Client Alert

Practical Lessons Learned From the First 100 Days of Securities Offering Reform

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Today marks the 100th day of the securities offering reform rules under the Securities Act of 1933 that became effective on December 1, 2005. Many of our clients have been interested in the evolving market practice on several issues involving these securities offering reform rules. This client alert summarizes some of these general developments that we have observed over the past three months.

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Preliminary Prospectus. The question of how best to convey information to investors at the "time of sale" has arisen on many recent securities offerings. Since it is often impractical to convey a final prospectus to investors prior to the time that an underwriter needs to confirm sales (i.e. immediately after the pricing terms are determined), the general approach has been to use a preliminary prospectus that can be furnished to investors prior to pricing. The primary exception to this approach has been for pure secondary sales of equity, where a number of overnight "bought" deals are still being done without the use of a preliminary prospectus.

Final Term Sheet. Since the preliminary prospectus normally will not include final pricing terms, many underwriters use Bloomberg screens containing these final pricing terms to confirm sales in debt offerings. The evolving practice vis-à-vis the securities offering reform rules has been for a final term sheet containing the information posted on these Bloomberg screens to be prepared and then filed by the issuer with the Securities and Exchange Commission as a free writing prospectus. Many recent underwriting agreements have included covenants by the issuer to file this final term sheet with the SEC, together with appropriate representations and indemnification provisions in respect of the information contained in that final term sheet. Letters from counsel delivered at closing customarily reference this final term sheet within the package of information on which counsel provides 10b-5 negative assurance. The practice on retail offerings has been less defined, given that the retail investor base does not have universal access to email, the Internet and Bloomberg screens. The use of final term sheets in equity offerings has also varied, with the majority of primary common stock deals not using final term sheets absent a change in deal size or other last minute developments that independently might necessitate a free writing prospectus.

Access Equals Delivery. Rule 173 under the 1933 Act now permits underwriters to provide a simple notice within the sales confirmation sent to investors, in lieu of accompanying that confirmation with a copy of the final prospectus. While we understand that some underwriters now have procedures in place to include this

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notice in lieu of a prospectus, other underwriters continue to send the prospectus while they work to update their internal systems to take advantage of the new approach. Some issuers have taken the initial position in light of Rule 173 that they will not provide copies of the final prospectus from a financial printer, but underwriters continue to require at least a smaller complement of copies to furnish to investors upon request, as contemplated by Rule 173. Given the decreased emphasis on the final prospectus in light of the standard of conveying information at the "time of sale," however, some issuers save time and expense by dispensing with the "typesetting" process at the financial printer and instead having counsel prepare the prospectus from start to finish, with the final version sent to the printer for "camera-ready" printing.

Comfort Letters. The practice has continued for comfort letters to be delivered by independent accountants both at pricing and closing, with the main question being which disclosure document should be covered by each of these two letters. The preferred approach has been to cover both the preliminary prospectus and final prospectus in both letters, but the practice has varied from offering to offering.

Free Writing Prospectuses. Although the practice on free writing prospectuses has varied from deal to deal, the most common approach has been a mutual covenant by the issuer and the underwriters not to use a free writing prospectus without the other party's consent, with certain exceptions for "electronic road shows" – which continue to be common practice – and the types of free writing prospectuses used by underwriters that are of lesser concern to issuers given how the securities offering reform rules work. To the extent that free writing prospectuses have been used (other than final term sheets), many issuers have been filing the information on Form 8-K as well.

The summary above sets forth observations on the evolving market practice, but each securities offering will have unique issues that may suggest deviations from this market practice.

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