Reinhart

The SEC Adopts Significant Changes to the Public Offering Process

On June 29, 2005, the Securities and Exchange Commission (SEC) adopted important amendments to its rules under the Securities Act of 1933 (the "Securities Act"). The SEC published the final rules on July 19, 2005, and the rules will become effective on December 1, 2005. The amendments address several major areas, including (1) communications relating to registered offerings, (2) reforms to the registration and public-offering process, and (3) the delivery of information to investors and related liability issues. Application of the rules in a number of instances depends on the category of the issuer, including a new category of large public companies termed "well-known seasoned issuers" (WKSIs). A few related changes were also made to the periodic reporting requirements under the Securities Exchange Act of 1934 (the "Exchange Act"). This update provides a brief overview and summary of the most significant changes adopted by the SEC.

POSTED:

Jul 27, 2005

RELATED PRACTICES:

Corporate Law
https://www.reinhartlaw.com/practices/corporate-law

RELATED PEOPLE:

Benjamin G. Lombard
https://www.reinhartlaw.com/people/benjamin-lombard

James M. Bedore
https://www.reinhartlaw.com/people/james-bedore

Categories of Issuers

The SEC's new rules divide issuers in registered public offerings into four categories.

- A "non-reporting" issuer is an issuer that has not previously been required to file reports pursuant to Section 13 or 15(d) of the Exchange Act. This category includes private companies conducting an initial public offering.
- An "unseasoned issuer" is an issuer that is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act, but is not eligible to use Form S-3 for a primary offering of its securities. [1]
- A "seasoned issuer" is eligible to use Form S-3 for a primary offering of its securities. [1]
- A "well-known seasoned issuer," or WKSI is eligible to use Form S-3 for a primary offering of its securities and has either (a) at least $700 million of total market value of common equity held by non-affiliates or (b) issued at least $1 billion of non-convertible securities, other than common equity, in registered offerings for cash in the preceding three years.[2]

The benefits of the new rules will not apply to various types of ineligible issuers, including blank check issuers, shell companies, penny stock issuers, financially

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

distressed issuers and issuers who have violated the anti-fraud provisions of the federal securities laws. In addition, the new rules will not apply to offering of securities in connection with merger and acquisition transactions, which are subject to a separate regulatory framework that was significantly reformed in 1999.

Communications Related to Registered Offerings

The rules liberalize permitted-offering activities and communications, significantly easing the prohibitions on "gun-jumping." These rules are generally nonexclusive safe harbors that do not preclude reliance on the SEC's prior positions in this area. The amendments relating to "gun-jumping" have the following effects:

- All issuers are permitted to use a new type of written communication called a "free writing prospectus" after the filing of a registration statement.[3] Offering participants other than the issuer, such as underwriters, dealers or selling stockholders, will be liable for a free writing prospectus only if they use, refer to, or participate in the planning and use of the free writing prospectus by another offering participant who uses it. An issuer will have liability for any issuer information contained in any other offering participant's free writing prospectus as well as any free writing prospectus it prepares, uses or refers to.
- WKSIs are permitted to engage at any time in oral and written communications, including the use at any time of a free writing prospectus.
- All issuers (other than non-reporting issuers) are, at any time, permitted to continue to publish regularly released factual business information and forward-looking information other than offering-related communications.[4]
- Non-reporting issuers are, at any time, permitted to continue to publish factual business information that is regularly released and intended for use by persons other than in their capacity as investors or potential investors.
- Communications by issuers more than 30 days before filing a registration statement will be permitted so long as they do not reference a securities offering that is later the subject of the registration statement. The issuer should also take reasonable steps to prevent publication of such communications during the 30-day period before the filing of a registration statement.
- The exclusions from the definition of prospectus are expanded to allow a broader category of routine communications regarding issuers, offerings and procedural matters, such as communications about the schedule for an offering and about account opening procedures.
- The exemptions for research reports by brokerage firms are expanded.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

- Electronic roadshows will constitute free writing prospectuses and generally will be required to be filed with the SEC unless the issuer makes at least one version of an electronic roadshow available in electronic form to an unrestricted audience. Live roadshows and other conferences with investors (including live webcasts or video transmission of roadshow presentations) will continue to be deemed oral communications only, and thus will not be subject to prospectus liability or filing with the SEC. · For non-reporting issuers, the statutory prospectus must accompany or precede the free writing prospectus if the issuer or an offering participant prepares or pays for the dissemination of the free writing prospectus.

Free Writing Prospectuses

A free writing prospectus is 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 and is not:

- a prospectus satisfying the requirements of Section 10(a) of the Securities Act;
- a preliminary or summary prospectus subject to completion in accordance with the SEC's rules;
- certain communications permitted for asset-backed issuers; or
- a prospectus because a final prospectus meeting the requirements of Section 10(a) of the Securities Act was sent or given with or prior to the written communication. Conditions to use of a free writing prospectus include the following:
- generally, except for a WKSI, a registration statement must have been previously filed containing a prospectus;
- information in the free writing prospectus may be different from or in addition to the information in the registration statement, so long as it does not conflict with the information in the registration statement (including information incorporated by reference from Exchange Act reports);
- the free writing prospectus must contain a legend;[5] and
- generally, the free writing prospectus must be filed with the SEC.[6]

Liability Issues

The final rules address the following matters relating to liability under the Securities Act.

- Any free writing prospectus used by any person (whether or not it is filed) will

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

be subject to Section 12(a)(2) liability and the antifraud provisions of the federal securities laws. However, a free writing prospectus will not be part of the registration statement and thus will not be subject to Section 11 liability.
- The final rules codified the SEC's position that, for purposes of disclosure liability under Section 12(a)(2) and Section 17(a)(2) of the Securities Act, when assessing when a statement made to an investor prior to or at the time of sale by a seller includes or represents a material misstatement or omits to state a material fact necessary to make the statement not misleading, information conveyed to the investor only after the time of the contract of sale should not be taken into account. · All prospectus supplements will be deemed part of the registration statement for purposes of Section 11 liability. In addition, Section 11 liability may arise for the issuer and the underwriters, but not for directors, executives or auditors, at the time of any prospectus filing reflecting a takedown of securities from a shelf registration statement.

Improvements in Registration Procedures

Automatic Shelf Registration for WKSIs WKSIs will be able to use a more flexible shelf registration process with the following key advantages:

- Shelf registration statements by WKSIs will be automatically effective upon filing.
- WKSIs may register unspecified amounts of different types or classes of securities on a shelf registration Form S-3 or Form F-3 without needing to allocate between primary and secondary offerings.
- WKSIs can add different classes of securities and eligible majority-owned subsidiaries as registrants after the automatic registration statement is effective.
- WKSIs may exclude more information from the base prospectus in a shelf registration that is currently allowed, including excluding a plan of distribution.
- Filing fees may be paid either in advance or on a "pay as you go" basis at the time of each offering. Modernization of Shelf Registration Process The amendments include a number of improvements in the shelf registration process that will benefit issuers in addition to WKSIs:
- The amendments codify, in a single rule, the information that may be omitted from a base prospectus in a shelf registration statement at effectiveness and included in a later prospectus supplement, post-effective amendment or, where permitted, an Exchange Act filing that is incorporated by reference.
- The amendments eliminate the current rule that an issuer may only register

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

securities that it intends to offer within two years. Instead, a shelf-registration must be updated with a new registration statement that is filed every three years.
- The restrictions on Rule 415(a)(4) "at the market" equity offerings by seasoned issuers have been eliminated.
- Immediate takedowns of securities off shelf-registration statements are now permitted, eliminating the staff's informal "48-hour" waiting period.
- Issuers may use prospectus supplements (rather than post-effective amendments) to make material changes to the plan of distribution described in the base prospectus.
- Seasoned issuers may identify selling shareholders in prospectus supplements (rather than post-effective amendments) where the securities to be sold (or securities convertible into such securities) are outstanding when the registration statement is filed.

Incorporation by Reference into Form S-1

The amendments allow Exchange Act reporting issuers that are current in filing their Exchange Act reports to incorporate by reference previously filed Exchange Act reports into a Securities Act registration statement on Form S-1 (or Form F-1). The SEC will also eliminate Forms S-2 and F-2.

Prospectus Delivery Reforms The amendments create an "access equals delivery model" for final prospectuses. As a result, filing a final prospectus with the SEC and satisfying other conditions will allow offering participants to conduct an offering without printing and actually delivering a final prospectus. There is also a cure provision for an inadvertent failure to file the final prospectus. In addition, there is a separate requirement to notify investors that they have purchased securities in a registered offering. Additional Disclosure Requirements in Exchange Act Reports

The amendments include the following changes in Exchange Act periodic reports:

- Form 10-K must include disclosure of risk factors, where appropriate. Form 10-KSB for small business issuers will not require risk factor disclosure.
- Form 10-Q reports must include updated risk-factors, where appropriate.
- Disclosure of the issuer's status as a "voluntary" filer of Exchange Act reports must be made where applicable.
- "Accelerated filers" and WKSIs must disclose in Form 10-K written staff comments that were issued more than 180 days before the end of the fiscal

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

year to which the Form 10-K relates, where those comments remain unresolved at the time of the filing of the Form 10-K and the issuer believes that the unresolved comments are material.

This update is intended to provide a summary about new regulatory developments and should not be considered legal advice. If you have any questions or would like assistance regarding the matters discussed in this client update, please call your regular Reinhart contact or one of the following members of our Securities Team:

Benjamin G. Lombard
414-298-8225
blombard@reinhartlaw.com

[1]Generally, an issuer eligible to use Form S-3 for a primary offering of its securities includes any public company that (a) has been subject to reporting under the Exchange Act and has made all required filings on a timely basis for a period of at least the preceding 12 calendar months and (b) has a total market value of common equity held by non affiliates of at least $75 million.

[2] An issuer that qualifies as a WKSI based on (b) rather than (a) is not eligible to use form S-3 for a primary offering of its securities is still a WKSI but may only use the automatic shelf registration process for offerings of nonconvertible securities other than common equity for cash.

[3] Free writing prospectuses are described in more detail below.

[4] Information is considered regularly released if the issuer has previously released the same type of information in the ordinary course of its business, and the release is consistent in all material respects in timing, manner and form with the issuer's similar past releases.

[5] There is a cure provision for unintentional or immaterial failures to include a legend.

[6] There is also a cure provision for unintentional or immaterial failures to file a free writing prospectus.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.

these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

All materials copyright © 2025 Reinhart Boerner Van Deuren S.C. All rights reserved.