories would also be considered ineligible for use of the communications safe harbors, exemptions, and exclusions and the automatic shelf registration statement procedure.

[158] We are proposing to include a waiver provision to allow us to waive a issuer's ineligibility if we find good cause to provide the waiver. Registered investment companies and business development companies would not be eligible for waivers of ineligibility.

[159] These issuers are in the category of issuers that 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].

[160] The covered decrees or orders would be prohibitions on future violations of the federal securities laws, orders requiring issuers to cease and desist from violating the federal securities laws, and determinations of violations of the federal securities laws. The settlements would include settlements in which the issuer or its subsidiary neither admits nor denies that it violated the federal securities laws.

[161] See proposed amendments to Securities Act Rule 405.

[162] 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 proposed rule providing for delayed pricing because of ''prior substantial abuses''); and the Shell Companies Release note 73.

[163] See Securities Act Section 27A and Exchange Act Section 21E [15 U.S.C. 78u–5].

[164] 17 CFR 230.482.

[165] 17 CFR 230.498.

they are otherwise eligible? For example, are there other ways to distinguish penny stock offerings that should be disqualified from those involving legitimate capital raising?

• Should issuers be required to have filed their Exchange Act reports timely for the preceding 12 months as well as being current in their Exchange Act reports for purposes of relying on the new proposed communications rules?

• Should we extend or shorten the look-back periods used to disqualify issuers in any category?

• Would disqualification from our proposals on the basis of a ''going concern'' opinion from the issuer's independent auditor cause undue pressure to be placed on auditors not to issue those opinions? Should we replace that disqualification with one dependent on whether the issuer had: (1) Net losses or negative cash flows from operations for two or more of the past three annual fiscal periods; or (2) a deficit in net worth at the date of the most recent balance sheet?

• Should an issuer's disclosure of a material weakness in its internal controls over financial reporting make an issuer ineligible for purposes of the proposals?

• Should blank check companies, penny stock issuers or shell companies be able to rely on some aspect of our proposals for capital-raising transactions?

• Are there other types of offerings that also should be excluded from our proposals?

• Should an issuer be considered an ineligible issuer if it or its subsidiary were found to have violated, entered into a settlement with a state agency or another governmental agency with regard to, or been made the subject of a judicial or administrative order or decree, for violating or allegedly violating state securities laws or any securities laws? Should an issuer be considered ineligible if an affiliate of an issuer were found to have violated, settled allegations of violations of, or been made the subject of a judicial or administrative order or decree for violating or alleged violations of securities laws?

• Should registered investment companies or business development companies be able to rely on our proposed rules permitting use of a free-writing prospectus?

• Certain of today's proposals regarding communications apply to certain types of communications made around the time of registered business combination transactions as defined in Rule 165(f)(1), while others are not available to registered business combination transactions. As a result, the rules and regulations adopted pursuant to Regulation M–A will continue to apply to business combination transactions. We request comment as to whether the inclusions and exclusions of business combination transactions in the proposed amendments and rules are proper and whether such inclusions and exclusions are clear and unambiguous. Should we make any modifications to the Regulation M–A model in light of our proposals?

• Should an issuer that undertakes a registered capital formation transactions at the same time as it engages in a business combination transaction be eligible to rely on our communications proposals for the capital formation transaction? If yes, should any limitations be placed on the communications or should the issuer, if otherwise eligible, be able to use the proposals for free writing prospectuses or our other proposals?

(3) Filing Conditions

(a) General Conditions

Under our proposal, use of a free writing prospectus would be conditioned on filing of that prospectus or information contained in that prospectus in the following circumstances: [166]

• Where a free writing prospectus is prepared by or on behalf of the issuer, known as an ''issuer free writing prospectus,'' and used by any person, the issuer shall file that free-writing prospectus; [167]

• Where a free writing prospectus prepared by a party participating in the offering 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 contained or incorporated in the registration statement or a filed free writing prospectus, the issuer shall file that information;

• Where a free writing prospectus is prepared by a party other than the issuer and is distributed in a manner reasonably designed by such party to lead to its broad unrestricted dissemination, the other party shall file the free writing prospectus, unless it has already been filed; and

• Where a free writing prospectus prepared by any person contains only a description of the terms of the issuer's securities, the issuer must file the free writing prospectus that contains the final terms of the issuer's securities.[168]

The conditions would provide that the issuer file the issuer-prepared free writing prospectus or material issuer information on or before the date of first use, except in the case of final terms of securities. Because the free writing prospectus would be either that of the issuer or would contain material issuer information, we believe the proposed timing is appropriate. The issuer would have control over the use or would know that it provided the information for use. Issuer information contained in free writing prospectuses would be publicly available on our EDGAR system [169] as a result of the proposed rule's filing condition.[170]

In most cases, there would be no condition that underwriters and participating dealers file the free writing prospectuses that they prepare. This would include information prepared by underwriters and others on the basis of, but not containing, issuer information.[171] Examples of this information would include information prepared by underwriters that could be, but would not be limited to, information that is proprietary to an underwriter.

[166] See proposed Rule 433(d). Unlike Securities Act Rule 425 applicable to business combination transactions which covers all communications, including Securities Act Rule 135 notices, under proposed Rule 433, Rule 135 notices and Securities Act Rule 134 notices would not be considered free writing prospectuses and would, therefore, not be subject to the conditions to use in the proposed Rule. Electronic road shows would not be subject to the filing condition in certain circumstances. See Section III.D.3 below under ''Electronic Road Shows''.

[167] As we discuss above, under our proposed Rule 163, a well-known seasoned issuer could use an issuer-prepared free writing prospectus before the shelf registration statement was filed or before a class of securities was included in the effective shelf registration statement. In this case, use of the free writing prospectus would be conditioned on filing when the registration statement was filed or amended to include the class not yet included.

[168] The final terms of the issuer's securities would either be contained in an issuer free writing prospectus or, if contained in another party's free writing prospectus, would be issuer information.

[169] We maintain an Internet site at *www.sec.gov* that contains reports, proxy and information statements, and other information regarding issuers that file electronically with us through EDGAR.

[170] As today, oral communications would not be subject to any filing condition but would still be subject to liability under Securities Act Section 12(a)(2) and the anti-fraud provisions of the federal securities laws.

[171] We are attempting to ensure that issuer information made available to any party in a written offer in connection with the registered offering would be filed and made publicly available. As we note earlier, the proposed exclusions from restrictions on free writing under proposed Rules 163 and 164 would not be available for any plan or scheme to evade the requirements of Section 5. This would include situations in which issuer provided information, such as issuer prepared projections or forward-looking information, is characterized as underwriter or participating dealer information in order for the issuer to avoid filing the information.

Our proposals contain an exception to the general principle that underwriter free writing prospectuses would not need to be filed. If any person, other than the issuer, participating in the offer or sale of the securities distributed a free writing prospectus in a manner that was reasonably designed to achieve broad unrestricted dissemination, such use would be conditioned on such person filing the free writing prospectus on or before the date of first use.[172] For example, the filing condition would apply where: [173]

- An underwriter included a free writing prospectus on an unrestricted Web site or hyperlinked from an unrestricted Web site to information that would be a free writing prospectus [174] or if a dealer or other offering participant released or gave a copy of its free writing prospectus to a newspaper or other media; or
- An underwriter or other offering participant sent out a press release regarding the issuer or the offering that would be a free writing prospectus.

A free writing prospectus including information about the issuer, its securities, or the offering, provided by or on behalf of the issuer or an offering participant that is prepared by persons in the media business who are not affiliated with or paid by the issuer or an offering participant would be subject to filing by the issuer or offering participant involved within one business day after first publication or first broadcast. Persons in the media would have no filing or other obligations under these provisions.

A free writing prospectus that contained only a description of the securities offered, regardless of whether the issuer or other offering participant prepared or used it, would be subject to filing only if it reflected the final terms of the securities being offered. The issuer would have to file the free writing prospectus within two days after the later of the date such terms became final or the date of first use.[175] We believe this filing condition is appropriate for free writing prospectuses that contain only a description of the final terms of a security. Preliminary term sheets and other descriptive material containing only the terms of the securities that do not reflect final terms of securities or transactions would not be subject to filing. All such written offering materials, whether or not filed, would be free writing prospectuses.

The 1998 proposals would have required all free writing to be filed, regardless of whose communications were involved. This filing condition caused commenters to raise concerns that participants might be liable for communications they had not made or used.[176] By providing that the filing condition applies only to an issuer free writing prospectus and issuer information, whether contained in an issuer free writing prospectus or in another participant's free writing prospectus, or to information in a free writing prospectus broadly disseminated, we believe we have addressed the concerns about cross-liability under Securities Act Section 12(a)(2) for other participants' free writing materials.[177] Comments regarding the 1998 proposals also expressed concern that the public filing would cause competitive harm to underwriters by making their confidential proprietary products public.[178] The filing condition in proposed Rule 433 would not extend to a free writing prospectus prepared by an underwriter, including information prepared on the basis of issuer information that does not include issuer information, unless the free writing prospectus fell into the ''broad dissemination'' category. Free writing prospectuses sent directly to customers of an offering participant, without regard to number, would not be broadly disseminated.

Request for Comment

- Is it appropriate to distinguish between issuer information and information prepared by an underwriter on the basis of issuer information for purposes of filing? If not, why not? Should the proposed rule provide additional specificity regarding the determination of whether a free writing prospectus is prepared on the basis of issuer information but does not include issuer information? If so, please describe the manner in which the proposed rule should provide that specificity.
- Should all offering participants free writing prospectuses be required to be filed?
- Have the proposals to limit filing to issuer free writing prospectuses, issuer information in any other person's free writing prospectus and broadly disseminated free writing prospectuses of other participants alleviated concerns about cross-liability for free writing prospectuses used by other offering participants?
- Is the phrase ''manner reasonably designed to lead to broad dissemination'' clear enough or should we consider a more precise definition? If yes, then what definition should be used?
- Should we define issuer information differently? If yes, how should we define it?
- Should we require free writing prospectuses that contain only preliminary terms of a securities offering to be filed? If yes, why?

(b) Electronic Road Shows

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 with investors in the selling effort. Historically, these presentations were conducted in person and limited to institutional investors. Today, due to advances in electronic media, road shows also are being conducted or re-transmitted over the Internet or other electronic media.

We intend to make clear that electronic communications, including electronic road shows, are graphic communications that fall within our proposed definition of written

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[172] An underwriter, dealer, or other offering participant would be considered to have made such a distribution of a free writing prospectus if the dissemination was made by or on its behalf. As with an issuer free writing prospectus, ''by or on behalf of'' an underwriter, dealer, or other offering participant would mean that the particular underwriter, dealer, or other offering participant, its agent or representative authorized and approved the use of the free writing prospectus before its dissemination. Thus, an issuer, underwriter, dealer, or other offering participant could not indirectly disseminate information through the press or otherwise without complying with the conditions of proposed Rule 433. In that case, the materials provided to the press would be a free writing prospectus of the underwriter, dealer, or other offering participant.

[173] Where an issuer distributed a free writing prospectus prepared by an underwriter, dealer or other offering participant, that free writing prospectus would be an issuer free writing prospectus for purposes of the filing condition.

[174] On the other hand, a Web site with access restricted to customers or a subset of customers would not require filing. (Neither would an e-mail by an underwriter to its customers, regardless of the number of customers.)

[175] As proposed, the filing condition under this provision of proposed Rule 433 would not be satisfied by the timely filing of a prospectus supplement under Rule 424.

[176] See, *e.g.*, comment letters in File No. S7–30–98 from the ABA; Ford Motor Credit Company; Investment Company Institute (''ICI''); Merrill Lynch; and Sullivan & Cromwell.

[177] Commenters were also concerned that underwriters and participating dealers would not be able to satisfy their suitability determination obligations if underwriter or participating dealer materials were publicly filed, because they might be considered to be offering the issuer's securities to a potentially anonymous group of investors. We believe that our proposal addresses these concerns as well by, among other things, providing that free writing prospectuses prepared and used by offering participants sent directly to their customers would not be considered broadly disseminated. See note 174.

[178] See comment letters in File No. S7–30–98 from Credit Suisse First Boston Corporation (''CSFB''); J.C. Bradford & Co.; and Morgan Stanley Dean Witter (''Morgan Stanley'').

communication.[179] Thus, under our proposed rules, an electronic road show would be a written offer and a prospectus, but it would also be a free writing prospectus. It would therefore be permitted if the conditions of proposed Rule 433 were satisfied. Issuer involvement or participation in an electronic road show would make it an issuer free writing prospectus.[180] Our proposals would apply to electronic road shows in all registered securities offerings, not just initial public offerings.[181]

Electronic road shows—those road shows transmitted electronically by the Internet, videos, e-mail, CD–ROM or any other medium—have to date proceeded in reliance on a series of no-action letters granted by the staff of the Division of Corporation Finance.[182] Our proposals would permit the use of electronic road shows without many of the conditions in the electronic road show no-action letters,[183] provided the issuer satisfies the conditions of Rule 433.[184] We believe that, once we categorize electronic road shows as graphic communications and thus as written communications and free writing prospectuses, we should not subject them to additional conditions. Indeed, we believe broadly available electronic road shows treated as free writing prospectuses should be encouraged. Therefore, our proposals would provide that an electronic road show or its script would not be subject to filing, except for material issuer information not previously included (including by incorporation by reference) in the registration statement or in a free writing prospectus related to the offering, if the issuer does the following:

- Makes at least one version of a *bona fide* electronic road show [185] readily available electronically to any potential investor at the same time as the electronic road show; and
- Files any issuer free writing prospectus or material issuer information used at an electronic road show (other than the road show itself).

We believe that our proposed treatment of electronic road shows would strike 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 shows that often have not been open to retail investors generally. We also believe that our proposal would address 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, 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.[186] While we are not proposing to require that road shows be made available to unrestricted audiences, issuers and underwriters would be free to open road shows to all investors, and we believe that our proposal will encourage issuers to do so.

Request for Comment

- Should we include a definition of road show to describe these activities? If so, what should the description cover? That the road show be made to more than a specified number of persons?
- Will our proposal, if adopted, lead to more widespread use of electronic road shows? To such road shows being available to all potential investors? Should we make it a condition that electronic road shows be available to all potential investors?
- Should we consider including any of the conditions in the electronic road show no-action letters that we are not including in our proposals? If so, which ones and why?
- Is our proposed definition of what constitutes a ''*bona fide* electronic road show'' adequate? Is there any reason to discourage transmission of different versions of a road show? For example, could an issuer prepare a road show for some investors and a second, less-informative version for others? Should we otherwise limit this possibility?
- Should an issuer be permitted to edit a retransmitted road show? Should the rule expressly permit editing?
- Should visual presentations such as slides or power point presentations used but not distributed at live road shows be considered free writing prospectuses? Should we consider the use of electronic media to transmit an otherwise oral presentation to an audience overflow room as a written communication and an electronic road show, even if the presentation to the overflow room is not interactive?
- Should electronic road shows transmitted over the television or radio be treated differently from electronic road shows transmitted through the Internet?
- Should electronic road shows in business combination transactions be treated in the same manner as proposed Rule 433? If so, should there be a filing obligation similar to that in Securities

[179] All electronic communications would be written communications due to their character as graphic communications, not because they fall within the concept of broadcast. See proposed amendments to the definition of ''graphic communication'' in Securities Act Rule 405.

[180] Live road shows would continue to be considered oral communications.

[181] We recognize that road shows may be used in marketing the issuer's securities in certain private placement transactions, as well. Our proposals do not address those offerings, although the inclusion of electronic communications in the definition of written communication would 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 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.

[182] See Staff 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).

[183] For example, the road show audience would not have to be limited in any way, and the road show need not be the re-transmission of a live presentation in front of an audience. In addition, those distributing the road show would not have to limit viewers to seeing it either within a 24-hour period or twice. They could also allow viewers to copy, print or download the road show. Multiple versions of the electronic road show would be permitted. Each would be a separate free writing prospectus. If we adopt our proposals, the electronic road show no-action letters for registered public offerings would be withdrawn at that time. See discussion of Staff no-action letters in note 182.

[184] Electronic road shows would have to satisfy the legend condition discussed in Section III.D.3. above under ''Permitted Use of a Free Writing Prospectus After the Filing of a Registration Statement under Proposed Rule 433'' and, for road shows involving a non-reporting or unseasoned issuer, would be subject to the condition that the issuer's statutory prospectus accompany or precede the electronic road show. As such, those issuers would have to include in the electronic road show a hyperlink to the issuer's filed statutory prospectus in its registration statement.

[185] We propose to define ''*bona fide* electronic road show,'' for purposes of the proposed rule, as a version of an electronic road show (one that is provided or made available by means of graphic communication) that contains a presentation by some members of an issuer's management and that, where the issuer is using more than one version of an electronic road show, covers the same general areas regarding the issuer, its management, and the securities being offered as the other versions. 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.

[186] *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 would be permitted for different audiences under the filing exemption, so long as at least one version of a *bona fide* electronic road show was available to all potential investors.

Act Rule 425? If not, what filing and other disclosure requirements should apply?

(c) Unintentional Failures To File

Comments in response to the 1998 proposals regarding free writing materials expressed the concern that the failure to file all free writing materials would result in a Section 5 violation. We propose to address this concern by providing the ability to cure any unintentional failure to file free writing materials.[187] The proposal provides that the material must be filed as soon as practicable after discovery of the failure to file.

Proposed Rule 164 would allow an issuer and any other person relying on the proposed 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 would be available if a good faith and reasonable effort was made to comply with the filing condition and the free writing prospectus was filed as soon as practicable after the discovery of the failure to file.[188]

As in the business combination rules, we are proposing the cure provision to avoid potential chilling of communications due to uncertainty over a filing status. Any attempt to avoid complying with the filing conditions of Rule 433 as a plan or scheme to evade Section 5 would make the proposed exclusion and permitted use unavailable.

Request for Comment

- Is a cure provision on filing necessary?
- Are there other concerns about the filing obligations not addressed by the cure provision? If yes, then what are they and how can they be remedied without eliminating a filing obligation?
- Should we specify what persons at an issuer or offering participant, such as any senior officer, must discover the failure to file?
- Should free writing prospectus filing obligations be part of an issuer's disclosure controls and procedures?
- If there is a failure to file, should there be any cooling off period before which an issuer could complete a transaction?

(d) Filed Free Writing Prospectus Not Part of Registration Statement

A free writing prospectus used after a registration statement is filed complying with Rule 433 would 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 proposing to modify the Section 10(b) filing requirement to provide that a free writing prospectus filed pursuant to proposed Rule 433 shall identify the registration statement to which it relates, but would not have to be filed as part of the registration statement. We believe that the modified filing condition will enhance investor protection because it should facilitate filing of the free writing prospectus on a timely basis and more readily identify the filed information, whether an issuer or another party's free writing prospectus or issuer information in a free writing prospectus, as a free writing prospectus.[189] Any free writing prospectus that is used, regardless of whether it is filed, would be subject to liability under Securities Act Section 12(a)(2) and the anti-fraud provisions of the federal securities laws.[190]

Request for Comment

- Should we require free writing prospectuses to be filed as part of the registration statement? If yes, would the filing obligation affect whether parties use free writing prospectuses?

(4) Information in a Free Writing Prospectus

We are proposing to 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 proposed rule would permit information in a free writing prospectus to go beyond information the substance of which is contained in the prospectus included in the registration statement. We believe that exempting free writing prospectuses meeting the conditions of the proposed rule 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 a statutory prospectus.

Treating a free writing prospectus satisfying the conditions of proposed Rule 433 as a Section 10(b) prospectus would provide for additional continuing Commission oversight and enforcement authority over the contents and use of the free writing prospectus. We would retain the ability to halt the use of any materially false or misleading free writing prospectus in accordance with Section 10(b). Under proposed amendments to Securities Act Rule 418, our staff would be able to request any free writing prospectus that had been used in connection with a securities offering to enable the staff to monitor its use.[191] We believe that the proposals balance the expressed needs of issuers and market participants to communicate more freely during an offering while protecting investors and the market from offering communications that contain fraudulent or misleading statements.

Request for Comment

- Should we require that free writing prospectuses contain particular information in addition to the legend? If yes, what information?
- Should we limit the type of information that can be included in a free writing prospectus? If yes, what should the limitations be?
- Should we require explicitly that a free writing prospectus contain a balanced presentation of the information or is the required legend recommending that potential investors read the prospectus, including the risk factors, sufficient?
- Should we amend Rule 418 to permit the staff to request copies of all free writing prospectuses that are used, whether or not they are required to be filed? If no, why not?

(a) Legend Condition

We are not proposing 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, recommending

[187] Such a ''cure'' provision is included in Regulation M–A. See Securities Act Rule 165(e) [17 CFR 230.165(e)]. See also the Campos Article, note 102, at § 1:30.

[188] Underwriter materials subject to the filing condition would need to be filed on or before the date of first use and would have to include the proposed Rule 433 legend.

[189] The free writing prospectus could also 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 [15 U.S.C 77r].

[190] The treatment of a free writing prospectus as a permitted prospectus under Securities Act Section 10(b) would be the same as sales literature used by investment companies and business development companies under Securities Act Rule 482 [17 CFR 230.482].

[191] See proposed amendment to Securities Act Rule 418 [17 CFR 230.418].

that potential investors read the prospectus, including Exchange Act documents incorporated by reference, including risk factors, if any, and stating that the communication constitutes a written offer pursuant to a free writing prospectus.[192] In addition, the legend also would advise 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 dealer by calling a toll-free number. The proposal also provides that the legend indicate that the free writing prospectus is part of a public offering. Because in most, if not all cases, the legend provided by the proposed rule would not be included in published articles, the filing of a published article with us as a free writing prospectus including the legend would satisfy the condition of proposed Rule 164.[193]

Proposed Rule 164 would permit a user to cure an unintentional failure to include the legend in any free writing prospectus, as long as a good faith and reasonable effort was made to comply with the condition and the free writing prospectus is amended to include the legend as soon as practicable after discovery of the omitted legend.[194] In addition, if a free writing prospectus has been transmitted to potential investors without the legend, in order to fall under the cure provision, the free writing prospectus must be retransmitted, with the appropriate legend, to all investors who originally received it.[195]

Our proposed legend condition is intended to identify more clearly materials as free writing prospectuses used in connection with a registered offering. We believe that this legend would assist investors in evaluating the content and would provide a record of the free writing materials the issuer prepared and used or issuer information included in free writing prospectuses used in connection with the offering.

We understand that issuers or other users of written communications that are permissible in connection with registered offerings may sometimes include legends or disclaimers in those materials. Several of these additional legends or disclaimers are inappropriate. In particular, disclaimers of responsibility or liability that would be impermissible in a statutory prospectus or registration statement also would be impermissible in free writing prospectuses. Examples of impermissible legends or disclaimers that would cause the materials to not be free writing prospectuses that could be used in reliance on the proposed exclusion include:

- Disclaimers regarding accuracy or completeness;
- Statements requiring investors to read or acknowledge that they have read any disclaimers or legends or the registration statement; and
- Language indicating that the communication is neither a prospectus nor an offer to sell or a solicitation or an offer to buy.[196]

Request for Comment

- Should the legend contain other information?
- Are there any other legends that should be ineligible? Should the proposed rule include specific language regarding legends that are ineligible?
- Should we require inclusion of the legend with published articles when they are filed by the issuer or other offering participants?
- Should we specify who at an issuer or offering participant , such as any senior officer, must discover the failure to include the legend? If yes, why?
- Securities Act Rule 425, which contains similar cure provisions, does not contain any more specificity than we are proposing. Should cure provisions in capital formation transactions contain different provisions? If so, why?
- Instead of, or in addition to, the toll free number, should the legend provide an e-mail address to be contacted to request the prospectus?

(b) Proposed Amendment to Rule 408

Finally, we are proposing to amend Securities Act Rule 408 to make clear that a failure to include information that is included in a free writing prospectus in a prospectus filed as part of a registration statement would 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.[197]

Request for Comment

- Should we amend Rule 408 as proposed?

(5) Record Retention Condition

Proposed Rule 433 would condition 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. This record retention condition would apply to all offering participants and would apply regardless of whether the free writing prospectus was filed.[198] We are proposing a three-year retention period because that timeframe is consistent with retention periods for brokers and dealers to retain securities sale confirmations.

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

Request for Comment

- Should the record retention condition apply to all users, including issuers as well as brokers and dealers?
- Should record retention be a condition for free writing prospectuses that are filed? If yes, then would it be difficult to determine when the retention condition would apply?
- Should we have a record retention condition? If yes, is three years enough? Should it be shorter such as two years or longer such as five years?
- For issuers, rather than conditioning the use of a free writing prospectus on specific record retention in proposed Rule 433, should retention of the free writing prospectus used by issuers be mandated as part of an issuer's disclosure controls and procedures?

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

(1) General

The proposed communications rules would 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

[192] See proposed Rule 433(c).

[193] See proposed Rule 433(d).

[194] See proposed Rule 164(c)(2).

[195] Proposed Rule 163 contains similar cure provisions.

[196] See proposed Rule 164. See also the Asset-Backed Securities Proposing Release at note 58.

[197] The general anti-fraud provisions would of course apply to free writing prospectuses.

[198] For example, the record retention policy would apply to free writing prospectuses prepared by underwriters and not containing issuer information and to electronic road shows and term sheets not reflecting final terms not required to be filed.

circumstances under which an issuer retains responsibility for information included on its Web site;[199] however, today's proposals could raise new issues 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. As such, proposed Rule 433 would make clear that 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 Web site is considered a written offer of such securities made by the issuer and, unless otherwise exempt, would be a free writing prospectus of the issuer.[200] The same would be true of information contained on or hyperlinked to an offering participant's Web site. Accordingly, the requirements of Rule 433 would apply to these free writing prospectuses. For example, if an issuer or other offering participant included a hyperlink within a written communication used to offer the issuer's securities, such as an electronic free writing prospectus, to another Web site or to other information, the hyperlinked information would be considered part of that written communication.[201]

(2) Historical Information on an Issuer Web Site

We recognize the importance of an issuer's Web site as a means to communicate with the public, not just with potential investors, about their business. Commenters on our 2000 Electronics Release expressed concerns regarding the possibility that historical issuer 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.[202] Historical information that is not an offer, including for example, regularly released information that would fall within one of our proposed safe harbors, would not become an offer if accessed at a later time, unless it was updated or otherwise modified or used or referred to (by hyperlink or otherwise) in connection with the offering. We also believe that issuers in registration should be able to segregate historical information on their Web site so that it remains accessible to the public but will not be presumed to be reissued or republished for purposes of the Securities Act.

Proposed Rule 433 would not apply to historical issuer information that otherwise could be considered an offer but that is properly identified as such and located in a separate section of the issuer's Web site containing historical issuer information, sometimes known as archives, as that information would not be considered a current offer of the issuer's securities. This historical information could include, but would not be limited to, regularly released information that would fall within our proposed safe harbors.[203]

The proposed exclusion in Rule 433 for historical archived information would cover information that could be demonstrated to be previously published (for example, by being dated). The information could not be incorporated or otherwise included in a prospectus or used, identified, updated or modified in connection with the offering or otherwise. We believe that the availability of historical issuer information also would provide investors with more readily accessible information about the issuer. Under our proposal, issuers would need to review information on their Web sites to determine, for example, whether information constituted an offer or was archived properly.

Request for Comment

- Should any issuer hyperlink to a third party Web site be permitted for purposes of the exclusions for historical issuer information? If so, should the exclusion be limited to hyperlinks to an issuer's Exchange Act reports and other filings with us?
- Are there circumstances under which a hyperlink embedded in a free writing prospectus or other material should not be deemed to have been adopted by, or be treated as part of the free writing prospectus of, the issuer?

c. Interaction of Communications Proposals With Regulation FD

As a consequence of our proposals to liberalize communications during the offering process and encourage continuing ongoing regular communications by reporting issuers, we believe it is necessary to revisit the exclusions from Regulation FD for communications made during a registered offering of securities.[204] The communications regime that we are proposing contemplates that certain material non-public issuer information could be made public through the prospectus filed as part of a registration statement, the issuer's filing obligation for free writing prospectuses, or, in the case of reporting issuers, through the satisfaction of Regulation FD. Oral communications of an issuer made in connection with a registered offering would continue not to be subject to any filing or public disclosure requirement. We continue to believe that subjecting oral communications that occur as part of a registered offering process in a capital formation transaction to a public disclosure requirement could adversely affect the capital formation process.

We are proposing to amend Regulation FD to specify the circumstances, both in terms of the type of offering and the means of communication, in which issuer communications would be excluded from the operation of that Regulation in connection with a registered securities offering. The effect of our amendments would be to identify the types of communications that would continue to be excluded from the Regulation in connection with registered securities offerings.

As amended, Regulation FD would 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 and satisfying the requirements of proposed Rule 433, or to a communication falling within the

[199] 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 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.

[200] The issuer would have to assess whether an available exemption for such offer existed under any other rule. This approach is consistent with our interpretations on the use of electronic media in our 2000 Electronics Release. See the 2000 Electronics Release at note 62. Hyperlinks from a third party Web site to an issuer's Web site may be a free writing prospectus of the third party with regard to the issuer's securities, depending on the facts and circumstances.

[201] For example, while a research report published or distributed by a broker or dealer may not be considered an offer by the broker or dealer under Rule 139, an issuer hyperlinking to that research report would not be able to rely on Rule 139 and the research report would be a free writing prospectus of the issuer, and the conditions of Rule 433, including the filing requirements, would have to be satisfied. See the 2000 Electronics Release note 62 at II.B.2.

[202] See, *e.g.*, comment letters in File No. S7–11–00 from the ACCA; The Council of Infrastructure Financing Authorities; and the Florida Division of Bond Finance.

[203] See discussion in Section III.D.1 above under ''Permitted Continuation of Ongoing Communications During an Offering'' regarding proposed Rules 168 and 169.

[204] See 17 CFR 243.100(b)(2).

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; and
- An oral communication made in connection with the registered offering after filing of the registration statement for the offering under the Securities Act.

The proposals also would narrow the types of registered offerings eligible for the exclusion to those involving capital formation for the account of the issuer and underwritten offerings that are both an issuer capital formation and a selling security holder offering, in addition to the existing exclusion for registered business combination transactions.[205]

In view of our proposals 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 capital raising securities offering. Communications made during or in connection with a registered offering and 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—would be subject to Regulation FD.

Request for Comment

- Are the proposed exclusions appropriate?
- Are there other or different exclusions relating to registered securities offerings that would be appropriate?
- Should we retain the exclusion from Regulation FD for oral communications made in connection with the registered offerings? For purposes of the exclusion, should we consider defining oral communications as relating to the registered securities offering? If yes, describe the types of oral communications in connection with registered offerings that should be subject to Regulation FD. If no, describe the effects, if any, on capital formation transactions if we were to eliminate the exclusion from Regulation FD of oral communications made in connection with certain registered offerings.
- Should we continue to exclude from Regulation FD communications made in reliance on the exception to the definition of prospectus in clause (a) of Section 2(a)(10) where a final prospectus meeting the requirements of Section 10(a) is sent or given prior to or with the written communication? If such communications are in connection with the type of registered securities offering excluded from Regulation FD, discuss why such communications should now be made subject to the provisions of Regulation FD.

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 tremendous attention in recent years. The Sarbanes-Oxley Act,[206] our rules regarding analyst certification,[207] the self-regulatory organization rules we approved,[208] and the global research analyst settlement[209] have addressed many of the abuses identified with analyst research and have required structural reforms and increased disclosures.[210] As a direct result of these initiatives and actions, we expect that analyst research reports used by market participants will be more useful and will disclose conflicts of interest relating to research of which investors should be aware.

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.

Especially in light of the recent reforms and limitations on abusive conduct by analysts in connection with offerings, we believe it is appropriate to limit the restrictions on research as written offers under 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 would not jeopardize investor protection but that would permit dissemination of research around the time of an offering under a broader range of circumstances than is currently the case. We also are cognizant of information suggesting declines in research coverage[211] and seek to avoid Securities Act restrictions that discourage research coverage or

[205] Currently, Regulation FD excludes from its operation any disclosure made in connection with a securities offering under the Securities Act, whether oral or written, other than an offering of the type described in Securities Act Rule 415(a)(1)(i)–(vi) [17 CFR 230.415(a)(1)(i)–(vi)]. As compared to our proposal, Regulation FD currently does not limit the exclusion based on the means of communication, nor does it limit the exclusion based on whether capital formation offerings are involved. The existing exclusion in Regulation FD for registered business combination transactions would not be affected by our proposed changes.

We also have proposed inclusion of a proviso that would bring within Regulation FD any offering that includes an issuer capital formation offering if it is being registered for the purpose of evading the requirements of Regulation FD. This would cover the situation, for example, where a *de minimis* issuer participation was included in what was otherwise entirely a selling security holder offering in an attempt to exclude communications in the offering from the application of Regulation FD.

[206] See Section 501 of the Sarbanes-Oxley Act [15 U.S.C. 78o–6(a)(2)].

[207] See 17 CFR 242.500 through 505. Regulation Analyst Certification (''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 *Order Approving Proposed Rule Changes Relating to Research Analyst Conflicts of Interest,* Release No. 34–48252 (Aug. 4, 2003) [68 FR 45875] (''SRO Rule Approval Order'').

[208] See *Order Approving Proposed Rule Changes Regarding Analyst Conflicts of Interest,* Release No. 34–45908 (May 16, 2002) [67 FR 34968]; SRO Rule Approval Order note 207.

[209] See Lit. Rel. 18438 (Oct. 31, 2003); Press Release 2004–120 (August 26, 2004).

[210] The settlement, which involved twelve brokerage firms and two individuals, requires the settling firms to, among other things, adopt structural 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 and disclosure of their analysts' quarterly performance. The firms are also required to pay for independent research for a five-year period and to make this research available to the firm's customers.

The self regulatory organizations, the National Association of Securities Dealers and the New York Stock Exchange adopted rules requiring, among other things, separating analyst compensation from investment banking influence, prohibiting analysts from 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 affect an investment banking relationship, requiring disclosure of any compensation from an issuer or other relationships with clients, and requiring additional registration, qualification, and continuing education requirements on research analysts. See SRO Rule Approval Order note 207.

[211] See *e.g., Analyst Stock Ownership, Declining Coverages, 'Settlement' Consequences Outlined,* FinancialWire, February 26, 2004; Bob Tedeschi, *Can the Dot-Coms Still Standing Reclaim the Attention of Analysts Still Employed? Stay Tuned*, the N.Y. Times, Apr. 21, 2003 at C10.

dissemination where they are not necessary to protect investors.

b. Proposals Amending 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 prohibition on pre-filing offers and impermissible prospectuses. We are proposing measured amendments that would make incremental modifications to these rules.[212] Our proposed rules would also, for the first time, contain a definition of research report. The proposals would also expand the circumstances in which offering and non-offering participants could disseminate research reports during a registered offering.[213]

We proposed revisions to Rules 137, 138 and 139 in the 1998 proposals and most commenters addressing that aspect of the 1998 proposals expressed general approval for the proposals.[214] Our current proposals take a similar approach, while being designed to ensure that appropriate investor protections are maintained. The 1998 proposals also would have changed Rules 138 and 139 to provide that research provided under those safe harbors would no longer be excluded from the definition of ''prospectus'' in Section 2(a)(10). Many commenters opposed this change and believed that this would result in brokers and dealers being less likely to publish research even in situations where they would be permitted to do so under the Rules.[215] We believe that this change is not necessary to protect investors and have, therefore, maintained our current approach with respect to liability for research, which includes general anti-fraud liability, used in reliance on these Rules.[216]

i. Definition of Research Report

To assure consistency between Regulation AC and the research safe harbors contained in Rules 137, 138, and 139, we are proposing to include a definition of research report that will be the same as the definition of ''research report'' in Regulation AC and would also include media broadcasts.[217] Under our proposals, ''research report'' would be defined as a written communication, as defined in Securities Act Rule 405, that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision. This definition is intended to encompass all types of research reports, whether issuer specific or industry compendiums separately identifying the issuer.

While we are generally proposing the same definition of ''research report'' as in Regulation AC, for purposes of Rule 139, it is possible that particular documents, such as industry reports, would be research reports under our proposal, even if they fall outside of Regulation AC.[218] We believe that it is appropriate to maintain this distinction because of the different purposes of the rules. Industry reports that fall within the Rule 139 safe harbor provisions would be considered research reports under the proposed definition, even though Regulation AC may not require them to contain a certification. The proposed definition of research report would not include confirmations or account statements that contain rating information provided in accordance with the requirements of the global research analyst settlement.[219]

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 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.[220]

We are proposing to expand the exemption 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 would 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, participants in the securities

[212] The safe harbor provisions of Securities Act Rules 137, 138, and 139 would continue to be available only to brokers and dealers. Issuers could not use the safe harbor provisions or research reports prepared or distributed by brokers or dealers in reliance on the rules to directly or indirectly communicate with potential investors about an issuer's offering. For example, a hyperlink on an issuer's web site during its registered offering to a research report would raise these concerns. Issuers using research reports in this manner could be deemed to have adopted the contents of such reports and, under our proposals, the reports would be considered free writing prospectuses.

[213] The proposed changes to the rules would continue to permit the distribution of independent research within the safe harbor provisions. Our current 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 would depend on whether the independent research distribution by the broker or dealer satisfied the conditions of the research rule at the time of the distribution. If a broker or dealer would not be able to rely on any of the research safe harbors for their own research, they similarly could not 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 would be distributed by an offering participant and thus would not satisfy the requirements of Securities Act Rule 137 and could not be used in reliance on the safe harbor. Such research could continue to be distributed by the entity not participating in the offering that prepared it, but such distribution could not be used to evade the prohibitions of the Securities Act. A research report constituting an offer and not falling within a safe harbor would 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.

[214] See, *e.g.,* comment letters in File No. S7–30–98 from the ABA; ACCA; ACIC; Business Roundtable; Fried Frank; J.C. Bradford & Co.; Merrill Lynch; New York State Bar Association; Sullivan & Cromwell; the Securities Industry Association (''SIA''); and TMBA.

[215] See, *e.g.,* comment letters in File No. S7–30–98 from the ABA; TBMA; Merrill Lynch; Morgan Stanley; Bar Association of the City of New York (''New York City Bar''); and Sullivan & Cromwell.

[216] 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.

[217] As in Regulation AC and existing Rules 137, 138 and 139, communications considered research reports would not need to include recommendations. Regulation AC contains a separate definition for public appearance that includes research that is broadcast. Our new proposed definition of written communications, however, encompasses electronic (through the definition of graphic communication) as well as broadcast communications. Thus, because broadcast is already encompassed in the definition of research report, a separate definition for broadcast or public appearance would be unnecessary for purposes of relying on the safe harbors.

[218] In the release adopting Regulation AC, we stated that it was not possible, for purposes of that rule, to provide a complete list of all types of communications that would or would not fall within the definition of ''research report,'' but that, in general, certain communications specified in the release would not be research reports for Regulation AC purposes. Because of the different purposes of the rules, including the fact that the Securities Act is aimed at addressing all communications, both written and oral, whether a communication is a research report would be a facts and circumstances determination.

[219] 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 ratings, along with the 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 by the settlement, would raise concerns in that they would be provided in the ordinary course, and as to confirmations, after the sale of the securities. We would, however, as we note above, be concerned about the continued inclusion of ratings of either the firm or the independent research provider on the firms' Web sites if the conditions to the safe harbors in Rules 137, 138, or 139 were not available to the firm at that time.

[220] 17 CFR 230.137.

distribution, among others, and publish or distribute the research report in the regular course of business. Permitting research on non-reporting issuers in reliance on Rule 137 would make clear when research can be provided on these issuers. These proposed provisions would not, due to the other limitations of the Rule, however, enable offering participants to rely on the Rule to publish research about the non-reporting issuer.

Request for Comment

- Should the type of eligible issuer be expanded or limited beyond blank check companies, shell companies, and penny stock issuers?
- Should Rule 137 be expanded to include research on issuers other than those eligible to use Forms S–2 or F–2 (which we propose to eliminate) or Forms S–3 or F–3? If not, why not?
- Securities Act Section 4(3) affects the ability of dealers to publish research on non-reporting issuers following effectiveness of the registration statement. Are there reasons to discourage publication of research by non-participating dealers in the aftermarket of an IPO?
- Would the publication of timely research by entities, including dealers, not involved in the initial offering enhance investor protection in the aftermarket? Would it have other effects? If so, what would those effects be?

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, for example, to that issuer's fixed income securities, and vice versa, if it publishes or distributes the research in the regular course of its business.[221] The underlying premise of Rule 138 is that there is less opportunity to condition the market when a broker or dealer is underwriting one type of security but providing regular course research on the other type (for example, underwriting an offering of equity securities while providing research on debt securities).

We are proposing to amend Rule 138 to expand the categories of eligible issuers. As proposed, the Rule generally would 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.[222] As we note above, 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. We believe the current limitation on the type of issuers under this Rule is no longer necessary to protect investors due to the enhanced Exchange Act reporting obligations. Like the proposals regarding Rules 137 and 139, the Rule would exclude issuers that have historically posed certain risks of abuse, including blank check companies, shell companies and penny stock issuers.

We also are proposing to require that as a condition to the exemption the broker or dealer 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.[223] 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. If a broker or dealer began publishing research about a different type of an issuer's security around the time of public offering of an issuer's security and did not have a history of publishing research of that type, we would be 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 proposed permissible free writing rules.

Request for Comment

- Should the type of eligible issuer be limited beyond blank check companies, shell companies, and penny stock issuers?
- Is the requirement that the broker or dealer must have published or distributed research in the regular course of its business on the same types of securities appropriate?
- Should the proposed rule contain a condition that the broker or dealer must have published or distributed research on the securities of the particular issuer? If yes, why?
- Should the Rule 138 safe harbor be available if the issuer is a business development company filing periodic reports on Forms 10–K and 10–Q?

iv. Rule 139

Rule 139 permits a broker or dealer participating in a distribution of securities by a seasoned issuer or a larger foreign private issuer publicly traded abroad to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed with reasonable regularity in the normal course of its business.[224] Rule 139 also provides a safe harbor in those situations for distributions by smaller seasoned issuers, if the broker or dealer complies with additional restrictions on the nature of the publication and the opinion or recommendation expressed in it.

(A) Issuer Specific Reports

Under the proposals, reports about a specific issuer could cover only issuers with at least a one year reporting history who are current and timely in their Exchange Act reports and are eligible to register a primary offering of securities on Forms S–3 or F–3,[225] based on the $75 million minimum public float or investment grade securities provisions of those forms.[226] Penny stock issuers, blank check companies, and shell companies would be excluded.

We are retaining the requirement that the broker or dealer publish or distribute the research report in the regular course of its business, but not the requirement of publication with reasonable regularity. 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, proposing that the broker or dealer must, at the time of use, have distributed or published research reports about the issuer or its securities.[227] This new proposed requirement, we believe, would retain the most important element of the ''reasonable regularity'' requirement, namely that the report initiating

[221] 17 CFR 230.138.

[222] In addition, Rule 138 requires that a foreign private issuer's securities be traded on a designated offshore securities market for at least twelve months. We are proposing to amend 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. We are proposing to eliminate these Forms, as discussed below.

[223] Current Rule 138 requires that the broker or dealer publish or distribute research in the regular course of business, but does not contain a condition that the broker or dealer have published or distributed research reports on the same types of securities.

[224] 17 CFR 230.139.

[225] As in the proposed changes to Rule 138, we are proposing that the foreign private issuer's equity securities be traded on a designated offshore securities market for at least twelve months. See proposed amendments to Rule 138.

[226] As is the case today, the eligibility determination would be made in the same manner as Form S–3 or Form F–3 eligibility at the time of reliance on the rule.

[227] See proposed amendments to Rule 139.

coverage of an issuer not benefit from an exemption under Rule 139.

We are not proposing a minimum time period for the broker or dealer to have distributed or published research reports. In addition, the proposal does not require that the previously published or distributed research report cover the same securities that are the subject of the registered offering. We believe that the recently adopted safeguards on publication of research, together with the limitation on such reports to issuers eligible to use Forms S–3 and F–3 for primary offerings, diminish any need to impose a minimum time period for prior publication or distribution or need for the previously published or distributed research to cover the same securities being sold in the registered offering.

(B) Industry-Related Reports

Industry reports under the proposals could cover issuers required to file reports pursuant to Exchange Act Section 13 or Section 15(d) or satisfying the conditions to use by foreign private issuers. The safe harbor for industry reports is not available if the issuer is now or any predecessor of the issuer was during the last two years a blank check company, shell company, or penny stock issuer. The proposals extend the safe harbor for industry reports to registered offerings of any reporting issuer, not only reporting issuers eligible to register their securities on Form S–3 or Form F–3. Registered offerings by non-reporting issuers would not benefit from the exemption.

Our proposals would remove the prohibition on a broker or dealer making a more favorable recommendation than the one it made in the last publication. We are not proposing that the report include any prior recommendations. The proposals provide, however, that the research reports must contain similar type of information about the issuer or its securities as contained in prior reports.

We believe that with the recently adopted safeguards regarding analyst recommendations, it is appropriate to remove the ''no more favorable'' recommendation conditions in current Rule 139. We believe the proposal would be consistent with our recent actions affecting research analysts and research reports and would result in enhanced opportunity to provide information to investors regarding issuers and their securities.

Request for Comment

- Should the type of eligible issuer be limited beyond blank check companies, shell companies, and penny stock issuers?
- The staff has previously declined to permit reliance on Rule 139 if the issuer is an open-end management investment company.[228] Should reliance on proposed Rule 139 be permitted if the issuer is an open-end management investment company or other investment company (*e.g.*, closed-end management investment company, unit investment trust, business development company)? If so, what additional conditions, if any, should be required for reliance on the rule? What advantages or disadvantages would Rule 139 offer as compared to Rule 482, which was recently amended to permit investment company advertisements to contain information the ''substance of which'' is not contained in the investment company's prospectus?[229]
- Are there reasons that we should maintain the current requirement in Rule 139 that the broker or dealer publish reports with reasonable regularity? If yes, should we provide more specificity as to what reasonable regularity means?
- Is the requirement in the proposed amendments to Rules 138 and 139 that the broker or dealer, at the time of use, be publishing reports about the issuer or its securities appropriate?
- Will our proposed approach lead to more research being published?
- Are there reasons to maintain the ''no more favorable recommendation'' requirement in current Rule 139?
- How many firms subject to the global research analyst settlement use their Web sites, rather than confirmations or account statements, to disclose security ratings of issuers provided by independent research providers along with the security ratings of the issuer provided by the firm?

v. Research Report Proposals in Connection With Regulation S and Rule 144A Offerings

The restrictions in Regulation S on directed selling efforts and offshore transactions[230] and in Rule 144A on offers to non-QIBs and general solicitation[231] have resulted in brokers and dealers withholding regularly published research that they have not prepared with a view towards promoting the offering to investors in those types of offerings.[232]

We are proposing to provide that research reports meeting the conditions of Rules 138 and Rule 139 will not be considered offers or general solicitation or general advertising in connection with offerings relying on Rule 144A.[233] The proposals also would provide that these research reports would not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Regulation S.[234] As we indicated in the 1998 proposals, we do not believe that the publication of research in reliance on Rules 138 and 139 would be used to circumvent Rule 144A and Regulation S. Limiting the ability to rely on these exemptions when research on the issuers may otherwise be available, in any case, could, we believe, negatively impair capital formation.

Request for Comment

- Should we put any limitations on offerings relying on Rule 144A or Regulation S if research is published or distributed in reliance on Rules 138 and 139? If yes, why?

vi. Research and Proxy Solicitations

We also are proposing to codify a Commission staff position[235] that the publication or distribution of research under the conditions set forth in Rules 138 and 139 is permitted in connection with a registered securities offering that is subject to the proxy rules under the

[228] See Staff no-action letter to *Charles Schwab & Co., Inc.* (Dec. 30, 1987).

[229] See *Amendments to Investment Company Advertising Rules,* Release No. 33–8294 (Sept. 29, 2003) [68 FR 57760].

[230] 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 is acting as an underwriter on behalf of an issuer in connection with a Regulation S offering, questions arise regarding whether those actions would conflict with the prohibition against directed selling efforts or the offshore transaction condition. The concern stems from the fact that the distribution 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.

[231] Securities Act Rule 144A [17 CFR 230.144A] provides a safe harbor from the registration requirements of the Securities Act for resales of restricted securities to ''qualified institutional buyers'' (''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, it may be viewed as making offers to persons that receive it, including those who are not QIBs.

[232] We began to address some of these concerns in 1998. In the 1998 proposals, we also expressed an 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 proposed amendments would codify that view.

[233] See proposed amendments to Rule 138 and Rule 139.

[234] See proposed amendments to Regulation S.

[235] See Staff no-action letter to *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (Oct. 24, 1997).

Exchange Act.[236] The new rule would provide that distribution of research in accordance with Rule 138 or 139 would be a solicitation to which Rules 14a–3 through 14a–15 (other than Rule 14a–9) of the proxy rules [237] would not apply.

Request for Comment

- Should we codify the staff position that research published in reliance on Rules 138 and 139 would not be solicitations under Rule 14a–1(l)(2)? If not, why not?

IV. Liability Issues

A. Information Conveyed by the Time of Sale for Purposes of Section 12(a)(2) and Section 17(a)(2) Liability

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.[238] 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 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.[239]

The term ''sale'' under the Securities Act includes any contract of sale.[240] We believe that we should address, at this time, the discrepancies in time between the time of the contract of sale for securities (when an investor makes the investment decision 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 has made the decision to purchase a security.[241] This availability, therefore, does not necessarily address the receipt by investors of information at the time of an investment decision.

We interpret Section 12(a)(2) and Section 17(a)(2) as reflecting a core concept of the Securities Act—that materially accurate and complete information regarding an issuer and the securities being sold should be available to investors at the time of the contract of sale, when they make their investment decisions.[242] Under our interpretation, the time at which an investor enters into a contract of sale, and therefore becomes committed to purchase the securities, is one appropriate time [243] to apply the liability standards of Section 12(a)(2) and Section 17(a)(2).[244]

We interpret Section 12(a)(2) and Section 17(a)(2) as meaning that, for purposes of assessing whether information that is conveyed to an investor at the time of sale (including a contract of sale) by or on behalf of a seller (including an issuer, underwriter, participating dealer, or other offering participant) includes or represents a material misstatement 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, information conveyed to the investor only after the time of the contract of sale should not be taken into account.[245] For purposes of Section 12(a)(2) and 17(a)(2), whether or not information has been conveyed to an investor by a seller (including an issuer, underwriter, participating dealer or other offering participant) at or prior to the time of the contract of sale currently is a facts and circumstances determination, and our actions today do

[236] See proposed Exchange Act Rule 14a–2(b)(5).

[237] 17 CFR 240.14a–3 through 14a–15.

[238] 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 provisions).

[239] See Securities Act Section 17(a)(2) [15 U.S.C. 77q(a)(2)].

[240] See Securities Act Section 2(a)(3). Courts have held consistently that the date of a sale is the date when the investment decision is made, 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 (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 244, below, the Uniform Commercial Code no longer requires that a securities contract be in writing.

[241] 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 a shelf registration statement.

[242] 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, whichever comes first. 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.''

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 initial public offerings at least 48 hours before the confirmation of the sale of the securities could be sent. Our proposals today 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].

[243] Our interpretation is not intended to affect any rights currently existing at any other time. Section 12(a)(2) would apply to oral communications and prospectuses (including final prospectuses) at other times. Section 17(a)(2) would similarly apply 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. Nothing in our interpretation or proposed rule would limit any ability to proceed under those sections based on statements made in offers.

[244] 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.

[245] 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 statement 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.

not affect that determination.[246] 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. If our proposals today are adopted, such information also could include information contained in free writing prospectuses.

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. Our actions today also do not affect these requirements.

Under our interpretation, the liability determination as to an oral communication, prospectus, or statement, as the case may be, would not take into account information conveyed only after the time of sale (including the contract of sale).[247] Thus, evaluation of information at or prior to the time of sale (including contract of sale) would not take into account any modifications, corrections, or additions that are made available subsequent to the time of sale (including the contract of sale), including information contained in any final prospectus, prospectus supplement, or Exchange Act filing that is only filed or delivered subsequent to the time of sale (including the contract of sale).

Our interpretation of Section 12(a)(2) and Section 17(a)(2) is independent of the information requirements for registration statements or final prospectuses or prospectus supplements and of the prospectus filing or delivery requirements,[248] and is not intended to affect the information that must be contained in the prospectus filed as part of the registration statement. As today, the final prospectus would have to contain information necessary to satisfy a line item requirement or Securities Act Rule 408 and to meet the requirements of Securities Act Section 10(a).[249] Section 12(a)(2) would also apply to material deficiencies in disclosure in final prospectuses.

In furtherance of our interpretation discussed above, we are also proposing an interpretive rule, Rule 159, under Section 12(a)(2) and Section 17(a). We intend that the effect of our proposed interpretive rule would be the same as our interpretation. Our proposed rule would provide 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,[250] 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,[251] any information conveyed to the purchaser only after that time of sale will not be taken into account.

The proposed interpretive rule would also provide that 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) would mean knowing at the time of such sale.

We find that our interpretation and believe that our proposed 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.

Unlike our 1998 proposals, which were criticized for potentially harming the capital formation process by requiring actual delivery of a prospectus and term sheet in order to shift the liability determination date to the time of sale, we do not believe that our interpretation or proposed rule should result in ''speed bumps'' or otherwise slow down the offering process. In light of the proposed new rules regarding communications, issuers and underwriters should have sufficient flexibility to communicate information in a manner that does not slow the offering process. At the same time, in our view, the interpretation that the quality of information should be assessed at the time of the contract of sale is unassailable, and investors should have materially complete and accurate information at that time.

1. Rule 412

Under current 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 proposing to revise Rule 412 to make it consistent with our other proposals. The revisions would provide that:

- Subsequently provided information deemed part of or incorporated by reference into a registration statement or prospectus would not modify or supersede any information conveyed to an investor at the 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; and
- Information contained in a document that is deemed part of or incorporated by reference into a registration statement or prospectus would modify or supersede the information contained in the registration statement or prospectus itself.[252]

Request for Comment

We request comment with respect to our proposed interpretive rule, including on the following specific questions:

- Would actual communication to an investor provide sufficient ability for offering participants to be able to advise investors of developments prior to the time of the contract of sale without creating speed bumps for an offering? Does the concept provide sufficient opportunity for investors to have information at the time of the contract of sale? Do actual communications to investors reflect market practices today? What other concepts, if any, regarding communications should we consider?
- Should we provide more detailed guidance as to what is considered

[246] Direct communications could take various forms, including orally or through the use of electronic or other free writing prospectuses under the proposed communications regime.

[247] This interpretation would not, of course, affect the ability of the seller and the purchaser to consider subsequently provided facts or disclosure and by agreement revise 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 proposed rule, the time of the contract of sale to that purchaser would be the time of the new contract of sale.

[248] When we use the term prospectus supplements, we refer to prospectuses or prospectus supplements filed pursuant to Rule 424.

[249] We remind issuers that, notwithstanding prior disclosure of information, issuers must still include required disclosures in their registration statements, either directly or through incorporation by reference (for those issuers eligible to use the registration forms that permit incorporation by reference).

[250] These would 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.

[251] 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 they were made, not misleading.

[252] 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.''

information that is conveyed to an investor at or prior to the time of the contract of sale? If so, how should we define it and what information should be included? Should it include only information that is included in the issuer's registration statement including Exchange Act documents that are incorporated by reference? Should it include free writing prospectuses that have been filed? What other information should it include?

- Should there be a concept of public dissemination similar to that in Regulation FD? If yes, how would an investor know to look for the information to be able to assess statements made in a prospectus or oral communication? Should there be any requirement that the registration forms disclose that information may be filed in an Exchange Act report of an issuer or otherwise disseminated in a manner to advise the investor? Should there be a requirement that information be conveyed directly to an investor in all cases? Would a concept of public dissemination provide sufficient opportunity for investors to be advised of and be able to access the information at or prior to the time of the contract of sale? What types of public dissemination of issuer information reflect market practices today? What other concepts, if any, of public dissemination of information should we consider?
- Should we consider a rule that would require a passage of a specified time between an Exchange Act document filing or free writing prospectus filing on EDGAR and a time of contract of sale in order for the information to be considered part of the information against which statements would be evaluated? Should we address the method by which information should be made available to an investor to be considered conveyed to the investor for purposes of Section 12(a)(2) and Section 17(a)(2)?
- Do the proposed rules regarding communications and the interpretation regarding information that is conveyed to an investor lead to evidentiary issues that should be addressed?
- As to any of the above requests for comment, are there any special considerations that apply to investment companies in general, or to particular types of investment companies (*e.g.*, open-end management investment companies, closed-end management investment companies, unit investment trusts, business development companies) that we should address? If yes, please describe.
- Currently, Rule 412 only addresses information in subsequently filed Exchange Act reports incorporated by reference that modifies or supersedes information in previously filed Exchange Act reports. Because the proposed revisions to Rule 412 and proposed Rule 430B would permit issuers to use either Exchange Act reports incorporated by reference or prospectus supplements deemed part of registration statements to update information in the registration statement and prospectus, would it be clear to investors what information in the prospectus either directly (other than for Section 10(a)(3) updates to registration statements) or through filed Exchange Act reports or prospectus supplements was being updated?
- Do the proposed revisions to Rule 412 provide issuers with greater ability than they have today to update information in the filed registration statement and prospectus in a timely manner?

2. Relationship of Interpretation and Proposed Rule to Section 11 Liability

Under our interpretations, information contained in a prospectus or prospectus supplement that is filed after the time of the contract of sale will be considered to 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.[253] The date and time that the information is deemed part of the registration statement preserves an investor's rights under Section 11, but does not affect any rights assessed at the 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 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,[254] would not, under our interpretation, be taken into account under Section 12(a)(2) or Section 17(a)(2), unless the information was conveyed to an investor at or prior to the time of the contract of sale.[255] Similarly, an investor's rights under Section 11 would not be affected by information conveyed to an investor at or prior to the time of the contract of sale that is not in or deemed part of the registration statement at the time of the effectiveness of the registration statement for the securities sold to the investor.

[253] Whether the time of sale occurs on the same date as the effective date of a registration statement would depend on the type of registered offering the issuer is undertaking. For example, for offerings not eligible to be registered on a delayed basis under Rule 415, the prospectus in the registration statement must contain all required information, other than that permitted to be omitted pursuant to Rule 430A. For these non-shelf offerings, the effective date of the registration statement would be on or before the sale date, but the registration statement at the effective date would be deemed, as today, to contain information that was not actually contained in the prospectus or registration statement at the date of effectiveness, but is included in the filed final prospectus under Rule 430A. For shelf offerings, based on our proposed amendment regarding the treatment of prospectus supplements, the effective date of the registration statement for liability purposes would be the earlier of the date of first use of certain prospectus supplements or the time of the contract of sale. See discussion regarding proposed Rule 430B in Section V.B.1. below under ''Proposed Rule 430B.''

[254] Individual offerings under a shelf registration statement are sometimes referred to as a ''takedown off the shelf''.

[255] An investor could also pursue an action under Section 12(a)(2) based on the final prospectus.

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.[256] As a result, there is a possibility that issuers may not be held liable under Section 12(a)(2) for information contained in the issuer's prospectus included in its registration statement. Therefore, as part of our proposals regarding Section 12(a)(2), we are proposing a rule providing that an issuer in a primary offering of securities, regardless of the form of the underwriting arrangement, be considered to offer or sell the securities to the purchaser, and therefore be a seller for purposes of Section 12(a)(2) as to any communications made by or on behalf of the issuer.[257] Proposed Rule 159A provides that any of the following communications would be made by or on behalf of an issuer:

- An issuer's registration statement relating to the offering and any preliminary prospectus or prospectus supplement relating to the offering filed pursuant to Securities Act Rule 424 or Rule 497;
- Any free writing prospectus prepared by or on behalf of the issuer and, in the case of an issuer that is an open-end management investment company, any profile provided pursuant to Securities Act Rule 498;
- Information about the issuer or its securities provided by or on behalf of the issuer and included in any other free writing prospectus, or, in the case of an issuer that is a registered investment company or business development company, in any advertisements pursuant to Securities Act Rule 482; and
- Any other communication made by or on behalf of the issuer.

A communication by an underwriter or dealer participating in an offering would not be on behalf of the issuer solely by virtue of that participation. However, depending on the facts and circumstances, a communication by an underwriter or dealer could be a communication on behalf of an issuer to the extent it contained issuer information. 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).

[256] 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).

[257] We are not proposing to address the status of the issuer as a seller in a registered offering of transactions by selling security holders only.

Request for Comment

- Should issuers always be considered sellers with regard to issuer information, regardless of who is communicating the information?
- Should we condition issuer liability for issuer information contained in a free writing prospectus or other communication on the issuer giving the information to the other party for use? On whether the issuer gave the user of the free writing prospectus permission to include the issuer information or issuer free writing prospectus?
- Should there be any particular level of issuer involvement in the communication in order for the issuer to be considered a seller of the securities for purposes of Section 12(a)(2)?
- Should the proposed rule extend to entirely secondary offerings?
- Should proposed Rule 159A apply to investment companies, and if so, to which types (*e.g.*, open-end management investment companies, closed-end management investment companies, unit investment trusts, business development companies)?
- Are the communications covered by proposed Rule 159A with respect to investment company issuers (*e.g.*, profiles provided pursuant to Rule 498, issuer information included in advertisements pursuant to Rule 482) appropriate?

V. Securities Act Registration Proposals

A. Overview of Proposals

As discussed above, enhanced requirements for reporting under the Exchange Act for public issuers and the shifting of the Division of Corporation Finance's resources toward reviewing Exchange Act reports are intended to improve the quality and currency of disclosure under the Exchange Act. Together with technological advances, these developments provide the basis for our proposals to modernize many procedural aspects of securities offerings registered under the Securities Act.

Our proposals cover the registration procedures for seasoned and unseasoned issuers, and seek to streamline the registration process for most types of reporting issuers. These proposals include:

- A more flexible automatic registration process for well-known seasoned issuers;
- Modifications that would clarify and expand how and when information could be included in registration statements;
- A clarification of the Securities Act liability treatment of information provided in prospectus supplements and Exchange Act reports incorporated by reference;
- Modification of the timing of effectiveness of shelf registration statements applicable to issuers to coordinate the timing of effectiveness with the timing of offerings and, therefore, more closely replicate the statutory liability framework intended under the Securities Act; and
- Proposals related to non-shelf offerings of securities.

B. Procedural Proposals

1. Procedural Changes Regarding Shelf Offerings

a. Overview

We are proposing changes to the operation of the shelf registration system under the Securities Act. These proposals involve:

- Clarification and codification of 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;
- The treatment of prospectus supplements; and
- liberalization of requirements under Securities Act Rule 415, including:
  - Elimination of the two year limitation for registered securities for a delayed offering;
  - Elimination of the ''at-the-market'' offering restrictions;
  - Elimination of the prohibition against immediate takedowns off delayed shelf registration statements; and
  - Conforming changes to Rule 424 regarding the filing of prospectus supplements.

b. Information in a Prospectus

i. Mechanics

(A) Proposed Rule 430B

Rule 415 provides for continuous or delayed offerings and is, therefore, the foundation for shelf-registration.[258] Primary offerings on a delayed basis may be registered by 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 (often referred to as ''secondary offerings''). 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.[259]

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.[260] This is generally the case, for example, for offerings relating to most exercise or conversion transactions, for offerings involving employee benefit plans, offerings involving dividend reinvestment plans,

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[258] Securities Act Rule 415(a)(i) [17 CFR 230.415(a)(i)] currently reads as follows:

(a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, Provided, That:

(1) The registration statement pertains only to:

(i) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary;

(ii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant;

(iii) Securities which are to be issued upon the exercise of outstanding options, warrants or rights;

(iv) Securities which are to be issued upon conversion of other outstanding securities;

(v) Securities which are pledged as collateral;

(vi) Securities which are registered on Form F–6 (§ 239.36 of this chapter);

(vii) Mortgage related securities, including such securities as mortgage backed debt and mortgage participation or pass through certificates;

(viii) Securities which are to be issued in connection with business combination transactions;

(ix) Securities the offering of which will be commenced promptly, will be made on a continuous basis and may continue for a period in excess of 30 days from the date of initial effectiveness;

(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 a continuous or delayed basis by or on behalf of the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary; or

(xi) Shares of common stock which are to be offered and sold on a delayed or continuous basis by or on behalf of a registered closed-end management investment company or business development company that makes periodic repurchase offers pursuant to § 270.23c–3 of this chapter.

[259] See Securities Act Rule 415(a)(1)(ix) [17 CFR 230.415(a)(1)(ix)].

[260] 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 issuer is not registered on Form S–3 or Form F–3, updating information regarding the issuer cannot be included in future periodic reports filed under the Exchange Act and incorporated by reference, and therefore must be included in the prospectus 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.

and many continuous offerings by selling security holders.

However, other offerings, principally delayed and continuous offerings where the terms of securities offered and sold in different takedowns vary, as for example in underwritten offerings, and some offerings by selling security holders, such as underwritten offerings where terms also vary in different offerings, require that the prospectus included in the related registration statement at the time of effectiveness, usually referred to as a ''base prospectus,'' be supplemented to reflect the final terms of the security and offering for each particular offering of securities, as well as certain other updating information where necessary or appropriate. In addition, in all types of continuous or delayed offerings employing shelf registration under Rule 415, there may be circumstances where a prospectus will be supplemented with additional information other than at the time of a takedown.

Each of these types of forms of prospectuses and prospectus supplements including omitted, updated, or supplemented information is filed with us under Rule 424, which provides a framework for prospectus filing and filing deadlines. There currently is, however, no rule that specifies the relationship between forms of base prospectuses and prospectus supplements and the information that may be omitted from or included in one or the other. We are proposing two new rules, Rules 430B and 430C, 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. We are also proposing conforming changes to Rule 424.

We propose to codify, in a single rule, the prospectus requirement for shelf registration statements for registered primary securities offerings, other than business combination transactions and exchange offers. Proposed Rule 430B would be a shelf offering corollary to existing Rule 430A, in that it would describe the type of information that primary shelf eligible and automatic shelf issuers may omit from a base prospectus in delayed offerings and include instead in a prospectus supplement, Exchange Act report incorporated by reference, or a post-effective amendment.[261] Rule 430B is intended to be largely consistent with current requirements and practice for shelf registration statements for delayed offerings on Forms S–3 and F–3.[262] Under proposed Rule 430B, a base prospectus in a shelf registration statement could continue to omit information that is unknown or not reasonably available to the registrant pursuant to Rule 409.[263]

Rule 430B would provide that a base prospectus that, as today, omitted information as provided in the Rule would be a permitted prospectus.[264] Thus, after a registration statement is filed, offering participants could use a base prospectus that omitted information in accordance with the Rule. In addition, issuers could communicate using Rule 134 notices, and issuers and other offering participants could use free writing prospectuses under proposed Rules 164 and 433.[265]

(B) Means for Providing Information

As today, a base prospectus that omits information would not be considered a Securities Act Section 10(a) final prospectus.[266] To satisfy the requirements of Securities Act Section 10(a), as is the case with shelf registration statements today, an issuer would have to include the information omitted from the base prospectus in a prospectus supplement, or, where permitted as described below, through its Exchange Act filings that were incorporated by reference into the registration statement and prospectus, and identified on the cover page of a prospectus supplement. Currently, information included in a base prospectus or in an Exchange Act periodic report that is incorporated into a base prospectus is included in the registration statement. Proposed Rule 430B would make clear that prospectus supplements and information in them also would be deemed to be part of and included in the registration statement.[267]

Our proposals would provide shelf issuers with primary and automatic shelf registration statements the ability to add to a prospectus more additional or omitted information than is currently the case by means other than a post-effective amendment to the registration statement.[268] We are proposing to amend 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 Exchange Act reports. Such information could also be contained in the prospectus or a prospectus supplement. For example, material changes in the plan of distribution, which currently are required to be included in post-effective amendments, could be amended under our proposal by incorporated Exchange Act reports or prospectus supplements. Under our proposals, prospectus supplements would be deemed to be part of and included in the registration statement.[269]

Request for Comment

- Would the provisions of proposed Rule 430B provide shelf issuers more certainty regarding the provision of information in delayed offerings off of shelf registration statements?
- Does proposed Rule 430B need to contain different or additional provisions in order to codify current practice in delayed shelf registered offerings? If so, what current practice is not addressed, what different or additional provisions should be considered, and what is the statutory or regulatory basis for the current practice that is not addressed in proposed Rule 430B?
- Should shelf issuers, other than well-known seasoned issuers, be

[261] Our proposals regarding permissible omissions from a base prospectus in proposed Rule 430B apply to delayed offerings under Rule 415(a)(1)(x) made by issuers eligible to use Form S–3 or Form F–3 to register a primary offering of securities in reliance on General Instructions I.B.1 or I.B.2 of Form S–3 or Form F–3. Rule 430B as proposed would also apply to offerings of mortgage-backed securities under Rule 415(a)(1)(vii). Issuers could not rely on proposed Rule 430B for offerings made in reliance on other provisions of Rule 415(a). For example, issuers not otherwise eligible to use Form S–3 or Form F–3 for primary offerings, 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, do not need to rely on this rule and would not be eligible do so. The information permitted by proposed Rule 430B to be omitted would not be relevant to these types of conversion or exercise transactions.

[262] While we intend proposed Rule 430B to be largely consistent with current requirements and practice for shelf registration statements, it also would significantly liberalize requirements for automatic shelf registration statements, as discussed below. Those changes, which are discussed in Section V.B.2 below under ''Automatic Shelf Registration for Well-Known Seasoned Issuers,'' would permit issuers to omit information regarding whether the offering is a primary offering or an offering on behalf of persons other than the issuer, the plan of distribution for the securities, and the identification of other registrants unless known.

[263] See proposed Rule 430B and Rule 409 [17 CFR 230.409].

[264] The proposal codifies that such a prospectus would satisfy the requirements of Section 10 for purposes of Section 5(b)(1).

[265] See proposed Rules 164 and 433(a)(1)(ii).

[266] See Securities Act Section 5(b)(2).

[267] In the 1998 proposals, we expressed the position that information contained in a prospectus supplement is subject to liability under Section 11. Today's proposals would codify that position.

[268] Issuers would still have the flexibility to file post-effective amendments to include the information.

[269] The proposed amendments would explicitly permit information required in the prospectus pursuant to Item 3 through Item 11 of Form S–3 and Form F–3 to be included in this manner.

allowed to amend their plans of distribution through incorporated Exchange Act reports or prospectus supplements, rather than only through post-effective amendments?

- Should Rule 430B apply to additional categories of offerings permitted under Rule 415(a)(1)?
- Should paragraph (vii) of Rule 415(a)(1) be eliminated, especially in the event that we adopt our proposed rules for asset-backed securities?
- Securities Act Rule 424 includes references to filing multiple copies. Should those references be revised to reflect electronic filing on EDGAR?

(C) Identification of Selling Security Holders Following Effectiveness

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 known to the issuer. 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 proposing to allow seasoned 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 [270] to identify selling security holders after effectiveness.

The proposals would provide that the identities of the selling security holders, and all information about them, as required by Item 507 of Regulation S–K,[271] could be added to the registration statement covering the resale of their securities after effectiveness by either an amendment to that registration statement or a prospectus supplement which, under our proposals, would be part of the registration statement for which for liability purposes there would be a new effective date tied to the date of the transactions covered by the prospectus supplement. In either case, as a result of our proposals today, the information would be part of and included in the prospectus in the registration statement. This ability to identify security holders after effectiveness would be available under the proposals only if:

- The resale registration statement identified the specific private transaction or transactions pursuant to which the securities were sold; and
- The private transaction was completed and the securities that were the subject of the registration statement were issued in the private transaction and outstanding prior to initial filing of the resale registration statement.

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 the proposed changes is to provide a more convenient method to identify selling security holders in registration statements, rather than to change the existing responsibilities and liabilities of issuers and these selling security holders under the federal securities laws.

The proposals would require the registration statement to specify the particular private transaction in which the securities covered by the registration statement, on behalf of the to-be-named selling security holders, were acquired. The securities covered by the registration statement would have to be issued and outstanding and the private offering in which the securities were sold completed under Securities Act Rule 152 [272] before the resale registration statement could be filed. Our proposed changes could not be used to offer or sell securities in the private offering or as a way to circumvent the provisions of Rule 152.

An issuer registering the resale of securities sold in a private offering, in which the securities were not yet issued in the private offering, although the investors were contractually bound to acquire the securities, would not be able to rely on this provision to identify selling security holders who would be acquiring the securities directly from the issuer. The issuer could still register the resale of these securities, but must identify the selling security holders in the registration statement prior to effectiveness. In this case, the issuer would know the identities of the selling security holders who would acquire the securities from the issuer and would therefore be required to identify them in the resale registration statement prior to filing.[273]

We would continue to limit the availability of resale registration statements for transactions that, although in technical compliance with the federal securities laws, are part of a plan or scheme to evade the registration requirements of the Securities Act.[274]

Request for Comment

- Will the conditions allowing the inclusion of the selling security holder information after the registration statement is effective enable issuers to satisfy their contractual obligations to the selling security holders?
- Are there other situations in which selling security holders should be identified by prospectus supplement rather than by post-effective amendment?
- Should the ability to identify selling security holders by prospectus supplement be limited to seasoned issuers? If so, why?
- Should the proposal cover securities that are issuable upon conversion of outstanding securities? If yes, should there be any restrictions on the types of convertible securities that may be outstanding or the conversion terms of the outstanding convertible securities? For example, should the names of security holders holding convertible securities with fixed conversion terms be permitted to be included by prospectus supplement? Should the names of security holders holding convertible securities with variable conversion terms be permitted to be included by prospectus supplement? If yes, explain why with specificity.

ii. Information Deemed Part of Registration Statement

We are proposing provisions in Rule 430B that will make clear that information contained in a prospectus supplement, whether filed in connection with a takedown or otherwise, will be deemed part of the registration statement containing the base prospectus to which the prospectus supplement relates. We also are proposing a new Rule 430C that would

[270] 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 aggregate 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. In addition, blank check companies, shell companies, and penny stock issuers would not be eligible to rely on this proposed rule.

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.

[271] Item 507 of Regulation S–K [17 CFR 229.507].

[272] 17 CFR 230.152.

[273] See proposed Rule 430B. The proposals regarding automatic shelf registration statements would provide eligible well-known seasoned issuers with additional flexibility in this regard. See the discussion in Section V.B.2 below under ''Information that May be Omitted From the Base Prospectus.''

[274] See proposed Rule 430B.

have similar provisions regarding the treatment of prospectus supplements that would apply to offerings made in reliance on Rule 415(a)(1)(i) and (ix).[275] As a result of the proposed rules, prospectus supplements would, in all cases, be considered 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

Proposed Rule 430B and proposed Rule 430C would deem information contained in prospectus supplements to be included in the registration statement as follows:

- For a prospectus supplement filed other than in connection with a takedown (pursuant to Rule 424(b)(3) or Rule 497(c) or (e)) under proposed Rule 430B and Rule 430C, as applicable, all information contained in that prospectus supplement would be deemed part of the registration statement as of the date the prospectus supplement is first used;[276] and
- For a prospectus supplement filed in connection with a takedown (pursuant to Rule 424(b)(2), (b)(5), (b)(7) or proposed Rule 424(b)(8)) under proposed Rule 430B, all information in that prospectus supplement would be deemed part of 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.[277]

We have chosen the particular triggering dates for prospectus supplements to be deemed part of registration statements for a number of reasons. First, 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 the registration statement because that is the date on which the prospectus supplement updates the information in the registration statement.[278] Second, a prospectus supplement filed in connection with a takedown would be part of the registration statement the earlier of when it is first used or, to provide that the date for assessing Section 11 liability for both issuers and underwriters and generally all other persons having liability under Section 11, would be the same as the relevant time of sale, as discussed below.[279]

Proposed Rule 430B also would establish a new effective date for a shelf registration statement for liability purposes for a takedown or takedowns.[280] That new effective date would be the date a prospectus supplement filed in connection with the takedown or takedowns was deemed part of the relevant registration statement. The new effective date would not, however, be considered the filing of a new registration statement for purposes of Form eligibility.[281] Such determination would remain, as today, to be made at the time of the Section 10(a)(3) update to the registration statement. As proposed, the new effective date would be for liability purposes only, would not, by itself, require the filing of additional consents of experts, and would not constitute an updating of the registration statement and prospectus for purposes of Securities Act Section 10(a)(3).[282] For example, a prospectus supplement filed in connection with one or more takedowns of securities that did not include other disclosure for which the consent of an expert would be required pursuant to Securities Act Section 7 and Securities Act Rule 436[283] would not require consents to be filed or be considered the filing of a new registration statement.

The triggering of a new effective date for a takedown would not, under our proposals, affect the information that was in the registration statement at the time of any prior sale. We are revising Securities Act Rule 412 to make clear that information contained in a prospectus supplement deemed part of, or in an Exchange Act report that is incorporated by reference into, a registration statement or prospectus as of a new effective date for a takedown of securities would not modify or supersede any information that was contained in that registration statement or the prospectus for purposes of an earlier effective date with respect to a prior takedown of securities off that registration statement. Thus, the rights of an investor in a prior sale (with a previous effective date) would be unaffected by subsequently filed prospectus supplements or Exchange Act reports.

Including information contained in prospectus supplements in registration statements and having prospectus supplements filed in connection with takedowns off shelf registration statements trigger new effective dates would provide and preserve important investor protections under the Securities Act. Under these provisions final prospectuses, including prospectus supplements, used in shelf offerings would in their entirety be part of the registration statement, as we believe was contemplated by and within the intent of the Securities Act. These provisions also would reconcile the effective date for shelf offerings with a comparable date for non-shelf offerings, as we believe was also within the intent of the Securities Act. We believe the proposals also would eliminate the unwarranted, disparate treatment of underwriters and issuers and others subject to liability under Section 11.[284] Today, new effective dates of shelf registration statements occur annually at the time of the Section 10(a)(3) updates, when takedowns occur periodically

[275] Proposed Rule 430C, as discussed below, addresses only prospectus supplements filed pursuant to Securities Act Rule 424(b)(3), and the filing of those prospectus supplements would not trigger new effective dates of the registration statement.

[276] We have already 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].

[277] These new provisions would determine when a prospectus supplement is deemed part of the registration statement for Securities Act Section 11 purposes. They would not affect the determination of when information was conveyed to a purchaser for Section 12(a)(2) liability purposes.

[278] See proposed amendments to Securities Act Rule 412(a) [17 CFR 230.412(a)].

[279] Our proposals also address the circumstance in which facts and information may change between the date the prospectus supplement is deemed part of the registration statement and the time of the contract of sale (if later) of securities to a purchaser. In that case, an issuer may have liability to a purchaser if, as of the first contract of sale of the securities, there were material misstatements or materials omissions such that the registration statement was misleading.

[280] We are also proposing to amend Rule 158 to include conforming changes to the effective date for purposes of Securities Act Section 11(a).

[281] See Securities Act Rule 144 and Rule 401 [17 CFR 230.144 and 230.401].

[282] See the discussion in Section V.B.1. below under ''Issuer Undertakings.''

[283] Securities Act Section 7 [15 U.S.C. 77g] and Securities Act Rule 436 [17 CFR 230.436].

[284] Currently, there can be a mismatch among offering participants in the time that liability is assessed. For example, in an offering from a shelf registration statement, an issuer could have its liability assessed as of the date of the registration statement's original effectiveness 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. Thus, for example, underwriters in takedowns occurring after initial effectiveness 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 the Section 10(a)(3) update while issuers would not. We believe that the Securities Act contemplates that as a general matter, the date of effectiveness of a registration statement for an offering and the date on which an underwriter becomes an underwriter would be close in time and this proposed change would effect that.

throughout the year. Our proposals generally would not change the date at which disclosure is evaluated under Section 11 for underwriters but generally would move the effective date for the issuer and others subject to liability under Section 11 to the same date, or approximately the same date, as for underwriters for takedowns off shelf registration statements.

Request for Comment

- Would prospectus supplements be filed any sooner than they are today as a result of proposals that would deem the prospectus supplement part of the registration statement and trigger new effective dates if the prospectus supplement relates to a takedown off a shelf registration statement? If so, how?
- Would the ability to include information in an Exchange Act report that is otherwise required to be contained in a prospectus enable issuers to file the information reflecting the takedown prior to the end of the second business day after the takedown?
- Would investors be able to locate the information that was included in the prospectus through incorporation by reference of an Exchange Act report through the proposed cover page disclosure?
- In shelf takedowns, would investors be able to identify the effective dates for the securities sold in their particular takedown?
- In light of the new effective date for liability purposes that would be imposed by proposed Rule 430B, will there be questions regarding the necessity of providing an auditor's consent or the letter regarding unaudited financial information (see Item 601(b)(15) of Regulation S–K) for interim period takedowns for prospectus supplements that did not contain disclosure for which a consent was required? If so, what would be the appropriate means to address this possible situation?
- Would a new effective date for each takedown for liability purposes have any effect on liability for incorporated Exchange Act reports that have not been modified or superseded?
- Should proposed Rule 430C apply to prospectus supplements filed by closed-end management investment companies under Rule 497?

iv. Proposed Amendments to Rule 415

(A) Elimination of Limitation on Amount of Securities Registered

For offerings other than business combination transactions and continuous offerings, the proposals would eliminate the current provision in Securities Act Rule 415 that limits the amount of securities registered to an amount that are intended to be offered or sold within two years from the registration statement effective date.[285] The two-year requirement was designed to ensure that the issuer had a *bona fide* intention to offer and sell securities in the proximate future.[286] We are proposing to eliminate this requirement for registration statements for capital raising transactions, as we do not believe that imposing it on shelf issuers is necessary to permit shelf registration or provides any significant investor protection in view of how shelf registered offerings are effected today. We are proposing, however, that shelf registration statements could only be used for three years after the initial effective date of the registration statement.[287] Under this proposal, new shelf registration statements would have to be filed every three years, with unsold securities and unused fees carried forward to the new registration statement.[288] Continuous offerings begun prior to the end of the three years could continue on the old registration statement until the effective date of the new registration statement, at which point the continuous offerings could continue on 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 would benefit from a periodic updating and consolidation requirement.[289]

Request for Comment

- Should we keep the two-year intention requirement for shelf registration issuers? If not, should we require shelf registration issuers to file new registration statements every three years? Should the period be longer, such as five years?

[285] See proposed amendments to Securities Act Rule 415(a)(2).

[286] 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].

[287] Our proposal would not limit the amount that could be registered.

[288] For fee carry-forward provisions, see Securities Act Rule 457(p) [17 CFR 230.457(p)].

[289] See, for example, our proposals to revise Securities Act Rule 412 to permit information in registration statements and prospectuses to be modified or superseded by subsequently filed Exchange Act reports and prospectus supplements and our proposals to revise Forms S–3 and F–3 to permit most information to be included in the prospectus through incorporation by reference.

(B) Immediate Takedowns From a Shelf Registration Statement Filed Under Rule 415(a)(1)(x)

We are proposing to amend Securities Act Rule 415 to allow primary offerings on Form S–3 or Form F–3 to occur promptly after effectiveness of a shelf registration statement.[290] With respect to immediate offerings from an effective registration statement, our rules currently permit omission of information from the prospectus at the time of effectiveness only in reliance on Securities Act Rule 430A.[291] Our proposed changes affecting the treatment of prospectus supplements would provide sufficient protection to investors to allow, in an immediate offering, omission of information under Rule 415 and proposed Rule 430B. To provide an alternative to issuers, Rule 430A would continue to be available for immediate takedowns.[292]

Request for Comment

- Should we permit immediate takedowns off shelf registration statements without requiring reliance on Rule 430A? If not, why not?

(C) Eliminating ''At-the-Market'' Offering Restrictions

We are proposing to eliminate the restrictions on primary ''at-the-market'' offerings of equity securities currently set forth in Rule 415(a)(4),[293] initially included to address concerns about the integrity of trading markets, [294] because they no longer provide protection to markets or investors. The market today has greater information about issuers than it did at the adoption of the ''at the market'' limitations, due to enhanced Exchange Act reporting. Further, trading markets for issuers' 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 issuers to access capital in the markets. Once eliminated, an issuer eligible to conduct an offering pursuant to Rule 415(a)(1)(x) could conduct an ''at-the-market'' offering of equity securities without requiring identification of an

[290] See proposed amendments to Securities Act Rule 415(a)(1)(x).

[291] See *Prospectus Delivery; Securities Transactions Settlement,* Release No. 33–7168 (May 11, 1995) [60 FR 26604] at Section II.A.5.

[292] We also propose to amend Securities Act Rule 430A [17 CFR 230.430A] to enable the rule to be relied on by issuers using automatic shelf registration statements that go effective automatically.

[293] 17 CFR 230.415(a)(4).

[294] See *Adoption of Integrated Disclosure System,* Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380] at Section IV.B.2.d.

underwriter in its registration statement [295] and without a volume limitation.

Request for Comment

- Would the continuous offering provisions of Rule 415(a)(1)(ix), which require that an issuer must be ready and willing to sell those securities at all times, provide enough protection in the case of ongoing at-the-market offerings, or is there a concern that unseasoned and non-reporting issuers would use these provisions to conduct delayed offerings for which they were not eligible? If so, should the requirements contained in current Rule 415(a)(4) regarding the amount of securities to be offered apply to those offerings?
- Are there other constraints or conditions we should impose on the types of offerings that can be conducted at-the-market?
- Should we continue to impose Form S–3 or F–3 eligibility as a condition to conducting primary ''at-the-market'' offerings of equity securities? Should non-reporting and unseasoned issuers be permitted to do at-the-market offerings?

v. Rule 424 Amendments

In conjunction with our other procedural proposals, we are proposing certain companion modifications to Securities Act Rule 424. First, we are proposing to amend Instruction 2 to require that any prospectus supplement filed pursuant to Securities Act Rule 434 [296] (which permits the use of term sheets) must be filed at the same time as other prospectus supplements for shelf registration statement takedowns. We do not believe that prospectus supplements used by issuers relying on Rule 434 should be treated differently than any other type of offering. The liability for the information would be the same in all cases. We are also proposing to amend Rule 434 to make similar changes to the timing of a prospectus supplement filing.

Second, we are proposing to add a requirement that in cases of offerings where information regarding the terms of the securities or the plan of distribution or other information related to the offering (including changes or additions to information previously provided) is included in Exchange Act reports incorporated by reference, the prospectus supplement filed pursuant to Rule 424 would be required to disclose on its cover page the Exchange Act report or reports containing such information. This cover page disclosure would assist investors and the markets in locating this offering-related information.

Request for Comment

- Should we eliminate Rule 434, which we believe has only been very rarely used, in light of our other proposed procedural changes?
- Would the requirement to include cover page references to where omitted information about the securities or plan of distribution may be located be helpful to investors and to issuers?

vi. Issuer Undertakings

We are proposing conforming revisions to the issuer undertakings that are required in connection with a shelf registration statement. These revisions would reflect the issuer's agreement regarding the inclusion of information contained in prospectus supplements in registration statements and new effective dates of the registration statement.

(A) Treatment of Information in Prospectus Supplements

Item 512(a) of Regulation S–K currently requires an issuer to undertake to file a post-effective amendment to a 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.[297]

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 proposing to revise the Item 512(a) undertaking to clarify that for shelf registration statements filed on Forms S–3 and F–3 for primary offerings of securities in reliance on Rule 415(a)(1)(x),[298] all the disclosures required by this undertaking can be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report that an issuer files that is incorporated by reference into the registration statement, instead of only in periodic reports. This would permit an issuer to use an incorporated Form 8–K (or Form 6–K) to satisfy this undertaking. As discussed below, we also are proposing to revise the undertaking to allow automatic shelf issuers to include in this manner all other information that has been omitted from the base prospectus. 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 only 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, incorporated by reference into the registration statement.[299]

Request for Comment

- Should issuers be able to incorporate by reference Form 8–K or 6–K reports to satisfy their obligations to file post-effective amendments for certain items, in addition to those permitted today? If so, are there other disclosure and other registration statement requirements that should similarly be permitted to be satisfied through the incorporation by reference of current reports on Form 8–K or 6–K?
- Are the proposed undertakings necessary?
- Is there a method other than through undertakings to achieve our objectives effectively? What is it?
- Foreign private issuers are required to undertake to update their financial statements under Item 512(a)(4) of Regulation S–K. Should we modify this requirement? If so, how should we modify it to continue to require financial statements to be included in a registration statement within the required time?

[295] Underwriters could, as in the case with other information, be included in the relevant prospectus supplement.

[296] 17 CFR 230.434.

[297] In addition, Item 512(a)(4) contains a provision under which foreign private issuers are required to undertake to update 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 proposing to modify this requirement. Foreign private issuers would 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).

[298] For automatic shelf registration statements, this provision would not apply. See discussion in Section V.B.1 below under ''Mechanics for Including Information.''

[299] See Securities Act Rule 436 [17 CFR 230.436].

(B) Prospectus Supplements Deemed Part of a Registration Statement and New Effective Dates

To reflect the issuer's understanding of and agreement to the proposed changes described above, we are proposing to include a new undertaking in which the issuer would agree that information in filed prospectus supplements are deemed part of and included in registration statements and that new effective dates would occur.[300] The new undertaking would provide that the issuer would acknowledge that a prospectus supplement, other than one filed in connection with a takedown,[301] would be deemed part of and included in the relevant registration statement as of the date of its first use and that a prospectus supplement filed in connection with a takedown would be deemed part of and included in the relevant registration statement as of the earlier of the date it is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. The issuer would acknowledge that such date, in the case of a prospectus supplement filed in connection with a takedown, would also be deemed for purposes of liability to be a new effective date of the registration statement relating to the securities to which the prospectus supplement relates, and the offering of such securities at that time would be deemed to be the initial bona fide offering of the securities. The proposed undertaking would assure that the issuer would agree and other offering participants would be aware that they have liability for information that is included in or deemed part of the registration statement, that the liability of the issuer and other offering participants would be assessed as of the indicated date, and that the statute of limitations for Section 11 liability for securities sold in that takedown would commence at that time.

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 proposing a new undertaking in Form N–2 similar to that which we are proposing in Item 512(a) of Regulation S–K.[302] We are also proposing to amend 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.[303]

Request for Comment

- Are the proposed undertakings clear as to when issuers would be liable for prospectus supplements?
- Should we require an undertaking by closed-end management investment companies in Form N–2 acknowledging that a prospectus supplement would be deemed part of and included in the relevant registration statement as of the date of its first use, similar to the undertaking we are proposing to require in Regulation S–K? What modifications to the proposed undertaking would be appropriate for closed-end management investment companies?

c. Changes to Form S–3 and Form F–3

In addition to the proposed changes that would allow additional Form S–3 or Form F–3 disclosures to be included through prospectus supplements and Exchange Act reports, we are proposing to amend Form S–3 and Form F–3 to expand the categories of majority-owned subsidiaries that would be eligible to register their non-convertible securities or guarantees under proposed General Instruction I.C. of the respective forms. The permitted circumstances would be the same as those needed for majority-owned subsidiaries to be well-known seasoned issuers. The proposed revisions would expand the use of Form S–3 and Form F–3 to allow it to be used to register offerings of guarantees by majority-owned subsidiaries of non-convertible securities of other majority-owned subsidiaries or of the parent. We believe that this expansion is appropriate in that it recognizes the various types of subsidiary guarantees that may be employed in registered debt offerings of related entities. Whether information regarding the subsidiary would have to be included in the registration statement would depend, as today, on whether the subsidiary met the eligibility conditions of Rule 3–10 of Regulation S–X and Exchange Act Rule 12h–5.[304]

Request for Comment

- Should we expand Forms S–3 and F–3 eligibility only for wholly-owned subsidiary guarantors, instead of majority-owned subsidiaries?

2. Automatic Shelf Registration for Well-Known Seasoned Issuers

a. Overview

In addition to the updating of the shelf registration process described above, we are proposing 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 in this release as ''automatic shelf registration,'' would involve filings on Form S–3 or Form F–3. The automatic shelf registration proposals would be in addition to the proposed communications exemptions and would allow eligible well-known seasoned issuers substantially greater latitude in registering and marketing securities. The automatic shelf registration process would continue to enable the issuer, as with other shelf registrants, to takedown securities off the shelf registration statement from time to time.[305]

For well-known seasoned issuers, we believe that the proposed modifications would facilitate immediate market access and promote efficient capital formation, without at the same time diminishing investor protection. Most significantly, the proposals would 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 have proposed, would encourage these issuers to raise their necessary capital through the registration process.[306]

[300] See proposed Rules 430B and 430C.

[301] These supplements would be those filed pursuant to Securities Act Rule 424(b)(3).

[302] Proposed 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.

[303] See proposed Rule 415(a)(3).

[304] See Rule 3–10 of Regulation S–X [17 CFR 210.3–10] and Exchange Act Rule 12h–5 [17 CFR 240.12h–5].

[305] As with other delayed shelf registration statements, the issuer would only be considered to be in registration or offering its securities when it offers securities in a takedown off its registration statement. See *e.g.*, the 2000 Electronics Release at note 62.

[306] The flexibility permitted under the proposed automatic shelf registration process would benefit issuers and investors by facilitating different types of offers that issuers currently may elect not to conduct on a registered basis. In particular, this process would facilitate the registration under the Securities Act of rights offers conducted by eligible foreign private issuers. At present, foreign private issuers frequently do not extend rights offers to their U.S. security holders because the current registration process under the Securities Act does not accommodate the timing mechanics of rights offers, 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

Under our proposed automatic shelf registration process, eligible well-known seasoned issuers could register unspecified amounts of different specified types of securities on automatically 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 process would 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. They would also be able to freely accommodate both primary and secondary offerings using automatic shelf registration. Thus, these issuers would have 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.

Issuers using an automatic shelf registration statement would be permitted to pay filing fees in advance 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 proposals would 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 would 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, would permit well-known seasoned issuers with maximum flexibility to use a free writing prospectus to structure transactions.

b. Automatic Shelf Registration Mechanics

i. Eligibility

The automatic shelf registration statement could be used for all primary and secondary offerings of securities of eligible well-known seasoned issuers, other than those in connection with business combination transactions or exchange offers.[307] We believe that, in introducing automatic shelf registration, we should limit availability to only well-known seasoned issuers.[308]

As proposed, an issuer could file an automatic shelf registration statement if it met the eligibility criteria on the initial filing date and would reassess its eligibility at the time of each updated prospectus required by Section 10(a)(3).[309] If an issuer were no longer eligible to use an automatic shelf registration statement at the time of its Section 10(a)(3) update, it would have to either post-effectively amend its registration statement onto the form it was then eligible to use or file a new registration statement on such a form. Any offerings that were ongoing at that time, such as registered conversions of outstanding convertible securities, could continue on the automatic shelf registration statement until a post-effective amendment or new registration that was filed in a timely manner was declared effective.[310] For example, a well-known seasoned issuer that was initially eligible for automatic shelf registration, that lost eligibility at the time of Section 10(a)(3) update, but that retained its eligibility to file a shelf registration statement under Rule 415 on Form S–3, could file a post-effective amendment or a new registration statement on Form S–3 that designated an amount of securities to be registered and otherwise complied with requirements for seasoned issuers that are not well-known seasoned issuers.

In general, securities of majority-owned subsidiaries of well-known seasoned issuers could be included on the automatic shelf registration statement if the subsidiary satisfied the conditions for being considered a well-known seasoned issuer described above.[311] Under automatic shelf registration, as proposed, a registration statement could be amended by post-effective amendment to add an eligible subsidiary as an issuer.[312]

Request for Comment

- Should eligibility for automatic shelf registration be limited to well-known seasoned issuers? If not, provide empirical and other information explaining why it should be available to a broader class of issuers, including the extent to which such issuers are followed by analysts and investors in the market.

ii. Information in a Registration Statement

(A) Information That May Be Omitted From the Base Prospectus

Our proposals would allow automatic shelf issuers to omit more information from the base prospectus in an automatic shelf registration statement than is the case currently or than would be the case in a regular shelf offering registration statement. A base prospectus included in an automatic shelf registration statement could, as today, omit information pursuant to Securities Act Rule 409[313] that was unknown and not reasonably available and, as proposed, could omit the following additional information:

- Whether the offering is a primary or secondary offering;
- The names of any selling security holders; and
- Any plan of distribution for the offering securities.[314]

Omitting this additional information from the base prospectus would not affect the information that an investor would be provided in connection with a particular sale.[315]

(B) Mechanics for Including Information

We believe that our proposals to broaden the means by which issuers may include information in an automatic shelf registration statement would benefit both issuers and investors. Our proposals would provide issuers with automatic shelf registration statements the ability to add omitted information to a prospectus generally by means other than a post-effective amendment to the registration statement.[316] As we discuss above, we

effective so that sales in a rights offer can take place immediately after filing should encourage eligible foreign private issuers to extend rights offers to U.S. holders.

[307] As today, business combination transactions and exchange offers could not be registered on Form S–3 or Form F–3.

[308] Certain subsidiaries of well-known seasoned issuers would also be permitted to be included on the parent's automatic shelf registration statement.

[309] For shelf registration statements, the Section 10(a)(3) update usually occurs upon the filing of the issuer's Form 10–K or Form 20–F (or a post-effective amendment with similar updating of information) for the prior fiscal year.

[310] To be considered timely for this purpose, the post-effective amendment or new registration statement would have to be filed within the period established by Securities Act Section 10(a)(3), which is 120 days after the issuer's most recent fiscal year end.

[311] See discussion in Section II above under ''Well-Known Seasoned Issuers; Other Categories of Issuers''.

[312] See discussion below at note 319.

[313] 17 CFR 230.409.

[314] See proposed Rule 430B.

[315] In shelf registration statements today, base prospectuses generally do not contain detailed information about particular securities offering takedowns. That information is communicated orally or through a preliminary prospectus and reflected in the final prospectus filed pursuant to Rule 424. The automatic shelf would expand the categories of information that may be omitted. In addition, the right to omit information from a base prospectus does not affect the fact that under our interpretation and proposed Rule 159 whether there are material misstatements or material omissions is assessed on the basis of information conveyed at the time of sale.

[316] Issuers would still have the flexibility to file post-effective amendments to include the information.

are proposing to amend 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 Exchange Act reports or be contained in the prospectus or a prospectus supplement that would be deemed to be part of and included in the registration statement.[317] Examples of the types of information that could be added in this manner for automatic shelf registration statements would include the public offering price, 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 approach would be that an issuer desiring to add to the registration statement new types of securities[318] or new eligible issuers, including guarantors, and the securities they intend to issue must do so by post-effective amendment.[319] New issuers and their officers and directors would be required to be signatories to the post-effective amendment.[320]

(C) Registration of Securities to be Offered

An eligible issuer may register on an automatic shelf registration statement an unspecified amount of securities to be offered, without indicating whether the securities would be sold in primary offerings or secondary offerings on behalf of selling security holders. Well-known seasoned issuers that satisfy the definition based only on their aggregated registered debt issuances could register only non-convertible obligations under General Instruction I.B.2. of Form S–3 and Form F–3. The calculation of registration fee table in the initial registration statement also would not need to include a dollar amount or specific number of securities, but would specify each class of security registered. The issuer could specify the number or dollar amount of securities in a prospectus supplement for each offering.[321]

The base prospectus in the initial registration statement would identify and describe, to the extent the information was available at that time, the classes of securities registered. As under current practice with shelf registration, the descriptions would not need to contain detailed information as to particular security terms and conditions. In addition, we are proposing to expand 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.[322] Allowing registration without separately allocating the registered classes of securities would, we believe, provide greater flexibility to well-known seasoned issuers in conducting registered securities offerings.

We propose 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.[323] Under the proposals, a well-known seasoned issuer could 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 would file a post-effective amendment to register an unspecified amount of securities of the new class of security.[324] This requirement would make the registration statement cover each new class of securities to be offered. An issuer could provide the disclosure about the new class of securities of the issuer in the post-effective amendment to, in a prospectus supplement deemed part of and included in, or in an Exchange Act report that was incorporated by reference into the registration statement.[325]

(D) Pay-as-You-Go Registration Fees

We are proposing to permit 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

[317] The proposed amendments would permit any information required in the prospectus pursuant to Item 3 through Item 11 of Form S–3 and Form F–3 to be included in this manner.

In addition to the other proposed changes to Rule 424 that would apply to all issuers, we are proposing to revise Rule 424 to address specifically prospectus supplements filed by shelf issuers that contain only transaction specific information, such as term sheets that have been used as free writing prospectuses.

[318] See discussion in Section V.B.2 below under ''Registration of Securities to be Offered.''

[319] Adding the issuer by post-effective amendment, including necessary signatures and information and filings necessary for qualification under the Trust Indenture Act of 1939 where applicable, would ensure that the entity would 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 would be required in the amended registration statement, either in a prospectus that was part of the registration statement or through incorporation by reference, unless the subsidiary was exempt from reporting pursuant to Exchange Act Rule 12h–5. The post-effective amendment also would need to include necessary opinions and consents. All disclosure items with regard to that new issuer could be incorporated by reference from the new issuer's Exchange Act reports or registration statement, or be included in a prospectus supplement or a post-effective amendment. A new effective date for Section 11 liability purposes would also occur at the time of a takedown off the registration statement, which would include that information.

[320] 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''.

[321] See proposed 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 I.D.1.(b)(5) and Instructions to the Calculation of Registration Fee Table.

[322] See proposed General Instruction II.E. of Form S–3 and proposed General Instruction II.F. of Form 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. Issuers cannot currently offer and sell securities of selling security holders using an unallocated shelf registration statement.

[323] See proposed amendments to Securities Act Rule 413.

[324] If an issuer using automatic shelf registration determined 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 would need to qualify the indenture or guarantee under the Trust Indenture Act of 1939 [15 U.S.C. 77aaa–77bbbb]. 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 propose today, however, an issuer would be permitted to add securities to a shelf registration statement by means of a post-effective amendment. As such, unlike in the existing registration statement process, the effectiveness of an automatic shelf registration post-effective amendment that adds securities to a shelf registration statement would 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 proposed automatic shelf procedure, the Trust Indenture Act qualification requirement would be satisfied in the following manner: (1) For debt securities or guarantees included in the registration statement at original effectiveness, the trust indenture would be required to be included in the registration statement at the time that registration statement became effective; and (2) for debt securities or guarantees added to the registration statement through a post-effective amendment, the trust indenture would be required to be included in the registration statement at the time that post-effective amendment became effective.

[325] This disclosure would become part of the registration statement regardless of the method chosen to provide it.

that time. Under this proposal, the issuer would pay a small initial filing fee at the time of filing the initial registration statement.[326] The triggering event for a required fee payment under our proposals would be a takedown off a shelf registration statement. For each takedown, the issuer could file a prospectus supplement for the takedown that would include a calculation of registration fee table or could file a post-effective amendment including the same information. The issuer would pay the appropriate fee calculated in accordance with Securities Act Rule 457 at the time of the filing of the prospectus supplement. The proposals would require that the issuer file the prospectus supplement in accordance with the due date for the prospectus supplement under Rule 424(b)(2), (b)(5), (b)(7) or (b)(8). 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 could pay the appropriate fee and file such a prospectus supplement. Our proposals would amend Rule 424 to require an issuer using automatic shelf registration and the pay-as-you-go registration fee payment procedure to include on the cover page of the prospectus supplement a fee table calculating the registration fee for the current or future takedowns for which it is paying the required fee.

(E) Registration Under Securities Act Sections 5 and 6

Compliance with Securities Act Sections 5 and 6 would depend on 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. For purposes of Securities Act Section 5, any securities offered and sold off an effective automatic shelf registration statement would be deemed to satisfy the requirements of Securities Act Section 5(c) if the registration statement, or any amendment thereto, included that class of securities prior to the offer and sale. If the class of securities was included on the registration statement, the amendment, incorporated Exchange Act document or prospectus supplement reflecting the transaction and the fee table was filed on a timely basis, and the appropriate fee was timely paid at or before the time of filing, the securities sold in the takedown would be deemed to be registered for purposes of Securities Act Section 6. Thus, Securities Act Section 5(a) would be deemed satisfied if the automatic shelf registration statement included the class of securities sold and the filing fee was timely paid. If, however, the filing and fee payment were not made on a timely basis, the sale of the securities would not be considered registered for purposes of the Securities Act.

(F) Automatic Effectiveness

As proposed, all automatic shelf registration statements and post-effective amendments thereto would become effective automatically upon filing, without staff review.[327] In addition, we are proposing to amend Securities Act Rule 401(g) to provide that an automatic shelf registration statement would be deemed to be filed on the proper form unless we notified the issuer after filing of our objection to the use of such form. Therefore, if an issuer had not been notified by us, it could conduct offerings with certainty that it had registered the securities on the proper form. After we notified an issuer of our objection, the issuer could not proceed with subsequent offerings (those offerings not in progress), unless it amended the registration statement to the proper form, or otherwise resolved the issue with us.[328] In that case, even if we were to notify an issuer that it was ineligible to use an automatic shelf registration statement, securities sold prior to our notification would not have been sold in violation of Section 5. In the 1998 proposals, we proposed to eliminate the presumption that an effective Securities Act registration statement is on the appropriate form. Many commenters opposed that proposal due to concerns about liability for a Section 5 violation. We believe our proposals address those concerns and appropriately protect the integrity of the registration process.[329]

Automatic effectiveness of automatic shelf registration statement would not, we believe, raise 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 without previous staff review of each offering.[330] With automatic effectiveness of the automatic shelf registration statements, we would expect issuers to evaluate whether there are unresolved disclosure or accounting issues that the Commission staff has raised on the issuer's Exchange Act filings before filing the automatic shelf registration statement or at the time of its Section 10(a)(3) update to such registration statement. Our 1998 proposals would have disqualified an issuer from short-form registration if the issuer's Exchange Act reports were subject to unresolved comments issued by Commission staff. Many commenters opposed that disqualification.[331] We are not proposing a similar disqualification. However, because we believe it is important that issuers address unresolved comments, as we discuss below, we are proposing to require disclosure by accelerated filers, which include well-known seasoned issuers, of 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, for a lengthy period of time.[332]

Request for Comment

- Should we permit omission of additional information from the base

[326] The initial filing fee would be applied against the fees payable in connection with the first takedown off the registration statement.

Because an issuer also would have the ability to pay any filing fee in advance of a takedown, the proposals would provide flexibility in the timing of the fee payment if the issuer satisfied the conditions to the delayed payment. 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.

[327] See proposed Rule 462(e) and (f).

[328] For ongoing offerings, such as registered exercises of outstanding warrants or options, the issuer, if it is eligible for a primary offering on Form S–3 or Form F–3, once notified by us, would have to amend the 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, conversions could continue.

[329] See, *e.g.*, comment letters in File No. S7–30–98 from the ABA; ACIC; CSFB; Merck & Co, Inc.; SIA; and William J. Williams, Jr.

[330] The staff of the Division of Corporation Finance would continue to review prospectus supplements that involve novel and unique securities offerings that are submitted to them prior to the issuer undertaking the offering.

[331] See, *e.g.*, comment letter in File No. S7–30–98 from the Business Roundtable; Citigroup; Jack Coffee *et al.*; Fried Frank; Morgan Stanley; New York City Bar; PricewaterhouseCoopers LLP; SIA; Sullivan & Cromwell; and William J. Williams, Jr.

[332] See proposed amendments to Form 10–K and Form 20–F. We recently announced a new policy to publicly release staff comment letters and response letters relating to disclosure filings made after August 1, 2004 that are selected for review not less than 45 days after the staff has completed a filing review. See SEC Press Release 2004–89 (Jun. 24, 2004). See discussion in Section VII.B below under ''Disclosure of Unresolved Staff Comments.''

prospectus under automatic shelf registration? For example, should we permit omission of all information regarding the description of securities other than the identification of the classes of securities registered?

• Should we permit omission of less information in the base prospectus under automatic shelf registration? What additional information should we require?

• Should we make automatic effectiveness optional for automatic shelf registration statements? If so, why?

• If a well-known seasoned issuer did not want automatic effectiveness of its automatic shelf registration statement, should they still be able to use the automatic shelf registration statement process?

• Should we permit well-known seasoned issuers to elect to include a delaying amendment under Securities Act Section 8(a)? If so, in what circumstances?

• Should we condition automatic effectiveness on resolution of staff comments? Why or why not?

• In view of the recent changes affecting reporting issuers with respect to their Exchange Act reports, including among other things, accelerated filing deadlines for periodic reports for accelerated issuers, and issuer certifications of periodic reports and evaluation of disclosure controls and procedures and internal controls over financial reporting, as well as changes in the listing standards intended to improve corporate governance and enhance the role of the issuer's audit committee, should we consider whether to reevaluate the factors discussed in Securities Act Rule 176 [333] regarding what constitutes a reasonable investigation and reasonable grounds under Securities Act Section 11(c)? If so, please explain specifically what changes should be made and how each of those changes would work in the context of each type of registered securities offering.

(G) Duration

An automatic shelf registration statement would become effective automatically and would 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, proposing to require issuers to file new automatic shelf registration statements every three years that would, in effect, restate their then-current registration statement and amend it, as they deem appropriate. Under our proposals, issuers would be prohibited from issuing securities off an automatic shelf registration statement that is more than three years old. Our proposals provide, however, that, so long as eligibility for automatic shelf registration is maintained, the new registration statement would be effective immediately and would carry forward the securities registered and any fee paid on the old registration statement. As a result, an issuer's securities offerings under the registration statement would be uninterrupted.[334]

Request for Comment

• Should automatic shelf registration for well-known seasoned issuers be optional, as proposed, or mandatory? Would mandatory automatic shelf registration eliminate any market overhang effect? Would it create any uncertainty?

• Should we treat automatic shelf registration statements the same as non-automatic shelf registration statements and require that a new automatic shelf registration statement be filed every three years? If so, is three years appropriate or should we increase the requirement to five years or reduce it to two years?

• Is the pay-as-you-go filing fee procedure workable? Could it be made more workable? If so, how?

• What advantages or disadvantages would result from mandatory automatic registration in terms of the inability to undertake unregistered private offerings or other unregistered offerings?

• Should we provide by rule or interpretation guidance regarding the ability of issuers to undertake private offerings while they have automatic shelf registration statements on file?

• Should we adopt a less stringent presumption of proper form that would allow the Commission to object within some period of time after the initial filing (and automatic effectiveness) instead of on a prospective basis? What would be an appropriate period of time? 10 days? 15 days?

3. Unseasoned Issuers and Non-Reporting Issuers

a. Overview

We are proposing a number of procedural changes that would 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; [335] and

• Eliminating Form S–2 and Form F–2.

The provisions of proposed Rule 430C discussed above regarding prospectus supplements used in continuous offerings also would affect offerings by non-reporting issuers and reporting issuers that are not seasoned issuers.[336]

b. Proposed Amendments to Form S–1 and Form F–1—Expanded Use of Incorporation by Reference

i. Eligibility

As part of our initiatives to integrate further the Exchange Act and the Securities Act, we are proposing to amend 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 to incorporate by reference into its Form S–1 or Form F–1 information from its previously filed Exchange Act reports and documents.[337] Successor registrants could incorporate by reference if their predecessors were eligible.[338] The ability to incorporate by reference into a Form S–1 or Form F–1 would not be available to those issuers who are in the category of ''ineligible issuers.'' As we discuss above, ineligible issuers include:

• Reporting issuers who are not current in their Exchange Act reports;

• Issuers who are (or were, or their predecessors were, in the past three years) blank check issuers;

• Issuers who are (or were, or their predecessors were, in the past three years) shell companies;

• Issuers who are (or were, or their predecessors were, in the past three years) penny stock issuers;

• Issuers who have received a ''going concern'' opinion from their auditors for the most recent fiscal year;

• Issuers who have filed for bankruptcy or insolvency during the past three years;

[333] 17 CFR 230.176.

[334] We are proposing a similar three-year requirement for non-automatic shelf issuers. See discussion in Section V.B.1. above under ''Elimination of Limitation on Amount of Securities Registered.''

[335] See proposed amendments to Form S–3 and Form F–3.

[336] See discussion in Section V.B.1 above under ''Information Deemed Part of Registration Statement.''

[337] As with Form S–3, under the proposal, to be current, 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) [15 U.S.C. 78m, 78n, or 78o(d)] during the preceding 12 calendar months (or for such shorter period that the issuer was required to file such materials).

[338] This is the same as for Form S–2 today. The succession would either have to be primarily for the purpose of changing the state 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.

• Issuers who have been or are the subject of refusal or stop orders under the Securities Act; or

• Issuers who have been found to have violated the federal securities laws, have entered into a settlement with any government agency involving allegations of violations of federal securities laws, or have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the federal securities laws [339] during the past three years.[340]

In addition, the ability to incorporate by reference would be further conditioned on the issuer making its Exchange Act reports and other documents readily accessible on the issuer's web site. Today, all information must be included directly in the prospectus included in the registration statement. By conditioning the ability to incorporate by reference on the ready accessibility of an issuer's Exchange Act reports and documents on its web site, we are providing investors the ability to obtain the information from those reports and documents at the same time that they would have been able to obtain the information if it was set forth directly in the registration statement.

ii. Proposed Procedural Requirements

As proposed, the prospectus in the registration statement at effectiveness would identify all Exchange Act reports and documents, such as proxy and information statements, that are incorporated by reference. There would be no incorporation by reference of Exchange Act reports and documents not identified in and filed after the registration statement was effective—known as ''forward incorporation.'' Under the proposals, an issuer eligible to incorporate by reference its Exchange Act reports and other documents into its Securities Act registration statement would list the incorporated reports and documents, state that it would provide copies of any incorporated reports or documents on request, and indicate that the reports and documents are available from us through our EDGAR system or our public reference room. The Form S–1 or Form F–1 would have to include material changes in or updates to the information that is incorporated by reference from an Exchange Act report or document.

[339] The covered decrees or orders would be prohibitions on future violations of the federal securities laws, orders requiring issuers to cease and desist from violating the federal securities laws, and determinations of violations of the federal securities laws.

[340] See proposed amendments to Form S–1 and Form F–1.

Request for Comment

• Should we require as a condition to incorporation by reference that all Exchange Act reports within a 12-month period (or such shorter period that the issuer was required to file such materials) have been timely filed?

• Should there be other eligibility conditions? If so, what should they be?

• Should we have the same ineligibility conditions as we have for the use of a free writing prospectus? Should there be other ineligibility provisions for financially troubled issuers?

• Should there be ineligibility provisions for issuers that have disclosed a material weakness in their internal controls over financial reporting?

• Should we consider allowing forward incorporation by reference in Form S–1 and Form F–1? If so, what conditions should we impose on such use?

• Should we require that issuer's maintain their own web sites as a condition to incorporation by reference or should the issuer be able to provide a uniform resource locator (URL) to the particular location on another web site, such as the Commission's, where the issuer's Exchange Act reports would be located? How long should the issuer be required to include the information on its web site or provide the URL to where the reports are located?

c. Elimination of Form S–2 and Form F–2

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.[341] Expanding the types of issuers that may incorporate by reference through our proposed amendments to Form S–1 and Form F–1, without requiring delivery of the incorporated documents, would make Form S–2 and Form F–2 superfluous. We are, therefore, proposing to rescind Form S–2 and Form F–2.[342]

[341] According to data obtained from our internal Filing Activity Tracking System (''FACTS''), over the last three years, a total of 10 Form F–2s have been filed by 9 different issuers and a total of 253 Form S–2s have been filed by 153 different issuers.

Request for Comment

• Should we eliminate Forms S–2 and F–2? If not, why not? What types of reporting issuers would continue to use Form S–2 and Form F–2 if the proposed amendments to Form S–1 and Form F–1 regarding incorporation by reference are adopted?

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.[343] 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.[344] Otherwise, such a communication is a prospectus and may not be provided unless it meets the requirements of Securities Act Section 10(a). 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.[345] However, an investor's investment decision and the 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 occurring in the aftermarket, as a result of our rules, investors in securities of reporting issuers are not

[342] We are proposing to amend Forms S–4 and F–4 to delete the references to Forms S–2 and F–2.

[343] 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).

[344] 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.

[345] *See* Securities Act Rule 174(b) [17 CFR 230.174(b)].

delivered a final prospectus.[346] 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.[347]

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.[348] 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.[349]

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 proposing today, are aimed at providing more information to investors when they need it to make informed investment decisions. The increase in the flow of current information about a reporting issuer and the proposed ability of offering participants to use free writing prospectuses in connection with offerings would give offering participants a greater ability to provide information to investors about the securities before they make their investment decisions. 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.[350]

B. Prospectus Delivery Proposals

We are proposing changes to the prospectus delivery requirements. Our proposals 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.

We have attempted to address the goal of ensuring that investors have materially complete and accurate information at the time of their investment decision through other aspects of our proposals and believe it is also appropriate at this time to modify the prospectus delivery provisions. 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 could be satisfied through a means other than physical delivery. Because the contract of sale has already occurred, we also believe that delivery of a confirmation and the delivery of the final prospectus need not be linked.[351]

Many commenters and market participants have encouraged us to adopt an ''access equals delivery'' model for prospectus delivery.[352] Under 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 propose a prospectus delivery model for issuers and their intermediaries that relies on timely access to filed information and documents.[353] Under this model, issuers, brokers, or dealers can satisfy their final prospectus delivery obligations if a final prospectus is on file with the Commission within the required time.

Our proposals would:

- Eliminate the existing link between delivery of the final prospectus and the delivery of a confirmation of sale;
- Provide that the obligation to have a final prospectus precede or accompany a security for sale could be satisfied by filing the final prospectus with us within the required time;
- Permit written notices of allocations; and
- Permit the prospectus delivery obligations in dealer transactions during any prospectus delivery period and registered resale transactions in securities that are trading to be satisfied if the final prospectus has been filed with us or will be filed with us within the required time.

1. Access Equals Delivery

a. Proposals

We are proposing new Rule 172 [354] to implement our access equals delivery model.[355] Under the proposed rule, a final prospectus would 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 with us as part of the registration statement by the

[346] For non-reporting issuers who are listed, as of the offering date, on a national securities exchange or automated quotation system, we only require that prospectuses be delivered for 25 days after the offering date. *See* Securities Act Rule 174(d) [17 CFR 230.174(d)].

[347] 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,* section 2–b–3 (3d ed. 2001). *See also* Cohen, *Truth in Securities Revisited,* 79 Harv. L. Rev., note 15 at 1386 (1966) (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 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 proposed Rule 159 would also provide that liability under Section 12(a)(2) would be assessed based on the information conveyed at the time of the contract of sale, independent of the contents of the final prospectus filed after the time of sale.

[348] *See* Securities Act Rule 153 [17 CFR 230.153].

[349] Securities Act Rule 434 allows issuers and other offering participants to meet their prospectus delivery requirement by delivering a preliminary prospectus and a term sheet or abbreviated term sheet before or at the time of sale. The information contained in the preliminary prospectus, confirmation and term sheet or abbreviated term sheet must, in the aggregate, meet the informational requirements of Securities Act Section 10(a).

[350] Paper copies also remain available through our public reference room.

[351] Courts have consistently held that the date of a sale is the date when the investment decision is made, not the date that a confirmation is sent. See discussion at note 240 above.

[352] Commenters on prospectus delivery aspects of the 2000 Release indicated support for some sort of ''access equals delivery'' model. See comment letters in File No. S7–11–00 from ACCA; New York City Bar; SIA; and TBMA.

[353] 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; Steve Lohr, *Libraries Wired, and Reborn,* The N.Y. Times, Apr. 22, 2004 at G1.

[354] See proposed Rule 172.

[355] This proposed prospectus delivery model would be in addition to Rules 153 and 174, as we propose to amend those rules. See discussion in Section VI.B.3 under the heading ''Transactions Taking Place on an Exchange or Through a Registered Trading Facility—Rule 153'' and in Section VI.B.4 under the heading ''Aftermarket Prospectus Delivery—Rule 174''.

required Rule 424 prospectus filing date.[356]

Our proposed ''access equals delivery'' model would continue to satisfy the principal statutory purposes of prospectus delivery while recognizing the need to modernize the obligations in view of technological and market structure developments.[357]

b. Exceptions to the Proposals

We have excluded certain types of offerings from the proposed rule 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 would 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 combinations and exchange offers.[358]

Finally, registered investment companies and business development companies would not be able to rely on the proposed 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 apply to registered investment companies and business development companies in the context of a broader reconsideration of this framework.

c. Notification

In addition to providing access to information, prospectus delivery can serve the function of informing investors that they purchased securities in a registered transaction. To preserve this function, we are proposing Rule 173, which provides that for each transaction involving a sale by an issuer or underwriter to a purchaser or a sale in which the final prospectus delivery requirements apply, each underwriter, broker or dealer participating in a registered offering (or, if the sale was effected by the issuer and not an underwriter, broker or dealer, then the issuer) may send to each purchaser from it, not later than two business days after the completion of the sale, in lieu of the final prospectus, a notice providing that the sale was made pursuant to a registration statement or a final prospectus pursuant to a registration statement.

The proposed Rule also would provide that an investor could request a final prospectus. Under the proposed rule, a requested final prospectus would not have to be provided before settlement.[359]

We propose to exempt compliance with proposed Rule 173 from being a condition to the exemption from final prospectus delivery under proposed Rule 172 and non-compliance with proposed Rule 173 would not result in a violation of Securities Act Section 5. The same offerings excluded pursuant to proposed Rule 172, as discussed above, would also be excluded from this notification provision.[360]

Request for Comment

- Would the adoption of the proposed condition that the final prospectus be on file within the required filing time period of Rule 424 affect either the timing of filing of final prospectuses or the use of the proposed rule?
- Should we consider any cure provisions in the event that the final prospectus is not filed within the required timeframe? Or notice inadvertently not included?
- Would the cost of receiving a final prospectus shift to an investor so that the investor would not access the final prospectus?
- Should investors be able to request a copy of a prospectus in all cases?
- Should we restrict the operation of the provisions only to capital formation transactions?
- Should we limit the operation of the new proposed rule regarding prospectuses only to offerings made in reliance on Rules 430 and 430A, and proposed Rule 430B?
- Should the proposed rules be available for continuous and best efforts offerings, where the final prospectus may be used by the issuer and underwriters or placement agents to offer and sell the securities?
- Should we consider extending an access equals delivery concept to the obligation in Exchange Act Rule 15c2–8 to deliver preliminary prospectuses?
- Commenters and others have recommended that we amend our rules to provide that confirmations incorporate by reference the final prospectus.[361] Given our broad exemptive authority to address the issue more directly, we have not proposed such an approach. Would it be more appropriate to provide that confirmations incorporate by reference the final prospectus? If so, why?
- Should we condition the availability of proposed Rule 172 on an issuer either posting the final prospectus on its web site or providing a hyperlink directly to the final prospectus on EDGAR? Alternatively, should we require issuers to disclose whether or not their final prospectuses will be available on an issuer's web site, if it has one, after the final prospectus is filed on EDGAR?
- Is the notice requirement of proposed Rule 173 appropriate? What should be the timeframe for the notice proposed to be required under proposed Rule 173? Should it be longer than the two business days?
- Should we amend the rules regarding record making and keeping by registered brokers and dealers to clarify any obligation arising under this proposal if we adopt this proposal?

[356] Rule 424, which we propose to amend, governs when final prospectuses must be filed with the Commission.

A final prospectus only filed as provided in proposed Rule 172 would 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). Written offers prepared or paid for by non-reporting and unseasoned issuers after availability of the final prospectus could be used only if the final prospectus preceded or accompanied the written offer. For those issuers, filing under proposed Rule 172 would not satisfy this requirement to provide the final prospectus under proposed Rule 433.

[357] We are not proposing to amend Exchange Act Rule 15c2–8(d) [16 CFR 15c2–8(d)], which requires broker-dealers to take reasonable steps to comply promptly with written requests for copies of the final prospectus.

[358] Securities Act Rule 162 [17 CFR 230.162] 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)].

[359] The final prospectus also could, as today with regard to offerings relying on Securities Act Rule 434, 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.''

[360] In addition, as a result of the operation of proposed Rule 172 and Rule 173, if a current final prospectus has been filed with us, final prospectuses would no longer be required to be delivered in connection with market making transactions by dealers affiliated with issuers.

[361] Joseph McLaughlin, ''Ten Easy Pieces for the SEC,'' 18 Rev. Secs. & Comms. Reg. 200 (1985); ''Report of the Task Force on Disclosure Simplification,'' *www.sec.gov/news/studies/smpl.htm* (Mar. 5, 1996), ''Report of the Advisory Committee on the Capital Formation and Regulatory Process,'' *www.sec.gov/news/studies/capform.htm* (July 24, 1996); comment letters in File No. S7–30–98 from the ABA and Gerald S. Backman, *et.al.*

2. Confirmations and Notices of Allocations

We are proposing an exemption from Securities Act Section 5(b)(1) to allow written confirmations and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus.[362] The exemption would be conditioned on the registration statement being effective and the final prospectus meeting the requirements of Securities Act Section 10(a) being filed with us within the required timeframe. The exemption would permit:

- Confirmations containing information limited to that called for in Exchange Act Rule 10b–10 [363] and other information customarily included in confirmations; and
- Written communications from a broker-dealer to a customer or from an underwriter to participating dealers in the selling group notifying them of the basic terms of the transaction or their allocations of securities in a registered offering.

Under the proposed exemption, for example, broker-dealers could send e-mail notices after effectiveness to inform investors in a public offering of their allocations. Under the proposed rule, the notices of allocations could include the name of the securities, the amount allocated to the customer, the price of the securities, and the date or expected date of settlement and incidental information. Similar information would be required for notices to participating dealers. The exemption would not be available for the same offerings excluded from the access equals delivery proposal discussed above.

Request for Comment

- Should the notice of allocation include other information? If so, what type of information should be included in these communications?
- Should the notice of allocation to participating dealers be required to contain any particular information?
- Should any information be restricted or prohibited in the notices?
- Should we amend the record making and keeping rules by registered brokers and dealers if adopt this proposal?

3. Transactions Taking Place on an Exchange or Through a Registered Trading Facility—Rule 153

Securities Act Rule 153 [364] 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 delivery obligation of a final prospectus before or with a security will be satisfied if the issuer or underwriter delivers copies of the final prospectus to the exchange.[365] 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.[366] 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 is currently effectively no significance to the paper copies of prospectuses delivered to national securities exchanges.

We believe it is important, therefore, to amend Rule 153.[367] Under our proposed amendments, brokers or dealers effecting transactions on an exchange or through any trading facility registered with us [368] would be deemed to satisfy their prospectus delivery obligations under Securities Act Section 5(b)(2) with regard to transactions in securities that are already trading on the market or through the trading facility if:

- The final prospectus is on file with us or will be on file with us by the applicable prospectus filing date;
- Securities of the same class are trading on an exchange or through any trading facility registered with us; and
- The registration statement relating to the offering is effective and not the subject of a stop order issued under Securities Act Section 8.

These changes would eliminate the difficulties for prospectus delivery in registered resales and other sales into existing trading markets where securities of the same class already are trading. We would not require as part of the rule that physical copies of the prospectus are sent to the exchange or a market maker and the exchange and the market maker no longer would need to keep track of any prospectuses.[369]

Our 1998 proposals recommended eliminating Rule 153. Commenters on that proposal were concerned that elimination of the Rule would cause difficulty because of the inability to identify buyers in exchange and other market transactions. Because the 1998 proposals would have taken another approach to prospectus delivery than we are proposing, we believe that our proposed modifications to Rule 153 would address commenters' concerns.

Request for Comment

- Are our beliefs accurate regarding the current use of Rule 153 and the additional impracticalities caused by transactions through other markets or on other trading facilities?
- Is there a reason why continued delivery to an exchange or to a market maker would be helpful?
- Should there be a requirement for the issuer, broker or dealer to notify the exchange or trading facility that the final prospectus is or will be on file with us?
- Should our new proposals apply to all transactions effected through a national securities exchange or through a facility of a national securities association or an alternative trading system?
- Is there a reason to repeal Rule 153 in its entirety in view of proposed Rule 172?
- How are prospectus delivery obligations of selling security holders satisfied today?

[362] *See* proposed Rule 172.

[363] 17 CFR 240.10b–10.

[364] 17 CFR 230.153.

[365] Securities Act Rule 153 is an interpretive rule defining the phrase ''preceded by a prospectus'' as used in Securities Act Section 5(b)(2).

[366] 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, 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.

[367] The proposed amendment would not supersede the exemption in Securities Act Rule 174 for transactions in securities of reporting issuers.

[368] This would include national securities exchanges, trading facilities of a national securities association and alternative trading systems.

[369] If we adopt the proposed changes to Rule 153, our interpretation in Question 11 in *Use of Electronic Media For Delivery Purposes,* Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458] would no longer be effective.

• Should the rule be available to primary offerings of securities by issuers? Such as issuer sales of securities into an existing trading market?

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.[370] Securities Act Rule 174 exempts from aftermarket prospectus delivery any transaction relating to securities of a reporting issuer. The rule applies only to dealers and does not apply to underwriters or dealers continuing to act as such with regard to any unsold allotment. 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. 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 was to assure wide dissemination of information about the issuer in the market. For reporting issuers, the Rule assumes that the information is already disseminated and so 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, proposing to revise Rule 174 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).

Request for Comment

• Should proposed Rule 172 be made available to aftermarket delivery obligations as proposed?

• Are there other changes that should be made to Rule 174 that would assist dealers in satisfying their aftermarket delivery obligations?

• As proposed, consistent with existing Rule 174(g), we propose to retain specific prospectus delivery obligations for blank check companies. Should blank check companies be excluded from proposed Rule 172 or proposed Rule 174 or, if not, should there be additional requirements in proposed Rule 172 or proposed Rule 174 for blank check companies? Should shell companies and penny stock issuers be eligible to use proposed Rule 172 and proposed Rule 174?

VII. Additional Exchange Act Disclosure Proposals

A. Risk Factor Disclosure

Many Securities Act registration statements require an analysis of the risks associated with an investment in an issuer's securities. Items 503(c) of Regulation S–K and Regulation S–B [371] 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 propose to extend risk factor disclosure to annual reports on Forms 10–K and registration statements on Form 10.[372] We are not proposing to extend this requirement to Forms 10–KSB or Form 10–SB. As with risk factor disclosure that is required in Securities Act registration statements, risk disclosure in Exchange Act registration statements and annual reports would describe the most significant factors that may adversely affect the issuer's business, operations, industry or financial position, or its future financial performance. Risk factor disclosure under the Exchange Act would be the same type of Item 503 disclosure as in a Securities Act registration statement, other than information about a particular securities offering. We also are proposing that the risk factor disclosure in Exchange Act reports be written in accordance with the same ''plain English'' standards as apply to risk factor disclosure in Securities Act registration statements.[373] Our proposals would also require quarterly updates to the risk factors disclosure to reflect any material changes from risks previously disclosed in Exchange Act reports. They would not otherwise require a restatement or repetition of risk factors in quarterly reports.

The proposed requirement to include risk factor disclosure in Exchange Act filings would, we believe, further enhance the contents of Exchange Act reports and their value in informing investors and the markets. Further, requiring risk factor disclosure in Exhange Act registration statements and annual reports, would 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.[374]

We are proposing to require 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 and conditions and other circumstances in order to prepare the other portions of the quarterly report, including the financial statements and MD&A.[375] Therefore, we believe that issuers should be able to, on a quarterly basis, identify changes to risk factors affecting them.

We proposed including risk factor disclosure in the 1998 proposals, and

[370] Securities Act Section 4(3), which provides an exemption from Section 5 for transactions by dealers, is not available for the later of either 40 days or 90 days after the later date of the effectiveness of the registration statement or the first bona fide offer of the security. The 90-day period applies to securities of issuers who have not previously registered under the Securities Act. The 40-day period applies to securities of issuers who have previously registered under the Securities Act.

[371] See Item 503(c) of Regulation S–K [17 CFR 229.503(c)] and Item 503(c) of Regulation S–B [17 CFR 228.503(c)].

[372] See proposed 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 20 at Section II.B.4.

[373] Securities Act Rule 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.

[374] 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 the Business Roundtable.

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; *P. Stolz Family P'ship L.P.* v. *Daum,* 355 F.3d 92, 97 (2d Cir., 2004); *In re Sprint Corp. Sec. Litig.,* 232 F. Supp. 2d 1193 (D. Kan. Sept. 30, 2002).

[375] 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.

many commenters supported this requirement.[376] Other commenters opposed any risk factor disclosure requirement for Exchange Act reports, for varying reasons, including that the information is already included elsewhere in the reports, an increased burden on issuers, and possible increased litigation arising from the risk disclosure.[377] Commenters also suggested that the risk factor disclosure standard should be similar to that contained in Securities Act Section 27A—''important factors that could cause actual results to differ materially from those in forward-looking statements''—rather than the standard reflected in Item 503 of Regulation S–K. [378] Because one of our goals is to further integrate the Securities Act and the Exchange Act, we believe it is important to establish consistent disclosure standards. We, therefore, are proposing to require compliance with Item 503, *i.e.* the most significant risks facing an issuer. We also note that the Section 27A provisions are aimed at providing protections where forward-looking statements are included, rather than providing protections for all discussions of the risks facing an issuer, but observe that issuers could appropriately use risk factor disclosure to identify a number of the factors referenced in Section 27A.

Request for Comment

- Should we require risk factor disclosure about specific matters that are in addition to those referred to in Item 503 of Regulation S–K? If so, what are they?
- Are there ways, in addition to those we have used in Item 503 and our plain English rules and our guidance on MD&A,[379] to ensure that issuers include meaningful, rather than boilerplate, risk factor disclosure?
- Should we extend risk factor disclosure requirements to Forms 10–KSB and 10–SB?

[376] *See, e.g.*, comment letters in File No. S7–30–98 from the ABA; ACCA; Ernst & Young LLP; New York City Bar; NASAA; the Philadelphia Bar Association; and Sullivan & Cromwell.

[377] *See, e.g.*, comment letters in File No. S7–30–98 from the CIT Group, Inc.; Joseph Grundfest; Intel Corporation; and Navistar International Corporation.

[378] *See, e.g.*, comment letters in File No. S7–30–98 from the American Society of Corporate Secretaries; and the Business Roundtable.

[379] See the 2003 MD&A Release note 33; *Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33–8056, (Jan. 22, 2002) [67 FR 3746]; *Interpretive Release: Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*, Release No. 33–6835 (May 18, 1989) [54 FR 22427].

B. Disclosure of Unresolved Staff Comments

Because enhanced Exchange Act reporting provides a principal element of support for, and is at the core of, today's proposals, 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 proposing would eliminate some of the incentives issuers have to respond to comments on their Exchange Act reports in a timely manner. In particular, with automatic effectiveness, well-known seasoned issuers would not be subject to the possibility that effectiveness of a Securities Act registration statement could be delayed while comments are resolved. In addition, all shelf eligible issuers would 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 mandate in the Sarbanes-Oxley Act as well as our view of the importance of the role of an issuer's Exchange Act reports. Under the circumstances and with the greater flexibility given in our proposals to communications outside the statutory prospectus and offering procedures, we think it is necessary to establish added incentives for accelerated filers to timely resolve outstanding staff comments on their Exchange Act reports.

We are proposing to require all accelerated filers to disclose, in their annual reports on Forms 10–K or 20–F, written comments our staff made in connection with review of Exchange Act reports that the issuer believes are material that were issued more than 180 days before the end of the fiscal year covered by the annual report and which remain unresolved as of the date of the filing of the Form 10–K or Form 20–F. The disclosure would be required to be sufficient to disclose the substance of the comments. Staff comments that have been resolved, including those that the staff and issuer have agreed would be addressed in future Exchange Act reports, would not need to be disclosed. Issuers would be able to include their position regarding any such unresolved comments.

Through the Form 10–K and Form 20–F disclosure, accelerated filers (including those issuers eligible for shelf registration and automatic shelf registration) would disclose long unresolved comments. This is designed to compensate for immediate effectiveness for well-known seasoned issuers, elimination of the two year limitation, and for increased emphasis by the staff of Exchange Act reports for all shelf registrants.[380]

Request for Comment

- Should we require disclosure of unresolved staff comments in quarterly reports as well?
- Is 180 days the right timeframe to resolve outstanding staff comments? Is it too short? Is it too long?
- Should the 180 days be calculated from the date of the initial written comment letter from the staff, regardless of comments received after that date that relate to or arise from the original comments or issuer responses to the original comments?
- Should we require the proposed disclosure of unresolved comments to also appear in Form 10–KSB reports filed by small business issuers?
- Should we require the proposed disclosure of unresolved comments to also appear in Form 40–F?
- Should we require issuers to list each outstanding comment in its disclosure by repeating the comment verbatim as issued by the staff? Should we permit issuers to paraphrase or summarize the outstanding staff comments?
- Are there more appropriate means to provide incentives to timely resolve staff comments?
- Should issuers have to disclose comments that have been resolved and will be addressed in future Exchange Act reports?
- Should we require disclosure of all unresolved comments without regard to a materiality assessment by the issuer?
- Should the staff have a role in determining which unresolved comments should be disclosed?
- Should the staff have to address issuer responses to outstanding written comment on Exchange Act reports within a particular timeframe after the response has been submitted by the issuer on EDGAR? If yes, what timeframe?

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

Our filing system does not prohibit issuers that are otherwise not required to file Exchange Act reports with 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 reports even after their reporting

[380] Shelf registration statements allow an issuer to take down securities at any time during the year, even when staff comments on its Exchange Act reports may be pending.

obligation under Exchange Act Section 15(d) has been suspended.[381]

We are proposing 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. The box would be for informational purposes only. An issuer's filing obligation would be unaffected by an incorrectly checked box.

We believe that it is important that investors and other market participants are aware that an issuer is a voluntary filer and thus, may cease to file its Exchange Act reports at any time and for any reason without notice. In addition, our communications and procedural proposals do not permit voluntary filers to become seasoned issuers. Identification of voluntary filers would enable us to monitor their use of our proposed communications rules as well as our other regulatory requirements.

Request for Comment

- Are there alternative means of addressing the issues posed by voluntary filers? Should we stop accepting voluntary filings and instead allow voluntary filers to register under Section 12(g) of the Exchange Act on a basis where they are exempted from certain provisions of the Exchange Act that do not apply to them? If so, should we limit any possible exclusions only to voluntary filers that have only issued debt in registered offerings? Should there be any other limitations?
- Should we require disclosure of voluntary filer status on Form 40–F? If not, why not?

VIII. Application of Proposals to Asset-Backed Securities

In April, we proposed new Regulation AB and other new and amended rules and forms to address comprehensively the registration, disclosure, and reporting requirements for asset-backed securities (''ABS'') under the Securities Act and the Exchange Act (the ''ABS Proposal'').[382] This section describes how ABS offerings and the ABS Proposal would fit within the proposals we are making today.

ABS issuers offering securities registered on Form S–1 would be non-reporting issuers. ABS issuers offering securities registered on Form S–3 would be considered seasoned issuers. Today's proposal would provide that no ABS issuer would be a well-known seasoned issuer. As a result, automatic shelf registration would not be available to issuers of ABS. The general content of ABS registration statements under current practice and under the ABS proposals would not change under today's proposal.

We would anticipate that the communications proposals that we make today would, if adopted, apply to ABS offerings. Therefore, safe harbor exclusions from the definition of offer for purposes of the gun-jumping provisions would apply. Many of these proposals would have only limited application in respect of ABS. Certain of them, however, could be applicable. For example, the proposals regarding regularly released information for reporting issuers could apply, depending on the facts and circumstances, to information conveyed to investors in outstanding ABS, such as static pool information provided with respect to pools underlying outstanding ABS, either in Exchange Act reports or other communications, where the conditions of the proposed rule are satisfied.

In addition, under today's proposals regarding free writing prospectuses, the permitted use of free writing materials would change for ABS issuers from that contained in the ABS proposals. Following a series of staff no-action letters from the mid-1990s, certain ABS issuers have been permitted to use written offering related communications outside of the prospectus in connection with offerings registered on Form S–3.[383] Under the ABS Proposal, we have proposed codifying the use of these informational and computational materials for these issuers in accordance with the existing no-action letters. Under the ABS Proposal, these materials would all be filed on Form 8–K and incorporated by reference into the registration statement, regardless of who prepared the materials.

Under our proposal today, these materials would be considered free writing prospectuses, and their use would be conditioned on satisfying the conditions of proposed Rule 164 and proposed Rule 433. The conditions of proposed Rule 433 would permit use of free writing prospectuses by non-reporting issuers, including ABS issuers using Form S–1, if a registration statement containing a statutory prospectus complying with our requirements was filed and, in the case of free writing prospectuses prepared by or involving payments made or compensation given by issuers or other offering participants, the free writing prospectus was preceded or accompanied by the most recent statutory prospectus. Under our proposals, ABS issuers eligible to use Form S–3 would be seasoned issuers. Proposed Rule 433 would condition use of free writing prospectuses in offerings registered on Form S–3 on filing of a registration statement containing a statutory prospectus complying with our requirements, but not on actual delivery of that prospectus. Underwriters that use informational and computational materials would not be required to file the free writing prospectuses that they prepare. Including information prepared by the underwriters on the basis of, but not containing, issuer information, such as computational materials based on pool data provided by the issuer, would not trigger a filing requirement for an underwriter's free writing prospectus. However, an issuer would be required to file such materials prepared by it, as well as issuer information included in an underwriter's free writing prospectus unless it was already filed or part of a registration statement or previously filed free writing prospectus or issuer information. In addition, as is the case today, any final term sheet would need to be filed.[384] A free writing prospectus in an ABS offering, like any free writing prospectus, would not be automatically incorporated by reference into the registration statement under today's proposals.[385] Whether filed or not, all free writing prospectuses would be subject to Section 12(a)(2) liability under today's proposals.

Today's proposal would also address some of the concerns that were expressed in comments on the ABS Proposal regarding discrepancies between the time an investor makes an investment decision and the time of availability of a prospectus supplement.[386] Under today's proposals, information conveyed to investors by or on behalf of an issuer or other offering participant after the time of contract of sale would not be used to evaluate liability under Section 12(a)(2). For example, if a prospectus (including a free writing prospectus) provided

[381] 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.

[382] *See* Asset-Backed Securities Proposing Release, note 58.

[383] See note 31 of the Asset-Backed Securities Proposing Release, note 58 above.

[384] See proposed Rule 433.

[385] Issuers could, of course, choose to include this information or incorporate it by reference (for example, by filing a report on Form 8–K that is incorporated by reference) into a registration statement and prospectus.

[386] See comment letters in File No. S7–21–04 from Investment Company Institute and Fidelity Management and Research Company.

prior to the time of the contract of sale failed to disclose material information about the asset pool and the omission caused the information conveyed to the investor to be misleading, then the omission could not be corrected by conveying the information subsequently, including in a subsequently available prospectus or prospectus supplement.

Today's proposal would also address some comments we received on the ABS Proposal requesting that we amend Rule 134 for ABS offerings. Our proposals broaden this rule and would permit a number of the items commenters requested. However, as is the case with offerings generally, we have not proposed to amend Rule 134 in a manner that would permit detailed term sheets for ABS offerings under the rule. Under today's proposals such information in ABS offerings, including informational and computational materials, could be provided in free-writing prospectuses or included in or incorporated by reference into registration statements and prospectuses.

As we noted in the ABS Proposal, we proposed codifying an existing staff no-action letter that provided a tailored research report safe harbor for Form S–3 ABS, which proceeded from the existing research report safe harbors in Rules 137, 138 and 139. As discussed above, we are proposing revisions today to the safe harbors in Rules 137, 138 and 139. To the extent these existing safe harbors are modified, we also will consider similar modifications to the proposed ABS safe harbor, if adopted.

Request for Comment

- How should ABS issues be treated under the current proposal? Is our proposal that S–1 ABS would be considered non-reporting issuers and S–3 ABS would be considered seasoned issuers appropriate?
- Should automatic shelf registration or other elements of today's proposals that would be available to well-known seasoned issuers also be made available to ABS issuers?
- Should computational materials prepared by an underwriter based on but not including asset data received from the issuer be considered issuer prepared free writing prospectus so that it must be filed?
- Should we be more restrictive regarding the use of free writing by ABS issuers and, as is the case today, only permit it for ABS issuers eligible to use Form S–3?
- Are further changes needed to revise Rule 134 for ABS issuers?
- Would it be helpful for us to explain how any other parts of today's proposal apply to ABS offerings?
- If the ABS Proposal is adopted, would it be appropriate to delete Securities Act Rule 415(a)(1)(viii)? If not, why not?

IX. General Request for Comment

We request comment on the proposals in this release, suggestions for additions to the proposals, and comment on other matters that might have an effect on the proposals contained in this release.

X. Paperwork Reduction Act

A. Background

The proposed rules and amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[387] We are submitting these to the Office of Management and Budget for review and approval in accordance with the PRA.[388] The titles for the collections of information are:[389]

(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);
(16) ''Form N–2'' (OMB Control Number 3235–0026);
(17) ''Rule 173'' (OMB Control Number to be determined);
(18) ''Rule 163'' (OMB Control Number to be determined); and
(19) ''Rule 433'' (OMB Control Number to be determined).

We adopted all of the existing regulations and forms pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. 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 proposing for adoption new Securities Act Rules 163, 173, and 433 and eliminating Securities Act Forms S–2 and F–2.

The proposed amendments to existing forms and regulations and new requirements would 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. Our proposals 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 proposed collections of information and are not intended to represent the full economic cost of complying with the proposals. 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 would be mandatory. For registration statements and periodic reports, there would be no mandatory retention period for the information disclosed, and the information gathered would be made publicly available. The information collection requirements related to the communications and prospectus delivery proposals would apply only to issuers and other offering participants choosing to rely on them. There would be a mandatory record retention period

[387] 44 U.S.C. 3501 *et seq.*

[388] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[389] 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.

with respect to the communications and prospectus delivery provisions in the proposals. Moreover, communications covered by the proposals that are made by or on behalf of an issuer, and communications that are broadly disseminated by another offering participant, would have to be filed and would be publicly available on the EDGAR filing system, whereas communications by or on behalf of other parties would not have to be filed.

B. Summary of Information Collections

The proposals would add the following disclosure requirements to Exchange Act periodic reports and registration statements:

- Risk factor disclosure;
- Disclosure by accelerated filers, in their annual reports on Forms 10–K or 20–F, of any written staff comments regarding their Exchange Act periodic 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
- A ''check box'' that would 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.[390]

The proposals would impose the following new disclosure requirements and filing or publication 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; [391]
- A brief legend in ''free writing prospectuses'' [392] 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; [393]
- Additional disclosure in the undertakings required to be included in a registration statement for securities to be offered pursuant to Rule 415; [394]
- A filing condition in connection with the use of certain free writing prospectuses; [395] and
- Making a version of an electronic road show readily available to the public.

The proposals would 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 proposals likely would eliminate the need to file multiple registration statements.

C. Paperwork Reduction Act Burden Estimates

For purposes of the PRA, we estimate the annual incremental reduction in the paperwork burden for registrants to comply with our proposed 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.[396] For broker-dealers, we estimate the annual incremental paperwork burden to comply with our proposed collection of information requirements to be approximately 3,874,133 hours of in-house issuer personnel time.[397] Those estimates include the time and the cost of preparing and reviewing disclosure, filing documents or otherwise publicizing information, and retaining records. Our methodologies for deriving the above estimates are discussed below.

Our 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 estimate 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 issuer at an average cost of $300 per hour.[398] For Securities Act registration statements, Exchange Act registration statements, all filings by foreign private issuers, and the free writing prospectus rules, we estimate 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 estimate the annual incremental paperwork burden for all issuers to prepare the disclosure required in Exchange Act periodic reports and registration statements under our proposals 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. Those estimates include the time and the cost of preparing and reviewing the proposed disclosure. Our estimates reflect our belief that, because our current disclosure requirements for Exchange Act reports (such as Management's Discussion and Analysis of Financial Condition and Results of Operations) [399] 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 of the Commission, the proposed disclosure that issuers would have to make in their Exchange Act periodic reports and registration statements should not impose significant new burdens.

We estimate that, over a three-year time period,[400] the annual incremental disclosure burden imposed by the proposed new disclosure requirements

[390] 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.

[391] Under proposed Securities Act Rule 173, this new requirement would be imposed where the proposed amendment to Securities Act Rule 172 would eliminate the more burdensome requirement of delivery of a final prospectus.

[392] ''Free writing prospectuses'' are written communications that constitute offers to sell or solicitations of offers to buy securities.

[393] In this regard, see note 390 regarding the burden associated with checking a box on the cover page.

[394] We also are proposing to require similar undertaking language in Form N–2, the registration statement form for closed-end management investment companies.

[395] See the discussion in Section III above under ''Permissible Use of Free Writing Prospectuses'' under ''Filing Conditions.''

[396] 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.

[397] We assume that brokers and dealers would not use outside professionals to comply with the proposed collection of information requirements.

[398] 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.

[399] Item 303 of Regulation S–K [17 CFR 229.303].

[400] We calculated an annual average over a three-year period because OMB approval of PRA submissions covers a three-year period.

would average 6.43 hours per Form 10–K (consisting of risk factor disclosure and disclosure by accelerated filers of outstanding comments), 0.23 hours per Form 10–Q (consisting of disclosure of material changes to risk factors), 0.05 hours per Form 20–F (consisting of disclosure by accelerated filers of outstanding comments), and 12 hours per Form 10 (consisting of risk factor disclosure).[401] These estimates were based on the following assumptions:

- 970 reporting issuers would have been required to prepare risk factor disclosure within the past year for a Securities Act registration statement; [402]
- Issuers who have not recently prepared risk factor disclosure will spend a greater amount of time preparing the disclosure in year 1 and will become more efficient in preparing the disclosure in years 2 and 3; [403]
- Issuers would include disclosure of new or material changes to risk factors in 15% of all 10–Qs filed; and
- 796 domestic and 52 foreign accelerated filers would have unresolved written staff comments that the issuer believes to be material each year, and, therefore, would need to disclose this fact.[404]

Tables 1 and 2 below illustrate the incremental annual compliance burden of the collection of information in hours and cost for periodic reports and registration statements under the Exchange Act.

TABLE 1.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR EXCHANGE ACT PERIODIC REPORTS

	Annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	75% issuer (D)=(C)*0.75	25% professional (E)=(C)*0.25	$300 prof. cost (F)=(E)*$300
10–K	8,220	6.43	52,854.6	39,640.95	13,213.65	$3,964,095
10–Q	20,264	0.23	4,660.72	3,495.54	1,165.18	349,554
Total				43,136.49		4,313,649

TABLE 2.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR EXCHANGE ACT REGISTRATION STATEMENTS AND FOREIGN PRIVATE ISSUER EXCHANGE ACT ANNUAL REPORTS

	Annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
10	56	12	672	168	504	$151,200
20–F	1,036	.05	51.8	12.95	38.85	11,655
Total				180.95		162,855

2. Communications and Prospectus Delivery

For purposes of the PRA, we estimate that the annual paperwork burden for issuers that choose to comply with our communications proposal would be approximately 1,532 hours of issuer personnel time and a cost of approximately $1,379,000 for the services of outside professionals. Those estimates reflect the burden hours and costs associated with the proposed disclosure, filing, and record retention conditions. We estimate that, over a three-year period, the annual burden for the information collection and record retention conditions set forth in proposed Securities Act Rules 163 and 433 would be an average of 2.11 hours per issuer (including the burden for offering participants that may need to file free writing prospectuses with respect to the issuer's offering),[405] and 3,874,133 hours total for all respondents to comply with proposed Rule 173.[406]

[401] We obtained data from our internal Filing Activity Tracking System database (''FACTS''). We calculated the average incremental increase in the burden for each Form 10–K by adding the average time per form that it will take to prepare the risk factor disclosures ([(970 Forms 10–K involving issuers who have recently prepared risk factors multiplied by 4 hours) plus (7,250 other Forms 10–K multiplied by 6.64)]/8,220 Forms 10–K = 6.33 hours per Form 10–K), and the average time per form that it will take to prepare disclosure of outstanding comments [796 Forms 10–K involving issuers with outstanding comments multiplied by 1 hour/8,220 Form 10–Ks = .1 hours], which equals 6.43 hours per Form 10–K. The calculation for Form 10–Q is as follows: [(20,264 Forms 10–Q multiplied by 15% frequency of disclosure multiplied by 1.5 hours)]/20,264 Forms 10–Q = .23 hours per Form 10–Q. The calculation for Form 20–F is: [(52 Forms 20–F involving disclosure of outstanding comments multiplied by 1 hour)/1,036 Forms 20–F = .05 hours per Form 20–F]. Because Form 10 filers generally are new entrants to the Exchange Act reporting system, they will be preparing risk factor disclosure for the first time. Based on our estimate that it will take first time filers 12 hours to prepare this disclosure, the average incremental increase in the burden will be 12 hours per Form 10. See also notes 402 and 403 and accompanying text.

[402] We assume that the paperwork burden associated with preparing risk factor disclosure is significantly reduced when an issuer already has prepared risk factor disclosure for a previous Securities Act registration statement. This number does not include registration statements on Form S–3 because many of those registration statements are for delayed offerings, and issuers often do not include risk factors in the base registration statement for these offerings. We used FACTS as our source.

[403] We estimate that it will take issuers who have not recently prepared this disclosure 12 hours in year one and 4 hours in years two and three, which comes to an average of 6.64 hours over the three-year period. Because Form 10 registration statements are filed by issuers who generally would not have previously prepared this disclosure, we estimate that these issuers will take 12 hours to prepare this disclosure.

[404] We obtained data from our FACTS database that indicates that 848 accelerated fliers had outstanding comments as of September 27, 2004. We estimate that it will take issuers an average of 1 hour to comply with this disclosure requirement.

[405] See also notes 407–409, and accompanying text, for an explanation of the underlying assumptions and calculations used. The calculation for the burden hours issuers would spend under Rule 433 is: (3,650 free writing prospectuses in connection with filings multiplied by 0.25 hours per filing) plus (4,002 free writing prospectuses in connection with electronic road shows multiplied by 0.25 hours per filing) plus (2,001 electronic road shows multiplied by 0.25 hours to make each road show available) plus (3,703 filings multiplied by 1 hour per filing for record retention) = 6,116.25 hours. The calculation for the burden hours issuers would spend under Rule 163 is: (53 free writing prospectuses in connection with filings multiplied by 0.25 hours per filing) = 13.25 hours. Accordingly, the calculation for the burden hours per issuer imposed by Rules 433 and 163 is: (6,116.25 hours for Rule 433 plus 13.25 hours for Rule 163)/2,906 issuers = 2.11 hours.

[406] See also notes 410 and 411 for an explanation of the underlying assumptions and calculations used. This is based on the estimate that broker dealers would deliver 232.448 million prospectuses, and spend 1 minute per prospectus

These estimates were based on the following assumptions:

- Filing a free writing prospectus or making a version of an electronic road show readily available each would require about 0.25 burden hours; [407]
- Issuers would make readily available to the public 2,001 electronic road shows per year; [408]
- 7,705 free writing prospectuses per year would be filed in connection with 3,703 offerings by 2,906 issuers; [409]

We also estimate that issues, on average, would file one free writing prospectus in connection with electronic road shows). We estimate that most well-known seasoned issuers would have an automatic shelf registration statement on file and would therefore not rely on the exemption provided in proposed Rule 163. Therefore, we estimate that 3,650 free writing prospectuses would be filed under Rule 433 and 53 free writing prospectuses would be filed under Rule 163 (in addition to any filings made in connection with electronic road shows).

Accordingly, the calculation for the number of free writing prospectuses filed per year is: (3,650 filed under Rule 433) plus (53 filed under Rule 163) plus (4,002 filed with road shows) = 7,705.

- The burden to retain free writing prospectuses would be no more than one hour per year for all free writing prospectuses associated with each offering;
- There would be approximately 232.45 million individual responses to proposed Rule 173 annually; [410] and
- The burden of the proposed Rule 173 notice requirement would be one minute per response.[411]

Table 3, below, illustrates the incremental annual compliance burden of the collection of information in hours and in cost for the communication and prospectus delivery proposals.

TABLE 3.—CALCULATION OF PRA BURDEN ESTIMATES FOR COMMUNICATIONS [412]

	Annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Rule 433 filing	7,652	0.25	1,913	478.25	1,434.75	$430,425
Make available electronic road show	2,001	0.25	500.25	125.06	375.19	112,556
Rule 433 record retention	3,703	1	3,703	925.75	2,777.25	833,175
Rule 163 filing	53	0.25	13.25	3.31	9.94	2,981
Total				1,532		1,379,137

[412] This table does not include the incremental burden estimate of 3,874,133 hours for proposed Rule 173, which is discussed above.

3. Securities Act Registration Statements

For purposes of the PRA, we estimate that the proposals 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. That estimate reflects changes to the number of filings that could result from our proposals, as well as the decrease in disclosure preparation time resulting from our proposed expansion of incorporation by reference. These estimates were based on the following assumptions:

- 95 additional Forms S–1 and 5 additional Forms F–1 would be filed per year as a result of our proposed elimination of Forms S–2 and F–2; [413]
- Each year, 277 Forms S–1 and 8 Forms F–1 would incorporate information by reference; [414]
- Incorporating information by reference would reduce the paperwork burden in Forms S–1 by 374,227

preparing the Rule 173 notice (232.448 million multiplied by (1/60 hours) = 3,874,133 hours).

[407] Aside from a brief legend, we do not propose to specify the type of information that could be in a free writing prospectus. Accordingly, we are not estimating a paperwork burden for the specific information included in a free writing prospectus, other than the legend condition and the filing or dissemination condition, as applicable.

[408] For the period from August 1, 2003 to July 31, 2004, approximately 2,906 issuers filed 3,703 offerings, approximately 299 of which were initial public offerings by issuers that are not small business issuers. We estimate that close to 100% of the 299 initial public offerings filed involved an electronic road show, and approximately 50% of the 3,404 non-initial public offerings filed involved an electronic road show. Accordingly, the calculation for the number of road shows that will be made available per year is: [(299 IPOs) multiplied by (100%)] plus [(3,404 non-IPOs) multiplied by (50%)] = 2,001 electronic road shows available per year.

[409] We estimate that issuers, on average, would file two free writing prospectuses for each electronic road show under Rule 433. Based on the calculation in note , above, we estimate that, in connection with 2,001 electronic road shows, issuers would file 4,002 free writing prospectuses per year.

[410] In a recent release relating to confirmation requirements, we estimated that approximately 2.54 billion confirmations will be sent to customers annually in connection with transactions not involving mutual funds, unit investment trusts interests, and plan securities. *Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds,* Release No. 33–8358 (Jan. 29, 2004) [69 FR 6438] at Section VIII.C.4. These confirmations are sent for transactions in primary registered offerings as well as for transactions in the secondary market.

According to data obtained from the databases provided by the Center for Research in Securities Prices at the University of Chicago and the Securities Data Corporation, we estimated that, in 2002, the dollar amount of equity issued in the primary markets was 11.4% of the size of the total dollar amount of all the equity trades that year.

Accordingly, the calculation for confirmations sent annually in connection with transactions in primary registered offerings is: (2.54 billion confirmations) multiplied by (11.4% in the primary markets) = 289.56 million confirmations. This indicates that 289.56 million transactions are conducted annually in connection with primary registered offerings, for which prospectuses are required to be delivered.

In addition, Securities Act Rule 174 requires delivery of a prospectus for 25 calendar days following an IPO. We estimate that 1 million prospectuses are delivered annually pursuant to this requirement.

We further estimate that in 80% of instances where issuers and markets participants are required to deliver prospectuses, they would use the Rule 173 notice rather than delivering final prospectuses. Accordingly, the calculation for annual responses to proposed Rule 173 is: (289.56 million + 1 million) multiplied by 80% = 232.448 million.

[411] We have previously estimated that it takes one minute to generate and send a confirmation because the process of generating a confirmation is automated. *See Confirmation Requirements for Transactions of Security Futures Products Effected in Futures Accounts,* Release No. 34–46471 (Jun. 10, 2002) [67 FR 39647]. We believe that the incremental burden of Rule 173 would be a similar burden.

[413] Source: EDGAR—Forms S–2 and F–2 filed from October 1, 2003 to September 30, 2004.

[414] We estimate that repeat issuers that would be eligible to incorporate by reference under the proposals filed 277 Forms S–1 and 8 Forms F–1. Source: FACTS, from Aug. 1, 2003 to July 31, 2004.

hours [415] and Forms F–1 by 15,680 hours;[416]

• Each year, 38 Forms S–4 and 3 Forms F–4 would no longer incorporate information by reference about either the acquiring issuer or the issuer being acquired as a result of our proposed changes to Forms S–4 and F–4 and elimination of Forms S–2 and F–2; [417]

• Including additional information in Forms S–4 and F–4 as a result of not being eligible to incorporate by reference would increase the paperwork burden in Form S–4 by 51,338 hours [418] and Form F–4 by 5,880 hours; [419]

• 1,883 Forms S–3, 99 Forms F–3, and 65 initial registration statements or post-effective amendments on Form N–2 filed for an offering of securities pursuant to Rule 415 would each require one minute to include the additional Item 512 undertakings in the proposals; [420]

• The number of Forms S–3 and Forms F–3 filed per year would be reduced by 121 and 4 per year, respectively, as a result of automatic shelf registration proposals; [421] and

• Five additional Forms S–3 and one additional Form F–3 would be filed per year as a result of our amendments to form eligibility for majority-owned subsidiaries.[422]

Table 4 through Table 8, below, illustrate the incremental annual compliance burdens of the collection of information in hours and in cost for registration statements under the Securities Act.

TABLE 4.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR FORMS S–1, S–4, F–1 AND F–4 DUE TO ELIMINATION OF FORMS S–2 AND F–2

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–1	95	398	37,810	9,452.5	28,357.5	$8,507,250
Form F–1	5	167	835	208.75	626.25	187,875
Form S–4	38	1,351	51,338	12,834.5	38,503.5	11,551,050
Form F–4	3	1,960	5,880	1,470	4,410	1,323,000
Total				23,965.75		21,569,175

[415] We estimate that the burden to complete a Form S–1 that incorporates information by reference would be the same as the burden currently imposed by Form S–3 (398 hours). Therefore, the amount of time eliminated for each Form S–1 that incorporates information by reference would be 1,351 hours per form (1,749 hours for a Form S–1 that does not incorporate information by reference minus 398 hours for a Form S–1 that incorporates information by reference). Therefore, the total amount of time saved for the 277 issuers that would be able to incorporate by reference would be 374,227 (277 issuers multiplied by 1,351 hours per form).

[416] We estimate that the burden to complete a Form F–1 that incorporates information by reference would be the same as the burden currently imposed by Form F–3 (167 hours). Therefore, the amount of time eliminated for each Form F–1 that incorporates information by reference would be 1,960 hours per form (2,127 hours for a Form F–1 that does not incorporate information by reference minus 167 hours for a Form F–1 that incorporates information by reference). Therefore the total amount of time saved for the 8 issuers that would be able to incorporate by reference would be 15,680 (8 issuers multiplied by 1,960 hours per form).

[417] From filings on EDGAR from 10/1/2003 to 9/30/2004, we estimate that Forms S–2 represent 3.6% of registration statements filed on Form S–1, S–2, or S–3. Because many Forms S–4 include information about two different issuers, we estimate that 5% of Forms S–4 will include information about an issuer that is eligible to use Form S–2. Therefore, we estimate that 38 Forms S–4 (751 Forms S–4 filed from 10/1/2003 to 9/30/3004 multiplied by 5%) would have incorporated information by reference as a result of an issuer being eligible to use Form S–2. We also estimate that Forms F–2 represent 3.4% of registration statements filed on Form F–1, F–2, or F–3. Because many Forms F–4 include information about two different issuers, we estimate that 5% of Forms F–4 will include information about an issuer that is eligible to use Form F–2. Therefore, we estimate that 3 Forms F–4 (68 Forms F–4 filed from 10/1/2003 to 9/30/2004 multiplied by 5%) would have incorporated information by reference as a result of and issuer being eligible to use Form F–2.

[418] We estimate that the burden for each issuer involved to complete a Form S–4 without incorporating information by reference would be the same as the burden currently imposed by Form S–1 (1,749 hours). We also estimate that the burden for each issuer involved to complete a Form S–4 where the issuer is eligible to incorporate information by reference would be the same as the burden currently imposed by Form S–3 (398 hours). Therefore, the amount of time added to each Form S–4 that no longer includes information incorporated by reference would be 1,351 hours per form (1,749 hours to complete disclosure without incorporating by reference minus 398 hours to complete disclosure with incorporation by reference). The calculation for the burden including additional information in Forms S–4 as a result of not being eligible to incorporate by reference is (38 Forms S–4 that would have incorporated information by reference as a result of an issuer being able to use Form S–2) multiplied by 1,351 hours per form = 51,338 hours.

[419] We estimate that the burden for each issuer involved to complete a Form F–4 without incorporating information by reference would be the same as the burden currently imposed by Form F–1 (2,127 hours). We also estimate that the burden for each issuer involved to complete a Form F–4 where the issuer is eligible to incorporate information by reference would be the same as the burden currently imposed by Form F–3 (167 hours). Therefore, the amount of time added to each Form F–4 that no longer includes information incorporated by reference would be 1,960 hours per form (2,127 hours to complete disclosure without incorporating by reference minus 167 hours to complete disclosure with incorporation by reference). The calculation for the burden including additional information in Form F–4 as a result of not being eligible to incorporate by reference is: (3 Forms F–4 that would have incorporated information by reference as a result of being an issuer eligible to use Form S–2) multiplied by 1,960 hours per form = 5,880 hours.

[420] We estimate that 1,883 Forms S–3 (1,999 Forms S–3 filed on EDGAR from 10/1/2003 to 9/30/2004 minus 121 Forms S–3 due to automatic shelf registration proposals plus 5 new majority-owned subsidiaries) and 99 Forms F–3 (102 Forms F–3 filed on EDGAR from 10/1/2003 to 9/30/2004 minus 4 Forms F–3 due to automatic shelf registration proposals plus 1 new majority-owned subsidiary) would require the additional undertakings. We further estimate that 40 initial registration statements and 25 post-effective amendments by closed-end management investment companies on Form N–2 would require the additional undertakings.

[421] From data derived from our FACTS database, we estimate that 418 registrants each filed approximately 2 Forms S–3 or F–3 per year (covering both primary and secondary offerings). We estimate that 30% of these registrants would be ''well-known seasoned issuers'' that are eligible to use automatic shelf registration. Because automatic shelf registration would eliminate the need for multiple registration statements, we estimate that 125 registrants (418 registrants multiplied by 30% = 125.4) would file only one Form S–3 or F–3. Therefore, the number of Forms would be reduced by 125 (121 Forms S–3 and 4 Forms F–3).

[422] A search in EDGAR from 8/1/2003 to 7/31/2004 for registered guaranteed debt securities yielded about 25 Forms S–3 and no Form F–3 registration statements. We are assuming that the proposals to allow more majority-owned subsidiaries to be eligible to use short-form registration would increase the number of registered guarantee offerings by 20% (25 multiplied by 20% = 5). While our search yielded no majority-owned subsidiaries registered guarantees on Form F–3 during the time period in question, we are assuming that at least one additional registration statement would be filed under the proposals.

TABLE 5.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR FORMS S–1 AND F–1 TO REFLECT ISSUERS ELIGIBLE TO INCORPORATE BY REFERENCE

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–1	277	(1,351)	(374,227)	(93,556.75)	(280,670.25)	($84,201,075)
Form F–1	8	(1,960)	(15,680)	(3,920.00)	(11,760.00)	(3,528,000)
Total				(97,476.75)		(87,729,075)

TABLE 6.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR FORMS S–3, F–3 AND N–2 TO REFLECT NEW ITEM 512 UNDERTAKINGS

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–3	1,883	[423] 0.0167	31.38	7.85	23.54	$7,061.25
Form F–3	99	0.0167	1.65	0.41	1.24	371.25
Form N–2 [424]	65	0.0167	1.083	1.08	0.00	0.00
Total				9.34		7,432.50

[423] 1/60 of an hour, or 1 minute.
[424] In the case of Form N–2, we are assuming that all of the incremental burden will be borne in-house by company professionals.

TABLE 7.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR REDUCTION IN MULTIPLE FORMS S–3 AND F–3 TO DUE TO AUTOMATIC SHELF REGISTRATION

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)= (C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–3	(121)	398	(48,158)	(12,039.50)	(36,118.50)	($10,835,550)
Form F–3	(4)	167	(668)	(167.00)	(501.00)	(150,300)
Total				(12,206.50)		(10,985,850)

TABLE 8.—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES FOR EXPANDING THE MAJORITY-OWNED SUBSIDIARIES ELIGIBLE TO USE FORMS S–3 OR F–3

	Incremental annual responses (A)	Incremental hours/form (B)	Incremental burden (C)=(A)*(B)	25% issuer (D)=(C)*0.25	75% professional (E)=(C)*0.75	$300 prof. cost (F)=(E)*$300
Form S–3	5	398	1,990	497.50	1,492.50	$447,750
Form F–3	1	167	167	41.75	125.25	37,575
Total				539.25		485,325

D. Request for Comment

We request comment in order to (a) evaluate whether the collections of information are necessary for the proper performance of our functions, including whether the information will have practical utility, (b) evaluate the accuracy of our estimate of the burden of the collections of information, (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected, and (d) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.[425]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, with reference to File No. S7–38–04. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7–38–04, and be submitted to the Securities and Exchange Commission, Office of Filings and Information Services, Branch of Records

[425] Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

Management, 450 Fifth Street, NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

XI. Cost Benefit Analysis

A. Background

We are proposing revisions to the registration, communications, and offering processes under the Securities Act. Our proposals 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 goal of the proposed 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 proposals 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 proposals would:

- 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 Proposals

The amount of flexibility granted to issuers under our proposed 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 our 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 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 proposals, we would categorize issuers into tiers, consisting of non-reporting issuers, unseasoned issuers, seasoned issuers, and well-known seasoned issuers. The first three tiers of issuers would be identified by pre-existing criteria under the existing federal securities laws. A non-reporting issuer would be an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act. An unseasoned issuer would be 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.[426] A seasoned issuer would be an issuer that is eligible to use Form S–3 or Form F–3 to register offerings of securities to be sold by or on its behalf, on behalf of its subsidiary, or on behalf of a person of which it is the subsidiary. Our longstanding experience with these categories of issuers provides us with a basis for determining the amount of flexibility provided by the proposals.

The characteristics of the last tier of issuer, called well-known seasoned issuers in the proposals, would be easily measurable and readily available so that issuers and market participants can determine eligibility easily. 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 in the past three years provides sufficient proxy.[427]

Under the proposals, a well-known seasoned issuer would 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 proposing 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 proposed rules and amendments are designed to improve investors' access to information, to promote communications between offering participants and investors, and to maintain adequate investor protection. The proposals would operate in the following manner:

- There would 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 would be two separate exclusions from the gun-jumping provisions for communications not encompassed in the proposals 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, would be permitted in connection with an

[426] Under the proposals, an issuer that is voluntarily filing Exchange Act reports, but is not required to do so, would be an unseasoned issuer for purposes of the communications and procedural proposals.

[427] For further discussion of the characteristics of well-known seasoned issuers, see Section II above.

offering and would be excluded from the definition of ''prospectus.''

• Issuers and other offering participants would 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 would be expanded.

2. Securities Act Registration Amendments

As part of our proposals to modernize the regulatory regime for registered securities offerings, we are proposing to streamline the registration process for most types of reporting issuers. The proposals recognize the role that technology and improved Exchange Act reporting procedures have on informing the marketplace. Our proposals address the registration procedures for seasoned and unseasoned issuers. These proposals include:

• Modifications that would clarify and expand how and when information could 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 automatic effectiveness and pay-as-you-go registration fee payment; and

• Proposals related to non-shelf offerings of securities.

3. Prospectus Delivery

We are proposing an ''access equals delivery'' prospectus delivery model, where final prospectus delivery obligations for purposes of Securities Act Section 5(b)(2) would be satisfied if the issuer filed the final prospectus with the Commission within the required time frame. Our proposals would:

• Eliminate the existing link between delivery of the final prospectus and the delivery of confirmations of sale;

• Provide that the obligation to have a final prospectus precede or accompany a security for delivery after sale be satisfied by filing a final prospectus with us within the required time;

• Permit written notices of allocations; and

• Permit the prospectus delivery obligations in dealer transactions during any prospectus delivery period and registered resale transactions in securities that are trading to be satisfied if the final prospectus was filed within the required time.

4. Exchange Act Reports

A public issuer's Exchange Act record 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 proposing several reforms to Exchange Act reporting requirements related to our proposed reforms to the Securities Act offering process. We propose to:

• Extend risk factor disclosure requirements to annual reports on Exchange Act Form 10–K and registration statements on Exchange Act Form 10;

• Require updates to risk factor disclosure in quarterly reports on Exchange Act Form 10–Q;

• Require accelerated filers to disclose in their annual reports on Exchange Act Form 10–K any written staff comments 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; and

• Include a box on the cover page of Exchange Act annual report forms for an issuer to check if it is filing reports voluntarily.

C. Benefits

As discussed, the overall goal of the proposed 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 proposed 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 our proposals 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. We also believe that our proposals will provide cost-saving options to issuers and underwriters.

1. Increased Information Flow

The primary benefit that our proposals seek to achieve is an increased flow of information to investors during a registered offering. The proposals regarding communications, registration, and liability would operate harmoniously to increase the amount of valuable information that could be provided to investors before they make investment decisions. We believe that more information would be provided on a more timely basis because the proposals would eliminate regulatory barriers to the dissemination of that information and the markets may provide incentives for issuers, underwriters, or broker dealers to produce additional information.

Increased information flow would promote efficient capital markets because the market may be able to value securities more accurately. Under the proposals, underwriters could 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. The ability of offering participants to use free writing prospectuses in connection with offerings would impart a greater ability to provide information to investors about securities before they make investment decisions. For example, issuers and underwriters would be able to provide proprietary analytical material that is specifically tailored to address the particular asset allocation considerations of different investors. In addition, we are proposing amendments 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 proposals would 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 could be satisfied through relatively inexpensive mass dissemination of the information through electronic means.

2. Investor Protection

Another benefit of the proposals is that they would maintain investor protection against misleading or inaccurate disclosures. Investor protection is of paramount importance in maintaining fair, orderly, and efficient capital markets. The proposals regarding liability and disclosure in Exchange Act periodic reports, as well as the filing and record retention conditions for free writing prospectuses, would maintain and enhance investor protection in connection with registered securities offerings.

A central premise underlying our liability proposals, which is reflective of the conceptual basis for the Securities Act, is that materially accurate and complete information regarding an issuer and the securities being sold should be available to investors at the time of sale (including the time of the contract of sale), when they make their investment decisions (not at the time of settlement or thereafter).[428] We believe that our proposals would 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 materially complete and 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 fair and accurate information about transactions.[429]

The free writing prospectus proposals would promote investor protection by requiring issuers to file issuer-prepared free writing prospectuses and issuer information in free writing prospectuses. We believe that conditioning the use of written issuer-provided information on filing would improve investor protection. On the one hand, the proposed filing requirement is designed to assure that written issuer information is publicly available. On the other hand, requiring underwriters to publicize their propriety analysis may cause them unjustifiable competitive harm and liability exposure. Moreover, our proposals to require a version of an issuer's electronic road show presentations to be either filed or publicly available provide appropriately for the availability of information to all investors.[430]

Our proposals to allow certain registration statements to become effective automatically 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 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 proposals to include additional disclosures in Exchange Act periodic reports also would promote investor protection. We believe that the disclosure by accelerated filers 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 decide if those comments raise particular concerns that would affect their decision to invest in the securities. We believe that the disclosure of risk factors 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 would be subject to risk factor disclosure requirements in its Securities Act registration statement.

3. Facilitating Capital Formation

We anticipate that our proposals would facilitate capital formation, and possibly lower the cost of capital, by improving access to the public capital markets. The proposals 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 proposals would depend on the characteristics of the issuer. We propose to grant the most flexibility under the automatic shelf registration system to eligible well-known seasoned issuers. Other issuers also would benefit, albeit to a lesser degree, from our other proposed amendments to the registration process.

The proposals may lower the cost of capital because they would provide significant flexibility to issuers and underwriters in marketing their securities. For example, automatic shelf registration would enable well-known seasoned issuers to take advantage of market windows more effectively for the following reasons. First, issuers would have more control over the timing of their public offerings and would be able to complete an offering more quickly. Second, underwriters would have more latitude to make changes to the plan of distribution of the issuer's securities in response to changing market conditions. Finally, freeing issuers from the constraint of having to initially register a particular class or amount of securities would permit issuers to structure securities on a real-time basis to accommodate investor demand.

The other amendments 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 would allow issuers to offer securities directly to the marketplace, without using the underwriting or syndication process. Under our proposals to expand Form S–3 eligibility to cover additional majority-owned subsidiaries, issuers would have greater flexibility to structure offerings of guaranteed securities without losing the benefits of shelf registration. In addition, our proposals to expand incorporation by reference 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 would not be subject to a liquidity discount. In addition, registered securities offerings provide a larger investor base than that available to those who participate in private placements. Accordingly, issuers may

[428] *See, e.g.,* Release No. 33–3519 (Oct. 11, 1954) [19 FR 6727]; Release No. 33–4968 (Apr. 24, 1969) [34 FR 7235]; *Adoption of Integrated Disclosure System,* Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380].

[429] 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?'' (July 16, 2003), Tuck School of Business Working Paper No. 03–22.

[430] The proposals would not affect the application of the Securities Act to oral road show presentations for their institutional investor clients.

incur lower transaction costs when raising capital because they would have access to a much deeper market for their securities and would not have to expend additional resources to locate investors.

The prospectus delivery proposals 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 could be satisfied through a means other than physical delivery. Because the contract of sale would have already occurred by the time the final prospectus was 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 would enable investors to review the confirmation and verify trade data closer to the time of the investment decision.

4. Reduced Regulatory Uncertainty

The proposals modify the federal securities laws related to communications, liability, shelf registration, and the use of electronic media during a registered offering. The proposals, by enhancing issuers' certainty about the regulatory treatment of and liability provisions attached to the publication 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 proposed 30-day bright line exclusion and the proposed exemption from the prohibition on offers prior to filing for well-known seasoned issuers would provide issuers with comfort in communicating information without risk of violating the gun-jumping provisions. Moreover, as a result of the proposed safe harbors for regularly released factual business information and forward-looking information, issuers, brokers, and dealers would be able to avoid disruption in their ordinary communications with the investment community. At the same time, those communications could benefit all investors because there would be more current information and analysis available upon which to make investment decisions.

The proposals to amend the shelf registration procedures would codify in a single location rules for permissible omissions from shelf registration statements under the Securities Act and the permissible methods to include the omitted information. This would 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 proposals would address the disparate treatment of underwriters from a liability standpoint by establishing a new effective date for liability purposes for issuers and other offering participants in connection with takedowns off shelf registration statements, as reflected in prospectus supplements filed for such takedowns.

5. Lower Costs

The prospectus delivery proposals and our proposals related to the registered securities offering process would provide cost-saving options to issuers, underwriters and participating broker-dealers. For purposes of our PRA analysis, we have estimated that our proposed amendments to the registered securities offering processes would reduce the current compliance costs by approximately $87,299,000.[431] 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 would 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 our ''access equals delivery'' proposals. Investors may request the final prospectus, and we estimate that they will do so 25% of the time. Therefore, we estimate the annual cost savings will be approximately $130,753,000.[432]

D. Costs

While the overall goal of the proposed 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 may be potential costs to our proposal. These include costs for compliance with the new rules, potential behavioral changes resulting from our liability proposals, and certain other costs.

1. Compliance Costs

One potential cost of the proposals 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. For purposes of our PRA analysis, we have estimated that these costs will be approximately $621,800.[433] 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, our proposals 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.

Another potential compliance cost is the additional expenditures that issuers and offering participants may incur in storing and archiving information to satisfy the proposed record retention conditions. Especially when the communication has been transmitted electronically or is contained on Web sites, parties will need to implement appropriate mechanisms to ensure that they retain for three years adequate records of any free writing prospectuses used. For purposes of our PRA analysis, we have estimated that these costs will be approximately $948,900.[434]

[431] For purposes of monetizing the cost of issuer personnel time, we estimate the average hourly cost of issuer personnel time to be $125. The calculation for total cost is: (85,170 hours of issuer personnel time multiplied by $125 per hour) plus ($76,652,993 professional costs) = $87,299,000. *See* also notes 413 through 424 and accompanying text.

[432] ($0.75 per prospectus) multiplied by (232.45 million prospectuses multiplied by 75% frequency of relying on proposed Rule 172) = $130,753,125.

[433] We estimate the average hourly cost of issuer personnel time to be $125. The calculation for total filing cost is: (478.25 issuer hours to make filings under Rule 433 plus (3.31 issuer hours to make filings under Rule 163) plus (125.06 issuer hours to make available electronic road show) multiplied by ($125 per hour) plus ($430,425.00 professional costs to make filings under Rule 433) plus ($2,981.25 professional costs to make filings under Rule 163) plus ($112,556 professional costs to make available electronic road show) = $621,789.75. *See* also Table 3 in Section X above under ''Paperwork Reduction Act.''

[434] The calculation for total record retention cost is: (925.75 issuer hours) multiplied by ($125 per hour) plus $833,175.00 professional cost =

Continued

The proposed disclosures may increase the cost to issuers of preparing their Exchange Act reports. We do not expect the costs to accelerated filers of including disclosure of certain unresolved staff comments to be significant, because, even when an accelerated filer would have to include that disclosure, the information would be readily available to the issuer. For purposes of our PRA analysis, we have estimated that these additional disclosures will cost a total of $138,713 per year.[435]

Including risk factor disclosure will require extra effort for issuers who do not already include this disclosure in their Exchange Act reports for other reasons. For purposes of the PRA, we have estimated that these additional disclosures will result in additional costs of $9,743,417 to prepare, review, and file the proposed disclosure.[436] Because issuers already are required to prepare financial statements and other information about their business, financial condition, and prospects in their quarterly and annual reports, some of which will include these risk factors, we believe that issuers will have the information available to create their 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[437] 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 would not impose a significant incremental costs because the notice could consist of a pre-printed message that is automatically delivered with the confirmation required by Exchange Act Rule 10b–10. Accordingly, we estimate that the cost for complying with proposed Rule 173 prospectus would be approximately $0.05 per notice. We estimate the annual cost of providing the notifications would be approximately $11,622,500.[438] The cost savings resulting from the elimination of the requirement to supply a final prospectus to each investor would offset these costs, however.

2. Potential for Increased Liability

Our proposals to deem prospectus supplements to be part of and included in effective registration statements, and to modify, for liability purposes, 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 the prospectus supplements and the information conveyed to investors.

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 particular, some commenters on the 1998 proposals expressed concern that issuers might be liable for failure to disclose, or for failure to disclose prominently enough, a particular risk that in hindsight should have been emphasized. In addition, issuers were particularly concerned about liability for information that may be forward-looking in nature.

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 proposal, however, we were sensitive to potential additional costs that the proposed disclosure requirement might impose. For example, for liability purposes, we are not proposing to treat 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 would 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 due to its business, operations, or other matters. 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[439] 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. Research Reports

While the proposed rules expand, to some extent, the circumstances under which brokers and dealers can publish research reports on an issuer or its securities while the issuer is engaging in a registered offering, they also contain revised conditions to the availability of the safe harbors. For example, while we are expanding the categories of eligible issuers for purposes of Securities Act Rule 138, we also are revising the requirement that the broker or dealer have an established history of publishing or distributing research to provide that the research must be on the type of securities being offered. This could act as a barrier to brokers or dealers with no established history of publishing particular types of research from publishing research while they are participating in an offering. In addition, we are proposing to exclude from Securities Act Rules 137, 138, and 139 research reports relating to issuers who are, or their predecessors in the prior three years were, blank check companies, shell companies, or penny stock issuers. This could preclude certain issuers from being covered by brokers or dealers that are participating

$948,893.75. See also Table 3 in Section X above under ''Paperwork Reduction Act.''

[435] For purposes of the PRA, we estimated that issuers would spend a total of $61,650 on outside professionals to prepare this disclosure. We also estimated that issuers would spend a total of 616.5 hours of issuer personnel time preparing this disclosure. We estimate the average hourly cost of issuer personnel time to be $125, resulting in a total cost of $77,062.50 for issuer personnel time. This results in a total cost of $138,712.50 for all issuers.

[436] For purposes of the PRA, we estimated that issuers would spend a total of $4,414,854 on outside professionals to prepare this disclosure. We also estimated that issuers would spend a total of 42,628.5 hours of issuer personnel time per year on risk factor disclosures. We estimate the average hourly cost of issuer personnel time to be $125 per year, resulting in a total cost of $5,328,563 for issuer personnel time. This results in a total cost of $9,743,416.50 for all issuers.

[437] 17 U.S.C. 77z–2.

[438] ($0.05 per notice) multiplied by (232.45 million confirmations) = $11,622,500. *See* also note 410 and accompanying text.

[439] *See e.g.*, Item 503 of Regulation S–K [17 CFR 229.503].

in one of these issuers' registered offerings.

4. Other Potential Costs

We are proposing to allow 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 proposing to require accelerated filers 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 proposed rules also could impose certain costs on underwriters. For example, removing the restrictions on at-the-market offerings could affect underwriters negatively because issuers may decide not to hire an underwriter to conduct an offering.

We also recognize that relaxing restrictions on communications may impose an analytical 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 our proposals, some offerings would 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 would 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.

E. Request for Comment

- Will our proposals result in investors receiving more timely and accurate information upon which to base an investment decision?
- Is our definition of ''well-known seasoned issuer'' appropriate for the purposes of the proposal?
- If we were to remove restrictions on at-the-market offerings, would issuers be inclined to conduct at-the-market offerings without the services of an underwriter?
- We request data to quantify the costs of filing issuer free writing prospectuses, even if they are not required to meet our statutory prospectus requirements. In addition, how many free writing prospectuses would an issuer expect to file on average in connection with each offering? How many other free writing prospectuses are offering participants likely to file in connection with each offering?
- We request comment on the costs of implementing and maintaining any storage systems and capabilities that issuers and offering participants will need to retain for three years adequate records of any free writing prospectuses used. Please provide any quantitative data on which you rely in formulating your comments.
- We request comment on whether investors would benefit overall from issuers communicating with investors outside of the statutory prospectus. Does the benefit of greater freedom in communications outweigh the cost to security holders of obtaining and analyzing the additional information?
- We request comment or data on any other costs that would be associated with the proposed relaxation of the communications restrictions and the amendments to the filing requirements.
- We request comment on the additional costs that issuers and underwriters may incur in complying with the proposed notification requirement for investors who purchased in a registered offering.
- We request comment as to whether the proposals regarding delivery of final prospectuses would negatively impact investors and, if so, how.
- We request comment on the assumptions and quantitative data underlying the costs to investors of acquiring final prospectuses. What percentage of investors would contact issuers for copies of prospectuses? What percentage of investors would obtain prospectuses through the Internet? How much would it cost investors in terms of paper, printer ink, Internet connection costs, and time to download information and print prospectuses?
- What are the costs to issuers and underwriters of printing and delivering prospectuses?
- Would issuers and underwriters incur additional incremental costs if they needed to print extra prospectuses due to demand for paper copies?
- We request comment on the number of prospectuses that issuers and underwriters would no longer need to print and deliver to investors and the size of the resulting cost savings.
- We request comment (especially quantitative data) as to whether having access to research reports will enhance investors' ability to evaluate securities and help ensure that the market will properly value securities.
- We request comment on the quantification of the benefits to investors of determining liability as to a statement or communication in a manner that does not take into account information conveyed only after the time of the contract of sale.
- We request comment on the costs and benefits of our proposal that an issuer in a primary offering of securities, regardless of the form of underwriting, be considered a seller for purposes of Securities Act Section 12(a)(2).
- We request comment on whether, and how, investors would benefit from the disclosure regarding unresolved comments in Exchange Act periodic reports, including any quantifiable benefits of having this additional disclosure.
- We request comment on whether, and how, investors would benefit from the disclosure regarding risk factors, including any quantifiable benefits of having this additional disclosure.
- We request comment on the potential liability costs of including the disclosure requirements in Exchange Act periodic reports, including a quantification of the costs of preparing the risk factor and unresolved staff comment disclosures and of the potential litigation costs.
- We request comment on whether it would be difficult or costly for investors to compile materials that are incorporated by reference into prospectuses.

XII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Exchange Act Section 23(a)(2) [440] 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

[440] 15 U.S.C. 78w(a)(2).

2(b)[441] and Exchange Act Section 3(f)[442] 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 proposed amendments are intended to modify and advance the Commission's regulatory system for offerings under the Securities Act of 1933, enhance communications between public issuers and investors, and promote investor protection. We anticipate these proposals 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 proposals 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.

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 request comment on whether the proposals, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their views, if possible.

[441] 15 U.S.C. 77b(b).

[442] 15 U.S.C. 78c(f).

XIII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Securities Act and the Exchange Act that would (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 proposals are intended to modify and advance the Commission's regulatory system for offerings under the Securities Act of 1933, enhance communications between public issuers and investors, and promote investor protection.

A. Reasons for the Proposed Action

In 1998, the Commission proposed new rules under the Securities Act that were intended to modernize the securities offering process to recognize the evolution of the securities markets and securities products since the Securities Act's adoption and to enable market participants to capitalize on new technologies.[443] The underlying premise of those proposals—the need to modernize the securities offering and communications processes—was supported by commenters at the time. However, commenters indicated dissatisfaction with a number of the specifics in the 1998 proposals. We believe that the objectives of the 1998 proposals in reforming the offering process continue to be supported, and merit our attention still.

The 1998 proposals were a step in an evaluation 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.[444] Mr. Cohen's article was followed by a 1969 study led by Commissioner Francis Wheat[445] and the Commission's Advisory Committee on Corporate Disclosure in 1977.[446] 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.[447]

The Commission's attention to the offering and communications processes under the Securities Act has 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.[448] 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.[449] 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

[443] *See The Regulation of Securities Offerings,* Release No. 33–7606A (Nov. 13, 1998 [63 FR 67174] (the ''1998 proposals'').

The National Securities Markets Improvement Act of 1996 (NSMIA) 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 consistent with the protection of investors.'' See Securities Act Section 28 [15 U.S.C. 77z–3]. This authority permitted a number of the proposals put forth in our 1998 proposals to go beyond previous modernization efforts.

[444] 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.'')

[445] *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).

[446] *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).

[447] *See Adoption of Integrated Disclosure System,* Release No. 33–6383 (Mar. 16, 1982) [47 FR 11380], *Delayed or Continuous Offering and Sale of Securities,* Release No. 33–6423 (Sept. 10, 1982) [47 FR 39799], and *Shelf Registration,* Release No. 33–6499 (Nov. 17, 1983) [48 FR 52889].

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

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

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 delivered its report, the Commission issued a concept release regarding regulation of the offering process.[450] The release sought input on a number of significant issues, including the concept of company registration, integration of the Securities Act and Exchange Act, enhanced Exchange Act reporting, whether information was properly and timely made available in the offering process, and whether the review of filings of issuers by the staff of the Division of Corporation Finance should be modified, at least for some category of large seasoned issuers.

While many of the issues cited above remain valid matters for consideration, much of the comment in response to our 1998 proposals suggested that the existing system of regulating capital formation in the registered offering market provides a number of advantages that should be carefully considered and retained if we are to make other changes. In putting forward proposed rules today, we have 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 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 current rules 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 proposing revisions to 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. Our proposals 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.

B. Objectives

The overall goal of the proposed reforms is to make the registration system more workable for issuers and underwriters and more effective for investors in today's capital markets. The proposals 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 proposals would:

- 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.

C. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 7, 10, 19, 27A, and 28 of the Securities Act of 1933, as amended, Sections 3, 10, 12, 13, 15, 17, 21E, 23, and 36 of the Securities Exchange Act of 1934, as amended, and Sections 8, 24(a), 30, and 38 of the Investment Company Act of 1940.

D. Small Entities Subject to the Proposed Rules

The proposals would affect issuers that are small entities. Securities Act Rule 157[451] and Exchange Act Rule 0–10(a)[452] define a issuer 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.[453] We estimate that there were approximately 2,500 public issuers, other than investment companies, that may be considered small entities. We estimate that there are approximately 233 investment companies that may be considered small entities.

In addition to small issuers, small broker-dealers may be affected by the rules. Paragraph (c)(1) of Rule 0–10[454] 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 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, the Commission estimates 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 our proposals. Generally, we believe larger broker-dealers engage in these activities, but we request comment on whether and how these proposals will affect small broker-dealers.

For purposes of the proposals, we would categorize issuers into tiers, consisting of non-reporting issuers, unseasoned issuers, seasoned issuers, and well-known seasoned issuers. The first three tiers of issuers would be identified by pre-existing criteria under the existing federal securities laws. A non-reporting issuer would be an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act. An unseasoned issuer would be 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.[455] A seasoned issuer would be an issuer that is eligible to use Form S–3 or Form F–3 to register offerings of securities to be sold by or on its behalf, on behalf of its subsidiary, or on behalf of a person of which it is the subsidiary. Our longstanding experience with these categories of issuers provides us with a basis for determining the amount of flexibility provided by the proposals.

The characteristics of the last tier of issuer, called well-known seasoned issuers in the proposals, would be easily

[450] *Securities Act Concepts and Their Effects on Capital Formation,* Concept Release, Release No. 33–7314 (July 25, 1996) [61 FR 40044].

[451] 17 CFR 230.157.

[452] 17 CFR 240.0–10(a).

[453] 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.

[454] 17 CFR 240.0–10(c)(1).

[455] Under the proposals, an issuer that is voluntarily filing Exchange Act reports, but is not required to do so, would be an unseasoned issuer for purposes of the communications and procedural proposals.

measurable and readily available so that issuers and market participants can determine eligibility easily. 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 in the past three years provides sufficient proxy.[456]

Under the proposals, a well-known seasoned issuer would 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.

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. We have proposed that the reforms not be 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 proposed to exclude these offerings from the reforms because they pose the greatest risk of abuse of the reforms.

To the extent the proposals 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 proposed rules. We believe that the current proposals are a cost-effective initial approach to address specific concerns related to small entities.

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

E. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments 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 proposing 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. Small issuers, like larger issuers, will have to file any free writing prospectus they use. We are not proposing to require issuers that file on Form 10–KSB, who tend to be smaller issuers, to disclose risk factors. Unlike larger companies that are ''accelerated filers,'' smaller issuers will not be required to disclose outstanding staff comments in their annual reports.

The proposals also would affect broker-dealers participating in a registered offering, as they would no longer be required to delivery a final prospectus, but would be able to send a notice of allocation and notice of prospectus availability. They also would be permitted to prepare and use free writing prospectuses. The broker-dealer would have to retain copies of the free writing prospectus for three years. Finally, the broker-dealer would be permitted to issue research reports with respect to a broader class of issuers and securities than currently permitted.

We encourage written comments regarding this analysis. We solicit comments as to whether the proposed amendments could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or completely duplicate the proposed rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

1. Establishing different compliance or reporting requirements that take into account the resources of small entities;
2. The clarification, consolidation, or simplification of disclosure for small entities;
3. Use of performance standards rather than design standards; and
4. Including smaller entities in some of the reforms.

The Commission has considered a variety of reforms to achieve its regulatory objectives. We are not proposing to require small business issuers to include disclosure of risk factors or unresolved staff comments in their Exchange Act periodic reports. We are proposing to liberalize generally the restrictions regarding communications around the time of a Securities Act registered offering of securities. As discussed above, the proposed flexibility will be greatest for larger, more seasoned issuers; however, the proposals would 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.

H. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. In particular, we request comments regarding:

1. The number of small entities that may be affected by the proposals;
2. The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
3. How to quantify the impact of the proposed rules.

Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, or, in the alternative, a certification under Section 605(b) of the Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

XIV. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[457] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;

[456] For further discussion of the characteristics of well-known seasoned issuers, *see* Section II above.

[457] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

• A major increase in costs or prices for consumers or individual industries; or

• Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on: (a) The potential effect on the U.S. economy on an annual basis; (b) any potential increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

XV. Statutory Basis—Text of the Proposed Amendments

We are proposing 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 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 229, 230, 239, 240, and 243

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 proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. 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, 77*ggg,* 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

2. Amend § 228.512 as follows:

a. Add paragraph (a)(4);

b. Add paragraph (a)(5); and

c. Add paragraph (g).

The additions read as follows:

§ 228.512 (Item 512) Undertakings.

* * * * *

(a) * * *

* * * * *

(4) For determining liability under the Securities Act of 1933 to any purchaser, each prospectus filed by the 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 it is first used after effectiveness.

(5) For determining liability of the small business issuer under the Securities Act of 1933 to any purchaser, the small business issuer undertakes that in a primary offering for the benefit of the small business issuer pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, the small business issuer will be considered to offer or sell the securities by means of any of the following communications:

(i) A small business issuer's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424 (§ 230.424 of this chapter);

(ii) Any free writing prospectus prepared by or on behalf of the undersigned small business issuer;

(iii) Information about the small business issuer or its securities (A) provided by or on behalf of the undersigned small business issuer and (B) included in any other free writing prospectus; and

(iv) Any other communication made by or on behalf of undersigned small business issuer.

* * * * *

(g) If the small business issuer is relying on Rule 430C (§ 230.430C of this chapter), include the following:

Each prospectus filed pursuant to Rule 424(b)(3) (§ 230.424(b)(3) of this chapter) as part of a registration statement in reliance on Rule 430C (§ 230.430C of this chapter) relating to an offering made pursuant to Rule 415(a)(1)(i) or (ix) (§ 230.415(a)(1)(i) or (ix) of this chapter), other than registration statements relying 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 in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement.

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

3. The authority citation for part 229 continues to read 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, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 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.

* * * * *

4. Amend § 229.512 as follows:

a. Revise the proviso immediately following paragraph (a)(1)(iii);

b. Add paragraph (a)(5); and

c. 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 and 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 prospectus supplement filed pursuant to Rule 424(b) (§ 230.424(b) of this chapter).

* * * * *

(5) That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser, except as provided in (a)(5)(ii) or (a)(5)(iii) of this section:

(i) 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

(ii) If the registrant is relying on Rule 430B (§ 230.430B of this chapter): Each prospectus filed pursuant to Rule 424(b)(2), (b)(5), (b)(7) or (b)(8) (§ 230.424(b)(2), (b)(5), (b)(7), or (b)(8) of this chapter) as part of a registration statement in reliance on Rule 430B (§ 230.430B of this chapter) or otherwise relating to an offering made pursuant to Rule 415(a)(1)(i) or (x) (§ 230.415(a)(1)(i) 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 it is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. Such date shall be deemed to be a new effective date of the registration statement for liability purposes as provided in Rule 430B (§ 230.430B of this chapter) 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 in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement; or

(iii) If the registrant is relying on Rule 430C (§ 230.430C of this chapter): Each prospectus filed pursuant to Rule 424(b)(3) (§ 230.424(b)(3) of this chapter) as part of a registration statement in reliance on Rule 430C (§ 230.430C of this chapter) relating to an offering made pursuant to Rule 415(a)(1)(i) or (ix) (§ 230.415(a)(1)(i) or (ix) of this chapter), other than registration statements relying 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 in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement.

(6) That, for the purpose of determining liability of the registrant under the Securities Act of 1933 to any purchaser:

The undersigned registrant undertakes that in a primary offering for the benefit of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, it will be considered to offer or sell the securities by means of any of the following communications:

(i) A registrant's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424 (§ 230.424 of this chapter);

(ii) Any free writing prospectus prepared by or on behalf of the undersigned registrant;

(iii) Information about the registrant or its securities (A) provided by or on behalf of the undersigned registrant and (B) included in any other free writing prospectus; and

(iv) Any other communication made by or on behalf of undersigned registrant.

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

5. 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, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

6. Revise § 230.134 to read as follows:

§ 230.134 Communications not deemed a prospectus.

Except as provided in paragraph (f) 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 (which includes a prospectus satisfying the requirements of section 10 of the Act, including a price range where required) 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:

(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;

(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, 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)(15) of this section;

(7) The name and address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;

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

(9) 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);

(10) 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);

(11) 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;

(12) 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;

(13) 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;

(14) Any statement or legend required by any state law or administrative authority;

(15) 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;

(16) The names of selling security holders (if included in the prospectus filed at the time of the communication);

(17) The names of securities exchanges or other securities markets where any class of the issuer's securities are, or will be, listed;

(18) The ticker symbols, or proposed ticker symbols, of the issuer's securities; and

(19) Information disclosed in order to correct inaccuracies previously contained in a communication 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, including a price range where required, 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:

(1) Which does no more than state from whom a written prospectus meeting the requirements of section 10 of the Act, including a price range where required, may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or

(2) Which is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405 (§ 230.405), which meets the requirements of section 10 of the Act, including a price range where required, 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 (other than a free writing prospectus as defined in Rule 405 (§ 230.405)) which meets the requirements of section 10 of the Act, including a price range where required, 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 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) This section does not apply to a notice, circular, advertisement, letter, or other 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)).

(f) A section 10 prospectus included in any communication pursuant to this section shall remain a prospectus for all purposes under the Act.

7. 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 any 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;
(c) The broker or dealer publishes or distributes the research report in the regular course of its business; and
(d) The issuer is not and any predecessor of the issuer during the past three years was not:
(1) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
(2) A shell company 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).
Instructions to § 230.137.
1. *Definition of research report.* For purposes of this section, *research report* means a written communication as defined in Rule 405 (§ 230.405) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision.
2. Paragraph (b) of this section does not preclude payment of the regular price being paid by the broker or dealer for independent research, so long as the conditions of paragraph (b) of this section are satisfied.
3. Paragraph (b) of this section does not preclude payment of the regular subscription or purchase price for the research report.
8. 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, nonparticipating preferred stock; or
(ii) The research report relates solely to the issuer's non-convertible debt securities or non-convertible, nonparticipating 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:
(i) Is required to file reports, and has filed all required periodic 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 satisfies the public float threshold in General Instruction I.B.1. of Form F–3 or is issuing non-convertible investment grade securities as defined in General Instruction I.B.2. of Form F–3; and
(C) 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;
(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 any predecessor of the issuer during the past three years was not:
(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));
(ii) A shell company 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 paragraphs (a)(1), (a)(2), (a)(3) and (a)(4) 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 paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) 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.
Instruction to § 230.138.
Definition of research report. For purposes of this section, *research report* means a written communication as defined in Rule 405 (§ 230.405) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision.
9. 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) *Research reports of any type.*
(i) The issuer:
(A) Meets the registrant requirements of Form S–3 (§ 239.13 of this chapter) or Form F–3 (§ 239.33 of this chapter) and the minimum float or investment grade securities provisions of either paragraph (B)(1) or (2) of General Instruction I of the respective form; or
(B) Is a foreign private issuer that:
(*1*) Meets the registrant requirements of Form F–3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a);
(*2*) Either satisfies the public float threshold in General Instruction I.B.1.of Form F–3 or is issuing non-convertible investment grade securities pursuant to General Instruction I.B.2. of Form F–3; and

(*3*) 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;

(ii) The issuer is not and any predecessor of the issuer during the past two years was not:

(A) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(B) A shell company 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 is, at the time of publication or distribution, publishing or distributing research reports about the issuer or its securities.

(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 (15 U.S.C. 78m or 78o(d) 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.

Instructions to § 230.139.

1. *Definition of research report.* For purposes of this section, research report means a written communication as defined in Rule 405 (§ 230.405) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision.

2. *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:

(i) Have previously published or distributed projections on a regular basis in order to satisfy the ''regular course of its business'' condition;

(ii) At the time of publishing or disseminating a research report, be publishing or distributing projections with respect to that issuer; and

(iii) 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 all issuers represented in the comprehensive list of securities contained in the research report.

10. 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 on or through a national securities exchange or facility thereof, trading facility of a national securities association, or an alternative trading system registered pursuant to Rule 301 of Regulation ATS under the Securities Exchange Act of 1934 (§ 242.301 of this chapter), shall mean the filing of the final prospectus for the securities that are the subject of the transaction with the Commission by the applicable filing date under Rule 424 (§ 230.424) if the conditions in paragraph (b) of this section are satisfied.

(b) *Conditions.* A broker or dealer may rely on paragraph (a) of this section with regard to any requirement to deliver a prospectus for transactions covered by that paragraph if:

(1) Securities of the same class 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 with the Commission a prospectus that satisfies the requirements of section 10(a) of the Act, other than omitting price-related information under Rule 430A (§ 230.430A), or for offerings relying on Rule 430B (§ 230.430B) or Rule 430C (§ 230.430C), the issuer has filed or will file such a prospectus within the time required under Rule 424 (§ 230.424).

(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* 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* 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).

11. Amend § 230.158 to revise paragraph (c) to read as follows:

§ 230.158 Definition 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 by the issuer of registered securities to the public filed for the purposes of:

(i) Including any prospectus required by section 10(a)(3) of the Act;

(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; or

(iii) Including any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

(3) The date of filing of the last report of the issuer incorporated by reference into the prospectus, and relied upon in lieu of filing a post-effective amendment for purposes of paragraphs (c)(2)(i), (ii) and (iii) of this section, next preceding a particular sale by the issuer of registered securities to the public; or

(4) The most recent effective date of the registration statement for liability purposes determined pursuant to Rule 430B (§ 230.430B) next preceding a particular sale by the issuer of registered securities to the public.

* * * * *

12. 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).

13. Add § 230.159A to read as follows:

§ 230.159A Definition of ''seller'' for purposes of section 12(a)(2) of the Act.

For purposes of section 12(a)(2) of the Act only, *seller* shall include the issuer of the securities with regard to, and the issuer shall be considered to offer or sell the securities by means of, any of the following communications made by or on behalf of the issuer in connection with primary offerings of securities of the issuer, regardless of the underwriting method used to sell the issuer's securities:

(a) An issuer's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 424 (§ 230.424) or Rule 497 (§ 230.497);

(b) Any free writing prospectus as defined in Rule 405(§ 230.405) prepared by or on behalf of 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 provided pursuant to Rule 498 (§ 230.498);

(c) Information about the issuer or its securities (1) provided by or on behalf of the issuer and (2) included in 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)), in any advertisement pursuant to Rule 482 (§ 230.482); and

(d) Any other communication made by or on behalf of the issuer.

Notes to § 230.159A: 1. For purposes of this section, information is provided or a communication is made *by or on behalf* of an issuer if the issuer or an agent or representative authorizes the information or communication and approves the information or communication before its provision or use.

2. This rule shall not affect in any respect the determination of whether any other person is a ''seller'' for purposes of section 12(a)(2) of the Act.

14. 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.

Because of the objectives of this section and the policies underlying the Act, the exemption is not available for any communication that, although in technical compliance with the section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) In an offering by a well-known seasoned issuer as defined in Rule 405 (§ 230.405), that will 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 any written offer made in reliance on this exemption will be a prospectus under section 2(a)(10) of the Act and a free writing prospectus as defined in Rule 405 (§ 230.405) relating to a public offering of securities to be covered by the registration statement to be filed and the exemption from section 5(c) provided in this section for such written offer shall be conditioned on satisfying the conditions in paragraph (b) of this section.

(b) *Conditions.* (1) *Legend.* (i) Every written offer made in reliance on this exemption shall contain the following legend:

> [Issuer's name] may file a registration statement (including a prospectus) with the SEC for this offering. Before you invest, you should read the prospectus in it and other documents the issuer has filed with the SEC for more complete information about [issuer's name], including any risks affecting the issuer or its securities, 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]. This document is a written communication that is an offer pursuant to a free writing prospectus.''

(ii) The legend 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 unintentional failure to include the 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 legend condition;

(B) The free writing prospectus is amended to include the legend as soon as practicable after discovery of the omitted legend; and

(C) If the free writing prospectus has been transmitted without the legend, the free writing prospectus must be retransmitted with the legend to all prospective purchasers to whom, or by

the same means as, the free writing prospectus was originally transmitted.

(2) *Filing condition.*

(i) Every written communication made pursuant to this exemption shall be filed with the Commission promptly upon the filing of the registration statement or amendment covering the securities that are being offered in reliance on this exemption.

(ii) An immaterial or unintentional failure to file or delay in filing a free writing prospectus to the extent as 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 the following communications:

(i) Communications subject to Rule 166 (§ 230.166) for business combination transactions;

(ii) Communications made in connection with offerings registered on Form S–8 (§ 239.16b); or

(iii) Communications in offerings of securities of ineligible issuers as defined in Rule 405 (§ 230.405).

(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 authorizes the communication and approves the communication before its use.

(d) For purposes of this section, a written 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 an issuer is deemed a written offer by the issuer and a free writing prospectus of the issuer.

(e) A communication exempt 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).

15. 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.

Because of the objectives of this section and the policies underlying the Act, the exemption is not available for any communication that, although in technical compliance with the section, is part of a plan or scheme to evade 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 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. Communications satisfying the requirements of Rule 168 (§ 230.168) or Rule 169 (§ 230.169) or other safe harbors or exemptions from the definition of offer or the requirements of section 5(c) of the Act are not subject to the restriction of this section on distribution or publication 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 to the following communications:

(1) Communications subject to Rule 166 (§ 230.166) for business combination transactions;

(2) Communications made in connection with offerings registered on Form S–8 (§ 239.16b of this chapter); or

(3) Communications in offerings of securities of ineligible issuers as defined in Rule 405 (§ 230.405).

(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 authorizes the communication and approves the communication before its use.

(d) A communication exempt 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).

16. Add § 230.164 to read as follows:

§ 230.164 Post-filing free writing prospectuses in connection with certain registered offerings.

Preliminary Note to § 230.164.

Because of the objectives of this section and the policies underlying the Act, 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.

(a) In connection with a registered offering, a free writing prospectus as defined in Rule 405 (§ 230.405) used by an issuer, underwriter or participating 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 condition contained in Rule 433 (§ 230.433) 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 requirement; and

(2) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(c) An unintentional failure to include the legend in a free writing prospectus as necessary to satisfy the legend condition contained in Rule 433 (§ 230.433) 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 legend as soon as practicable after discovery of the omitted legend; and

(3) If the free writing prospectus has been transmitted without the legend, the free writing prospectus must be retransmitted with the legend to all prospective purchasers to whom, or by the same means as, the free writing prospectus was originally transmitted.

17. Add § 230.168 to read as follows:

§ 230.168 Factual business information and forward-looking information regularly released by a reporting issuer.

Preliminary Note to § 230.168.

This section is only available for factual business information and forward-looking information released or disseminated as provided in this section. This section is not available for any communication that may be in technical compliance with this section but is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) In the case of 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)), and that 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)), for purposes of sections 2(a)(10) and 5(c) of the Act, the continued regular release or dissemination by or on behalf of the issuer of factual business information and 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.

(b) Definitions. Except as provided in paragraph (c) of this section, *factual business information* is limited to 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 or some aspect of its business;

(ii) Advertisements of, or other information about, the issuer's products or services;

(iii) Factual information about business or financial developments with respect to the issuer;

(iv) Dividend notices; and

(v) Factual information set forth in any report that the issuer files pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(2) Except as provided in paragraph (c) of this section, *forward-looking information* is limited to some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(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, information is released or disseminated on behalf of the issuer if the issuer or an agent or representative authorizes the communication and approves the communication before its use.

(c) *Exclusions.* (1) For purposes of this section, *factual business information* does not include information about the registered offering or information released or disseminated as part of the offering activities in the registered offering; and

(2) For purposes of this section, *forward-looking information* does not include information about the registered offering or information released or disseminated as part of the offering activities in the registered offering.

(d) *Conditions to exemption.* The following conditions must be satisfied with respect to the information:

(1) The issuer has previously released or disseminated information of the type described in this section in the ordinary course of its business; and

(2) The information is released or disseminated in the ordinary course of the issuer's business and the timing, manner and form in which the information is released or disseminated is materially consistent with similar past disclosures.

18. Add § 230.169 to read as follows:

§ 230.169 Factual business information regularly released by a non-reporting issuer.

Preliminary Note to § 230.169.

This section is only available for factual business information released or disseminated as provided in this section. This section is not available for any communication that may be in technical compliance with this section but is part of a plan or scheme to evade the requirements of section 5 of the Act.

(a) In the case of an issuer that is not 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)) and that 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)), for purposes of sections 2(a)(10) and 5(c) of the Act, the continued regular release or dissemination by or on behalf of the issuer of factual business 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.

(b) *Definitions.*

(1) Except as provided in paragraph (c) of this section, *factual business information* is limited to 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 or some aspect of its business;

(ii) Advertisements of, or other information about, the issuer's products or services; and

(iii) Factual information about business or financial developments with respect to the issuer.

(2) For purposes of this section, information is released or disseminated on behalf of the issuer if the issuer or an agent or representative authorizes the communication and approves the communication before its use.

(c) *Exclusions.* For purposes of this section, *factual business information* does not include:

(1) Information about the registered offering or information released or disseminated as part of the offering activities in the registered offering; or

(2) Forward-looking information.

(d) *Conditions to exemption.* The following conditions must be satisfied with respect to the information:

(1) The issuer has previously released or disseminated information of this type in the ordinary course of its business;

(2) The information is released or disseminated in the ordinary course of the issuer's business and the timing, manner and form in which the information is released or disseminated is materially consistent with similar past disclosures; and

(3) The information is released or disseminated to persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who regularly and historically have provided such information to such persons.

19. 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, 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 and notices of allocation of

securities sold or to be sold in an offering pursuant to a registration statement that identify the securities and information which is otherwise limited to information regarding pricing, allocation and settlement, and information incidental thereto 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.

(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, other than omitting price-related information under Rule 430A (§ 230.430A), or for offerings relying on Rule 430B (§ 230.430B) or Rule 430C (§ 230.430C), the issuer has filed or will file such a prospectus within the time required under Rule 424 (§ 230.424).

(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).

20. Add § 230.173 to read as follows:

§ 230.173 Notice of registration.

(a) Each underwriter or broker or dealer participating in an offering pursuant to a registration statement shall provide to each purchaser from it in a transaction that represents: (1) A sale by the issuer or an underwriter, or (2) a sale where a final prospectus meeting the requirements of section 10(a) of the Act is not exempt pursuant to section 4(3) of the Act and Rule 174 (§ 230.174), from a requirement to be delivered, 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 an underwriter, broker, 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 exempt from and not a requirement for compliance with Rule 172 (§ 230.172).

(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, including pursuant to Rule 430B (§ 230.430B), notices as set forth in paragraph (a) are exempt from the provisions of section 5(b)(1) of the Act.

(f) *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).

21. 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 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).

22. 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 automatically 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 that becomes effective automatically pursuant to Rule 462 (§ 230.462) is 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) the issuer has commenced pursuant to the registration statement before the Commission has notified the issuer of its ineligibility 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 relying on General Instructions I.B.1 or I.B.2 of Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) for primary offerings of its securities.

23. Amend § 230.405 as follows:

a. Add new definitions of ''automatic shelf registration statement'', ''free writing prospectus'', ''ineligible issuer'', ''shell company'', ''well-known seasoned issuer'', and ''written communication'', in alphabetical order; and

b. Revise the definition of ''graphic communication''.

The revision and additions read as follows:

§ 230.405. Definition of terms.

* * * * *

Automatic shelf registration statement. The term *automatic shelf registration statement* means a registration statement filed on Forms S–3 or 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 Rule 405 (§ 230.405) 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), or Rule 431 (§ 230.431); or

(2) 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 the definition written communication in Rule 405 (§ 230.405) 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.

Ineligible issuer. (1)An *ineligible issuer* is an issuer with respect to which any of the following is true:

(i) Any issuer that is required to file reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that has not filed all materials required by sections 13, 14 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78n, or 78o(d)), including any certifications required by any reports;

(ii) Within the past three years, the issuer or its predecessor was a blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(iii) Within the past three years, the issuer or its predecessor was a shell company as defined in Rule 405 (§ 230.405);

(iv) The issuer is registering 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 it or its predecessor has issued penny stock in the last three years;

(v) The issuer is a limited partnership that is offering and selling its securities other than through a firm commitment underwriting;

(vi) The independent registered public accountant that examined the issuer's financial statements for the most recent fiscal year expressed in its report substantial doubt about the issuer's ability to continue as a going concern;

(vii) 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; *provided, however,* that this would not make the issuer ineligible if it has filed an annual report with audited financial statements subsequent to its emergence from that bankruptcy, insolvency or receivership process;

(viii) Within the past three years, the issuer or any of its subsidiaries 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));

(ix) Within the past three years, the issuer or any of its subsidiaries entered into a settlement with any government agency involving allegations of violations of the federal securities laws or regulations;

(x) Within the past three years, the issuer or any of its subsidiaries 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 federal securities laws;

(B) Requires that the person cease and desist from violating any provision of the federal securities laws; or

(C) Determines that the person violated any provision of the federal securities laws;

(xi) 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

(xii) The issuer is the subject of any pending proceeding under section 8A of the Act in connection with an offering.

(2) The following issuers shall also be deemed to be ineligible issuers:

(i) The issuer is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

(ii) The issuer 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)); or

(iii) The issuer is registering an offering relating to a business combination transaction as defined in Rule 165(f)(1)(§ 230.165(f)(1)), but only for purposes of such offerings.

(3) An issuer, other than an issuer described in paragraph (2)(i) or (2)(ii) of this section 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.

* * * * *

Shell company. The term *shell company* means a registrant with no or nominal operations and with:

(1) No or nominal assets; or

(2) Assets consisting solely of cash and cash equivalents.

* * * * *

Well-known seasoned issuer. A *well-known seasoned issuer* is any issuer that as of the last business day of its most recently completed second fiscal quarter prior to the date of filing its Form 10–K or Form 20–F (§ 249.310 or § 249.220f of this chapter) or amendment to its registration statement for purposes of complying with section 10(a)(3) of the Act:

(1)(i) Is eligible to file a registration statement on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) for primary offerings of its securities relying on General Instruction I.B.1, I.B.2 (for issuers satisfying the requirements of paragraph (1)(i)(A) of this section), or I.D. of Form S–3 or General Instruction I.B.I, I.B.2 (for issuers satisfying the requirements of paragraph (1)(i)(B) of this section) or I.C. of Form F–3 and:

(ii) Has either:

(A) A market value of its outstanding common equity held by non-affiliates of $700 million or more; or

(B) Has issued in the last three years at least $1 billion aggregate amount of debt securities in offerings registered under the Act and will register only debt securities;

(2) Is a majority-owned subsidiary of a well-known seasoned issuer and, as to the subsidiaries' securities that are being or may be offered:

(i) The well-known seasoned issuer parent has fully and unconditionally guaranteed, as defined in Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter), the payment obligations on the subsidiary's securities and the securities are non-convertible obligations;

(ii) Are guarantees of:

(A) Non-convertible obligations of its parent; or

(B) Non-convertible obligations of another majority-owned subsidiary where such non-convertible obligations are fully and unconditionally guaranteed, as defined in Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter), by the parent; or

(iii) Are non-convertible obligations fully and unconditionally guaranteed, as defined in Rule 3–10 of Regulation S–X (§ 210.3–10 of this chapter), by another majority-owned subsidiary of the same well-known seasoned issuer parent that itself is a well-known seasoned issuer, other than pursuant to this paragraph (2) of this section.

(3) Is required to file reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) and has been required to file reports pursuant to those sections for at least the last 12 calendar months;

(4) Has filed all materials it was required to file during the last 12 calendar months under section 13, 14 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78n or 78o(d));

(5) Has filed in a timely manner all materials required to be filed during the 12 calendar months and any portion of a month immediately preceding the date of determination, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a) of Form 8–K (§ 249.308 of this chapter), and if the issuer has used (during the 12 calendar months and any portion of a month immediately preceding the date of determination) Rule 12b–25(b) of the Securities Exchange Act of 1934 (§ 240.12b–25(b) of this chapter) with respect to a report or a portion of a report, it has actually filed that report or portion thereof within the time period prescribed by that section;

(6) Is not an ineligible issuer as defined in Rule 405 (§ 230.405); and

(7) Is not an asset-backed issuer as defined in Rule 405 (§ 230.405).

* * * * *

Written communication. Except as otherwise specifically provided or the context otherwise requires, a *written communication* is any communication that is written, printed, broadcast, or a graphic communication as defined in Rule 405 (§ 230.405).

24. 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.

25. Amend § 230.412 as follows:

a. Remove the authority citation following the section;

b. Revise paragraph (a); and

c. Add paragraph (d).

The revision and addition read 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 shall be deemed to be modified or superseded for purposes of the registration statement or the prospectus to the extent that a statement contained in the prospectus 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 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 after the most recent effective date or after the date of the most recent prospectus may modify or replace existing statements contained in the registration statement or the prospectus.

* * * * *

(d) Notwithstanding paragraph (a) of this section, any statement contained in a document that is deemed to be incorporated by reference or deemed to be part of, or any statement contained in a registration statement or the prospectus after the most recent effective date of the registration statement for liability purposes deemed to have occurred pursuant to Rule 430B (§ 230.430B), will not modify or supersede any statement contained in the registration statement or the prospectus or contained in a document that is incorporated or deemed to be incorporated by reference or deemed to be part of a registration statement or the prospectus immediately before the most recent deemed effective date pursuant to Rule 430B (§ 230.430B).

26. Revise § 230.413 to read as follows:

§ 230.413 Registration of additional securities and additional classes of securities.

(a) Except as provided in sections 24(e)(1) and 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(e)(1) and 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 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. The provisions of Rule 401 (§ 230.401), other than Rule 401(g)(2) (§ 230.401(g)(2)), do not apply to any post-effective amendment filed in reliance on this section:

(1) Securities of a class different than those registered on the effective automatic shelf registration statement, provided that the information required by Item 202 of Regulation S–K (§ 229.202 of this chapter) is contained either in the post-effective amendment, a report on Form 10–K (§ 249.310 of this chapter), Form 20–F (§ 249.220f of this chapter), Form 10–Q (§ 249.308a of this chapter), Form 8–K (§ 249.308 of this chapter), or Form 6–K (§ 249.306 of this chapter) under the Securities Exchange Act of 1934 that is incorporated by reference into the registration statement, or a prospectus filed pursuant to Rule 424 (§ 230.424) deemed to be part of and included in the registration statement; or

(2) Securities of a subsidiary that are permitted to be included in an automatic shelf registration statement, provided that the subsidiary is identified as and satisfies the signature requirements of an issuer in the post-effective amendment and the provisions of paragraph (b)(1) of this section are satisfied.

27. Amend § 230.415 as follows:

a. Remove the authority citations following the section;

b. Revise paragraph (a)(1)(x);

a. Revise paragraph (a)(2);

b. Revise paragraph (a)(3);

e. Revise paragraph (a)(4) including the undesignated paragraph; and

f. Add paragraph (a)(5).

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 issuer, a subsidiary of the issuer or a person of which the issuer is a subsidiary.

* * * * *

(2) Securities in paragraphs (a)(1)(viii) and (ix) of this section 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), 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) Securities in paragraph (a)(1)(i) or (x) of this section registered on a Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) may be offered and sold only if not more than three years have elapsed since the initial effective date of the registration statement. *Provided, however,* that continuous offerings of securities covered by the registration statement that commenced within the three years of the initial effective date may continue until the effective date of the new registration statement filed pursuant to paragraph (a)(5) of this section.

(5) Prior to the end of the three-year period described in paragraph (a)(4) of this section, an issuer may file a new registration statement and prospectus. The new registration statement and prospectus must include all the information that would be required at that time in a prospectus relating to all offering(s) that it covers. Upon the effective date of the new registration statement, any unsold securities covered by the earlier registration statement and any ongoing continuous offerings of securities pursuant to Rule 415 (§ 230.415) covered by the earlier registration statement would be deemed to be included in the new registration statement and any filing fee paid in connection with the earlier registration statement with regard to those securities may be used, pursuant to Rule 457(p) (§ 230.457(p)), to offset the filing fee due for the new registration statement. For purposes of Rule 457(p) (§ 230.457(p)), other than continuous offerings of securities that commenced prior to the expiration of the three year period described in paragraph (a)(4) of this section, the offering of securities on the earlier registration statement will be deemed terminated as of the date of effectiveness of the new registration statement. For automatic shelf registration statements, in addition to ongoing continuous offerings referenced in paragraph (a)(4) of this section, any offers of securities covered by the earlier registration statement also will be deemed included on the new registration statement as of the effective date of the new registration statement.

* * * * *

28. 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 issuer 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 issuer, which have been prepared within the past twelve months for or by the issuer 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 prepared or used by the issuer, any underwriter or any participating dealer.

* * * * *

(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 issuer upon request, provided that:

* * * * *

29. Amend § 230.424 as follows:

a. Revise the introductory text of paragraph (b);

b. Revise paragraph (b)(2);

c. Revise Instruction 2 following paragraph (b)(7);

d. Add paragraph (b)(8); and

e. Add paragraph (g).

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 filed pursuant to Rule 433(d) (§ 230.433(d)), 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. The ten copies shall be filed or transmitted for filing as follows:

* * * * *

(2) A form of prospectus used in connection with a primary offering of securities pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)) or securities registered for issuance on a delayed basis pursuant to Rule 415(a)(1)(i), (vii) or (viii) (§ 230.415(a)(1)(i), (vii) or (viii)), or that 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) * * *

Instruction 2: A form of prospectus sent or given in reliance on Rule 434(c) (§ 230.434(c)) with respect to securities registered on Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter), other than an abbreviated term sheet filed pursuant to paragraph (b)(7) of this section, shall be filed with the Commission in the time required by paragraph (b)(1) or (b)(2) of this section, as applicable.

(8) 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.

* * * * *

(g) A form of prospectus filed pursuant to paragraph (b)(2) or (b)(5) of this section that (1) operates to reflect the payment of the filing fee for the offering pursuant to Rule 456 (§ 230.456) or (2) does not include disclosure of omitted information regarding the terms of the offering, the securities, or the plan of distribution 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 (15 U.S.C. 78m or 78o(d)) incorporated or deemed incorporated by reference into the prospectus, must include on its cover page the calculation of registration fee table reflecting the payment of the filing fee for the securities that are the subject of the form of the prospectus filed pursuant to paragraph (b)(2) or (b)(5) of this section or the identification of the periodic or current reports that are incorporated or deemed incorporated by reference into the prospectus that contain the omitted information as specified in this paragraph.

30. Amend § 230.430A to add paragraph (f) following the note to read as follows:

§ 230.430A Prospectus in a registration statement at the time of effectiveness.

* * * * *

(f) This section shall apply to registration statements that are automatically effective pursuant to Rule 462(e) and (f) (§ 230.462(e) and (f)).

31. 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) (viii) or (x) (§ 230.415(a)(1) (viii) or (x)) may omit information that is unknown or not reasonably available to the issuer pursuant to Rule 409 (§ 230.409). A form of prospectus filed as part of an automatic shelf registration statement for offerings pursuant to Rule 415(a)(1)(§ 230.415(a)(1)), other than Rule 415(a)(1)(vii) (§ 230.415(a)(1)(vii)), may also omit information as to whether the offering is a primary offering or an offering on behalf of persons other than the issuer, the plan of distribution for the securities, and the identification of other issuers unless known. 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) (§ 230.415(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, in addition to the information omitted pursuant to paragraph (a) of this section, 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 offering in which the selling security holders acquired the securities being registered on their behalf was completed;

(ii) The securities were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities; and

(iii) The registration statement refers to any unnamed selling security holders in a generic manner by identifying the transaction in which the securities were acquired.

(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 in the prospectus by a post-effective amendment to the registration statement, a prospectus filed pursuant to Rule 424 (§ 230.424), or, if the applicable form permits, by 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 in accordance with applicable requirements.

(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, that is contained in a form of prospectus filed with the Commission pursuant to Rule 424(b)(3) (§ 230.424(b)(3)), shall be deemed part of and included in the registration statement as of the date it is first used after effectiveness.

(f) 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, that is contained in a form of prospectus filed with the Commission pursuant to Rule 424(b)(2), (b)(5), (b)(7) or (b)(8) (§ 230.424(b)(2), (b)(5), (b)(7) or (b)(8)), shall be deemed to be part of and included in the registration statement on the earlier of the date such form of prospectus is first used or the date and time of the first contract of sale of securities to which such subsequent form of prospectus relates. Such date shall be deemed, for liability purposes only, to be a new effective date of the registration statement relating to the securities to which such subsequent form of 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, except for any prospectus filed for purposes of including information required by section 10(a)(3) of the Act, the provisions of Rule 401 (§ 230.401) do not apply when prospectuses are deemed part of or included in registration statements.

(g) Notwithstanding paragraph (e) or (f) of this section, no statement in a document incorporated or deemed incorporated by reference or a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or a prospectus deemed part of and included in a registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the effective date occurring based on the filed prospectus.

(h) Issuers relying on this section shall furnish the undertakings required by Item 512(a) of Regulation S–K (§ 229.512(a) of this chapter).

32. Add § 230.430C to read as follows:

§ 230.430C Prospectus in a registration statement pertaining to an offering pursuant to Rule 415(a)(1)(i) or (ix) after effective date.

(a) In offerings pursuant to Rule 415(a)(1)(i) or (ix) (§ 230.415(a)(1)(i) or (ix)) by issuers not subject to the reporting requirements of section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) or not eligible to register a primary offering of its securities on Form S–3

(§ 239.13 of this chapter) pursuant to General Instructions I.B.1, I.B.2, I.C. or I.D. or Form F–3 (§ 239.33 of this chapter) pursuant to General Instructions I.A.5, I.B.1, I.B.2 or I.C., information contained in a form of prospectus filed with the Commission pursuant to (i) Rule 424(b)(3) (§ 230.424(b)(3)) for the purpose of providing the information required by section 10(a) of the Act, other than section 10(a)(3) of the Act, or for the purpose of providing information relating to the issuer or identified selling security holders that constitutes a substantive change from or addition to the information in the last form of prospectus filed; or (ii) Rule 497(c) or (e) (§ 230.497(c) 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, no statement in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a prospectus deemed part of and included in a registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of the registration statement.

(c) Nothing in this section shall affect the information required to be included in an issuer's registration statement and prospectus.

(d) In offerings subject to paragraph (a) of this section, the issuer shall furnish the undertakings required by Item 512(a) of Regulation S–K (§ 229.512(a) of this chapter), Item 512(a) and/or (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.

33. 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 this section) that are the subject of a registration statement that has been filed under the Act. A free writing prospectus that satisfies the conditions of this section and which may include information the substance of which is not included in the registration statement, 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 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 section 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 (§ 230.164) in connection with a registered offering of securities:

(1) *Eligibility and prospectus conditions for non-reporting and unseasoned issuers.* If at the time of the filing of the registration statement, the issuer of the securities that are the subject of the registration statement is not 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)) or does not satisfy the requirements to use Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) for a primary offering of securities pursuant to General Instructions I.B.1, I.B.2, I.C. or I.D. of Form S–3 or General Instructions I.A.5, I.B.1, I.B.2 or I.C. of Form F–3, then any person participating in the offer or sale of the securities may use a free writing prospectus after the registration statement is filed as follows:

(i) If the free writing prospectus was prepared by or on behalf of an issuer or any other person participating in the offer or sale of the securities, if consideration has been or will be given by the issuer or an offering participant for the publication or broadcast (in any format) of any free writing prospectus (including any published article, publication or advertisement), or if Securities Act section 17(b) requires disclosure that consideration has been or will be given by the issuer or any offering participant for any activity described therein, then the free writing prospectus shall be accompanied or preceded by the most recent prospectus that, other than by reason of this section or Rule 431 (§ 230.431), satisfies the requirements of section 10 of the Act, including a price range where required; *provided, however,* that use of the free writing prospectus is not conditioned on providing the most recent statutory prospectus if a prior statutory prospectus has been provided and there is no material change from the prior statutory prospectus reflected in the most recent statutory prospectus; *provided, further,* that after effectiveness and availability of a final prospectus meeting the requirements of section 10(a) of the Act, no earlier statutory prospectus may be provided, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier statutory prospectus had been previously provided:

(A) The condition in paragraph (b)(1)(i) of this section would be satisfied if an electronic free writing prospectus contained a hyperlink to the issuer's most recent preliminary prospectus; and

(B) For purposes of this section, a written 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 an issuer, underwriter, or participating dealer is deemed a written offer by such person and free writing prospectus of such person.

(ii) Where paragraph (b)(1)(i) of this section does not apply, the issuer shall have previously filed as part of its registration statement a statutory prospectus that, other than by reason of this section or Rule 431 (§ 230.431), satisfies the requirements of section 10 of the Act.

(2) *Eligibility and prospectus conditions for seasoned issuers and well-known seasoned issuers.* If at the time of the filing of the registration statement and at the time of an amendment to the registration statement for purposes of complying with section 10(a)(3) of the Act, the issuer of the securities that are the subject of the registration statement is a well-known seasoned issuer as defined in Rule 405 (§ 230.405), or if not a well-known seasoned issuer, is an issuer eligible to use Form S–3 or Form F–3 (§ 239.13 or § 239.33 of this chapter) to register securities to be offered and sold by or on its behalf, on behalf of its subsidiary or on behalf of a person of which it is the subsidiary pursuant to General Instructions I.B.1, I.B.2, or I.C. of Form S–3 or General Instruction I.A.5, I.B.1. or I.B.2 of Form F–3, then the issuer or any other person participating in the offer or sale of the securities may use a free writing prospectus if the issuer shall have previously filed as part of its registration statement a statutory prospectus covering the securities that satisfies the requirements of section 10 of the Act (other than pursuant to Rule 431 (§ 230.431)), which could be a base prospectus satisfying the conditions of Rule 430B (§ 230.430B).

(3) *Successors.* A successor issuer will be considered to satisfy the applicable provisions of paragraph (b)(2) of this section if:

(i) Its predecessor and it, taken together, satisfy the conditions, provided that the succession was primarily for the purpose of changing the state 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.

(4) *Ineligible issuers.* This section is not available if the issuer is an ineligible issuer as defined in Rule 405 (§ 230.405).

(c) *Information in a free writing prospectus.*

(1) A free writing prospectus used in reliance on this section shall not contain information inconsistent with information contained in any prospectus or prospectus supplement included in the registration statement or otherwise filed and not superseded or modified or 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)) and not superseded or modified.

(2) A free writing prospectus used in reliance on this section shall contain a prominent legend in the following form:

''[Issuer's name] has filed a registration statement (including a prospectus) with the SEC for this offering. Before you invest, you should read the prospectus in it and other documents the issuer has filed with the SEC for more complete information about [issuer's name], including any risks affecting the issuer or its securities, and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at *www.sec.gov* and clicking on_____. Alternatively, the company, 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]. This document is a written communication that is an offer pursuant to a free writing prospectus.''

(3) The legend may indicate that the documents are also 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) 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 filing shall constitute a free writing prospectus for purposes of this section and the Act but will not be filed as part of the registration statement:

(i) The issuer shall file:

(A) Any issuer free writing prospectus used by any person;

(B) Any free writing prospectus of any person used by the issuer;

(C) Any issuer information that is contained in a free writing prospectus prepared by any other person (but not information prepared by a person other than the issuer on the basis of that issuer information); and

(D) Any free writing prospectus prepared by any person that contains only a description of the final terms of the issuer's securities.

(ii) Any person other than the issuer participating in the offer and sale of the securities shall file any free writing prospectus that is distributed by such person in a manner reasonably designed to lead to its broad unrestricted dissemination, unless such free writing prospectus has previously been filed under this section.

(2) Each free writing prospectus or issuer information contained in a free writing prospectus filed under this section shall identify on the cover page 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 is substantially the same as, and does not contain substantive changes from or additions to, a free writing prospectus already filed.

(4) The condition to file issuer information contained in a free writing prospectus of a person 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 that is the subject of the issuer's registration statement.

(5) Notwithstanding the provisions of paragraph (d)(1) of this section, a free writing prospectus that contains only a description of the final terms of the securities being offered for sale in a registered offering shall be filed by the issuer within two days of the later of the date such terms have become final and the date of first use.

(6) Notwithstanding any other provision of this paragraph (d), road shows transmitted or made available by means of graphic communication are free writing prospectuses provided that the condition to file a road show transmitted or made available by means of graphic communication, including any script for such road show, pursuant to this section shall not apply if:

(i) 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 transmitted or made available by means of graphic communication, the version available without restriction is made available no later than the other versions); and

(ii) The issuer complies with the filing conditions of paragraph (d)(1)(i)(C) of this section for issuer information provided at an electronic road show, except where paragraph (d)(4) of this section does not require such filing.

(e) *Treatment of information on, or hyperlinked from, an issuer's web site.*

(1) Except as provided otherwise in paragraph (e)(2) of this section, 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 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) Historical issuer information that is identified as such and located in a separate section of the issuer's Web site containing historical issuer information will not be considered a current offer of the issuer's securities and therefore not a free writing prospectus unless such information has been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering or is otherwise used or identified in connection with the offering.

(f) *Free writing prospectuses published or distributed by media.* Any written communication about an issuer or its securities for which an issuer or any person participating in the offer or sale of the securities or any person acting on their behalf provided information that is published or disseminated by a person unaffiliated with the issuer or any person participating in the offer or sale of the securities that is in the business of publishing, broadcasting or otherwise disseminating written communications would be considered to be a free writing prospectus prepared by or on behalf of the issuer or a person participating in the offer or sale of the securities for purposes of this section. Provided, however, the conditions of paragraphs (b)(1)(i), (c), and (d) of this section will not apply if:

(1) No payment is made or consideration given by or on behalf of the issuer or any person participating in the offer or sale of the securities for the written communication; and

(2) The issuer or any other person participating in the offer or sale of the securities files the written communication with the Commission with the legend required by paragraph (c) of this section within one business day after the publication or dissemination of the written communication.

(g) *Record retention.* Issuers and offering participants, including underwriters and participating dealers, shall retain all free writing prospectuses they have used for three years following the initial bona fide offering of the securities in question.

(h) *Definitions.*

(1) For purposes of this section, an *issuer free writing prospectus* means a free writing prospectus prepared by or on behalf of the issuer.

(2) For purposes of this section, *issuer information* means material information about the issuer or its securities that has been provided by or on behalf of the issuer.

(3) For purposes of this section, 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 and approves the communication or information before its use.

(4) For purposes of this section, a *bona fide electronic road show* means a version of a road show that contains a presentation by some officers of an issuer or other person in an issuer's management and, if an issuer is using or conducting more than one road show transmitted or made available by means of graphic communication, includes discussion of the same general areas of information regarding the issuer, its management, and the securities being offered as such other issuer road show or shows for the same offering.

Instructions to § 230.433.

1. An issuer eligible to file information with the Commission on paper must file five copies of the information required by paragraph (d) of this section.

2. This section does not apply to communications that are not written communications at road shows that are not transmitted or made available by means of graphic communication.

3. This section does not affect in any way the operation of the provisions of clause (a) of section 2(a)(10) of the Act providing an exception from the definition of ''prospectus.''

34. Amend § 230.434 as follows:

a. Revise paragraph (d) before the Instruction; and

b. Revise paragraph (g).

The revisions read as follows:

§ 230.434 Prospectus delivery requirements in firm commitment underwritten offerings of securities for cash.

* * * * *

(d) Except in the case of offerings pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)), the information contained in any term sheet or abbreviated term sheet described under this section shall be deemed to be part of the registration statement as of the time such registration statement was declared effective. In the case of offerings pursuant to Rule 415(a)(1)(x) (§ 230.415(a)(1)(x)), the information contained in any term sheet or abbreviated term sheet described under this section shall be deemed to be part of the registration statement as of the earlier of the date it is first used after effectiveness or the date and time of the first contract of sale of the securities described in the term sheet or the abbreviated term sheet.

* * * * *

(g) For purposes of this section, *prospectus subject to completion* shall mean any prospectus that is either a preliminary prospectus used in reliance on Rule 430 (§ 230.430), a prospectus omitting information in reliance on Rule 430A (§ 230.430A), or a prospectus omitting information in reliance on Rule 430B (§ 230.430B) that is contained in a registration statement at the time of effectiveness or as subsequently revised.

35. 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.

36. Amend § 230.456 as follows:

a. Revise the section heading;

b. Designate the current text as paragraph (a); and

c. Add paragraphs (b) and (c).

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 classes of securities pursuant to Rule 413(b) (§ 230.413(b)), may defer payment of the registration fee to the Commission required by section 6(b)(2) of the Act on the following conditions:

(i) The issuer pays an initial registration fee calculated in accordance with Rule 457(r) (§ 230.457(r)) at the time of the initial filing of the registration statement which will be credited against any fee subsequently due pursuant to this section;

(ii) The issuer pays the registration fees (*pay-as-you-go registration fees*) calculated in accordance with Rule 457(r) (§ 230.457(r)) in connection with an offering of securities from the registration statement at the time of or before the filing of the prospectus supplement pursuant to Rule 424(b)(2), (5) or (8) (§ 230.424(b)(2), (5) or (8)) within the time required by such section, in connection with a sale of securities in a particular offering; and

(iii) At the time the issuer pays a pay-as-you-go registration fee it reflects the payment of a pay-as-you-go registration fee 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 in connection with the offering either in a post-effective amendment filed at the time of the fee payment or on the cover page of the prospectus reflecting the terms of the securities filed in a timely manner 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 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.

(c) 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 timely filed as required in paragraph (b)(1) of this section.

37. 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 pays an initial registration fee of $100 at the time of initial filing of the registration statement, the ''Calculation of Registration Fee'' table in the registration statement 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 pay-as-you-go registration fee in accordance with Rule 456(b) (§ 230.456(b)).

38. 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 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.

39. 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 (§ 239.13 or § 239.33 of this chapter) 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.

40. 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 information, an opinion or arecommendation 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 information, an opinion or a recommendation 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

41. 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, 78*l,* 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 78mm, 79e, 79f, 79g, 79j, 79*l*, 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.

* * * * *

42. Remove the authority citation following § 239.11.

43. Amend Form S–1 (referenced in § 239.11) as follows:

a. Add General Instruction VI;

b. Add Item 11A;

c. Redesignate Item 12 as Item 12A; and

d. Add new Item 12.

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.

Form S–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 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 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), 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 15(d) of the Exchange Act for its most recently completed fiscal year;

D. The registrant is not an ineligible issuer;

E. If a registrant is a successor registrant it shall be deemed to have met conditions A., B., C., and D. 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; and

F. The registrant makes its periodic and current reports filed pursuant to Section 13 or 15(d) of the Exchange Act readily available and accessible on a Web site maintained by or for the issuer and containing information about the issuer.

* * * * *

Item 11A. Material Changes

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 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 VI.:

(a) It must specifically incorporate by reference into the prospectus 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 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 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 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 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 450 Fifth Street, NW., 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*).

* * * * *

44. Remove and reserve § 239.12 and remove Form S–2 referenced in that section.

45. Amend § 239.13 as follows:

a. Remove the word ''or'' at the end of paragraph (c)(2);

b. Revise paragraph (c)(3);

c. Add paragraphs (c)(4), (c)(5) and (c)(6);

d. Redesignate paragraph (d) as paragraph (e); and

e. 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.

* * * * *

(c) * * *

(3) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

(4) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

(5) The registrant-subsidiary fully and unconditionally guarantees the payment obligations on non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of paragraph (c)(1), (c)(2), or (c)(3) of this section; or

(6) The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of paragraphs (c)(1) or (c)(2) of this section.

Note to paragraph (c): With regard to paragraphs (c)(3), (c)(4), (c)(5), and (c)(6) 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 securities.

(d) Automatic shelf offerings by well-known seasoned issuers.

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Act of securities offerings pursuant to Rule 415 (§ 230.415 of this chapter), other than 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) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A, and Rule 430B (§ 230.415, § 230.430A, and § 230.430B of this chapter) provided, however, that a registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 (§ 230.405 of this chapter) may register only non-convertible obligations satisfying the conditions of General Instruction I.B.2. of this Form.

(ii) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B (§ 239.415 and § 230.430B of this chapter) if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(A) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter);

(B) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(C) Securities of a subsidiary that are a guarantee of

(1) Obligations of the parent registrant; or

(2) Non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(D) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter); or

(E) Securities of a subsidiary that meet the conditions of Transaction Requirement set forth in paragraph (b)(2) (Primary Offerings of Non-Convertible Investment Grade Securities); or

(iii) Securities to be offered for the account of any person other than the

issuer (''selling security holders'') pursuant to paragraph (b)(1) or (b)(3) of this section, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement or current report under the Exchange Act identifying the selling security holders and the amount of securities to be sold by each of them;

(2) The registrant requirements of paragraph (a) of this section and transaction requirements of paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section are satisfied;

(3) The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rule 456(b) (§ 230.456(b) of this chapter) and Rule 457(r) (§ 230.457(r) of this chapter) or in accordance with Rule 456(a) (§ 230.456(a) of this chapter);

(4) If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to section 13 or 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);

(5) An automatic shelf registration statement and post-effective amendment will become effective automatically (Rule 462 (§ 230.462) 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; and

(6) The registrant may register additional classes of its or its subsidiary's securities on a post-effective amendment pursuant to Rule 413(b) (§ 230.413(b) of this chapter).

* * * * *

46. Amend Form S–3 (referenced in § 239.13) as follows:

a. Add two check boxes to the cover page immediately before ''Calculation of Registration Fee'' table;

b. Revise the Note to the ''Calculation of Registration Fee'' Table;

c. Remove the word ''or'' at the end of General Instruction I.C.2.;

d. Revise paragraph 3. and add paragraph 4, 5, and 6 to General Instruction I.C.;

e. Add paragraph D. to General Instruction I.;

f. Revise paragraph D. of General Instruction II.;

g. Add paragraphs E., F., and G. to General Instruction II.;

h. Revise the heading of General Instruction IV;

i. Designate the current text under General Instruction IV as paragraph A;

j. Add a heading to paragraph A.;

k. Add paragraph B. to General Instruction IV; and

l. 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.

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) 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 the initial filing fee. 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)(iii) (§ 230.456(b)(1)(iii)) deemed part of and included in the registration statement, the Fee Table must specify the aggregate offering price for all classes of securities in the referenced offering 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

* * * * *

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 fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

4. The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

5. The registrant-subsidiary fully and unconditionally guarantees the payment obligations on the non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of I.C.1, I.C.2, or I.C.3 above; or

6. The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of I.C.1 or I.C.2 above.

Note to General Instruction I.C.: With regard to paragraphs I.C.3, I.C.4, I.C.5, and I.C.6 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 guaranteed securities.

* * * * *

D. Automatic Shelf Offerings by Well-Known Seasoned Issuers

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Securities Act of securities offerings pursuant to Rule 415 (§ 230.415), other than Rule 415(a)(1)(vii) or (viii) (§ 230.415(a)(1)(vii) or (viii)), as follows:

1. The securities to be offered are:

(a) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A, and Rule 430B (§ 230.415, § 230.430A, and § 230.430B);

(b) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(i) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405);

(ii) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(iii) Securities of a subsidiary that are a guarantee of:

(A) Obligations of the parent registrant; or

(B) Non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(iv) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405; or

(v) Securities of a subsidiary that meet the conditions of Transaction Requirement I.B.2. (Primary Offerings of Non-Convertible Investment Grade Securities).

(c) Securities to be offered for the account of any person other than the issuer (''selling security holders'') pursuant to General Instruction I.B.1. or I.B.3. of this Form, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement, or periodic or current report under the Exchange Act identifying the selling security holders and the amount of securities to be sold by each of them;

2. The registrant requirements of General Instruction I.A.and transaction requirements of General Instruction I.B.1, I.B.2, I.B.3, or I.B.4 of this Form are satisfied;

3. The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rules 456(b) (§ 230.456(b)) and 457(r) (§ 230.457(r)) or in accordance with Rule 456(a) (§ 230.456(a));

4. If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to Section 13 or 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);

5. An automatic shelf registration statement and post-effective amendment will become effective automatically (Rule 462, § 230.462) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission; and

6. The registrant may register additional classes of its or its subsidiaries securities on a post-effective amendment pursuant to Rule 413(b) (§ 203.413(b)).

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)), and where this Form is not an automatic shelf registration statement, Rule 457(o) (§ 230.457(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) (§ 230.456(b)) permits the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(r) (§ 230.457(r)) permits the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in a particular offering off the registration statement. In this event, the Fee Table in the initial filing must identify the classes of securities being registered and the initial filing fee, 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)(iii) (§ 230.456(b)(1)(iii)), the amended Fee Table must include the aggregate offering price for all classes of securities referenced in the offering 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.C., or I.D., information in is only required to be furnished as of the date of initial effectiveness of the registration statement to the extent required by Rule 430A (§ 230.430A) or Rule 430B (§ 230.430B). 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 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 pursuant to Rule 424(b) (§ 230.424(b).

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 securities being registered for resale on behalf of such persons was completed and the securities issued prior to filing the resale registration statement, the registrant may, in lieu of identifying all selling security holders prior to

effectiveness of the resale registration statement, identify any known selling security holders and the amounts of securities to be sold by them and refer to any unnamed selling security holders in a generic manner by identifying the transaction in which the securities were acquired. Following effectiveness, the registrant must file a prospectus, a prospectus supplement or a post-effective amendment to the registration statement to add the names of the 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., for offerings pursuant to General Instruction I.B.1 or I.B.3 for the account of persons other than the issuer, the registration statement and the prospectus included in the registration statement does not need to designate the securities that will be offered for the account of such persons, identify them, or identify the transactions in which they acquired their securities until the registrant files a post-effective amendment to the registration statement or a prospectus pursuant to Rule 424(b) (§ 230.424(b)) 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 Classes of Securities After Effectiveness

A registrant relying on General Instruction I.D. of this Form may register additional classes of securities, pursuant to Rule 413(b) (§ 230.413(b)) by filing a post-effective amendment to the effective registration statement. The registrant 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, if filed, 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. Such 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, or, as to the information only, contained in a prospectus filed pursuant to Rule 424(b) (§ 230.424(b)) that is deemed part of and included in the registration statement and prospectus.

* * * * *

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.

* * * * *

47. 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. Revise the heading and introductory text of Item 12;

c. Revise the introductory text of Item 13;

d. Revise the heading and introductory text of Item 14;

e. Revise the heading and paragraph (a) of Item 16;

f. Revise the heading and introductory text of Item 17;

g. Revise paragraph (b) of Item 18; and

h. Revise paragraph (c) of Item 19.

The revisions read as follows:

Note: The text of Form S–4 does not and the amendments will not appear in the Code of Federal Regulations.

Form S–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 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 or 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.

* * * * *

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.

* * * * *

48. Amend Form F–1 (referenced in § 239.31) as follows:

a. Add General Instruction VI;

b. Add Item 4A;

c. Redesignate Item 5 as Item 5A; and

d. Add new Item 5.

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.

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 4 of this Form in accordance with Item 4 and Item 5 of this Form:

A. The registrant is subject to the requirement to file reports pursuant to Section 13 or 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 an ineligible issuer;

E. If a registrant is a successor registrant it shall be deemed to have met conditions A., B., C., and D. above if:

1. Its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the 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;

F. The registrant makes its periodic and current reports filed pursuant to Sections 13 or 15(d) of the Exchange Act readily available and accessible on a Web site maintained by or for the issuer and containing information about the issuer.

* * * * *

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, if not included in the reports filed under the Exchange Act which are incorporated by reference into the prospectus pursuant to Item 5:

i. Information required by Rule 3–05 and Article 11 of Regulation S–X;

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); 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 6 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 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 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 shall be incorporated by reference.

2. Any report on Form 10–Q or Form 8–K filed since the date of filing of the annual report shall also be incorporated by reference. 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 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 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 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 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 450 Fifth Street, NW., 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 § 239.32 and remove Form F–2 referenced in that section.

50. Amend § 239.33 as follows:

a. Remove the word ''or'' at the end of paragraph (a)(5)(ii);

b. Revise paragraph (a)(5)(iii);

c. Add paragraphs (a)(5)(iv), (a)(5)(v), and (a)(5)(vi); and

d. 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.

* * * * *

(a) * * *

(5) * * *

(iii) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

(iv) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

(v) The registrant-subsidiary fully and unconditionally guarantees the payment obligations on the non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of paragraph (a)(5)(i), (a)(5)(ii), or (a)(5)(iii) of this section; or

(vi) The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of paragraph (a)(5)(i) or (a)(5)(ii) of this section.

Note to paragraphs (a)(5)(iii), (a)(5)(iv), (a)(5)(v), and (a)(5)(vi): In the situation described in paragraphs (a)(5)(iii), (a)(5)(iv), (a)(5)(v), and (a)(5)(vi) of this section, the parent or 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 securities. Both the parent or subsidiary guarantor and the majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the 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 (§ 210.3–10 of this chapter) specifies the financial statements required.

* * * * *

(c) *Automatic shelf offerings by well-known seasoned issuers.*

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Securities Act of securities offerings pursuant to Rule 415 (§ 230.415 of this chapter), other than Rule 415(a)(1)(vii) (§ 230.415(a)(1)(vii) of this chapter), as follows:

(1) The securities to be offered are:

(i) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A and Rule 430B (§ 230.415, § 230.430A, and § 230.430B of this chapter);

(ii) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B (§ 230.415 and § 230.430B of this chapter) if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(A) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter);

(B) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(C) Securities of a subsidiary that are a guarantee of:

(*1*) Obligations of the parent registrant; or

(*2*) Non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(D) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405 of this chapter); or

(E) Securities of a subsidiary that meet the conditions of the Transaction Requirement set forth in paragraph (b)(2) (Primary Offerings of Non-Convertible Investment Grade Securities); or

(iii) Securities to be offered for the account of any person other than the issuer (''selling security holders'') pursuant to paragraph (b)(1) or (b)(3) of this Form, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement or Form 8–K or Form 6–K incorporated by reference (§§ 249.308 or 249.306 of this chapter) identifying the selling security holders and the amount of securities to be sold by each of them.

(2) The registrant requirements of paragraph (a) of this section and transaction requirements of paragraph (b)(1), (b)(2), (b)(3) or (b)(4) of this section are satisfied;

(3) The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rules 456(b) (§ 230.456(b) of

this chapter) and 457(r) (§ 230.457(r) of this chapter) or in accordance with Rule 456(a) (§ 230.456(a) of this chapter);

(4) If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)) and satisfies the requirements of this Form with regard to incorporation by reference or information about the subsidiary is included in the registration statement (or a post effective amendment to the registration statement);

(5) An automatic shelf registration statement and post-effective amendment will become effective automatically pursuant to Rule 462 (§ 230.462) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission; and

(6) The registrant may register additional classes of its or its subsidiaries securities on a post-effective amendment pursuant to Rule 413(b) (§ 230.413(b)).

51. Amend Form F–3 (referenced in § 239.33) as follows:

a. Add two check boxes to the cover page immediately before ''Calculation of Registration Fee'' table;

b. Revise the Note to the ''Calculation of Registration Fee'' Table;

c. Remove the word ''or'' at the end of paragraph (ii), revise paragraph (iii) and add paragraph (iv), (v), and (vi) to General Instruction I.A.5.;

d. Add paragraph C. to General Instruction I.;

e. Revise paragraph C. of General Instruction II.;

f. Add paragraphs F., G., and H. to General Instruction II.;

g. Revise the heading of General Instruction IV and designate the current text under General Instruction IV as paragraph A;

h. Add a heading to paragraph A.;

i. Add paragraph B. to General Instruction IV; and

j. Add paragraph (f) of Item 6 to 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.

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) 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) under the Securities Act, the Fee Table must state that it registers an unspecified amount of securities of each identified class of securities and the initial filing fee. 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)(iii) (§ 230.456(b)(1)(iii)) deemed part of and included in the registration statement, the Fee Table must specify the aggregate offering price for all classes of securities in the referenced offering 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

* * * * *

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 fully and unconditionally guarantees the payment obligations on the securities being registered, and the securities being registered are non-convertible securities;

(iv) The parent of the registrant-subsidiary meets the Registrant Requirements and the applicable Transaction Requirement, and the registrant-subsidiary fully and unconditionally guarantees the payment obligations on the parent's securities being registered;

(v) The registrant-subsidiary fully and unconditionally guarantees the payment obligations on the non-convertible obligations being registered by another majority-owned subsidiary in accordance with the requirements of paragraph I.A.5(i), (ii), or (iii) above; or

(vi) The securities of the registrant-subsidiary are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself meets the Registrant Requirements and the applicable Transaction Requirement by virtue of paragraph I.A.5(i), or I.A.5(ii) above.

Note: In the situation described in paragraphs I.A.5(iii), I.A.5(iv), I.A.5(v), and I.A.5(vi) above, the parent or 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 securities. Both the parent or subsidiary guarantor and the majority-owned subsidiary shall each disclose the information required by this Form as if each were the only registrant except that if the subsidiary will not be eligible to file annual reports on Form 10–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 X (§ 210.3–10) specifies the financial statements required.

* * * * *

C. Automatic Shelf Offerings by Well-Known Seasoned Issuers

Any registrant that, immediately prior to the filing of a registration statement on this Form, is a well-known seasoned issuer may use this Form for registration under the Securities Act of securities offerings pursuant to Rule 415

(§ 230.415), other than Rule 415(a)(1)(vii) or (viii) (§ 230.415(a)(1)(vii) or (viii)) as follows:

1. The securities to be offered are:

(a) Securities of the registrant to be offered pursuant to Rule 415, Rule 430A and Rule 430B (§ 230.415, § 230.430A and § 230.430B);

(b) Securities of majority-owned subsidiaries to be offered pursuant to Rule 415 and Rule 430B if the parent registrant is a well-known seasoned issuer and the subsidiary meets the following requirements:

(i) Securities of a subsidiary that is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405);

(ii) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by the parent registrant;

(iii) Securities of a subsidiary that are a guarantee of (A) obligations of the parent registrant or (B) non-convertible obligations of another majority-owned subsidiary where such obligations are fully and unconditionally guaranteed by the parent registrant;

(iv) Securities of a subsidiary that are non-convertible obligations and are fully and unconditionally guaranteed by another majority-owned subsidiary of the parent registrant that itself is a well-known seasoned issuer at the time it becomes a registrant, other than by virtue of paragraph (2) of the definition of well-known seasoned issuer in Rule 405 (§ 230.405); or

(v) Securities of a subsidiary that meet the conditions of Transaction Requirement I.B.2. (Primary Offerings of Non-Convertible Investment Grade Securities).

(c) Securities to be offered for the account of any person other than the issuer (''selling security holders'') pursuant to General Instruction I.B.1. or I.B.3. of this Form, provided that the registration statement and the prospectus are not required to separately identify the securities to be sold by selling security holders until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement or report under the Exchange Act identifying the selling security holders and the amount of securities to be sold by each of them.

2. The registrant requirements of General Instruction I.A. and transaction requirements of General Instruction I.B.1, I.B.2, I.B.3, or I.B.4 of this Form are satisfied.

3. The registrant pays the registration fee either on a pay-as-you-go basis pursuant to Rules 456(b) (§ 230.456(b)) and 457(r) (§ 230.457(r)) or in accordance with Rule 456(a) (§ 230.456(a)).

4. If the registrant is a majority-owned subsidiary, it is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act and satisfies the requirements of the Form with regard to incorporation by reference or information about the subsidiary is included in the registration statement (or a post effective amendment to the registration statement).

5. An automatic shelf registration statement and post-effective amendment will become effective automatically (Rule 462, § 230.462) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission.

6. The registrant may register additional classes of its or its subsidiaries securities on a post-effective amendment pursuant to Rule 413(b) (§ 203.413(b)).

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) (§ 230.457(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) (§ 230.456(b)) permits the registrant to pay the registration fee on a pay-as-you-go basis and Rule 457(r) (§ 230.457(r)) permits the registration fee to be calculated on the basis of the aggregate offering price of the securities to be offered in a particular offering off the registration statement. In this event, the Fee Table in the initial filing must identify the classes of securities being registered and the initial filing fee, 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)(iii) (§ 230.456(b)(1)(iii)), the amended Fee Table must include the aggregate offering price for all classes of securities referenced in the offering 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 430B (§ 230.430B). 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 430B (§ 230.430A or § 230.430B), 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 pursuant to Rule 424(b) (§ 230.424(b)).

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 securities being registered for resale on behalf of such persons was completed and the securities issued prior to filing the resale registration statement, the registrant may, in lieu of identifying all selling security holders prior to effectiveness of the resale registration statement, identify any known selling security holders and the amounts of securities to be sold by them and refer to any unnamed selling security holders in a generic manner by identifying the transaction in which the securities were acquired. Following effectiveness, the registrant must file a prospectus, a prospectus supplement or a post-effective amendment to the registration statement to add the names of the 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., for offerings pursuant to General

Instruction I.B.1 or I.B.3 for the account of persons other than the issuer, the registration statement and the prospectus included in the registration statement does not need to designate the securities that will be offered for the account of such persons, identify them, or identify the transactions in which they acquired their securities until the registrant files a post-effective amendment to the registration statement or a prospectus pursuant to Rule 424(b) (§ 230.424(b)) 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 Classes of Securities After Effectiveness

A registrant relying on General Instruction I.C. of this Form may register additional classes of securities, pursuant to Rule 413(b) (§ 230.413(b)) by filing a post-effective amendment to the effective registration statement. The registrant 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, if filed, 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. Such 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, or, as to the information only, contained in a prospectus filed pursuant to Rule 424(b) (§ 230.424(b)) that is deemed part of and included in the registration statement and prospectus.

* * * * *

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.

* * * * *

52. 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 the heading, introductory text, and the introductory text of paragraphs (b)(2) and (b)(3)(vii) to Item 12 in Part I.;

c. Revise Instructions 1. and 3. to Item 13;

d. Revise the heading and introductory text of Item 14;

e. Revise the heading and text of Item 16;

f. Revise the heading and introductory text of Item 17;

g. Revise paragraph (b) of Item 18; and

h. Revise the heading and paragraph (c) of Item 19.

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.

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 Prospectus

* * * * *

B. Information About the Registrant

* * * * *

Item 12. Information With Respect to F–3 Registrants

If the registrant meets the requirements 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

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.

* * * * *

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 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

a. 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) 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

53. 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, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 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.

* * * * *

54. 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 registered under the Securities Act of 1933 in which the broker or dealer or its affiliate participates or acts in an advisory role.

PART 243—REGULATION FD

55. 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.

56. Amend § 243.100 by revising paragraph (b)(2)(iv) to read as follows:

§ 243.100 General rule regarding selective disclosure.

* * * * *

(b) * * *

(2) * * *

(iv) By any of the following means 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) that does not also involve a registered offering for capital formation purposes for the account of the issuer, including an underwritten offering that is both for the account of the issuer and selling security holders (unless the issuer's offering is being registered for the purpose of evading the requirements of this section):

(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 and satisfying the requirements of Rule 433 under the Securities Act (§ 230.433 of this chapter), 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); and

(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

57. 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 *et seq.*, unless otherwise noted.

* * * * *

58. 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.

Form 10

* * * * *

Item 1A. Risk Factors

Set forth, under the caption ''Risk Factors'', the risk factors described in Item 503(c) of Regulation S–K (§ 229.503(c)) applicable to the registrant, including 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. Provide the 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).

* * * * *

59. Amend Form 20–F (referenced in § 249.220f) as follows:

a. Add the a check box 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 paragraph (c) to General Instruction E; and

c. Add Item 4A.

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.

Form 20–F

* * * * *

Check the following box if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934.

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) 942–2960.

* * * * *

Item 4. * * *

Item 4A. Unresolved Staff Comments

If the registrant is an accelerated filer and has received written comments from the Commission staff regarding its periodic filings under the Exchange Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved, disclose the substance of any such unresolved comments that the registrant believes are material. Such disclosure may include the position of the registrant with respect to any such comment.

* * * * *

60. Amend Form 10–K (referenced in § 249.310) as follows:

a. Add a check box 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. Add Item 1A. to Part I; and

c. Add Item 1B. 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.

Form 10–K

* * * * *

Check the following box if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. □

Note: Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Act from their obligations under those Sections.

* * * * *

Part I

* * * * *

*Item 1. * * **

Item 1A. Risk Factors

Set forth, under the caption ''Risk Factors,'' the risk factors described in Item 503(c) of Regulation S–K (§ 229.503(c)) applicable to the registrant, including 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. Provide the 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 and has received written comments from the Commission staff regarding its periodic filings 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 include the position of the registrant with respect to any such comment.

* * * * *

61. Amend Form 10–KSB (referenced in § 249.310b) by adding a check box 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 * * *'' 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.

Form 10–KSB

* * * * *

Check the following box if the registrant 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.

* * * * *

62. 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.

Form 10–Q

* * * * *

Part II. Other Information

* * * * *

*Item 1. * * **

Item 1A. Risk Factors

Set forth any material changes from previously disclosed risk factors contained in the registrant's Form 10–K in response to Item 1A to part I of Form 10–K.

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PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

63. 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), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

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64. Amend Form N–2 (referenced in § 239.14 and § 274.11a–1) by adding paragraphs 4.d and 4.e to Item 34, to 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

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Item 34. Undertakings

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4. * * *

d. that, for the purpose of determining liability under the 1933 Act to any purchaser, except as provided in paragraph 4.d.2 of these undertakings:

(1) Each prospectus filed by the registrant pursuant to Rule 497(c) or (e) under the 1933 Act [17 CFR 230.497(c) or (e)] shall be deemed to be part of the registration statement as of the date it is first used after effectiveness; and

(2) Each prospectus filed pursuant to Rule 497(c) or (e) under the 1933 Act [17 CFR 230.497(c) or (e)] as part of a registration statement in reliance on Rule 430C [17 CFR 230.430C] relating to an offering made pursuant to Rule 415(a)(1)(i) or (ix) [17 CFR 230.415(a)(1)(i) or (ix)], other than registration statements relying 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 in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated or deemed incorporated by reference or in a prospectus deemed part of and included in the registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the date the filed prospectus was deemed part of and included in the registration statement.

e. That for the purpose of determining liability of the Registrant under the 1933 Act to any purchaser:

The undersigned Registrant undertakes that in a primary offering for the benefit of the undersigned Registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, it will be considered to offer or sell the securities by means of any of the following communications:

(1) A Registrant's registration statement relating to the offering and any preliminary prospectus and prospectus supplement relating to the offering filed pursuant to Rule 497 [17 CFR 230.497];

(2) Any information about the Registrant or its securities:

(A) Provided by or on behalf of the undersigned Registrant; and

(B) Included in any advertisement pursuant to Rule 482 under the 1933 Act [17 CFR 230.482]; and

(3) Any other communication made by or on behalf of the undersigned Registrant.

* * * * *

Dated: November 3, 2004.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

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