

Public Company Advisory

Recent developments governing public companies and their officers, directors and investors

SEC Adopts Sweeping Public Offering Reforms

The Securities and Exchange Commission adopted final rules yesterday that will implement sweeping reforms of SEC rules governing public offerings of securities under the Securities Act of 1933. The new rules were adopted substantially as proposed by the SEC on October 26, 2004. The amendments will significantly streamline the process for filing registration statements and completing public offerings, especially for larger public companies that will qualify as “well-known seasoned issuers.” The new rules will also give companies increased flexibility to issue communications under SEC rules and will greatly expand the permitted use of electronic media for investor communications during offerings. At the time this summary was prepared, the SEC release containing the final rules was not available, and the effective date of the amendments is uncertain. We will publish more detailed information concerning the impact of the amendments after the SEC publishes the final rules.

The new rules will have three principal effects: (i) reduce SEC restrictions on communications before and during public offerings, (ii) revise SEC rules to permit increased use of electronic media for investor communications during offerings and eliminate most current conditions on use of electronic media, and (iii) streamline a variety of SEC rules that affect the public offering capital formation process.

Offering Communications

The first group of reforms relates to permissible communications by companies before and during a public offering. Currently, SEC rules impose strict limitations on communications that might be viewed as an offer of securities before a registration statement is filed, and restrict written communications even after filing. The new rules will significantly change these restrictions, but will impose liability for materially deficient disclosures. The changes include the following:

- “Well-known seasoned issuers” (as described in the last section of this Advisory) will be permitted to engage at any time in all types of communications even if the communication would be an “offer” under the Securities Act of 1933, subject to some conditions (including filing with the SEC in some cases).
- All reporting companies and certain asset-backed issuers will be permitted to continue to publish at any time regularly-released factual business information and forward-looking information.

- Non-reporting companies (for example, pre-IPO private companies) will be permitted to continue to publish at any time regularly-released factual business information, as long as it is not intended for use by investors in making investment decisions.
- Companies will be permitted to issue communications more than 30 days before filing a registration statement, as long as the communications do not refer to the pending securities offering. After filing, eligible companies, underwriters and other offering participants will be permitted to issue various communications, subject to conditions that may include filing with the SEC.

Electronic road shows will be subject to rules that will permit wider distribution and access to road shows, subject in some cases to a requirement that one version of the road show presentation be readily available to an unrestricted audience. The new rules will also expand the current exemptions for research reports and relax existing rules on media publication of information that could be treated as an offer of securities.

In addition, the new rules will change how the liability provisions of the Securities Act of 1933 apply to offering communications, depending on factors such as whether the company issued the communication and whether the communication was filed with the SEC.

Electronic Prospectus Delivery

The new rules will significantly change current requirements for delivery of prospectuses, creating an “access equals delivery” model for final prospectuses that will for the first time permit broad use of e-mail and Internet access to satisfy prospectus delivery requirements in public offerings if the company satisfies certain conditions and files the prospectus with the SEC. The new rules will also include a cure provision for inadvertent filing failures.

Shelf Offerings

The new rules will streamline the requirements governing “shelf offerings” by eligible companies. Among these changes are permitting immediate “take downs” or offerings of securities after a shelf registration statement becomes effective, eliminating restrictions on “at the market” (in general terms, variable price) offerings, and eliminating the requirement that companies register only amounts of securities that they intend to offer within two years, among other changes.

Well-known seasoned issuers will be able to take advantage of a new significantly more flexible “automatic shelf registration” procedure. This will allow these companies to register unspecified amounts of specific types or classes of securities on an immediately effective Form S-3 or Form F-3 registration statement. It will also create a “pay as you go” fee structure for publicly offered securities and permit registration of additional classes of securities after a registration statement has become effective.

Finally, the new rules will for the first time permit companies to incorporate the reports they file with the SEC under the Securities Exchange Act of 1934 into Form S-1 and Form F-1 registration statements, subject to conditions. This will significantly streamline the offering process for companies that are not eligible to use Form S-3 or Form F-3.

Liability Issues

As noted above, the new rules will reduce current restrictions on permitted methods for delivery of information to investors. The SEC believes that this will significantly reduce legal “speed bumps” that affect the timing of securities offerings. However, the new rules will also expressly confirm the SEC staff’s existing interpretation that liability for material misstatements and omissions is determined based on the information conveyed to an investor at the time a security is sold, rather than the information subsequently provided to the investor. The new rules also contain a variety of technical changes in how the liability provisions of the federal securities laws apply to offering documents, and will in some cases reduce the scope of documents for which officers, directors, and independent auditors and other experts are liable.

Other Changes

The new rules include a variety of changes in other SEC requirements that are intended to complement the changes in registered offerings.

- If not already doing so, companies will be required to include risk factors in Form 10-K reports, where appropriate.
- Accelerated filers and well-known seasoned issuers will be required to disclose in Form 10-K reports any SEC staff comments on the company’s SEC reports that were issued more than 180 days before the end of the fiscal year covered by the Form 10-K report that the company believes to be material and have not been resolved when the company files the Form 10-K.

“Well-Known Seasoned Issuer”

Consistent with the SEC’s original proposal, the final rules will create a new class of public company, referred to as a “well-known seasoned issuer.” A company will qualify as a well-known seasoned issuer if it has:

- filed all reports required under the Securities Exchange Act of 1934 on a timely basis for at least one year, and

- either (a) \$700 million or more of worldwide public securities float, or (b) subject to certain limitations, issued at least \$1 billion of non-convertible securities other than common equity in registered offerings in the preceding three years.

Some companies (such as “blank check,” “shell” and “penny stock” companies) will not be eligible to take advantage of the new rules. In addition, many of the new rules will not be available to investment companies or business development companies, nor will they apply in merger and acquisition transactions.

The securities and corporate finance attorneys at Goodwin Procter keep current on these matters. We are available to help advise investment banks, public companies and their officers and directors on specific issues as well as to provide educational presentations to help them understand and meet their responsibilities under both current and proposed rules and regulations. Please contact your regular Goodwin Procter attorney or any of the individuals listed below if we may be of assistance.

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