

## SECURITIES ALERT

### SEC REFORMS SECURITIES OFFERING REGULATIONS



On June 29, 2005, the Securities and Exchange Commission (SEC) adopted rules that modify and advance the registration, communications and offering processes under the Securities Act of 1933. The new rules eliminate restrictions on the timing and methods of communicating information to potential investors and facilitate timely access by issuers to the capital markets. The new rules focus on communications related to registered securities offerings, simplification of shelf registration procedures, and modernization of prospectus delivery procedures.

The following summary is based on information provided at the SEC's open meeting, the SEC's press release announcing the adoption of the final rules and the text of the proposed rules issued in November 2004. The SEC is expected to publish the text of the final rules on its website shortly, at which time we will prepare a more thorough analysis.

### REGISTERED OFFERING COMMUNICATIONS REFORMS

The Securities Act of 1933 and related rules restrict certain types of communication by issuers from the time that they file a registration statement with the SEC until the date of the offering. The new rules liberalize existing restrictions by facilitating certain ongoing disclosure and permitting greater use of written communications other than the prospectus during the course of an offering. The new rules make the following modifications:

- allow issuers to communicate more than 30 days prior to filing a registration statement without violating the gun-jumping provisions if: (1) the communication does not reference a securities offering and (2) the issuer takes reasonable steps to prevent further distribution of the information during the 30-day period immediately before the filing of the registration statement;
- create new safe-harbors during the course of an offering that allow: (1) reporting issuers to continue dissemination of regularly released factual business and forward-looking information and (2) non-reporting issuers to disseminate factual business information;
- create a new category of issuers, well-known seasoned issuers ("WKSIs"), defining them as issuers that are eligible to use Form S-3 or F-3, have filed Exchange Act filings for at least one year, have been timely in those filings for at least one year, and

have either a \$700 million public float or have issued an aggregate of \$1 billion in registered debt securities in the preceding three years;

- permit WKSIs to engage in oral and written offers at any time before a registration statement is filed;
- expand the information about an offering permitted under Securities Act Rule 134 and the use of so-called “free writing prospectuses” – written offers to sell securities relating to a registered offering that do not satisfy the requirements of a traditional statutory prospectus – after a registration statement is filed; and
- expand the circumstances in which a broker or dealer can publish research on an issuer or the securities offered around the time of the offering without being deemed a violation of the Securities Act.

### **SHELF REGISTRATION PROCESS REFORMS**

The new rules modernize the shelf registration process. WKSIs can file “automatic shelf registration statements” that are effective immediately upon filing. A WKSI does not have to specify in the registration statement the amount of securities to be offered, the allocation of the registered securities between those to be offered on a primary and secondary basis, or the plan of distribution. Therefore, WKSIs can essentially make unlimited sales off their shelf registration. The new rules also:

- clarify the information that may be omitted from a base prospectus in a shelf registration statement;
- provide for a “pay as you go” filing system, requiring issuers to pay a small initial filing fee at the time of filing a shelf registration statement and an additional fee whenever securities are taken down off the shelf;
- replace the requirement that issuers register only securities they intend to offer within two years with a requirement that the issuer update the registration statement with a new registration statement filed every three years;
- eliminate restrictions on using a shelf registration statement for primary “at-the-market” offerings of equity securities; and
- permit immediate takedowns of securities off shelf registration statements.

### **PROSPECTUS DELIVERY/LIABILITY REFORMS**

The new rules create an “access equals delivery” model for final prospectuses. Under the new rules, filing a final prospectus with the SEC within a specified time frame satisfies delivery obligations, eliminating the requirement of delivery of copies to each investor. Also, consistent with this approach, liability for prospectus disclosure will be based on information communicated on or prior to the time that the investment decision is made; information conveyed to an investor after the time of the contract of sale will not be taken into account.

### **CONTACT INFORMATION**

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

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