

Weil Briefing: Capital Markets

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Securities Act Reform: SEC Staff Issues Transitional Guidance

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On September 13, 2005, the SEC's Division of Corporation Finance published a set of Frequently Asked Questions to help companies, underwriters and other offering participants prepare for the effective date of the SEC's sweeping securities offering reforms -- December 1, 2005.¹ The staff's guidance, which can be found at <http://www.sec.gov/divisions/corpfin/transitionfaq.htm>, provides a practical roadmap for making the transition to full compliance with the new rules. During an American Bar Association conference held the same day,² Corporation Finance Division Director Alan Beller underscored the staff's desire to facilitate the transition, and urged those whose questions have not been addressed in the FAQs to call the staff on a dedicated hotline established by the Division's Office of Chief Counsel ((202) 551-2200 (responsible attorneys are Heather Maples and Robyn Manos)).

Highlights of the FAQs include the following:

- The various communications rules, which take the form of new and amended rules adopted under the Securities Act of 1933, will apply beginning December 1, 2005, even if a particular registered offering began before this date. See FAQ 2. What exactly does this mean?
 - Eligible companies (with eligibility determined as of December 1) can rely on Rule 168 (for reporting companies) and 169 (for non-reporting companies) to release factual business communications. For reporting companies, this includes regularly released projections.
 - Eligible Well-Known Seasoned Issuers ("WKSIs," with eligibility evaluated as of December 1, 2005) may rely on new Rule 163 to make written offers pursuant to "free-writing prospectuses" before filing a registration statement. Their underwriters (and other offering participants) do not have the benefit of this exemption.
 - Eligible companies (with eligibility determined as of December 1) may rely on new Rule 163A for communications made by or on behalf of a company more than 30 days in advance of filing a registration statement, subject to specified conditions. Underwriters and other offering participants are not covered.
 - Eligible issuers (with eligibility determined as of December 1) and participants in offerings by these issuers can rely on amended Rule 134 to communicate a broader array of offering-related information to prospective investors after a registration statement has been filed.
 - Eligible issuers – with eligibility determined whenever the offering commenced, even if before December 1, 2005 – and participants in their offerings may use free-writing prospectuses to solicit in accordance with the conditions established in new Rules 164 and 433.

¹ Securities Offering Reform, SEC Release No. 33-8591 (July 19, 2005), published in the Federal Register at 70 Fed. Reg. 44722 (Aug. 3, 2005). For more on these reforms, please see our client memo posted on <http://www.weil.com>.

² Mr. Beller discussed the FAQs during a live teleconference and webcast presented by the ABA Section of Business Law and the ABA Center for Continuing Legal Education held on September 13, 2005, entitled "Securities Offering Reform Explained (recorded in Washington, D.C.)."

- A WKSI with an existing (*i.e.*, already effective) short-form shelf registration statement on Form S-3 or F-3 cannot simply amend that registration statement on December 1 to have the benefit of “pay-as-you-go” and other features of automatic shelf registration. Instead, for technical reasons, the WKSI must file a new registration statement designated as an automatic shelf registration statement and carry forward any unused filing fees for unsold securities. See FAQ 7.
- The new undertakings required by amended Item 512 of Regulation S-K (acknowledging, for example, that a prospectus supplement filed in connection with a shelf offering is part of the registration statement and therefore subject to strict liability under Section 11 of the Securities Act) must be included in all registration statements, or in the first post-effective amendment to registration statements, filed on or after December 1, 2005. See FAQ 3.
 - A company may not add these undertakings simply by including them in the next Form 10-K or 20-F that updates the registration statement via incorporation by reference under Section 10(a)(3) of the Securities Act. According to the staff, however, a company that has filed its registration statement before December 1 need not include the undertakings in the registration statement unless it is otherwise filing a pre-effective (for registration statements that do not go effective by December 1) or post-effective (for registration statements that have gone effective by December 1) amendment to that registration statement. See FAQs 3-6.
- Beginning December 1, 2005, all new shelf registration statements will have a finite, three-year life span. See Rule 415(a)(5), as amended. For any shelf registration statement that has gone effective prior to December 1, the three-year period starts to run on December 1 regardless of how long that registration statement has been effective. For any shelf registration statement that “goes effective” after December 1, the three years begin to run on the effective date. See FAQ 12.
- Various amendments to annual reports on Forms 10-K, 10-KSB (for small businesses) and 20-F (for foreign private issuers) will require disclosure of risk factors, long-unresolved staff comments that the company believes are material, and the status of the company as a WKSI or a voluntary reporting company (a company, often a high-yield bond issuer, that continues to file SEC reports even though it no longer has an obligation to do so under the federal securities laws). These amendments apply only to those companies with fiscal years ending on or after December 1, 2005. Once a U.S. company files its first annual report reflecting the new risk-factor disclosure, it must update that disclosure for material changes in the next quarterly report (*e.g.*, on Form 10-Q). See FAQs 13, 14.

Please call your Weil Gotshal & Manges contact if you have any questions on either or both these FAQs or the new securities offering reforms.