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I. Well-Known Seasoned Issuers; Other Categories of Issuers

***A. Other Categories of Issuers, Fed Reg, Vol 69 No 221
Wed Nov 17, 2004, p 67398--Comments by Alexandra
Christine Sparling***

Request for Comment

Should we raise the proposed public float test of \$700 million (e.g., to \$800 million)? If so, why?

The Commission should not raise the proposed public float test of \$700 million. Based on the empirical data provided by the Office of Economic Analysis, the proposed public float test of \$700 million will provide a reasonable proxy for whether a company has a demonstrated market following. There is arguably no single “correct” level of the public float standard that will always provide a reliable proxy for having a sufficient public following. Instead, there is more likely a *range* that is reasonable. Regardless of precisely where the threshold is set, it will undoubtedly be both under-inclusive and over-inclusive in given instances. Therefore, if the Commission sees fit to take a more conservative approach, instead of raising the public float test to something above the proposed \$700 million, it would be more effective to instead add *another metric* than to simply raising the bar on the single metric of public float. (*Specific suggestions follow below.*)

Alternatively, should we lower the public float test (e.g., to \$500 million, \$400 million, or \$300 million)? If so, why? If we were to lower the threshold, how can we ensure that the issuers meeting that threshold would be sufficiently well followed? If we were to lower the threshold, what other characteristics not present in issuers with a lower public float would need to be present to ensure that an issuer would be well followed?

No, the Commission should not lower the public float test. Until the proposed classification system has been in place for some period of time and the inevitable complications are addressed, the Commission should proceed cautiously. As discussed in greater detail below, the parameters of the well-known seasoned issuer requirements should be revisited in approximately two years, and at that time, based on the experience we will by then have accumulated, it may be reasonable to lower the threshold to something below \$700 million.

In response to the query of what other characteristics would need to be present in issuers with a lower public float, I believe that while such factors probably could be identified and incorporated into the well-known seasoned issuer qualification, it would not be a cost effective approach to what the Commission is trying to accomplish. It likely would be possible to identify issuers that have a public float below \$700 million and yet are the subject of extensive public scrutiny, but making that identification would require engaging in a complicated, expensive, fact based inquiry. The issuer would have to invest heavily in providing evidence of this actual following, and the Commission would have to invest heavily in policing such an issuer-specific, fact based qualification system. This would be the wrong approach to take as part of a proposal that is designed to simplify the offering process.

It makes far more sense to use an easily documented proxy for market following (such as public float and/or trading volume) than it does to conduct a fact-based inquiry for each issuer. The Commission would be wise to limit the qualification to a proxy-based analysis, and avoid the complications of fact-based inquiries.

Is a public float threshold the proper standard, or should we use another standard, such as percentage of institutional ownership, average daily trading volume, asset size, or any combination of these? If so, how would the standard compare to the public float threshold and how could it be readily determined and verified?

Qualification as a well-known seasoned issuer should be based in large part on public float, but qualification should also be supplemented by consideration of average daily trading volume. This would help to address situations in which companies will be able to meet the \$700 million public float test, but whose shares are tied up by a small number of institutional investors and therefore are not closely followed by the wider equity markets. In these cases, public float alone is not an adequate proxy for having a large following, and adding the volume-based standard would significantly aid in shaping the requirements such that qualifying issuers are in fact well known and well followed.

Analyzing the empirical data the Commission has already obtained could align such a trading volume standard with the public float standard relatively easily. In most cases, public float and average trading volume will be closely related and there should be an area of overlap between the two metrics. The data will show what degree of volume typically is found with companies having the required public float. Whatever that volume level is should be used in conjunction with the required public float. I would expect that in most cases, if a company fulfills one standard it would also fulfill the other, but this secondary requirement would help to prevent thinly traded outliers with little research available to the investing public (such as those controlled by a small number of institutional investors) from qualifying as a well-known seasoned issuer in contravention of the purpose of the proposal.

Should we use the same public float calculation as we use for purposes of the cover page of the Form 10-K and Form 20-F? Would another calculation date for the public float be more appropriate? Is there another readily available information source for public floats of issuers that provides the information other than annually?

For the sake of clarity and consistency, the method of calculation for the well known seasoned issuer qualification should be the same as the method of calculation used for the cover page of Form 10-K and Form 20-F.

Although the method of calculation should be the same, the date of the calculation need not be the same. In the interest of accurately reflecting the underlying reality of what the public float actually is at the relevant timeframe, the most current information available should be used; hence, the calculation should be done at the time of the offering. An issuer should not be bound to a status that may have been accurate at the time of filing the 10-K, but is no longer accurate in light of changed circumstances. This move toward heightened accuracy will not result in any undue complication for issuers or for investors. Investors understand that public float and trading volume are dynamic figures, and so allowing the issuer to make the calculation at the time of the offering should not create any unnecessary confusion for investors. Moreover, allowing this flexibility in the date of calculation would be more consistent with the Commission's overriding goal of providing high quality, current information to the investor.

Should we have a requirement for the staff to evaluate the eligibility thresholds for well-known seasoned issuers on a periodic basis? If so, how often should we evaluate the thresholds and what factors should we consider? Alternatively, should the definition provide for automatic adjustments in the public float and aggregate debt requirement based on factors such as, for example, analyst coverage, institutional ownership, or average daily trading volume for equity, or changes in debt rating for debt issuers? If yes, how often should adjustments occur, what factors should trigger an adjustment, and why?

Whatever the Commission chooses as the final eligibility threshold for a well-known seasoned issuer, the qualification requirements should be evaluated after the proposal has been in effect for two years. At that time, the workability and effectiveness of the proposed threshold can be more meaningfully evaluated. Then it would be reasonable to make adjustments to the threshold level to ensure that the classification system is functioning as it was designed to. At that same time, it would be sensible to put into place a policy of automatic adjustments to the threshold based on some sort of index. The eligibility threshold should not become a fact-based formula based on actual media and analyst scrutiny, because that would result in unnecessary complication as discussed above. In order to keep this classification system efficient and workable, qualification must be based on a proxy for market following; to do an inquiry into actual market following would simply be too cumbersome and expensive. The Commission's desire to simplify the offering process is correct, and this goal should not be undercut by allowing the classification system to become unduly complex. Introducing a number of fact based inquiries into the equation will complicate the system, first because of the difficulty of providing evidence of an issuer's actual following, and also because each factor has an element of subjectivity, and thus can become a point of dispute. Thus, a fact-based inquiry should be avoided because it would result in conflict that will detract from the efficiency the proposal is meant to provide.

Should eligibility to use the proposals available to well-known seasoned issuers be calculated on the basis of trading conducted on any national securities exchange, any particular national securities exchange, the Nasdaq Stock Market, or any particular portion of the Nasdaq Stock Market (e.g., the National Market System or the SmallCap Market)? If yes, should there be any limitation on the trading location or platform?

Despite the fact that an increasing portion of the trading market is moving off the exchanges, it is sensible to limit the well-known seasoned issuer calculation only to trading done on securities exchanges located in the United States. It is critical to the success of the proposed classification system that we have easy access to relevant reporting statistics and that is best achieved by imposing this limitation. However, it would be inequitable to favor any particular national securities exchange over any other. Investors benefit from the competition that exists among the national exchanges, and this competition would likely be hampered if certain markets were able to enjoy such a significant competitive advantage over others.

Over the counter trades should not be included in the well known seasoned issuer calculation. Over the counter trades are often not indicative of a large and active public

following, and so allowing them as part of the calculation would frustrate the purpose of the proxy.

Besides the amount of registered debt sold by the issuer over a three-year period, are there any other bases upon which to determine that issuers eligible based on debt issuances are well-known seasoned issuers? Should investment grade debt ratings be part of the basis for eligibility?

No comment.

Is the eligibility threshold of \$1 billion of registered debt over the prior three years the appropriate threshold? If not, should the threshold be higher? Should it be lower?

The proposed \$1 billion registered debt threshold is reasonable and should not be any lower. As is the case with equity based qualification, the Commission should revisit the qualification requirements in two years, and at that time, make any adjustments to the requirement levels that then seem appropriate.

Should an issuer be eligible to be a well-known seasoned issuer based on debt issuances if it has both publicly held debt and equity securities?

Issuers should have to qualify separately. If the issuer qualifies as a well known seasoned issuer based on debt issuances, then that qualification should only apply to future debt issuances, not to equity issuances and vice versa. This is because fixed income markets and equity markets are very separate worlds, and tend to produce very different kinds of research generated by different sources. The sources and providers of fixed income research may be very distinct from sources and providers of equity research, and thus may not be readily available to those investing in the other. Therefore, an issuer who qualifies based on debt should not be able to benefit from that qualification in an equity issuance and vice versa.

Should offering participants be required to recalculate an issuer's eligibility at the time of use of a free writing prospectus or should the eligibility determination be done once a year for all purposes?

Participants should be required to calculate eligibility at the time of use of a free writing prospectus. This timing will provide the most accurate information, which in turn will lead to the most accurate proxy for market following. This recalculation will not impose an unduly large burden on the issuer in light of the significant benefits an issuer will receive based on its qualification. Because circumstances can change dramatically over time, it would be bad policy to allow an issuer to qualify based on facts that might be almost a year old.

The proposed classification system is based on using information about an issuer as a proxy for having a market following, but the use of a proxy is almost by definition imperfect and unavoidably introduces some degree of uncertainty. Therefore, it is important that the proxy be based on the highest quality information available even if this

means recalculating status at the time of using a free writing prospectus. This insistence on high quality information suggests that the most current information available should be used to make the well-known seasoned issuer calculation.

Should we permit majority-owned subsidiaries to be considered well-known seasoned issuers under the proposed tests? Should we limit the definition only to wholly-owned subsidiaries? We are proposing conforming changes to Forms S-3 and F-3. Is this appropriate or necessary?
No comment.

Our proposed \$700 million public float requirement is higher than the current \$75 million public float level generally required for short-form and delayed shelf registration. The public float threshold for short-form and delayed shelf registration has not been revised since 1992. While our proposals do not alter that public float threshold for short-form registration, should that threshold be revised upward in light of the length of time since it was last revised, the changes that have occurred in the markets since then, and the underlying rationale that the firms eligible to use short form registration should be sufficiently well-followed? If so, what threshold would be appropriate? Provide empirical data supporting any proposed threshold.

The public-float threshold for short-form and delayed shelf registration is outdated and needs to be revised. I do not have access to empirical data to support any specific threshold, but because the figure has not been revised in thirteen years, it clearly needs to be reevaluated.

After it has been recalibrated to be in line with today's dollars, this threshold, like the WKSI threshold, should be tied to some index so that it automatically adjusts annually to keep up with the changing value of the dollar.

One disqualification from an issuer being considered a well-known seasoned issuers is that it is an "ineligible issuer", as we propose to define that term. Should well-known seasoned issuers, who otherwise satisfy the eligibility conditions, be disqualified from being a well-known seasoned issuer for all purposes of our proposals if it is an ineligible issuer under the definition? If not, why not?

I support the Commission's proposal that an ineligible issuer be prohibited from obtaining well known seasoned issuer status. The definition of "ineligible issuer" effectively captures the many situations in which an issuer should not be afforded the extra flexibility and leniency that well known seasoned issuer status would provide, and so it is reasonable that this status not be available to them.

Moreover, this proposal seems particularly justifiable considering that an ineligible issuer has the ability to have its status as an ineligible issuer changed if the Commission determines, upon a showing of good cause, that such status is not necessary under the circumstances. This proposal is a reasonable balance that protects the investor while also giving the issuer fair access to the most beneficial issuance rules.

Do the categories of seasoned, unseasoned, and non-reporting issuers appropriately describe the issuers that fall into these categories? If not, why not and what would be a more appropriate categorization?

Yes, the categories of seasoned, unseasoned, and non-reporting issuers are well drawn and appropriate.

II. Communications Proposals

A. Definition of Written Communication, p 67400-- Comments by Alexandra Christine Sparling

Request for Comment

Does the proposed definition of graphic communication provide a workable framework within which to analyze electronic communications?

The proposed definition of graphic communication is generally a descriptive, if not exhaustive, enumeration of the electronic communications being used today. As such, it provides a clear framework by which to analyze whether or not a currently used given electronic communication is a graphic communication. The Commission could provide further clarity, however, by including video-conferencing in its already lengthy list of specific examples of electronic communications. Videoconferences are a ubiquitous form of business communication and thus it would be helpful to many issuers if the Commission would clarify their place in the proposed framework.

Because new means of electronic communications will undoubtedly continue to develop in the future, this rule should be written in such a way that it could deal with electronic communications that are not in existence today. Although the Commission states that this is its intention in saying that all electronic communications other than telephone will be considered graphic, I do not believe that will be adequate, because people will likely argue that some future method of communication is analogous to telephone communication and so should be treated as oral. Including a statement regarding what underlying characteristic it is that the Commission is trying to capture in the definition of written communication could prevent this potential dispute. The Commission should provide clarification as to whether the classification turns on the ability of the recipient of the communication to obtain a recorded copy of the communication, or whether it turns on some other factor. This addition to the definition would help prevent the need to revisit it in the future.

Are there communications not covered by the proposed definitions that should be considered written or graphic? Should we provide that only interactive communications, such as those allowing face-to-face or telephonic interactions, would still be considered oral?

See above for a discussion of video-conferencing.

The Commission should provide that only interactive communications would be considered oral, but that merely being interactive will not *automatically* qualify a given communication for oral status. By limiting the modes of communication that will qualify for the less restrictive oral classification, and by default considering all other communications graphic, the Commission would help ensure that all currently unanticipated modes of communication fall under the more restrictive written definition.

At the end of a two-year trial period, when the effectiveness of these proposals could be evaluated more accurately (see discussion *supra*), the Commission could reconsider the labeling of any modes of communication it is unable to now anticipate.

Although the analysis required for any particular communication would be factspecific, should we provide further guidance or examples regarding the use of specific technologies? If so, which technologies should we address at this time?

See above response for comment regarding the appropriate definition of written communication.

B. "By or on Behalf of" the Issuer, p 67403--Comments by Alexandra Christine Sparling

Request for Comment

Is the definition of "by or on behalf of an issuer" clear? If not, why not?

The definition of "by or on behalf of an issuer" is not as clear as it should be. See discussion of Securities Act Rule 405 below.

Should we provide more specificity limiting the approval or authorization to specific persons acting for the issuer, whether as an employee, agent, or representative? For example, should we specify that the approval and authorization must be made by persons who regularly provide such approval and authorization? In addressing this question, discuss whether there should be different formulations depending on the applicable contexts for determining whether information is provided or actions are taken "by or on behalf of" a person.

The Commission should provide more specificity regarding what will constitute approved or authorized communication. See discussion below.

The "by or on behalf of" condition is included in many of our proposed rules, should we include a general definition of "by or on behalf of" in Securities Act Rule 405?

It is not entirely clear when the Commission would consider a communication to be made "by or on behalf of" an issuer. In the vast majority of specific cases it will be quite clear whether a communication has been made by or on behalf of an issuer, but

there will be instances in which it is not clear, because of questions about who has the authority to authorize such communications.

The Commission should provide guidance regarding both 1) what kinds of communications will be considered “authorized” and 2) who will be considered to act on behalf of an issuer. For example, the Commission should explain whether the authorization must be written, or whether verbal authorization will suffice.

The Commission should be specific about whether only managerial employees, or all employees, or agents, or even affiliates can provide such authorization and approval. The general notion seems to be one of respondeat superior, but because that is a state law concept, counsel’s understanding of the term may vary from state to state and without detailed clarification, this will almost certainly be an area that will invite dispute.

Is it clear when communications are made "by or on behalf" of an issuer? If not, what additional conditions should we include?

It is not entirely clear when communications are made by or on behalf of an issuer. See discussion above.

C. Non-Offering Related Information, p 67404--Comments by Aura Tamar Reinhard

Request For Comment

Does the safe harbor provide sufficient certainty for issuers as to when particular types of communications can be made? If not, how could additional certainty be provided without opening the door to risks of abuse?

Yes, the safe harbor provides sufficient certainty for reporting issuers as to when particular types of communications can be made with respect to factual and forward-looking information. Reporting issuers should feel certain that any dissemination of either factual or forward-looking information will be protected under the safe harbor provision so long as the particular release is done in a manner consistent with prior releases. For example, if a reporting issuer released forward-looking information on a quarterly basis as a matter of ordinary business practice, such a release would be protected during an offering; if it increased the releases of such information near the time of an offering, it would not be protected. Because of the three conditions provided by the SEC- that communications be made by or on behalf of the issuer, that communications must not be related to the offering of securities, and that communications must be of the type that are regularly released-there should be enough criteria by which issuers can determine their eligibility to release such information.

Are there other categories of factual business information or forward-looking information that should be added to the list of permitted communications within the safe harbor? Should any of the proposed categories be deleted?

No, there are no other categories of factual or forward-looking information that should be added to the list of permitted communications within the safe harbor. The categories enumerated under the current proposal appear to be sufficiently extensive to cover most types of information. As it has long been recognized that ordinary factual business communications that an issuer regularly releases are not considered an offer of securities, the safe harbors will most likely not impact the traditional analyses of communications made about a registered offering or as part of offering activities.

Should we require a particular history, or length of time that the issuer has been regularly releasing this information as a condition to reliance on the exemption? For example, six months; one year; or a different period? What would be an appropriate period?

No, a particular history or length of time that the issuer has been regularly releasing this information should not be required as a condition to reliance on the safe harbor exemption. Under the current proposal, the general standard of requiring releases to be consistent with a company's track record permits case-by-case, "facts and circumstances" analysis and will likely lead to a more fair application of the provision. Although this may result in a higher administrative burden and higher administrative costs of enforcement within the SEC, such a general standard will permit the largest number of issuers to qualify for the proposed safe harbors. Being that the amount of information that will be released into the market under the safe harbors will increase as the number of issuers that qualify for the safe harbors increases, and this is the purpose of the safe harbors, a general standard is best. An alternative to imposing a time requirement would be to impose a quantity requirement, such as 3 prior releases of material information to qualify. This more objective standard may provide increased certainty, yet a low number, such as two or three releases, will permit most issuers to qualify for the exemptions.

Should there be any limitation on the availability of the safe harbor for issuers that have been determined to have not complied with Regulation FD, Regulation G, or any Form 8-K requirements for earnings releases?

Yes. Given that Regulation FD is designed to ensure that select groups of investors are not privy to firm-specific information before other investors (e.g., executives are not allowed to reveal nonpublic information during their communications with analysts and select shareholders), Regulation G is designed to ensure accurate accounting and financial disclosures, and Form 8-k is required by the SEC when a publicly held company incurs any event that might affect its financial situation or the share value of its stock, then yes, factual business information and forward-looking information should continue to be subject to the provisions of Regulation FD, Regulation G, and Form 8-K. While the safe harbor provisions are intended to encourage the release of information, it is necessary to continue to require that the release and/or dissemination of such information is accurate, that issuers are held accountable, and that a minimum level of liability is maintained. Also, under the current proposals the safe harbor provision is not permitted where issuers are not current in their Exchange Act reports or

where any issuer was found to have violated federal securities laws in the past 3 years, to have entered into a settlement with any federal agency involving allegations of such violations, or to have been the subject of an administrative or judicial decree regarding such laws. As such, a requirement that issuers comply with Regulation FD, Regulation G, and maintain Form 8-K eligibility, is consistent with the SEC's general scheme of permitting the release of more information, but only when issuers have met certain procedural requirements and retain their accountability and liability to investors and the market.

Would reporting issuers involved in registered offerings be reluctant to release ordinary course forward-looking information despite the proposed safe harbors? More or less reluctant than they are today? What other changes could we make to eliminate this reluctance?

Initially, there may be some hesitation given the long history of prohibition of these types of releases surrounding an offering. However, upon the formal adoption of the safe harbor provisions, issuers should be far less reluctant to release such information than they are today. As the system shifts, they should begin to feel more comfortable. The certainty issue raised in prior Request for Comment is at issue here: so long as the issuers have guidelines sufficient for them to feel certain that they are in compliance with the safe harbor provisions, they should not be reluctant to release such information.

Should there be a specified history of releasing information for only certain categories of forward-looking information, such as financial projections?

No, a particular history or length of time that the issuer has been regularly releasing certain categories of forward-looking information should not be required as a condition to reliance on the safe harbor exemption. Under the current proposal, the general standard of requiring releases to be consistent with a company's track record permits case-by-case, "facts and circumstances" analysis and will likely lead to a more fair application of the provision. Although this may result in a higher administrative burden and higher administrative costs of enforcement within the SEC, such a general standard will permit the largest number of issuers to qualify for the proposed safe harbors. Being that the amount of information that will be released into the market under the safe harbors will increase as the number of issuers that qualify for the safe harbors increases, and this is the purpose of the safe harbors, a general standard is best. An alternative to imposing a time requirement would be to impose a quantity requirement, such as 3 prior releases of material information to qualify. This more objective standard may provide increased certainty, yet a low number, such as two or three releases, will permit most issuers to qualify for the exemptions. Moreover, where an issuer regularly releases forward-looking information in the ordinary course, including financial projections, it is not beneficial to investors or the markets to force these issuers to suspend such releases merely because they are involved in a registered offering. Generally, we want to encourage the release of all forward-looking information and want as many issuers as possible to be included in the safe harbor; better for the market; the standard under the current proposal will most likely accomplish this.

Is the proposal regarding forward-looking information appropriate? Are the risks of this information conditioning the market greater than with the release of factual business information? If so, how? Should there be additional restrictions in this safe harbor?

No comment.

Should there be a distinction between releasing such information in the pre-filing and post-filing periods?

No comment.

Should the safe harbor identify the specific conditions under which communications would constitute ordinary course communications?

No, the safe harbor provision should not identify specific conditions under which communications would constitute ordinary course communications. A general “track record” standard that is proposed currently is best. Such a standard that looks at each issuer’s specific past performance, rather than setting specific conditions or criteria, will more likely result in the greatest number of issuers qualifying for the safe harbor provisions. It is best for the market and for investors that as many issuers as possible utilize the provisions to release information.

Should we consider defining what "part of the offering activities" means for purposes of the safe harbors?

Yes, the SEC should consider defining what “part of the offering activities” means for purposes of the safe harbors. A specific definition will make it easier for issuers to determine when their activities are not protected by the safe harbor provisions. The greater the certainty surrounding the safe harbor provisions, the more likely it is the issuers will release information, and the purposes of establishing the safe harbor provisions will be served.

As we note above, a voluntary filer would fall into the category of unseasoned issuers because it is not required to file periodic or current reports under the Exchange Act. Should voluntary filers be permitted to rely on the safe harbor available to reporting issuers even though they are not required to file Exchange Act reports?

Yes, voluntary filers should be permitted to rely on the safe harbor available to reporting issuers even though they are not required to file Exchange Act reports. Such a rule is consistent with the SEC’s strong desire to provide more certainty regarding application of the gun-jumping prohibitions to dissemination of regularly-released “factual business information” during the offering process. In other words, if a particular issuer has a history of voluntary filing, this should continue and be encouraged, regardless of whether or not they were required to do so under the Exchange Acts.

Should registered investment companies and business development companies be eligible to use the proposed safe harbors for factual business information and forward-looking information?

No, registered investment companies and business development companies should not be eligible to use the proposed safe harbors for factual business information and forward-looking information. This is because business development companies are closed-end investment companies that are not required to register under the Investment Company Act; these types of issuers are subject to a separate framework of regulation – Securities Act Rules 156, 482, and 498 – governing communications with investors; any changes should be addressed within that framework.

D. Regularly Released Factual Business Information - Non-Reporting Issuers, p 67404--Comments by Aura Tamar Reinhard

Request for Comment

We request comment on the same issues regarding the regularly released concept as in the safe harbor for reporting issuers.

Yes, the safe harbor provides sufficient certainty for non-reporting issuers as to when particular types of communications can be made with respect to factual information. Non-reporting issuers should feel certain that any dissemination of factual information will be protected under the safe harbor provision so long as the particular release is done in a manner consistent with prior releases. Because of the three conditions provided by the SEC- that communications be made by or on behalf of the issuer, that communications must not be related to the offering of securities, and that communications must be of the type that are regularly released-there should be enough criteria by which issuers can determine their eligibility to release such information.

Should the factual business information safe harbor permit some related forward-looking information so long as the information is not projections?

Maybe; while the rationale for not permitting the release of forward-looking information is that there is a lack of such information or history for non-reporting issuers in the market, perhaps there should be a case-by-case determination for non-reporting issuers. Under such a system, those non-reporting issuers who have a history of releasing ordinary course forward-looking information would be permitted to continue such releases in a manner consistent with prior releases. While this may result in higher administrative costs, it would encourage the release of information by non-reporting issuers.

In initial public offerings by non-reporting issuers, should we consider using our authority, including our exemptive authority in Section 27A, to propose a projections and forward-looking information safe harbor from liability for the forward-looking statements

that would be similar to the liability safe harbor for forward-looking statements contained in Securities Act Section 27A?

Yes. “Given that the market will continue to demand forward estimates and make valuation decisions based on them, the requirement that they be included in the prospectus is the best alternative to the current reality of selective and non-accountable disclosure. The NASD should encourage the SEC to extend the Section 27A safe harbor to IPOs so that underwriters feel more confident that they are protected in doing so.”

If we determine to propose a safe harbor of this type for initial public offerings, what kinds of conditions should we consider for its use?

The same conditions that are required for reporting issuers to be eligible for the Section 27A safe harbor should be met with respect to initial public offerings. In other words, any forward-looking statements should be identified as such and accompanied by meaningful cautionary statements, unless such information is immaterial. In addition, if the plaintiff fails to prove that the forward-looking statement was made with actual knowledge, then the IPO should qualify for the safe harbor.

As a condition for this safe harbor or one for initial public offerings, should we require the issuer to file projections or other forward-looking information as part of the registration statement? Should the projections be required to follow Item 10 of Regulation S-K or S-B as applicable? Should projections be required to be accompanied by an accountant's report on the projections or forecasts?

No comment.

Would a liability safe harbor for initial public offerings cause issuers to provide more projections publicly? Would there be concerns about the quality of these projections in light of the safe harbor?

Yes, a safe harbor provision for initial public offerings would most likely cause issuers to provide more projections publicly. Such a provision will enable issuers to release such information without fear of violating the SEC's registration rules. Over time, investors should come to expect issuers to publicly release such information, which will provide an incentive for IPO issuers to provide such information to the market. So long as liability remains and issuers are held to certain standards (e.g., anti-fraud provisions, Regulation FD, Regulation G), then there should not be serious concerns about the quality of projections.

***E. Other Permitted Communications Prior to Filing a
Registration Statement, p 67406-- Comments by Steven
Edward Hurdle, Jr.***

Request for Comment

Should we restrict the ability to rely on the exclusion only to the issuer or should we allow other offering participants to rely on the exclusion? If so, why?

I think the proposed Rule 169 exclusion should be restricted to the issuer. Allowing other offering participants to rely on the exclusion, especially underwriters, has the potential to allow communications that might approach selling efforts. For example, an underwriter, while still having to comply with the requirement that the communication not reference a securities offering, might be able to issue a report extolling the benefits of the issuer. This would stimulate demand for the securities, and even though it meets with the technical requirements of the Rule, it circumvents the Rule's intent to provide bright-line guidance for information that was not otherwise prohibited.

Is the 30-day timeframe sufficient? Should it be longer? Should it be shorter?

Any number of days here is obviously arbitrary, because the circumstances are fact-dependent for each individual issuer. In my opinion, 30 days seems like a long enough time to protect the public from company communications that could unduly influence them, while allowing issuers to continue to make communications without fear of sanctions. However, this safe harbor could create adverse incentives—this fear is likely keeping some issuers in line. If the bright-line rule is implemented, issuers could make previously prohibited statements right up until the last day.

Would issuers engage in communications using the exclusion prior to the 30-day period before registration?

Yes, I believe issuers would engage in communications in reliance on this Rule's safe harbor. My impression is that right now issuers avoid communication that might be construed as inappropriate prior to issuing securities for fear of being sanctioned for gun-jumping. This bright-line rule helps by increasing the certainty for issuers. However, there is a danger that issuers would engage in too much communication prior to the quiet period, as I mentioned in the previous request for comment.

Would issuers be able to establish appropriate procedures to ensure compliance with the "reasonable steps" requirement?

Issuers would not immediately be able to determine what "reasonable steps" are. What is "reasonable" is highly fact-dependent and is usually resolved by the courts. Over time, a pattern would probably emerge, but this "reasonable steps" phrase invites litigation. A laundry list of steps would not be appropriate, either, because it does not account for the multitude of preventative actions an issuer may take. This seems contrary to the very idea of a safe harbor, which is supposed to provide certainty for the issuer. Perhaps the Commission could provide a non-exhaustive list of potential actions an issuer may take to prevent dissemination in the quiet period, such as stopping the media communications, for example. I also theorize that a cottage industry would arise among legal professionals providing guidelines of reasonable steps, and I anticipate that

the Commission will ultimately issue interpretive releases with the most frequent examples.

Does the concept of "reasonable steps" in the proposed rule provide sufficient guidance to issuers? If not, what additional restrictions or provisions should be included?

No, "reasonable steps" is not sufficient guidance. As I said above, "reasonable steps" is a murky phrase—indeed, "reasonable" may be the most ill-defined word in legal lexicon. However, I am unable to substitute a more appropriate phrase, as "reasonable" adequately conveys the idea. While I believe this will invite litigation, I also think it will prompt issuers to err on the side of caution. However, the Commission may provide some guidance by providing a non-exhaustive list of actions an issuer may take.

For example, the Commission may proscribe a Rule stating that "reasonable steps" include asking media outlets to stop running prior communications, having its public relations department cease distributing violative press releases, etc.

If the issuer puts information on its web site or another web site prior to the 30-day period and the information remains on the web site, thus being available during the 30-day period prior to the registration statement being filed, should the issuer be able to rely on the proposed 30-day exclusion for such information?

Yes, issuers should be able to rely on the safe harbor for web information. Under our current state of technology, internet browser caching and record retention capabilities all but ensure that anything once on the internet can remain in the public domain, regardless of the issuer's actions to remove it. If the information is beyond the issuer's ability to remove, and yet the issuer loses the protection of the safe harbor if it stays up, the issuer will understandably be reluctant to provide information via a web site. Stifling the normal flow of communications would be an unintended and unfortunate effect of the Rule. It also invites litigation over who put the information on the website in the first place.

From a practical standpoint, it is also often difficult to determine when something was posted to the internet in the first place, or the source of the information. Therefore, I suggest a slightly different Rule for information on web sites: I suggest that only information where the issuer is clearly the source and that was clearly posted before the 30-day period of silence be given the safe harbor protection.

A final concern related to web communications is that the information up on the web may have never been intended for internet dissemination. Suppose a representative gave a speech, and someone recorded or transcribed it, and put it up on a web site. Should the issuer therefore be responsible? In my opinion, no.

Is it clear when communications made in reliance on the 30-day exemption are made "by or on behalf" of an issuer? If not, what additional conditions should we include?

No comment.

Are the classes of ineligible issuers and offerings appropriate? Should the exclusion not be available to any other type of issuers or offerings?

The classes seem appropriately fitted for the goal. However, this appears to slide down a slippery slope towards merits regulation, based on the risk level of the underlying company. If the goal is to protect investors from risky investments, perhaps undercapitalized companies should be included. Companies making initial public offerings or high-yield bond issuances might also be included. Since the provision is not available to companies separately regulated, such as business development companies and mutual funds, perhaps banks should also be included in the list because of their federal regulatory scheme.

Should the exclusion apply to offerings registered on Form S-8?

Offerings on Form S-8 (employee benefit plans) might be excluded because these plans are subject to ERISA, and thus fall under the category of already-regulated entities. In balancing this with the need of the issuer to make communications with its employees, I think excluding communications made in relation to an S-8 offering from the safe harbor is in the best interest of employee-investors, many of whom may not be financially savvy and therefore require more protection.

Should the exclusion be available for non-reporting issuers? Would there be greater potential for abuse with this category of issuers?

There is a greater potential for abuse with non-reporting issuers. Reporting issuers making periodic reports under the Securities Exchange Act demonstrate a minimum level of continued accountability. First-time issuers, on the other hand, are more likely to be running a scam or fraud. This higher likelihood of abuse leads to the suggestion that non-reporting issuers should be included in the category of high-risk issuers noted above. However, most first-time issuers are legitimate companies, and this perhaps does not justify such a blanket exclusion, especially since they are the ones who could most likely benefit from the safe harbor's provisions to allow marketing up to 30 days before the offering. Weighing these concerns against each other, I feel like protecting the investing public is more of a legitimate goal of the Commission than ensuring demand for a company's securities, so this information should not come within the safe harbor.

Should there be a restriction on inclusion of securities offering-related information in view of Securities Act Rule 135?

No comment.

Should we limit the condition restricting any reference to securities offering only to references to registered securities offerings?

Perhaps. Section 5 gun-jumping rules broadly apply to all securities. But, there are so many exemptions for securities from Section 5—Regulation A, Regulation D, Section 3, Section 4, to name a few—that unregistered securities offerings are often exempted regardless.

Should communications in offerings relying on Rule 155 be permitted during the 30-day period without further conditions?

No comment.

Should Regulation FD continue to apply to these communications, as we propose? If not, why not?

Yes, Regulation FD should continue to apply to these communications. The intent of the proposed Rule is to provide greater certainty to issuers and avoid unnecessary limitations on issuer communications. Compliance with Regulation FD requires more communication—it requires equal disclosure toward all investors. There is not a good policy reason for excluding communications in reliance on the proposed safe harbor from Regulation FD requirements.

F. Permitted Pre-Filing Offers for Well-Known Seasoned Issuers, p 67407--Comments by Aura Tamar Reinhard

Request for Comment

Should we permit any written or oral offer to be made by a well-known seasoned issuer before a registration statement is filed?

Yes. Although these communications would be exempt from the gun-jumping provisions, they would still be considered offers and would thus be subject to current liability standards applicable to such offers. In addition, they will still be subject to Regulation FD and anti-fraud provisions. Moreover, it is expected that well-known seasoned issuers will usually have a registration statement on file that they could use for any of their registered offerings (new “automatic shelf” registration process makes this more likely), thus making it rare that a well-known seasoned issuer will make an offer prior to filing the registration statement. In those rare cases, this proposed rule will enable well-known seasoned issuers to liberalize their communications. A written offer would meet the definition of “free writing prospectus” and would thus need to comply with requirements of such a prospectus.

In addition to provisions that would allow issuers to cure an omission of the legend, should there be cure provisions in the event that the issuer failed to file the written offer when the registration statement was filed?

Yes, there should be cure provisions, but only with respect to immaterial or unintentional failure to file. In other words, an issuer should be required to demonstrate good faith and reasonable efforts to comply with filing requirement. Under the proposal,

the material must be filed as soon as practicable after discovery of the failure. This is a logical requirement, being that such a cure provision will avoid potential chilling of communications due to uncertainty over filing status.

Should the requirement for filing written offers made in reliance on the proposed exemption apply to written offers that only contain a description of the securities being offered?

No comment.

Should communications made in reliance on the proposed rule be subject to Regulation FD, as we propose? If not, why not? Or should there be specific exceptions? If so, what type of communications should be excluded?

Yes, communications made in reliance on the proposed rule should be subject to Regulation FD, as is currently proposed. Requiring compliance with Regulation FD will function to enhance investor confidence because it will help ensure that communications are accurate, that issuers will be held accountable, and so forth.

Should there be other exclusions from the filing requirement?

No.

Should the filing obligation apply if the issuer fails to file a registration statement covering the securities offered within a particular time period after the offer? If so, how long?

Yes, the filing obligation should apply if the issuer fails to file a registration statement covering the securities offered within a particular time period after the offer. Delayed failure to file a registration statement covering offered securities may indicate bad faith, fraud, intentional delay, and so forth. A reasonable amount of time would be approximately 15-30 days.

G. Relaxation of Restrictions on Written Offering Related Communications—Rule 134, p 67408--Comments by Steven Edward Hurdle, Jr.

Request for Comment

Is there information that we propose to permit under Rule 134 that should be prohibited or limited because it will further the use of "selling" documents that are not prospectuses?

In order to combat impermissible early selling efforts, Rule 134 tombstone advertisements have traditionally been very limited in the information they are allowed to release. However, new technology has made information much more readily available. If the issuer's name is included in a tombstone advertisement, as it always is, investors can

access the issuer's website and get its contact information and lines of business, or can do much of the industry research that is to be found in the statutory prospectus. Similarly, including the name of the underwriters can lead a determined investor to the contact information. Describing the terms of the securities being offered has been allowed to some extent previously, and expanding the information permitted helps to create a better picture of the offering as a whole without, I think, turning the tombstone advertisement into a selling document. However, allowing information about marketing plans, opening accounts and submitting indications of interest or conditional offers to buy seems to cross the line from informing the public to selling to the public. Accordingly, in my opinion, this information should remain prohibited in Rule 134 communications.

For Rule 134 communications about debt securities, I believe that the reasonable expected credit rating should be excluded under the proposed Rule because this is information vital to the terms of the security, yet remains unknown at the time. It has the potential to greatly increase demand for the security but seems to lack an element of accountability as currently stated. Perhaps the Commission could prescribe a Rule permitting this type of information if accompanied by the methodology for determining the probable credit rating. This would provide additional protections to investors if the issuer makes a false or misleading statement, and would force issuers to carefully consider whether this information is worth a possible fraud lawsuit.

Is there other information that we should permit under Rule 134? For example, is there information about the issuer or the offering that should be included in Rule 134 but is not part of these proposals? If so, address whether the additional information might transform the notice into a selling document.

No. Tombstone advertisements should continue to include only minimum information necessary to understand the offering. Through their own research, investors can learn other important information about the issuer—EDGAR is available for seasoned issuers' filings with the Commission, and for new issuers, investors always have the prospectus. Continuing to exclude information from Rule 134 communications keeps the current penalty and enforcement scheme in place by maintaining liability for false or misleading statements in the registration statement or statutory prospectus. However, this must be weighed against the fact that many investors do not read the prospectus or registration statement. The tombstone advertisement may therefore be one of the only documents that investors see before purchasing a security. Taking the competing concerns into consideration, I believe that including enough information to make the Rule 134 communication thorough for the type of investor who buys strictly based on this advertisement would transform the tombstone into a selling document. Such additional information should therefore continue to be excluded.

Should the Rule permit more information about the underwriters or the syndicate, such as information about the allocation of shares among the members of the underwriting syndicate?

I don't think including this information necessarily transforms the Rule 134 communication into a selling document. This information is not as freely available from

investor research as other information is, but a determined investor searching EDGAR might be able to find a filing with this information. This information may begin to look like a proxy for taking indications of interest or conditional offers to buy because it could allow investors to directly contact the underwriters. This has the potential for abuse by underwriters. As I stated above, I believe the advertisement should contain the minimum amount of information necessary to understand the offering. Information about the securities themselves is more essential than about the underwriting syndicate, I think, because most investors are going to purchase on the open market than directly from the syndicate. Therefore, information about the allocation of shares can probably safely continue to be excluded, but I would permit the identification of the lead or managing underwriter as this likely has a great effect on how the securities are going to be distributed or marketed.

Should we permit more information about allocations and auction mechanics?

With respect to allocations, I do not think more information should be permitted because it is not essential to understand the central securities offering. However, I would permit a small amount of information about auction mechanics because that part is essential to investor understanding of the purchase system. However, I would still not permit information about submitting bids, but would only outline the terms of the auction; additional information would look like submitting an indication of interest.

Should we revise the information requirements of Rule 134 with regard to solicitations of offers to buy or indications of interest? If so, would it be appropriate to require a communication containing such a solicitation to describe how and when offers to buy would be accepted, including the methods and timing of notification of the registration statement's effective date, the purchase price of the securities, and how indications of interest would become offers to buy?

No, this information should continue to be excluded. For the reasons stated above, the Rule 134 circulars have not been selling documents. Including information about accepting offers to buy and indications of interest begins to make the tombstone look like a selling document. Accordingly, this information should be excluded. However, information about effective date and offering price could be included because it is important information about the issue, and without the other information about offers to buy, it avoids the appearance of a selling document.

Where Rule 134 requires that a notice be accompanied or preceded by a prospectus, should we permit notification of the location of the prospectus to satisfy this requirement? Should we permit this for a certain class of issuers such as well-known seasoned issuers? Other seasoned issuers?

Yes, notification of the location of the prospectus would be permitted. Internet access is so prevalent today in the United States that I am comfortable concluding that virtually every investor can access a prospectus on a website. This is more time-efficient and cost-efficient for issuers, and takes very little effort on the part of investors. Because

it seems like so few investors actually read prospectuses, informing them of the location is not likely to dissuade many from reading them who would otherwise have read them. However, notifying the investing public of the location of a hardcopy physical prospectus, rather than an electronic version, should be insufficient because that does not afford the same level of access. And of course, providing investors with a physical prospectus should continue to satisfy the prospectus delivery requirement, though I do not know how many issuers would continue to use this method when electronic delivery is available.

I don't think this option should be restricted to only seasoned issuers. It seems to me that prospectuses are not more important in an initial public offering than a seasoned issue, nor that this type of requirement would help prevent the perpetration of frauds on the investing public, because even electronic prospectuses would continue to be regulated.

H. Permissible Use of Free Writing Prospectuses, p 67410-- Comments by Steven Edward Hurdle, Jr.

Request for Comment

Does the proposed definition cover all the types of communications that issuers and other persons participating in the offer and sale of the issuer's securities would use outside the statutory prospectus?

This addition to Securities Act Rule 405 is fairly expansive: "any 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," other than a statutory prospectus. While oral communications are excluded from the definition of "free writing" under the proposed Rule, as they are under the current Rule, the definition is slightly narrow enough to exclude other types of written communications. Since "offer" is a defined term in the Securities Act that is much more encompassing than one might first think, if the Commission really wants to only cover communications that constitute an offer to sell, in common parlance, it may draft a more precise definition. Currently, the proposed Rule covers things such as marketing or informational materials that do not meet the requirements of a Section 10(a) statutory prospectus. This is not necessarily a bad thing, because this type of communication probably would not be a Section 2(a)(10) prospectus. However, this language might be drafted more precisely to avoid confusion.

Do our proposals regarding information provided to the media by or on behalf of the issuer or other offering participants provide enough guidance for issuers and other offering participants to determine when such a communication is a free writing prospectus?

No. The proposed Rule lays out several factors for when the communication would be deemed a free writing prospectus, but there is not a bright-line test that issuers can follow. For example, if the issuer prepared the statement or paid for the broadcast, the communication would be considered a free writing prospectus. This takes care of clear-cut situations, such as handing the media a press release. What if a media program

talking about the issuer happened to broadcast on a station sponsored in part by the issuer, even if the program itself was not? In light of the Commission's desire to provide bright-line guidance, this does not seem to accord. Drafting a rule without more specificity invites litigation over these issues. However, I do not think it is possible for the Commission to prescribe a Rule covering all possible situations where the issuer provides information to the media or pays for it.

Should the free writing prospectus be considered part of the registration statement?

As currently proposed, the free writing prospectus would not be filed as part of the registration statement. However, under proposed Rule 433(d), the free writing prospectus must be filed, as must post-effective free writing prospectuses for well-known seasoned issuers under Rule 163. With this in mind, I do not know that considering the prospectuses as part of the registration statement would make much of a difference as they are already often filed.

Currently, free writing prospectuses violate Securities Act Section 5 (although the proposed Rule will change this), so I think most of the time issuers unintentionally issue free writing prospectuses. View this in light of the civil liability provisions under the Securities Act: Section 12 (covering prospectuses) is harsher than Section 11 (covering registration statements) because of (a) the absence of the due diligence defense, (b) the absence of a causation defense, (c) no limitation to designated defendants, and (d) no requirement of scienter. Therefore, making the prospectus part of the registration statement will not add further protections to investors by way of the Securities Act civil liability provisions.

Including the free writing prospectus as part of the registration statement also raises issues of consistency. Suppose the issuer sends out two free writing prospectuses simultaneously to two different investors, each offering the securities for sale at different prices. If the free writing prospectuses were then required to be part of the registration statement, the issuer would have a registration statement with one of its most fundamental terms being contradictory. Perhaps if the free writing prospectus were treated as part of the registration for each individual investor who received one, this scheme could work.

Should the issuer have to approve every free writing prospectus before its use?

No, the issuer should not have to approve every free writing prospectus before its use. From a practical standpoint, this would be impossible. Perhaps the Commission could prescribe a Rule wherein the use of a free writing prospectus is deemed to be impliedly approved by the issuer when issued by an agent or person acting in good faith on the issuer's behalf. Additionally, since free writing prospectuses often arise unintentionally, it would be difficult to require the issuer to approve something it is not aware it is creating.

I. Permitted Use of a Free Writing Prospectus After the Filing of a Registration Statement Under Proposed Rule 433

1. Seasoned Issuers and Well-known Seasoned Issuers, p 67412--Comments by Richard Forrest Marr, Jr.

Request for Comment

Should the proposed rule make the proposed distinctions among the types of issuers?

No. For offerings by unseasoned issuers, the same rule should apply that applies for seasoned issuers and well-known seasoned issuers. Only initial public offerings should require delivery of a prospectus at a before access to a free writing prospectus.

Should the proposed rule's distinction in methods of providing the preliminary prospectus apply to different issuers?

Yes. However, only as stated above.

For initial public offerings or offerings by unseasoned issuers, should the proposed rules provide as a condition to use of a free writing prospectus that a copy of the prospectus be delivered at or before access to a free writing prospectus, or should it suffice that the preliminary prospectus has been filed with us before then and is available?

It should generally suffice for the issuer to file the prospectus. With ubiquitous use of the Internet and ease of access to EDGAR, all investors should easily be able to obtain any document that is filed with the commission.

For all other issuers, should availability of a prospectus on file with us be sufficient when a free writing prospectus is used or should there be a delivery obligation?

Yes. With ubiquitous use of the Internet and ease of access to EDGAR, all investors should easily be able to obtain any document that is filed with the commission.

Rule 434 permits the use of term sheets together with prospectuses in certain types of offerings. Should we retain Rule 434 in light of the free writing prospectus proposals? If so, how and when would the rule be used and for what types of offerings?

No comment.

Should the proposed rule include additional limitations or restrictions for free writing prospectuses that are broadcast over television or radio?

No.

2. Ineligible Issuers, p 67412--Comments by Richard Forrest Marr, Jr.

Request for Comment

Should other categories of issuers also be precluded from reliance on our communications and automatic shelf registration proposals? For example, is there any reason we should disqualify offerings by certain types of entities, such as limited partnerships or limited liability companies?

No comment.

On the other hand, should any of the offerings we propose to disqualify instead be permitted to use our proposed communications and automatic shelf registration process if they are otherwise eligible? For example, are there other ways to distinguish penny stock offerings that should be disqualified from those involving legitimate capital raising?

Yes. Limited partnerships seem to be arbitrarily excluded based on their organizational type. Many issuers are structured as limited partnerships and have significant capital raising needs. Such issuers should not be excluded from the proposal solely based on their organizational form. Other criteria should be identified that better indicate the issuer is likely to be involved in illegitimate capital raising.

Additionally, the commission should consider grouping the ineligible issuers into categories and limiting their ability to take advantage of the proposal in different levels. For example, issuers that are ineligible for not being current on their Exchange Act reports might only be deemed partially ineligible, such that a WKSI might have to meet the requirements of an unseasoned issuer.

Should issuers be required to have filed their Exchange Act reports timely for the preceding 12 months as well as being current in their Exchange Act reports for purposes of relying on the new proposed communications rules?

No. While the “carrot” of being able to take advantage of the proposal should be provided to encourage issuers to be current in the Exchange Act reports, failure to timely file only one Exchange Act report is not a good indicator of whether an issuer is likely to be involved in illegitimate capital raising.

Should we extend or shorten the look-back periods used to disqualify issuers in any category?

Yes. The look-back period for settlements should be shortened to one year, or settlements should not be a criterion for ineligibility at all.

Would disqualification from our proposals on the basis of a "going concern" opinion from the issuer's independent auditor cause undue pressure to be placed on auditors not to issue those opinions? Should we replace that disqualification with one dependent on whether the issuer had: 1) net losses or negative cash flows from operations for two or

more of the past three annual fiscal periods; or 2) a deficit in net worth at the date of the most recent balance sheet?

Yes. The problem with the going concern opinion is that it can be a self-fulfilling prophecy. When an auditor issues a going concern opinion, it lowers stockholders' and creditors' confidence in the company. Thus, rating agencies may downgrade the debt of the company, leading to an inability of the company to obtain new capital. Ultimately, the auditor is put in the position of determining whether a company can continue operating. This problem is exacerbated by the fact that GAAP does not clearly define the going concern concept.

An issuer should only lose the benefit of the proposal if it has failed to meet clearly defined criteria. Because the going concern concept is not well defined, it should not be used to disqualify an issuer. Thus, determining eligibility based on concrete measures, such as net losses or negative cash flows from operation for two or more of the past three annual fiscal periods or a deficit in the net worth at the date of the most recent balance sheet, is much more reasonable and fair to the issuer.

Should an issuer's disclosure of a material weakness in its internal controls over financial reporting make an issuer ineligible for purposes of the proposals?

Yes. However, please see the response above about determining categories of ineligible issuers.

Should blank check companies, penny stock issuers or shell companies be able to rely on some aspect of our proposals for capital-raising transactions?

No comment.

Are there other types of offerings that also should be excluded from our proposals?

No comment.

Should an issuer be considered an ineligible issuer if it or its subsidiary were found to have violated, entered into a settlement with a state agency or another governmental agency with regard to, or been made the subject of a judicial or administrative order or decree, for violating or allegedly violating state securities laws or any securities laws? Should an issuer be considered ineligible if an affiliate of an issuer were found to have violated, settled allegations of violations of, or been made the subject of a judicial or administrative order or decree for violating or alleged violations of securities laws?

Making an issuer ineligible if it violated securities laws is reasonable. However, the commission should consider at least two alterations to this ineligibility criterion.

First, there should be a differentiation between violating the antifraud provisions of the federal securities laws and other securities laws violations. Violations of antifraud provisions should make an issuer completely ineligible. However, violations of other provisions should be treated differently. Again, categories are needed.

Second, making an issuer ineligible for just entering into a settlement with regard to violating securities laws is overly broad. Settlements with state agencies could include violations that do not reflect on whether an issuer should be able to take advantage of the proposal.

Should registered investment companies or business development companies be able to rely on our proposed rules permitting use of a free-writing prospectus?

No comment.

Certain of today's proposals regarding communications apply to certain types of communications made around the time of registered business combination transactions as defined in Rule 165(f)(1), while others are not available to registered business combination transactions. As a result, the rules and regulations adopted pursuant to Regulation M-A will continue to apply to business combination transactions. We request comment as to whether the inclusions and exclusions of business combination transactions in the proposed amendments and rules are proper and whether such inclusions and exclusions are clear and unambiguous. Should we make any modifications to the Regulation MA model in light of our proposals?

No comment.

Should an issuer that undertakes a registered capital formation transactions at the same time as it engages in a business combination transaction be eligible to rely on our communications proposals for the capital formation transaction? If yes, should any limitations be placed on the communications or should the issuer, if otherwise eligible, be able to use the proposals for free writing prospectuses or our other proposals?

No comment.

3. Filing Conditions

a) General Conditions, 67414--Comments by Richard Forrest Marr, Jr.

Request for Comment

Is it appropriate to distinguish between issuer information and information prepared by an underwriter on the basis of issuer information for purposes of filing? If not, why not? Should the proposed rule provide additional specificity regarding the determination of whether a free writing prospectus is prepared on the basis of issuer information but does not include issuer information? If so, please describe the manner in which the proposed rule should provide that specificity.

No comment.

Should all offering participants free writing prospectuses be required to be filed?

No. Free writing prospectuses should not have to be filed at all. If a free writing prospectus includes information that is not contained in the statutory prospectus, then the new information should have to be filed. However, the entire free writing prospectus should not have to be filed. If the entire free writing prospectus must be filed, any investor can rely on the information contained therein. Thus, the issuer is exposed to greater liability under section 12(a)(2). This can happen when the information in the free writing prospectus was intended for a sophisticated investor but it was relied upon by another investor who reviewed the EDGAR filing. This expanded liability will discourage issuers from providing disclosure.

Have the proposals to limit filing to issuer free writing prospectuses, issuer information in any other person's free writing prospectus and broadly disseminated free writing prospectuses of other participants alleviated concerns about cross-liability for free writing prospectuses used by other offering participants?

No. The proposal requires issuers to continuously monitor and analyze free writing activities by all participants in the offering. A better approach would be to permit the issuer to identify those participants in the offering, such as the underwriter, who are authorized to provide a free writing prospectus on behalf of the issuer.

Furthermore, underwriters may be subject to cross-liability for free writing prospectuses under the rule as it is currently stated. The rule should be clarified to specify that underwriters will not be liable for free writing prospectus prepared by other underwriters, even if the underwriter has reviewed such free writing prospectus.

The proposed rule could also hold auditors liable for free writing prospectuses based on their association with the issuer, even though they have very limited ability to track and review free writing prospectus documentation. The proposed rule should also be clarified to remove such potential liability.

Is the phrase "manner reasonably designed to lead to broad dissemination" clear enough or should we consider a more precise definition? If yes, then what definition should be used?

The phrase is clear. However, as currently articulated, the proposed rule could hold issuers liable for a free writing prospectus prepared by underwriters when the actions of the underwriters could not have been anticipated by the issuer and the issuer took appropriate measures to prevent such action. The proposed rule should be clarified to eliminate such potential liability.

Should we define issuer information differently? If yes, how should we define it?

No. However, the proposed rule should make clear that broadcast or dissemination by the media of a story regarding an issuer or the offering is not a free writing prospectus if such broadcast or dissemination is completely independent of the issuer and any other offering participants.

Should we require free writing prospectuses that contain only preliminary terms of a securities offering to be filed? If yes, why?

No.

b) Electronic Road Shows, p 67415--*Comments by Adrian Noeau Betts*

Request for Comment

Should we include a definition of road show to describe these activities? If so, what should the description cover? That the road show be made to more than a specified number of persons?

It seems as though a definition of ‘road show’ would be useful as part of Proposed Rule 433(h). This is because a variety of written offers or webcast presentations might slip through unfiled, so long as the issuer claims that the webcast is a road show. For instance, an issuer could create a number of web-based spoken advertisements for the security. The issuer could then file a single bona fide version of the advertisement, either a generic version which contains the same information, or simply one version of the advertisement. The other versions would then be allowed to be publicly transmitted unfiled, so long as the issuer simply claims that they are a road show, the bona fide version of which was already filed.

The definition should therefore adequately distinguish a genuine road show presentation from what is more accurately a simple advertisement. A number of criteria could be included to further this end:

1. The length of the free writing prospectus should be enough to lead a reasonable viewer to regard it as a presentation, rather than an advertisement.
2. Whereas an advertisement may be filmed on a closed set, a road show is a presentation to an audience. The number of persons may be an important consideration, but their position relative to the presenter is probably more telling: the audience should be made up of investors, not simply employees of the issuer who are asked to pose as an audience.
3. Not all road shows are interactive, question-and-answer sessions, so this factor may help in determining whether a presentation is indeed a road show. However, it ought not be included as a requirement for such a finding.
4. Finally, in order to be deemed a road show, the free writing prospectus ought to be available in its entirety, or at least close to its entirety. In other words, simple highlights of a presentation are more accurately considered advertisements rather than road shows.

Will our proposal, if adopted, lead to more widespread use of electronic road shows? To such road shows being available to all potential investors? Should we make it a condition that electronic road shows be available to all potential investors?

Though use of electronic road shows will likely increase as a result of Proposed Rule 433(d)(6), such an increase will likely be marginal, and will occur only with certain types of issuers. Larger, older, and more well-known companies are likely to continue predominately using the traditional face-to-face road shows, while newer, smaller issuers may view the electronic road show as an appealing option. The former type of issuer has likely built up key relationships with investment bankers, dealers and large institutional investors, relationships which such issuers will not likely want to jeopardize. Since the proposal covers webcast transmissions of presentations, it will continue to be necessary for management to make the presentations. Therefore, the expense involved in putting on a road show is not likely to decrease, and in fact will more likely increase as a result of using electronic road shows. Another reason is that many of these firms are able to sell their entire issue to the large investors, and thus do not need the public to have access to the road show. Evidence is mixed as to the effect on price of allowing more investors access to an offering. Finally, even though electronic road shows are allowed under the proposal, many issuers will probably continue to be wary of potential liability to investors under the applicable sections of the 1933 and 1934 Acts, and prefer to reduce this exposure by limiting the number of people with access to the road show.

On the other hand, issuers that are deemed to either too small or too risky to be considered by large institutional investors may be able to benefit from electronically transmitting their road shows. These issuers are likely to need a greater number of investors to be able to sell their entire issue, and public access to the presentations can accomplish this. The extent and type of road shows allowable under the statutes will have a great impact on their effectiveness in actually creating more public interest in an offering.

Should we consider including any of the conditions in the electronic road show no-action letters that we are not including in our proposals? If so, which ones and why?

No comment.

Is our proposed definition of what constitutes a "bona fide electronic road show" adequate? Is there any reason to discourage transmission of different versions of a road show? For example, could an issuer prepare a road show for some investors and a second, less-informative version for others? Should we otherwise limit this possibility?

What constitutes a 'bona fide' road show under Proposed Rule 433(h)(4) is difficult to delineate accurately beforehand. As such, consistent enforcement of the provision will likely be more important in its ultimate success. There are certainly policy concerns with issuers transmitting a road show that is markedly different than the filed, publicly available, version. The greatest potential problem would be where the transmitted road show actually conveys information contradictory to what was filed. Another concern would be where, due to slight changes in verbiage and emphasis, the

same information is conveyed in the two versions, but in a way which leaves the audiences with different messages. A third, and probably more likely, concern is the one raised in the question, where a less-informative version is prepared for some investors.

The first concern can probably be addressed by including in the definition of 'bona fide' a requirement that information in the transmitted road show not be contradictory to that contained in the publicly available show. This addition to the definition is not likely to be met with opposition, since most people would expect a 'bona fide' version of a presentation, at the very least, to include consistent information.

The second concern, where different audiences are left with conflicting messages, despite the same information being conveyed, can be dealt with in a similar way to the concern mentioned above. Thus, the noncontradiction requirement can be amended to require not only consistent information, but also that the information be presented in a way that is intended to convey the same overall message as the publicly available road show. This addition also conforms with what most people would consider 'bona fide', since the requirement fits in with the notion that the transmitted road show be generally consistent with the publicly available road show.

The third concern raised by the definition of 'bona fide' is that issuers may release two consistent (i.e. noncontradictory) versions of the presentation, but one is more informative than the other. This situation should not raise any policy concerns by itself, since it is indeed the purpose of Rule 433 that an issuer be able to transmit different versions of a road show without filing each one. Some differences are to be expected, and it is reasonable to assume that issuers may want to tailor their presentations to their expected audience. An important caveat is that while some differences are to be expected and allowed, a given road show cannot be "less informative" by leaving out only the negative portions of the show. This situation would arise where an issuer transmits what amounts to a highlight show of the bona fide version. Such a situation will likely fail the 'same overall message' requirement discussed above, except that here the overall message does not involve a single piece of information, but the presentation as a whole. However, consistent enforcement of the rule may be more important in this case than the definition of 'bona fide' under the provision. As such, specific facts and circumstances would be necessary before deciding that the omitted information was done in order to change the overall message of the road show.

Should an issuer be permitted to edit a retransmitted road show? Should the rule expressly permit editing?

No comment.

Should visual presentations such as slides or power point presentations used but not distributed at live road shows be considered free writing prospectuses? Should we consider the use of electronic media to transmit an otherwise oral presentation to an audience overflow room as a written communication and an electronic road show, even if the presentation to the overflow room is not interactive?

As long as electronic slides or power point presentations are not distributed during a road show, there seems to be little reason to consider those materials free writing

prospectuses under Proposed Rule 433(d)(6). While it is true that such materials lie somewhere between what is clearly oral communication and what is written offering material, slides and such lie closer to the former. This is because slides generally provide little more than a bare outline of the road show, and are used only to accompany the oral presentation. They may even be thought of as akin to a presenter's hand gestures, as they are used only to augment or emphasize important points, not to make those points. Even though slides are written, there is no concern with their wide dissemination so long as the slides are used only during the presentation and not distributed to the audience.

Another reason not to consider presentation slides free writing prospectuses is that doing so may actually hinder the overall policy and effectiveness of the securities laws. This is so because slides tend to be very brief, and may mislead readers by themselves. Slides are frequently created not to impart substantive information, but simply to highlight major points of emphasis or provide a broad road map of the accompanying oral presentation. In order to make slides easier for audiences to read during the show, the number of words that appear on the slides are severely limited. Incomplete sentences are common, and many of the ideas expressed on slides are not fully explained or accompanied by proper qualifying language. Rather, the explanation and qualifying language are provided orally by the presenter. If the slides were considered free writing prospectuses, and thus required to be filed, the necessary explanations and qualifications would be omitted. Should an investor read the slides without the benefit of hearing the presentation, the slides would likely be useless, or, even worse, misleading. Therefore, unless the slides are distributed to the audience (and subject to wide dissemination), they should not be considered free writing prospectuses.

The transmission of an oral presentation to an audience overflow room presents different potential concerns than the use of slides, but such transmissions should still not be considered free writing prospectuses. Here, because electronic media are used to transmit the presentation, the potential for recording and dissemination is greater than slides which are under the presenter's control at all times. However, this concern may be addressed by a requirement that if such a technique is used, it must be done in such a way that the audience is not able to copy the presentation. This requirement is less burdensome to issuers, since they only need to ensure they have the proper equipment and software to prevent copying by the audience. Another reason not to consider these transmissions free writing prospectuses is that a presenter may not know that the transmission is necessary until the time of the road show, when more people show up than were expected. In this situation, an issuer may have intended in good faith only to give an oral presentation, but due to later circumstances, find itself subject to a filing requirement. Because the presentation is still in essence an oral one, the mere fact that it had to be transmitted to some of the audience electronically is no reason to consider it for that reason a free writing prospectus.

Should electronic road shows transmitted over the television or radio be treated differently from electronic road shows transmitted through the Internet?

A presentation broadcast over television or radio airwaves would not seem to be a written communication under the 'graphic communication' definition in Proposed Rule 405 (see FN 179 on Federal Register page 67415). However, for purposes of 433(d)(6),

regarding the use of transmitting road show presentations over the internet, television and radio road shows should be treated the same. This would serve the broad purpose of 433(d)(6) in facilitating the use by issuers of mass communication technology in reaching a greater number of potential investors with their road show presentations. Thus, a bona fide version of an issuer's road show would have to be filed, but not if the presentation were broadcast over closed circuit to an audience overflow room.

Broadcasts over the airwaves should be treated as free writing prospectuses because they lie closer to written offering material than purely oral communications. In effect, television and radio broadcasts are more like internet webcasts than face-to-face meetings. While broadcasts are not downloaded like webcasts, and are thus not necessarily saved- or, recorded- an audience may do so easily. Further, once a broadcast is recorded on a tape or disc, it may be widely disseminated very easily. Another factor which makes broadcasts similar to webcasts is the manner in which they are accessed by the public. For television broadcasts and internet webcasts, the only difference is the screen on which the presentation is viewed. In short, television and radio broadcasts are so similar to webcasts, that road shows transmitted in any of these media should be treated the same.

Should electronic road shows in business combination transactions be treated in the same manner as proposed Rule 433? If so, should there be a filing obligation similar to that in Securities Act Rule 425? If not, what filing and other disclosure requirements should apply?

No comment.

**c) Unintentional Failures to File, p 67416--Comments
by Adrian Noeau Betts**

Request for Comment

Is a cure provision on filing necessary?

The cure provision in Proposed Rule 164(b) would certainly address the concern of chilling the use of free writing materials by issuers. However, the cure provision invites other potential problems, and is therefore not the best way to advance the policy of encouraging issuers to use these communications. One major issue with this proposal is that it would represent such a great departure from the rest of Section 5 of the Securities Act. In that Section, there is no cure provision for a failure to file, regardless of the issuer's state of mind or the immateriality the unfiled information. By introducing the notions of good faith and reasonableness of an issuer's effort to Section 5 analysis, Rule 164 drastically changes the structure and function of Section 5. Another potential problem is that it may not be practicable to cure the failure to file until after the effective date of the registration statement. For that matter, the failure may not even be discovered until after that date. At that point, it would seem hardly worth it to require filing, since any damage done by the failure would most likely be complete. Or, if no damage was caused by the failure, the protection provided to investors by the filing would seem to be unnecessary.

Of course, should the cure provision not be adopted, there still remains the concern with chilling the use of free writing materials. This is not a concern to be taken lightly, since a Section 5 violation may lead to draconian liability. I suggest that instead of allowing issuers to cure failures to file, Proposed Rule 433 should change the filing requirement so that only bona fide versions of all types of free writing materials are required. In other words, simply extend the proposed policy regarding electronic road shows to all free writing materials. By requiring a bona fide version be filed, investors are protected by having, if not the specific material, at least the same general information publicly and timely available. Further, inquiries into the issuer's state of mind and the materiality of information are not introduced into a Section 5 analysis. This suggestion also addresses issuers' concerns about chilling by reducing the exposure to liability. Issuers would only need to ensure that a single bona fide version of all their free writing materials is filed prior to their use. This alleviates much of an issuer's burden of making sure every version of its free writing material is filed, regardless of how similar that material is to other material that may have already been filed. If a particular free writing prospectus is not filed, the Section 5 inquiry only needs to examine the material that was filed to see if the same general information appears, albeit in a somewhat different form. This policy will help ensure that information is available to investors without chilling issuers or changing the underlying structure of Section 5.

Are there other concerns about the filing obligations not addressed by the cure provision? If yes, then what are they and how can they be remedied without eliminating a filing obligation?

No comment.

Should we specify what persons at an issuer or offering participant, such as any senior officer, must discover the failure to file?

No comment.

Should free writing prospectus filing obligations be part of an issuer's disclosure controls and procedures?

Because Proposed Rule 164(b) already requires good faith and reasonable efforts on the part of the issuer, there is little reason to require specific controls and procedures to that effect. This is not to say that issuers should not have such procedures, or that those procedures would not be useful in determining whether the issuer acted in good faith or used reasonable efforts. However, requiring controls and procedures would not advance the policies regarding free writing prospectuses. In cases where an issuer does not fail to file anything, there would seem to be little gained by requiring the disclosure of the fact that the issuer has appropriate procedures in place. Since all the required filing is completed, we can assume the issuer's procedures are adequate. In cases where a failure to file does occur, the disclosure of adequate procedures would not likely, by themselves, prove that the issuer acted in good faith or used reasonable efforts. Other facts would need to be established before good faith and reasonable effort are found. Put

another way, the proposed requirement may lead to the curious situation where an issuer truthfully discloses that it has adequate procedures, even though a failure to file occurs and the issuer is found not to have acted in good faith or used reasonable efforts.

If there is a failure to file, should there be any cooling off period before which an issuer could complete a transaction?

No comment.

**d) Filed Free Writing Prospectus Not Part of
Registration Statement, p 67416--*Comments by Adrian
Noeau Betts***

Request for Comment

Should we require free writing prospectuses to be filed as part of the registration statement? If yes, would the filing obligation affect whether parties use free writing prospectuses?

No comment.

**4. Information in a Free Writing Prospectus, p 67416--
*Comments by Vona Stella Ekpebe***

Request for Comment

Should we require that free writing prospectuses contain particular information in addition to the legend? If yes, what information?

There is no need to require an issuer to include information in the free writing prospectus in addition to the legend condition, where the additional information is information already disclosed in a statutory prospectus.

Requiring the inclusion of information in addition to the legend in a free writing prospectus undermines the SEC's purpose for, in the first place, permitting a free writing prospectus. The SEC has noted that the statutory restrictions that limit an issuer's freedom to communicate with its investors in the period between the date on which a registration statement is filed and the date on which it becomes effective, were promulgated in an era where the permitted tools for communication (the preliminary prospectus and statutory prospectus) properly balanced an issuer's need to communicate with investors, the available means of communications, and an investor's need for protection from false and misleading information. Proposed Rules No. 221, 69 Fed. Reg. 67399 (Nov. 17, 2004). The SEC however notes that the financial markets have undergone significant changes since when those initial restrictions on communications were first enacted. *Id.* Nowadays, issuers engage in complex transactions such that investors would likely benefit from an issuer's ability to easily disclose such transactions. *Id.* Thus, the SEC has concluded that it believes investors "would benefit from access to greater permissible communications ..." *Id.*

If it is in the vein of providing flexible means of communication between issuers and investors that the SEC has proposed the free writing prospectus, then encumbering

the free writing prospectus by requiring the disclosure of additional information tends to undermine the flexibility of this proposed means of communication. Particularly since there is no need for the SEC to require the disclosure of additional information in the free writing prospectus, as the proposed legend in the free writing prospectus will recommend that the investor read the statutory prospectus. Requiring that information already disclosed in the prospectus be disclosed once more in the free writing prospectus is unnecessarily repetitive and wastes an issuer's resources.

So long as the legend is prominently displayed and very clearly recommends to the investor to read the prospectus, there is no need to require that additional information already disclosed in the statutory prospectus be disclosed in the free writing prospectus.

If however, there is *material* information relevant to the information contained in the free writing prospectus (i.e., where the information is relevant to ensuring that information contained in the free writing prospectus is not false or misleading) and that information is not already disclosed in a statutory prospectus or other document filed with the registration statement, then the SEC should require that such information be included in the free writing prospectus – this is probably already an implicit requirement of the antifraud provisions of the securities law.

Should we limit the type of information that can be included in a free writing prospectus? If yes, what should the limitations be?

The SEC should not limit the *content* of information disclosed in a free writing prospectus. This way, the SEC ensures that the issuer is able to use the free writing prospectus as it deems necessary to communicate whatever information it needs to communicate with its investors.

The SEC need not worry that the issuer will use the free writing prospectus to bombard investors with unnecessary information, as too much information may be burdensome to an investor who will have to siphon the important from the unimportant information. Because the issuer spends its resources to send free writing prospectuses to its investors, it is likely that the issuer will send out free writing prospectuses, for the most part, when it has important information to communicate.

There is already a limit on the *quality* of information disclosed in the free writing prospectus – such disclosed information is already subject to anti fraud provision of the federal securities laws, which require that information communicated cannot be false or misleading.

The SEC may, however, want to limit the extent to which an issuer can use the free writing prospectus to send out differing types of information to different types of investors. For example, the SEC may want to limit whether an issuer can send out two sets of free writing prospectuses on the same transaction – one containing less information and sent to less sophisticated investors, and the other containing more information and sent to more sophisticated investors. It may be a good idea for the SEC to require that information disclosed through a free writing prospectus to one set of investors needs to be disclosed to all other investors to ensure that all investors will have access to the same information (perhaps Regulation FD already bars the described scenario by requiring that whatever is disclosed privately needs to be publicly disclosed –

this may suggest that an issuer cannot disclose information to more sophisticated investors that it would not reveal to lesser sophisticated investors).

Should we require explicitly that a free writing prospectus contain a balanced presentation of the information or is the required legend recommending that potential investors read the prospectus, including the risk factors, sufficient?

There is no need to require the free writing prospectus to contain a balanced presentation of the information, as the required legend recommending that potential investors read the prospectus including the risk factors is sufficient.

If the discussion of risk factors contained in the statutory prospectus, adequately contains a balanced presentation of information in a free writing prospectus, then requiring that the discussion be duplicated in the free writing prospectus is repetitive.

The SEC may be concerned, however, of a situation where an investor having read a highly positive, glowing, and one-sided presentation of information relating to a transaction, is conditioned to think positively of the transaction, even before he has read the statutory prospectus. One of the important services performed by the restrictions in Securities Act Section 5 (particularly the provision limiting written solicitations or offers to buy or sell from issuers to investors during the waiting period to the preliminary prospectus) is that it prevents the issuer from conditioning the market to think favorably about the issuer's proposed transactions. Since the investor receives the solicitation or offer to buy or sell, when he receive a full, detailed, and complete discussion of the proposed transaction in the preliminary prospectus, the investor is more likely to properly assess his interests in the transactions. Thus, the SEC should be weary of the possibility that the free writing prospectus may permit the issuer to, in some ways, favorably condition the market.

Nonetheless, the SEC need not solve the potential problem of a conditioned market by requiring a duplication of information already detailed in a statutory prospectus. Instead the SEC can require that the legend specify that it is the investor's responsibility to read the prospectus and registration statement in order to get a balanced and full sense of the information being discussed in the free writing prospectus. This particular specification would help investors understand the importance of not relying solely on a free writing prospectus, and of understanding the free writing prospectus in the context of other relevant documents filed with the SEC.

Should we amend Rule 418 to permit the staff to request copies of all free writing prospectuses that are used, whether or not they are required to be filed? If no, why not?

Yes, the SEC should amend Rule 418 to permit the staff to request copies of all free writing prospectuses that are used, whether or not they are required to be filed, because it will enable the SEC to exercise effective oversight over the use of the free writing prospectus.

While the use of the free writing prospectus is still in its early stages, the SEC may want to monitor its use to ensure that it is not being abused and that it is being used in the manner in which the SEC intended.

After the early stages, when companies have become more familiar with the regulations guiding the use of the free writing prospectus, the SEC may want to continue requesting copies of free writing prospectuses as these are considered Section 10(b) prospectuses and the SEC would need access to them in order to exercise the type of oversight it usually exercises with a Section 10 (b) prospectus.

a) Legend Condition, p 67417--Comments by Vona Stella Ekpebe

Request for Comment

Should the legend contain other information?

The legend should, in addition to recommending that investors read the statutory prospectus, specifically note that the investor should not rely on the free writing prospectus for a balanced representation of the material contained therein and that the investor has to read the prospectus to ensure that he is getting a clearer sense of the information.

The SEC's proposed free writing prospectus, while it is a creative way to loosen up communication between investors and issuers, bears significant risk of misinforming investors, as there may be no meaningful limits on the information contained in it. Thus it is important that investors read the statutory prospectus – which is likely to be more cautious and conservative in its presentation of information. The SEC can help ensure that investors who receive a free writing prospectus also read the statutory prospectus by, not only recommending that the investor read the statutory prospectus, but also by clearly noting to the investor that if the investor wants to get a balanced representation of the information contained in the free writing prospectus, the investors should make sure to read the statutory prospectus. A mere recommendation to read the statutory prospectus may not fully underscore the importance of the statutory prospectus to ensuring that the investor clearly understands all the facets involved in the particular transaction presented in the free writing prospectus. But if the legend clearly states that the investor may not be getting a balanced presentation of the information contained in the free writing prospectus, the investor is completely put on notice about the importance of complementing the free writing prospectus with the statutory one.

Thus I recommend that in addition to the information the SEC proposes the legend to contain, that the legend also disclose the following information:

- A specification that the investor should make sure to read the prospectus and the registration statement *in order to get a balanced understanding of the information contained in the free writing prospectus.*

Are there any other legends that should be ineligible? Should the proposed rule include specific language regarding legends that are ineligible?

No comment.

Should we require inclusion of the legend with published articles when they are filed by the issuer or other offering participants?

No comment.

Should we specify who at an issuer or offering participant, such as any senior officer, must discover the failure to include the legend? If yes, why?

Yes the SEC should specify who at an issuer has the responsibility to ensure the inclusion of the legend with the free writing prospectus. By specifying the party with the responsibility, the SEC may be able to reduce future litigation over the issue.

It isn't too difficult to imagine a situation where an issuer failed to include the legend and its officers are disclaiming responsibility over the failure. A lawsuit will likely ensue and the courts will be forced to come up with a test for determining who should have detected the failure. It would be better for the SEC to specify, when it promulgates the proposed rules, which officers are responsible for ensuring that the legend is included in the free writing prospectus.

Securities Act Rule 425, which contains similar cure provisions, does not contain any more specificity than we are proposing. Should cure provisions in capital formation transactions contain different provisions? If so, why?

No comment.

Instead of, or in addition to, the toll free number, should the legend provide an e-mail address to be contacted to request the prospectus?

Yes, in addition to the toll free number, the legend should provide an e-mail address to be contacted to request the prospectus. Informing many of the SEC's rules is the idea that issuers be allowed to utilize available technology to communicate easily with their investors. Similarly, the SEC should, where appropriate, encourage investors to use available technology to communicate with issuers. E-mail technology is largely available, fast, easy and convenient to use. In this particular instance, use of e-mail technology to contact issuers to request the prospectus seems appropriate as it facilitates the ease with which investors can ensure that they receive the statutory prospectus, since the statutory prospectus is likely to contain more balanced and detailed information than the free writing prospectus.

b) Proposed Amendment to Rule 408, p 67417--
Comments by Vona Stella Ekpebe

Request for Comment

Should we amend Rule 408 as proposed?

Yes the SEC should amend Rule 408 as proposed, to make clear that a failure to include information included in a free writing prospectus with a prospectus filed as part

of a registration statement does not, by virtue of the non-inclusion, constitute an omission of material information.

On one hand, there is good reason to argue that the proposed amendment is unnecessary. Rule 408 is already properly qualified by the requirement that the information needing to be included with a registration statement is *material* information. Thus, there is no real need for the clarification the SEC is proposing. Were a court faced with determining whether information included in a free writing prospectus but not included with the statutory prospectus constitutes a violation of Rule 408, it is likely that the court will evaluate the issue under a materiality standard – whether or not the proposed amendment to Rule 408 has been adopted. In other words, the court will likely evaluate whether the omitted information was material to an investor. If the omitted material is material, the courts may deem the failure to include it a violation of Rule 408. Conversely, where the information omitted is not material, the court is likely not to deem the failure as a violation of Rule 408. Thus, in terms of the analysis to be undertaken in determining whether material in a free writing prospectus that is not included in a statutory prospectus or with any other document filed with the registration statement violates Rule 408, the SEC's proposed clarification provides nothing new.

Nonetheless, it is still a good idea to amend Rule 408 as proposed because it probably reduces, if not prevents, the possibility that litigation will occur in those cases in which a violation of Rule 408 is argued solely on the fact that there had been a failure to include with the registration statement, information included in a free writing prospectus. Thus, there may be some gain in amending Rule 408 as proposed.

c) Record Retention Condition, p 67417--*Comments* by Adam Grant Fraser

Request for Comment

Should the record retention condition apply to all users, including issuers as well as brokers and dealers?

Under the proposal as it currently stands, both the issuer and underwriters would have to keep copies of all free writing prospectuses. There is no need to require multiple parties to maintain copies of the same document, especially given that securities offerings today often involve many underwriters. Instead, a single party should be given the responsibility for retaining each such record. The most straightforward rule would be to require either the issuer or the lead underwriter to retain copies of all prospectuses. In the alternative, the issuer and each underwriter could be required to maintain those prospectuses which they themselves prepared, which would avoid forcing underwriters to share proprietary information such as the identities of their clients with other parties. In either case, this change would give the SEC the same ability to exercise oversight over free writing prospectuses while minimizing the administrative burden on participants in the underwriting process.

Should record retention be a condition for free writing prospectuses that are filed? If yes, then would it be difficult to determine when the retention condition would apply?

The proposal requires the retention of records regardless of whether they have been filed with the SEC. There is no reason to require issuers or underwriters to retain copies of records that have already been filed with the SEC. Records filed with the SEC are in the hands of a government agency that can preserve the documents for as long as necessary and prevent any efforts to destroy or tamper with the documents. Furthermore, information filed with the SEC can be made available to the public through the EDGAR database, which will further the SEC's stated goal of making the contents of free writing prospectuses more accessible to potential investors. In short, filing with the SEC fulfills all of the stated goals of the proposed record retention condition and does so better than requiring the issuer or underwriter to retain records would.

Should we have a record retention condition? If yes, is three years enough? Should it be shorter such as two years or longer such as five years?

There should be a record retention condition but it should only apply in limited circumstances. According to the securities offering reform proposal, free writing prospectuses would be required to be filed whenever they are made "by or on behalf of" the issuer or whenever they contain issuer information. Under this provision, many free writing prospectuses would be required to be publicly filed. The main exceptions would be free writing prospectuses prepared by underwriters not on behalf of an issuer and not containing issuer confidential information. For example, a letter written by a broker whose firm is participating in the underwriting process to one of his clients would be considered a free writing prospectus but would not be required to be filed. Electronic road shows and term sheets not containing final terms would also fall into this category. In these situations the record retention condition will serve as an excellent compromise – allowing issuers and underwriters to keep proprietary information and preliminary discussions confidential while still allowing the SEC to police fraud. But in other circumstances where the free writing prospectus is required to be publicly filed, the record retention condition simply serves no purpose.

These modifications would continue to serve the purposes identified by the SEC for proposing the record retention condition but would be significantly less burdensome on issuers and underwriters – encouraging the capital formation process while protecting investors. This is precisely the goal of the SEC's securities offering reform proposals.

For issuers, rather than conditioning the use of a free writing prospectus on specific record retention in proposed Rule 433, should retention of the free writing prospectus used by issuers be mandated as part of an issuer's disclosure controls and procedures?

No comment.

5. Treatment of Communications on Web Sites and Other Electronics Issues

a) Historical Information on Issuer Website, p 67418- *-Comments by Adam Grant Fraser*

Request for Comment

Should any issuer hyperlink to a third party web site be permitted for purposes of the exclusions for historical issuer information? If so, should the exclusion be limited to hyperlinks to an issuer's Exchange Act reports and other filings with us?

Companies should be allowed to link to historical information provided by third parties, as long as the links are placed in a section of the company's web page designated for historical information. This would allow issuers to include information like old analyst reports and media articles which could be extremely valuable to investors in assessing the company's performance.

Are there circumstances under which a hyperlink embedded in a free writing prospectus or other material should not be deemed to have been adopted by, or be treated as part of the free writing prospectus of, the issuer?

Hyperlinks can be extremely valuable to investors: giving them access to credible information and analysis that the company itself either does not have access to or does not feel comfortable discussing. For instance, a company making an initial public offering could include in an e-mail to potential investors hyperlinks to research reports prepared by investment banks discussing the value of the company, or to a study done by an independent research firm projecting the future size of the market for the company's products. This kind of information can be particularly valuable because it is critical to the investment decision but is often exactly the type information that is missing from a company's own public statements. Today, registration statements and prospectuses prepared in connection with securities offerings often contain a great deal of information about a company's historical performance and current situation, but little analysis of the projected future performance that is the key driver of value. Apparently, despite the existence of the "bespeaks caution" doctrine that protects companies from liability for forward looking statements, companies do not feel comfortable making these kinds of projections for fear they will fail to meet them and be punished by the market accordingly. Information from third parties can play a critical role in bridging this gap, especially for individual investors who lack the financial expertise of many larger institutional investors. Such information could include reports by investment researchers or consulting firms analyzing the value of the company or providing insights into key assumptions that affect the estimate of value, such as revenue growth and operating margin projections. Thus, hyperlinking, which makes this information more accessible for ordinary investors, should be encouraged.

However, treating the linked documents as part of the free writing prospectus will have a chilling effect on this type of communication and lead to just the opposite result. By defining the hyperlinked document as part of the free writing prospectus the SEC

proposal would hold the company offering the securities liable for any false or misleading statements contained in the linked document. But imposing securities law liability does not make sense here. The purpose of such liability is to give companies an incentive to make full and accurate disclosure to investors by punishing issuers for any statements that are found to be false or misleading. This is normally an appropriate approach because the issuer has the knowledge of its own affairs and control over the contents of its securities filings that allow it to make sure there are no false or misleading statements. In the case of documents maintained by third parties, though, this assumption breaks down because the information contained in those documents will often rely on proprietary data or analysis and the contents of those documents are not under the control of the issuer.

The information contained in hyperlinked documents will often rely on third party proprietary data or analyses, so the issuer does not even have the ability to determine whether a statement is false or misleading. For example, an issuer might provide investors a link to a report prepared by an independent research firm indicating that many customers of the issuer's competitors are dissatisfied and considering switching to the issuer's products. If the report is based on a confidential survey of competitor customers performed by the research firm, the issuer would have no way of being certain that the data was accurate. The study could have been done by a reputable firm, but if it turned out that the data for the survey had been fraudulently created by an analyst at the research firm then the company could be held liable for securities fraud, even though they have done nothing wrong.

In addition, the contents of hyperlinked documents are under the control of third parties, so even if the issuer was able to verify their accuracy and completeness at one point in time, the third party could soon after alter them in a way that rendered them materially false or misleading. For example, a company making a secondary offering might want to provide investors a link to a research report prepared by an investment bank discussing the value of the offered securities. Even if the company conducted a detailed review of the report and contacted the analyst to verify the methods and assumptions he used, the investment bank might later update the copy of the research report maintained on its website in a way that rendered it false or misleading. Again, the company could be held liable for committing securities fraud even though here it undertook extraordinary efforts to verify the accuracy of the hyperlinked document.

As a result of these possibilities, it would be a rare instance, if ever, that competent issuer's counsel could confidently advise the company to link to documents maintained by third parties. Therefore, investors would lose many of the benefits that hyperlinking could offer under the SEC's current proposal.

Instead of the general rule proposed by the SEC, the final changes should add language to Rule 433 stating that, as long as it is maintained by a third party not affiliated with the issuer, a document hyperlinked from a free writing prospectus will not be considered part of the free writing prospectus. The modified Rule should further provide that issuers will only be liable for false or misleading statements contained in a hyperlinked document if they had actual knowledge that the statements were false or misleading; there would be no due diligence requirement because companies do not have the ability to exercise meaningful review over third party documents and such a requirement would deter companies from hyperlinking in the first place. As conditions to

taking advantage of this rule, issuers would be required to, for each hyperlinked document:

- 1) Identify the third party who is responsible for the contents of the document;
- 2) Disclose any material conflicts of interest that the third party is subject to, such as investment banking or consulting relationships;
- 3) State that the issuer has not investigated and does not vouch for the accuracy of any statements contained in the hyperlinked document;
- 4) Warn that investors should consider the credibility of the third party in assessing the information contained in the document; and
- 5) Inform investors that the hyperlinked document may contain expressions of opinion which others would disagree with and that any such statements do not necessarily reflect the consensus of informed opinion on the issue.

These requirements are meant to make sure that investors have an accurate view of the limitations of third party documents and approach them with a skeptical eye. Of course, companies are to be expected to provide hyperlinks to some third party documents and not others. These cautionary statements will help investors assess the credibility and number of sources in determining how much weight to place on the conclusions they draw. The securities laws are premised on the idea that all other things being equal more information is better – that is what this suggested change provides.

6. Interaction of Communications Proposals with Regulation FD, p 67419--*Comments by Adam Grant Fraser*

Request for Comment

Are the proposed exclusions appropriate?

The proposed exclusions are appropriate. The capital raising process requires a level of intimate communication with potential buyers that is different in kind from that which a company normally engages in as part of its ongoing business. Furthermore, there are already a number of protections in place to ensure that investors have roughly equal access to information during the securities offering process. Registration statements and prospectuses are filed and available to all investors via the SEC's website, and under the new rules a representative version of the presentation used for electronic road shows and any free writing prospectuses containing confidential information about the issuer would also be required to be filed.

Are there other or different exclusions relating to registered securities offerings that would be appropriate?

At some point in the future the SEC may want to consider examining in more detail whether further measures are needed to create a level playing field in securities offerings, but for now the current approach is appropriate. The SEC's securities offering reform proposals represent a quantum leap forward and can hopefully be implemented with minimal further delay.

Should we retain the exclusion from Regulation FD for oral communications made in connection with the registered offerings? For purposes of the exclusion, should we consider defining oral communications as relating to the registered securities offering? If yes, describe the types of oral communications in connection with registered offerings that should be subject to Regulation FD. If no, describe the effects, if any, on capital formation transactions if we were to eliminate the exclusion from Regulation FD of oral communications made in connection with certain registered offerings.

No comment.

Should we continue to exclude from Regulation FD communications made in reliance on the exception to the definition of prospectus in clause (a) of Section 2(a)(10) where a final prospectus meeting the requirements of Section 10(a) is sent or given prior to or with the written communication? If such communications are in connection with the type of registered securities offering excluded from Regulation FD, discuss why such communications should now be made subject to the provisions of Regulation FD.

No comment.

7. Use of Research Reports

a) Rule 137, p 67421--*Comments by Nathan I. Agam*

Request for Comment

Should the type of eligible issuer be expanded or limited beyond blank check companies, shell companies, and penny stock issuers?

When the researcher in question is part of a non-conflicted broker-dealer, the lack of interest would suggest that analysts be allowed to cover any issuer they feel worthy of coverage. While it is worthwhile to consider historical patterns of abuse, analysts have nothing to gain and everything to lose (in terms of both reputation and legal liability) by providing biased coverage of an entity with whom it has no prior relationship. The SEC should presume that analysts are sophisticated individuals who are capable of navigating the murky waters of even questionable entities like blank check, shell, and penny stock companies and allow them to cover those issuers when there is no question of a conflict of interest for them or their parent broker-dealer.

Should Rule 137 be expanded to include research on issuers other than those eligible to use Forms S-2 or F-2 (which we propose to eliminate) or Forms S-3 or F-3? If not, why not?

The same reasoning applies to this question as to the first. While companies that are not eligible to file on forms S-3 or F-3 cannot provide as much information to analysts, those analysts are sophisticated and the SEC should presume that they can

provide valuable insight about a non-seasoned issuer. In the context of IPOs, truly non-conflicted research could be a boon to investors who do not have as much experience in valuing companies based upon limited information. If, however, the SEC wishes to discourage all but the most risk-tolerant investors from investing in volatile early market securities, preventing truly independent analysts from providing research of non-seasoned issuers is a good first step.

Securities Act Section 4(3) affects the ability of dealers to publish research on non-reporting issuers following effectiveness of the registration statement. Are there reasons to discourage publication of research by non-participating dealers in the aftermarket of an IPO?

A cynic might suggest that a non-participating broker-dealer might attempt to negatively influence the aftermarket of an IPO by causing its analysts to rate such an issue poorly. This might cause the IPO to perform poorly, embarrassing the participating broker-dealer and perhaps driving future business to the non-participating broker dealer. Surely, however, the possible legal liability and repercussions to the broker-dealer's reputation serve as a strong check on such behavior. On the other hand, broker-dealers might have a industry-wide preference for positively reviewing IPOs to drive their performance even when they are non-participating. Such preferences might arise out of a 'scratch my back, I'll scratch yours' mentality, where non-participating broker-dealers help IPO issuers in exchange for the IPO's underwriters providing positive research on the broker-dealer's own IPO clients in the future. Such behavior is also likely to be limited by the analyst's reputation and legal concerns.

Would the publication of timely research by entities, including dealers, not involved in the initial offering enhance investor protection in the aftermarket? Would it have other effects? If so, what would those effects be?

The offering of timely research would only enhance investor protection in the aftermarket. However, such research might also induce excessive investor reliance. Perhaps unsophisticated investors should not attempt to personally value individual issues when considering their investment decisions. Such concerns are alleviated when an investor subscribes to truly independent non-broker-dealer research or hands over the investment decision to sophisticated investment advisors with proven track records as demonstrated by their investment performance. Encouraging independent research that is subsidized by underwriting proceeds might lead investors to stop using investment advisors or subscription-funded research when those options are in fact better choices for the investor.

b) Rule 138, p 67421--*Comments by Nathan I. Agam*

Request for Comment

Should the type of eligible issuer be limited beyond blank check companies, shell companies, and penny stock issuers?

Under rule 138, the potential for conflicts of interest rises significantly. Even though there is less chance of conditioning the market because the only eligible issuers are seasoned, this rule increases the risk that a broker-dealer will attempt to influence its analysts to provide positive research in exchange for an issuers' business in the other security. While this may not be such a problem for most issuers, if there has been historical abuse by blank check, shell and penny stock companies, such likelihood for abuse remains. In fact, this rule should be extremely limited to only the largest issuers where coverage can come from several sources, hopefully at least one of whom will be truly independent. Perhaps analysts have been 'scared straight' by recent developments, but this rule provides shelter for inappropriate behavior.

Is the requirement that the broker or dealer must have published or distributed research in the regular course of its business on the same types of securities appropriate?

Such a rule is very appropriate. When there is as much potential for abuse as under this rule, broker-dealers will be tempted to start up debt research departments in order to capture the business of a large equity issuer, and to start up equity research departments in order to capture the business of a large debt issuer. A requirement that a broker dealer have a research department already in place goes a long way towards countering such behavior. However, 'regular course of business' must be defined. A proper start would be requiring periodic research reports on the type of security going back for longer than the typical issuance timeline. Such a definition would ensure that a broker dealer's research department that did not cover that type of security would not have time to start coverage and comply with the rule while still using coverage to gain any particular issuer's business. Additionally, such a requirement will give a newly started research department time to develop a track record and build a reputation. This would actually help the broker-dealer and encourage them to develop research departments that they otherwise might not, and result in more research becoming available to investors.

Should the proposed rule contain a condition that the broker or dealer must have published or distributed research on the securities of the particular issuer? If yes, why?

Such a proposal does make sense in order to prevent the potential for broker-dealers to attempt to barter beneficial coverage in exchange for new business. However, it does nothing to address the problem of a broker-dealer attempting to trade beneficial research for repeat or continuing business. I would hesitate before I would allow any broker-dealer to begin covering any securities of an issuer immediately before or concurrent with securing that issuer's business. On the other hand, if other constraints on analysts properly ensure true analyst independence, then this only serves to restrict the amount of research available on any given issuer. When a broker-dealer has been covering an issuer in the past, it provides a historical basis for ensuring the fairness of the broker-dealer's opinion on the issuer, and simply helps eliminate the cloud of impropriety that seems to follow initiating coverage in response to new business.

Should the Rule 138 safe harbor be available if the issuer is a business development company filing periodic reports on Forms 10-K and 10-Q?

A company's status as a special form of blank-check issuer does nothing to show that they are any less likely to abuse the safe harbor compared to historical accounts of blank-check issuers. While such development-stage firms do have legitimate business purposes that might be served by having independent research available, these firms can probably raise money from private equity, venture, and mezzanine markets until they have developed enough of a track record to justify wider market investment in their portfolio companies. Therefore, this safe harbor should not be available to business development company issuers, even if they file periodic reports. Let the BDC portfolio companies get coverage when the BDC company exits from their investment.

c) Rule 139, p 67422--*Comments by Nathan I. Agam*

Request for Comment

Should the type of eligible issuer be limited beyond blank check companies, shell companies, and penny stock issuers?

Here, under one case we have historical context of a broker-dealer's investigation of a firm. If their new research were to become biased, there would be evidence of the wrongdoing. Such a paper trail provides enough threat of discovery that analysts are likely to remain unbiased. In this case, therefore, it seems there is no need to limit eligible issuers beyond the three mentioned above. Under the case of industry reports, there is some additional concern because an analyst could initiate coverage of an issuer, but that seems adequately addressed by the restrictions on what types of data may be included in the publication.

The staff has previously declined to permit reliance on Rule 139 if the issuer is an open-end management investment company. Should reliance on proposed Rule 139 be permitted if the issuer is an open-end management investment company or other investment company (e.g., closed-end management investment company, unit investment trust, business development company)? If so, what additional conditions, if any, should be required for reliance on the rule? What advantages or disadvantages would Rule 139 offer as compared to Rule 482, which was recently amended to permit investment company advertisements to contain information the "substance of which" is not contained in the investment company's prospectus?

When an investment company issues securities, there is a very strong incentive for conflicts of interest, because investment companies will be buying securities of other companies from underwriters as well as using them to place their own securities. This relationship is unique because these companies are among the few that can give broker-dealers business at both the 'manufacturing end' and the 'distribution end.' Further, an investment company's best asset is the advisor or the committee that picks the securities in which the company will invest. The only research that an analyst can contribute is on the background and historical performance of the advisor or on the securities which the

advisor has picked. Perhaps reliance should be permitted for statutorily-defined research reports that require disclosure of the investment company's holdings, past performance, the advisor's background and philosophy and nothing that would attempt to predict future investment decisions that the advisor might make.

Rule 482 seems designed to prevent investment companies from conditioning the market to buy their shares. There is some danger of 'information creep' by continually allowing investment companies to put more and more information and cautionary statements in their advertisements. Perhaps a better solution is to limit rule 482 to its original scope of only allowing limited information, and using rule 139 to encourage more in depth research on funds to be published. This prevents information creep and provides a (hopefully) unbiased source of non-technical evaluations of a fund manager and the fund's underlying assets.

Are there reasons that we should maintain the current requirement in Rule 139 that the broker or dealer publish reports with reasonable regularity? If yes, should we provide more specificity as to what reasonable regularity means?

It seems reasonable to eliminate this requirement in exchange for a requirement that the broker-dealer have published prior reports in the ordinary course of business. Rather than provide a 'bright-line' rule for compliance which broker-dealers might rely on to skirt the letter of the law while violating the spirit, it gives a broker-dealer the flexibility to pursue what it feels are valid business practices and weigh the costs and benefits of covering a particular issuer, and not feeling bound to provide updates when no new information has reached the market. Additionally, broker-dealers will still be unable to trade the benefit of new coverage for an issuer's business, because any remarkable departures from their prior coverage of an issuer will have to be justified in the research report.

Is the requirement in the proposed amendments to Rules 138 and 139 that the broker or dealer, at the time of use, be publishing reports about the issuer or its securities appropriate?

Absolutely. One of the primary methods by which research departments were corrupted in the past was through the temptation to promise positive coverage of an issuer in order to secure that issuer's business. By requiring a research department to have covered the issuer in the past, an analyst runs a much greater risk of being 'found out' and having his reputation tarnished if he suddenly changes his view on an issuer right around the time his broker dealer is attempting to capture that issuer's business.

Will our proposed approach lead to more research being published?

As it stands, it most certainly should, because it is increasing the scope of the safe harbors and providing ways for broker dealers to obey the letter of the law and still give some measure of benefit to issuers in exchange for their business. A better question might be in what ways can the SEC encourage truly independent, unaffiliated research

companies to provide more research reports to the market, rather than just to their subscribers?

Are there reasons to maintain the "no more favorable recommendation" requirement in current Rule 139?

If analysts have in fact become more independent, there is every reason to remove this rule. Gagging analysts when they honestly have good things to say about an issuer simply means that the SEC is irrationally depressing market prices for a particular issuer. This amounts to discrimination against covered issuers. Since there seems to be enough of a framework to curb analyst bias, this particular leg can safely be jettisoned.

How many firms subject to the global research analyst settlement use their web sites, rather than confirmations or account statements, to disclose security ratings of issuers provided by independent research providers along with the security ratings of the issuer provided by the firm?

No comment.

**d) Research Report Proposals in Connection with Regulation S and Rule 144A Offerings, p 67422--
*Comments by Nathan I. Agam***

Request for Comment

Should we put any limitations on offerings relying on Rule 144A or Regulation S if research is published or distributed in reliance on Rules 138 and 139? If yes, why?

The SEC does not need to put limitations on offerings relying upon Rule 144A, because the investors in those markets are sophisticated and have the market power to purchase or develop their own independent research if broker-dealer research is insufficient. A broker-dealer that attempts to condition the 144A market using research runs a much stronger risk of creating backlash for future business because the investors in the 144A market are repeat players who have continuing relationships with the dealers.

While the SEC may wish to provide protection to foreign investors who purchase securities covered by regulation S, those investors are not under United States jurisdiction, and broker-dealers already have to deal with foreign regulations that foreign jurisdictions feel adequately protect their investors. In all, this suggests that the SEC does not need to further limit offerings under either Rule 144A or Regulation S in regards to broker-dealer research.

**e) Research and Proxy Solicitations, p 67423--
*Comments by Nathan I. Agam***

Request for Comment

Should we codify the staff position that research published in reliance on Rules 138 and 139 would not be solicitations under Rule 14a-1(1)(2)? If not, why not?

The staff position should be codified. Analysts have already come to rely upon the position, and leaving open the potential for rapid change only increases the monitoring costs of legal compliance for these analysts, reducing the amount of productive time that can be devoted to valuable analysis. Codifying the position does not preclude the SEC from later amending the rule if circumstances change and warrant such an amendment. It simply provides legal certainty for analysts where before there was none.

III. Liability Issues

A. Information Conveyed by the Time of Sale for Purposes of Section 12(a)(2) and Section 17(a)(2) Liability, p 67424-- Comments by Jinah Lee

Request for Comment

We request comment with respect to our proposed interpretive rule, including on the following specific questions:

Would actual communication to an investor provide sufficient ability for offering participants to be able to advise investors of developments prior to the time of the contract of sale without creating speed bumps for an offering? Does the concept provide sufficient opportunity for investors to have information at the time of the contract of sale? Do actual communications to investors reflect market practices today? What other concepts, if any, regarding communications should we consider?

If offering participants are required to actually communicate new information to investors prior to the time of the contract of sale, speed bumps would be created for the offering. Actual communication over-protects investors and unnecessarily slows down the offering process. With technological advances in the way information is disseminated (e.g., the Internet, e-mail, etc.) in conjunction with the theory of market efficiency, public disclosure of new information on the part of the offering participants should be sufficient to ensure that investors have the new information at the time of the contract of sale and that the new information is incorporated in the price of the offering. Public disclosure of new information could be achieved through press releases, updates to the offering participants' websites, or SEC filings.

Should we provide more detailed guidance as to what is considered information that is conveyed to an investor at or prior to the time of the contract of sale? If so, how should we define it and what information should be included? Should it include only information that is included in the issuer's registration statement including Exchange Act documents that are incorporated by reference? Should it include free writing prospectuses that have been filed? What other information should it include?

More detailed guidance as to what is considered information that is conveyed to an investor at or prior to the time of the contract of sale should be provided. If the purpose of Rule 159 is to ensure that investors receive materially accurate and complete information regarding an issuer and the securities being sold at the time of the contract of sale, such information should be defined as broadly as possible to include all communications, including written, oral, and graphic communications. The definition should not be limited to the issuer's registration statement and Exchange Act documents that are incorporated by reference, and should include filed free writing prospectuses. In light of the Supreme Court's definition of "prospectus" in *Gustafson v. Alloyd*, 513 U.S. 561 (1995) (limiting § 12(a)(2) liability to public primary offerings), explicit guidance regarding the definition is needed. Liability under § 12(a)(2) should apply to all communications, not just conforming prospectuses, in both public and private offerings of both primary and secondary offerings.

Should there be a concept of public dissemination similar to that in Regulation FD? If yes, how would an investor know to look for the information to be able to assess statements made in a prospectus or oral communication? Should there be any requirement that the registration forms disclose that information may be filed in an Exchange Act report of an issuer or otherwise disseminated in a manner to advise the investor? Should there be a requirement that information be conveyed directly to an investor in all cases? Would a concept of public dissemination provide sufficient opportunity for investors to be advised of and be able to access the information at or prior to the time of the contract of sale? What types of public dissemination of issuer information reflect market practices today? What other concepts, if any, of public dissemination of information should we consider?

There should be a concept of public dissemination similar to that in Regulation FD. Rather than requiring that information be conveyed directly to an investor in all cases, there should be a requirement that the registration forms disclose that information may be filed in an Exchange Act report of an issuer or otherwise disseminated (e.g. via updates to the issuer's website). Public dissemination via Exchange Act filings or updates to the issuer's website would provide sufficient opportunity for investors to be advised of and be able to access the information at or prior to the time of the contract of sale. Most if not all potential investors have access to computers and an Internet connection. Prior to making any decision to invest, an investor could easily search for new filings in EDGAR or look for updates on the issuer's website. The burden of ensuring that the investor receives current and correct information is thus split between the issuer and the investor.

Should we consider a rule that would require a passage of a specified time between an Exchange Act document filing or free writing prospectus filing on EDGAR and a time of contract of sale in order for the information to be considered part of the information against which statements would be evaluated? Should we address the method by which information should be made available to an investor to be considered conveyed to the investor for purposes of Section 12(a)(2) and Section 17(a)(2)?

No period of time should be specified. Such specification would be arbitrary and would either be overbroad or too narrow. Such specification also would offer no remedy to the problem it is trying to avoid. Assuming that the purpose of a rule requiring passage of a specified time is to avoid cases where information is disseminated simultaneously with an investor's decision to invest, such a rule would also create problems where an investor chooses to invest at the very same moment the specified time passes. Rules of reason should apply, and courts should be able to distinguish whether information is part of the information against which statements are to be evaluated. It may be helpful to offer a non-exhaustive list of methods by which information should be made available to an investor to be considered conveyed to the investor for purposes of Section 12(a)(2) and Section 17(a)(2). The list should include such methods as filing with the SEC, prominent and clear updates to issuer information on the issuer's website, press releases, etc.

Do the proposed rules regarding communications and the interpretation regarding information that is conveyed to an investor lead to evidentiary issues that should be addressed?

Section 12(a)(2) requires that the purchaser not know of the material misstatement or omission at issue. This requirement suggests that the purchaser must prove they relied on the misstatement or omission or that the issuer can defend by proving that the purchaser knew of the misstatement or omission. Proposed Rule 159 should not affect this requirement.

As to any of the above requests for comment, are there any special considerations that apply to investment companies in general, or to particular types of investment companies (*e.g.*, open-end management investment companies, closed-end management investment companies, unit investment trusts, business development companies) that we should address? If yes, please describe.

No comment.

Currently, Rule 412 only addresses information in subsequently filed Exchange Act reports incorporated by reference that modifies or supersedes information in previously filed Exchange Act reports. Because the proposed revisions to Rule 412 and proposed Rule 430B would permit issuers to use either Exchange Act reports incorporated by reference or prospectus supplements deemed part of registration statements to update information in the registration statement and prospectus, would it be clear to investors what information in the prospectus either directly (other than for Section 10(a)(3) updates to registration statements) or through filed Exchange Act reports or prospectus supplements was being updated?

Updates should clearly and explicitly relate back to the information in the prospectus that it is updating to avoid confusion on the part of the investor.

Do the proposed revisions to Rule 412 provide issuers with greater ability than they have today to update information in the filed registration statement and prospectus in a timely manner?

The proposed revisions to Rule 412 encourage issuers to update information in a timely manner but does not appear to provide issuers with a greater ability to update information.

B. Relationship of Interpretation and Proposed Rule to Section 11 Liability, p 67426--Comments by Jinah Lee

Request for Comment

Should issuers always be considered sellers with regard to issuer information, regardless of who is communicating the information?

If the issuer information originated from the issuer or was approved by the issuer, and the third party communicating the information does not materially misstate the information and includes all material information in the communication, the issuer should always be considered a seller with regard to that issuer information, regardless of who is communicating the information.

Should we condition issuer liability for issuer information contained in a free writing prospectus or other communication on the issuer giving the information to the other party for use? On whether the issuer gave the user of the free writing prospectus permission to include the issuer information or issuer free writing prospectus?

Issuer liability should not be conditioned on the issuer giving the information to the other party for use or the issuer giving permission to the other party for use. If the information conveyed by the other party is materially the same as the information which originated from the issuer or was approved by the issuer, then the issuer should still be considered a seller with regard to that information.

Should there be any particular level of issuer involvement in the communication in order for the issuer to be considered a seller of the securities for purposes of Section 12(a)(2)?

As long as the information in the communication originated from the issuer or was approved by the issuer, the issuer should be considered a seller of the securities for purposes of Section 12(a)(2). If the communication includes information which did not originate from the issuer or was not approved by the issuer, the issuer should not be considered a seller for those portions of the communication.

Should the proposed rule extend to entirely secondary offerings?

Proposed Rule 159A should extend to entirely secondary offerings. If the issuer benefits from the offering, the issuer should be considered a seller. Even though issuers

do not economically benefit directly from secondary offerings, issuers arguably do benefit in non-economic ways from secondary offerings. Because issuers benefit from secondary offerings, there remains an incentive for issuers to make material misstatements or material omissions in information that the issuer disseminates or approves. By extending the rule to secondary offerings, that incentive is offset.

Should proposed Rule 159A apply to investment companies, and if so, to which types (*e.g.*, open-end management investment companies, closed-end management investment companies, unit investment trusts, business development companies)?

No comment.

Are the communications covered by proposed Rule 159A with respect to investment company issuers (*e.g.*, profiles provided pursuant to Rule 498, issuer information included in advertisements pursuant to Rule 482) appropriate?

No comment.

IV. Securities Act Registration Proposals

A. Proposed Rule 430B, p 67427--Comments by Jacqueline Loan Le

Request for Comment

Would the provisions of proposed Rule 430B provide shelf issuers more certainty regarding the provision of information in delayed offerings off of shelf registration statements?

Yes, proposed Rule 430B would provide shelf issuers more guidance regarding omissions and inclusion of information in base prospectuses. The rules for shelf registration procedures are currently unclear and are not codified under one single rule. For example, shelf issuers currently rely on rule 430A to submit omitted information up to 15 days after the effective date. Next, rule 424(b)(2) allows issuers to file a prospectus supplement only up to 2 days after the date of a takedown. Finally, shelf issuers rely on rule 415(a)(3) to submit omitted information via a post effective amendment after an effective date or after a takedown. Rule 430B will merge rules 430A, 424, and 415, under one codified rule and slightly amend the provisions to allow issuers to submit omitted information via a prospectus supplement, exchange act report information incorporated by reference, or post-effective amendment. Rule 430B will also make clear that for liability issues, effective dates will be reset after each prospectus supplement is submitted. Thus, rule 430B codifies and provides clear guidance regarding information omissions and inclusions in base prospectuses.

Does proposed Rule 430B need to contain different or additional provisions in order to codify current practice in delayed shelf registered offerings? If so, what current practice

is not addressed, what different or additional provisions should be considered, and what is the statutory or regulatory basis for the current practice that is not addressed in proposed Rule 430B?

No comment.

Should shelf issuers, other than well-known seasoned issuers, be allowed to amend their plans of distribution through incorporated Exchange Act reports or prospectus supplements, rather than only through post-effective amendments?

Yes. To further promote flexibility, efficiency, and capital formation from shelf offerings, traditional shelf issuers, as well as well known seasoned issuers (“WKSI”) should be allowed to amend plans of distribution through prospectus supplements or post-effective amendments. (As will be discussed shortly, there are issues with incorporation by reference of Exchange Act Reports). Rule 430B should be extended to traditional shelf issuers because they have in the past reported reliable information and are otherwise regulated by other anti-fraud securities laws, such as Section 11.

Should Rule 430B apply to additional categories of offerings permitted under Rule 415(a)(1)?

Yes. Rule 430B should apply to additional categories of offerings permitted under Rule 415(a)(1). Currently, rule 415(a)(1) lists 11 types of securities allowed for shelf registrations including those filed under forms F-6,¹ S-3 or F-3.² The securities enumerated under Rule 415(a)(1) have generally been highly rated securities. They include resales by selling security holders, dividend reinvestment and employee benefit plans, securities underlying options, warrants, rights and convertible securities, securities pledged as collateral, depositary shares underlying ADRs, and mortgage related and other investment grade asset-backed securities. Thus, Rule 430B should include additional categories of offerings, as long as investors are still adequately protected and inclusion of the additional categories would promote further flexibility, efficiently, and uniformity for issuers.

Should paragraph (vii) of Rule 415(a)(1) be eliminated, especially in the event that we adopt our proposed rules for asset-backed securities?

No - Rule 415(a)(1)(vii) [which permits shelf registration for mortgage related securities] should be retained, in addition to Rule 415(a)(1)(x) [which permits shelf registration only for those registered under forms S-3 or F-3]. Since certain MBS products [filed under forms S-1 or S-3, and may include participating MBS and CMBS not filed under forms S-3 or F-3] are unique and are highly rated, we should retain 415(a)(1)(vii) so not to exclude such highly rated and qualified mortgage related issuers.

¹ Rule 415(a)(1)(vi)

² Rule 415(a)(1)(x)

Securities Act Rule 424 includes references to filing multiple copies. Should those references be revised to reflect electronic filing on EDGAR?

No comment.

B. Identification of Selling Security Holders Following Effectiveness, p 67428--Comments by Jacqueline Loan Le

Request for Comment

Will the conditions allowing the inclusion of the selling security holder information after the registration statement is effective enable issuers to satisfy their contractual obligations to the selling security holders?

Yes. Allowing issuers to defer reporting selling security holder information until after effectiveness speeds up the registration statement process and does not appear to infringe upon any contractual rights of the selling security holders. As long as selling security holders are guaranteed a clearly specified sale statement that identifies the private transaction or transactions, selling security holders should be contractually protected.

Are there other situations in which selling security holders should be identified by prospectus supplement rather than by post-effective amendment?

No comment.

Should the ability to identify selling security holders by prospectus supplement be limited to seasoned issuers? If so, why?

No. Although seasoned issuers are generally more credible and possibly more reliable to eventually disclose information about selling security holders, other traditional shelf issuers should be given similar benefits with regards to identifying selling security holders. Traditional shelf issuers are just as capable as seasoned issuers to update selling security holder information, and would be subject to the same resetting of effective dates and liabilities related to submission of a prospectus supplement. Hence, as long as non-seasoned shelf issuers are held to the same liability standards and requirements as seasoned issuers, both should be able to identify selling security holders by prospectus supplement.

Should the proposal cover securities that are issuable upon conversion of outstanding securities? If yes, should there be any restrictions on the types of convertible securities that may be outstanding or the conversion terms of the outstanding convertible securities? For example, should the names of security holders holding convertible securities with fixed conversion terms be permitted to be included by prospectus supplement? Should the names of security holders holding convertible securities with variable conversion terms be permitted to be included by prospectus supplement? If yes, explain why with specificity.

No comment.

C. Information Deemed Part of Registration Statement, p 67430--Comments by Jacqueline Loan Le

Request for Comment

Would prospectus supplements be filed any sooner than they are today as a result of proposals that would deem the prospectus supplement part of the registration statement and trigger new effective dates if the prospectus supplement relates to a takedown off a shelf registration statement? If so, how?

No. At first glance, it may appear that triggering new effective dates when new prospectus supplements are filed would motivate issuers to file prospectus supplements sooner so that the statute of limitations would not be further extended. However, this presumption neglects the fact that most issuers generally want to include all relevant information in their base prospectuses and prospectus supplements as soon as possible. Omitted items are usually those that are unknown or not reasonable available to issuers at the time of filing a base prospectus (or in the case of takedowns, a prospectus supplement). For example, pricing information may be missing immediately after a takedown. It would appear that issuers do not have as much control over such missing information. Thus, the speed at which issuers file prospectus supplements will ultimately not be dependent on any motivation factors such as a “new effective date” but instead on the availability of the missing information.

Would the ability to include information in an Exchange Act report that is otherwise required to be contained in a prospectus enable issuers to file the information reflecting the takedown prior to the end of the second business day after the takedown?

Yes. According to Rule 424(b)(2): A supplementary prospectus can disclose information previously omitted from a prospectus filed as part of an effective registration statement as long as the prospectus supplement is filed with the SEC no later than the second business day following the earlier of the date of determination of the offering price or the date of a public offering or sales. With 430B, incorporation by referencing to an Exchange Act report will also be an acceptable alternative as long as it also meets the second business day deadline. Incorporation by reference would make it easier, cheaper, and quicker for issuers to include previously omitted information. Hence, it is reasonable to conclude that incorporation by reference would assist issuers in meeting Rule 424(b)(2)’s “second business day” deadline.

However, although incorporation by reference may promote flexibility and efficiency that can assist issuers in meeting the second business day deadline, it does not guarantee that issuers will meet the deadline. For example, incorporation by reference will not help issuers in cases where missing data are not yet available in any Exchange Act report.

Would investors be able to locate the information that was included in the prospectus through incorporation by reference of an Exchange Act report through the proposed cover page disclosure?

Yes. Investors would be able to locate information if the cover page disclosures contain clear instructions how and where to look for information on a relevant exchange act report. However, the ease at which investors find the desired information is debatable. Incorporation by reference is a new relaxed information reporting procedure for issuers that inherently shifts the burden to investors to look for information. Although investors would be able to eventually locate the desired information, they would need to flip back and forth through numerous documents/reports to look for the information. Further, the additional references and documents could be onerous for some unsophisticated, non-savvy investors. Thus, incorporation by reference of an Exchange Act report does not serve the interests of investors. The SEC's goal should be to protect investors, not provide shortcuts for issuers.

In shelf takedowns, would investors be able to identify the effective dates for the securities sold in their particular takedown?

This is not clear in the proposal. The proposal should however, clearly require issuers to notify, whether through a front-page supplemental prospectus disclosure, or in a letter of notice to investors, the new effective dates in relation to the particular shelf takedown.

In light of the new effective date for liability purposes that would be imposed by proposed Rule 430B, will there be questions regarding the necessity of providing an auditor's consent or the letter regarding unaudited financial information (see Item 601(b)(15) of Regulation S-K) for interim period takedowns for prospectus supplements that did not contain disclosure for which a consent was required? If so, what would be the appropriate means to address this possible situation?

Issues: With the new proposal, Section 11 liability will apply to auditors and experts at the new effective date. However, current Securities Act Section 7(a) does not permit auditors or other experts to be subjected to Section 11 liability in the absence of a signed consent. It can be argued that auditor's or expert's consent should be included in the takedown process because experts and auditors are independent sources that help prevent fraudulent or unreliable information from slipping through the cracks. Thus, requiring auditor and expert consent is highly beneficial to investors.

Although, the required consent can stall or cause undue delays, the added vote of confidence (comfort letter) is worth the wait for investors and would be fair for auditors and experts. Alternatively, accounting firms are proposing that Section 11 liability for auditors should still be as of the date of the most recent 10-K. This proposal will protect auditors and possibly put investors more on guard, but probably less preferable.

Would a new effective date for each takedown for liability purposes have any effect on liability for incorporated Exchange Act reports that have not been modified or superseded?

Yes, this will create new liability for any prior misstatements or omissions in incorporated Exchange Act reports. Currently, liability under Section 11 is based upon the contents of the registration statement *at the time of effectiveness*. The SEC in the past stated that “Section 11 ordinarily does not apply to statements omitted from an effective registration statement and subsequently disclosed in a prospectus or prospectus supplement, rather than a post-effective amendment.”

By proposing a new effective date for every shelf takedown (and for every new prospectus supplement filed), Section 11 liability will indirectly be imposed on all documents, reports, and information incorporated by reference since the last Form 10-K, 10-Q, or 8-K. This will extend the statute of limitations for any misstatements or fraudulent statements made in the referenced exchange act reports.

By extending liability for incorporated Exchange Act reports that have not been modified or superseded, the SEC places additional pressure on issuers, accountants and experts to make sure that the exchange act reports are accurate and up to date with the most recent data.

Should proposed Rule 430C apply to prospectus supplements filed by closed-end management investment companies under Rule 497?

No comment.

D. Elimination of Limitation on Amount of Securities Registered In Shelf Registration, p 67430--Comments by Jacqueline Loan Le

Request for Comment

Should we keep the two-year intention requirement for shelf registration issuers? If not, should we require shelf registration issuers to file new registration statements every three years? Should the period be longer, such as five years?

Generally, a shelf registration is feasible where an issuer has no present intention to immediately sell all the securities being registered. Sometime in the future, when the issuer is ready to offer securities, the issuer takes the securities "off the shelf." However, Rule 415(a)(2) requires an issuer to report the total number of securities “reasonably expected” to be offered and sold within the next two years. This requirement was intended to ensure that shelf issuers have a reasonable intention to issue securities. Yet, this two-year intent requirement does not really serve any significant investor protection interest. Investors are not more protected if shelf issuers report what they intend to sell in the next two years. Therefore, the requirement should be eliminated to allow issuers flexibility in issuing shares.

Further, with the current shelf registration scheme, issuers often face share price depression due to “market overhangs” that occur upon a filing of a shelf registration

statement. The uncertainty inherent in SEC staff review causes the market to react negatively, often discounting share prices well in advance of an offering announcement. The proposal to eliminate the two-year intention requirement may reduce some of the market overhang as issuers have one less SEC review hurdle to overcome.

However, by eliminating the two year intent requirement and imposing flexible Rule 430B, we may be giving issuers too much flexibility at potential costs to investors. Allowing issuers to later takedown an unlimited amount of securities by merely filing prospectus supplements is analogous to an unchecked runaway train. Further, liberalizing the shelf registration procedures shifts the burden onto investors to find and make sense of information in the numerous supplemental prospectuses and post effective amendments. So, by requiring issuers to file a new shelf registration statement every 3 years, we are able to provide investors updated and uniformly packaged information. A new shelf registration statement every 3 years would also give the SEC staff, investors, and others involved in the registration process (i.e. issuers, lawyers, auditors, and experts) ample opportunity to verify and rectify any inaccurate reported information. This cost to issuers is reasonable, considering the flexibility and efficiency Rule 430B would otherwise offer. Requiring issuers to register new shelf registration statements every 5 years may be too long.

We should, however, make exceptions for shelf registration issuers engaged in transactions that have little or no omitted information to update subsequent to the filing of a base prospectus. These transactions may include exercise or conversion transactions, employee benefit plans, dividend reinvestment plans, and offerings by selling security holders. In such cases, where there are no new information or missing information to update, filing a brand new registration statement every three years would not serve any investor interest at the expense of issuers. Thus, the SEC should exempt the “new registration statement every three years” requirement for issuers involved in offerings where there are no omitted or new information to update beyond the base prospectus.

***E. Immediate Takedowns From a Shelf Registration Statement Filed Under Rule 415(a)(1)(x), p 67430--
Comments by Elizabeth Padley Shoemaker***

Request for Comment

Should we permit immediate takedowns off shelf registration statements without requiring reliance on Rule 430A? If not, why not?

Summary

Yes. The SEC should permit immediate takedowns off shelf registration statements by requiring reliance on either Rule 430A or 430B. In most instances, 430B would make immediate takedowns from a shelf registration statement filed under Rule 415(a)(1)(x) easier than they are under current rules. Thus, there would be more convenience for issuers and investors would remain protected.

430A was intended to apply to a variety of situations, not just shelf registrations. Currently, reliance on 430A is the only permissible way to make an immediate takedown off shelf registration statements. The rule provides a specific list of items that may be

omitted from the prospectus (the base prospectus) at the time a registration statement is declared effective as long as certain conditions are met.

Proposed Rule 430B would provide an alternative way for issuers to make an immediate takedown. The proposal describes 430B as the “shelf offering corollary” to 430A, and it claims that 430B will codify the requirements.³ However, those codified requirements should be made clearer.

Increased Convenience for Issuers

If the takedown will occur within 13 business days or so of a registration statement becoming effective, reliance on 430A is probably more convenient than reliance on 430B, because it allows an issuer to supply omitted information using a prospectus supplement, and the effective date will not change. For those situations, the SEC’s plan to continue to make 430A available as an alternative to 430B is beneficial for issuers. As a simple illustration, assume an eligible shelf registration issuer that had omitted information about its underwriting commissions from its red herring prospectus. Then 13 business days after its registration statement becomes effective, the issuer decides to make a takedown under 430A, so the issuer sets the commissions. The issuer could then file a prospectus supplement within two business days in accordance with Rule 424(b)(1). By doing so, the issuer would be within the 15-day window provided in 430A, so the issuer would not have to file a post-effective amendment. Pursuant to 430A(b), the effective date of the supplement would be the effective date of the registration statement that had become effective about two weeks earlier.

Even if an issuer is outside of the 15-day window provided in 430A(a)(3) and has to file a post-effective amendment to the registration statement, 430A may still be more convenient than 430B if the information originally omitted was only price-related information. Pursuant to Rule 462(c), if the post-effective amendment contains only “price-related information omitted from the registration statement in reliance on Rule 430A”, it shall become effective upon its filing.

However, if a post-effective amendment contains information other than price-related information, the amendment would not become effective automatically upon its filing, so there could be delays while the SEC reviews it. Thus, when an issuer is providing information other than price-related information outside of 430A’s 15-day window, 430B is a more convenient alternative, because 430B allows such omitted information to be included in a prospectus supplement filed pursuant to Rule 424 or through Exchange Act reports incorporated by reference.

Investors Remain Protected

One way issuer reliance on 430B would affect investors is that the filing of a prospectus supplement would “reset” effective dates for liability purposes. Under 430A(b), prospectus supplements are deemed to be a part of the registration statement as of the time the registration statement is declared effective. However, under 430B(f), such supplements are deemed to be a part of the registration statement “on the earlier of the date such form of prospectus is first used or the date and time of the first contract of sale of securities to which subsequent form of prospectus relates.” Furthermore, for liability purposes, such date shall be deemed “to be a new effective date of the registration statement relating to the securities to which such subsequent form of prospectus relates

³ SEC Release No. 33-8501, Section V.B.1.b.i.(A).

and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.” Such “resetting” under 430B is necessary to protect investors by “lengthening” the statute of limitations set forth under Section 13 of the Securities Act. Such resetting is not necessary under 430A, because issuers have only the 15-day window in which they can update using a prospectus supplement. After 15 days they must file a post-effective amendment which serves to reset the date of effectiveness.

Although the benefits to investors of such “resetting” under 430B would outweigh any negative consequences, one troubling aspect might be the potential for difficulty in identifying the effective dates for the securities sold in their particular takedown. While that might be a concern for takedowns that are not immediate, for immediate takedowns, the effective dates should be easy to identify, because they should occur soon after the registration statement becomes effective.

Another way 430B would affect investors is that omitted information could be supplied through incorporation by reference. Whether omitted information is provided through a supplement or through incorporation by reference, 430B protects investors with the provisions in paragraph (g) regarding subsequently filed information.

430B(g) provides:

[N]o statement in a document incorporated...by reference or a prospectus deemed part of and included in a registration statement or the prospectus will supersede or modify any statement that was in a document incorporated...by reference or a prospectus deemed part of and included in a registration statement or the prospectus as to any purchaser who had a date and time of contract of sale prior to the effective date occurring based on the filed prospectus.⁴

Reliance on Rule 409

The SEC proposal says, “Proposed Rule 430B would be a shelf offering corollary to existing Rule 430A, in that it would describe the type of information that primary shelf issuers may omit from a base prospectus.”⁵ In a sense it does so by providing that information omitted from a base prospectus pursuant to Rule 409 would be considered a final prospectus under Section 10(a) of the Securities Act. On the other hand, instead of providing a specific list of items that may be omitted, such as the list in 430A(a), 430B(a) states that a base prospectus “may omit information that is unknown or not reasonably available to the issuer pursuant to Rule 409.” As such, it seems that 430B is intended to broaden the information that may be omitted. However, reliance on 409 also introduces a new area for uncertainty, because it is unclear whether 409 contemplates information that has not yet been determined.

For example, under 430A, it is clearly permissible to omit information with respect to “discounts or commissions to dealers”. Rule 409 says, “Information required need be given only insofar as it is known or reasonably available to the registrant.” If a range for the commissions to dealers has been agreed upon, but a final number has not yet been set, under 409, does the price range for those commissions need to be included

⁴ Id. at Section XV. (Text of Proposed Amendment)

⁵ Id. at Section V.B.1.b.i.(A).

in the base prospectus? In other words, under 409, are tentative terms considered information “insofar as it is known” to the registrant? The proposal claims, “Proposed Rule 430B would...describe the type of information that primary shelf issuers may omit from a base prospectus.”⁶ However, as the above example shows, 430B falls short of describing the type of information that may be omitted. Thus, in order to protect issuers, 430B should be reworded and/or 409 should be amended to clarify what information may be omitted from a base prospectus.

If, indeed, 430B was intended to broaden the information that may be omitted, one way to clarify the rule would be to amend 430B(a) as follows:

A...prospectus...may omit information with respect to the public offering price, underwriting syndicate (including any material relationships between the registrant and underwriters not named therein), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, terms of the securities dependent upon the offering date, and/or information that is unknown or not reasonably available to the issuer pursuant to Rule 409.

Wording of Proposed Change to Rule 415(a)(1)(x)

Currently, 415(a)(1)(x) applies to securities “which are to be sold on a continuous or delayed basis”. As amended, the rule would apply to securities “which are to be sold on an immediate, continuous or delayed basis”. The disjunctive conjunction “or” implies exclusivity such that the securities could not be sold, for example, on an immediate and delayed basis. To clarify that such securities, indeed, may be sold on more than one basis, the amended rule should apply to securities “which are to be sold on an immediate, continuous and/or delayed basis”.

F. Eliminating "At-the-Market" Offering Restrictions, p 67431--Comments by Elizabeth Padley Shoemaker

Request for Comment

Would the continuous offering provisions of Rule 415(a)(1)(ix), which require that an issuer must be ready and willing to sell those securities at all times, provide enough protection in the case of ongoing at-the-market offerings, or is there a concern that unseasoned and non-reporting issuers would use these provisions to conduct delayed offerings for which they were not eligible? If so, should the requirements contained in current Rule 415(a)(4) regarding the amount of securities to be offered apply to those offerings?

Rule 415(a)(1)(ix) does not explicitly require an issuer to be ready and willing to sell those securities at all times. Neither the term “promptly” nor “continuous” is defined in the rule. Thus, an issuer might consider just two or three consecutive business days to be “continuous”. “Promptly” is not defined either, so it appears that 415(a)(1)(ix) has

⁶ Id.

created a loophole for issuers who are not eligible to use short-form registration to conduct delayed offerings. Therefore, in the case of ongoing at-the-market offerings there is a concern that unseasoned and non-reporting issuers would use the provisions of 415(a)(1)(ix) to conduct delayed offerings for which they were not eligible.

The requirements in current 415(a)(4) regarding the amount of securities to be offered sets a volume limitation at 10% of the public float volume for voting securities. Applying that limitation to 415(a)(1)(ix) offerings would offer reasonable protection to investors and would serve as a deterrent to issuers trying to take advantage of the loophole. Alternatively, investors would enjoy better protection if the loophole were closed to explicitly prohibit unseasoned and non-reporting issuers from using the provisions of 415 to conduct delayed offerings for which they are not eligible.

Are there other constraints or conditions we should impose on the types of offerings that can be conducted at-the-market?

The current proposal claims:

The market today has greater information about issuers than it did at the adoption of the “at the market” limitations, due to enhanced Exchange Act reporting. Further, trading markets for issuers’ securities have grown significantly since that time. Requiring the involvement of underwriters and limiting the amount of securities that can be sold imposes artificial limitations on this avenue for issuers to access capital in the markets.⁷

In general, the above claim is correct. However, even (or maybe especially) in today’s larger trading markets, investors should be protected from unscrupulous issuers taking advantage of loopholes. As suggested above, a volume limitation may offer investors such protection. On the other hand, if the SEC would like to eliminate “at the market” limitations, it should close the loopholes that have the potential to injure investors, because the least sophisticated investors are the ones least likely to be aware of the loopholes.

Should we continue to impose Form S-3 or F-3 eligibility as a condition to conducting primary “at-the-market” offerings of equity securities? Should nonreporting and unseasoned issuers be permitted to do at-the-market offerings?

As mentioned in the comment above, today’s market has greater information about issuers, so imposing short-form registration eligibility as a condition to conducting primary “at-the-market” offerings of equity securities serves to impose artificial limitations to access to capital on unseasoned and/or non-reporting issuers. Thus, as long as investors are adequately protected from unscrupulous issuers (e.g., those taking advantage of a loophole,) the SEC should not continue to impose Form S-3 or F-3 eligibility as a condition to conducting primary “at-the-market” offerings of equity securities. Non-reporting and unseasoned issues should be permitted to take advantage of at-the-market offerings.

⁷ Id. at Section V.B.1.b.iv.(C).

G. Rule 424 Amendments, p 67431--Comments by Elizabeth Padley Shoemaker

Request for Comment

Should we eliminate Rule 434, which we believe has only been very rarely used, in light of our other proposed procedural changes?

No. The proposed amendments to Rule 424(b)(7) Instruction 2 and Rule 434(d) and (g) appear to be a very straightforward way of aligning the proposed changes. Rare use does not sufficiently justify the elimination of Rule 434.

Would the requirement to include cover page references to where omitted information about the securities or plan of distribution may be located be helpful to investors and to issuers?

Yes. The requirements should promote accessibility of information. Identification of the reports incorporated by reference would particularly benefit the least sophisticated investors, and the SEC should be most concerned about their protection. As for issuers, such references might also help issuers keep track of what they have filed. As a further suggestion, cover pages filed electronically should contain hyperlinks to such reports if those reports have been filed electronically.

H. Issuer Undertakings, p 67431--Comments by Pauline Phuong Truong

Request for Comment

Should issuers be able to incorporate by reference Form 8-K or 6-K reports to satisfy their obligations to file post-effective amendments for certain items, in addition to those permitted today? If so, are there other disclosure and other registration statement requirements that should similarly be permitted to be satisfied through the incorporation by reference of current reports on Form 8-K or 6-K?

I support:

1. the proposal to revise Item 512 undertaking to clarify that for shelf registration statements filed on Forms F-3 and S-3 in reliance on Rule 415(a)(1)(x), all disclosures required by the undertaking can be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report that an issuer files that is incorporated into the registration statement.
2. the proposal to revise the undertaking to allow automatic shelf issuers to include in the manner described above, all other information that has been omitted from the base prospectus.
3. the proposal to amend Rule 512 undertakings to clarify that Foreign Private Issuers ('FPIs') may satisfy their undertaking obligations by the use of an incorporated Form

6-K (to be further discussed in Question iv below).

However, Form 6-K should be amended to provide a check box to indicate whether or not the Form is being incorporated by reference into any Securities Act Registration Statement, with sufficient space to identify the previously filed Registration Statement into which the Form 6-K is to be incorporated otherwise it is not clear since issuers have numerous means to effect such incorporation. This will assist investors to confirm the disclosures that are intended to be included in the Registration Statement.

Issues to consider:

1. It is ambiguous re: an underwritten offering what the ‘date and time of contract of sale’ referenced in Proposed Item 512 (a)(5)(iii) is. It should refer to the time when there is a binding agreement between the underwriter and purchaser.
2. The definition of ‘Primary offering’ should be clarified.

Are the proposed undertakings necessary?

For primary offerings on Form S-3 or Form F-3, the proposed amendments to Item 512(a) would permit **all** of the disclosures required by these undertakings to be contained in any filed prospectus supplement deemed part of and included in the registration statement or any Exchange Act report that is incorporated by reference into the Registration Statement. e.g. an issuer could use an incorporated Form 8-K or 6-K to satisfy the undertaking.

This change would essentially overcome the issues related to the post-effective amendment requirements of the current regime associated with ‘fundamental’ disclosure and changes and ‘material’ changes to the plan of distribution section, which may be ambiguous. This would also streamline current practices in a helpful way.

Is there a method other than through undertakings to achieve our objectives effectively? What is it?

Although a new undertaking (in which an issuer would agree that information in filed prospectus supplements is deemed part of the registration statements and new effective dates would occur, and setting forth additional acknowledgements etc) is good, these matters may be better reflected in a Rule setting forth the substantive effects of these undertakings and acknowledgements, rather than imposing a burden on each issuer to replicate the language in each relevant registration statement it may file.

Foreign private issuers are required to undertake to update their financial statements under Item 512(a)(4) of Regulation S-K. Should we modify this requirement? If so, how should we modify it to continue to require financial statements to be included in a registration statement within the required time?

The proposed definition of a WKSII in Rule 405 (1)(i) applies both to domestic issuers and FPIs. While both domestic issuers and FPIs may be widely followed,

currently the extent and timing of information required to be filed by FPIs is significantly less than that of domestic issuers.

The current disclosure system provides certain accommodations to FPIs, including:

1. having 6 months after the year end to file the annual report on Form 20-F,
2. interim reporting on the basis of home country and stock exchange practice rather than quarterly reports, and
3. not being subject to the current reporting requirements of Form 8-K.

Thus, a FPI that meets the definition of a WKSI would receive automatic effectiveness of a shelf registration statement on Form F-3 with financial information that is less timely and less comprehensive than would be required in the Form S-3 of a domestic issuer.

I believe that the undertakings by FPIs to update their financial statements under item 512(a)(4) and the obligations required by these undertakings, should be modified. Furthermore, I believe that the undertakings Item 10 of Form F-3 (which requires issuers to provide undertakings required by Item 512 of Regulation S-K) should be modified.

First, the undertaking in Item 512(a)(4), which applies specifically to FPI engaged in delayed or continuous offerings, requires such issuers to agree to include the financial statements by Item 8.A of Form 20-F.

The Item 512(a)(4) undertaking and the requirements of Item 8.A. of Form-20 F both require amendment because in certain cases, these rules are unnecessarily confusing.⁸ Financial disclosure obligations should be set forth in rules adopted by the Commission, rather than in staff interpretations that in some cases appear to contradict the rules.

Issues to consider:

1. Item 512(a)(4) contains reference to Rule 3-19 of Regulation S-X, which no longer exists.
2. Item 8.A.5 of Form 20-F provides that 'if at the date of the document the company has published interim financial information that covers a **more current** period than those otherwise required by this standard, more financial information must be included in the document.' The staff has viewed that this disclosure obligation should apply not only in the case of interim financial information, but also in annual financial information. Form 20-F should be revised to reflect this obligation.
3. The rules are unclear as the meaning of the term 'more current' or the means by which an issuer that is required to include more current information should do so. e.g. is posting the information on the internet sufficient? I suggest that the Commission develop a rule or formal interpretation to clarify these issues.

⁸ Footnote no. 297 in The SEC, *Securities Offering Reform, Securities Act Release No. 8501*, November 3, 2004 at page 67431 specifically states that the SEC does not propose to modify Item 514(a)(4).

4. The Commission may also need to confirm by rule or formal interpretation whether FPIs may either incorporate the financial disclosure by reference to certain sections of the Form 6-K containing the required disclosure, or file a separate Form 6-K that includes the required disclosure.
5. Many FPIs and their Counsels and accountants have questioned their ability to follow informal staff guidance where it appears to contradict the rules. It is suggested that the rules applicable to financial disclosure obligations in connection with continuous offerings by foreign issuers be amended to avoid inconsistencies between the requirements of the rules and current staff interpretations.

Second, in order to qualify for automatic effectiveness of a Registration Statement as a WKSI, the extent and timing of information available to investors at the time of a securities offering should be the same for both domestic issuers and FPI.

Thus, if FPI wants to receive the proposed benefits of automatic shelf registration, they should be required to comply with the more rigorous reporting obligations, per domestic issuers.

Perhaps there should be a qualification to the definition of WKSI to include only those FPIs that elect to comply with the domestic reporting forms (i.e. Forms 10-K, 10-Q, and 8-K), and also subject to the more stricter filing deadlines.

The Commission should also consider whether a FPI should be required to prepare its financial statements on the basis of US GAAP or IFRS in order to qualify as a WKSI.

Issues to consider:

Many FPIs have decided to avoid the registered securities markets in the US as a result of disclosure and other requirements imposed on registered issuers by the Sarbanes-Oxley Act. To what extent FPI will return to the US capital markets as a result of the proposals? Will the rigorous filing deadlines deter FPIs from returning to the US capital markets?

1. Prospectus Supplements Deemed Part of a Registration Statement and New Effective Dates, p 67432--Comments by Pauline Phuong Truong

Request for Comment

Are the proposed undertakings clear as to when issuers would be liable for prospectus supplements?

Section 11 Liability

A claim under s11 arises when any part of the registration statement at the time it becomes effective either:

1. contains an untrue statement of material fact; or

2. omits a material fact required to be included in the registration statement or otherwise necessary to make the included statements not misleading.

Proposed Rule 430B & C and Information Deemed Part of the Registration Process

Proposed Rule 430B

Rule 430B specifies that information that is unknown or not reasonably available may be omitted from a base prospectus in delayed offerings and later included in a prospectus supplement, an Exchange Act report incorporated by reference, or a post-effective amendment. (Forms S-3 and F-3 would also be amended to permit all information required in the prospectus to be incorporated by reference from Exchange Act reports or provided in the prospectus or prospectus supplement).

Also, information contained in a prospectus supplement will be deemed part of the registration statement containing the base prospectus to which the prospectus supplement relates.

Proposed Rule 430C

Rule 430C would codify similar provisions relating to shelf registrations by issuers not eligible to use Forms S-3 or F-3 for primary offerings. As a result, prospectus supplements would be considered part of the registration statement for the purposes of liability under s11 of the Securities Act.

Date of Inclusion of Prospectus Supplements in Registration Statements and New Effective Dates

Per Rules 430B and 430C, the date that the information in the prospectus supplement will be deemed to be part of the registration statement would be determined as follows:

1. for supplements filed in connection with a shelf takedown under proposed Rule 430B, the earlier of the date that the supplement is **first used** (is not the date the prospectus supplement is given to a purchaser in connection with a sale, but instead the date the prospectus is available to an underwriter or any prospective purchaser) and the date and time of the **first contract of sale of securities** to which the supplement relates.
2. for supplements filed **other than in connection with a takedown** under proposed Rule 430B or C, as applicable, as of the date the prospectus supplement is **first used**.

The proposed undertakings are not very clear as to when issuers would be liable for prospectus supplements. The Commission should clarify the meaning of the phrase ‘date it is first used’ in the proposed amendments to e.g. Rule 424(b) para 2. ‘First used’ is referred to in footnote 276,⁹ relating to proposed Rule 430 B & C, which states that ‘first use’ for the purposes of Rule 424 is not the date the prospectus supplement is given to a purchaser in connection with a sale, but instead the date the prospectus is available to an underwriter or any prospective purchaser. When exactly is a prospectus ‘available to an

⁹ The SEC, *Securities Offering Reform, Securities Act Release No. 8501*, November 3, 2004 at [page 67429](#).

underwriter or any prospective purchaser' in this context? When it is posted on the internet or when it is posted for delivery to the underwriter or prospective purchaser?

The term 'first contract of sale' is also ambiguous. It should refer to the time when there is a binding agreement between the underwriter and purchaser.

Should we require an undertaking by closed-end management investment companies in Form N-2 acknowledging that a prospectus supplement would be deemed part of and included in the relevant registration statement as of the date of its first use, similar to the undertaking we are proposing to require in Regulation S-K? What modifications to the proposed undertaking would be appropriate for closed-end management investment companies?

The proposals prohibit investment companies, including open-end funds and closed-end funds and business development companies (BDCs) from taking advantage of the rules that would increase flexibility for securities offerings because:

1. their activities are subject to the Investment Company Act 1940; and
2. in the case of open and closed end investment companies, they are subject to disclosure requirements under the Exchange Act that differ from those that apply to operating companies.

BDCs should be allowed to use the new registration process, including shelf registration and forward incorporation by reference to the same extent as operating companies.

Closed end investment companies can elect to be regulated as BDCs under s54 of the Investment Company Act 1940.

These BDCs are:

- subject to the Exchange Act reporting provisions (using Forms 10-K, 10-Q and 8-K).
- not considered to be an 'investment company' for the purposes of the provisions of the Investment Company Act applicable to open- and closed- end funds.
- Securities Act offerings by BDCs are, through Commission staff, registered on Form N-2.

Currently BDCs and closed-end funds are prohibited from utilizing Rule 415 shelf registration procedures for general capital raising because they use Form N-2¹⁰ rather

¹⁰ Defined in footnote no. 302 of the SEC, *Securities Offering Reform, Securities Act Release No. 8501*, November 3, 2004 at page 67432 as: 'the registration form used by closed-end management investment companies to register under the Investment Company Act of 1940 and to offer their securities under their Securities Act.'

than Form S-3 (for seasoned issuers and WKSIs) to register their securities. This does not permit incorporation by reference to their periodic reports.

Proposed rules should apply equally to BDCs so as to encourage more disclosure by BDCs to the investing public, encourage more timely disclosure, per objective of the Commission.

It is recommended that Rule 415 and Form S-3-like incorporation by reference be extended to Business Development Companies ('BDCs') that satisfy the requirements of Form S-3 because their characteristics (which are not shared by traditional closed-end investment companies, e.g. BDCs are registrants under the 1934 Act, file the same periodic reports under 1934 Act, provide disclosure in their prospectuses like other 1934 Act Registrants etc.) mean that they should be treated like other registrants.

To achieve the same benefits for BDCs that operating companies have with Form S-3, it is recommended that the Commission allow BDCs to incorporate by reference into their Form N-2 Registration Statements their Forms 10-K, 10-Q and 8-K, and to utilize the new shelf registration streamlining procedures for Form S-3 embodied in the Proposals.

Closed-end funds that do not elect to be BDCs should not be able to do the above because their regular Exchange Act Reports are different in scope from Form 10-K and 10-Q. Furthermore, their Exchange Act Reports are filed only semi-annually and they do not file current reports on Form 8-K.

Updating a shelf Registration Statement by incorporation by reference facilitates the offering of securities for seasoned issuers and should be encouraged.

J. Changes to Form S-3 and Form F-3, p 67432--Comments by Pauline Phuong Truong

Request for Comment

Should we expand Forms S-3 and F-3 eligibility only for wholly-owned subsidiary guarantors, instead of majority-owned subsidiaries?

To be a WKSI, Rule 405(1)(i) requires that:

1. The issuer has either
 - a) public common equity float of \$700 million or more; or
 - b) for the purposes of registering debt only securities, at least \$1 billion aggregate amount of registered debt securities issued in the last 3 years.
2. The issuer be eligible to file a registration statement on Form S-3/F-3 for primary offerings.
3. The issuer must file reports pursuant to s13 or 15(d) of the Exchange Act and has been required to file such reports for at least the last 12 calendar months.
4. The issuer has filed all materials required to be filed during the preceding 12 calendar months and any portion of a month immediately preceding the date of determination, other than a report that is required solely pursuant to Form 8-K.

5. The issuer is not an ineligible issuer as defined in the proposed Rule 405.

I concur with the Commission that WKSIs should be limited to those issuers that 'have a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace.'¹¹ By definition, WKSIs are good guarantors.

Under the proposed WKSIs definition, a majority-owned subsidiary of a WKSIs would be considered a WKSIs itself in respect of offered securities (even if it does not separately meet the eligibility criteria of the WKSIs definition) if:

- a. the parent WKSIs provides a **full and unconditional guarantee** (defined in Rule 3-10 of Regulation S-X) the subsidiary's payment obligations and the subsidiary's securities are non-convertible obligations,
- b. the offered securities are guarantees of
 - i. **non-convertible obligations** of the issuer's WKSIs parent,
 - ii. **non-convertible obligations** of another majority-owned subsidiary where such non-convertible obligations are fully and unconditionally guaranteed by the WKSIs parent, or
- c. the offered securities are non-convertible obligations that are **fully and unconditionally guaranteed** by another majority-owned subsidiary of the WKSIs parent, which itself is a WKSIs. (other than pursuant to paragraph 2 of the WKSIs definition)

Forms S-3 and F-3 should not be amended to expand the categories only for wholly-owned subsidiary guarantors. Majority-owned subsidiaries should be eligible to register their non-convertible securities or guarantees under General Instructions I.C. of the respective forms. This allow majority-owned subsidiaries to be treated as WKSIs for the purposes of issuing its own securities on Forms S-3 and F-3, if certain conditions are satisfied, including full and unconditional guarantee from the parent WKSIs and non-convertible obligations are involved.

For registration purposes, the difference between a majority-owned and wholly-owned subsidiaries of a registrant relates to the information that investors need in order to make an investment decision. The Commission's existing rules e.g. Item 3-10 of Regulation S-X already sufficiently addresses this difference.

The creation of the automatic shelf registration process for WKSIs and their majority – owned subsidiaries, would provide those issuers eligible to utilize the process substantially greater latitude in registering and marketing securities, per the Commission's objective and to enable a wide number of issuers to participate.

¹¹ The SEC, *Securities Offering Reform, Securities Act Release No. 8501*, November 3, 2004 at page 67396.

K. Automatic Shelf Registration for Well-Known Seasoned Issuers

1. Automatic Shelf Registration Mechanics, p 67433-- *Comments by Christine Michelle Weaver*

Request for Comment

Should eligibility for automatic shelf registration be limited to well-known seasoned issuers? If not, provide empirical and other information explaining why it should be available to a broader class of issuers, including the extent to which such issuers are followed by analysts and investors in the market.

No, at least not entirely. While it makes sense to exclude issuers who are ineligible for Well-Known Seasoned Issuer (WKSI) status based on factors other than market cap, it does not make sense to base many of the benefits of automatic self registration benefits upon market size.

For example, “pay-as-you-go” only allows a security issuer to avoid paying the costs of a security offering months or years in advance of when the capital actually becomes available to offset the costs. Whether an issuer pays the fees in advance or utilizes “pay-as-you-go” makes no difference in investor protection. However, allowing the largest market cap companies to pay for securities only as they take them down from the shelf offers them an advantage denied to their smaller competitors. Small corporations already feel that SEC regulations burden them disproportionately to large corporations. Absent an investor protection rationale, giving special benefits to the largest corporations only reinforces the perception that the S.E.C. is unfair to small business. “Pay-as-you-go” should be available to all Form S-3 and Form F-3 issuers who are eligible to file for universal shelf registration.

The remaining provisions of automatic shelf registration are more complicated. The provisions permitting issuers to “add additional classes of securities and eligible majority-owned subsidiaries as additional registrants after an automatic shelf registration is effective” and to “permit more information to be excluded from the base prospectus” deal directly with issues involving investor protection and are more complicated.

Some would argue the SEC proposals lead to a conclusion that “access equals delivery” and that the difference in market analysis for WKSIs and for universal shelf registrants, who are required to have a market cap of at least \$75 million, is negligible. This argument has merit, however, allowing an issuer to add new securities and the securities of majority-owned subsidiaries to the shelf at any time prior to takedown without any time delay is a significant change to the shelf registration process. The market will need time to adjust and work out the kinks in the system; it would be less disruptive to begin with a select few issuers (such as the WKSIs) and evaluate the automatic registration process in two years. If the process has not been abused and not caused disruption after two years, then the SEC should strongly consider expanding automatic shelf registration eligibility to all universal shelf registrants excluding those with recent securities violations or bankruptcies.

2. Information in a Registration Statement, p 67435-- Comments by Christine Michelle Weaver

Request for Comment

Should we permit omission of additional information from the base prospectus under automatic shelf registration? For example, should we permit omission of all information regarding the description of securities other than the identification of the classes of securities registered?

As proposed, the omission of information such as whether the offering is a primary or secondary offering does not pose any risk to investors provided they receive this information prior to sale of the securities.

However, I am concerned that the plan of distribution for the securities may not be available until the time of sale. While corporate capital needs shift quickly, and a two-year plan of distribution may not be adequate in today's quickly changing marketplace, I think securities holders have a right to know in advance for what purpose the securities are being sold. As needs change, the issuer ought to be permitted to file immediately effective amendments to the prospectus indicating plan of distribution at any time prior to seven days before the takedown. The release of information would give the market time to digest the information before sales begin.

Under current practice, base prospectuses do not contain detailed information about the securities being offered. Antifraud provisions prohibit issuers from excluding materially important information if the omission would make the statement misleading. Furthermore, much of the information desired in the prospectus is already known in the market through EDGAR filings and the like. As a result, I see no reason to require automatic shelf registration statements to contain more information in the base prospectus than would be required in non-automatic shelf registration statements.

Should we permit omission of less information in the base prospectus under automatic shelf registration? What additional information should we require?

In a contrary vein, unless the security sellers are affiliates of the issuer, I see no purpose in requiring that the issuer disclose the identity of selling security holders. While market participants might like to know if founding family members several generations removed or Wall Street bigwigs are selling their stake in an issuer, the information creates an overhang and depresses the price. The impact to issuer and the seller are greater than the market protection afforded. Absent an affiliate's interest in a corporation, the identity of securities sellers should remain private.

Should we make automatic effectiveness optional for automatic shelf registration statements? If so, why?

As noted on 69 Fed. Reg. 67432, the most significant purpose of the automatic shelf registration process would be to provide Well Known Seasoned Issuers (WKSI) with "flexibility" in raising capital through the registration process. Maximum flexibility should permit maximum choice. An issuer may prefer some of the mechanisms of

automatic registration such as “pay-as-you-go” and the ability to add additional types of securities without having to file a post-effective amendment, but may wish to delay effectiveness in order to please an underwriter or to resolve an auditing issue.

If a well-known seasoned issuer did not want automatic effectiveness of its automatic shelf registration statement, should they still be able to use the automatic shelf registration statement process?

Yes. See Above.

Should we permit well-known seasoned issuers to elect to include a delaying amendment under Securities Act Section 8(a)? If so, in what circumstances?

WKSIs should be permitted to elect to include a delaying amendment under Securities Act Section 8. Footnote 306 on 69 Fed. Reg. 67432 indicates that it is hoped that “this process would facilitate the registration under the Securities Act of rights offers conducted by eligible foreign private issuers. However, foreign private issuers may need additional SEC comments and assistance in preparing a shelf registration. Rather than risk the SEC suspending automatic effectiveness or Section 5 liability because of defects in the registration statement, these foreign private issuers may prefer to place a delaying amendment. In the same vein domestic WKSIs may desire similar measures if they are registering an unfamiliar type of security. Admittedly, under both scenarios, the issuers can utilize the universal shelf registration process rather than automatic shelf registration. However, if flexibility is the goal, then delaying amendments should be permitted in automatic shelf registration.

Should we condition automatic effectiveness on resolution of staff comments? Why or why not?

Yes, Automatic effectiveness should be conditioned on resolution of staff comments. Automatic shelf registration is designed to permit issuers flexibility in raising capital without a decline in investor protection. However, if the issuer has unresolved comments regarding other offerings or periodic reporting, investors need additional protection and automatic effectiveness should not be available to an issuer. This is a logical progression from the eligibility criteria for Well Known Seasoned Issuers. Issuers who are not current in their reporting requirements, who have agreed to a consent or who have been convicted of a securities violation are ineligible for WKSI status. Issuers who have unresolved comments hover between eligibility and ineligibility. For the protection of investors, it makes sense to refuse to deny new automatic shelf registrations until the staff comments are resolved.

However, when the corporation already has a shelf registration filled through the automatic shelf registration process, an appropriate reaction becomes more complicated. Staff comments do not necessarily mean that the company has engaged in fraud or even filed incorrectly. Staff comments are not a punitive measure, and do not carry with them due process protection. As a result, suspending automatic effectiveness of an already effective shelf registration statement is too harsh a reaction unless the comments are

related to the shelf registration statement or documents incorporated by reference into the registration. Under such circumstances, the automatic shelf registration should be frozen until the staff comments are resolved. All this would mean is that the issuer could not effect a takedown until after the staff comments are resolved. Because time is of the essence in shelf offerings, the SEC should develop strategies to limit the time that the effectiveness of an automatic shelf registration is frozen. In the alternative, automatic shelf registrants should be required to disclose in the final prospectus that there are unresolved comments from the SEC staff and the nature of the unresolved comments. This warning should appear prominently within the final prospectus.

In view of the recent changes affecting reporting issuers with respect to their Exchange Act reports, including among other things, accelerated filing deadlines for periodic reports for accelerated issuers, and issuer certifications of periodic reports and evaluation of disclosure controls and procedures and internal controls over financial reporting, as well as changes in the listing standards intended to improve corporate governance and enhance the role of the issuer's audit committee, should we consider whether to reevaluate the factors discussed in Securities Act Rule 176 regarding what constitutes a reasonable investigation and reasonable grounds under Securities Act Section 11(c)? If so, please explain specifically what changes should be made and how each of those changes would work in the context of each type of registered securities offering.

Reevaluation when significant changes occur in the securities market is always a good idea. Investor protection demands that gatekeepers such as underwriters be held accountable. On the other hand, underwriters can not be expected to perform the same due diligence on an automatic shelf registration takedown two years after effectiveness as they would on an IPO. It is not economically or practically feasible. Underwriters should be held accountable under Section 11 in automatic shelf registration statements where there are red flags indicating that further investigation beyond the original due diligence is warranted. For example, an underwriter would not be protected if he relied on accounting statements when the Sarbanes-Oxley 404 report indicates problems in internal controls, unless the underwriter can show that the underwriter investigated the areas where internal controls were lacking and found no material defects. However, the underwriter may be protected if after investigating the internal controls, a strongly worded cautionary statement is included in the registration statement alerting investors that the data may be compromised due to internal control problems. The duty of underwriters to act as gatekeepers and protect investors must not be relaxed.

3. Duration, p 67436--Comments by Christine Michelle Weaver

Request for Comment

Should automatic shelf registration for well-known seasoned issuers be optional, as proposed, or mandatory? Would mandatory automatic shelf registration eliminate any market overhang effect? Would it create any uncertainty?

Automatic shelf registration should be optional. As noted above, the purpose of the proposed regulations is to offer issuers maximum flexibility in raising capital through registered offerings. Flexibility requires choice.

Should we treat automatic shelf registration statements the same as non-automatic shelf registration statements and require that a new automatic shelf registration statement be filed every three years? If so, is three years appropriate or should we increase the requirement to five years or reduce it to two years?

Automatic shelf registration statement should be treated the same as non-automatic shelf registration statements in regard to duration. Although for some stable WKSIs circumstances will not change significantly over the course of three years, requiring a renewal of stale registration statements protects investors. It requires that careful thought be given by management and their team of lawyers to the accuracy of the statement, and provides underwriters, accountants and other experts with the opportunity to perform careful, complete due diligence. If updates are made, it protects issuers and underwriters from liability as new takedowns are made. In order to balance the costs, however, the SEC proposal to carryover any fees paid on the prior registration statement to the new statement should be implemented.

Is the pay-as-you-go filing fee procedure workable? Could it be made more workable? If so, how?

“Pay-as-you-go” is workable as proposed. In fact, under the provisions permitting addition of new classes of securities after the registration becomes effective, “pay-as-you-go” is the only workable filing fee procedure. Otherwise, if the company has to pay a fee whenever it adds new securities, the offering may be delayed.

Some commentators have suggested allowing issuers to pay part of the fees in advance particularly when the issuer is planning an immediate or imminent takedown. This suggestion makes sense. As long as fees are collected in a timely manner before or during takedown, it should make no difference when the issuer pays.

What advantages or disadvantages would result from mandatory automatic registration in terms of the inability to undertake unregistered private offerings or other unregistered offerings?

It will be easier to undertake registered offerings and may reduce the number of unregistered offerings, but I do not see how the rules would impact ability to make unregistered offerings.

Should we provide by rule or interpretation guidance regarding the ability of issuers to undertake private offerings while they have automatic shelf registration statements on file?

No comment.

Should we adopt a less stringent presumption of proper form that would allow the Commission to object within some period of time after the initial filing (and automatic effectiveness) instead of on a prospective basis? What would be an appropriate period of time? 10 days? 15 days?

The SEC should adopt a presumption of proper form. However, the Commission should be allowed to object if proper form is clearly not followed. The appropriate period of time should be ten business days. Clearly erroneous form in a shelf registration statement should be recognized by the market within ten business days, and an alerted SEC would have time to act. At the same time, the issuer would not be burdened by worry that the SEC might object within a month. Rather SEC comments could be dealt with promptly. However, I am concerned about immediate takedowns and the repercussions a 10 day window might have on sales. Perhaps, in these cases the issuer should request prospective approval before filing the registration statement.

L. Unseasoned Issuers and Non-Reporting Issuers

1. Proposed Procedural Requirements, p 67437-- *Comments by Kristi Demetric Ann Matthews*

Request for Comment

Should we require as a condition to incorporation by reference that all Exchange Act reports within a 12-month period (or such shorter period that the issuer was required to file such materials) have been timely filed?

Yes. The purpose of having categories of issuers is to provide those issuers who have proven themselves as reliable and responsible the means to incorporate prior information by reference. In allowing unseasoned issuers to incorporation by reference they would need to exercise the same actions as issuers in higher categories in order to enjoy the benefit.

Should there be other eligibility conditions? If so, what should they be?

No. The eligibility conditions as noted under the proposed rule are sufficient.

Should we have the same ineligibility conditions as we have for the use of a free writing prospectus? Should there be other ineligibility provisions for financially troubled issuers?

Yes, however the proposed amendment already have the same ineligibility guidelines listed with its proposal as the ineligibility conditions for the use of a free writing prospectus.

No. There should not be any other ineligibility provisions for financially troubled issuers. The ineligibility provisions are quite exhaustive.

Should there be ineligibility provisions for issuers that have disclosed a material weakness in their internal controls over financial reporting?

Yes, one of the central purposes to the Exchange Act was to encourage an efficient internal control mechanism within issuing corporations. The purpose of incorporation by reference is to alleviate duplicative reporting for established issuers. If an issuer has a material weakness, they should continue to operate under the regular rules which will allow for transparency in determining if the issuer has remedied the material weakness.

Should we consider allowing forward incorporation by reference in Form S-1 and Form F-1? If so, what conditions should we impose on such use?

Yes. We should allow forward incorporation by certain issuers under the reporting guidelines of 13a or section 15d of the Exchange Act of 1934. All information provided in forward incorporation must have been reasonably omitted, and not a deceptive practice.

Should we require that issuer's maintain their own web sites as a condition to incorporation by reference or should the issuer be able to provide a uniform resource locator (URL) to the particular location on another web site, such as the Commission's, where the issuer's Exchange Act reports would be located? How long should the issuer be required to include the information on its web site or provide the URL to where the reports are located?

Yes. The issuer should be required to provide a URL to the particular location on another website, or maintain the information on their websites as a condition to incorporation by reference. The issuer should be required to include the information on its web site or provide the URL to where the reports are located for up to 2 years after the initial filing of the reports.

2. Elimination of Form S-2 and Form F-2, p 67437-- *Comments by Kristi Demetric Ann Matthews*

Request for Comment

Should we eliminate Forms S-2 and F-2? If not, why not? What types of reporting issuers would continue to use Form S-2 and Form F-2 if the proposed amendments to Form S-1 and Form F-1 regarding incorporation by reference are adopted?

Yes. The acceptance of the S-1 and F-1 incorporation by reference rules would allow the majority of current S-2 and F-2 issuers to move to S-1 and F-1 documentation, thereby making the need for Form S-2 and F-2 obsolete.

V. Prospectus Delivery Reforms

A. Prospectus Delivery Proposals

1. Access Equals Delivery, p 67439--Comments by Kristi Demetric Ann Matthews

Request for Comment

Would the adoption of the proposed condition that the final prospectus be on file within the required filing time period of Rule 424 affect either the timing of filing of final prospectuses or the use of the proposed rule?

No. The current rule states the time that the prospectus must be sent to the investors. Allowing the issuer to post the documentation and information on the web should be easier and quicker for the issuer to fulfill and not negatively affect the filing time period of Rule 424.

Should we consider any cure provisions in the event that the final prospectus is not filed within the required timeframe? Or notice inadvertently not included?

Yes, only if it was an unintentional failure to provide the prospectus or notice in the required framework. However, if a final prospectus or notice is not delivered or included, and there are no reasonable explanations, then the same penalties that are incurred under the regular prospectus Rule 424 should apply, as under 12b.

Would the cost of receiving a final prospectus shift to an investor so that the investor would not access the final prospectus?

No, the cost of receiving the final prospectus would not shift to the investor in such a manner that the investor would not access the final prospectus. In most cases, the investor has researched the company on it own and has decided to invest within a corporation before receiving a final prospectus, as noted within the request for Comments. Investors are still likely to invest within the corporations, irrespective of physically receiving a final prospectus.

Should investors be able to request a copy of a prospectus in all cases?

Yes, investors should be able to request a copy of the prospectus in all cases. Many investors would like being able to access a copy of the prospectus at their leisure, however some investors like receiving physical copies. While, I think the former group of investor is likely to be more prevalent than the latter, copies of prospectuses should be available for investors who request them.

Should we restrict the operation of the provisions only to capital formation transactions?

No. The operations of this provision should not be limited to issuers who are raising capital through capital formation transactions. Other transactions benefit from the easy access and operations of the proposed rule.

Should we limit the operation of the new proposed rule regarding prospectuses only to offerings made in reliance on Rules 430 and 430A, and proposed Rule 430B?

No. The proposed rule need not be limited to offerings made in reliance to Rules 430, 430A, or proposed Rule 430B. There are other operations regarding prospectuses that can benefit from proposed Rule 172 under the access equals delivery concept. These types of issuers should not be excluded unless they do not meet the eligibility for using proposed Rule 172.

Should the proposed rules be available for continuous and best efforts offerings, where the final prospectus may be used by the issuer and underwriters or placement agents to offer and sell the securities?

Yes, under continuous and best efforts offering information concerning the sale of a security may change and vary. Having a prospectus online in a central location, accessible to investors would be beneficial to investors, as long as the issuers kept the prospectus in accordance to rule 10 a and 5b2.

Should we consider extending an access equals delivery concept to the obligation in Exchange Act Rule 15c2-8 to deliver preliminary prospectuses?

Yes. Rule 15c2-8 of the Exchange Act requires that the issuer take reasonable steps to deliver a preliminary prospectus to interested parties who makes a written request for such information and to interested parties who expect customer's solicitation of orders. An access equals delivery concept can be considered a reasonable deliverance of a preliminary prospectus. This concept will allow the investor to have access to the preliminary prospectus, in such a manner as proposed for the final prospectus. As long as the issuer, in accordance with Rule 15c2-8, amended the preliminary prospectus as new information was gathered, an access equal delivery concept for preliminary prospectus would still satisfy the issuer's obligations under Rule 15c2-8.

Commenters and others have recommended that we amend our rules to provide that confirmations incorporate by reference the final prospectus. Given our broad exemptive authority to address the issue more directly, we have not proposed such an approach. Would it be more appropriate to provide that confirmations incorporate by reference the final prospectus? If so, why?

No. All confirmations should include a complete confirmation because investors would be given at least one document with all of the pertinent information concerning the purchase of their security. This eliminates any potential mistakes and or deception on the part of the issuer with regards to the final statement concerning the confirmation of a sale.

Should we condition the availability of proposed Rule 172 on an issuer either posting the final prospectus on its web site or providing a hyperlink directly to the final prospectus on EDGAR? Alternatively, should we require issuers to disclose whether or

not their final prospectuses will be available on an issuer's web site, if it has one, after the final prospectus is filed on EDGAR?

Yes, the information should be easy to obtain by the investor. Issuers should either provide posting of or a hyperlink to the final prospectus. Issuers should also disclose whether or not their final prospectuses will be available on the issuer's web site after the final prospectus is filed on EDGAR because it provides additional information to the investor.

Is the notice requirement of proposed Rule 173 appropriate? What should be the timeframe for the notice proposed to be required under proposed Rule 173? Should it be longer than the two business days?

Yes. The notice requirement under proposed Rule 173 is appropriate. The timeframe of the notice requirement should be extended to five (5) business days. This gives the issuer ample time to verify all information to ensure that the investor receives an accurate notice of confirmation.

Should we amend the rules regarding record making and keeping by registered brokers and dealers to clarify any obligation arising under this proposal if we adopt this proposal?

Yes. All obligations and requirements should be indicated in the rules. If the proposal changes any of the obligations with regards to record making and record keeping by brokers and dealers, then the changes should be clearly listed in the rules.

2. Confirmations and Notices of Allocations, p 67440-- Comments by Michael Jacob Bercovich

Request for Comment

Should the notice of allocation include other information? If so, what type of information should be included in these communications?

Under the proposed rule the notices of allocations could include the name of the securities, the amount allocated to the customer, the price of the securities, and the date or expected date of settlement and incidental information. I feel that this list encompasses most of the important things that should be included within these allocation notices, however one thing is conspicuously missing. The new rule's goal is to prevent the waste and time needed to provide a prospectus after a sale, because these prospectuses can be readily accessed from the internet. If this is the case, I believe that the notices of allocations should also include a direct link to a website where the prospectus can be found. I also believe that the notices of allocation should mention not only where the prospectus can be found, but also give information where the investor can obtain a copy of the prospectus. Many investors may still find it vital to look through the prospectus as they make future investment decisions.

Should the notice of allocation to participating dealers be required to contain any particular information?

Just as the comment above, I also believe it is important that information regarding the prospectus must be included within the notice of allocation to the participating dealers. It may even be more important to give this information to the participating dealers because they are dealing with more investors than the individual investor himself.

Should any information be restricted or prohibited in the notices?

I don't feel that any information needs to be restricted or prohibited in the notices. Obviously the prospectus itself is an encompassing document and the fact that the notice of allocation is replacing some of its functions, there should not be any restrictions on information contained within this notice. If the issuer or underwriter wants to add more information to the notice of allocation then they should be able to do so.

Should we amend the record making and keeping rules by registered brokers and dealers if adopt this proposal?

I do not believe that the record making and keeping rules by registered brokers and dealers need to be changed if they adopt this proposal. However, one thing that must be recorded and kept if the new rule is adopted is that a clear record of the notices of allocations must be kept. If prospectuses are no longer being delivered it is important that all information based upon the sales and allocations of securities be recorded. This would help prevent any arguments whether or not the proper information was delivered to the investor.

3. Transactions Taking Place on an Exchange or Through a Registered Trading Facility --Rule 153, p 67440-- *Comments by Michael Jacob Bercovich*

Request for Comment

Are our beliefs accurate regarding the current use of Rule 153 and the additional impracticalities caused by transactions through other markets or on other trading facilities?

I believe that the beliefs regarding the current use of Rule 153 are accurate and that it is important to extend the scope of the rule to other markets or trading facilities such as NASDAQ. Obviously, there has been a growth in importance of these markets over the last few years and there should be no doubt that they be included into the scope of this rule.

Is there a reason why continued delivery to an exchange or to a market maker would be helpful?

I feel that continued delivery to an exchange or market maker is not necessary, but since it still may be helpful, this practice should continue. The fact that the prospectuses are readily available online makes it unnecessary that this information be delivered to the exchange market. However, by requiring its delivery it would provide another source of protection for these markets against issuers that have a problem with their securities. It is not a strenuous request to require this delivery and it would allow the exchanges to have immediate access to these prospectuses as the sale is taking place.

Should there be a requirement for the issuer, broker or dealer to notify the exchange or trading facility that the final prospectus is or will be on file with us?

I definitely believe that the issuer, broker or dealer should notify the exchange or trading facility that the final prospectus is or will on file with SEC. There are two distinct reasons that this action should be taken. To begin with, by requiring notification to the markets that the prospectus is filed with the SEC, it gives the exchange notice that the issuer's sales of securities are effective. The second reason that the notification should be required is that gives the exchange information where they can find the prospectus if they have any need for it.

Should our new proposals apply to all transactions effected through a national securities exchange or through a facility of a national securities association or an alternative trading system?

I believe that the wide dissemination of other markets such as NASDAQ make it very important that each of these types or markets are included within Rule 153. The importance of these markets have increased over the past decade and as long as there are reputable markets which are filed with the SEC then they should be able to fall under the scope of Rule 153.

Is there a reason to repeal Rule 153 in its entirety in view of proposed Rule 172?

Even though Rule 172 is comprehensive in its application of final prospectus delivery, it is unnecessary to repeal Rule 153. Rule 153 deals mostly with secondary offerings between members of the same exchange. It is helpful that Rule 153 is in effect because it helps dispel any confusion between primary and secondary offerings. By keeping Rule 153 there are no questions regarding the encompassment of Rule 172 and it is unnecessary to repeal the rule.

How are prospectus delivery obligations of selling security holders satisfied today?

No comment.

Should the rule be available to primary offerings of securities by issuers? Such as issuer sales of securities into an existing trading market?

I do not feel that it is necessary that Rule 153 be extended to primary offering of securities by issuers. Other rules such as Rule 172 cover many primary offering requirements and it can still be helpful that there is a specific rule regarding these secondary offerings taking place exclusively on the same exchange markets. By making this rule available to primary offerings, there are less protections afforded to the investor and are unnecessary to be included within this rule.

4. Aftermarket Prospectus Delivery --Rule 174, p 67441-- *Comments by Michael Jacob Bercovich*

Request for Comment

Should proposed Rule 172 be made available to aftermarket delivery obligations as proposed?

I believe that proposed Rule 172 be made available to aftermarket delivery obligations as proposed. The fact that most people can access the prospectus online makes it unnecessary for the actual aftermarket delivery of the prospectus. Any investor can go to the broker and receive a printed copy of the prospectus and thus making it inefficient to require aftermarket delivery obligations.

Are there other changes that should be made to Rule 174 that would assist dealers in satisfying their aftermarket delivery obligations?

I believe that proposed Rule 172 would effectively satisfy all aftermarket delivery obligations and thus it would be unnecessary to make any other changes to Rule 174.

As proposed, consistent with existing Rule 174(g), we propose to retain specific prospectus delivery obligations for blank check companies. Should blank check companies be excluded from proposed Rule 172 or proposed Rule 174 or, if not, should there be additional requirements in proposed Rule 172 or proposed Rule 174 for blank check companies? Should shell companies and penny stock issuers be eligible to use proposed Rule 172 and proposed Rule 174?

No comment.

VI. Additional Exchange Act Disclosure Proposals

A. Risk Factor Disclosure, p 67442--Comments by Robin S. Nourmand

Request for Comment

Should we require risk factor disclosure about specific matters that are in addition to those referred to in Item 503 of Regulation S-K? If so, what are they?

I believe the discussion of risk factors should also discuss developments in the industry that may significantly contribute to the speculative or risky nature of the security. Often a structural change in the industry, or even the possibility of one (e.g. a looming threat of a price war, etc.), can derail the financial performance of a company. For instance, if the merger of two large competitors will yield significant scale economies that will make it hard for the subject firm to maintain, much less grow, market share, such information should be disclosed in the risk factors section. Similarly, if the firm faces an increasingly strong supplier or buyer base, such a fact would seriously jeopardize the ongoing performance of the company and should be disclosed.

Furthermore, depending on how far the SEC wants to go in informing the public about investment risks, it could require issuers to disclose a statement whereby growth stocks (e.g. those with higher valuation multiples, such as P/E ratios) state how sensitive their stock performance is to their future growth rates. The SEC could require companies to mention that downward revisions in growth rates and missing targets is more likely to send the security tumbling than in other securities where the present value of future growth is not as significant an issue.

Are there ways, in addition to those we have used in Item 503 and our plain English rules and our guidance on MD&A, to ensure that issuers include meaningful, rather than boilerplate, risk factor disclosure?

As discussed above, the SEC should also require issuers to comment on industry and valuation specific risks, in order to give issuers a framework to follow.

Furthermore, it should explicitly require issuers to not include general/boilerplate statements of risks that affect all issuers. The SEC should specifically mandate that issuers be specific in the disclosures they make. The SEC should require that firms use concrete figures and examples when discussing risk factors, such as “lack of profitable operations in recent periods” and “financial position.” Instead of allowing issuers to make boilerplate comments, the SEC should have firms quantify what they mean and compare their “financial position” to those of industry leaders and industry laggards. If a firm is diversified and operates in different industries, this disclosure can be branched out in order to cover all such divisions.

The main problem with these recommendations is that they create monitoring and enforcement costs for the SEC. However, monitoring and enforcement is one of the main purposes of the SEC’s existence. While superfluous monitoring tasks should be avoided, here, the monitoring cost is worth the enhanced information that risk disclosures will provide investors.

Also, the SEC should be mindful that if the risk disclosure section repeats much of the MD&A section’s disclosures, readers will become frustrated with the document and desensitized to its content. Therefore, where these risk disclosures overlap with risk disclosures in the MD&A section, issuers should include hyperlinks in the MD & A section and incorporate by reference risks that have already been (clearly and concisely) disclosed in the new risk disclosures portion of the Exchange Act filing.

Should we extend risk factor disclosure requirements to Forms 10-KSB and 10-SB?

To the extent that these small businesses include such disclosures in their MD & A and 503(c) filings, these entities should not have to bear an increased burden of disclosure, as it could become cost-prohibitive. Ideally, if these businesses have access to information that can be synthesized to create these disclosures (at the level discussed above), the filers should do so, due to the strong policy encouraging full disclosure. However, if they do not have data readily available, they should not have to invest significantly in creating these disclosures, especially if the disclosures themselves may turn out to be speculative (e.g. if a firm, in good faith, cannot accurately estimate what effect a revision in earnings growth would have on the price of its securities).

B. Disclosure of Unresolved Staff Comments, p 67442-- Comments by Robin S. Nourmand

Request for Comment

Should we require disclosure of unresolved staff comments in quarterly reports as well?

Unresolved staff comments should be disclosed in quarterly reports if and only if they were not disclosed in the annual reports (i.e. because they were not required to be disclosed, based on the SEC's proposed criteria) and would be disclosed if an annual report were to be filed on the date when the quarterly reports was to be filed. That is, if the comments (1) were material, (2) were made more than 180 days before the end of *the fiscal quarter* and (3) remain unsolved when *the quarterly report* is filed (and did not appear in the annual report), then they should be disclosed in the quarterly report. This way, the SEC would keep the pressure on/incentive for issuers to expeditiously respond to staff comments, even after the filing of annual reports.

Furthermore, if a comment were disclosed in a previous annual or quarterly Exchange Act filing and it has still not been resolved by the next annual or quarterly report, it should be incorporated by reference. The issuer should state that the specific issues disclosed in the previous Exchange Act filing have not be adequately addressed. This way, the issuer continues to have the incentive to respond to and resolve the staff concerns even after it has disclosed them once. It also allows investors to stay abreast of the current status of SEC staff comments and will alert them if certain comments remain chronically unresolved.

Is 180 days the right timeframe to resolve outstanding staff comments? Is it too short? Is it too long?

The 180 days guideline does not necessarily seem too short or too long, but it does seem somewhat arbitrary. Personally, I believe one quarter (90 days) should be enough for issuers to respond to SEC staff comments. If the staff feels that its resources would be strained if it had to live up to 90 day lead times, then perhaps 180 days is not too long.

Additionally, I would propose that the staff be able to classify certain comments as more urgent than others. In such cases, the staff could require disclose of unresolved comments even if 180 days have not passed. For instance, for certain comments, the SEC

staff could require that they be disclosed if they are unresolved 90 or 60 days following receipt by the issuer. The problem is that if the issuer and SEC staff could not possibly resolve the issue by that time limit, then they may not even bother trying and may be content disclosing the unresolved comment in the following Exchange Act filing. Thus, it is important that the time limits the SEC chooses are realistic.

Should the 180 days be calculated from the date of the initial written comment letter from the staff, regardless of comments received after that date that relate to or arise from the original comments or issuer responses to the original comments?

The 180 day time limit should be calculated from the date of the initial comment letter for three main reasons. First, 180 days is a long time and should be ample for the issuer to resolve the issue(s). Second, it doesn't allow the issuer to "push back"/"restart the clock" by submitting incomplete responses to the SEC. Finally, keeping this strict timeline will require the issuer to resolve the issue as soon as possible and therefore reinforces the issuer's incentive to expedite.

Should we require the proposed disclosure of unresolved comments to also appear in Form 10-KSB reports filed by small business issuers?

Small business issuers likely don't have many reasons to be treated differently, other than that they may lack the resources to respond within the 180 day window. If this is true, then they should be afforded more time.

Should we require the proposed disclosure of unresolved comments to also appear in Form 40-F?

No comment.

Should we require issuers to list each outstanding comment in its disclosure by repeating the comment verbatim as issued by the staff? Should we permit issuers to paraphrase or summarize the outstanding staff comments?

Issuers should repeat SEC comments verbatim and not be allowed to paraphrase (except for one exception, mentioned below). This reduces SEC monitoring and enforcement costs. The staff will not have to worry whether the issuer misstated or distorted its comments. Furthermore, the SEC staff can be sure that nothing (that it considered important enough to comment on) was left out or mischaracterized.

The one exception I would suggest is that (if the SEC does not consider it too costly) it should offer issuers a single opportunity to paraphrase the staff comment. The SEC would then simply accept or reject it, depending on whether the characterization is fair or not. If the SEC rejects it, the issuer must state the comment verbatim. This would allow the issuer to distill the essence of the comment in a fair way while knowing that if the mischaracterize the comment, they will not have a second chance and will have to include the original comment verbatim.

Are there more appropriate means to provide incentives to timely resolve staff comments?

No comment.

Should issuers have to disclose comments that have been resolved and will be addressed in future Exchange Act reports?

Issuers should briefly mention the issue (in one or two sentences), incorporate it by reference, and mention that it has been resolved.

Should we require disclosure of all unresolved comments without regard to a materiality assessment by the issuer?

The SEC staff should create a grading scale whereby it rates the significance and urgency of certain comments. This would allow investors to recognize when they should pay more attention to some issues and take others less seriously (i.e. because they are trivial or technical in nature). This would also incent issuers to allocate more of their resources to expediting addressing those concerns that the SEC has rated as more important.

Should the staff have a role in determining which unresolved comments should be disclosed?

The grading scale discussed above can be used to determine whether certain comments even merit being disclosed. The SEC should have sufficient expertise in order to determine what is significant enough to be disclosed.

Should the staff have to address issuer responses to outstanding written comment on Exchange Act reports within a particular timeframe after the response has been submitted by the issuer on EDGAR? If yes, what timeframe?

No, the issuer should bear the responsibility of forwarding any responses it make in its Exchange Act filings to SEC comments. This not only takes the burden off the SEC, but makes sure that what the issuer tells the SEC staff and what the issuer tells investors are one in the same. Thus, the issuer should forward any responses in EDGAR filings to the SEC in any subsequent discussions on the matter.

C. Disclosure of Status as Voluntary Filer Under the Exchange Act, p 67443--Comments by Robin S. Nourmand

Request for Comment

Are there alternative means of addressing the issues posed by voluntary filers? Should we stop accepting voluntary filings and instead allow voluntary filers to register under Section 12(g) of the Exchange Act on a basis where they are exempted from certain provisions of the Exchange Act that do not apply to them? If so, should we limit any

possible exclusions only to voluntary filers that have only issued debt in registered offerings? Should there be any other limitations?

The SEC should continue allowing voluntary filings as a way to increase market efficiency and investor awareness. However, the SEC should draw even more attention to the fact that the voluntary filer is doing so without any legal obligation. It should further explain the implication that the issuer could therefore cease filing at any given time. A checkbox alone will not fully convey this information.

Should we require disclosure of voluntary filer status on Form 40-F? If not, why not?

No comment.