



Babirak, Vangellow & Carr, P.C.
1920 L Street, N.W.
Suite 525
Washington, D.C. 20036
Tel: (202) 467-0920
Fax: (202) 318-4486
Web site: www.bvcpc.com

Babirak, Vangellow & Carr, P.C.

CORPORATE ADVISOR

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

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Overview

On June 29, 2005, the SEC adopted new rules that are expected to significantly streamline the offering process and the registration of securities under the Securities Act of 1933 (Securities Act).

The new rules:

- Divide issuers into four categories: ***well known seasoned issuers; seasoned issuers; unseasoned issuers; and non-reporting issuers***
- Modify the “gun jumping” provisions under the Securities Act
- Permit “free writing prospectuses” subject to certain conditions
- Provide that in person road shows are oral communications and, after the filing of a registration statement, are not subject to the gun jumping rules
- Provide that road shows that do not originate live are graphic communications and, as such, are written communications which are permitted subject to compliance with Rule 433
- Improve the shelf registration process, particularly for well-known seasoned issuers, who will now be able to take advantage of the automatic shelf registration process
- Change the ways in which final prospectus delivery requirements can be satisfied by creating an “access equals delivery” model
- Amend certain disclosure requirements, including requiring “risk factor” disclosure in the Form 10-K and updates of such disclosure in the Form 10-Q, disclosure of the issuer’s status as a voluntary filer, and, for accelerated filers, disclosure of outstanding SEC staff comments in the Form 10-K that were issued 180 days before the end of the fiscal year to which the annual report relates

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

- Permit reporting issuers that are current in their Exchange Act reports to incorporate by reference previously filed information into the Form S-1 (but not prospective information)
- For purposes of liability for disclosure under Section 12(a)(2) and 17(a)(2) of the Securities Act, establish that prospectus supplements are included in the registration statement, and that liability under such provisions is based on information conveyed to an investor before the time of his investment decision, regardless of any modifications in the final prospectus

The new rules become effective on December 1, 2005. The following summary of the new rules does not address changes in the rules as they apply to Asset Backed Issuers.

Four New Categories of Issuers

The new rules create, in effect, four new categories of issuers, as follows:

- *Well-Known Seasoned Issuers* – A well know seasoned issuer is an issuer that, as of its eligibility date, satisfies the following requirements: (a) meets the registrant requirements of Form S-3 or F-3, (b) as of a date within 60 days of its eligibility determination date must have either (i) a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of \$700 million or more, or (ii) must have issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash (not exchange) registered under the Securities Act. The issuer must also not be an “ineligible issuer,” including reporting issuers that are not current, issuers who are (or were, or their predecessors were, during the past three years) blank check issuers, shell companies and penny stock issuers, issuers who have filed for bankruptcy within the past three years, issuers who are limited partnerships offering or selling their securities other than in a firm commitment underwriting, issuers who are or have been the subject of refusal or stop orders under the Securities Act, or issuers who have been found to have violated the anti-fraud provisions of federal securities laws, have been made the subject of a judicial or administrative decree or order prohibiting certain conduct or activities regarding the anti-fraud provisions during the past three years. A majority-owned subsidiary may also be considered a well-known seasoned issuer under certain circumstances.
- *Seasoned Issuers* – A seasoned issuer is an issuer that is eligible to use Form S-3 or F-3 to register primary offerings of securities.
- *Unseasoned Issuers* – An unseasoned issuer is an issuer that is required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Exchange Act), but does not satisfy the requirements of Forms S-3 or F-3 for primary offerings of securities. Voluntary filers do not qualify.
- *Non-Reporting Issuers* – A non reporting issuer is an issuer that is not required to file reports under Section 13 or 15(d) of the Exchange Act, regardless of whether it is filing voluntarily.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

New Communications Rules

The new rules significantly change the “gun jumping” restrictions under the Securities Act. The gun jumping rules have restricted the types of offering communications that an issuer or other person may use during a registered public offering.

Under existing rules:

- Before the filing of a registration statement, all offers are prohibited
- After the filing of a registration statement and before effectiveness, written offers may only be made by means of a “statutory prospectus,” i.e., a preliminary prospectus
- After effectiveness of the registration statement, delivery of additional written offering materials has been permitted if a final prospectus that meets the requirements of Section 10(a) of the Securities Act has been delivered or is delivered with such materials

Under the new rules, all communications, other than oral communications, are defined as written communications. All forms of electronic communications (other than telephone and other live, in real-time communications to a live audience, such as road shows) are graphic and, therefore, written communications for purposes of the Securities Act.

The new rules include two non-exclusive safe harbors from the gun jumping provisions for continuing ongoing business communications. Rule 168 is available to reporting issuers and Rule 169 is available to non-reporting issuers.

Rule 168

New Rule 168 provides a safe harbor for **reporting issuers** (as well as asset backed issuers and certain nonreporting foreign private issuers) from the gun-jumping provisions for continued publication or dissemination of communications of regularly released factual business information and forward looking information. Rule 168 provides a non-exclusive safe harbor that such communication is not an impermissible prospectus and does not violate the prohibition on pre-filing offers. Factual business information is defined as:

- Factual information about the issuer, its business or financial developments, or other aspects of its business
- Advertisements of, or other information about, the issuer’s products or services; or
- Dividend notices.

Such information will, however, continue to be subject to the provisions of Regulation FD, Regulation G, Item 10 of Regulation S-K and Regulation S-B, and Item 2.02 of Form 8-K.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

Forward looking information includes:

- Projections of the issuer’s revenues, income, earnings per share, capital expenditures, dividends, capital structure, or other financial items;
- Statements about the issuer’s management’s plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;
- Statements about the issuer’s future economic performance, including statements of the type contemplated by MD&A;
- Assumptions underlying or relating to any of the foregoing information.

The rule has the following conditions for reliance:

- Factual business and forward looking information will be considered released or disseminated by or on behalf of an issuer if the issuer or an agent or representative of the issuer (other than an offering participant who is an underwriter or dealer) authorizes or approves the release or dissemination of the communication before it is made. The safe harbor is not available for information released in a manner intended to circumvent either the conditions to use or the permitted manner of use of the information;
- The purpose of the safe harbor is to enable a reporting issuer to continue its past ordinary course practice of releasing or disseminating publicly factual business and forward looking information. Communications of both factual business information and forward looking information must satisfy the same conditions regarding regular release. Information will be considered regularly released or disseminated if the issuer has previously release or disseminated the same type of information in the ordinary course of its business, and the release or dissemination is consistent in material respect in timing, manner and form with the issuer’s similar past release or dissemination of such information. The method of release must also be consistent in material respects with prior practice;
- The safe harbor excludes any information about the registered offering itself. Publication of information about the registered offering outside the registration statement or a prospectus is limited to statements allowed under other exemptions or exclusions, such as Rule 134 or 135.

The purpose of the rule is to permit reporting issuers to continue their ordinary course factual business communications.

Rule 169

New Rule 169 provides a narrower safe harbor for regularly released factual business information that is available to **all issuers**, including **non-reporting issuers**. The rule provides a non-exclusive safe harbor for the issuer’s release or dissemination of regularly released ordinary course factual business information intended for use by persons other than in their capacity as investors or potential investors, such as customers and suppliers.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

Factual business information is defined as:

- Factual information about the issuer, its business or financial developments, or other aspects of its business;
- Advertisements of, or other information about, the issuer’s products or services.

As with the safe harbor for reporting issuers, the safe harbor requires that the information be regularly released in the ordinary course of business, released or disseminated by or on behalf of the issuer, and not include information about the registered offering or information released or disseminated as part of the offering activities in the registered offering.

Communications During the Pre-Filing Period

Rule 163A – 30-Day Bright Line Exclusion

New Rule 163A will now provide to **all issuers** a bright line time period, ending 30 days prior to filing a registration statement, during which issuers may communicate without risk of violating the gun-jumping provisions. Such communications will be excluded from the definition of “offer” for purposes of Section 5(c). The rule is non-exclusive. The rule is not available for issuers offering securities off a shelf registration statement, since the rule applies prior to the filing of a registration statement. Also, the rule may not be relied upon by a blank check company, a shell company, or by a penny stock issuer. Communications regarding business combination transactions are not covered. The rule is also not available for communications regarding offerings made by a registered investment company or a business development company.

The 30-day bright line exclusion is subject to the following conditions:

- a communication made in reliance upon the rule cannot reference a securities offering that is or will be the subject of a registration statement;
- a communication made in reliance on the rule will have to be made “by or on behalf of” the issuer;
- the issuer will have to take reasonable steps within its control to prevent further distribution, or publication of the communication during the 30-day period immediately before the issuer files the registration statement.

Rule 163 – Exclusion for Well-Known Seasoned Issuers

New Rule 163 provides an exemption from the prohibition on offers before the filing of a registration statement for offers made by or on behalf of **well-known seasoned issuers**. The exemption permits these issuers to engage in unrestricted oral and written offers before a registration statement is filed without violating the gun-jumping rules. The exemption is available only for communications made “by or on behalf of” the issuer and not for a communication by an underwriter or prospective underwriter or dealer.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

All such communications will still be considered to be offers subject to liability standards applicable to such offers. Also, such communications are still subject to Regulation FD (as communications made in reliance on the rule are not considered to be in connection with a registered securities offering for purpose of the exclusion from Regulation FD).

Any written offer made under Rule 163 will be considered a free writing prospectus and be subject to the conditions for use of free writing prospectuses discussed below and will need to include a legend. The condition that a free writing prospectus be promptly filed will only apply when and if a registration statement is filed.

In view of the automatic shelf registration process, it is expected that well known seasoned issuers usually will have a registration statement on file that they can use for registered offerings and are unlikely to rely on the rule.

Communications During the “Waiting” or Registration Period**Rule 134**

Rule 134 provides a safe harbor from the gun jumping rules for limited public notices (tombstone advertisements) about an offering made after an issuer files its registration statement by excluding such notices from the definition of prospectus under Section 2(a)(10). All issuers (including well known seasoned issuers) are precluded from relying upon Rule 134 until the issuer files a registration statement that includes a statutory (preliminary) prospectus.

The new rules modify and expand the information permitted in a Rule 134 notice, including:

- permit increased information about the issuer and its business, including where to contact the issuer;
- permit more information about the terms of the securities offered;
- expand the scope of permissible factual information about the offering, including underwriter information, more details about the mechanics of and procedures for transactions in connection with the offering process, the anticipated schedule, and description of marketing events;
- allow more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;
- allow more factual information regarding procedures for directed share plans and other participation in offerings by officers, directors, and employees;
- permit the correction of inaccuracies in permissible information previously disclosed pursuant to the rule;
- expand the disclosure permitted regarding credit ratings to include the security rating that is reasonably expected to be assigned.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

The amended rule does not permit a detailed description of the securities. Such a detailed description may be provided in a free writing prospectus, described below.

Much of the information permitted under the new rule may be provided before the inclusion of a bona fide prices range in the registration statement or the amount of securities to be offered, for example, in an initial public offering. However, information regarding pricing and rating of the security can only be provided if a price range is included where required in the registration statement.

Free-Writing Prospectus

Under existing gun jumping rules, after the filing of a registration statement, an issuer and other offering participants may only make written offers in the form of a statutory prospectus and, after effectiveness of a registration statement, written offers other than a statutory prospectus may be made only if a final prospectus meeting the requirements of Section 10(a) is sent or given prior to or at the same time as the written offer.

Under the new rules, issuers and underwriters will be able to use a free writing prospectus during the waiting (post filing, pre-effective) period provided certain conditions are met. The new rules provide that written offers, including electronic communications, outside the statutory prospectus will be considered a free writing prospectus. A written communication will only be considered a free writing prospectus where it constitutes an offer by an offering participant of a security under the Securities Act. Not all written communications relating to an offering will be deemed an offer. The rule excludes from the definition a prospectus satisfying the requirements of Section 10(a) or the rules permitting preliminary or summary prospectuses or prospectuses subject to completion, or that is not a prospectus because at or prior to such time a final prospectus meeting the requirements of Section 10(a) was sent or given.

Well known seasoned issuers will be able to use a free writing prospectus that satisfies certain conditions at any time (i.e., before or after the filing of a registration statement). If a well know seasoned issuer uses a free writing prospectus before filing, the free writing prospectus must be filed once the registration statement has been filed and it must contain a legend that notifies the recipient where the statutory prospectus may be accessed or a link to the SEC’s Edgar website.

Under Rule 164, any other **eligible issuer or offering participant** may use a free writing prospectus that satisfies certain conditions after a registration statement has been filed and the conditions of Rule 164 and Rule 433 have been met. **Eligible seasoned issuers** are not required to deliver a statutory prospectus but the free writing prospectus must include a legend notifying the recipient of the link to the SEC’s Edgar web site where the recipient may access the prospectus.

Non-reporting issuers and unseasoned issuers are permitted to use free writing prospectuses after filing of a registration statement but must accompany or precede the delivery of such materials with a copy of the preliminary prospectus for the offering. If the free writing prospectus is in electronic form, delivery of the preliminary prospectus may be satisfied by an active hyperlink from the free writing prospectus. In the following situations, for example, the most recent statutory prospectus must precede or accompany the free writing prospectus or the communication cannot be made in reliance on Rules 164 and 433:

- direct written communication by an issuer or offering participant

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

- written communication or television or radio broadcast prepared by or on behalf of or used by the issuer or offering participant
- paid published or broadcast advertisements

Generally, issuers and, in certain circumstances, underwriters must file the free writing prospectus on or prior to its distribution, unless exempt, under the following circumstances:

- where the free writing prospectus is prepared by or on behalf of or used or referred to by the issuer, the issuer shall file the free writing prospectus
- where the free writing prospectus prepared by or on behalf of or used by an offering participant other than the issuer contains material information about the issuer or its securities that have been provided by or on behalf of an issuer that is not already included or incorporated in the prospectus or a filed free writing prospectus, the issuer shall file the free writing prospectus
- where a free writing prospectus used or referred to by an offering participant other than the issuer is distributed by or on behalf of such offering participant in a manner reasonably designed to lead to its broad unrestricted dissemination, the offering participant shall file the free writing prospectus
- where a free writing prospectus or portion thereof prepared by or on behalf of the issuer or other offering participants comprises a description of the final terms of the issuer's securities in the offering or of the offering, the issuer must file such free writing prospectus or portion thereof after such terms have been established for all classes of the offering

The issuer must file the issuer prepared free writing prospectus or material issuer information on or before the date of first use. In most cases, free writing prospectuses prepared by underwriters are not required to be filed. However, free writing prospectuses that include the final terms of the securities in the offering or the offering must be filed by the issuer (whether prepared by the issuer or an underwriter or dealer or other offering participant) within two days of the later of the date such terms became final for all classes of the offering or the date of first use.

Rule 433 conditions the use of a free writing prospectus that has not been filed with us on issuers and offering participants retaining any free writing prospectus for three years from the date of the date of initial bona fide offering of the securities in question. An immaterial or unintentional failure to retain a free writing prospectus will not result in a violation of Section 5(b)(1) or the loss of the ability to rely on the exemption so long as a good faith reasonable effort was made to comply with the record retention rule.

Media Communications

Under the new free writing prospectus rules, where an **issuer or offering participant** provides information about the issuer or the offering that constitutes an offer, whether orally or in writing, to a member

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

of the media and where the media publication of that information is an offer by the issuer or other offering participant, such publication will be considered a free writing prospectus of the issuer or offering participant. If the issuer or offering participant prepares or pays for the preparation of the publication or dissemination of or uses or refers to a published article, television or radio broadcast, or advertisement, the issuer will be required to comply with the prospectus delivery or availability, legending and other requirements of the SEC's new rules. Where the free writing prospectus is prepared and published or broadcast by persons in the media that are unaffiliated with the issuer or offering participant, and the preparation, publication, or broadcast is not paid for by the issuer or offering participant, an issuer or offering participant would not have to comply with the prospectus delivery or availability requirements (although, except in the case of a well known seasoned issuer) a filed registration statement would need to be on file.

Electronic Road Shows

Issuers and underwriters frequently conduct road shows to market their offerings to the public and are a means by which issuers are involved directly and actively in a selling effort to investors. Under the new rule, a live in real time road show to a live audience (including slides and other visual aids) that is transmitted graphically will not be a graphic communication and therefore not a written communication. Thus, it will not be deemed a free writing prospectus. Road shows that do not originate live, in real time to a live audience and are graphically transmitted are electronic road shows that will be considered written communications and, therefore, free writing prospectuses. They will be permitted if the conditions of the new rules are satisfied. The SEC has withdrawn the electronic road show no-action letters in favor of the free writing prospectus approach. For road shows that are free writing prospectuses, the filing conditions of Rule 433 will not apply, except for issuers not required to file reports under Section 13 or 15(d) at the time of filing the registration statement and such issuer is registering an offering of common equity or convertible securities. With respect to such road shows for initial public offerings of common equity or convertible securities that trigger the filing requirements, the issuer is required to make at least one unrestricted version of a bona fide electronic road show for the offering readily available without restriction electronically to the public. (A “bona fide electronic road show” is a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other members of issuer management and, if the issuer is using or conducting more than one road show that is a written communication, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or road shows for the same offering that are written communications.)

Communications on Web Sites

New Rule 433(e) makes clear that an offer of an issuer's securities that is contained on an issuer's web site or that is contained on a third party web site hyperlinked from the issuer's web site is considered a written offer of such securities made by the issuer and, unless exempt, will be a free writing prospectus. The SEC has stated that historical information that is not an offer under the Securities Act, either because its use and content are such that it does not fall within the Securities Act definition of that term or because it falls within a safe harbor, will not be deemed an offer because it is accessed at a later time, unless it is updated or used or referred to in connection with the offering. New Rule 433 provides that historical information will not be considered a current offer of the issuer's securities (and not a free writing prospectus) if that historical information is separately identified as such and located in a separate section of the issuer's web site containing historical information.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

Under the new rules, therefore, issuers will need to carefully review information contained on their web sites to determine, first, whether information is an offer and, second, whether such information has been adequately archived with other historical information. Also, issuers should assure that such historical information is not incorporated by reference or otherwise included in a prospectus of the issuer or otherwise referred to in connection with the offering.

Cross-Liability Issues

A free writing prospectus is subject to disclosure liability under Section 12(a)(2) of the Securities Act and under the anti fraud provisions of federal securities laws. Section 12(a)(2) provides a private cause of action against any person who offers a security by means of a materially misleading communication in connection with a registered offering. A free writing prospectus filed under Rule 433, however, will not be filed as part of the registration statement and will not be subject to liability under Section 11 of the Securities Act, unless expressly filed as part of or incorporated by reference into the registration statement.

Certain commenters on the SEC’s proposed rules expressed concerns about cross-liability issues arising under Section 12(a)(2) for free writing prospectuses prepared by other offering participants. Accordingly, under new Rule 159A, an offering participant other than an issuer will not be considered to offer or sell securities to a person “by means of” a free writing prospectus unless:

- the offering participant used or referred to the free writing prospectus in offering or selling the securities to that person;
- the offering participant offered or sold the securities to that person and participated in planning for the use of that free writing prospectus by other offering participants and such free writing prospectus was used or referred to in offering or selling securities to that person by one or more of such other offering participants; or
- the offering participant was required to file the free writing prospectus under Rule 433.

New Shelf Registration Rules

The SEC has adopted new rules that are expected to streamline the registration process primarily for ***well known seasoned issuers and seasoned issuers*** but also for ***unseasoned and non-reporting issuers***.

Rule 415 under the Securities Act provides for continuous and delayed offerings and is the foundation for shelf registration. Primary offerings on a delayed basis may only be registered by seasoned issuers. A number of other delayed or continuous offerings may be undertaken or registered by any issuer, such as offerings on a continuous basis of securities issued on exercise of outstanding options or warrants. Also, it permits registration by an issuer of continuous offerings that will commence promptly and continue for more than 30 days from the initial effectiveness.

The new rules clarify the information included in and omitted from base prospectuses in shelf registration statements, codify the manner of inclusion of information in the final prospectus, provide for treatment of prospectus supplements, liberalize certain of the requirements under Rule 415, including eliminating the two year limitation for registered securities for delayed offerings, eliminating the at-the-market restrictions for

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

issuers registering primary offerings of Form S-3 and F-3, eliminating the prohibition on immediate take downs off delayed shelf registration statements, and making certain changes to Rule 424.

New Rule 430B describes the type of information that primary shelf eligible and automatic shelf issuers may omit from a base prospectus in a Rule 415 offering and include such information instead in a prospectus supplement, Exchange Act report incorporated by reference, or post effective amendment. Rule 430B provides that a base prospectus in a shelf registration statement must comply with the applicable form requirements but can continue to omit information that is not known or not reasonably available to the registrant pursuant to Rule 409.

Rule 430B provides that a base prospectus that omits information as provided in the rule will be a permitted prospectus. After a registration statement is filed, offering participants can use a base prospectus that omits information in accordance with the rule. Also, the issuer can communicate using Rule 134 notices, and issuers and other offering participants can use free writing prospectuses under Rules 164 and 433.

Means of Providing Information

A base prospectus that omits required information is not a Section 10(a) final prospectus. To satisfy Section 10(a), an issuer must include the information omitted from the base prospectus in a prospectus supplement, post-effective amendment or Exchange Act filings (where permitted) incorporated by reference into the registration statement and identified in a prospectus supplement. Rule 430B makes clear that prospectus supplements and information in them will also be deemed part of and included in the registration statement. The new rules permit certain shelf issuers the ability to add to the prospectus by means other than post effective amendment. The new rules amend Forms S-3 and F-3 to permit all information required in the prospectus about the issuer and its securities to be incorporated by reference to its Exchange Act reports. Such information can also be contained in the prospectus or a prospectus supplement. For example, material changes in the plan of distribution which are currently required to be in a post-effective amendment, can now be amended by incorporated Exchange Act reports or prospectus supplements.

Also, the new rules permit issuers eligible to use Form S-3 or F-3 for primary offerings to identify selling security holders and the amounts of securities to be registered on behalf of each after effectiveness, by amendment to the registration statement, prospectus supplement or incorporation by reference to an Exchange Act report (subject to filing a prospectus supplement identifying such report). Identification of the selling security holders by this means is only available if:

- the registration statement is an automatic registration statement
- the following conditions are satisfied:
 - the resale registration statement identifies the initial offering transaction pursuant to which the securities (or the securities convertible into such securities) were sold
 - the initial offering of the securities (or the securities convertible into such securities) is complete
 - the securities (or the securities convertible into such securities) the subject of the registration statement are issued and outstanding prior to the initial filing of the resale registration statement

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

An issuer registering the resale of securities acquired in a private offering may not rely on this provision to identify after effectiveness selling security holders who will acquire the securities directly from the issuer if the securities are not yet issued in the private offering, even where the investors are contractually bound to acquire the securities. In such case, the issuer must identify the selling security holders in the registration statement at the time of filing and prior to effectiveness.

Information Deemed Part of Registration Statement

Rule 430B make clear that information contained in a prospectus supplement required to be filed under Rule 424, whether in connection with a take-down from a shelf registration statement or otherwise, will be deemed part of and included in the registration statement containing the base prospectus to which the prospectus supplement relates. Rule 430C has similar provisions regarding treatment of prospectus supplements that will apply to offerings made in reliance upon Rule 415(a)(1)(i) and (ix). Accordingly, prospectus supplements will be considered part of and included in a registration statement for purposes of liability under Section 11.

Rule 430B and 430C deem information contained in a prospectus supplement to be part of and included in a registration statement as follows:

- for a prospectus supplement required to be filed other than in connection with a take down of securities, all information contained in that prospectus supplement will be deemed part of and included in the registration statement as of the date the prospectus supplement is first used
- under Rule 430B, for a prospectus supplement required to be filed in connection with a take down of securities pursuant to Rule 424(b)(2), (b)(5), or (b)(7), all information in that prospectus supplement will be deemed part of and included in the registration statement as of the earlier of the date it is first used or the date and time the first contract of sale of securities in the offering to which the prospectus supplement relates

Rule 430B also establishes a new effective date for shelf registration statement for Section 11 liability purposes only for the issuer and for a person that is at the time an underwriter. The new effective date will be the date a prospectus supplement filed in connection with the take down is deemed part of the relevant registration statement.

The filing of the a form of prospectus should not result in a later Section 11 liability date for directors and officers signing the registration statement, and experts, than that would apply prior to the new rules. Under Rule 430B, except for an effective date resulting from the filing of a form or prospectus for purposes of updating the registration statement pursuant to Section 10(a)(3) or reflecting fundamental changes in the information in the registration statement, the prospectus filing will not create a new effective date for directors or signing officers. Any person signing any report or document incorporated by reference in the prospectus that is part of the registration statement or the registration statement, other than a document filed for the purpose of updating the prospectus pursuant to Section 10(a)(3) or reflecting a fundamental change, is deemed not to be a person who signed the registration statement as a result. The new effective date also does not apply to a person that becomes an underwriter after the effective date; Section 11(d) provides that the date the person became an underwriter is its effective date. The filing of a prospectus will

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

not require the filing of a additional consents of experts, unless the prospectus supplement includes a new report or opinion of an expert whose consent is otherwise required.

Amendments to Rule 415*Elimination of Limitation on Amount of Securities Registered*

The new rules also amend Rule 415 to eliminate certain restrictions on the amount of securities that may be registered under a delayed or continuous shelf registration under Rule 415(a)(vii), (ix) and (x). Under the old rule, the amount of securities that could be registered in these offerings was limited to an amount which, at the time the registration statement became effective, was reasonably expected to be offered and sold within two years from the initial effective date. Under the new rules, for automatic shelf offerings and offerings under Rule 415(a)(1)(vii), (ix) and (x), a new shelf registration statement must be filed every three years with unsold securities and unused fees carried forward to the new registration statement.

Automatic shelf registration statements go effective immediately upon filing. In other cases, as long as the new registration statement is filed within three years of the original effective date of the old registration statement the issuer may continue to offer and sell securities from the old registration statement for up to six months thereafter until the new registration statement is effective.

Immediate Take Downs from Shelf Registration Statements

The new rules also amend Rule 415(a)(1)(x) to allow offerings on Forms S-3 and F-3 to occur immediately after effectiveness of a shelf registration statement. Under old rules, Rule 430A only permitted omission of limited information from the prospectus at the time of effectiveness. Rule 430B will permit far more information to be left for inclusion in a prospectus supplement.

Elimination of “At-the-Market” Offering Restrictions for Seasoned Issuers

The new rules eliminate the restrictions in Rule 414(a)(4) on “at the market” offerings of equity securities by primary shelf eligible issuers. Accordingly, such an issuer may conduct an “at-the-market” offering without, among other things, identifying the underwriter and without the limitations on the amount of securities that may be registered.

Rule 424 Amendments

A new paragraph (b)(8) is being added to Rule 424 for forms of final prospectus not filed within the time limits of Rule 424. Also, a new paragraph (b)(7) has been added for filing prospectuses identifying selling security holders. This conforms the rule to certain other procedural changes that the SEC has made.

Elimination of Rule 434

Rule 434 (dealing with term sheets) has been eliminated.

Rule 512 Undertakings

The new rules include certain revisions to the issuer undertakings in Rule 512 to reflect the issuer’s

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

agreement regarding inclusion of information contained in the prospectus. The amendments reflect the issuer's agreement regarding the inclusion of information contained in prospectus supplements in registrations statements and new effective dates of the registration statement on filing of a prospectus supplement.

Automatic Shelf Registration Statement

The new rules will permit **eligible well-known seasoned issuers** to register unspecified amount of different specified types of securities on immediately effective Form S-3 or F-3 registration statements. Unlike other issuers registering primary offerings on Form S-3 or F-3, the automatic shelf registration rule allows eligible issuers to add additional classes of securities and to add eligible majority subsidiaries as additional registrants after effectiveness of an automatic registration statement. They are also able to accommodate primary and secondary offerings using the automatic shelf registration.

The new rules will permit **eligible well-known seasoned issuers** to pay filing fees at any time in advance of a takedown or on a “pay as you go” basis at the time of each takedown off the shelf registration statement in an amount calculated for that takedown.

The new rules also permit more information to be excluded from the base prospectus in an automatic shelf registration statement than from a regular shelf registration statement. The omitted information may be included at or before the time of filing a prospectus supplement. Such registration statements become effective on filing without review by the SEC staff. The issuer would be required to file a new registration statement every three years.

Under the new rules, an issuer may file an automatic shelf registration statement if it meets the eligibility criteria for well-known seasoned issuers on the initial filing date. The issuer must also determine its eligibility at the time of each amendment to its shelf registration statement for purposes of providing its update under Section 10(a)(3). If an issuer is no longer eligible to use an automatic registration statement at the time of its determination of eligibility (for example, at the time of filing its annual report), it will have to either post-effectively amend its registration statement onto the form that it is then eligible to use or file a new registration statement on such form.

A base prospectus included in an automatic registration statement can under Rule 430B omit information pursuant to Rule 409 that is unknown and not reasonably available and can omit the following additional information:

- whether the offering is a primary or secondary offering;
- the description of the securities to be offered other than an identification of the name or class of securities;
- the names of any selling stockholders;
- disclosure regarding an plan of distribution.

The new rules permit such issuers the ability to add the omitted information to a prospectus by means of:

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

- a post-effective amendment to the registration statement;
- incorporation by reference from Exchange Act reports; or
- a prospectus or prospectus supplement that would be deemed part of and included in the registration statement.

Examples of information that may be added in this way include:

- public offering price;
- any updating information regarding the issuer (whether or not a fundamental change);
- detailed description of securities including information not contained or incorporated by reference in the base prospectus;
- identity of underwriters and selling stockholders;
- plan of distribution.

Unseasoned Issuers and Non-Reporting Issuers

New Rule 430B expands the circumstances in which **unseasoned issuers** may incorporate information from their Exchange Act reports into their Form S-1 and Form F-1 registration statements. A reporting issuer that has filed at least one annual report and is current in its reporting obligations under the Exchange Act is now permitted to incorporate by reference into its Form S-1 or Form F-1 information from its previously filed Exchange Act reports and documents. Such issuers will not be able to incorporate by reference to Exchange Act reports filed after the registration statement is effective, i.e., no “forward incorporation by reference” will be permitted. The rule conditions reliance upon the rule on the requirement that the reports and other materials that are incorporated by reference must be readily available and accessible on a web site maintained by or for the issuer and containing issuer information. The new rules eliminate the infrequently used Forms S-2 and F-2.

Prospectus Delivery Reforms

The SEC’s new rules adopt a prospectus delivery model based upon the concept of “access equals delivery.” Currently, under Section 5(b)(2) of the Securities Act, a final statutory prospectus must accompany or precede a written confirmation of sale of a security. Under these requirements, if no preliminary prospectus or written selling materials are distributed, the final prospectus is the only prospectus received by investors. However, an investor’s purchase commitment and the resulting contract of sale of securities to the investor in the offering generally occur before the final prospectus is required to be delivered.

The new rules reflect the SEC’s view that delivery of the sales confirmation and the delivery of the final prospectus need not be linked.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

“Access Equals Delivery”

Under the new rules, the SEC has adopted an “access equals delivery” model of prospectus delivery under new Rule 172. This new model permits issuers, underwriters and dealers to satisfy their prospectus delivery requirements if a final prospectus meeting the requirements of Section 10(a) of the Securities Act is timely filed with the SEC as part of the registration statement in accordance with Rule 424(b). All issuers, except for registered investment companies and business development companies, are eligible to rely on this new prospectus delivery model.

The new rule covers the prospectus delivery obligations in dealer transactions during any prospectus delivery period and in broker or dealer transactions on exchanges as long as the final prospectus has been or will be filed with the SEC.

Certain types of offerings have been excluded from the new rule, including offerings pursuant to Form S-8, business combination transactions and exchange offers.

Also, the SEC has also adopted Rule 173 which applies to each sale involving:

- a sale by an issuer or an underwriter to a purchaser; and
- a sale in which the final prospectus delivery requirements apply.

Rule 173 provides that in these transactions, each underwriter or dealer participating in a registered offering (or the issuer if the sale was not effected through an underwriter or dealer) must provide to each purchaser, not later than two business days after the completion of a sale, a copy of the final prospectus or, in lieu of the final prospectus, a notice providing that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered in the absence of Rule 172. An investor can also request a final prospectus, although it does not need to be provided before settlement. Compliance with Rule 173 is not a condition to reliance on Rule 172 to satisfy final prospectus delivery. Accordingly, non-compliance with Rule 173 will not result in a violation of Section 5 of the Securities Act.

Additional Exchange Act Disclosure Provisions

The new rules include a new item requiring risk factor disclosure in annual reports on Form 10-K and Exchange Act registration statements on Form 10 (but not in the Form 10-KSB or Form 10-SB). Such disclosure must be in the same “plain English” that is required in Securities Act registration statements. The new rules also provide for quarterly updates to reflect material changes from risk factors as previously disclosed in Exchange Act reports.

The new rules also require that **accelerated filers** and **well known seasoned issuers** disclose in their annual reports on Form 10-K or Form 20-F, written comments made by the SEC staff that: (i) the issuer believes are material; (ii) were issued more than 180 days before the end of the fiscal year covered by the annual report; and (iii) remain unresolved as of the date of the filing of the Form 10-K or Form 20-F.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

Also, the new rules require a voluntary filer under the Exchange Act to check a box to disclose its status as a voluntary filer on the Form 10-K, Form 10-KSB and Form 20-F. Generally, a voluntary filer is an issuer that has completed a registered offering under the Securities Act and continues to file Exchange Act reports after its Exchange Act Section 15(d) filing obligations have terminated.

Securities Act Liability Issues

In view of the reforms in the offering process and, in particular, to the so called “gun jumping” rules, the SEC has also addressed in an interpretation and a new rule the timing of liability under the Securities Act by, among other things, applying Section 11 liability to prospectus supplements and addressing the question of whether and when an issuer is deemed to be a seller in an initial distribution for purposes of Securities Act Section 12(a)(2) liability.

Section 11 of the Securities Act imposes liability for untrue statements of material facts or omissions of material facts required to be included in a registration statement or necessary to make the statements in the registration statement not misleading at the time the registration statement becomes effective.

Section 12(a)(2) imposes liability on sellers for offers or sales by means of a prospectus or oral communication that includes an untrue statement or omits to state a material fact that makes the statement made, based on the circumstances under which they were made, not misleading.

Section 17(a)(2) is a general anti-fraud provision which provides that it shall be unlawful for any person in the offer and sale of a security to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

A “sale” for purposes of the Securities Act includes a “contract of sale.” The SEC’s new interpretation and rule seek to bridge the gap between the time of the contract of sale (i.e., when an investor becomes committed to purchase the security) and the later availability of the prospectus. The Securities Act permits final prospectuses to become available after an investor becomes committed to purchase a security. The SEC’s view is that liability under Section 12(a)(2) and 17(a)(2) attaches based on the information conveyed to the investor at or before the contract of sale (which is the time the investor makes his investment decision) and that information conveyed after that time should not be considered in determining Section 12(a)(2) or 17(a)(2) liability, including information contained in any final prospectus, prospectus supplement, or Exchange Act filing.

In the context of certain offerings, including certain shelf offerings, the contract of sale may well occur well before the delivery of a final statutory prospectus, liability being based upon the preliminary prospectus, free writing prospectus or other information delivered or conveyed or made available prior to their investment decision. The SEC emphasized in the adopting release that it interprets Section 12(a)(2) and 17(a)(2) as not requiring that oral statements or the prospectus or other communications contain all information called for under the SEC’s disclosure requirements. Rather, liability is based on whether the communication includes a material misstatement or omits to include material information necessary to make the communication, under the circumstances in which it was made, not misleading.

Securities Offering Reform: SEC Makes Significant Changes to Rules Related to Registered Offerings of Securities and the “Gun Jumping” Rules

Information contained in a prospectus or prospectus supplement that is filed after the time of sale would be considered to be part of and included in a registration statement for purposes of liability under Section 11, which is determined at the time the registration statement is effective.

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For further information about Babirak, Vangellow & Carr, P.C., and its lawyers, you may visit our web site at www.bvcpc.com. If you have any question regarding any topic covered in this Corporate Advisor or regarding any corporate finance or related matter, please feel free to contact one of the following:

*Neil R.E. Carr, Esq.
(202) 467-0916
ncarr@bvcpc.com*

*B. Henry Perez, Esq.
(202) 467-0917
hperez@bvcpc.com*