

Chapter 2

SEC Registered Offerings and the Recent Securities Offering Reforms

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2.1 Background

In July 2005, the US Securities and Exchange Commission (the “SEC”) adopted far-reaching reforms to the securities offering process in the US. These reforms, which became effective in December 2005, are part of the SEC’s evolutionary process of modifying and, where possible, streamlining the securities offering process over the past 30 years. These changes reflect the SEC’s view that the US securities laws and rules, though first implemented in the 1930s, should reflect changes in technology and investor expectations, and that barriers to open communications should, where possible, be eliminated.

These reforms fall into three principal categories:

- (a) the securities offering process, particularly for certain large, well-known issuers;
- (b) communications during the offering process; and
- (c) delivery (and timeliness of delivery) of information to investors.

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This chapter will address the impact of recent reforms on foreign private issuers.²

2.1.1 *New categories of issuers*

The greatest beneficiaries of the reforms are issuers that fall within a newly-created category of issuer: the well-known seasoned issuer, or “WKSI”. WKSI is defined in Rule 405 under the US Securities Act of 1933 (the “Securities Act”) as a “reporting issuer” (i.e. an issuer that is required to file reports under Section 13(a) or Section 15(d) of the US Securities Exchange Act of 1934 (the “Exchange Act”)) that:

- (a) meets the registrant requirements for use of the registration statement on Form S-3 or Form F-3³ under the US Securities Act of 1933 (the “Securities Act”);

² Rule 405 under the US Securities Act of 1933 defines a foreign private issuer as “any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) more than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.” Foreign private issuers have been previously granted relief from various requirements under the US securities laws (such as Regulation FD, the short swing profits prohibitions of Section 16(b) under the Exchange Act and the Exchange Act proxy rules) and are permitted to use forms for registration statements under the Securities Act (the so-called “F” forms) which require substantially similar disclosure as that required of US domestic issuers but with certain dispensations accorded foreign private issuers. This chapter addresses the reforms as they affect foreign private issuers which take advantage of such relief and use the F forms for registration statements.

³ Form F-3 registrant requirements include requirements that: (1) the issuer be a foreign private issuer (as defined in Rule 405); (2) the issuer has a class of securities registered pursuant to Section 12(b) or a class of equity securities registered pursuant to Section 12(g) or is required to file reports pursuant to Section 15(d) and has filed at least one annual on Form 20-F or 40-F; (3) the issuer has been subject to the requirements of Section 12 or 15(d) and has filed all the material required to be filed pursuant to Section 13, 14, or 15(d) of the Exchange Act for a period of at least 12 calendar months immediately preceding the filing of the registration statement; (4) the issuer has filed in a timely manner all reports required to be filed during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement and, if the registrant has used (during those 12 calendar months and that portion of a month) Rule 12b-25(b) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by Rule 12b25; (5) neither the registrant nor any of its consolidated or unconsolidated subsidiaries have, since the end of their last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to Section 13(a) or 15(d) of the Exchange Act, failed to pay any dividend or sinking fund instalment on preferred stock, defaulted on any instalment or instalments on indebtedness for borrowed money or defaulted on any rental on one or more long-term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole.

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- (b) either:
 - (i) as of a date within 60 days of its eligibility determination (as discussed below), has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of \$700 million or more; or
 - (ii) as of a date within 60 days of its eligibility determination, has issued within the last three years at least \$1 billion in aggregate principal amount of non-convertible securities (other than common equity) in primary offerings for cash registered under the Securities Act; and
- (c) is not an “ineligible issuer”, an asset backed issuer,⁴ an investment company registered under the US Investment Company Act of 1940 (the “Investment Company Act”) or a “business development company”.⁵

The requirement that the non-convertible equity securities be issued for cash effectively excludes from the determination of the \$1 billion threshold any registered exchange offers, including those in connection with debt securities initially placed in Rule 144A transactions subject to registration rights agreements, as is often used for high yield offerings within and outside the US. Further, these so-called “voluntary filers” are not “reporting issuers” since they are not required to file reports pursuant to Section 13 or 15(d) of the Exchange Act. Voluntary filers are not entitled to claim WKSI status nor status as reporting issuers generally, unless they otherwise register under the Exchange Act.

An “ineligible issuer” is defined in Rule 405 to include:

- (a) any issuer which is a reporting issuer but which, subject to certain limited exceptions, has not filed all reports and other materials required to be filed during the preceding 12 months (or such short period for which it was a reporting issuer);
- (b) an issuer which is, or during the past three years it or its predecessor was:

⁴ See Item 1101 of Regulation AB under the Securities Act.

⁵ As defined in Section 2(a)(48) of the Investment Company Act.

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- (i) a blank check company,⁶ shell company⁷ or a company issuing penny stock (as defined at length in Rule 3a51-1 under the Exchange Act);
- (ii) an issuer with respect to which, within the past three years, a petition under the federal bankruptcy laws or any state insolvency laws was filed by or against it;
- (iii) an issuer, or any entity which was at the time a subsidiary of the issuer, that within the past three years was convicted of any felony or misdemeanours identified in Section 15(b)(4)(B)(i) through (iv) under the Exchange Act;⁸ or
- (iv) an issuer which has filed a registration statement that is the subject of any pending proceeding or examination under Section 8 of the Securities Act or has been the subject of any refusal order or stop order thereunder within the past three years.

The determination as to an issuer's eligibility as a WKSI, is generally determined as either the time of filing its most recent shelf registration

⁶ Rule 419(a)(2) of the Securities Act defines a blank check company as "(i) a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and (ii) is issuing 'penny stock,' as defined in Rule 3a51-1 under the Securities Exchange Act."

⁷ Rule 405 defines a shell company as "a registrant, other than an asset-backed issuer as defined in Item 1101(b) of Regulation AB, that has: (1) no or nominal operations; and (2) either: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets."

⁸ The convictions referred to in Section 15(b)(4)(B)(i) through (iv) include a conviction for such subsidiary or entity that:

- "(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government of conspiracy to commit any such offense;
- (ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, foreign person performing a function substantially equivalent to any of the above or entity or person required to be registered under the Commodity Exchange Act (7 USC. 1 *et seq.*) or any substantially equivalent foreign statute or regulation;
- (iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities or substantially equivalent activity however denominated by the laws of the relevant foreign government; or
- (iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code, or a violation of a substantially equivalent foreign statute."

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statement, or the time of filing its most recent amendment to its shelf registration statement, whichever is the latest, unless the issuer has not filed a shelf registration statement or amendment to such shelf for 16 months, in which case the determination date is the time of filing the issuer's most recent annual report on Form 20-F.⁹

Under certain circumstances, a subsidiary of a WSKI that does not itself qualify as a WSKI may nonetheless take advantage of the liberalised rules and relief provided to WSKIs under the new securities offering reforms. In particular, a majority-owned subsidiary of a WSKI will be treated as a WSKI itself (notwithstanding that it does not independently meet the requirements of a WSKI) in connection with the offering and sale of its own securities if:

- (a) the securities are non-convertible (other than common equity) and the parent WSKI fully and unconditionally guarantees those securities (within the meaning of Rule 3-10 of Regulation S-X);
- (b) the securities being offered are guarantees of non-convertible securities (other than common equity) of either its WSKI parent or another majority-owned subsidiary where those non-convertible securities are fully and unconditionally guaranteed by the WSKI parent; or
- (c) the subsidiary is offering non-convertible investment grade securities.¹⁰

The offering reforms also provide some limited advantages for "seasoned issuers". Seasoned issuers are defined as reporting issuers which are eligible to use Form F-3, with at least \$75.0 million in worldwide public equity float.

2.1.2 Perspective on the reforms

2.1.2.1 Offering process

An issuer seeking to make a public offering of its securities in the United States must do so pursuant to an effective registration statement on the

⁹ Paragraph (2) of the definition of well-known seasoned issuer in Rule 405 of the Securities Act.

¹⁰ Paragraph (1)(ii) of the definition of well-known seasoned issuer in Rule 405 of the Securities Act.

form required by law. In the case of first-time foreign private issuers and other certain foreign private issuers, including issuers required to file reports under the Exchange but which do not otherwise meet the requirements for use of a “short form” registration statement, this historically has been, and remains Form F-1. Form F-1 requires the inclusion of a fulsome prospectus meeting the requirements of that Form, including a detailed description of the issuer’s business and a discussion and analysis of its results of operations and financial condition for the periods required under the Form and related regulations. Any registration statement, including any short form registration statement, when filed, is subject to SEC review and comment and declaration of effectiveness. A similar process is applicable to post effective amendments to the prospectus, potentially adding further delay. Thus, for example, for first time issuers, the entire process continues to require that they schedule approximately three to four months to complete an initial public offering of their shares or other securities.

Over years the SEC has from time to time introduced measures designed to streamline the public offering process, such as the introduction of the so-called “short form” registration statements, including Form F-3, under which seasoned reporting foreign private issuers which meet the requirements for use of that Form may forgo preparing a full description of their businesses and other substantive provisions for inclusion in the prospectus included in the registration statement and, instead, incorporate by reference all such information previously filed with the SEC as part of their reporting obligations under the Exchange Act.

Further, Rule 415 under the Securities Act was temporarily introduced in 1982 (and permanently enacted in 1983) to permit eligible issuers to make continuous or delayed offerings of securities by filing a “shelf” registration statement under that Rule. Issuers have, prior to the reforms, been permitted to register only that amount of securities that they reasonably expected to sell within two years. In addition, as a matter of practice, the base prospectuses contained in such shelf registration statements have omitted certain transaction specific and other details. After the shelf has become effective (and, prior to the reforms, subject to the “convenience doctrine” which limited the availability of a shelf immediately after effectiveness, as discussed below at 2.2.1,

“Reforms Relating to the Securities Offering Process”), the issuer has then been permitted to make offerings of the registered securities under the shelf, preferably using a prospectus supplement to provide the information omitted from the base prospectus, which is filed with the SEC but is not subject to SEC review. Where post effective amendments are required to add certain new information,¹¹ such amendments were, and at least for non-WKSIs remain, subject to potential delay from an SEC review and comment at the time of filing the amendment. Where this occurs, non-WKSI issuers remain subject to delay (albeit significantly less than in the case of an initial public offering on Form F-1) in their ability to quickly access the US capital markets.

2.1.2.2 Communication restrictions and “gun-jumping”

The period surrounding an offering has also historically been subject to tight restrictions on communications by the issuer or other distribution participants during the offering period. Prior to filing the registration statement, Section 5(c) of the Securities Act provides that no “offers” – whether written or oral – for the securities may be made. The term “offer” has been broadly defined to include any communication or other publicity which may condition or prepare the market for the securities offering to soon follow. After filing, but before effectiveness of the registration statement (the so-called “waiting period”), offers (but not sales) may be made, but if in writing, only by way of the statutory red herring prospectus included in the registration statement filed with the SEC.¹² Only after the registration statement has been declared effective may other written materials be used in connection with the offering, provided that the additional materials are accompanied or preceded by a copy of the final prospectus meeting requirements of the Securities Act and included within the effective registration statement. These so called “gun-jumping” restrictions limited not only the issuer’s ability to communicate during an offer, but also the method of communicating information about the offer to investors and resulted in limitations on the distribution of research reports by analysts within the banks underwriting the securities being distributed.

As discussed below, the reforms have addressed some of these restrictions on capital formation and on methods of communicating to the

¹¹ See Item 512 of Regulation S-K.

¹² Section 5(b)(1) of the Securities Act.

public during an offering. The reforms also expanded some of the safe harbour exemptions for research reports, and these changes are discussed in a separate chapter of this book and are not therefore discussed here.

2.1.3 Liability and information delivery

2.1.3.1 Potential liability provisions

Under the US securities laws, there are a number of provisions that provide purchasers with potential rights of action, including principally:

- (a) Section 11 of the Securities Act, under which a purchaser may bring an action against certain persons listed there for untrue statements of material fact, or a failure to state a material fact within the registration statement;¹³

¹³ Section 11(a) states that:

“[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue:

- (i) every person who signed the registration statement;
- (ii) every person who was a director of (or person performing similar functions), or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
- (iii) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;
- (iv) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him; and
- (v) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least 12 months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the securities relying on such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.”

Notwithstanding this provision, no person other than the issuer is liable under Section 11(a) if they establish one of the defences listed in Section 11(b).

- (b) Section 12(a)(2) of the Securities Act under which a purchaser may bring an action against a person who sells a security to the purchaser by means of any prospectus or oral communication that includes an untrue statement of a material fact or omits to state a material fact;¹⁴ and
- (c) Section 17 of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, each of which have been interpreted to provide a private right of action against any person that sells a security by means of any untrue statement of material fact or any omission to state any material fact.¹⁵

2.1.3.2 Delivery of final prospectus

Prior to the securities offering reforms, a copy of the final prospectus was required to be delivered prior to, or contemporaneously with, the security being sold, as well as any written confirmation of sale (either of which continue to be deliverable only after effectiveness).¹⁶

¹⁴ Section 12(a)(2) of the Securities Act provides that any person who “(1) offers or sells a security (whether or not exempted by the provisions of Section 3, other than paragraphs (2) and (14) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.”

¹⁵ Relevant parts of Section 17 provide that it is unlawful “(a)(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.” Similarly, relevant parts of Section 10(b) prohibit the use of a “manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

¹⁶ Section 5(b) of the Securities Act states that: “It shall be unlawful for any person, directly or indirectly: (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of Section 10; or (2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of Section 10.”

2.2 The reforms

2.2.1 Reforms relating to the securities offering process

The reforms made substantial changes to the shelf registration and takedown process for seasoned issuers, both WKSI and non-WKSI, as well as other improvements in the offering process for unseasoned reporting issuers.

2.2.1.1 Automatically effective WKSI shelf registration statements and post-effective amendments

Under the reforms, a WKSI may (but is not required to) elect to file an automatically-effective shelf registration statement on Form F-3 for any primary or secondary offering of its securities. Any post-effective amendments filed by the WKSI in connection with such a shelf registration statement similarly become automatically effective. The automatic effectiveness for such registration statements and amendments now allows WSIs to avoid any delay that might arise from the SEC review and comment process and allows the WKSI to better take advantage of any market windows. The automatic shelf is not available for any business combination transaction or exchange offers.

Securities of majority-owned subsidiaries of WSIs may also be included in the parent's automatically-effective registration statement if the subsidiary satisfies the conditions for being considered a WKSI as discussed above.¹⁷

WSIs may register an unspecified amount of securities to be offered

A WKSI may register an unspecified amount of securities to be offered, without indicating if the offering is primary or secondary and without allocating the mix of securities being registered among the WKSI, its eligible subsidiaries or any selling security holder. Further, as discussed further below, the WKSI may add a new class of securities by filing an automatically effective post effective amendment to the registration statement.

¹⁷ See note 9 and accompanying text.

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No delay from unresolved SEC comments on prior exchange act filings

The automatic effectiveness of a WKSI shelf is not hampered by the existence of any unresolved SEC comments on the WKSI's annual report filed with the SEC, although the SEC made it clear that such issuers are expected to evaluate the need for disclosure concerning any such unresolved comments.

Pay-as-you-go registration fees

WKSIs may choose to pay the registration fee in respect of securities registered on an automatic shelf as and when the securities are "taken down" rather than at the time of registration. At the time of a take-down, the WKSI must pay the fee in respect of the securities offered and to file a prospectus supplement or post effective amendment setting out the registration fee table for that offering. A failure to pay the fee in a timely way may be cured if the WKSI made a good faith effort to pay the fee in a timely way and in fact pays it within four business days after the original fee was due.

2.2.1.2 Reforms to shelf registration process for WKSIs and all other seasoned issuers

Issuers permitted to register an unlimited amount of securities

The prior restriction under Rule 415 that an issuer may only register on a shelf registration statement an amount of securities that it reasonably expects to offer and sell within two years has been eliminated. WKSI issuers are permitted to register an unspecified amount of securities on their shelf registration statements. While other seasoned issuers must register a specified amount of securities, that amount has no limit under Rule 415 as amended by the reforms.

Base prospectus

The reforms added new Rule 430B, which clarifies shelf practice by specifying information that may be omitted from a base prospectus included as part of the shelf registration statement filed by a WKSI or other seasoned issuer. Under Rule 430B, the following information, not known and not reasonably available to the issuer at the time of filing the registration statement, may be omitted from the base prospectus for such issuers and be subsequently added in the manner discussed below:

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- (a) whether the offering is a primary offering or an offering on behalf of persons other than the issuer, or a combination of such offerings;
- (b) the plan of distribution for the securities;
- (c) a description of the securities registered other than an identification of the name or class of such securities; and
- (d) the identification of other issuers.

In addition, the base prospectus may omit the identities of selling security holders and amounts of securities to be registered on their behalf if the base prospectus is contained within an automatic shelf registration statement filed by a WKSI or if the issuer is a seasoned issuer and:

- (a) the initial offering transaction of the securities (or securities convertible into such securities) for which the resale offering is being registered, has been completed;
- (b) those securities (or such convertible securities) were issued and outstanding prior to the original filing of the registration statement covering the resale of the securities;
- (c) the registration statement refers to any unnamed selling security holders in a generic manner by identifying the initial offering transaction in which the securities were sold; and
- (d) the issuer is not and during the past three years neither the issuer nor any of its predecessors was a blank check company, a shell company or an issuer of penny stock.

The reforms generally permit issuers flexibility in choosing whether to add the omitted information for a given transaction by way of prospectus supplement (which involves no SEC review or comment for any issuer), post-effective amendment (which, in the case of a WKSI, is automatically effective) or by way of incorporation by reference of the issuer's Exchange Act reports filed with the SEC.

Notwithstanding this flexibility, where a WKSI seeks to add a new issuer or new types of securities, this may only be done by way of post effective amendment to the registration statement so as to make clear that the new issuer has become a registrant. Further, where the issuer chooses to include by way of incorporation by reference information about an offering, including a description of the securities, the

plan of distribution or the selling securities holders, the reforms require that the issuer also file a prospectus supplement to disclose which Exchange Act reports contain the information.

Each prospectus supplement filed in connection with a shelf registration statement will be considered part of the registration statement for purposes of potential liability under Section 11 of the Securities Act,¹⁸ but will only be considered for purposes of Section 12(a)(2)¹⁹ for any party if that party conveys the supplement to an investor at or before sale.

Immediate availability; duration

In a significant change of policy, the SEC has also eliminated the prior restrictions (the so-called “convenience doctrine”) on the immediate use of a shelf registration statement. Such prior restrictions had limited the immediate availability of a shelf registration statement by requiring that the base prospectus within any shelf registration statement sought to be used immediately after effectiveness only omit information relating to the offering price, underwriter discounts and other similar information as is omitted in the preliminary prospectus for other non-shelf offerings. Shelf registration statements, with omissions from the base prospectus and permitted by Rule 430B, are now immediately available upon effectiveness of takedowns.

Under the Reforms, issuers must file a new shelf registration statement every three years, as they are prohibited from issuing securities off a shelf that is more than three years old. For any WKSI issuers under an automatic shelf that remain eligible as a WKSI, the new shelf will be automatically effective, and any unused fees paid or unsold securities registered will carry forward to the new registration statement. Thus this update requirement poses no risk of disruption for a WKSI to the availability of its shelf registration statement.

Other issuers, however, need to consider the timing implications for filing the updated shelf and resolving any SEC comments in order to ensure the availability of the updated shelf before the existing shelf expires. To assist such non-WKSI seasoned issuers, provided that

¹⁸ See note 12.

¹⁹ See note 13.

they file the updated registration statement before the expiration of the prior shelf registration statement, the reforms permit them to continue to offer and sell securities under the existing shelf registration statement until either the effectiveness of the updated shelf registration statement, or the 180th day after the updated shelf registration statement is filed, whichever is earlier. As with WKSIs, any unsold securities or unused registration fees are carried forward from the prior registration statement to updated registration statement.

At-the-market offerings

Prior to the adoption of the reforms, issuers were restricted in their ability to conduct offerings of their equity securities at the then-current market price, as such offerings were generally limited to no more than ten per cent of the issuer's public float of such securities and were required to identify the underwriter in its registration statement. These requirements have been eliminated for WKSIs and other seasoned issuers. Thus, this little used offering method may become more common.

2.2.1.3 Securities offering reforms for reporting but unseasoned issuers

Unseasoned reporting issuers have also benefited from the reforms as the SEC now permits them to incorporate by reference in their registration statements on Form F-1 their Exchange Act reports filed with the SEC. This ability to incorporate by reference, however, is limited to information already on file with the SEC and which the issuer makes available on or from its website. In order to take advantage of this streamlining of the registration statement process, shortening the content requirements for the prospectus included in the F-1 registration statement, the issuer must be a reporting issuer that is current in its filing requirements and that has filed at least one annual report on Form 20-F. This ability to incorporate by reference is not available to blank check companies, shell companies and penny stock issuers.

2.2.2 Liberalisation of communications during an offering

The reforms also contain provisions that loosened restrictions on communications made around the time of an offering, including rules related to the use by WKSIs and other eligible issuers of "free writing" prospectuses, as well as non-exclusive safe harbour exemptions for other communications by or on behalf of issuers.

The reforms allow the use of written communications that constitute offers (a term which, as noted above, is broadly defined to include anything which could generate market interest in the securities being distributed) in certain circumstances that previously would have violated the “gun-jumping” restrictions of the Securities Act. As discussed above, those restrictions would otherwise prohibit offers – whether written or oral – from being made before a registration statement has been filed. Further, after the registration statement has been filed and during the waiting period, those restrictions would permit written offers only if in the form of the preliminary prospectus filed as part of the registration statement and, after effectiveness of the registration statement, such written offers could only be permitted if accompanied by or preceded by a copy of the prospectus included in the effective registration statement.

Under the reforms, the SEC also expanded the scope of the existing safe harbour exemption in Rule 134 for public notices by an issuer relating to its public offering where the announcement is published after the registration has been filed. In addition, the SEC adopted three new safe harbour exemptions relating to non-offering communications during the offering period:

- (a) Rule 163A, which exempts certain communications made more than 30 days before the filing of a registration statement;
- (b) Rule 168, which exempts certain regularly-released factual or forward-looking information; and
- (c) Rule 169, which also exempts certain regularly-released factual information and, in contrast to Rule 168, is available to a wider group of issuers.

In addition, the SEC expanded existing safe harbour relating to research reports during an offering. The treatment of research, including such safe harbours, is addressed in a separate chapter of this book.

2.2.2.1 Definition of “written communication”

To provide clarification regarding the various forms of modern communication, the SEC defined “written communication” as, essentially, all forms of communication that are not oral. Written communication is defined under Rule 405 as any “communication that is written, printed, a radio or television broadcast or a graphic

communication.” Graphic communication has been defined to include all forms of electronic media, such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, and internet websites.²⁰

As the SEC made clear in its adopting release and in the definition, graphic communication does not include a communication that, at the time of the communication, originates live, in real time, to a live audience. A television or radio broadcast, however, is always treated as a written communication, regardless of whether it is transmitted by graphic means.

Thus, for example, live telephone calls or video or webcasts or meetings, even if recorded by the recipient, are not written communications (although if the recording is subsequently transmitted by the recipient, that will constitute a written communication by the recipient; and conversely if recorded by or on behalf of the originating party and subsequently transmitted other than live and real time, will be a graphic communication). Similarly, a live road show meeting to a live audience that is transmitted to an “overflow” room is not a graphic communication and not, therefore, a written communication.

2.2.2.2 Use of free writing prospectuses

Under the reforms, the use of free writing prospectuses is permitted, to varying degrees, for most issuers, with WKSIs given the greatest flexibility. A free writing prospectus is defined under Rule 405 as a written communication that constitutes an offer to sell or a solicitation of an offer to buy securities that are, or will be, the subject of a registration statement, including notes, memoranda, emails, facsimiles, terms sheets and electronic road shows and other graphic communications.

The term does not, however, encompass communications that are not made by or on behalf of an offering participant. Thus a radio or

²⁰ Rule 405 explains that a graphic communication “shall include all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation . . . [but] shall not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.”

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television broadcast, or a newspaper story which is based upon information filed with the SEC or is available on an unrestricted basis or which is based on information contained in a communication exempt from the restrictions of Section 5 of the Securities Act based upon another safe harbour exemption, would not constitute an offer and, therefore, not a free writing prospectus. Conversely, any television or radio broadcast or any newspaper story based on information provided by the issuer or any offer participants could constitute an offer, although the exemption for offshore press conferences provided by Rule 135e under the Securities Act remains available for foreign private issuers.

2.2.2.3 Use of free writing prospectus by WKSIs

Under new Rule 163, WKSIs may use a free writing prospectus at any time, including before a registration statement relating to the securities being offered is filed. This may be of less benefit than would initially appear to the extent WKSIs establish and maintain the new automatically effective shelf registration statements. After the registration statement is filed, WKSIs may continue to use a free writing prospectus, with the mere availability of the preliminary prospectus sufficient for requirements of Section 5 under the Securities Act without requiring physical delivery of the preliminary by WKSIs or their offering participants.

Any free writing prospectus used by a WKSI in the pre-filing period must be filed with the SEC promptly upon the WKSI's filing of the registration statement relating to the securities. The Rule 163 safe harbour is not, however, available to communications relating to a business combination transaction subject to Rule 165 under the Securities Act²¹ or in offerings by investment companies registered under the Investment Company Act or to business development companies.

2.2.2.4 Use of free writing prospectuses by seasoned and unseasoned reporting issuers and nonreporting issuers

Seasoned and other reporting issuers, and their offering participants, are now permitted pursuant to Rule 164 to use a free writing

²¹ Rule 165 provides a safe harbour from some of the restrictions under Section 5 of the Securities Act for certain communications relating to a business combination.

prospectus after the registration statement is filed. As with WKSI, physical delivery of the preliminary prospectus contained within the registration statement is not required for seasoned issuers or their offering participants. Unseasoned issuers, and their offering participants, must however, physically deliver the preliminary prospectus to investors before or concurrently with the delivery of the free writing prospectus. A hyperlink to the preliminary prospectus within an electronic free writing prospectus will, however, satisfy this requirement.

2.2.2.5 Use of free writing prospectuses by other issuers

The limited use of free writing prospectuses has also been extended under Rule 164 to most ineligible issuers. Such issuers may use a free writing prospectus, containing nothing more than a description of the securities, after the registration statement has been filed and provided that the preliminary prospectus is physically delivered prior to or simultaneously with the free writing prospectus. The use of a free writing prospectus is not available to any issuer or its predecessor that, in the last three years, was a blank check company, a shell company or penny stock issuer, nor for any investment company registered under the Investment Company Act or any business development company.

2.2.2.6 Conditions to the use of a free writing prospectus

In addition to the prospectus delivery requirements discussed above, Rule 433 under the Securities Act sets out additional conditions to the use of a free writing prospectus as discussed below:

Content Requirements

Free writing prospectuses are subject to no specific required content other than the legend below. The SEC noted in adopting the reforms, however, that such communications must not contain information that conflicts with information in the statutory prospectus nor may it contain language that deems an investor to have read or have knowledge of or rely on the content of other documents incorporated in or referred to in the free writing prospectus. Rule 408 under the Securities Act was amended to make clear that the failure to include certain information within the statutory prospectus will not, solely because it is contained in the free writing prospectus, be considered a material omission of material fact required to be included in the registration statement.

Legend

Rule 433 requires that any free writing prospectus include substantially the following legend:

“The issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the issuer, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1-8[xx-xxx-xxxx].”²²

The failure to include the legend above may be cured, provided that the free writing prospectus is revised to include the legend as soon as practicable after discovering that the legend was omitted or erroneous and is retransmitted by substantially the same means to substantially the same investors to whom it was initially sent.

Filing Requirement

Except as discussed elsewhere below, the use of a free writing prospectus prepared by or on behalf of, or used or referred to by, an issuer (a so-called “issuer free writing prospectus”) is conditioned on the filing of that prospectus (or, in the case of a free writing prospectus prepared by another offering participant based on information provided by the issuer, such issuer information) with the SEC before its first use. Further, a free writing prospectus that contains the final terms of the offered securities must be filed by the issuer, and where that free writing prospectus contains no more than such final terms, the filing can be delayed up to two days after either the date that the terms became final for the securities offered, or the date of its first use, whichever is later. This filing requirement is not applicable if the free writing prospectus or issuer information does not contain substantive changes or additions to a free writing prospectus previously filed with the SEC.

²² Rule 433(c)(2)(i).

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In the case of a free writing prospectus being used by or on behalf of a WKSI issuer in the prefiling period pursuant to Rule 163, the free writing prospectus must be filed by the issuer promptly after the registration statement is filed.

An offering participant must file with the SEC any free writing prospectus that it distributes in a manner reasonably designed to lead to its broad and unrestricted dissemination.

An issuer or any other person relying on the safe harbour exemption may cure any immaterial or unintentional failure or delay to file if a good faith and reasonable effort is made to comply with the filing requirement and such filing is made as soon as practicable after the discovery of the failure to file.

Record Retention

Rule 433 conditions the use of a free writing prospectus on issuers and offering participants retaining for three years any free writing prospectus they have used and not filed with the SEC.

Any immaterial or unintentional failure to retain such free writing prospectuses will not result in a loss of the safe harbour for use of the free writing prospectus if a good faith and reasonable effort to comply with the record retention condition was made.

Treatment of Electronic Road Shows

Where road shows are electronic, conducted or retransmitted over the internet, but originate live, in real time, to a live audience, those communications, including any slides presented, are excluded from the definition of written communications and thus are not free writing prospectuses. Electronic road shows which do not originate live, in real time, to a live audience are written communications and are therefore free writing prospectuses. Under Rule 433(d)(8), however, such a road show need not be filed, except that in the case of a road show that is a written communication for an offering of common equity or convertible equity securities by an issuer that is, at the time of filing of the registration statement for the offering, not a reporting issuer, the road show is required to be filed unless the issuer makes at least one version of a *bona fide* electronic road show available without restriction by means of graphic communication to any person.

2.2.2.7 Liability for a free writing prospectus

A free writing prospectus will not be treated as part of the registration statement (unless the issuer elects to have it treated as part of the registration statement) for purposes of the provisions of Section 11 under the Securities Act imposing liability on specified persons (including every person who signed the registration statement, every director of the issuer at the time of filing the registration statement and the underwriters) if any part of the registration statement, when it became effective, contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.²³ However, any person using a free writing prospectus, regardless of who prepared it, will be subject to potential liability under Section 12(a)(2).²⁴

Consequently an offering participant will only face liability for a free writing prospectus it uses in connection with the offering.

2.2.2.8 Amendments to Rule 134

After the reforms, Rule 134 continues to provide a safe harbour exemption from the gun-jumping restrictions of Section 5 of the Securities Act, permitting communications concerning a registered public offering. The communication must be limited to the specifically enumerated items in the Rule, communication must be published or transmitted only after the registration statement has been filed. The exemption is available to all issuers and has been expanded to include further information, including:

- (a) greater detail about the issuer, including the location of the issuer and contact information;
- (b) greater detail about the securities being offered, including identifying whether the securities are convertible or exchangeable, their ranking (e.g. senior, subordinated, etc.) and credit ratings, and CUSIP numbers and ticker symbols;
- (c) greater detail about the offering, including underwriter information and a description of road shows, including the date, time and location of the road shows; and

²³ See note 12.

²⁴ See note 13.

- (d) more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities.

The Rule, as amended, permits the use of a 134 announcement in the context of an initial public offering before a bona fide price range and maximum amount of securities being offered has been included within the filed registration statement.

2.2.2.9 Limits on use of the safe harbours of Rules 163A, 168 and 169

The safe harbours provided by Rules 163A, 168 and 169 share certain limitations on who may rely on the safe harbours. None of these exemptions are available for communications related to issuers that are registered investment companies under the Investment Company Act or are a business development company. Additionally, communications must be made “by or on behalf of” an issuer to qualify for these safe harbours. Each rule provides that a communication is made by or on behalf of an issuer if the issuer, issuer’s agent or issuer’s representative authorises and approves the communication before it is made. The rules further provide that the agent or representative cannot be an offering participant who is an underwriter or dealer.

Rule 163A

New Rule 163A provides that, subject to the conditions stated below, communications made by or on behalf of an issuer more than 30 days before the filing of a registration statement will not constitute an “offer” to sell or buy the securities to be covered by such registration statement, and thus will not constitute “gun-jumping” in violation of the restrictions under Section 5 of the Securities Act. This safe harbour exemption, which is non-exclusive, is available only if the issuer takes reasonable steps to prevent further distribution or publication of the communication during the 30 days before the filing of the registration statement and if the communication does not relate to the securities offering. The Rule 163A safe harbour is not available for communications relating to business combination transactions subject to Rule 165 or 166,²⁵ nor to offerings of securities to be offered under any

²⁵ Rules 165 and 166 provide safe harbours from some restrictions of Section 5 of the Securities Act for certain communications relating to a business combination. Rule 165 requires, among other things, that additional disclosures be included in prospectuses covering securities

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employee benefit plans to employees and interests in those plans registered on Form S-8. Issuers do not qualify for this safe harbour if they are, or they or their predecessors within the last three years were, a blank check company, shell company or company issuing penny stock.

2.2.2.10 Safe harbours for regularly released information rules 168 and 169

Under the reforms, the SEC adopted Rules 168 and 169, which provide safe harbours for certain information that is regularly released by or on behalf of the issuer. The rules do not apply to communications that would defeat the protections of Section 5. Thus, these safe harbours do not apply to communications that are part of a plan or scheme to evade the requirements of Section 5 of the Act, and they do not apply to communications that contain information about a registered offering or are released or disseminated as part of offering activities.

For a communication to qualify as “regularly released”, the issuer must have previously released or disseminated information of the same type in the ordinary course of its business. The communication additionally must be consistent in material respects in timing, manner and form with similar past communications, which in part means that the method of communication must be similar to that of previously released information. The SEC stated in its adopting release that information need not be released on a scheduled or strictly periodic base to qualify as regularly released.

Rule 168

New Rule 168 provides that, subject to the conditions discussed below, the regular release of factual business information or forward-looking information will not act as an offer to sell or offer for sale of securities that are the subject of a registration statement that is effective or that the issuer proposes to file or has filed. Issuers that are reporting issuers may take advantage of the exemption, and issuers

involved in a business combination, and Rule 166 requires, among other things, that participants take all reasonable steps within their control to prevent further distribution or communication of business combination communications made before the first public announcement of the combination.

that are foreign private issuers may take advantage of the exemption so long as they:

- (a) meet the registrant requirements of Form F-3²⁶ (other than the reporting history requirements);
- (b) either satisfy the public float threshold of I.B.1 of Form F-3²⁷ or are issuing non-convertible investment grade securities meeting the requirements of I.B.2 of Form F-3;²⁸ and
- (c) either have had equity securities trading on a “designated offshore securities market” (as defined in Regulation S under the Act or as subsequently approved by the SEC under the provisions of that definition) for at least 12 months or have a world-wide market value of their outstanding common equity held by non-affiliates of \$700 million or more.

Rule 168 defines the types of factual information and forward-looking information that qualifies for the exemption. Qualifying factual information includes factual information about the issuer, its business or financial developments, advertisements or information about the issuer’s products or services and dividend notices, and includes information contained in reports or other information filed, furnished or submitted to the SEC under the Exchange Act. Qualifying forward-looking information includes:

- (a) projections of the issuer’s financial items, including revenues, income, earnings per share, capital expenditures, dividends and capital structure;
- (b) statements about plans or objectives for the issuer’s future operations, products or services;
- (c) statements about the issuer’s future economic performance, including the operating and financial review and prospects described in Item 5 of Form 20-F; and
- (d) assumptions underlying these types of information.

²⁶ As described in note 2.

²⁷ To meet the requirement of I.B.1, among other things, a registrant must have an aggregate market value of its voting and non-voting common equity held by non-affiliates of \$75 million or more. *See* Note 2.

²⁸ To meet the requirement of I.B.2, the securities must be offered for cash by or on behalf of the registrant and be investment grade securities at the time of sale. It further defines investment grade securities as securities that at least one nationally recognized statistical rating organization has rated in a generic rating category that signifies investment grade.

Rule 169

The Rule 169 safe harbour is available to virtually all issuers (other than those identified above at 2.2.2.9, “Limits on use of the safe harbours of Rules 163A, 168 and 169”), and it provides a non-exclusive safe harbour for the regular release of factual business information. The rules provide that such information will not act as an offer to sell or offer for sale of securities that are the subject of a registration statement that is effective or that the issuer proposes to file or has filed. In contrast to Rule 168, the Rule 169 safe harbour does not apply to forward-looking information. The definition of “regularly released” information is expanded relative to the other safe harbours and requires that the information be released or disseminated for use by persons other than in their capacities as potential investors (e.g. suppliers or customers) and be released or disseminated by employees or agents of the issuer who have historically provided such information.

Qualifying factual information includes factual information about the issuer, its business or financial developments, and advertisements or information about the issuer’s products or services.

2.2.3 *Delivery of information to investors*

2.2.3.1 *Liability*

The reforms introduce new Rule 159 under the Securities Act which makes clear that, for purposes of Section 12(a)(2) only, in determining whether a prospectus included an untrue statement of a material fact or omitted to state a material fact at the time of sale, any information conveyed to the purchaser only after the time of sale will not be taken into account. Rule 159A has also been added to make clear that the issuer is also a seller of its securities in a registered primary offering of such securities, regardless of the underwriting arrangements.

The SEC has noted that a seller and purchaser may, after a sale, terminate the sale in order to introduce disclosure of new material information or to correct a prior material omission and thereafter re-contract for the sale, and such a new contract will not be deemed to conflict with these liability provisions if:

- (a) the investor is given disclosure about the contractual arrangement and provided with sufficient information about its rights

- (including a right to damages for breach of contract) under the prior contract should the seller refuse to deliver the security;
- (b) sufficient disclosure of the new information is provided to the purchaser; and
- (c) the purchaser is allowed to elect whether or not to terminate the prior contract.

As a result of the new time of sale focus of Rule 159, market participants seek to convey any new information, as well as price and pricing related information, to investors prior to contracting to sell to them, thus creating a “disclosure package” comprising the preliminary prospectus together with any pricing term sheet or similar document to communicate such necessary final information at or before sale. This practice has been extended into the Rule 144A market as well, although Section 12(a)(2) is not applicable outside the context of a registered public offering.

In connection with shelf registration statements, new Rule 430C makes clear that prospectus supplements filed in connection with a takedown will be deemed part of the registration statement for purposes of Section 11 of the Securities Act as of either the date it is first used, or the time of the first contract of sale for the offered securities (whichever is earlier), while a prospectus supplement filed otherwise will be deemed part of the registration statement for purposes of Section 11 as of the date the prospectus supplement is first used. For purposes of Section 12(a)(2) of the Securities Act, as well as Section 17 of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, a filed prospectus supplement is only considered with respect to any seller if that seller conveyed or delivered a copy of the supplement to the purchaser.

2.2.3.2 Prospectus delivery

Under the reforms, issuers and underwriters need not physically deliver a copy of the final prospectus to the purchaser of the offered securities (unless the purchaser requests it) prior to or contemporaneously with a confirmation of sale or the security itself, provided that the issuer and the underwriter provide to the purchaser, within two business days of the sale, a notice to the effect that the sale was made pursuant to a registration statement.

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This relief from the physical delivery requirement is conditioned on the issuer having filed with the SEC the final prospectus, or made a good faith effort to file, within the prescribed time²⁹ and having cured any failure to file as soon as practicable. In addition, this relief is not available for business combination transactions, any offering by an investment company registered under the Investment Company Act, or any business development company or an offering registered on Form S-8.

2.2.3.3 Unresolved SEC comments

Foreign issuers which are WKSIs or which meet the definition of “accelerated filer”³⁰ are now required to include within their annual report on Form 20-F disclosure about any material unresolved comments from the SEC that were issued more than 180 days before the end of the fiscal year to which the annual report relates.

²⁹ See Rules 424(a) and 424(b) for the prescribed time for filing of prospectuses.

³⁰ Accelerated filers are required to file their annual reports substantially earlier than other issuers. Pursuant to Rule 12b-2 of the Exchange Act, an accelerated filer is a filer that: (i) has an aggregate market value of its voting and non-voting common equity held by non-affiliates equal to \$75 million or more; (ii) has been subject to the requirements of Section 13(a) and 15(d) of the Act for a period of at least 12 calendar months; (iii) has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Act; and (iv) is not eligible to use Forms 10-KSB and 10QSB.

