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SECURITIES ALERT

SEC ISSUES FINAL RULES IMPLEMENTING SECURITIES OFFERING REFORM

On July 19, 2005, the staff of the Securities and Exchange Commission (SEC) issued the final rules that implement reforms in the registration procedures for securities offerings under the Securities Act of 1933 (Securities Act). The full text of the rules is available at http://www.sec.gov/rules/final/33-8591.pdf. The rules will become effective on December 1, 2005.

The new rules address three principal areas: (1) communications during the offering process, (2) simplification of registration procedures and (3) liability provisions for offering related communications. They significantly alter the securities offering process for almost all issuers, principally by eliminating many of the restrictions on the timing and methods of communicating information to potential investors and streamlining registration procedures, particularly for larger, well-established companies. The SEC expects the changes will facilitate greater availability of information to investors and the market and make the capital formation process more efficient.

The following is our summary of the new rules.

ISSUER CATEGORIES

The new rules generally put issuers into five different categories for purposes of determining which obligations and benefits included within the new rules are applicable to a particular issuer. They are:

1. Well-Known Seasoned Issuer (WKSI) – A WKSI will be the entity that benefits most from the new rule changes. An issuer will qualify as a WKSI if it:

   • meets the registrant eligibility requirements of Form S-3 or Form F-3

   • is required to file reports under the Securities Exchange Act of 1934 (Exchange Act)

   • is current and timely in satisfying its filing obligations

   • has either (i) a worldwide market value of outstanding common equity (voting and non-voting) held by non-affiliates (commonly referred to as the "public float") of

$700 million or more as of a date within 60 days of the determination date or (ii) issued at least $1 billion aggregate principal amount of non-convertible debt and equity securities (other than common equity) during the preceding three years in registered primary offerings for cash (i.e., excluding exchange offers) as of a date within 60 days of the determination date, and

- the issuer is not an ineligible issuer (as defined below), an asset-backed issuer, a registered investment company or a business development company.

An issuer generally determines whether or not it qualifies as a WKSI at two points in time – initially when it is about to file a registration statement, and then again when it files annual financial statements to be incorporated in the previously filed registration statement.

2. Seasoned Issuer – A seasoned issuer is eligible to register a primary offering of its securities on Form S-3 or F-3 (i.e., an issuer which either (i) has a public float of at least $75 million or (ii) is making a primary offering of investment grade nonconvertible or asset-backed securities). A seasoned issuer will be able to take advantage of many of the new rules, but will not have as much flexibility regarding shelf registrations as a WKSI.

3. Unseasoned Issuer – An unseasoned issuer is an issuer required to file periodic and current reports with the SEC but which is not eligible to register a primary offering of its securities on Form S-3 or F-3. Unseasoned issuers will be more limited than WKSIs and seasoned issuers in their ability to employ the reforms adopted under the
new rules.

4. Non-Reporting Issuer – A non-reporting issuer is an issuer that is not required to file reports under the Exchange Act. The rules make clear that this category includes voluntary filers. These issuers will be most limited in their ability to employ the changes made under the new rules.

5. Ineligible Issuer – An ineligible issuer is denied the ability to use many of the benefits afforded issuers under the new rules, and will be prevented from being classified as a WKSI even if otherwise eligible. The following issuers are classified as ineligible issuers under the new rules:

   - an issuer required to file Exchange Act reports but which has failed to file all such reports (except certain current reports on Form 8-K) during the 12 months preceding a determination date

   - an issuer that has been either a blank check company, shell company or penny stock issuer at any time during the three years preceding a determination date

   - an issuer that is a limited partnership and is offering securities other than through a firm commitment underwriting

   - an issuer for which a bankruptcy petition has been filed during the three years preceding a determination date (unless, in the case of an involuntary filing, the petition has been dismissed within 90 days), except that an issuer which has emerged from bankruptcy and filed its first annual report with the SEC will no longer be an ineligible issuer

- an issuer convicted of a criminal offense arising from the sale of securities or unlawful misappropriation of property during the three years preceding a determination date
- an issuer (or any of its subsidiaries) that was the subject of a judicial or administrative decree or order related to certain violations of the anti-fraud provisions of the securities laws at any time during the three years preceding a determination date, or
- an issuer that was the subject of a stop order under the Securities Act at any time during the three years preceding a determination date or is the subject of a pending cease and desist order on a determination date.

REFORMS REGARDING COMMUNICATIONS RELATED TO REGISTERED OFFERINGS

Section 5 of the Securities Act generally provides that once an issuer is "in registration" no offers, oral or written, may be made for the sale of a security that is to be registered before filing of a registration statement with the SEC and that, once a registration statement is filed and before it is declared effective by the SEC, an offer can only be made by means of a prospectus that satisfies the requirements of the Securities Act. If an issuer violates Section 5 during these periods, the violation is commonly referred to as "gun jumping."

The new rules relax significantly these communication restrictions for certain categories of issuers prior to and after the filing of a registration statement. These changes include the following:

Safe Harbor for Communications Prior to Filing a Registration Statement. New Rule 163A permits all issuers (other than blank check and shell companies, penny stock issuers, registered investment companies and business development companies) to disseminate any communication at any time more than 30 days before the filing of a registration statement without risk of a gun jumping violation, provided that the communication:

- does not reference a securities offering
- is made by or on behalf of the issuer, and
- does not relate to a business combination or (unless the issuer is a WKSI) a securities offering made on Form S-8.

However, issuers are required to take reasonable steps to prevent re-dissemination of the information contained in the communication during the 30-day period immediately prior to the filing of a registration statement. Furthermore, the communications are subject to the anti-fraud provisions of the Securities Act and the Exchange Act.

Safe Harbors for Continuing Business Communications. Under new Rule 168, all issuers required to file reports under the Exchange Act, as well as certain non-reporting foreign private issuers and asset-backed issuers, may continue to disseminate regularly released factual business information and forward looking information at any time either before or after filing of a registration statement. "Factual business information" is defined to include (i) factual information about the issuer or business or financial developments regarding the issuer or other aspects of its business, (ii) advertisements or other information about the issuer's products or services and (iii) dividend notices. "Forward-looking information" is defined to include (i) projections of revenues, income or loss, earnings or loss per share, capital expenditures, dividends, capital structure or other financial items, (ii) statements about management's plans for future operations, (iii) statements about the issuer's future economic performance and (iv) assumptions underlying or relating to this type of information. Under new Rule 169, all issuers, including non-reporting issuers (e.g., an issuer

conducting an initial public offering or a voluntary filer), may disseminate factual business information (but not forward looking information) before or after the filing of a registration statement if the information is of a type that has been regularly released in the past to persons other than in their capacity as current or potential investors (e.g., customers or suppliers). With respect to both Rules 168 and 169, in order for the safe harbor to be available, (i) the information cannot relate to the offering itself, (ii) the issuer must have communicated previously the type of information to be covered by the safe harbor in the ordinary course of its business and (iii) the timing, manner and form in which the information is released must be consistent in material respects with prior practice.

Safe Harbor for Free Writing Prospectuses. Once a registration statement is filed with the SEC, Section 5 of the Securities Act prohibits making any written offer for the sale of the security that is the subject of the registration statement other than by means of a prospectus that complies with the requirements of the Securities Act. New Rules 164 and 433 have created a safe harbor under Section 5 for what is referred to in the rules as a "free writing prospectus," which is defined (in Rule 405) as any written communication used in the offer or sale of securities covered by a registration statement that is made other than by means of a prospectus meeting the requirements of the Securities Act. Although the new rules have expanded the definition of "written communication" to include essentially all forms of communication other than purely oral communication (i.e., telephone and other live, in real-time communications to a live audience), including all forms of graphic (which is defined to include electronic) communication, it permits issuers to use most forms of written communication following the filing of a registration statement, subject to certain procedural conditions and so long as the information included in the free writing prospectus does not conflict with information included in the registration statement and any filings made by the issuer under the Exchange Act which are incorporated in the registration statement. In addition, the rules allow WKSIs to use a free writing prospectus at any time, even prior to the filing of a registration statement.

The procedural conditions to use of free writing prospectuses are contained in new Rule 433. They include:

1. *Filing:* Generally, all issuers are required to file with the SEC any free writing prospectus (including those prepared or used by any "other offering participant," such as an underwriter, that includes information prepared by or on behalf of the issuer and that was not contained or incorporated by reference in the prospectus included within the registration statement or a previously filed free writing prospectus) by no later than the date of first use of the material. However, a free writing prospectus that contains only a description of the final terms of the securities being offered (to be used, for instance, in connection with a take down under a shelf registration) must be filed within two days of the later of the date such terms are finalized and the date of first use. The filing requirement does not apply to a free writing prospectus that does not contain any substantive changes or additions from a free writing prospectus previously filed with the SEC. In the case of a free-writing prospectus used by a WKSI prior to the filing of a registration statement, the material will generally have to be filed with the SEC promptly upon the filing of the registration statement. The filing requirement also applies to a free writing prospectus prepared by or for any other offering participant that does not include information furnished by the issuer if the material is distributed in a manner reasonably designed to lead to broad unrestricted dissemination.

2. *Legend Requirement:* Any free writing prospectus used by any issuer must include a legend (substantially in the form included in paragraph (c)(2) of Rule 433) indicating that it relates to a registered offering and where the registration statement and statutory prospectus can be accessed.

3. *Availability or Delivery of Statutory Prospectus:* For a WKSI or seasoned issuer, the free writing prospectus need not be accompanied or preceded by delivery of a statutory prospectus, so long as the statutory prospectus is (or, in the case of a free writing prospectus used by a WKSI prior to filing, will be) available from the SEC. For unseasoned issuers and non-reporting issuers, the statutory prospectus must accompany or precede the free writing prospectus. For a free writing prospectus that is an electronic communication, the statutory prospectus may be delivered by providing in the free writing prospectus a hyperlink to the statutory prospectus.

4. *Record Retention Requirement:* Issuers and other offering participants must retain free writing prospectuses for three years from the initial bona fide offering of the securities to which the free writing prospectuses relate if they were not filed with the SEC (which is permitted, for instance, in the case of a free writing prospectus that is not substantively different from material already on file with the SEC).

With respect to conditions 1, 2 and 4 above, the rules provide that an immaterial or unintentional failure to comply with the condition would not preclude an issuer from relying on the safe harbor, provided that the issuer makes a good faith and reasonable effort to comply with the condition and, in the case of the filing and legend requirements, the issuer corrects the failure to comply as soon as practicable after discovery of the failure.

Free writing prospectuses may not be used by an ineligible issuer except to describe the offering or the securities in the offering and, in any event, ineligible issuers which are blank-check companies, shell companies, or penny stock issuers may not use a free writing prospectus for any purpose. In addition, free writing prospectuses may not be used for exchange offers or business transactions that are subject to Regulation M-A (which stipulates what communications are permitted in such transactions).

Free writing prospectuses, whether or not filed with the SEC, are subject to the general liability and antifraud provisions of the federal securities laws, such as Section 12(a)(2) of the Securities Act, which provides a private cause of action against any person who offers a security by means of a materially misleading communication. However, since a free writing prospectus will not be deemed part of the registration statement, it will not be subject to liability under Section 11 of the Securities Act, which creates a cause of action for any purchaser of the registered security based on any material misstatement contained in or omitted from the registration statement. Furthermore, an amendment to Rule 408 adopted as part of the new rules provides that the failure to include information that is in a free writing prospectus in a registration statement would not, solely by virtue of inclusion of the information in the free writing prospectus, be considered an omission of material information required to be included in the registration statement.

Media Communications. Under current law, oral comments by a representative of an issuer subsequently published in an article have run the risk of being treated by the SEC as an impermissible written offer, and in certain cases have prompted the SEC to force issuers to delay an offering and/or include the remarks in a revised prospectus as a "cure" to the gun jumping violation. Under the new rules, communications with the media that are provided, authorized or approved (whether orally or in writing) by the issuer or any offering participant that are published or disseminated by the media will be treated as free writing prospectuses. However, so long as the issuer or other offering participant responsible for the media free writing prospectus did not provide consideration for the preparation or distribution of such material, such communication will not be subject to the prospectus delivery/availability requirement discussed above and the filing of the free writing prospectus (or the information underlying the free writing prospectus) may be made by the issuer within four days of becoming aware of its dissemination, unless the substance of the media communication has been filed previously with the SEC, in which case no filing is required. The filing with the SEC must include the legend required for a free writing prospectus as described above.

Electronic Road Shows. Under the new rules, an electronically transmitted road show that is conducted live in real time to a live audience will not constitute a free writing prospectus, even if it includes graphic communication (such as slide presentations), so long as the graphic communication is transmitted simultaneously as part of the live show in a manner designed to make it available only as part of the show and not separately. However, an electronic road show that is not live and transmitted in real time (i.e., one that is replayed or broadcast after the fact) will be considered a free writing prospectus and, as such, must comply with the four conditions specified above with respect to the safe harbor for a free writing prospectus, except that all issuers other than non-reporting issuers do not have to file the road show with the SEC. Non-reporting issuers using an electronic road show in connection with an initial public offering for common or convertible equity securities have the option of either filing a version with the SEC or making a bona fide version readily available without restriction electronically to any potential investor (by, for instance, posting it on the issuer's website).

Issuer Websites. Since materials posted on an issuer's website, as graphic communications, would be considered a free writing prospectus, the new rules have created a safe harbor from such treatment for historical information posted on the issuer's website, so long as the information is separately identified as such and is located in a separate section of the website.

Expansion of Rule 134 Notice. Previously existing Rule 134 has provided a safe harbor for written communications by an issuer containing limited specified information about an issuer and an offering outside the registration statement once the issuer has filed the registration statement relating to the offering with the SEC. The new rules amend Rule 134 to expand the types of permitted written information that may be part of the notice, such as more information about the issuer, the terms of the securities being offered, information concerning the underwriters and the mechanics of the offering, including information regarding opening of accounts and submitting indications of interest. As a practical matter, the expansion will be of benefit primarily to non-reporting issuers and ineligible issuers, which do not qualify for many of the other liberalizations on communication during the offering process provided by the new rules.

Safe Harbor for Offers by WKSIs. New Rule 163 allows WKSIs to engage in unrestricted oral and written offers at any time before or after a registration statement is filed without violating the gun-jumping provisions, subject only to the anti-fraud provisions of the securities laws and the four requirements applicable to free writing prospectuses discussed above.

Modification to Securities Act Exclusion Under Regulation FD. Regulation FD provides that when an issuer or person acting on its behalf discloses material non-public information to certain persons, the issuer must make prompt or simultaneous public disclosure of that information. Since its adoption in 2000, Regulation FD has included an exclusion from its coverage for communications in connection with Securities Act registration statements. The new rules narrow somewhat the exclusion from the regulation to make it consistent with the liberalization for communications provided in the rules by amending the regulation to enumerate the specific communications to which the exclusion will apply, including free writing prospectuses used after filing of the registration statement and communications permitted under Rule 134.

Changes to Safe Harbors for Research Reports. The new rules expand the circumstances in which a broker or dealer can publish research during an issuer's securities offering on the issuer or the securities offered without being deemed a violation of Section 5. The new rules amend:

- Rule 137, which permits brokers or dealers not participating in a registered offering of an issuer's securities to publish or distribute research reports on the issuer or the securities being offered under the conditions specified in the Rule, so that it applies to any issuer, rather than solely to issuers required to file Exchange Act reports

- Rule 138, which permits brokers or dealers that are offering participants in a registered offering of an issuer's securities to publish or distribute research reports about other securities of that issuer that are not part of the offering under the conditions specified in the Rule, to expand the categories of issuers that would be eligible for this purpose to include all issuers that are current in their periodic reports under the Exchange Act, not just Forms S-3 or F-3 eligible issuers, as well as any non-reporting foreign private issuer that has had its equity securities traded on a designated offshore securities market for at least 12 months or has a worldwide public float of at least $700 million, and

- Rule 139, which permits brokers or dealers that are offering participants in a registered offering of an issuer's securities to publish or distribute research reports about the securities included in the offering under the conditions specified in the Rule, to revise the class of issuers about which such reports are permitted to include issuers that have at least one year of reporting history under the Exchange Act, are current and timely in their Exchange Act reports and are eligible to use Forms S-3 or F-3 for primary offerings, as well as any non-reporting foreign private issuer that meets the requirements set forth above with respect to the amendments to Rule 138.

The new rules also provide that research reports permissible under Rules 138 and 139 do not constitute offers or general solicitation or general advertising under Rule 144A or directed selling efforts under Regulation S.

SIMPLIFICATION OF REGISTRATION PROCEDURES

The new rules include a number of changes to registration procedures that are designed to simplify and expedite the offering process, particularly for WKSIs. These changes include (1) automatic shelf registration for WKSIs, (2) streamlining shelf registration procedures for issuers generally, (3) adoption of an "access-equals-delivery" model for delivery of a final prospectus and (4) expansion of the use of incorporation by reference in Securities Act filings for most issuers. Each of these changes is described below.

Automatic Shelf Registration Statement for WKSIs. The new rules include amendments to Rule 415 that permit WKSIs to utilize an automatic shelf registration procedure under Forms S-3 or F-3. Under the new rules, a shelf registration statement filed by a WKSI, and all amendments thereto, for both primary and secondary offerings, will automatically become effective upon filing with the SEC without any staff review. Further, the issuer can register unspecified amounts of different classes of securities on the shelf registration and add classes of securities or additional subsidiary registrants (e.g., as guarantors) to the registration statement through a post-effective amendment or, for certain specified information such as the offering price, a detailed description of the securities offered, the plan of distribution and the identity of underwriters and selling shareholders, a prospectus supplement. In addition, WKSIs may opt to pay their SEC filing fees on a "pay-as-you-go" basis, which means that a registration fee would not have be paid at the time of the initial filing but only at the time of the takedown under the shelf registration by reference to the amount taken down.

Under the new rules, an issuer that qualifies as a WKSI based on the worldwide value of common equity held by non-affiliates (i.e., $700 million or more) is eligible to conduct an offering for any kind of security on an automatically effective shelf registration statement. An issuer that qualifies as a WKSI based on the aggregate value of issuances of its non-convertible securities (other than common equity) in registered offerings for cash during the three preceding years (i.e., $1 billion) may only use the automatic shelf registration statement to register investment-grade, non-convertible securities (other than common stock) unless the value of its common equity held by non-affiliates is at least $75 million, in which case it may register any security using an automatically effective shelf registration statement.

Additional Procedural Changes to Shelf Registration. The following additional changes to shelf registration procedures have also been enacted as part of the new rules:

- *Content of Base Prospectus and Means of Including Information in Final Prospectus:* New Rule 430B codifies the principle, which has been followed in practice, that a form of prospectus filed as part of a shelf-registration statement, often referred to as the "base" prospectus, may omit information that is unknown or not reasonably available to the issuer at the time of effectiveness. The new rule also permits all information omitted from the base prospectus to be included either in prospectus supplements or incorporated by reference from Exchange Act reports, thereby eliminating the need for post-effective amendments. In addition, WKSIs and seasoned issuers will in most instances be able to identify selling shareholders or changes in the plan of distribution after the registration statement's effectiveness via the filing of a supplement or by incorporation from an Exchange Act report (with, in the latter case, the filing of a prospectus supplement identifying the Exchange Act report from which such information is incorporated), rather than a post-effective amendment. However, the ability to identify selling shareholders after effectiveness via a prospectus supplement is available only if the resale registration statement identified the initial offering pursuant to which the securities were sold and refers to any unnamed selling shareholders in a generic manner and the securities that are the subject of the registration statement are issued and outstanding prior to the initial filing of the registration statement (which effectively precludes use of a prospectus supplement to identify selling shareholders in a resale registration relating to securities sold in a PIPE transaction).

- *Updating of Shelf Registrations:* Rule 415 under the Securities Act has been amended to eliminate the requirement that an issuer register on Form S-3 only securities that it reasonably expects to offer and sell within two years on a delayed or continuous basis. Instead, shelf registration statements can now be used for three years after the initial effective date. A new shelf registration statement must be filed prior to the three year expiration, with the unsold securities and unused fees carried forward, although sales can continue under the old registration statement, pending effectiveness of the new registration statement, for up to six additional months.

- *Immediate Takedowns for Primary Offerings:* The new rules also amended Rule 415 to permit primary offerings to occur immediately after effectiveness of a shelf registration statement.

- *Elimination of Restrictions on Primary "At-the-Market" Offerings of Equity Securities:* Rule 415 has been further amended to permit WKSIs and seasoned issuers to conduct "at-the-market" offerings of equity securities without identifying an underwriter in the registration statement or limiting the amount that can be sold in such offering (which, under the current rule, has been limited, for offerings of voting stock, to amounts having a value not exceeding 10% of the value of the public float for that class of stock).

Prospectus Delivery Changes. The new rules adopt an "access-equals-delivery" model for delivery of a final prospectus. The current rules require physical delivery by issuers and underwriters of a statutory prospectus prior to or simultaneously with delivery of the securities sold pursuant to the registration statement of which the prospectus is a part. Under new Rules 172 and 173, the prospectus delivery requirement will be satisfied if a final prospectus meeting the requirements of Section 10(a) of the Securities Act is timely filed as part of the registration statement, and a notice is sent to each purchaser, no later than two business days after completion of the sale, advising them the sale was made. In addition, written confirmations of sale and notices of allocation can be sent after effectiveness of the registration statement without being accompanied or preceded by a final prospectus. Furthermore, existing Rules 153 and 174 were also amended to allow brokers and dealers to rely on the access-equals-delivery regime for trades in

which they are required to comply with the prospectus delivery requirement. However, the access-equals-delivery regime will not apply to offerings on Form S-8, business combination transactions and exchange offers, or offerings by registered investment companies and business development companies.

Expanded Use of Incorporation by Reference, Elimination of S-2 and F-2 Forms and Additional Exchange Act Reporting Requirements. The new rules amend Forms S-1 and F-1 to permit issuers (other than blank check and shell companies and penny stock issuers) that have filed at least one annual report under the Exchange Act and are current in their reporting under the Exchange Act to incorporate by reference reports previously filed (but not future reports to be filed after the registration statement is declared effective) under the Exchange Act, so long as the issuer makes such reports readily accessible on its website. As a result of this change, the SEC eliminated registration statement Forms S-2 and F-2. The new rules also impose two additional reporting obligations on most issuers under the Exchange Act: (i) the issuers (other than small business issuers and asset-backed issuers) must include, "where appropriate," risk factors in their annual reports on Form 10-K and in registration statements on Form 10, and update them on their quarterly reports on Form 10-Q, and (ii) WKSIs and accelerated filers must disclose in their annual reports on Forms 10-K or 20-F the "substance" of SEC staff comments on the issuer's filings that the issuer believes are material and that remain unresolved on the 180th day after the issuer's fiscal year end. The new rules also require voluntary filers under the Exchange Act to indicate that status by checking a new box on the cover page of the applicable annual report form.

LIABILITY REFORMS

The new rules include changes to the liability provisions of the Securities Act in three principal respects: (1) specifying that information conveyed only on or before the time of sale of the securities included in a registered offering as the basis for liability under Sections 12(a)(2) and 17(a)(2), (2) the application of Section 11 liability to prospectus supplements and (3) classification of an issuer as a "seller" in an initial distribution for purposes of Section 12(a)(2).

Information Conveyed at the Time of Sale. A sale for purposes of the Securities Act takes place at the time that an investor is contractually bound to purchase the securities. A purchaser is typically considered bound at the time when an oral confirmation is conveyed to the purchaser regarding the price and amount of the securities sold. However, the issuer typically provides a final prospectus to the purchaser thereafter and, although most issuers take great pains to avoid including information in the final prospectus that is materially different from that available at the time of pricing, there have been circumstances in which material changes have appeared in the final prospectus. The SEC has taken the interpretive position in the past that liability for purposes of Section 12(a)(2) and Section 17(a)(2) (which makes it unlawful to obtain money or property by means of a material misstatement in an offer or sale of securities) is determined at the time the investor is contractually bound without regard to any subsequent disclosure in the final prospectus, and new Rule 159 codifies the SEC's position. Under the rule, a liability determination will not take into account information conveyed to a purchaser contained in any final prospectus, prospectus supplement or Exchange Act report filed or delivered subsequent to the time of sale where the information is not otherwise conveyed at or prior to the time of sale. This may have particular implications for shelf offerings where the final terms of the offered securities have generally not, until now, been memorialized until they appear in the final prospectus; under the new rule, offering participants will want to ensure that the terms of the offered securities and other material information relating to the issuer and the transaction have been delivered to the investors (presumably, through a form of free writing prospectus) prior to the time of sale.

Liability of Prospectus Supplements under Section 11 of the Securities Act. Under current law, prospectus supplements are subject to liability for material misstatements or omissions under Section 12(a)(2) of the Securities

Act, but the law has been unsettled as to whether liability also attaches under Section 11 of the Securities Act (which provides a private right of action, with strict liability for the issuer, to purchasers of securities in a registered offering for materially deficient disclosures in the registration statement at the time of its effectiveness). Under new Rule 430B, the SEC has clarified that prospectus supplements will be subject to liability under Section 11 and that, for purposes of that Section (which limits the liability under that Section with respect to a particular registration statement if the issuer has filed with the SEC an earnings statement for a period of at least 12 months following the effective date of the registration statement), the effective date of the registration statement will be the date of the filing of the supplement, rather than the date that the registration statement was originally declared effective. The liability with respect to the supplement only applies, however, to the issuer and participating underwriters; it will not apply to the issuer's officers and directors and will only apply to auditors and other experts who are required to issue a new consent with respect to the inclusion of their report or opinion in the supplement (and, if so, only with respect to that portion of the supplement covered by the report or opinion). In addition, although a free writing prospectus may be considered for purposes of liability under Sections 12(a)(2) and 17(a)(2) if used at or prior to the time of the contract of sale, it would not be considered subject to Section 11 liability, since a free writing prospectus is not considered part of a registration statement.

Issuer as Seller. Section 12(a)(2) of the Securities Act only provides a right of action against a party deemed to be the "seller" of the securities. Case law has raised some doubt as to whether an issuer would be deemed in all circumstances (e.g., a firm commitment underwriting) a seller for purposes of the statute. New Rule 159A now mandates that an issuer in a primary offering of securities, regardless of the form of underwriting arrangements, is considered a seller for purposes of Section 12(a)(2) as to any communication made by or on behalf of the issuer, although the SEC clarified that the rule is only intended to cover liability to purchasers in the initial distribution of the securities, not in the aftermarket.

CONTACT INFORMATION

If you have questions or would like to learn more about this topic, please contact the partner who represents you, or:

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