

SEC Adopts Major Changes to the Registered Offering Process under the Securities Act of 1933

June 30, 2005

On June 29, the United States Securities and Exchange Commission ("SEC") voted unanimously to adopt major amendments to the registered offering framework under the Securities Act of 1933 ("Securities Act") in the areas of offering communications, registration procedures, the timing of disclosures provided to investors and liability issues. The amendments dramatically change the securities offering process and particularly for a new category of large, already public companies that will be categorized as "well-known seasoned issuers" ("WKSIs").

The following summary is based on information provided at the SEC's open meeting and is not meant to be a comprehensive analysis of the amendments. The SEC is expected to publish final rules containing the full text of the amendments in the next two weeks, at which time we will prepare a more thorough analysis.

A. Overview

The amendments modernize certain aspects of the regulation of securities offerings under the Securities Act, and address three main areas:

- Permissible communications before and after the filing of a registration statement and clarification of associated liability;
- Timely delivery of information to investors without imposition of regulatory delays through mandatory delivery of information; and
- Improvement of registration and other procedures in the registered offering process.

The amendments categorize issuers into four groups:

- "Non-Reporting Issuers" are issuers that are not required to file reports pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 ("Exchange Act").
- "Unseasoned Issuers" are issuers that are required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act but do not satisfy the requirements of Forms S-3 or F-3 for primary offerings of their securities.
- "Seasoned Issuers" are issuers that are eligible to use Forms S-3 or F-3 for primary offerings of their securities.

- WKSIs constitute a new class of issuers that are eligible to register primary offerings of their securities on Forms S-3 or F-3 and have either (1) \$700 million of public common equity float or (2) issued \$1 billion of registered debt during the preceding three years.

Blank check companies, shell companies, penny stock issuers, financially-distressed issuers and issuers that have violated the anti-fraud provisions of the federal securities laws will not be permitted to avail themselves of WKSI status or other benefits of the amendments. In addition, investment companies and business development companies, as well as merger and acquisition transactions, are not covered by many of the amendments, as they are subject to separate regulatory frameworks.

B. Communications and Associated Liability

In recognition of the fact that issuers communicate in a variety of ways on an ongoing basis (including through electronic communications), the amendments significantly relax the prohibition on "gun-jumping" - offers prior to the filing of the registration statement and written communications during the "waiting period" or "quiet period" that begins after the filing of the registration statement and ends when the registration statement is declared effective. Generally, the amendments allow communications to be made before and during the registered offering process and will subject these communications to liability under Section 12(a)(2) of the Securities Act, but not Section 11 liability (that is, liability for material misstatements or omissions will attach only to the person who offers or sells the security, such as the issuer, and is subject to a defense if that person did not and could not reasonably have known of the untruth or omission).

The amendments related to "gun-jumping" are expected to have the following effects:

- WKSIs will be permitted to engage at any time in oral and written communications, including use at any time of a "free writing prospectus", defined as any written offer that is not a Section 10(a) statutory prospectus, subject to enumerated conditions (including, in specified cases, filing with the Commission).
- All reporting issuers will be permitted, at any time, to continue to publish regularly released factual business information and forward-looking information.
- Non-reporting issuers will, 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.
- Communications by issuers more than 30 days before filing a registration statement will not be considered prohibited offers so long as they did not reference a securities offering.
- 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, will be allowed without the communications being deemed a prospectus.
- The exemptions for research reports will be expanded.

After filing of the registration statement, all issuers and offering participants can use free writing prospectuses, so long as certain conditions are satisfied. These conditions include the filing of (1) any free writing prospectus provided by the issuer, (2) information provided by the issuer about the issuer or its securities that is contained in any other person's free writing prospectus and (3) any broadly disseminated free writing prospectus provided to potential investors by an underwriter or other offering participant. Other types of underwriter free writing prospectuses will not be required to be filed.

- Electronic roadshows will constitute free writing prospectuses and generally will be required to be filed unless the issuer makes at least one version of an electronic roadshow available in electronic form to an unrestricted audience. Note, however, that the release is expected to indicate that all "live" conferences with investors, including roadshows, will be deemed oral communications only, and thus will not be subject to prospectus liability.
- With respect to issuers that are not WKSIs or otherwise already reporting companies, the statutory prospectus must accompany or precede the free writing prospectus if the issuer or an offering participant prepares or pays for the dissemination of the free writing prospectus.
- Any free writing prospectus used by any person (whether or not it is filed) will be subject to Section 12(a)(2) liability and the antifraud provisions of the federal securities laws. However, a free writing prospectus will not be part of the registration statement and thus will not be subject to Section 11 liability.

C. Liability Timing Issues

The amendments codify the SEC's interpretation of 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 by or on behalf of a seller can result in liability (*i.e.*, includes 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), only information conveyed to the investor at or before the time of an investment decision should be taken into account. Information conveyed to the investor only after the time of the contract of sale (*e.g.*, a subsequently-filed prospectus or prospectus supplement) cannot be used to avoid liability.

Under the amendments, all prospectus supplements will be deemed a part of the registration statement, thus subjecting them to potential Section 11 liability. In addition, the amendments establish that Section 11 liability may arise for the issuer -- but not for directors, executives or auditors -- at the time of any prospectus filing reflecting a takedown of securities from a shelf registration statement.

D. Improvement of Registration and Other Procedures

Modernization of the Shelf Registration Procedure

The amendments will have the following effects on all shelf registration-eligible issuers:

- The amendments codify, in one rule, the information that can be excluded from the base prospectus of a shelf registration statement at effectiveness and included in later filings.
- The current requirement that the issuer register an amount of securities that is reasonably expected to be offered or sold within two years will be replaced with a requirement that the issuer update the registration statement with a new registration statement that is filed every three years.
- Restrictions on Rule 415(a)(4) "at-the-market" offerings will be eliminated.
- Immediate takedowns from registration statements will be permitted, eliminating the so-called "48 hour" waiting period for using a shelf registration statement once it becomes effective.
- Selling securityholders can be added to a registration statement by a prospectus supplement.
- Prospectus supplements will be permitted to include material changes to the plan of distribution contained in the base prospectus.
- Seasoned issuers with a \$75 million public float will be allowed to identify selling securityholders in prospectus supplements (rather than post-effective amendments) where the securities to be sold are outstanding when the registration statement is filed.

Automatic Shelf Registration

For WKSIs, more flexible shelf registration will be available ("Automatic Shelf Registration"):

- Automatic Shelf Registration will provide for automatic effectiveness of the WKSIs' registration statements upon filing and will allow WKSIs to register unspecified amounts of different types or classes of securities on the automatically effective Form S-3 or Form F-3 without having to allocate between primary and secondary offerings.
- WKSIs can add different classes of securities and eligible majority-owned subsidiaries as registrants after the automatic registration statement is effective.
- More information can be excluded from the base prospectus than is currently allowed; for example, the base prospectus would not need to include the plan of distribution.
- Filing fees can be paid in advance or on a "pay as you go" basis at the time of each offering.

Incorporation by Reference into Forms S-1 and F-1

The amendments allow Exchange Act reporting issuers that are current in their Exchange Act filings to incorporate previously filed Exchange Act reports into Forms S-

1 and F-1. Accordingly, the SEC will eliminate Forms S-2 and F-2 as no longer necessary.

Access Equals Delivery Model for Final Prospectuses

Filing a final prospectus and meeting other conditions will constitute delivery of the final prospectus for purposes of Section 5. Accordingly, physical delivery of the final prospectus will not be required if the applicable conditions are met. Moreover, to preserve an investors' ability to trace securities to a registered offering, there will be a requirement to notify investors that they have purchased securities in a registered offering.

Additional Disclosure Requirements in Exchange Act Reports

The amendments require that additional disclosures be provided in Exchange Act periodic reports.

- Risk factors will be required in Form 10-K.
- Disclosure will be required regarding whether issuers are "voluntary filers" under the Exchange Act.
- For accelerated filers as defined in Rule 12b-2 and WKSIs, disclosure in Form 10-K will be required regarding written SEC staff comments that were issued more than 180 days before the end of the fiscal year to which the Form 10-K relates where the comments are unresolved at the time of filing of the Form 10-K and the issuer believes that the comments are material.

* * * * *

Gibson, Dunn & Crutcher LLP lawyers are available to assist clients in addressing any questions they may have regarding these issues. For more information, please contact the Gibson Dunn attorney with whom you work, or [Brian Lane](#) (202-887-3646), [John F. Olson](#) (202-955-8522), [Ronald Mueller](#) (202-955-8671), or [Amy Goodman](#) (202-955-8653). To contact any of these attorneys by email, use the first letter of the attorney's first name, followed by the attorney's last name, followed by "@gibsondunn.com".

© 2005 Gibson, Dunn & Crutcher LLP