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## SEC Issues Adopting Release for Securities Offering Reforms

On July 19, 2005, the Securities and Exchange Commission (“SEC”) issued the adopting release for the securities offering reforms that were approved by the SEC on June 29, 2005. The reforms include significant new and amended rules and form changes modifying the registration, communication and offering processes for issuers of securities (the “Reforms”). The Reforms will become effective on or about December 1, 2005.

The 468-page release contains a detailed description and discussion of the Reforms. This memorandum provides an overview of the Reforms and highlights certain provisions of the Reforms that require changes from current practice. The release adopting the Reforms may be accessed at: <http://www.sec.gov/rules/final/33-8591.pdf>.

### Executive Summary

The Reforms are comprehensive in scope and reflect the integral role that technology plays in communicating important corporate information and developments to the securities markets in a timely manner. The Reforms are intended to modernize the securities offering and communications processes by encouraging the increased flow of information between issuers and investors, eliminating outmoded gun-jumping restrictions and ensuring timely delivery of information to investors at the time they commit to purchase a security.

The Reforms address three main areas:

- **Communications related to registered securities offerings.** The SEC has relaxed the restrictions on written offering-related communications by permitting the use throughout the registration process of “free writing prospectuses,” which are written offering materials other than the statutory prospectus. The Reforms also expand the scope of information permitted in communications under Securities Act Rule 134, a safe harbor for certain announcements of a registered offering. In addition, the Reforms modify existing “gun-jumping” restrictions under the Securities Act that previously limited the nature and timing of communications between issuers and the public throughout the course of a registered offering. The Reforms include a new 30-day bright line exception for certain otherwise impermissible communications prior to filing a registration statement.
- **Registration and other procedures in the offering and capital formation processes.** The Reforms alter the rules for shelf registration statements by clarifying and codifying the information to be included

in and omitted from base prospectuses as well as eliminating limitations on “at-the-market” offerings and the prohibition against immediate shelf takedowns. In addition, the Reforms introduce “automatic shelf registration” for well-known seasoned issuers (discussed below) and amend Forms S-1 and F-1 to allow reporting issuers to incorporate by reference information from previously filed Exchange Act reports and documents.

- **Delivery of information to investors, including delivery through access and notice, and timeliness of delivery.** The Reforms shift liability with respect to disclosures made in connection with the sale of a security to the disclosures that have been made as of the time an investor commits to purchase a security, rather than the disclosures included in the final prospectus, thereby reducing the utility of physical delivery of a final prospectus. The Reforms establish an “access equals delivery” model under which the filing of a prospectus with the SEC and compliance with certain other conditions enable offering participants to conduct securities offerings without physical delivery of a final prospectus.

### New Categories for Issuers and Non-Issuers

The SEC has divided issuers into four categories based upon the type of issuer, the issuer’s reporting history and the issuer’s equity market capitalization or historical debt issuance. An issuer’s ability to take advantage of the Reforms will be based upon its category.

**Seasoned issuers.** Seasoned issuers are those issuers that are eligible to use Form S-3 or Form F-3 to register primary offerings of securities<sup>1</sup> (typically referred to as “shelf issuers”). Majority-owned subsidiaries eligible to use Form S-3 or Form F-3 for primary offerings of their securities and issuers of asset-backed securities (“ABS”) eligible for registration on Form S-3 are also deemed seasoned issuers.<sup>2</sup>

**Well-known seasoned issuers.** Well-known seasoned issuers (“WKSI”) are those issuers generally characterized by the SEC as the most widely-followed issuers in the marketplace. Many of the revisions to the communications rules and registration processes addressed in the Reforms apply only to WKSI. A WKSI is a seasoned issuer and has either:

- \$700 million of worldwide common equity market capitalization held by non-affiliates, or
- issued, within the past three years, an aggregate of \$1 billion of non-convertible securities, other than common equity, in primary offerings for cash, registered under the Securities Act.

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1 The eligibility requirements for Form S-3 and Form F-3 provide that the issuer (i) has a security registered under Section 12 of the Securities Exchange Act of 1934, (ii) has been subject to the requirements of the Exchange Act for at least 12 months, (iii) has filed all annual, quarterly and current reports in a timely manner for at least the prior 12 months and (iv) has an aggregate worldwide market value of \$75 million or more of common equity held by non-affiliates.

2 The Reforms rescind Forms S-2 and F-2.

A majority-owned subsidiary of a WKSI that does not otherwise qualify as a WKSI may still be considered a WKSI in certain circumstances, such as where the parent WKSI unconditionally guarantees the securities of such subsidiary. WKSI status is not available to ABS issuers, registered investment companies or business development companies.

**Unseasoned issuers.** Unseasoned issuers include those issuers required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act that are not eligible to use Form S-3 or Form F-3 to register primary offerings of securities. Unseasoned issuers also include issuers that voluntarily file Exchange Act reports.

**Non-reporting issuers.** Non-reporting issuers include issuers not required to file periodic reports under the Exchange Act that do not file such reports voluntarily. ABS issuers offering securities on Form S-1 will be treated as non-reporting issuers.

The SEC has also created a class of **ineligible issuers** that are largely excluded from utilizing the Reforms. Ineligible issuers include those that:

- are not current in their Exchange Act reports for the prior 12 months,
- are or during the past three years were blank check or shell companies or penny stock issuers,
- are limited partnerships offering and selling their securities other than in a firm commitment underwriting,
- have filed for bankruptcy or insolvency during the past three years,
- have been or are the subject of refusal or stop orders under the Securities Act, or
- during the past three years:
  - > have been convicted of any felony or misdemeanor described in certain provisions of the Exchange Act,
  - > have been found to have violated the anti-fraud provisions of the federal securities laws, or
  - > have been made the subject of a judicial or administrative decree or order (including a settled claim or order) prohibiting certain conduct or activities regarding the anti-fraud provisions of the federal securities laws.<sup>3</sup>

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<sup>3</sup> Ineligibility of an issuer based on a settlement of a claim will apply only to settlements entered into after the effective date of the Reforms.

## Communications related to registered securities offerings

The Securities Act restricts the type and timing of communications that an offering participant may use prior to and throughout a registered offering. Violations of these restrictions are generally referred to as “gun-jumping.” The Reforms allow for increased communications between issuers or other offering participants and the public prior to and throughout a registered offering and eliminate gun-jumping restrictions that have become outdated in light of modern communications technology. The Reforms also address the treatment of electronic communications, including electronic road shows and information located on or hyperlinked to issuer websites.

### Ongoing Communications

The Reforms create two new safe harbors from the gun-jumping restrictions for ongoing communications at any time.

**Safe harbor for reporting issuers.** The Reforms create a safe harbor for continued communications by or on behalf of a reporting issuer containing *regularly released factual business information and forward-looking information*. Information will be considered released or disseminated *by or on behalf of* an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the release or dissemination of the communication before it is made.

As used in the new safe harbor relating to reporting issuers, “factual business information” is defined as:

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

As used in the new safe harbor, “forward-looking information” includes:

- projections of the issuer’s revenues, income, capital expenditures or other financial items,
- statements about management’s plans and objectives for future operations,
- statements about the issuer’s future economic performance, and
- assumptions underlying such forward-looking information.

Regularly released factual business information and forward-looking information includes factual business information and forward-looking statements contained in reports or materials filed with or furnished or submitted to the SEC by the issuer pursuant to the Exchange Act.

The safe harbor does not include information about a registered offering itself and publication of information about an offering outside a registration statement continues to be limited by the Securities Act. In addition, the safe harbor is unavailable with regard to information released by an issuer as part of the offering activities in a registered offering, such as a copy of a prior earnings 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 the offering activities.

**Safe harbor for non-reporting issuers.** The Reforms create a safe harbor for continued communications *by or on behalf of* a non-reporting issuer of *regularly released factual business information* by the same employees who have historically been responsible for providing such information to persons other than investors or potential investors. In contrast to reporting issuers, the safe harbor for non-reporting issuers does not permit the publication or dissemination of forward-looking information.

As used in the new safe harbor relating to non-reporting issuers, “factual business information” is defined as:

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

### **Pre-Filing Communications**

**30-day bright-line exclusion from the prohibition on offers prior to filing a registration statement.** Under the Reforms, communications *by or on behalf of* an issuer made more than 30 days prior to filing a registration statement are excluded from the gun-jumping restrictions *so long as such communications do not reference a securities offering that is or will be the subject of a registration statement*. In addition, the issuer must take reasonable steps within its control to prevent further dissemination of the communication during the 30-day period immediately before the registration statement is filed. In the case of reporting issuers, these communications remain subject to Regulation FD. This bright-line exclusion applies only to communications by or on behalf of the issuer and may not be used by potential offering participants who are underwriters or dealers.

This 30-day bright-line exclusion is not available for communications made in connection with offerings by blank check or shell companies or penny stock issuers.

For purposes of this exclusion, information posted on an issuer’s web site would not need to be removed from the web site provided that the information is:

- appropriately dated or otherwise identified as historical material, and
- not referred to as part of the offering activities.

**Permitted pre-filing offers by WKSIs.** WKSIs may engage in *unrestricted oral and written offers at any time* prior to the filing of a registration statement. These communications, while exempt from gun-jumping restrictions, remain subject to liability standards applicable to such offers such as Regulation FD and the anti-fraud provisions of the federal securities laws. Similar to the 30-day bright-line exclusion, this exemption applies only to communications made *by or on behalf* of the WKSI and may not be used by potential offering participants who are underwriters or dealers.

Written communications made in reliance on this rule will be considered a free writing prospectus (discussed below), must include the applicable legend<sup>4</sup> and, subject to certain limited exceptions, must be filed with the SEC.

### Post-Filing Communications

**Amended Rule 134.** Rule 134 under the Securities Act has been amended to expand the amount and types of permitted written offering-related communications that may be made under the gun-jumping restrictions after a registration statement is filed that includes a prospectus that satisfies the requirements of Section 10 of the Securities Act, including:

- increased information about an issuer and its business, including where to contact the issuer,
- more information about the terms of the securities being offered,
- a wider scope of factual information about the offering, including underwriter information, the 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 (*e.g.*, road shows),
- more factual information about procedures for opening accounts and submitting indications of interest and conditional offers to buy the offered securities,
- more factual information regarding procedures for directed share plans and other participation in offerings by officers, directors and employees,
- corrections to inaccuracies in permissible information previously disclosed under Rule 134, and
- expanded disclosure to include the credit ratings that are reasonably expected to be assigned to the offered securities.

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<sup>4</sup> Every written communication that is an offer made in reliance on this exemption must contain substantially the following legend:

The issuer may file a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at [www.sec.gov](http://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-xxxxxx].

Although the amended rule permits issuers to disclose more information about an offering in a Rule 134 notice, such notice may not include a detailed description of the securities being offered. Instead, this detailed information may be communicated in a term sheet as a free writing prospectus.

### **The Free Writing Prospectus**

**General.** In a departure from longstanding historical practice, the Reforms permit the use of written offering materials other than a statutory prospectus throughout the registration process, provided certain conditions are met. These “free writing prospectuses” include written communications that constitute offers, including electronic communications, outside the statutory prospectus and other limited communications that were previously permitted by the Securities Act.

**Definition of a free writing prospectus.** A free writing prospectus is a written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement.<sup>5</sup> A free writing prospectus may take any form and is not required to meet the informational requirements applicable to statutory prospectuses. Whether a communication constitutes an offer is based on the particular facts and circumstances of that communication. Communications that would not be considered offers or prospectuses for purposes of the gun-jumping restrictions (such as communications under Rule 134 and communications under the two safe harbors discussed above) are not free writing prospectuses.

A free writing prospectus may not contain information that conflicts with information contained in any prospectus or prospectus supplement or the issuer’s annual, quarterly or current reports under the Exchange Act. In addition, issuers are generally required to include a legend in all free writing prospectuses that indicates the offering referenced in the free writing prospectus is being made pursuant to a registration statement filed with the SEC and provides information on how to obtain the registration statement.

**Eligibility to use a free writing prospectus.** An issuer’s classification affects its ability to use a free writing prospectus.

- WKSIs may use a free writing prospectus at any time without regard to whether or not a related registration statement has been filed.
- Non-reporting, unseasoned and seasoned issuers and other offering participants are not permitted to use a free writing prospectus until a registration statement for the offering has been filed.
- Ineligible issuers are permitted to use free writing prospectuses that are limited to descriptions of the terms of the securities being offered and the offering. This limited exception for ineligible issuers is not available to issuers that are or during the past three years were blank check or shell companies or penny stock issuers.

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<sup>5</sup> The Reforms also adopt a new definition of “graphic communications” to clarify that all electronic communications (other than telephone and other live, in real-time communications to a live audience, as discussed below) are graphic and, therefore, are written communications for purposes of the Securities Act.

Free writing prospectuses by non-reporting or unseasoned issuers must also be accompanied or preceded by a physical copy of the most recent statutory prospectus if:

- the free writing prospectus was prepared by or on behalf of the issuer or an offering participant,
- a payment or other consideration was or will be provided by the issuer or an offering participant for the publication or broadcast of a free writing prospectus, or
- Section 17(b) of the Securities Act otherwise requires disclosure that consideration was or will be given by the issuer or an offering participant for any activity described in the free writing prospectus.

In the case of a non-reporting or unseasoned issuer, although the statutory prospectus must be delivered in physical form, the statutory prospectus is deemed to accompany an electronic free writing prospectus if the latter contains an active hyperlink to the statutory prospectus.

WKSIs and seasoned issuers are not required to physically deliver a statutory prospectus to recipients of a free writing prospectus. Instead, the user of the free writing prospectus must include a legend that notifies the recipient of the filing of the registration statement, the URL for or a hyperlink to the SEC Web site and a toll-free number to request a statutory prospectus.

In many cases, a free writing prospectus must be filed with the SEC. A free writing prospectus that contains the final terms of the offered securities must be filed by the issuer, regardless of whether it was prepared by the issuer. This filing must be made within two days after the later of the date on which the terms of the securities are final or the date of first use. The Reforms include a cure provision that permits the free writing prospectus to be filed as soon as practicable after the discovery of the failure to file in the case of an immaterial or unintentional failure to file.

If a free writing prospectus is not filed with the SEC, the issuer and offering participants must retain the free writing prospectus that they have used for three years from the date of the initial bona fide offering of the securities. The Reforms include a provision that an immaterial or unintentional failure to retain a free writing prospectus will not result in a violation of Section 5(b)(1) of the Securities Act or the loss of the ability to rely on the exemption so long as a good faith and reasonable effort was made to comply with the record retention condition.

Regardless of whether it is filed with the SEC, a free writing prospectus will not be deemed a part of a registration statement subject to liability under Section 11 of the Securities Act unless an issuer files it as part of the registration statement. However, any seller offering or selling securities by means of a free writing prospectus will be subject to liability under Section 12(a)(2) of the Securities Act with respect to such free writing prospectus. In general, offering participants, other than the issuer, are liable under Section 12(a)(2) of the Securities Act for a free writing prospectus only if they use, refer to or participate in the planning and use of the free writing prospectus by another offering participant who uses it. Issuers are liable for any issuer information provided by or on behalf of such issuers, contained in any other offering participant's free writing prospectus as well as any free writing prospectus such issuers prepare, use or refer to.

**Electronic Communications.** *Electronic Road Shows*

The Reforms clarify that electronic communications, including electronic road shows, are graphic communications that fall within the definition of written communications. The definition of graphic communications specifically excludes communications that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it may be transmitted through graphic means. Materials, such as slides or other visual aids, provided as part of a live road show, including a graphically transmitted live road show, will not be considered written communications so long as such materials are provided as part of such road show and are not available separately.

Road shows that do not originate live, in real-time to a live audience and are graphically transmitted are electronic road shows that will be considered written communications and, therefore, free writing prospectuses.

Under the Reforms, although a live Web-cast of a road show to a live audience would not be considered a graphic communication, a recording of that same Web-cast available on an issuer's web site would be a free writing prospectus.

For road shows that are free writing prospectuses, the filing conditions applicable to free writing prospectuses apply only where such road show relates to an initial public offering of common equity or convertible equity securities by voluntary filers or non-reporting issuers. However, these issuers may avoid this filing requirement by making at least one version of a bona fide electronic road show for the offering in question readily available without restriction electronically to any potential investor.

A *bona fide* electronic road show is a road show that is a written communication containing information presented by one or more of an issuer's officers or management, that includes a discussion of the same general areas as other issuer road shows for the same offering that are written communications. These general areas include information regarding the issuer, its management and the securities being offered. A *bona fide* version of an electronic road show does not need to address all of the same subjects or provide the same information as other versions.

*Offers and Other Information on Issuer Web Sites*

Offers of an issuer's securities on an issuer's web site or hyperlinked from the issuer's Web site to a third party Web site will be considered a written offer of such securities and, unless otherwise exempt, a free writing prospectus.

Historical information on an issuer's Web site will not be considered a current offer of the issuer's securities (and, therefore, a free writing prospectus) provided that the historical information is:

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

This historical information may become a current offer if the information is:

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

**Media Publications.** Where an issuer or other offering participant provides a member of the media with information about the issuer or the offering of securities and where the publication of that information by the media is considered an offer by such issuer or offering participant, then the media publication of such information will be considered a free writing prospectus by such issuer or offering participant.

Where an issuer or other offering participant prepares the publication or broadcast or pays for or provides other consideration for the preparation of such publication or broadcast, then such communication must satisfy the conditions of a free writing prospectus applicable to such issuer. For example, media communications prepared or paid for by non-reporting and unseasoned issuers would be considered a free writing prospectus and, as such, must be accompanied or preceded by the most recent statutory prospectus.

Where the media communication is prepared or published by persons in the media unaffiliated with the issuer or other offering participants, and the media communication is not paid for by the issuer or offering participants, then a statutory prospectus does not need to precede or accompany such media communication.

Generally, media communications that constitute free writing prospectuses must be filed with the SEC unless the information contained in such communication was previously filed with the SEC in a free writing prospectus. Alternatively, this filing obligation may be satisfied by filing:

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

#### **Expanded Safe Harbor for Research Reports**

The Reforms also modify the existing safe harbors that permit brokers and dealers to publish and distribute research reports around the time of a registered offering. A common definition of the term “research report” was adopted for all safe harbors, which does not require that the report provide sufficient information upon which to base an investment decision.

Rule 137, which permits brokers and dealers that are not offering participants to publish and distribute research reports with respect to reporting issuers that propose to file, have filed or have effective a registration statement, has been expanded to permit research reports with respect to

any issuer, including non-reporting issuers, with the exception of blank check and shell companies and penny stock issuers.

Rule 138 permits brokers and dealers participating in a distribution of securities by a seasoned issuer or by certain non-reporting foreign issuers to publish and distribute research reports on an equity security if the offering is of fixed income securities and vice versa. The Reforms expand the rule to permit research reports regarding any reporting issuer (except voluntary filers) that is current in its annual and quarterly reports and non-reporting foreign private issuers that either have had equity securities traded on a designated offshore securities market or a \$700 million worldwide public float. The Reforms also expand the condition of the safe harbor that the broker or dealer must have previously published or distributed research in the regular course of business to also require that the previous publication relate to the types of securities that are the subject of the report. In this connection, the SEC clarified that the broker or dealer does not have to have previously published research reports about a particular issuer or its securities.

Rule 139 permits a broker or dealer participating in a distribution of securities by a seasoned issuer or by certain non-reporting foreign private issuers to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed *with reasonable regularity* in the normal course of its business. Rule 139 also provides a safe harbor for industry reports covering *smaller seasoned issuers*, if the broker or dealer complies with restrictions on the nature of the publication and the opinion or recommendation expressed in that publication. For issuer-specific reports, the Reforms, among other things, eliminate the requirement that the reports be published “with reasonable regularity” but require that such reports not initiate coverage of the issuer. For industry-specific reports, the Reforms expand the scope of permitted reports to cover *all reporting issuers*, other than issuers that are or during the past three years were blank check or shell companies or penny stock issuers.

## **New Timing of Liability in the Offering Process**

### **Section 12(a)(2) and Section 17(a)(2) Liability**

The SEC acknowledges that in most securities offerings, an investor’s investment decision to purchase a security and the sale of securities to the investor occur prior to the delivery of the final prospectus. The Reforms codify the SEC’s position that materially accurate and complete information regarding the issuer and the securities being offered should be available to investors at the time of the contract of sale, when they make their investment decision, and that liability under Sections 12(a)(2) and 17(a)(2) of the Securities Act attaches to the disclosures provided to an investor prior to and at the time of the investment decision, including free writing prospectuses, regardless of any modification, correction or addition to such disclosure made available subsequent to the contract of sale. Therefore, in contrast to prior practice, for purposes of liability under Sections 12(a)(2) and 17(a)(2) of the Securities Act, misstatements or omissions in a preliminary prospectus or other offering materials available to investors at the time of the contract of sale may not be cured by corrections in the final prospectus.

Because misstatements or omissions may not be cured in the final prospectus, the SEC provided guidance in connection with terminating an existing contract of sale and entering into a new contract of sale. By terminating an existing contract of sale and entering into a new contract of sale,

an investor's rights to damages under the existing contract of sale would cease to exist. In its interpretive rule, the SEC stated that this procedure would not violate the securities laws provided that the investor is provided with:

- adequate disclosure of the contractual arrangement,
- adequate disclosure of its rights under the existing contract at the time termination is sought,
- adequate disclosure of the new information that the seller seeks to convey, and
- a meaningful ability to elect to terminate or not terminate the prior contract and to elect to enter into or not enter into the new contract.

Whether the investor has been provided with adequate disclosure will be a facts and circumstances test. In addition to providing various factors that would be considered in making this determination, the SEC expressly stated that the following would be considered violations of the anti-waiver provisions of the securities laws:

- any contractual provision to the effect that the seller is deemed to have communicated information to the purchaser, and
- any non-conditional contract that moves the time of sale forward to a different time.

### **Section 11 Liability in Shelf Offerings**

Section 11 of the Securities Act imposes liability for material misstatements in or omissions from a registration statement at the time that it is declared effective by the SEC. The Reforms provide that prospectus supplements filed after the initial effective date of a registration statement will be included in the registration statement for Section 11 liability purposes. The Reforms also establish a new effective date for each takedown of securities from a shelf registration statement for purposes of liability of issuers and underwriters (but not directors, officers and experts) under Section 11. If an expert provides a new report or opinion in an Exchange Act report or in connection with the takedown that would require a consent, however, there would be a new effective date for that expert.

## **Modernizing Registration Procedures**

### **Shelf Registration Statements**

The Reforms attempt to update the requirements for the shelf registration process to reflect current practice and technological developments. The Reforms:

- codify and clarify the information to be included in and omitted from base prospectuses in shelf registration statements,

- codify the manner of including information in the final prospectus,
- clarify the treatment of prospectus supplements,
- replace the requirement that issuers register only securities they intend to offer within two years with a new requirement that shelf registration statements be updated with new registration statements every three years,
- eliminate restrictions on “at-the-market” offerings,
- permit immediate takedowns of securities, and
- permit issuers to use prospectus supplements (rather than post-effective amendments) to make material changes to the plan of distribution described in the base prospectus.

**Relaxing the means for providing information.** Historically, in order to satisfy the disclosure requirements for a shelf registration statement, an issuer was required to include information omitted from a base prospectus in a prospectus supplement or, under limited circumstances, through its Exchange Act filings incorporated by reference into the shelf registration statement and base prospectus. Nevertheless, it was unclear whether the information contained within or incorporated by reference into the prospectus supplement was considered part of the registration statement. The Reforms codify this process to specifically provide that information omitted from a base prospectus may be provided in:

- a prospectus supplement,
- a post-effective amendment, or
- where permitted, through the issuer’s Exchange Act reports incorporated by reference into the shelf registration statement and base prospectus.

Under the Reforms, Forms S-3 and F-3 will permit all information required in the prospectus about the issuer and its securities to be incorporated by reference from the issuer’s Exchange Act reports. Seasoned issuers are no longer required to identify selling security holders in a shelf registration statement where the securities to be sold are outstanding when the shelf registration statement is filed, thereby permitting such issuers to identify the selling security holders in prospectus supplements or incorporated Exchange Act reports rather than post-effective amendments.

**Automatic shelf registration for WKSIs.** For offerings by WKSIs, the Reforms establish a significantly more flexible category of shelf registration, referred to as “automatic shelf registration” that features:

- automatic effectiveness,
- pay-as-you-go registration fees, and

- the ability to add both additional classes of securities and eligible majority-owned subsidiaries as additional registrants after effectiveness.

In addition, WKSIs are not required to specify the amount of securities to be registered and are permitted to omit more information from the base prospectus than is currently permitted for a typical shelf registration statement, such as:

- whether the offering is primary or secondary,
- the description of the securities to be offered other than an identification of the name or class of the securities,
- the names of any selling security holders, and
- the disclosure regarding any plan of distribution.

This omitted information would then be included at or before the time of filing a prospectus supplement. Automatic shelf registration statements must also be updated with a new registration statement every three years. Automatic shelf registrations are filed on Form S-3 or F-3 (as updated to reflect the Reforms) and will require only that the WSKI check a box on the cover of such form indicating that the filing is an automatic shelf registration.

#### **Incorporation by Reference on Form S-1 and Form F-1**

Prior to the Reforms, all disclosures required by Forms S-1 and F-1 had to be included directly in the prospectus forming a part of the registration statement. Under the Reforms, issuers that are current in filing their Exchange Act reports and have filed at least one annual report may now incorporate by reference previously filed Exchange Act reports into a registration statement on Form S-1 or Form F-1. Therefore, Form S-2 and Form F-2 have been rescinded as no longer necessary. Any information incorporated by reference into Forms S-1 or F-1 must be readily accessible on a Web site maintained by the issuer. This obligation may be satisfied by hyperlinking from the issuer's Web site directly to the incorporated Exchange Act reports on the SEC's Web site.

Under the Reforms, the information that may be incorporated by reference on Forms S-1 and F-1 includes, but is not limited to:

- summary information,
- risk factors,
- use of proceeds,
- plan of distribution,
- descriptions of the issuer's business, property and legal proceedings,

- financial statements, selected financial data and ratios of earnings to fixed charges, and
- management's discussion and analysis of financial conditions and results of operations.

The ability to incorporate by reference on Forms S-1 or F-1 is not available to:

- reporting issuers that are not current in filing their Exchange Act reports, and
- issuers that are or during the past three years were blank check or shell companies or penny stock issuers.

### Prospectus Delivery Reforms

Physical delivery of a final prospectus to investors in an offering is no longer required. Rather, the SEC has adopted an "access equals delivery" model such that a final prospectus is deemed to precede or accompany a security for sale so long as the final prospectus is filed or the issuer will make a good faith and reasonable effort to file it with the SEC within the applicable timeframe under Rule 424 of the Securities Act. Furthermore, the Reforms eliminate the requirement that confirmations of allocations sent by underwriters for a registered offering be accompanied or preceded by physical delivery of a final prospectus.

To preserve an investor's ability to relate purchased securities to a registered offering, the Reforms implement a separate requirement that 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, not later than two business days after the completion of the sale, in lieu of the final prospectus, a notice stating that the sale was made pursuant to a registration statement or a final prospectus pursuant to a registration statement. An investor may request a final prospectus, but issuers are not obligated to provide a requested final prospectus prior to settlement.

The amended prospectus delivery rules do not apply to offerings made to employees pursuant to an employee benefit plan registered on Form S-8, or business combinations or exchange offers registered on Form S-4.

### Required Disclosure in Exchange Act Reports

**Inclusion of risk factors in annual reports.** The Reforms amend Form 10-K and Form 10 to add a new item calling for risk factor disclosure if required by the standard set forth in Item 503(c) of Regulation S-K (which, prior to the Reforms, was applicable only to registration statements filed under the Securities Act). In the adopting release, the SEC noted that risk factor disclosure in the Form 10-K will be the same type of disclosure as required in a Securities Act registration statement by Item 503 of Regulation S-K, other than information about a particular securities offering. The SEC also recognized that risk factor discussion in a Form 10-K may not be necessary or appropriate in all cases and will depend on the issuer. The Reforms require issuers to provide updates to such risk factor disclosure in quarterly reports on Form 10-Q.

**Disclosure of unresolved staff comments.** In order to further ensure the reliability of Exchange Act reports, particularly in the case of WKSIs eligible to file automatic shelf registrations, the Reforms require all accelerated filers and WKSIs to disclose, in their annual reports on Forms 10-K or 20-F, written comments of the SEC made in connection with the SEC's review of the issuer's Exchange Act reports that:

- the issuer believes are material,
- were issued more than 180 days prior to the end of the fiscal year covered by such annual report, and
- remain unresolved as of the date of filing of such report.

**Disclosure of status as voluntary filer.** The Reforms require disclosure of voluntary filer status on the cover page of Forms 10-K and 20-F (as updated to give effect to the Reforms).