Canada Steps Up
Canada Steps Up
Canada Steps Up

Appendix D

(i) Major Developments in United States Securities Regulation: Securities Offering Reform and Executive Compensation and Proxy Initiatives

Cleary Gottlieb Steen & Hamilton LLP

August 10, 2006

Canada Steps Up
Canada Steps Up
Canada Steps Up

I. Introduction: The Context

Following the passage of the Sarbanes-Oxley Act in 2002 and the implementation of its enhanced issuer reporting requirements, the U.S. Securities and Exchange Commission (the "SEC") has turned its focus to certain key areas of the securities laws that for many years have been talked about as ripe for reform – the securities offering process and the executive compensation disclosure and proxy delivery rules. The SEC had previously tried to address the securities offering process in 1998 with its so-called "Aircraft Carrier" proposal, but this proposal would have so significantly revised the securities offering rules that it garnered too much opposition and literally sank of its own weight.

The path for securities offering reform – even greater reliance on periodic issuer reporting and less SEC staff focus on disclosure in connection with particular offerings, especially for seasoned issuers – has been generally agreed upon by the SEC and market participants for some time. The structure of the U.S. securities offering regulatory regime as adopted more than 70 years ago has made reform difficult, however. The U.S. Securities Act of 1933 (the "Securities Act") sets forth the basic requirement that every public offer or sale of a security must be made pursuant to a registration statement filed with the SEC. The U.S. Securities Exchange Act of 1934 (the "Exchange Act") requires issuers to file periodic reports, generally on an annual, quarterly and "current" basis. Because the Securities Act was adopted before the Exchange Act, the original statutory framework for the offering process did not contemplate reliance on periodic reports under the Exchange Act in the case of offerings by already public issuers.

As a result of this legal structure, the SEC has felt constrained in adopting an "integrated" approach to disclosure that would create greater efficiency and ease in the offering process, and has done so only slowly over time. Not until the early 1980s did the SEC introduce the concept of shelf registration, under which issuers can file registration statements for review and clearance by the SEC prior to any offerings, and then issue prospectus supplements at the time of offerings that remain free from SEC review. The enhancements to ongoing public company reporting brought about by the Sarbanes-Oxley Act and certain other initiatives, however, have eased the way for a more complete integrated disclosure regime. The SEC implemented such a regime through the securities offering reforms that became effective in December 2005, which have significantly expanded the flexibility available to large public issuers in accessing the capital markets. The SEC has continued down this same path of focusing on Exchange Act reporting with its recent initiatives with respect to the disclosure requirements for executive compensation and the requirements for delivery of proxy materials.

Canada Steps Up
Canada Steps Up
Canada Steps Up

II. Securities Offering Reform

The SEC adopted significant changes to the securities registration and offering rules under the Securities Act on June 29, 2005, and these changes went into effect on December 1, 2005.[1] The reforms, while quite significant, are incremental in nature and build on the existing integrated disclosure and shelf registration systems to achieve the SEC's goals of modernizing the securities offering and communications processes without compromising investor protection.

By modernizing and rationalizing the existing system to address a number of its problems while at the same time retaining its many benefits – and, indeed, heightening its flexibility in the case of a new category of large, seasoned issuers – the SEC has successfully carried forward and refined the advantageous elements of previous efforts at Securities Act reform, such as the Aircraft Carrier proposals,[2] while avoiding the pitfalls encountered by those prior efforts. As a result, these reforms, especially those regarding automatic shelf registration and other shelf registration reforms as well as the general liberalization of the communications rules applicable to registered offerings, provide a welcome reshaping of the securities offering process. And, because of the practical approach reflected in the new rules, the reforms do so with minimal disruption and cost in the marketplace. More importantly, the reforms increase the efficiency of the U.S. capital markets while at the same time providing more information to prospective investors under appropriate safeguards.

The reforms recognize two primary areas of evolution in the securities offering process and the capital markets. First, technological advances over the course of the last three decades have both increased the market's demand for more timely corporate disclosure and heightened the ability of issuers to provide it. Second, the reporting requirements of the Exchange Act have been enhanced in content and accelerated in timing as a result of the Sarbanes-Oxley Act and recent SEC rulemakings and interpretive actions. The SEC views enhanced Exchange Act reporting as a cornerstone of the securities offering reform process. In recognition of these developments, the reforms:

- facilitate greater availability of information to investors and the market;
- eliminate barriers to open communications;
- reflect the increased importance of electronic dissemination of information, including the use of the Internet;
- make the capital formation process more efficient; and
- clarify disclosure liability.

The SEC's reforms have also been motivated by its strong interest in attracting a greater volume of transactions to the U.S. public market through registration. By providing more flexibility for registered offerings, the reforms aim to reduce reliance on private placements, particularly Rule 144A offerings under the Securities Act. Offerings made under Rule 144A are made only to "qualified institutional buyers" ("QIBs"), which are generally large financial institutions; as these offerings are not made to the public, they are exempt from registration under the Securities Act.

[1] SEC Release Nos. 33-8591; 34-52056; IC-26993 (July 19, 2005) (the "Adopting Release").

[2] SEC Release Nos. 33-7606; 34-40632; IC-23519 (Nov. 3, 1998).

In light of these aims, the Securities Act reforms focus on three main areas of change:

- expanding permissible communications in connection with registered offerings;
- clarifying the liability framework applicable to registered offerings under the Securities Act; and
- streamlining the securities registration process.

With limited exceptions, the reforms address only registered offerings and not exempt offerings, such as those pursuant to Rule 144A or Regulation S under the Securities Act. Special rules applying the reforms to asset-backed securities issuers have also been adopted.

A series of explanatory charts summarizing the reforms can be found at the end of this chapter, including the key new concepts of well-known seasoned issuers or "WKSIs" and "free writing prospectuses," which are written offers to sell securities relating to a registered offering that do not include all of the information required for statutory prospectuses.

Categories of Issuers

Different rules apply to different categories of issuers under the securities offering reforms, and an understanding of these categories is key to analyzing the reforms.

1. Well-Known Seasoned Issuer

The cornerstone of the SEC's reforms is the creation of a new category of issuers referred to as "well-known seasoned issuers" or "WKSIs." Under the new rules, a WKSI is generally a company that (i) on the date of determination described in the next paragraph, meets the registrant requirements of a registration statement on Form S-3 or F-3 of the Securities Act, including having timely filed its Exchange Act reports for the preceding 12 calendar months, and (ii) within 60 days of that determination date either (1) has a worldwide market value of its voting and non-voting common equity held by non-affiliates of at least $700 million or (2) (x) has issued in the preceding three years at least $1 billion aggregate principal amount of registered non-convertible securities, other than common equity, in primary offerings for cash and (y) registers only non-convertible securities, other than common equity (unless the issuer also meets the $75 million public float requirement of Form S-3 or F-3).[3,4]

The determination date for WKSI status of an issuer is the later of (i) the time of filing of the issuer's most recent shelf registration statement and (ii) the time of the issuer's most recent annual amendment to a shelf registration statement, which typically occurs at the time of filing the issuer's most recent annual report on Form 10-K or 20-F of the Exchange Act (or the time by which the report should have been filed if not filed by the applicable due date).

[3]In calculating the $1 billion amount, an issuer generally may include the principal amount of any debt and the greater of the liquidation preference and par value of any non-convertible preferred stock. A parent issuer may include the aggregate principal amount of such securities issued by its majority-owned subsidiaries that the parent has fully guaranteed.

[4]A majority-owned subsidiary of a WKSI may also qualify if the subsidiary satisfies the WKSI criteria or if, with respect to non-convertible securities other than common equity, any of the following conditions is met: (i) the subsidiary's parent fully and unconditionally guarantees the subsidiary's non-convertible securities; (ii) the subsidiary guarantees the non-convertible securities of (A) its parent or (B) another majority-owned subsidiary (that are also guaranteed by the parent); or (iii) the subsidiary offers investment grade securities that meet the requirements for such securities in Form S-3 or F-3.

In addition, to qualify as a WKSI, the issuer may not fall within the category of "ineligible issuers" described below.

2. Seasoned Issuer

A "seasoned issuer" means an issuer eligible to use Form S-3 or F-3 to register a primary offering of securities.[5]

3. Unseasoned Issuer

An "unseasoned issuer" means an issuer that is required to file reports under Section 13 or Section 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or F-3 for a primary offering of its securities.[6]

4. Non-Reporting Issuer

A "non-reporting issuer" means an issuer that is not required to file reports under Section 13 or Section 15(d) of the Exchange Act, including issuers that voluntarily file Exchange Act reports (typically as a result of a contractual obligation).

5. Ineligible Issuer

Certain issuers are ineligible to qualify as WKSIs and, therefore, do not benefit from automatic shelf registration. According to the guidance published by the Division of Corporate Finance of the SEC, Canadian issuers filing annual reports on Form 40-F of the Exchange Act under the U.S.-Canadian Multi-Jurisdictional Disclosure System fall into this class. No free writing prospectus can be used in connection with the offerings of ineligible issuers except for, in the case of all ineligible issuers other than blank check companies, shell companies and penny stock issuers, free writing prospectuses that are limited to descriptions of the terms of the offered securities and the offering. Ineligible issuers also include:

- for eligibility to use a free writing prospectus, reporting issuers that are not current in their Exchange Act reports (as of the relevant date of determination),[7] other than reports on Form 8-K filed to disclose (1) entry into or termination of a material definitive agreement; (2) creation, acceleration or increase of a direct financial obligation or off-balance sheet arrangement; (3) costs associated with an exit or disposal plan; (4) a material charge for impairment of assets; (5) non-reliance on previously issued financial statements due to an error in such financial statement; or (6) with regard to asset-backed securities, any informational or computational material, a change in credit enhancement or other external support, or any update of material pool characteristics;[8]

[5]The reforms expand the majority-owned subsidiary eligibility in Forms S-3 and F-3 to allow majority-owned subsidiaries to use these forms under the same circumstances in which majority-owned subsidiaries may be WKSIs. Asset-backed securities issuers offering securities registered on Form S-3 would also be considered seasoned issuers but could not qualify for WKSI status.

[6]Foreign governments (or political subdivisions of foreign governments) that register securities on Schedule B of the Securities Act are ineligible to use Form S-3 or F-3. As a result, Schedule B issuers cannot satisfy the WKSI or seasoned issuer criteria and will not benefit from the communications reforms for seasoned issuers and WKSIs, or any of the reforms to the shelf registration process.

[7]Failure to *timely* file will not by itself result in an issuer being ineligible to use a free writing prospectus.

[8]*See* General Instructions I.A.3(b) of Form S-3.

- blank check companies, shell companies (other than a business combination related shell company) and penny stock issuers (in each case, at any time over the past three years (including predecessors));
- limited partnerships offering and selling their securities (other than in a firm commitment underwriting);
- issuers that have had an involuntary bankruptcy petition filed against it (if the case is not dismissed within 90 days) or the conversion of a bankruptcy case to a voluntary proceeding;[9]
- issuers or any entity that was at the time a subsidiary of an issuer[10] that was convicted within the past three years of a felony or misdemeanor described in Section 15(b)(4)(B) of the Exchange Act, such as larceny, making of false reports and robbery;
- issuers the registration statements of which are, or within the past three years have been, the subject of refusal or stop orders under the Securities Act;
- issuers (or their subsidiaries) that within the past three years (but in the case of a decree or order agreed to in a settlement, not before the effective date of the new rules) have been made the subject of a judicial or administrative decree or order finding a violation of the anti-fraud provisions of the federal securities laws or requiring the cessation of violations of the anti-fraud provisions of the federal securities laws, or prohibiting certain conduct or activities regarding the anti-fraud provisions of the federal securities laws; or
- issuers that are either investment companies or business development companies, in each case as defined in the U.S. Investment Company Act of 1940, as amended (the "Investment Company Act").[11]

Rule 164(h) of the Securities Act provides that the date of determination as to whether an issuer is an ineligible issuer in respect of an offering, for purposes of determining the circumstances under which a free writing prospectus can be used, is either (i) the time of filing the corresponding registration statement or (ii) for offerings registered pursuant to Rule 415, the earliest time after filing the corresponding registration statement at which the issuer or another offering participant makes a *bona fide* offer of the securities registered.[12] The Adopting Release makes clear that the timing of determination of ineligible issuer status applies to all issuers, including WKSIs, for these purposes.[13]

[9]Ineligibility due to bankruptcy proceedings will terminate once the issuer has filed an annual report with audited financial statements subsequent to its emergence from such proceedings.

[10]The "was at the time a subsidiary of an issuer" provision is intended to address concerns about a subsidiary that had been convicted of a felony or misdemeanor described in Section 15(b)(4)(B) prior to its acquisition disqualifying the acquiring issuer from WKSI eligibility.

[11]The new rules include a waiver provision that will enable the SEC to waive an issuer's ineligibility if the SEC determines, upon the "showing of good cause," that it is not necessary to categorize such issuer as an ineligible issuer.

[12]Rule 164 also clarifies that an offering participant, other than the issuer, must have a reasonable belief that the issuer is not an ineligible issuer at the time of determination in order to benefit from the issuer's eligibility.

[13]The timing of determination of ineligible issuer status for purposes of assessing whether an issuer qualifies as a WKSI is different.

Canada Steps Up
Canada Steps Up
Canada Steps Up

Liberalization of Communications Rules

Pre-Reform Rules Governing Communications

The offering process can be divided into three stages as a result of the provisions of Section 5 of the Securities Act. The first stage is the "quiet period," after the decision to proceed with an offering has been made but before the registration statement is filed. Under the regime previously in place, oral and written offers were prohibited during the quiet period. The term "offer" was (and in fact continues to be) interpreted broadly, and includes "the publication of information and statements, and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities. . . ."[14] During the second stage, the period between filing and effectiveness of the registration statement, written or oral offers, but not sales, could be made, but any offer made in writing or by radio or television had to be made exclusively through the preliminary prospectus filed as part of the registration statement. Finally, during the third stage, after the registration statement was made effective, offers and sales could be made. Offering material other than the prospectus could be used after effectiveness only if it was accompanied or preceded by a final prospectus. Violations of any of these restrictions during each stage were generally referred to as "gun-jumping." All offering materials – whether written or oral – also had to avoid making material misstatements and could not omit material information necessary to make the statements made not misleading under the general anti-fraud provisions of the U.S. securities laws.[15]

The SEC acknowledged that the existing regulatory scheme unnecessarily hindered legitimate communications that would be helpful to investors and provided different classes of investors unequal access to information.[16] In addition, the SEC recognized that the distinction between permissible communications and illegal offers violating Section 5 of the Securities Act was not clear and requires a "facts and circumstances" analysis. Although the SEC did not explicitly say this in the Adopting Release, we believe it was also concerned that the consequences of violating the gun-jumping rules – strict liability for rescission – was so harsh, even if the disclosure was truthful, that issuers and offering participants shied away from making disclosures that would be helpful to the market. To reduce this uncertainty and promote the dissemination of more information regarding offerings to all investors, the reforms liberalized many of the current restrictions on communications prior to and during offerings.

[14]SEC Release No. 33-5180 (Aug. 16, 1971); *see also* Section 2(a)(3) of the Securities Act (defining "offer" as any attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value).

[15]*See* Sections 11, 12(a)(2) and 17(a)(2) of the Securities Act and Rule 10b-5 under the Exchange Act.

[16]For example, the SEC observed in the Adopting Release that the current regulatory system has led to the practice of marketing securities through road show presentations that have not been open to retail investors generally. As a result, small investors generally have not had the same access to information as larger investors.

General Description of Communications Reforms

The reforms introduced the concept of a "free writing prospectus," which is defined as any written communication[17] representing an offer to sell or a solicitation of an offer to buy securities that is or will be the subject of a registration statement that does not otherwise satisfy the statutory prospectus requirements.[18] In order for a communication to be considered a free writing prospectus such communication must constitute an offer. A determination as to whether a particular communication is an offer is made, as was previously the case, based on the particular facts and circumstances of the communication, and not all communications related to an offering qualify as an offer.

Under the reforms, all existing limitations on communications disseminated at any time during the offering process by WKSIs were eliminated, although communications that represent a "free writing prospectus" are in many cases required to be filed. Other eligible issuers are permitted to disseminate communications that constitute a "free writing prospectus" after filing a registration statement, subject to filing and other conditions. The rules also include a new safe harbor allowing most forms of communication made more than 30 days prior to the filing of a registration statement; communications continue to be restricted during the 30-day period prior to the filing of the registration statement (except for WKSIs). However, it should be noted that, the SEC has not modified the definition of offer, which remains subject to existing broad interpretation.

Liability for Prospectuses and Oral Communications

Overview

The Securities Act provides purchasers of securities in a registered offering with a private right of action for materially deficient disclosure in registration statements under Section 11 and in prospectuses and oral communications under Section 12(a)(2). A claim under Section 11 arises when any part of the registration statement at the time it becomes effective either (i) contains an untrue statement of a material fact or (ii) omits a material fact required to be included in the registration statement or necessary to make the statements in the registration statement not misleading. Under Section 12(a)(2), sellers have liability for offers or sales by means of a prospectus or oral communication that contains a material misstatement or omits a material fact that is "necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." Section 17(a)(2) of the Securities Act is a general anti-fraud provision that makes it unlawful for any person in the offer and sale of a security to obtain money or property by means of any untrue

[17]The reforms define all methods of communication, including television or radio broadcasts or graphic communications, other than oral communications, as written communications for purposes of the Securities Act. The definition of graphic communications has been amended to include all forms of electronic media, such as audiotapes, videotapes, facsimiles, CD-ROMs, e-mail, Internet communications and other web-based communications, such as electronic postings on web sites.

[18]Written communications constituting an offer that are circulated at the same time as or after delivery of a final prospectus do not constitute a prospectus under the Securities Act. These communications would not be subject to the rules governing free writing prospectuses. In addition, Rule 134 notices, Rule 135 communications, regularly released factual business information and forward-looking information falling within new Rules 168 and 169, and research reports satisfying the requirements of Rule 137, Rule 138 or Rule 139, do not constitute free writing prospectuses because they are not considered to be offers or prospectuses for purposes of the gun-jumping provisions.

Canada Steps Up
Canada Steps Up
Canada Steps Up

statement of a material fact or any omission of a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading.[19] Courts generally have held that Section 17(a)(2) does not provide a private right of action.

Information Conveyed by the Time of Sale

Rule 159 codifies the SEC's interpretation that information conveyed to an investor *after* the time of a sale should not be taken into account in determining whether the information conveyed to an investor *at* the time of a sale by or on behalf of a seller (including an issuer, underwriter or participating dealer) was materially deficient under Section 12(a)(2) or Section 17(a)(2). Item 512 of Regulation S-K of the Securities Act also has been revised to require issuers to provide an undertaking to this effect. For purposes of this interpretation, the SEC states in the Adopting Release that a "sale" (including a contract of sale) of registered securities occurs at the time an investment decision is made.[20] This interpretation and Rule 159 attempt to address the discrepancy between the information available to investors when making an investment decision and the subsequent availability of a final prospectus (including corrections or modifications contained in any final prospectus or Exchange Act filings filed after the time of sale). As was previously the case, the determination whether information has been conveyed to an investor by a seller at or prior to the time of sale requires a "facts and circumstances" analysis, towards which the SEC provided helpful guidance in the Adopting Release.[21]

Registration Process Reforms

The reforms streamline the registration process for seasoned and unseasoned issuers. The procedural changes adopted:

- clarify and expand how and when information may be included in registration statements, as well as the issuer's liability for information provided in prospectus supplements and Exchange Act reports incorporated by reference;
- modify the timing of effectiveness of shelf registration statements and non-shelf securities offerings; and
- establish an automatic shelf registration process for WKSIs.

The creation of an automatic shelf registration process for WKSIs provides three notable benefits for these issuers. First, shelf registration statements filed by WKSIs are automatically effective. Second, no fees are due when an automatic shelf registration statement is initially filed, which allows a "pay-as-you-go" basis. Finally, automatic shelf issuers are also permitted to omit substantial information from a registration statement,

[19]The SEC interprets Sections 12(a)(2) and 17(a)(2) as not requiring that oral statements or the prospectus or other communications contain all material information, only that they contain all information necessary to make the statements therein not misleading.

[20]Section 2(a)(3) defines "sale" as including "every contract of sale." Under the SEC's interpretation, the time of contract of sale would be either the time the purchaser (i) enters into the contract (including acceptance by the seller of an offer) or (ii) completes the sale.

[21]Such information will also include information contained in free writing prospectuses.

including: (i) whether the offering is a primary or secondary offering; (ii) the description of the securities, other than the name or class of the securities; (iii) the names of any selling security holders; and (iv) any plan of distribution. This allows for so-called unallocated shelf registrations, which were not permitted under the previously existing rules. Omitted information may be incorporated by reference to Exchange Act reports[22] or be contained in the prospectus or prospectus supplement that is deemed to be part of the registration statement. This approach does not apply to additions of new types of securities, new issuers or guarantors, which require filing a post-effective amendment (that becomes effective immediately upon filing).[23]

Prospectus Delivery Reforms

Under the previously existing rules, a prospectus meeting the requirements of Section 10(a) of the Securities Act – a final prospectus – was required to be delivered to each investor in a registered offering at or prior to the earlier of delivery of a confirmation of sale and delivery of the securities.

The amendments to the prospectus delivery requirements eliminate, generally, the need to deliver final prospectuses in registered offerings, transactions involving securities of affiliate issuers (including market making transactions) and transactions involving unsold allotment securities.[24] They also eliminate the requirement that prospectuses be delivered in the aftermarket following an offering for a specified period of time and allow underwriters and dealers to send notices of allocations via e-mail.

The new rules do not apply to (i) offerings of any investment company registered under the Investment Company Act; (ii) offerings of any business development company; (iii) business combination transactions defined in Rule 165(f)(1); and (iv) offerings registered on Form S-8 of the Securities Act.[25]

New Exchange Act Disclosure Requirements

Risk Factor Disclosure

The reforms require risk factor disclosure, the purpose of which is to describe the most significant factors that may adversely affect the issuer's business, operations, industry or financial position or its future financial performance, in the issuer's annual reports and quarterly updates.

[22]If information that relates to the terms of the offering, the securities, the plan of distribution or any selling security holders (as opposed to issuer-related information) omitted from the base prospectus is included in an Exchange Act filing, a prospectus supplement must be prepared and filed under Rule 424 identifying the specific Exchange Act report or reports containing such information.

[23]Requiring post-effective amendments for these additions is intended to ensure that new issuers and their officers and directors become signatories to the registration statement and that all information, opinions and consents are provided in the registration statement, and for purposes of qualification of any debt securities being added to the registration statement for purposes of the U.S. Trust Indenture Act of 1939 (the "TIA"). In the case of debt securities, the post-effective amendment should also include the form of indenture to be qualified under the TIA, because a TIA-qualified indenture remains a requirement for a registered offering of debt securities. TIA qualification, however, should not introduce a speed bump because Section 309(a)(1) of the TIA provides that an indenture will be deemed qualified at the time the corresponding registration statement (or post-effective amendment) is declared effective (which will occur automatically upon filing). In the case of non-automatic shelf registration statements, the SEC staff will continue to take the view that an indenture must be qualified when the related registration statement first becomes effective.

[24]Issuers and underwriters may still choose to print prospectuses for record keeping purposes or other business-related reasons, including using prospectuses as a written confirmation of receipt. In addition, purchasers will have the right to request physical copies of the final prospectus pursuant to Rule 173.

[25]In offerings on Form S-8, the final prospectus is not filed with the SEC.

Canada Steps Up
Canada Steps Up
Canada Steps Up

Disclosure of Unresolved Staff Comments to Exchange Act Reports

In light of the reforms allowing for automatic effectiveness for WKSIs, and in order to ensure timely response to SEC staff comments on Exchange Act reports, the new rules require all "accelerated filers"[26] and WKSIs to disclose, in their annual reports on Form 10-K or 20-F, unresolved written comments made by the SEC staff in connection with review of Exchange Act reports that the issuer believes are material[27] and that were issued more than 180 days[28] before the end of the fiscal year covered by the annual report. However, issuers are also able to include their position regarding these unresolved comments.

Implications of the Reforms

We believe the basic approach of the reforms is a sound one. The reforms address many of the concerns that were raised by market participants about the previous system for registered offerings – particularly the rigidity of the limitations on communications and the inability of large seasoned issuers to obtain rapid access to the capital markets – while retaining its many advantages. In addition, the changes resulting from the reforms were relatively easy to implement because they were crafted within the framework of the existing system. We highlight below the most significant implications of the reforms for market participants.

- *Improvements in Shelf Registration Process.* The reforms result in significant improvements in how shelf registration worked. Most of the changes are incremental improvements in the efficiency of the process or in the clarity of the rules. The major innovation is the introduction of "automatic shelf registration," a much simpler and more flexible registration process without SEC review that is available only to WKSIs. As issuers and underwriters become familiar with this new tool, it should become the dominant technique for large issuers to access the market.

- *Rationalization of "Gun-Jumping" Rules.* Restrictions on public communications during the offering process had become unnecessarily burdensome, particularly in light of changes in communications technology and practices. They had also been a source of uncertainty, creating serious risks that have threatened the smooth execution of offerings. The reforms provide clarification and liberalization, both highly welcome. The liberalization is most notable for WKSIs, which are largely freed of gun-jumping concerns, but the clarification benefits all issuers and underwriters, and their counsel, by reducing uncertainty and addressing current technologies.

- *More Registered Offerings.* The reforms encourage many offerings that were conducted under Rule 144A to be conducted instead on a registered basis. Issuers of convertible securities and high yield debt

[26]The term "accelerated filer" is defined by Rule 12b-2 of the Exchange Act, and it means an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Act; and (iv) the issuer is not eligible to use "small business" Forms 10-KSB and 10-QSB of the Exchange Act for its annual and quarterly reports.

[27]Although the issuer must determine whether an unresolved comment is material, it is likely the staff of the SEC's Division of Corporation Finance will view comments that have not been resolved within the 180-day period as presumptively material.

[28]The 180-day time period commences from the date of the first comment letter that specifically raises the issue, which may be later than the initial comment letter on a filing.

often relied on Rule 144A to execute transactions quickly and take advantage of favorable market conditions. Many of these issuers qualify as WKSIs under the new rules and thereby benefit from automatic shelf registration. Offerings by WKSIs can be expected to move to the registered market, except in two sets of circumstances. The first is where a WKSI's disclosure would not meet SEC financial disclosure requirements. These circumstances could include (a) major acquisitions where target company or pro forma financial information is not yet available and (b) offerings by foreign private issuers that have not filed U.S. GAAP-reconciled interim financials or their Form 20-F, including U.S. GAAP-reconciled audited financials, within the required 9- or 15-month periods, respectively. The second set of circumstances is where the Regulation M prohibition on purchases of securities contemporaneously with a securities offering does not permit issuer repurchases that sometimes accompany convertible securities offerings, in which case the issuer has to rely on the exception from Regulation M for transactions in Rule 144A securities.

- *Heightened Dependence by Underwriters on Due Diligence Defense.* As discussed above, the benefits of automatic shelf registration will likely cause many WKSIs that previously conducted rapidly executed convertible securities and high yield debt offerings under Rule 144A to conduct those offerings on a registered basis. Disclosure liability for registered offerings under Sections 11 and 12(a)(2) of the Securities Act is stricter than that for Rule 144A offerings under Exchange Act Rule 10b-5, which requires a plaintiff to prove scienter (intent) and reliance. Moreover, unlike the Aircraft Carrier proposals, the reforms do not include any guidance on when the underwriter due diligence standards of Sections 11 and 12(a)(2) have been met in the context of these kinds of rapidly executed offerings by large seasoned issuers. The concern has been heightened for underwriters by the WorldCom decision,[29] in which the court adopted what many consider to be, as a practical matter, an unachievable measure of those standards, at least in the context of a motion to dismiss or for summary judgment. Accordingly, insofar as rapidly executed convertible securities and high yield debt offerings are conducted by weaker credits, underwriters should consider (together with issuers) whether these offerings, although they could be registered, in fact are more suitable for the QIB market to which they have been exclusively marketed in recent years under Rule 144A rather than for a broader public market.

- *Conveyance of Information to Investors for Purposes of Section 12(a)(2).* The new rules codify the SEC's interpretation in the Proposing Release that disclosure liability under Section 12(a)(2) of the Securities Act does not take account of information conveyed to investors after the time of the "contract of sale." The determination of whether information has been conveyed to an investor at or prior to the time of the contract of sale is a facts and circumstances test, but the Adopting Release

[29]*See* In re WorldCom, Inc. Securities Litigation, 346 F.Supp.2d 628 (S.D.N.Y. 2004). [26]The term "accelerated filer" is defined by Rule 12b-2 of the Exchange Act, and it means an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Act; and (iv) the issuer is not eligible to use "small business" Forms 10-KSB and 10-QSB of the Exchange Act for its annual and quarterly reports.

confirms, by citing Starr v. Georgeson,[30] that the correct standard to apply is what is "reasonably available" to the investor and not what the investor "truly knew."[31]

The SEC stopped short of providing safe harbors for determining when information is "reasonably available," but we believe the SEC's own emphasis on the integrated disclosure system makes it clear that information filed on the SEC's EDGAR website is "reasonably available." Nevertheless, pending development of further judicial or regulatory guidance on this test, it would be prudent to buttress this conclusion by using a free writing prospectus to eliminate any argument about reasonable availability where plainly material information is added to the EDGAR record shortly before the time of the contract of sale.

- *Finalizing Terms of Securities and Section 12(a)(2)* Disclosure Deadline. Often it is not clear when a contract of sale is entered into between an underwriter and investors. Underwriters may confirm sales with different purchasers at different times or even on different dates. In addition, conditional orders can be taken prior to effectiveness and become binding orders if the potential purchaser does not take further action. Thus, as was previously the case, the determination of whether information has been conveyed to an investor by a seller at or prior to the time of sale requires, as noted above, a "facts and circumstances" analysis.

We do not believe significant disclosure timing issues arise with respect to information about issuers, because, as discussed above, issuers and underwriters will be able to convey new information about the issuer prior to pricing by filing a Form 8-K or 6-K in conjunction with, when appropriate, a free writing prospectus. By contrast, finalizing the terms of complex securities – convertible notes, high yield bonds and structured products – has as a matter of practice often occurred after pricing given the speed at which offerings are conducted in today's capital markets, thereby raising concerns under Section 12(a)(2).

The Adopting Release provides guidance on how to address this concern. First, it states that an offering could be sold as being "the same as XYZ transaction" (with any specified modifications) and meet the standards of Section 12(a)(2) so long as none of the omitted information about any detailed terms makes those terms that are specified misleading. In this regard, the Adopting Release is clear in describing what Section 12(a)(2) requires.

> *"Securities Act Section 12(a)(2) … [does] not require that … the prospectus … contain all information called for under our line-item disclosure rules or otherwise contain all material information. Rather, under these provisions, the determination of liability is based on whether the communication includes a material misstatement or fails to include material information that is necessary to make the communication, under the circumstances in which it is made, not misleading."*[32]

As another example of this principle, the Adopting Release describes forward-sale transactions where contracts of sale are entered into based on portfolio profiles specifying important characteristics of asset pools

[30] Starr v. Georgeson Shareholder, Inc., 2005 U.S. App. LEXIS 11250 (2nd Cir. 2005).
[31] *Id* at *18.
[32] Adopting Release at 175 (emphasis added) (citation omitted).

within given ranges or market standards. Where the characteristics in the profiles do not exclude material elements of the pool's characteristics the omission of which would make the profiles misleading and where the final pools fall within the disclosed ranges or market standards, this kind of disclosure can meet the Section 12(a)(2) standard.

The second critical element of guidance provided by the Adopting Release deals with what happens if there is a material omission at the time of sale, or if a material correction in terms is required subsequently. In this regard, the Adopting Release states that purchasers and sellers can reassess their purchase commitment based on new or changed information and enter into a new contract of sale. In the SEC's view, the procedure by which a purchaser and seller agree to terminate the original contract and enter into a new contract of sale "must be the substantive equivalent of the termination by mutual agreement of the prior contract of sale and the entering into a new contract of sale."[33] Notably, this is consistent with what we believe happened previously when a mistake is made in explaining a material term of a security to an investor. The underwriter contacted the investor, explained the error and – both for liability avoidance and reputational reasons – provided an opportunity to cancel the trade. By adding the ability to use a free writing prospectus, the SEC now facilitates this process by permitting a written as well as an oral means of addressing this problem, particularly, as a practical matter, in the institutional market where securities with complex terms are generally sold.

- *10b-5 Letters.* Counsel for the issuer and the underwriters in a registered securities offering customarily provide so-called "10b-5 letters" to the underwriters at the closing of an offering, addressing the adequacy of disclosure in the final prospectus. Now that the SEC has reminded the market that Section 12(a)(2) liability is determined at the time of contract of sale, market participants have been reassessing whether it continues to make sense for these letters to focus on the final prospectus rather than the information conveyed to investors at the testing point.

This is a good question, but the answer needs to be informed by the same practical understanding of how the market works as the SEC and its staff have shown in crafting the new rules. As a theoretical matter, 10b-5 letters would be more meaningful if addressed to the information conveyed to investors (indeed, as suggested above, to each particular investor) at the time of contract of sale; and, as a practical matter, they should be able to be addressed at closing to the information about *the issuer* at the time of pricing either on EDGAR or included in specified free writing prospectuses. But it may not be practical to address the information conveyed to investors about *the terms of the securities* at the time of pricing as contrasted with their description in the final prospectus. Why? Speed bumps.

Everyone agrees that speed bumps in the offering process are anathema to the market. That is what sunk the Aircraft Carrier proposals, and the SEC went out of its way to disclaim any intention of adding speed bumps this time.[34] Because requiring counsel to assess whether a set of terms contains any material misstatement or omission in turn requires that those terms be in writing, asking counsel to shift their focus from the final prospectus to an earlier description of terms – at least in the typical shelf takedown – would necessarily introduce the very speed bump the market has loudly rejected. In the months since the reforms

[33]Adopting Release at 183.
[34]Adopting Release at 178.

Canada Steps Up
Canada Steps Up
Canada Steps Up

went into effect, market participants have largely accepted this argument, and have typically gotten comfortable with 10b-5 letters that cover the terms of an offering as set forth in a base or preliminary prospectus together with a free writing prospectus containing a final term sheet for the offering.

- *Use of Free Writing Prospectuses for which the Issuer is Responsible.* There are two circumstances where free writing prospectuses for which the issuer is liable are likely to be used. First, although we have just cautioned about self-inflicted speed bumps, we recognize that a free writing prospectus permits offering participants to clarify key complex terms in writing in an expeditious way. Second, as suggested earlier, in response to the sharpened focus on Section 12(a)(2) liability, free writing prospectuses can be expected to be used for late-breaking, material developments regarding the issuer.

- *Use of Free Writing Prospectuses for which the Issuer is Not Responsible.* Although underwriters can use free writing prospectuses after the filing of a registration statement, including those for which the issuer bears no responsibility as a matter of law, they have to consider, particularly in the latter case, the circumstances under which they will permit use of free writing prospectuses, and develop compliance procedures to control and track the information their employees distribute. Because an underwriter would have Section 12(a)(2) disclosure liability for any free writing prospectuses it sends (but not generally for any sent by other underwriters) – and an issuer will probably not agree to indemnify for a free writing prospectus it has not approved in advance – underwriters will likely want to circumscribe narrowly the information salespersons are permitted to e-mail to investors or otherwise deliver in writing. Consideration also will have to be given to whether, despite the Starr case, a free writing prospectus not accompanied by the statutory prospectus would meet the "fair and balanced" standard for underwriter communications in the National Association of Securities Dealers (the "NASD") Rule 2210 (which, subject to exception for egregious cases, such as those giving rise to the "buried facts" doctrine,[35] we hope the NASD interprets in a manner consistent with the Adopting Release).

Furthermore, in light of the uncertainties regarding whether the content of a free writing prospectus makes it one for which the issuer is liable – either as an issuer free writing prospectus or one that contains issuer information – issuers may insist that underwriters consult them prior to distribution by the underwriters of any written materials outside the statutory prospectus. To the extent an issuer is consulted and authorizes an underwriter to use a free writing prospectus, however, that free writing prospectus would constitute an issuer free writing prospectus for which the issuer has Section 12(a)(2) liability. One possible issuer reaction would be to prohibit the use by an underwriter of any free writing prospectus not prepared with the issuer's involvement, but this unfortunately would undermine the purpose behind the rules – to allow for separate underwriter communications without issuer liability. One possible solution that has been used is for issuers to require underwriters to covenant not to use any free writing prospectus that constitutes an issuer free writing prospectus or contains issuer information. This approach best addresses the inevitable uncertainty surrounding

[35]Under the "buried facts" doctrine, disclosure that "is presented in a way that conceals or obscures the information sought to be disclosed" is deemed to be inadequate. Werner v. Werner, 267 F.3d 288, 298 (3rd Cir. 2001). For example, a material fact hidden in the midst of a lengthy document or an important concept divided up and interspersed throughout a document would trigger this doctrine and lead a court to conclude that the facts were not adequately disclosed. *See id.*[33]Adopting Release at 183.

the application of these new terms by placing ultimate liability on whichever underwriter wishes to make use of this form of communication.

- *Use of Rule 134 by Non-Reporting and Unseasoned Issuers.* Although the new rules expand in useful ways the information that may be included in a Rule 134-protected press release, there continue to be circumstances where the applicability of the safe harbor is unclear. In these cases, issuers and underwriters can now rely on the free writing prospectus rules, but this is not a viable option in the case of offerings by non-reporting and unseasoned issuers because of the impracticality of complying with the requirement that a free writing prospectus be accompanied or preceded by a statutory prospectus (including a price range in an IPO).

- *Pre-Filing Communications Safe Harbors Not Applicable to Underwriters.* The new rules provide issuers with broad safe harbors from the gun-jumping rules for pre-filing communications. Underwriters, however, continue to be subject to the traditional "quiet period" requirements prohibiting offers (whether oral or written) prior to the filing of a registration statement.

- *Disclosure of Unresolved Staff Comments.* Any WKSI or accelerated filer must disclose in its annual report unresolved comments that are material and were issued more than 180 days before the end of the fiscal year covered by the annual report. This could effectively compel some issuers to accede to staff comments unless they are prepared to see these comments submitted to the court of public opinion.

- *Limitations on "Access Equals Delivery" Rule.* The "access equals delivery" rule permits electronic filing of a prospectus with the SEC to qualify as delivery for Securities Act purposes, although it only applies to the delivery of final prospectuses. Underwriters still have to deliver preliminary prospectuses to potential investors in IPOs pursuant to Exchange Act Rule 15c2-8.

- *Increased U.S. Public Market Access by Foreign Private Issuers.* An open question is to what extent these reforms help encourage foreign private issuers to continue to use the U.S. public capital markets. Foreign private issuers are increasingly inclined to avoid the public securities markets in the United States as a result of the disclosure and other requirements imposed on SEC-reporting issuers by the Sarbanes-Oxley Act. The reforms, including those directed at WKSIs, apply equally to foreign private issuers and domestic issuers. It remains to be seen how many foreign private issuers will view the benefits of WKSI status, in particular the immediate access to the U.S. public markets once they become seasoned, as outweighing the burdens imposed by the Sarbanes-Oxley Act.

III. Executive Compensation and Proxy Initiatives

Executive Compensation

The initiatives adopted in this area by the SEC on July 26, 2006[36] target the disclosure requirements under the Exchange Act (and generally appearing in proxy statements for annual shareholder meetings) for

[36]SEC Press Release, 2006-123 (July 26, 2006). As of the date of this chapter, the adopting release had not been issued by the SEC. The SEC had initially proposed changes to executive compensation disclosure in SEC Release Nos. 33-8655; 34-53185; IC-27218 (February 8, 2006).

Canada Steps Up
Canada Steps Up
Canada Steps Up

executive and director compensation, related party transactions, director independence and other corporate governance matters, and security ownership of officers and directors. The reforms are motivated by a desire to bring the current rules into line with changes in compensation practices and to ensure clearer and more complete disclosure. However, the reforms do not purport to regulate how much executives may be paid. Rather, they seek to provide investors with meaningful information on the various components and the total amount of compensation.

Among the most significant changes, the adopted rules will:

- Revise the method of identifying the executive officers whose compensation must be disclosed (the "named executive officers" or "NEOs") to require disclosure with respect to the Chief Executive Officer ("CEO"), Chief Financial Officer ("CFO"), and the three most highly paid executive officers other than the CEO and CFO based on total compensation (not solely annual salary and bonus);
- Replace the performance graph (moved to the annual report) and existing Compensation Committee Report in proxy statements with a new "Compensation Discussion and Analysis" section ("CD&A") regarding NEO compensation and equity granting practices – akin to the existing "Management's Discussion and Analysis" for financial information – which will be filed and subject to CEO and CFO certification requirements and liability under Section 18 of the Exchange Act, as well as a brief Compensation Committee report as to whether the Committee has reviewed and discussed the CD&A with management and recommended its inclusion in the disclosure documentation;
- Reformulate the proxy statement's Summary Compensation Table to include a column setting forth, for each NEO, a single number representing his or her total aggregate annual compensation and the grant date fair value of equity grants made during the year (as reported in financial statements);
- Require tabular and narrative disclosure of all director compensation;
- Require detailed disclosure of NEOs' post-employment benefits, including actuarial increases in benefits under retirement plans, as well as itemization and quantification of annual retirement, termination, and change-in-control benefits potentially payable in the future assuming the triggering event occurred on the last business day of the prior fiscal year and using the closing market price for company stock on such day;
- Expand the disclosure requirements for options and other equity compensation, including disclosure of each outstanding grant for each NEO and specific narrative disclosure regarding granting policies and practices, timing of grants and establishment of exercise prices;
- Lower the aggregate threshold (to $10,000) for disclosure of NEO perquisites and require that all perquisites be itemized with quantification for any perquisite exceeding the greater of $25,000 or 10% of aggregate perquisites;
- Modify the disclosure of related person transactions, eliminating certain specific requirements and raising the dollar threshold to $120,000;

- Consolidate disclosure regarding director independence and certain other corporate governance matters under new Regulation S-K Item 407;
- Clarify that foreign private issuers are not required to file individual employment agreements if not required by home country disclosure rules to disclose the individual employment arrangement in question (the SEC indicated that its new rules would not otherwise affect foreign private issuers); and
- Modify certain disclosure requirements of Form 8-K with respect to NEOs and certain management agreements and arrangements.

One of the proposed rules that the SEC did not adopt was the so-called "Katie Couric" proposal, which would have required certain compensation disclosure for up to three employees who are not executive officers but whose individual total annual compensation exceeds that of a named executive officer. While the SEC did not adopt the proposed rule, it did not eliminate the proposed requirement entirely; rather, it proposed a revised version and invited further public comment. The revised proposal would only apply to "large accelerated filers" (i.e., companies with worldwide market value of common equity of $700 million or more) and would be limited to employees with *policy-making* roles with respect to the company or a significant subsidiary or principal business unit or function of the company.

The rules will take effect generally for filings on or after December 15, 2006 for fiscal years ending on or after December 15, 2006. As such, companies will have to comply with the new rules for the 2007 Form 10-K and proxy season. Form 8-K compliance will be required for triggering events occurring 60 days or more after publication of the rules in the Federal Register.

E-Delivery of Proxy Materials

Currently, companies generally deliver their proxy materials to shareholders in paper form. Although electronic delivery of the materials is possible and despite the ease such delivery creates, the existing rules attach an affirmative consent requirement to electronic delivery, the additional constraints of which make electronic delivery unappealing to companies. However, given the evolution of technology and the SEC's awareness of the increased reliance that investors place on the Internet, the SEC on December 15, 2005[37] proposed to permit the delivery of proxy materials through a "notice and access" model. If adopted, the proposal will likely first apply in the spring 2007 proxy season, and it would create an alternative, not a replacement, to the current regime. It should be kept in mind that the proposal addresses only delivery of proxy materials, not e-voting or voting mechanics. The proposed rules also would not apply to business combinations.

[37] SEC Release Nos. 34-52926; IC-27182 (December 15, 2005).

Canada Steps Up
Canada Steps Up
Canada Steps Up

The proposed provisions would allow companies to post proxy materials, including the proxy statement, the proxy card and the annual report, on a website accessible to the public. The electronic and paper versions of the documents must be substantially identical.

The proposed provisions would require companies to, at least 30 days before the shareholders meeting, send to shareholders by regular mail a postcard-size notice of the availability of electronic proxy materials. The notice would include a prominent bold-face type legend that specifies the date, time and location of the shareholders meeting, the website address where e-proxy materials are available, and a toll-free telephone number and e-mail address that investors may use to request the paper versions, which must be sent within two business days of a request. The notice would also include a clear and impartial description of the matters to be considered at the meeting and the company's recommendations. Companies would also be able to include the proxy card with the notice or make it available on the website, so long as no other information or soliciting material accompanies or is included in the notice. Additional soliciting materials distributed after the notice is sent would be posted on the website specified in the notice.

Investors holding shares through brokers or banks would receive the notice through these intermediaries and would be permitted to request paper versions through them or by direct request to the company.

E-delivery of proxy materials would also be available for shareholder solicitations. In those cases, the soliciting shareholder would not be required to solicit all shareholders or to provide paper materials on request. In the case of shareholder solicitations, the required regular mail notice must be sent by the later of 30 days before the meeting or 10 days after the company files its proxy materials with the SEC.

If the proposal is adopted, companies and soliciting shareholders alike would see their proxy costs substantially reduced. Consequently, the proposed reforms would facilitate proxy contests and contested board elections.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

SECURITIES OFFERING REFORM EXPLANATORY CHARTS[1]

CATEGORIES OF ISSUERS

Category	*Criteria*
Well-known seasoned issuer (WKSI)	• Meets the registrant requirements of Form S-3 or F-3, including having timely filed its Exchange Act reports for the preceding 12 calendar months; • Either has at least $700 million of worldwide market value of its common equity held by non-affiliates or has issued at least $1 billion aggregate principal amount of registered non-convertible securities, other than common equity, for cash in primary offerings during past three years and registers only such types of securities; and • Is not an ineligible issuer. A majority-owned subsidiary of a WKSI also may be a WKSI if certain conditions are met. Issuers of asset-backed securities, investment companies and business development companies cannot be WKSIs.
Seasoned issuer	Form S-3 or F-3 eligible for primary offerings.
Unseasoned issuer	Required to file Exchange Act reports but not Form S-3 or F-3 eligible for primary offerings.
Non-reporting issuer	• Not required to file Exchange Act reports. • A voluntary filer is classified as a non-reporting issuer.

[1]These explanatory charts do not address certain elements of the securities offering reforms, such as changes in certain SEC rules with respect to research reports.

Canada Steps Up
Canada Steps Up
Canada Steps Up

COMMUNICATIONS	
WKSI	

Communications permitted more than 30 days before filing registration statement	• All communications by or on behalf of the issuer
	  • Written offers constitute a free writing prospectus, unless:
	    • do not reference a securities offering that is/will be registered;
	  • made by or on behalf of the issuer; and
	  • issuer takes reasonable steps within its control to prevent further distribution or publication during the 30-day period prior to filing
	• Free writing prospectus through media permitted whether or not paid for by issuer

Communications permitted during 30-day period before filing registration statement	• All communications by or on behalf of the issuer
	  • Written offers constitute a free writing prospectus
	  • Free writing prospectus through media permitted whether or not paid for by issuer

Communications permitted after after filing registration statement	• All communications
	  • Written offers constitute a free writing prospectus
	  • Free writing prospectus through media permitted whether or not paid for by issuer or an offering participant

Seasoned issuer	

Communications permitted more than 30 days before filing registration statement	• Factual business information
	• Forward-looking information
	• All other communications so long as:
	  • do not reference a securities offering that is/will be registered;
	  • made by or on behalf of the issuer; and
	  • issuer takes reasonable steps within its control to prevent further distribution or publication during the 30-day period prior to filing

Communications permitted during 30-day period before filing registration statement	• Factual business information • Forward-looking information • Other communications not constituting offers
Communications permitted after after filing registration statement	• All communications • Written offers constitute a free writing prospectus • Free writing prospectus through media permitted whether or not paid for by issuer or an offering participant

COMMUNICATIONS (continued)	
Unseasoned issuer	

Communications permitted more than 30 days before filing registration statement	• Factual business information
	• Forward-looking information
	• All other communications so long as:
	  • do not reference a securities offering that is/will be registered;
	  • made by or on behalf of the issuer; and
	  • issuer takes reasonable steps within its control to prevent further distribution or publication during the 30-day period prior to filing

Communications permitted during 30-day period before filing registration statement	• Factual business information • Forward-looking information • Other communications not constituting offers

Communications permitted after after filing registration statement	• All communications
	  • Written offers constitute a free writing prospectus
	  • Free writing prospectus must generally be accompanied or preceded by a statutory prospectus
	  • No free writing prospectus through media is permitted if paid for by issuer or an offering participant

Non-reporting issuer	

Communications permitted more than 30 days before filing registration statement	• Factual business information
	• All other communications so long as:
	  • do not reference a securities offering that is/will be registered;
	  • made by or on behalf of the issuer; and
	  • issuer takes reasonable steps within its control to prevent further distribution or publication during the 30-day period prior to filing

Communications permitted during 30-day period before filing registration statement	• Factual business information • Other communications not constituting offers

Communications permitted after after filing registration statement	• All communications
	  • Written offers constitute a free writing prospectus
	  • Free writing prospectus must generally be accompanied or preceded by a statutory prospectus, including a price range
	  • No free writing prospectus through media is permitted if paid for by issuer or an offering participant

Canada Steps Up
Canada Steps Up
Canada Steps Up

REGISTRATION PROCESS REFORMS	
Category of Issuer	
WKSI	
Type of Shelf Registration	• Automatic shelf registration, including unallocated shelf • Immediate effectiveness • Pay-as-you-go filing fees
Prospectus Delivery	• "Access equals delivery" – final prospectus deemed to be delivered if timely filed or good faith attempt to comply and filed as soon as practicable • Investor could still request final prospectus
Seasoned issuer	
Type of Shelf Registration	Current shelf registration regime with liberalization of: • Incorporation by reference rules • Use of prospectus supplement to identify selling security holders in certain circumstances • Ability to conduct immediate takedowns • Restrictions on at-the-market offerings • Limitations on amount registered
Prospectus Delivery	• "Access equals delivery" – final prospectus deemed to be delivered if timely filed or good faith attempt to comply and filed as soon as practicable • Investor could still request final prospectus
Unseasoned issuer	
Type of Shelf Registration	• Incorporation by reference of prior Exchange Act filings if issuer is current in its reporting requirements under the Exchange Act • No forward incorporation by reference
Prospectus Delivery	• "Access equals delivery" – final prospectus deemed to be delivered if timely filed or good faith attempt to comply and filed as soon as practicable • Investor could still request final prospectus
Non-reporting issuer	
Type of Shelf Registration	No incorporation by reference
Prospectus Delivery	• "Access equals delivery" – final prospectus deemed to be delivered if timely filed or good faith attempt to comply and filed as soon as practicable • Investor could still request final prospectus • Underwriters still must deliver preliminary prospectuses

ADDITIONAL EXCHANGE ACT DISCLOSURE	
Risk Factors	• Risk factors required "where appropriate" for all issuers in Form 10-K • Quarterly updates to risk factors in Form 10-Q to reflect any material changes
Unresolved Staff Comments	• Disclose in annual report outstanding written SEC staff comments on Exchange Act reports that are material and were issued more than 180 days before the end of the fiscal year covered by the annual report • Applies to WKSIs and all other issuers, U.S. and foreign private issuers, that are accelerated filers
Voluntary Filers	Required to check box on cover of Form 10-K or 20-F