

## Client Alert

Corporate and  
Securities



Pillsbury  
Winthrop  
Shaw  
Pittman  
LLP

Vol. 0804, No. 8047

## Securities Offering Reform: Communications Rules

November 29, 2005

On July 19, 2005, the Securities and Exchange Commission issued the final rules for the securities offering reforms that were previously approved by the SEC. SEC Release No. 33-5891, entitled “Securities Offering Reform” (the “Release”), becomes effective December 1, 2005.

### Table of Contents

<b>OVERVIEW .....</b>	<b>2</b>
A. SUMMARY OF NEW RULES – PRE-REGISTRATION .....	2
B. SUMMARY OF NEW RULES – POST-REGISTRATION .....	2
<b>PERMITTED COMMUNICATIONS PRIOR TO FILING A REGISTRATION STATEMENT .....</b>	<b>2</b>
A. BRIGHT-LINE EXCLUSION FROM THE PROHIBITION ON OFFERS – RULE 163A .....	2
B. PERMITTED OFFERS FOR WELL-KNOWN SEASONED ISSUERS .....	3
1. Definition of Well-Known Seasoned Issuers .....	3
2. Overview of Permitted Offers for WKSIs .....	4
3. Rule 163 .....	4
<b>PERMITTED COMMUNICATIONS AFTER THE FILING OF A REGISTRATION STATEMENT .....</b>	<b>5</b>
A. PERMITTED CONTINUATION OF ONGOING COMMUNICATIONS .....	5
1. Factual Business Information and Forward-Looking Information – Rule 168 .....	5
2. Factual Business Information – Rule 169 .....	6
B. RELAXATION OF RESTRICTIONS ON WRITTEN OFFERING-RELATED COMMUNICATIONS .....	7
1. Expansion of Rule 134 “Identifying Statements” .....	7
2. Permissible Use of Free Writing Prospectus .....	7
3. Amendments to Regulation FD .....	14
C. AMENDMENTS TO RESEARCH REPORT RULES 137, 138 AND 139 .....	15
1. Overview .....	15
2. Definition of Research Report .....	15
3. Rule 137 .....	15
4. Rule 138 .....	16
5. Rule 139 .....	16

## Client Alert

---

## Overview

### A. Summary of New Rules – Pre-Registration

- ▶ Rule 163A - Bright-line exclusion from prohibition on offers made more than 30 days before the date of the filing of the registration statement
- ▶ Rule 163 - Exemption from the prohibition on offers for most Well-Known Seasoned Issuers
- ▶ Rule 168 - Continued publication of regularly released factual business information and forward-looking information
- ▶ Rule 169 - Continued publication of regularly released factual business information (non-reporting issuers)

### B. Summary of New Rules – Post-Registration

- ▶ Rule 168 - Continued publication of regularly released factual business information and forward-looking information
- ▶ Rule 169 - Continued publication of regularly released factual business information (non-reporting issuers)
- ▶ Rule 134 - Safe harbor for limited public notices about an offering
- ▶ Rule 164 - Permits the use of a free-writing prospectus (“FWP”)
- ▶ Rule 433 - Provides certain conditions on the use of a FWP
- ▶ Rule 418 - SEC may request any FWP used in a securities offering
- ▶ Rule 408 - Information in a FWP does not necessarily have to be in the registration statement
- ▶ Rule 159A - Clarification of when an offering participant is considered to offer and sell the securities “by means of” a free writing prospectus
- ▶ Rules 137, 138 and 139 - Rules regarding research reports

## Permitted Communications Prior to Filing a Registration Statement

### A. Bright-line Exclusion From the Prohibition on Offers – Rule 163A

New Rule 163A establishes a bright-line test for certain issuer communications made by or on behalf of an issuer more than 30 days prior to the time the issuer files a registration statement. Such communications will be exempt from Section 5(c) of the Securities Act of 1933, as amended (the “33 Act”), which prohibits making offers unless a registration statement has already been filed with the SEC.



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

## Client Alert

---

Certain conditions exist under the Rule 163A safe harbor, including:

- ▶ The communication must not make any reference to an upcoming registered securities offering;
- ▶ The communication is made “by or on behalf of” the issuer;<sup>1</sup> and
- ▶ The issuer must take “reasonable steps”<sup>2</sup> to prevent the distribution of the communication during the 30 days immediately preceding the issuer filing its registration statement.

In addition, the exemption provided for in Rule 163A is not available for certain communications, including:

- ▶ Communications relating to business combination transactions subject to Rule 165;
- ▶ Communications made in connection with offerings registered on Form S-8, other than by WKSIs;
- ▶ Communications by issuers that are blank check or shell companies, and issuers for an offering of penny stock; and
- ▶ Communications by issuers that are investment companies or business development companies.

Finally, issuers should note that all issuer communications are still subject to provisions of federal law that address deficient disclosures, such as federal anti-fraud laws.

### **B. Permitted Offers for Well-Known Seasoned Issuers**

#### **1. Definition of Well-Known Seasoned Issuers**

One of the major revisions to securities offering law adopted by the Release is the introduction of the concept of Well-Known Seasoned Issuers (“WKSIs”). WKSIs are issuers that have a reporting history under the Securities Exchange Act of 1934, as amended (the “34 Act”) and are the most widely followed companies in the market.

WKSIs are public companies that (i) meet the requirements for using Form S-3 or Form F-3, (ii) have a worldwide market value of \$700 million or have issued at least \$1 billion of non-convertible securities, other than



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

---

<sup>1</sup> Rule 163A(c) specifically excludes offering participants who are underwriters or dealers from the definition of a communication made “by or on behalf of” an issuer. Therefore, underwriters or dealers in a proposed registered securities offering may not take advantage of the Rule 163A 30 day bright-line safe harbor.

<sup>2</sup> In the Release, the SEC declined to elaborate as to when an issuer will be considered to have taken “reasonable steps” to prevent further dissemination of the communication.

## Client Alert

---

common equity, in SEC-registered, primary offerings for cash in the last three years, and (iii) are not ineligible issuers.<sup>3</sup>

### 2. Overview of Permitted Offers for WKSIs

While Rule 163A allows all issuers to rely on the new safe harbor for communications made more than 30 days prior to filing a registration statement, WKSIs also can rely on the new Rule 163 safe harbor to engage in unrestricted oral and written offers at any time before a registration statement is filed (including within 30 days prior to filing a registration statement) without violating the federal gun-jumping laws.

### 3. Rule 163

Rule 163 states that offers will be exempt from Section 5(c) of the 33 Act for registered offerings by or on behalf of WKSIs<sup>4</sup>, provided that written communications made in reliance on Rule 163:

- ▶ Will be a FWP, as defined in Rule 405, and a prospectus under section 2(a)(10) of the Act;
- ▶ Contain a legend; and
- ▶ Must be filed with the SEC promptly upon filing of the registration statement.

#### a. Legends

Per Rule 163(b)(1)(i), the legend must be substantially in the following form:

“The issuer may file a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at [www.sec.gov](http://www.sec.gov). Alternatively, the company will arrange to send you the prospectus after filing if you request it by calling toll-free 1-8[xx-xxx-xxxx].”

An e-mail address at which the documents can be requested is also allowed to be added to the legend, or the legend may state that the documents are available on the issuer’s website and



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

---

<sup>3</sup> As defined by Rule 405, ineligible issuers include those that are required to file reports pursuant to section 13 or 15(d) of the 34 Act but have failed to file all required reports during the preceding 12 months.

<sup>4</sup> Rule 163(c) specifically excludes offering participants who are underwriters or dealers from the definition of a communication made “by or on behalf of” an issuer. Therefore, underwriters or dealers in a proposed registered securities offering may not take advantage of the Rule 163 safe harbor.

## Client Alert

---

provide the specific Internet address and particular location of such documents.

The rule also provides for remedies for immaterial or unintentional failures to include the specified legend.<sup>5</sup>

### b. Filing condition

Per Rule 163(b)(2), written communications made in reliance on Rule 163 must be filed “promptly upon the filing of the registration statement, if one is filed, or an amendment, if one is filed, covering the securities that have been offered in reliance on this exemption.” This filing condition shall not apply (i) if the communication has previously been filed with or furnished to the SEC, or (ii) if the issuer would not have had to file the communication per Rule 433 if the communication had occurred post-filing of the registration statement.

The rule also provides for remedies for immaterial or unintentional failures to file the communication.

### c. Ineligible offerings

Certain offerings are not eligible for the Rule 163 safe harbor. These offerings include business combination transactions subject to Rule 165 and communications by issuers who are investment companies or business development companies.

## Permitted Communications After the Filing of a Registration Statement

### A. Permitted Continuation of Ongoing Communications

#### 1. Factual Business Information and Forward-Looking Information – Rule 168

The SEC has previously recognized that an issuer’s regularly released ordinary factual business communications are not an offer of securities.<sup>6</sup> New Rule 168 provides a safe harbor for reporting issuers to continue their regular release of communications containing:

- ▶ factual business information,<sup>7</sup> or

---

<sup>5</sup> See Rule 163(b)(1)(iii).

<sup>6</sup> See Release Nos. 33-5180 (Aug. 16, 1971) and 33-5009 (Oct. 7, 1969).

<sup>7</sup> Rule 168(b)(1) defines factual business information as (i) factual information about the issuer and its business and financial developments, (ii) advertisements of, or other information about, the issuer’s

## Client Alert

---

- ▶ forward-looking information.<sup>8</sup>

The Rule 168 safe harbor provides that these communications are not deemed to violate sections 2(a)(10) and 5(c) of the 33 Act<sup>9</sup> so long as certain conditions are met. The Rule 168 safe harbor for release of factual business information and forward-looking information is conditioned upon:

- ▶ The issuer having previously released or disseminated factual business information or forward-looking information in the ordinary course of business; and
- ▶ The timing, manner and form in which the information is released or disseminated is materially consistent with past practice.

Rule 168 only applies to reporting issuers, such as issuers (including foreign private issuers) required to file reports pursuant to section 13 or 15(d) of the 34 Act and certain other well-established foreign private issuers that are not reporting issuers in the U.S., and does not apply to investment companies. In addition, the Rule 168 safe harbor does not apply to communications containing information about the registered offering or disseminated as part of the offering activities.

## 2. Factual Business Information – Rule 169

Unlike Rule 168, new Rule 169 is available to all issuers, including non-reporting issuers, but does not apply to investment companies. Rule 169 provides a safe harbor for issuers to continue their regular release of communications containing factual business information.<sup>10</sup>

The Rule 169 safe harbor for release of factual business information is conditioned upon:

- ▶ The issuer having previously released or disseminated factual business information in the ordinary course of business;
- ▶ The timing, manner and form in which the information is released or disseminated is materially consistent with past practice; and
- ▶ The information is released or disseminated:
  - For the intended use of persons other than investors or potential investors, such as customers or suppliers; and

---

products or services and (iii) dividend notices. Factual business information can be contained in reports or other materials filed with, furnished to or submitted to the SEC.

<sup>8</sup> Rule 168(b)(2) defines forward-looking information as (i) issuer financial projections, (ii) statements regarding management plans and objectives, (iii) statements about the issuer's future economic performance and (iv) related assumptions.

<sup>9</sup> Section 2(a)(10) provides a definition for the term "prospectus" and section 5(c) prohibits making offers unless a registration statement has already been filed with the SEC.

<sup>10</sup> Rule 169(b)(1) defines factual business information as (i) factual information about the issuer and its business and financial developments and (ii) advertisements of, or other information about, the issuer's products or services.



## Client Alert

---

- By the issuer's employees or agents who have historically provided the information to customers or suppliers.

In addition, the Rule 169 safe harbor does not apply to communications containing information about the registered offering or disseminated as part of the offering activities.

### **B. Relaxation of Restrictions on Written Offering-Related Communications**

#### **1. Expansion of Rule 134 "Identifying Statements"**

Rule 134 was originally intended to allow issuers to provide "identifying statements" in order to locate investors interested in receiving a copy of the prospectus.<sup>11</sup> The expanded Rule 134 allows issuers to include additional information that investors will find useful and allows certain less-risky written communications during an offering.

Amendments to Rule 134 allow for increased dissemination of information, including allowing:

- ▶ Increased information about an issuer;
- ▶ More information about the offered securities and the offering itself, including information about the underwriters; and
- ▶ More factual information about procedures for account opening and submitting indications of interest and conditional offers to purchase the securities.

Rule 134 communications occurring before the registration statement has become effective must include the legend prescribed in Rule 134(b)(1) and the name and address of a person from whom a Section 10 prospectus may be obtained. The Rule 134 safe harbor does not apply to investment companies.

#### **2. Permissible Use of Free Writing Prospectus**

Perhaps the biggest change in securities offering law is the introduction of the Free Writing Prospectus<sup>12</sup> ("FWP"), and allowing FWPs to be used to make written offers outside of the statutory prospectus, provided certain conditions are met.

##### **a. Definition of FWP**

Revised Rule 405 defines a FWP as a written communication constituting an offer to sell or a solicitation of an offer to buy registered securities that is used after the filing of the registration statement, or in the case of WKSIs, whether or not a registration



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

---

<sup>11</sup> Rule 134 allows "tombstone" advertisements.

<sup>12</sup> Free Writing Prospectus is defined in Rule 405.

## Client Alert

---

statement is filed. Specifically excluded from the definition of a FWP are offers or solicitations of offers to buy securities by means of a section 10(a) prospectus and certain written communications, such as the exception from the definition of prospectus found in clause (a) of section 2(a)(10) of the 33 Act.<sup>13</sup>

### b. Basic Rule

New Rule 164 states that a FWP of an issuer or any other offering participant, such as an underwriter or dealer, can be used after a registration statement has been filed, provided that the conditions specified in New Rule 433 are met. Rule 164 also provides for remedies for an immaterial or unintentional failure to file, or a delay in filing, the FWP, and for an immaterial or unintentional failure to include a specified legend.

### c. Rule 433 conditions

#### (1) Issuer Must Have Filed a Registration Statement

Rule 433(b)(1) allows seasoned issuers and WKSIs, and any other offering participants, to use a FWP only after a registration statement relating to the offering has been filed with the SEC. Such registration statement must include a Section 10 compliant prospectus.

Rule 433(b)(2) allows non-reporting and unseasoned issuers, including other offering participants, to use a FWP so long as:

- ▶ A registration statement relating to the offering that includes a Section 10 compliant prospectus has been filed with the SEC; and
- ▶ The FWP either is accompanied with or preceded by the Section 10 prospectus.<sup>14</sup>

#### (2) Information Allowed in a FWP

Rule 433(c) states that a FWP may contain information “the substance of which is not included in the registration statement.” Such “new” information in the FWP, however, may not conflict with either:

---

<sup>13</sup> This exception allows, for example, sales literature to be used after the effectiveness of the registration statement provided that the sales literature is accompanied or precede by the final prospectus that meets the requirements of Section 10(a) of the 33 Act.

<sup>14</sup> Rule 433(b)(2) also provides that an electronic communication containing an active hyperlink to the Section 10 prospectus will meet this requirement. Additionally, the Release notes that the condition that the Section 10 prospectus precede or accompany the FWP “will not require that it be provided through the same means, so long as it is provided at the required time. Referring to its availability will not satisfy this condition.”





## Client Alert

---

- ▶ Information in the registration statement, or
- ▶ Information incorporated by reference to the issuer's periodic and current reports filed or furnished to the SEC.

### (3) FWP Legend Requirement

Per Rule 433(c)(2)(i), a FWP must contain a legend in substantially the following form:

"The issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at [www.sec.gov](http://www.sec.gov). Alternatively, the issuer, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1-8[xx-xxx-xxxx]."

An e-mail address at which the documents can be requested is also allowed to be added to the legend, or the legend may state that the documents are available on the issuer's website and provide the specific Internet address and particular location of such documents.

Rule 164 also provides for remedies for immaterial or unintentional failures to include the specified legend.

### (4) FWP Filing Conditions – General

Rule 433(d) specifies that the FWP must be filed "no later than the date of first use" and must identify the SEC file number for the related registration statement, if known, or a description "sufficient to identify the related registration statement." The FWP is not filed as part of the registration statement. In addition, if a FWP has already been filed with the SEC, subsequent FWPs that do not contain substantive changes or additions do not have to be filed.

The **issuer** itself must file the FWP, or relevant portion of the FWP, under any of the following circumstances:

- ▶ The issuer prepares the FWP, the FWP is prepared on behalf of the issuer, or the issuer uses or refers to the FWP;



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

## Client Alert

---

- ▶ An offering participant (other than the issuer) prepares or uses a FWP, or has a FWP prepared on its behalf, that contains:
  - material information about the issuer or its securities,
  - provided by or on behalf of the issuer,
  - that is not already included in either a filed FWP or the registration statement; or
- ▶ The FWP contains the final terms of the issuer's securities in the offering.<sup>15</sup>

An **offering participant** (other than the issuer) must file the FWP used or referred to by the offering participant if it distributes or causes the distribution of the FWP "in a manner reasonably designed to lead to its broad unrestricted dissemination."<sup>16</sup>

### (5) FWP Filing Conditions – Road Shows

Per Rule 433(d)(8), for companies required to file reports with the SEC pursuant to Sections 13 or 15(d) of the 34 Act, road shows for securities offerings that are written communications<sup>17</sup> are FWPs but do not have to be filed with the SEC.

In the case of a road show that is a written communication for a company not registered with the SEC, however, such as a company conducting its initial public offering, the road show must be filed with the SEC unless the issuer makes available to the public without restriction at least one version of a "bona fide electronic road show" by means of graphic communication.

The Release notes that in-person road shows will continue to be considered oral communications and therefore do not have to be filed with the SEC. Communications provided or transmitted simultaneously with a road show and in a manner designed to make the communication available only as part of the road show are considered to be part of the road show and therefore, as long as the road show is not a written

---

<sup>15</sup> An issuer must file such a FWP within two days of the later of the date the final terms are established and the date of first use. See Rule 433(d)(5)(ii).

<sup>16</sup> The Release notes that FWPs "sent directly to customers of an offering participant, without regard to number, are not broadly disseminated for purposes of the Rule."

<sup>17</sup> The definition of "written communication" has been added to Rule 405 and states that a written communication is "any communication that is written, printed, a radio or television broadcast, or a graphic communication." The term "graphic communication" is also a newly defined term in Rule 405 and includes all forms of electronic media but does not include a communication that, when made, "originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means."



## Client Alert

---

communication, are considered to be oral communications that do not have to be filed with the SEC.

If the road show is a written communication but is not required to be filed with the SEC, the simultaneous communication also does not have to be filed with the SEC. If the simultaneous communication is in a separate file from or is transmitted separately from the road show, however, it will be a FWP and therefore must be filed with the SEC, even if the road show is not a written communication.

### (6) Issuer Website Information

New Rule 433(e) makes clear that issuer website offers of securities<sup>18</sup> are written offers of securities by the issuer, and therefore FWPs, and thus must be filed with the SEC unless exempt or excluded from the requirements of section 5(b)(1) of the 33 Act.

The Release treats historical information on an issuer's website differently as the SEC believes that the availability of such information provides investors with "more readily accessible information about the issuer." Historical information that is:

- ▶ Labeled as historical information;
- ▶ Segregated in a separate section of the issuer website;
- ▶ Not incorporated by reference in the issuer's prospectus; and
- ▶ Not referred to in connection with the offering;

will not be considered an offer of securities and thus will not be a FWP.

### (7) FWPs published or distributed by media

#### (A) Rule 433(f) – Overview

New Rule 433(f) deals with the gun-jumping issue of issuers and other offering participants using the media to disseminate information about a registered securities offering.<sup>19</sup> Specifically, Rule 433(f) states that any written



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

---

<sup>18</sup> An offer on an issuer's website is one that appears directly on an issuer's website or via hyperlink from the issuer's website to a third party's website.

<sup>19</sup> The Release states that "where an issuer or any offering participant provides information about the issuer or the offering that constitutes an offer, whether orally or in writing, to a member of the media and where the media publication of that information is an offer by the issuer or other offering participant, we will consider the publication to be a free writing prospectus of the issuer or offering participant in question."

## Client Alert

---

offer which the issuer or an offering participant “provided, authorized, or approved information” that is then prepared and published or disseminated by a person unaffiliated with the issuer is considered to be a FWP prepared by or on behalf of the issuer or such other offering participant.

(B) **Media Publications that are Prepared, or Consideration Paid, by the Issuer or Offering Participant**

If the issuer or offering participant prepares, pays for, or gives consideration for the preparation, publication or dissemination of the FWP, the issuer or offering participant must satisfy the Rule 433(b) conditions of use of the FWP at the time of publication or broadcast as described above. As a result, in the case of an IPO issuer, a statutory prospectus<sup>20</sup> must proceed or accompany the FWP, thereby prohibiting IPO issuers from preparing or paying for broadcast written advertisements, infomercials or broadcast spots that includes information beyond what is permitted in new Rule 134.

(C) **Unaffiliated Media Publications that are Not Prepared, and No Consideration is Paid, by the Issuer or Offering Participant**

If unaffiliated media prepares and publishes a communication on its own and without payment by the issuer or other offering participant, and such communication is considered to be an offer, Rule 433(f)(1) provides certain accommodations. In these cases, a registration statement including a statutory prospectus must be filed with the SEC, but the FWP would not have to be accompanied or preceded by a statutory prospectus.

In such a case, the issuer or other offering participant must file the FWP within four business days after the issuer or offering participant becomes aware of its publication or first broadcast. This filing obligation may be satisfied by filing (i) the media publication, (ii) all of the information provided to the media, or (iii) a transcript of the interview or similar materials given to the media, provided that all information given to the media is filed. Furthermore, information may be included in the filing that the issuer or offering participant “reasonably



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

---

<sup>20</sup> A statutory prospectus must include a price range, and therefore IPO issuers will effectively not be able to use a FWP, at least until the price range is added into the prospectus.

## Client Alert

---

believes is necessary or appropriate to correct information included in the communication.”

### (8) Record Retention

New Rule 433(g) mandates that issuers and offering participants retain for three years all FWP’s they have used but not filed with the SEC. For example, the SEC notes that the record retention policy applies to certain FWP’s, such as those “prepared by underwriters and not containing issuer information and descriptions of the terms of securities or of the offering not reflecting final terms.”

### d. Liability Issues Affecting FWP’s

#### (1) General Liability Issues

The FWP is subject to disclosure liability under Section 12(a)(2) of the 33 Act for untrue statements of material fact or material omissions, regardless of whether the FWP is filed with the SEC. In addition, the FWP is subject to liability under the anti-fraud provisions of the federal securities laws, including Rule 10b-5 under the 34 Act.

Section 11 liability for untrue statements of material fact or material omissions with respect to any part of the registration statement is inapplicable to the FWP because Rule 433(d) provides that the FWP does not have to be filed as part of the registration statement.<sup>21</sup>

#### (2) Cross-liability Issues

The Release and new Rule 159A also address cross-liability issues and concerns about liability for another participant’s FWP. Rule 159A clarifies when an offering participant, other than the issuer, is considered to offer and sell securities “by means of” a free writing prospectus for the purposes of Section 12(a)(2) of the 33 Act.<sup>22</sup>

Under Rule 159A, an offering participant other than the issuer will not be considered to offer or sell securities to a person “by means of” a free writing prospectus unless it:

---

<sup>21</sup> If the issuer elects, however, to file the FWP as part of the registration statement, the FWP would be subject to Section 11 liability.

<sup>22</sup> Section 12(a)(2) imposes liability on any person who offers or sells a security “by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.”



## Client Alert

---

- ▶ used or referred to the FWP in offering or selling the securities to the purchaser;
- ▶ (i) offered or sold the securities to the purchaser, (ii) participated in planning for the use of the FWP by other offering participants, and (iii) the FWP was used or referred to in offering or selling securities to the purchaser by one or more of such other offering participants; or
- ▶ is required to file the free writing prospectus with the SEC pursuant to Rule 433.

Rule 159A also provides that a person will not be considered to offer or sell securities by means of a FWP solely because another person used, referred to or filed the FWP with the SEC.

### 3. Amendments to Regulation FD

Regulation FD prohibits issuers from selectively disclosing material non-public information to certain persons, such as securities analysts, while not disclosing the same information to the public. The Release states that in connection with an offering of securities, certain material non-public information is allowed to be made public through the filing of either the prospectus, as part of the registration statement, or the FWP, with the SEC.

The amendments to Regulation FD provide that Regulation FD will not apply to disclosures made in the following list of communications in connection with a registered securities offering:

- ▶ A registration statement filed under the 33 Act, including a prospectus contained therein;
- ▶ A FWP used after filing of the registration statement for the offering or a communication falling within the exception to the definition of prospectus contained in clause (a) of Section 2(a)(10) of the 33 Act;
- ▶ Any other Section 10(b) prospectus;
- ▶ A notice permitted by Securities Act Rule 135;
- ▶ A communication permitted by Securities Act Rule 134; or
- ▶ An oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the 33 Act.

The Release further amends Regulation FD to clarify that Regulation FD does not apply to offerings by selling security holders under Rule 415(a)(1)(i) which also includes a registered offering for capital formation purposes for the issuer, unless the issuer's offering is included for the purpose of evading Regulation FD.



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

## Client Alert

---

### C. Amendments to Research Report Rules 137, 138 and 139

#### 1. Overview

Rules 137, 138, and 139 under the 33 Act describe circumstances in which a broker or dealer may publish research constituting an offer around the time of a registered securities offering without violating the Section 5 prohibitions on pre-filing offers and impermissible prospectuses. The Release notes the undisputed value of research reports in providing information to the market and investors and states that the SEC believes it is appropriate to limit the restrictions on research under the gun-jumping provisions of federal securities law by making incremental modifications to Rules 137, 138 and 139.

#### 2. Definition of Research Report

A research report is defined as a written communication including information, opinions, or recommendations with respect to an issuer's securities or an analysis of securities or an issuer. The definition does not require that the research report contain sufficient information upon which to base an investment decision. This definition is included in Rules 137, 138 and 139 and is intended to encompass all types of research reports, whether industry-specific or issuer-specific.

#### 3. Rule 137

Rule 137, as amended by the Release, allows brokers and dealers who are not participating in a registered offering to publish or distribute research reports with respect to an issuer's securities. The Release expands the safe harbor of Rule 137 to apply to securities of any issuer, including non-reporting issuers such as an issuer conducting its initial public offering.<sup>23</sup>

Revised Rule 137 will be available only to brokers and dealers who:

- ▶ are not participating in the registered offering of the issuer's securities;
- ▶ have not received compensation<sup>24</sup> from the issuer, its affiliates, or participants in the securities distribution, among others, in connection with the research report; and
- ▶ publish or distribute the research report in the regular course of business.



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

---

<sup>23</sup> Blank check companies, shell companies and penny stock issuers are excluded from the Rule 137 safe harbor.

<sup>24</sup> The prohibition on compensation applies only to compensation for the particular research report. The regular subscription or purchase price for the research report may still be paid by the issuer without the broker or dealer running afoul of the Rule 137 safe harbor.

## Client Alert

---

### 4. Rule 138

Rule 138, as amended by the Release, permits a broker or dealer participating in a distribution of an issuer's common stock and similar securities to publish or distribute research that is confined to that issuer's fixed income securities. It also permits the opposite; *i.e.*, a broker or dealer participating in a distribution of an issuer's fixed income securities to publish or distribute research that is confined to that issuer's common stock and similar securities.

The main conditions of the Rule 138 safe harbor are that the broker or dealer publish or distribute the research reports:

- ▶ On the types of securities in question; and
- ▶ In the regular course of its business.

The condition that the broker or dealer has published or distributed research reports on the same types of securities is a newly added condition to the Rule 138 safe harbor. The Release states that the SEC believes that it is appropriate to include this condition because it is important that the broker or dealer have a history of publishing or distributing a particular type of research.<sup>25</sup> This new condition does not mean, however, that the broker or dealer must have a history of publishing research reports about the particular issuer or its securities.

The Release also amends Rule 138 to allow brokers and dealers in Rule 144A offerings and Regulation S offerings to take advantage of the Rule 138 safe harbor so long as they follow the rules and conditions described above.

### 5. Rule 139

#### a. Overview

Rule 139, as amended by the Release, provides a safe harbor for issuer-specific research reports by permitting a broker or dealer participating in a distribution of securities by a seasoned issuer, or by certain non-reporting foreign private issuers, to publish research about the issuer or its securities if such research is in a publication distributed with reasonable regularity in the normal course of its business. Rule 139 also provides a safe harbor for industry reports covering smaller seasoned issuers if the broker or dealer complies with restrictions on the nature of the publication and the opinion or recommendation expressed in that publication.



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

---

<sup>25</sup> If a broker or dealer begins publishing research about a different type of security around the time of an issuer's public offering and does not have a history of publishing research on the types of securities being offered, the SEC is concerned that such publication or distribution might be a way to circumvent the provisions of Section 5 and the permissible free writing rules and thereby provide information about the publicly offered securities.



## Client Alert

---

The Release also amends Rule 139 to allow brokers and dealers in Rule 144A offerings and Regulation S offerings to take advantage of the Rule 139 safe harbor so long as they follow the prescribed rules and conditions.

### b. Issuer-specific Research Reports

Rule 139(a)(1) provides a safe harbor for issuer-specific research reports provided that the issuer:

- ▶ Meets the registration requirements of Form S-3 or F-3;
- ▶ Has filed with the SEC all periodic reports required during the preceding 12 months; and
- ▶ Is not a blank check or shell company, or an issuer for an offering of penny stock.

Additionally, the Rule 139(a)(1) safe harbor is conditioned upon the fact that the broker or dealer:

- ▶ Publishes or distributes research reports in the regular course of its business; and
- ▶ Such publication or distribution does not represent the initiation, or reinitiation, of publication of research reports about such issuer or its securities.

Furthermore, the requirement in the old Rule 139 that the research report must be published with “reasonable regularity” has not been retained in new Rule 139. The SEC does not believe that this requirement has increased investor protection and has raised concerns as to when the condition is satisfied, and therefore dropped the “reasonable regularity” requirement.

### c. Industry Reports – General

Rule 139(a)(2) provides a safe harbor for industry research reports provided that the issuer:

- ▶ Is required to file reports with the SEC pursuant to Section 13 or Section 15(d) of the 34 Act; and
- ▶ Is not a blank check or shell company, or an issuer for an offering of penny stock.

Additionally, the Rule 139(a)(2) safe harbor is conditioned upon the following:

- ▶ The research report includes similar information about a substantial number of issuers in the issuer’s industry, or contains a comprehensive list of securities currently recommended by the broker or dealer;



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

## Client Alert

---

- ▶ The analysis of the issuer or its securities is given no materially greater space or prominence than given to other issuers or securities;
- ▶ The broker or dealer publishes or distributes research reports in the regular course of its business; and
- ▶ The broker or dealer has included similar information about the issuer or its securities in prior reports.

Furthermore, the Release removes the prohibition in Rule 139 on a broker or dealer making a more favorable recommendation than the one it made in the last research report.<sup>26</sup>

### d. Industry Reports – Projections

The Release also revamps the Instructions to Rule 139 regarding projections of an issuer's sales or earnings. Such projections fall within the definition of research report. When a broker or dealer publishes such projections relying on the Rule 139(a)(2) safe harbor, it must:

- ▶ Have previously published or distributed projections on a regular basis in order to satisfy the "regular course of its business" condition;
- ▶ At the time it publishes or disseminates the research report, be publishing or distributing projections with respect to that issuer; and
- ▶ Include projections covering the same or similar periods with respect to:
  - a substantial number of issuers in the issuer's industry, or
  - substantially all issuers represented in the comprehensive list of securities contained in the research report.

For further information, please contact:

Robert B. Robbins<sup>(bio)</sup>  
Washington, DC  
+1.202.663.8136  
[robert.robbs@pillsburylaw.com](mailto:robert.robbs@pillsburylaw.com)



Pillsbury  
Winthrop  
Shaw  
Pittman<sup>LLP</sup>

Vol. 0804, No. 8047

---

<sup>26</sup> The old Rule 139 had the following requirement: "An opinion or recommendation as favorable or more favorable as to the registrant or any class of its securities was published by the broker or dealer in the last publication of such broker or dealer addressing the registrant or its securities prior to the commencement of participation in the distribution."

## Client Alert

---

Thomas J. Plotz [\(bio\)](#)  
Washington, DC  
+1.202.663.8544  
[thomas.plotz@pillsburylaw.com](mailto:thomas.plotz@pillsburylaw.com)

Jeffrey B. Grill [\(bio\)](#)  
Washington, DC  
+1.202.663.9201  
[jeffrey.grill@pillsburylaw.com](mailto:jeffrey.grill@pillsburylaw.com)

Jeffrey J. Delaney [\(bio\)](#)  
New York, NY  
+1.212.858.1292  
[jeffrey.delaney@pillsburylaw.com](mailto:jeffrey.delaney@pillsburylaw.com)

Todd W. Eckland [\(bio\)](#)  
New York, NY  
+1.212.858.1440  
[todd.eckland@pillsburylaw.com](mailto:todd.eckland@pillsburylaw.com)

Stanton D. Wong [\(bio\)](#)  
San Francisco, CA  
+1.415.983.1790  
[stanton.wong@pillsburylaw.com](mailto:stanton.wong@pillsburylaw.com)

Philip L. Rothenberg [\(bio\)](#)  
Washington, DC  
+1.202.663.8182  
[philip.rothenberg@pillsburylaw.com](mailto:philip.rothenberg@pillsburylaw.com)



Pillsbury  
Winthrop  
Shaw  
Pittman LLP

Vol. 0804, No. 8047

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice. © 2005 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.