

SECURITIES LAW UPDATE

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On June 29, 2005, the Securities and Exchange Commission (SEC) unanimously approved new rules that significantly reformed the securities offering process in three main areas.

- communications related to registered securities offerings, by liberalizing rules for written communications ("free writings") outside the statutory prospectus;
- the registration process, by allowing greater integration of disclosure contained in filed reports and greater freedom for certain "well-known seasoned issuers" to sell securities in "shelf" registrations; and
- delivery of information about issuers and offerings, by implementing an "access equals delivery" model that includes the use of electronic delivery and Internet access in lieu of physical prospectus delivery.

The offering reforms, effective December 1, 2005, generally follow the proposals made by the SEC in its November 3, 2004 release (SEC Rel. 33-8501 at <http://www.sec.gov/rules/proposed/33-8501.htm>). We summarized these proposals in our article "*Shush!! We're In Registration! Communications During the Offering Process*" which appeared in the January 2005 issue of *Atlantic Coast In-House*, as well as in the Spring 2005 edition of the Ruden McClosky Corporate Advisory, http://www.ruden.com/resources/pdf/newsletter_38.pdf. Please refer to that article for a general description of the re-forms or see the Adopting Release (SEC Rel. No. 330591 at <http://www.sec.gov/rules/final/33-8591.pdf>)

The SEC modified its proposals to address points made in the over 130 comment letters received by the SEC including:

Defining Certain Electronic Roadshows as Oral Communications

Roadshows that are live, in real-time and to a live audience, regardless of the means of transmission, will be treated as oral (not written) communications even if transmitted by graphic means such as the Internet or in a webcast.

Providing Incentives to Allow Unrestricted Access to Electronic Roadshows to Retail Purchasers

Although the SEC decided not to go so far as to require unrestricted access to all roadshows, the reforms do provide incentives for allowing unrestricted access to roadshows in connection with IPOs of equity securities, the type of offerings in which there is often a significant retail market. Electronic roadshows used in initial public offerings of common stock or a security convertible into common stock will not have to be filed with the SEC in situations where the issuer makes at least one version readily available electronically to an unrestricted audience.

Aligning Section 11 Liability Dates for Issuers and Underwriters, But Not Officers, Directors and Experts

The reforms make clear that information contained in a prospectus supplement that is filed after the time of sale is considered part of the shelf registration statement and is therefore subject to liability under Section 11 of the Securities Act of 1933¹. Section 11 of the Securities Act provides that a private right of action exists for materially deficient disclosure in the registration statement at the time the registration statement became effective.

Prior to adoption of the reforms, Section 11 liability of issuers for shelf registration statements attached on the effective date defined as the later of (i) the effective date of (x) the registration statement, or (y) a post-effective amendment to effect a Section 10(a)(3) up-date to the prospectus or reflect in the prospectus any facts or events representing a fundamental change in the information set forth in the registration statement, or (ii) the date of filing of the last report of the issuer incorporated by reference into the prospectus and relied on in lieu of filing a post effective amendment to effect a Section 10(a)(3) update or to report a fundamental change in the information set forth in the registration statement.

Section 11 liability for underwriters attaches at the latter of the last effective date for the pertinent registration statement or the date when the person becomes an underwriter.

Under the new rules, Section 11 liability for shelf registration statements would attach for issuers, as well as for underwriters², at the time of filing of prospectus supplements, which would constitute a new effective date for the registration statement. However, in response to comments, the SEC determined not to change the definition of effective date of the registration statement for other persons, including directors, signing officers and experts. The SEC also addressed commentators concerns regarding underwriter cross liability for free writing prospectuses used by others.

In addition, in the Adopting Release the SEC clarified the definition of "well-known seasoned issuer" in several respects, revised the definition of "ineligible issuer," extended the use of Rule 134 for IPOs even before a bona fide pricing range is established, and excluded from the definition of "free writing prospectus" media publications that are not prepared with the active cooperation of, or paid for, or used by, the issuer or any other offering participant to market securities.

¹ In the Adopting Release, the SEC confirmed its view set forth in the Proposing Release that for purposes of liability under Sections

² The reforms do not change the effective date for a person that becomes an underwriter after the effective date. In such case, the effective date is the date the person becomes an underwriter as provided in Section 11(d) of the Securities Act.