



## U.S. Securities and Exchange Commission

### **SEC Votes To Adopt Securities Act Rule Reform and Shell Company Regulations; Considers Matters Remanded by Court of Appeals**

**FOR IMMEDIATE RELEASE  
2005-99**

*Washington, D.C., July 1, 2005* - On June 29, 2005, the Commission voted to adopt changes to rules regarding various processes regulated under the provisions of the Securities Act of 1933; voted to adopt regulations to deter fraud and abuse in the securities markets through the use of shell companies; and considered matters remanded to the Commission by the U.S. Court of Appeals for the District of Columbia Circuit.

#### **1. Rules Regarding Securities Offering Reform**

The Commission voted to adopt modifications to the registration, communications, and offering processes under the Securities Act of 1933.

#### **Categories of Issuers**

In many cases, the amount of flexibility granted to issuers under the reforms is contingent on the characteristics of the issuer, including the type of issuer, the issuer's reporting history, and the issuer's equity market capitalization or amount of previously registered non-convertible securities, other than common equity. The rules divide issuers into four categories.

- A well-known seasoned issuer is a new class of issuer that is current and timely in its Exchange Act reports for at least one year and has either \$700 million of worldwide public common equity float or has issued \$1 billion of non-convertible securities, other than common equity, in registered offerings for cash, in the preceding three years.
- A seasoned issuer is a primary shelf eligible issuer.
- An unseasoned issuer is an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but is not a primary shelf eligible issuer.
- A non-reporting issuer is an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act.

The most significant revisions to the Commission's communications rules and registration processes apply to well-known seasoned issuers.

### **Liberalizing Communications Around the Time of Registered Offerings**

The rules update and liberalize permitted offering activity and communications to allow more information to reach investors by revising the "gun-jumping" provisions under the Securities Act. The cumulative effects of these rules are:

- Well-known seasoned issuers are permitted to engage at any time in oral and written communications, including use at any time of a new type of written communication called a "free writing prospectus," subject to enumerated conditions (including, in some cases, filing with the Commission).
- All reporting issuers are, at any time, permitted to continue to publish regularly released factual business information and forward-looking information.
- 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 the subject of a registration statement.
- All issuers and other offering participants will be permitted to use a free writing prospectus after the filing of the registration statement, subject to enumerated conditions (including, in some cases, filing with the Commission). Offering participants, other than the issuer, 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. Issuers will have liability for any issuer information contained in any other offering participant's free writing prospectus as well as any free writing prospectus they prepare, use, or refer to.
- 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 or about account-opening procedures.
- The exemptions for research reports are expanded.

A number of these new rules include conditions of eligibility. Most of the

rules, for example, are not be available to blank check companies, penny stock issuers, or shell companies.

The rules address the treatment under the Securities Act of electronic communications, including electronic road shows and information located on or hyperlinked to an issuer's website. The rules define written communication as any communication that is written, printed, a radio or television broadcast, or a graphic communication. The definition of graphic communication and, thus, electronic road show excludes communications that are carried live and in real-time to a live audience, regardless of the means of transmission. Electronic road shows for initial public offerings of common equity or convertible equity securities will have to make a bona fide electronic road show readily available to an unrestricted audience to avoid filing the electronic road show with the Commission. No other road shows will be subject to filing.

### **Liability Timing Issues**

The Commission addressed the liability provisions under the Securities Act. In this regard, the Commission:

- Reaffirmed the interpretation and adopted an interpretive rule that, for purposes of disclosure liability under Section 12(a)(2) and Section 17(a)(2) of the Securities Act, when assessing whether a statement 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 in light of the circumstances under which it was made, not misleading, information conveyed to the investor only after the time of the contract of sale should not be taken into account.
- Approved changes to the Securities Act procedures for shelf registration that will ensure that prospectus supplements filed after the initial effective date of a registration statement will be included in the registration statement for Securities Act Section 11 liability purposes.
- Approved rules that will establish a new Section 11 effective date for each takedown off a shelf registration statement for issuers and underwriters, and not for experts, directors, and signing officers. If an expert provides a new report or opinion in an Exchange Act report or in connection with the takedown that would require a consent, however, there would be a new effective date for that expert.

### **Improvements to Registration Procedures**

The rules will make improvements to the shelf registration provisions that will modernize the operation of the shelf registration process under the Securities Act. The changes will:

- Codify in a single rule the information that may be omitted from a base

prospectus in a shelf registration statement at effectiveness and included later;

- Replace the requirement that issuers register only securities they intend to offer within two years with a requirement that the issuer update the registration statement with a new registration statement that is filed every three years;
- Eliminate restrictions on "at-the-market" equity offerings by seasoned issuers with a \$75 million public float;
- Permit immediate takedowns of securities off of shelf registration statements;
- Permit issuers to use prospectus supplements (rather than post-effective amendments) to make material changes to the plan of distribution described in the base prospectus;
- For seasoned issuers with a \$75 million public float, revise the requirement to identify selling security holders by permitting selling security holders to be identified 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; and
- Establish a significantly more flexible version of shelf registration, referred to as "automatic shelf registration" for offerings by well-known seasoned issuers. Automatic shelf registration permits automatic effectiveness, pay-as-you-go registration fees, and the ability to exclude additional information from base prospectuses.

The rules also contain procedural changes that will allow reporting issuers that are current in filing their Exchange Act reports to incorporate by reference previously filed Exchange Act reports and other materials into a Securities Act registration statement on Form S-1 or Form F-1.

### **Prospectus Delivery Reforms**

The rules will change the way in which the final prospectus delivery obligations under the Securities Act are satisfied. The change will create an "access equals delivery" model for final prospectuses. Under this model, filing a final prospectus with the Commission and complying with other conditions will enable offering participants to conduct securities offerings without printing and actually delivering final prospectuses. A cure provision for inadvertent failures to file is included. In addition, the rules include a separate requirement to notify investors that they purchased securities in a registered offering.

### **Required Disclosure in Exchange Act Reports**

The rules require issuers to include the following in their Exchange Act periodic reports:

- For Form 10-K filers, disclosure of risk factors, where appropriate;
- Disclosure regarding the issuer's status as a "voluntary" filer of Exchange Act reports; and
- For "accelerated filers" and well-known seasoned issuers, disclosure in their reports of written staff comments that were issued more than 180 days before the end of the fiscal year to which the annual report relates, where those comments remain unresolved at the time of filing the annual report and the issuer believes those comments to be material.

The effective date of the rules will be 120 days following publication in the Federal Register.

## **2. Use of Form S-8, Form 8-K, and Form 20-F by Public Shell Companies**

The Commission voted to adopt rules and amendments to assure that investors in shell companies that acquire operations or assets have access on a timely basis to the same kind of information as is available to investors in public companies with continuing operations. The rules are intended to protect investors by deterring fraud and abuse in the securities markets through the use of shell companies.

The new rules and amendments relate to the use of Form S-8, Form 8-K, and Form 20-F by public shell companies. Form S-8 is used by public companies to register securities for sale under the Securities Act of 1933 in connection with employee benefit plans. Form 8-K is used by public companies to disclose certain corporate events on a current basis under the Securities Exchange Act of 1934. Form 20-F is a multi-function form under the Exchange Act for foreign private issuers.

The changes will

- define the term "shell company" to mean a registrant, other than an asset-backed issuer, that has no or nominal operations, and either:
  - no or nominal assets;
  - assets consisting solely of cash and cash equivalents; or
  - assets consisting of any amount of cash and cash equivalents and nominal other assets;
- revise the definition of "succession" to include a method of taking a private company public through a shell company that is known as the "back door" Exchange Act registration procedure;

- prohibit the use of Form S-8 by shell companies;
- permit former shell companies to use Form S-8 once they become operating companies and 60 days have passed since they filed with the Commission the information about the operating company that they will be required to provide if they were filing a registration statement under the Exchange Act;
- add new Form 8-K Item 5.06 to require disclosure when companies cease to be shell companies;
- revise the existing Form 8-K items relating to acquisition or disposition of assets and changes in control to require companies that cease being shell companies, within four business days of the transaction, to disclose information comparable to the information that they will be required to provide if they were filing an Exchange Act registration statement;
- require foreign private issuer shell companies to report transactions that cause them to cease being shell companies on Form 20-F, providing disclosure comparable to that which domestic companies will report on Form 8-K; and
- require companies to indicate on the cover page of their Exchange Act periodic reports whether they fall within the definition of "shell company."

The amendments would take effect 30 days after publication in the Federal Register, except for new Form 8-K Item 5.06, which would take effect Nov. 7, 2005.

### **3. Further Consideration of Adoption of Amendments to Rules under the Investment Company Act of 1940**

The Commission considered further its adoption of amendments to rules under the Investment Company Act of 1940. Acting in response to a decision by the Court of Appeals for the District of Columbia Circuit (Chamber of Commerce v. SEC) remanding two issues raised by the rulemaking, the Commission voted not to modify the amendments.

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The full text of detailed releases concerning each of these items will be posted to the SEC Web site as soon as possible.

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Modified: 07/01/2005