

SECURITIES ALERT

SEC PUBLISHES GUIDANCE REGARDING TRANSITIONING TO THE SECURITIES OFFERING REFORM RULES



On July 19, 2005, the Securities and Exchange Commission (SEC) issued final rules that implement reforms in the registration procedures for securities offerings under the Securities Act of 1933 (Securities Act).¹ The rules become effective on December 1, 2005. We issued a summary of the rules in our Securities Alert dated August 8, 2005, which can be found on our Web site at <http://www.akingump.com/docs/publication/780.pdf>.

On September 13, 2005, the SEC released Securities Offering Reform Transition Questions and Answers (Q&As). The Q&As are the views of the staff of the Division of Corporation Finance with respect to questions they have received regarding compliance with the rules. While the Q&As are not rules, regulations or statements of the SEC, they provide helpful guidance in interpreting the rules. The Q&As are available on the SEC's Web site at <http://www.sec.gov/divisions/corpfin/transitionfaq.htm>.

The following is a summary of the matters addressed by the Q&As.

AVAILABILITY OF THE NEW COMMUNICATION RULES

The availability of the new communication rules² depends on the time of communication, not when the offering commenced. Accordingly, an issuer can rely on the new rules with respect to a communication that first occurs on or after December 1, 2005, even if the offering commenced before December 1, 2005.

¹ 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. The rules 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 the registration procedures, particularly for larger, well-established companies. The full text of the new rules is available on the SEC's Web site at <http://www.sec.gov/rules/final/33-8591.pdf>.

² The new communication rules (Rules 134, 163, 163A, 164, 168, 169 and 433) generally provide for the use of written communications in the form of free writing prospectuses and also provide safe harbors for certain communications by issuers.

NEW UNDERTAKINGS

The new undertakings required by the rules³ —

- must be included in registration statements and amendments filed on or after December 1, 2005.
- do not need to be included in a registration statement effective prior to December 1, 2005, but need to be included on a post-effective amendment filed after December 1, 2005.
- do not need to be included in a registration statement filed before December 1, 2005 and not effective until after December 1, 2005, unless a pre-effective amendment is filed after December 1, 2005.

SHELF REGISTRATION STATEMENTS

A “well known seasoned issuer” (WKSI) with an existing shelf registration statement on file cannot convert that registration statement to a shelf registration statement that will be automatically effective. The WKSI issuer must file a new registration statement designated as an automatic shelf registration statement, but the issuer can carry forward unused filing fees from the existing registration statement to the new one.

An issuer with a resale registration statement effective before December 1, 2005, may amend the plan of distribution and may add or replace selling holders by a prospectus supplement, if the conditions in the new rules are met.⁴

On or after December 1, 2005, an issuer may use a shelf registration statement effective prior to December 1 that discloses it may be used for “at-the-market” offerings to conduct such offerings without identifying the underwriter in a post-effective amendment or limiting the amount of securities sold in the offering.

On or after December 1, 2005, an issuer may amend by prospectus supplement its plan of distribution in an existing shelf registration statement to provide for “at-the-market” offerings and immediately commence such an offering.

The new three-year time period during which shelf registration statements may remain effective begins December 1, 2005, regardless of how long the registration statement has been effective prior to that date. Therefore, for any shelf registration statement effective before December 1, 2005, the three-year period will begin on December 1, 2005. For a shelf registration statement effective on or after December 1, 2005, the three-year period will commence on the effective date of the registration statement.

³ These undertakings require the issuer to acknowledge (i) the date on which a prospectus supplement used pursuant to Rules 430B and 430C will first be deemed part of the registration statement and (ii) that the issuer in a primary offering will be deemed a “seller” for determining liability under the Securities Act.

⁴ Under new Rule 430B an issuer may use a prospectus supplement to identify or add selling security holders to an effective resale registration statement if the registration statement is an automatic registration statement or if the registration statement identified the private transaction in which the securities were sold, the private transaction was completed, and the securities subject to the registration statement were issued and outstanding prior to the initial filing of the resale registration statement.

AMENDMENTS TO FORMS 10-K, 20-F AND 10-Q

The new rules require certain new disclosures in Forms 10-K and 20-F regarding unresolved SEC comments, risk factors, WKSI status and voluntary filer status, and updated risk factor disclosure in Form 10-Q. These new disclosures —

- must be included in any Form 10-K or Form 20-F filed for any fiscal year ending after December 1, 2005. They do not need to be included in filings for fiscal years ending prior to December 1, 2005.
- must be included in any Form 10-Q filed after the issuer has first filed the new disclosures in its Form 10-K.

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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