



# Securities Briefing Vol. 4, No. 2

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## **TOPICS IN THIS SECURITIES BRIEFING:**

This Securities Briefing discusses the highlights of the following SEC rules:

- Final rules on securities offering reform;
- Final rules extending the Section 404 compliance date for smaller issuers; and
- Proposed rules revising the accelerated filer definition and the accelerated deadlines for filing Exchange Act reports.
- This Securities Briefing is intended only as a summary of the SEC rules discussed and you are encouraged to review the full text of the rules.

## **FINAL SEC RULES ON SECURITIES OFFERING REFORM**

### **OVERVIEW**

On June 29, 2005, the SEC adopted final rules regarding securities offering reform that include modifications to the registration, communications and offering process under the Securities Act of 1933.

The new rules were adopted to:

- Eliminate outdated restrictions on the offering process;
- Provide more timely information to investors by utilizing current technological advances; and
- Make the offering process more efficient.

The final rules will become effective on December 1, 2005. When the new rules go into effect, issuers will be able to make more communications to the public before and during the public offering process. The shelf registration process will be simpler and many of the past prospectus delivery requirements will be eliminated. The new rules will also change the application of certain liability provisions of the Securities Act which will impact the liability of issuers and other participants to the offering in some cases.

### **REFORM CREATES NEW CLASSIFICATION OF ISSUERS**

The availability of the various reforms depends on whether an issuer is classified as a "well-known seasoned issuer" or "WKSI," a "seasoned issuer," an "unseasoned issuer," or a "non-reporting issuer." The WKSIs have the greatest latitude to engage in communications during the offering process and the most flexible registration procedures. The SEC believes that because the WKSIs are widely followed and



constitute the most active market participants, it is appropriate to provide them with the most flexibility in communications and registrations. The definitions of the new issuer categories are as follows:

- A **WKSI** is an issuer eligible to use Forms S-3 or F-3 that is current in its periodic reporting and either has a public equity float of at least \$700 million or has issued in the last three years at least \$1 billion aggregate principal amount of debt for cash;
- A **seasoned issuer** is an issuer eligible to use Forms S-3 or F-3 to register primary offerings of securities;
- An **unseasoned issuer** is an issuer that files periodic reports but is not eligible to use Forms S-3 or F-3 to register primary offerings of securities; and
- A **non-reporting issuer** is an issuer not required to file periodic reports regardless of whether it is filing such reports voluntarily.

Many of the reforms are not available to blank check companies, penny stock issuers, shell companies and issuers that were in bankruptcy or insolvency during the last three years.

#### **REFORM CREATES ADDITIONAL DISCLOSURES FOR CERTAIN EXCHANGE ACT REPORTS**

The new rules, which apply to fiscal years ending on or after December 1, 2005, require the following new disclosures:

- Annual Reports on Form 10-K and Exchange Act registrations on Form 10 must include a disclosure of risk factors in plain English;
- Quarterly Reports on Form 10-Q must contain a disclosure of any material changes from previously disclosed risk factors; and
- Accelerated filers and WKSI's must disclose in their Annual Reports on Form 10-K or Form 20-F the substance of material unresolved SEC staff comments on their Exchange Act reports.

Note that the risk factor disclosure requirement is not imposed on Forms 10-KSB or 10-SB. The new rules do not require, and the SEC stated in the adopting release that it discourages, the unnecessary restatement or repetition of risk factors in quarterly reports.

The disclosure of unresolved SEC staff comments covers only those comments that were issued more than 180 days before the end of the fiscal year covered by the annual report that remain unresolved as of the date of filing the annual report. Comments that have been resolved or comments that the SEC staff and issuer have agreed will be addressed in future filings need not be disclosed.

The new rules also require disclosure on the cover page of the Annual Reports on Forms 10-K, 10-KSB and 20-F of whether the issuer is a voluntary filer and on the cover page of Annual Reports on Forms 10-K and 20-F of whether the issuer is a WKSI.



## **REGISTRATION REFORM DESIGNED TO SIMPLIFY THE SHELF REGISTRATION PROCESS**

The new rules expand and clarify the type of information that may be omitted from and included in the base prospectus of a shelf registration statement. The new rules now provide that information omitted from a base prospectus may be included in:

- A prospectus supplement;
- Previously filed Exchange Act reports; or
- A post-effective amendment.

The new rules provide that the information incorporated by reference from Exchange Act reports will be deemed part of the registration statement. Significantly, under the new rules, material changes to the plan of distribution can be disclosed in a prospectus supplement or in Exchange Act reports incorporated by reference, rather than in a post-effective amendment as previously required. Seasoned issuers with a \$75 million public float can identify selling shareholders in a prospectus supplement, rather than a post-effective amendment, if the securities to be sold are outstanding at the time of registration.

WKSIs are eligible for automatic shelf registrations with minimal information requirements that become effective immediately upon filing without SEC review. WKSIs also may utilize a "pay-as-you-go" filing fee system.

Further, the shelf registration statements on Forms S-3 and F-3 can now be used for the amount intended to be offered or sold for three years after effectiveness, rather than two, as previously provided.

The new rules amend registration statements on Forms S-1 and F-1 to permit incorporation by reference to Exchange Act reports by issuers that are (i) current in their reporting obligations, (ii) have filed at least one annual report, and (iii) make their Exchange Act reports readily accessible on their websites through hyperlinks to the EDGAR system or another third-party website.

## **COMMUNICATIONS REFORM RELATED TO REGISTERED PUBLIC OFFERING**

### ***Free Writing Prospectus and Gun Jumping***

Issuers and underwriters will now be able to use free writing prospectuses during the waiting period. Until now, an issuer could make written offers only through a statutory prospectus. Free writing prospectuses are written communications other than a statutory prospectus that constitute an offer to buy or sell securities. Free writing prospectuses include most forms of electronic communication, such as:

- Emails;
- Web sites;



- Audiotapes;
- Videotapes; and
- Computer networks.

Issuers will need to file the free writing prospectus with the SEC on or before its distribution. Underwriters, on the other hand, will not have to file them with the SEC, provided that the free writing prospectus is not aimed at broad, unrestricted distribution.

WKSIs can use a free writing prospectus at any time. A seasoned issuer will be able to use free writing prospectuses if the issuer files the statutory prospectus with the SEC. Non-reporting issuers and unseasoned issuers, however, will be able to use free writing prospectuses only if they are accompanied or preceded by a statutory prospectus.

The new rules provide the following changes and clarifications regarding communications prior to a registered offering:

- Factual business information may be released at any time by all issuers if the release is consistent with the issuer's past practices.
- Forward looking information may be released at any time by non-IPO issuers if the release is consistent with the issuer's past practices.
- Communications made more than 30 days prior to filing a registration statement are permitted so long as they do not refer to the pending securities offering and the issuer takes reasonable steps to prevent the further distribution of the communication during the 30-day period prior to filing the registration statement.
- Live road shows are not deemed to be free writing prospectuses.
- Electronic road shows are deemed to be free writing prospectuses and must comply with free writing prospectus rules. Electronic road shows, and subject to certain conditions, electronic road shows for equity IPOs, do not need to be filed with the SEC.

### ***Notices of Upcoming Offering (Rule 134)***

The SEC expanded the categories of information that may be included in Rule 134 notices about an upcoming offering. Although an issuer may not use Rule 134 to provide detailed information about the securities being offered, the new Rule 134 will allow factual information about the offering to be communicated, such as:

- Schedule of the offering;
- Anticipated securities ratings;
- How to open an account; and



- Submit indication of interest.

Rule 134 notices do not need to be filed with the SEC.

### **PROSPECTUS DELIVERY REFORMS**

Issuers, underwriters and dealers in most cases will no longer have to physically deliver final prospectuses to investors under the new "access equals delivery" model under the new rules. The obligation to physically deliver final prospectuses may now be satisfied by filing the final prospectus with the SEC by the required prospectus filing date. However, investors may still request physical delivery of the final prospectus if they wish. Also, in an IPO, preliminary prospectuses will still need to be delivered as required by Rule 15c2-8.

The new rules will also allow issuers or underwriters participating in a registered offering to send to purchasers of securities, in place of a final prospectus, a notice stating that the sale was made pursuant to a registered offering. Finally, provided that a statutory prospectus is filed with the SEC, underwriters, brokers and dealers can now deliver written confirmations and notices of allocations after effectiveness of a registration statement without an accompanying or preceding final prospectus.

### **CHANGES IN LIABILITY PROVISIONS**

Even though free writing prospectuses must be filed with the SEC, they will not be deemed to be part of the registration statement and will not be subject to Section 11 liability. Free writing prospectuses will be subject to disclosure liability under Section 12(a)(2) of the Securities Act and the anti-fraud provisions of the federal securities laws. In contrast, information in prospectus supplements will be subject to Section 11 liability because they will be deemed to be part of the shelf registration statements.

Additionally, under the new rules, the SEC will not take into account the information delivered to an investor after the time of sale for the purpose of determining whether the investor has received all material information before making an investment decision under Sections 12(a)(2) and 17(a)(2) of the Securities Act. This means that misstatements or omissions in a preliminary prospectus or other offering materials available at the time of sale may not be cured by corrections in a final prospectus delivered after the time of sale.

### **COPY OF FINAL SEC RULES REGARDING SECURITIES OFFERING REFORM**

A copy of the final SEC rules regarding securities offering reform is available on the SEC's website at [www.sec.gov](http://www.sec.gov) by selecting Final Rule: Securities Offering Reform or by going to <http://www.sec.gov/rules/final/33-8591.pdf>.

### **FINAL SEC RULES EXTENDING THE SECTION 404 COMPLIANCE DATE FOR SMALLER ISSUERS OVERVIEW**



On September 21, 2005, the SEC adopted final rules extending the date that non-accelerated filers, including a foreign private issuer that is not an accelerated filer, must provide the management report on internal control over financial reporting and related attestation report required by Section 404 of the Sarbanes-Oxley Act for an additional year. Non-accelerated filers do not need to comply with such requirements until the first fiscal year ending on or after July 15, 2007 (extended from July 15, 2006).

### **REASONS FOR EXTENSION DECISION**

The SEC indicated that the extension was appropriate in light of efforts "in the market place" that might affect the implementation of internal control over financial reporting by smaller issuers. In particular, the SEC's decision was influenced by comments provided at its April 2005 roundtable that raised "issues as to whether a broadly accepted or demonstrably suitable framework is currently in place for evaluating internal control at smaller public companies, including non-accelerated filers." Further, the SEC noted that the taskforce established by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) to provide guidance on the application of the COSO Framework to smaller companies had not yet released an exposure draft of its guidance for public comment and that conclusions were several months away. The SEC also indicated that its Advisory Committee on Smaller Public Companies continued to study the impact of the Sarbanes-Oxley Act and other federal securities laws on smaller issuers and would not complete its work until April 2006. In addition, the SEC's Advisory Committee on Smaller Public Companies had recommended that the SEC extend the Section 404 compliance date for smaller issuers. All of these factors resulted in the SEC's decision to provide an additional one year extension for Section 404 compliance for non-accelerated filers.

### **COMMENT PERIOD ON QUESTIONS RAISED BY SEC IN RELEASE**

The SEC has requested comments on a number of questions relating to the application of Section 404 to smaller public companies. Comments are due on or before October 31, 2005. Comments may be submitted electronically in one of the following ways:

- use the SEC's Internet comment form (<http://www.sec.gov/rules/other.shtml>), or
- send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov) and include file number S7-06-03 on the subject line, or
- use the Federal eRulemaking Portal (<http://www.regulations.gov>) and follow the instructions for submitting comments.

Paper comments can be sent in triplicate to Jonathon G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-9303.

### **COPY OF FINAL SEC RULES EXTENDING THE SECTION 404 COMPLIANCE DATE FOR SMALLER COMPANIES**



A copy of the final SEC rules extending the Section 404 compliance date for smaller companies, including the questions the SEC is requesting the public to comment on with respect to smaller issuers, is available on the SEC's website at [www.sec.gov](http://www.sec.gov) by selecting Final Rule: Management's Report On Internal Control Over Financial Reporting And Certification Of Disclosure In Exchange Act Periodic Reports That Are Not Accelerated Filers or by going to <http://www.sec.gov/rules/final/33-8618.pdf>.

## **PROPOSED SEC RULES REVISING ACCELERATED FILER DEFINITION AND ACCELERATED DEADLINES FOR FILING EXCHANGE ACT REPORTS**

### **OVERVIEW**

The SEC has proposed rules to amend the definition of the term "accelerated filer" and change the Exchange Act report filing deadlines applicable to certain accelerated filers.

### **ACCELERATED FILER DEFINITION**

The proposed rules create a new category of accelerated filer to be designated "large accelerated filers." A large accelerated filer is defined as a company that:

- Is not eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports;
- Has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of \$700 million or more as of the last day of its most recently completed second fiscal quarter;
- Has been subject to the Exchange Act reporting requirements for a least 12 months; and
- Has filed at least one annual report.

The proposed rules also amend the accelerated filer definition to permit an issuer to exit accelerated filer status at the end of the fiscal year if the issuer's aggregate market value of voting and non-voting equity held by non-affiliates is less than \$25 million as of the last day of its second fiscal quarter. Under the current rules, an issuer cannot exit accelerated filer status until it becomes eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports, which means it must wait two years before it can begin filing on a non-accelerated filer basis. The proposed rules permit large accelerated filers to exit from large accelerated filer status at the end of its fiscal year if its public float is less than \$75 million as of the last business day of its most recently completed second fiscal quarter.

The proposed rules amend the cover page of Forms 10-K, 10-Q and 20-F to require disclosure of whether the issuer is a large accelerated filer, accelerated filer or non-accelerated filer. The proposed rules also amend Regulation S-K to require accelerated filers to disclose in their annual reports on Form 10-K where investors can obtain access to their Exchange Act reports and whether they provide access to their Exchange Act reports on the company's website free of charge.

### **AMENDMENTS TO ACCELERATED DEADLINES FOR FILING EXCHANGE ACT REPORTS**



Under the existing SEC rules, accelerated filers must file Annual Reports on Form 10 K within 75 days after fiscal year end and Quarterly Reports on Form 10-Q within 40 days after quarter end. The existing rules also require all accelerated filers to file Annual Reports on Form 10-K for fiscal years ending on or after December 15, 2005, within 60 days after fiscal year end and Quarterly Reports on Form 10-Q within 35 days after quarter end. The proposed rules impose the 60-day accelerated filing deadline for Annual Reports on Form 10-K only on large accelerated filers while accelerated filers remain subject to the current 75-day filing deadline for Annual Reports. In addition, under the proposed rules, both large accelerated filers and accelerated filers will remain subject to the current 40-day filing deadline for Quarterly Reports. If the proposed filing deadlines are adopted, the SEC intends to begin applying the revised deadlines to Annual Reports for fiscal years ending on or after December 15, 2005.

#### **COMMENT PERIOD**

The SEC has requested comments on a number of questions relating to the proposed rules. Comments are due on or before October 31, 2005. Comments may be submitted electronically in one of the following ways:

use the SEC's Internet comment form (<http://www.sec.gov/rules/other.shtml>), or  
send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov) and include file number S7-08-05 on the subject line, or  
use the Federal eRulemaking Portal (<http://www.regulations.gov>) and follow the instructions for submitting comments.

Paper comments can be sent in triplicate to Jonathon G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-9303.

#### **COPY OF PROPOSED SEC RULES REVISING ACCELERATED FILER DEFINITION AND ACCELERATED DEADLINES FOR FILING PERIODIC REPORTS**

A copy of the proposed SEC rules revising the accelerated filer definition and the accelerated deadlines for filing periodic reports, including the questions the SEC is requesting the public to comment on relating to the proposed rules, is available on the SEC's website at [www.sec.gov](http://www.sec.gov) by selecting Proposed Rule: Revisions to Accelerated Filer Definition and Accelerated Deadlines for Filing Periodic Reports or by going to <http://www.sec.gov/rules/proposed/33-8617.pdf>.

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