



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

AMERICAN CORPORATE COUNSEL ASSOCIATION
2000 ANNUAL MEETING

SEC DISCLOSURE DEVELOPMENTS

COMPARISON CHART

CURRENT IPO PRACTICE VERSUS SEC AIRCRAFT CARRIER PROPOSALS

| Current S-1 practice for initial public offerings | Proposed Form A practice for initial public offerings | Notes |
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| <p>PRE-FILING STATEMENTS For an indefinite period before the filing of the registration statement the issuer can make no statement that could be construed as an offer of securities ("gun-jumping"). See Section 5(c) of the 1933 Act.</p> | | |
| <p><i>Factual information concerning the issuer.</i> Although the Commission has stated that "purely factual" information about the issuer's ongoing business may be distributed without violating Section 5 of the 1933 Act, the difficulty of applying that standard generally results in little or no discussion of many events after an issuer</p> | <p>"Factual business communications" made at any time before filing the registration statement are excluded from Section 5(c) liability. Includes factual business or financial developments, advertisements of products or services, dividend notices, facts in required S.E.C. reporting and factual responses to unsolicited inquiries from non-affiliates of issuer, underwriters and</p> | <ul style="list-style-type: none"> • Rule 10b-5 and §17 liability still attach to any pre-filing communication that could be considered to be in connection with the sale of securities. • Post-filing announcements of factual information are treated as free |

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| begins considering a securities offering. | participating dealers. Proposed Rule 169. | writing under Proposed Rule 165, see below. |
| <p><i>Other statements made more than 30 days before the filing of the registration statement.</i> Treated on same basis as statements made within 30 days of filing.</p> | <p>Any statement made more than 30 days before filing of the registration statement is not an offer of the securities for Section 5(c) purposes, <i>if</i> the issuer, underwriters and participating dealers take all reasonable steps in their control to prevent further distribution of that statement within the 30 day period. Proposed Rule 167(c).</p> | <ul style="list-style-type: none"> • There are practical problems with obtaining assurances from news media, analysts and others that they will not republish or transmit statements within the 30 day period and with removing all dangerous statements from websites and company publicity before the 30 day period begins. • Rule 10b-5 and §17 liability still attach to any pre-filing communication that could be considered to be in connection with the sale of securities. |
| <p><i>Pre-filing forward-looking statements.</i> Considered to be "particularly troublesome" as conditioning the market and are effectively banned.</p> | <p>Still banned for initial public issuers, but only in the 30 days prior to the filing of the registration statement. Limited safe harbor proposed for reporting issuers that have customarily released this type of</p> | |

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| | information for at least two fiscal years. Proposed Rule 168. | |
| Information about the offering. Limited safe-harbors for offering information under Rule 135. Underwriters cannot be identified. | Rule 135 essentially unchanged but applies only during the 30 day period prior to filing. | |
| Communications with potential underwriters and dealers. Communications with potential underwriters permitted, but neither issuer nor underwriters may canvass dealers prior to filing. | In IPO's, issuers and underwriters may contact dealers up to 30 days before filing and dealers may commit to offering. | This creates some anomalies and potential pressure on dealers to sign up before the 30 day period begins, with possible adverse effects on dealer due diligence. |
| INTEGRATION OF PRIOR PRIVATE OFFERINGS WITH INITIAL PUBLIC OFFERING ("Securities Act Metaphysics") | | |
| Private offering after an unsuccessful public offering. Because filing a registration statement is considered to be a general offer to the world, no private offer of the same or similar securities is possible until at least six months after the withdrawal of | Safe harbor allows private offering promptly after a failed public offering with two options <ul style="list-style-type: none"> • if the issuer and any underwriter in private offering accept Section 11 liability for statements made in the private | <ul style="list-style-type: none"> • The safe harbor doesn't address the need to make a private offering after a partially successful public offering. • Can an issuer effectively create federal civil liability by |

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| <p>the registration statement or abandonment of the offering. (Rule 502(a).)</p> | <p>offering, the private offering can be made immediately; or</p> <ul style="list-style-type: none"> • wait 30 days after withdrawal of registration statement, and sell with normal liabilities under Sections 12(a)(2) and 17 of the 1933 Act and Rule 10b-5. Purchasers must be advised that the public offering was withdrawn and that they do not have Section 11 remedies. <p>In all cases, the registration statement must be withdrawn with no sales made under it.</p> | <p>contract, or will the cause of action be under state contract law? Compare the situation under the Trust Indenture Act of 1939.</p> |
| <p><i>Completed private offering before public offering.</i> Although the private offering's status is preserved by Rule 152, the private offers may be considered to be pre-filing offers of the public securities in violation of Section 5(c), unless they are made more than six months before filing. Rule 502(a).</p> <ul style="list-style-type: none"> • An issuer that registers privately placed securities | <p>If the sale in the private offering is completed before the issuer files a registration statement, the private offers will not be integrated with the public offering, even if made in the 30 day period before filing. Proposed Rule 152.</p> <ul style="list-style-type: none"> • Private offerings that are completed before the filing of the resale registration statement will not be integrated, so long as sales are not made by broker-dealers who purchased securities from the | <ul style="list-style-type: none"> • The definition of "affiliate" will track the Rule 144 definition, which is currently under review. |

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| <p>for resale risks integration of the placement with the resale.</p> <ul style="list-style-type: none"> Privately placed convertible securities may be considered to be a continuing offer of the common stock. This may jeopardize a subsequent registration of that common stock. | <p>issuer or its affiliates, or by affiliates of the issuer. Proposed Rule 152.</p> <ul style="list-style-type: none"> Proposed Rule 152 prevents integration of the ongoing offer through convertible securities with the subsequent registered offering. | |
| <p><i>Unsuccessful private offering before public offering of similar securities.</i> Private offering is a prohibited, pre-filing offer of the securities being registered. Issuer should wait six months.</p> | <p>If no securities are sold in the private offering, all offerees are notified that it was abandoned, and the issuer (a) either includes the private offering materials in the registration statement or (b) informs all private offerees that the private offering materials and any indications of interest have been superseded, the issuer may file a registration statement. It may do so immediately unless the private offering was made to offerees who cannot qualify under Sections 4(2) or 4(6) or</p> | <p>The exemption for any statement that may be considered to be an offer, if made at least 31 days before filing, effectively limits the restrictions of this exemption to the 30 day period after the end of the private offering. See Proposed Rule 167(c).</p> |

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| | Rule 506. | |
| FILING THE REGISTRATION STATEMENT AND WAITING PERIOD CONDUCT | | |
| Filing. File registration statement before first offer | No change. | |
| Content of registration statement prescribed by Forms S-1, SB-1 or SB-2 | Forms A, SB-1 and SB-2 essentially unchanged. | |
| Fees paid for unused portions of prior registrations. May be used against obligations on new registration under Rule 429 (combined prospectuses) but cannot be used if prior registration withdrawn. | Fees on unused portions of completed or withdrawn registrations may be offset against any other 1933 Act registration fee for five years. Amended Rule 457. | |
| Written materials during the waiting period. Use of written offering materials except preliminary "red herring" prospectus violates Sections 5(a) and (b). | <p>Issuers and underwriters may freely use written offering materials ("free writing") that do not meet Section 10 standards if</p> <ul style="list-style-type: none"> • a red herring is delivered at least seven days before effectiveness; • the materials are filed with the S.E.C. before first use; • the final prospectus is properly filed and • the materials contain prominent | <ul style="list-style-type: none"> • Free writing must be converted to EDGAR format and filed before use. Issuers have concerns about their ability to review or control use of statements made by underwriters and dealers. • There is no requirement to deliver all free |

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| | <p>legends advising investors to read the disclosure documents and stating how they may be obtained.</p> <p>Proposed Rule 165.</p> | <p>writing materials to any investor.</p> |
| <p>Road shows. Currently limited to broker-dealers and large institutions, with no written materials allowed to be taken other than a preliminary prospectus.</p> | <p>If written materials are concurrently filed on EDGAR, they may be disseminated freely.</p> | |
| <p>Electronic communication. Limited to website information not related to offerings, Rule 135 notices and copies of preliminary prospectus. "Electronic road shows" must limit participation by use of passwords.</p> | <p>Freedom to use any electronic means, including road shows, e-mail responses to investor questions, even "chat room" participation, if materials immediately filed via EDGAR.</p> | <p>Impossibility of filing interactive materials such as chat room dialogues before use.</p> |
| <p>Delivery of preliminary prospectus. Preliminary prospectus for an IPO must be delivered at least 48 hours before mailing of confirmations, and broker-dealers must deliver a copy to any person expected to purchase. Rules 460 and 15c2-8.</p> | <p>Issuer and underwriters must deliver a preliminary prospectus in a way reasonably designed to reach each investor at least seven days before date of pricing of an IPO. Material changes to transaction or company information must be delivered in a way reasonably designed to reach each investor at least 24 hours before pricing or commitment to buy. Proposed Rules 172(b) & (c).</p> | <ul style="list-style-type: none"> • The proposal effectively requires the issuer and underwriters to track each offeree who indicates interest. • There is no requirement to deliver a pricing term sheet, as in Form B offerings. • Seasoned Form A issuers need |

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| | | only deliver a preliminary prospectus three days before pricing. |
| <i>Circle date</i> . Currently, shortly before the pricing date, underwriters take indications of interest. | Binding obligations to purchase still prohibited before effectiveness. | However, the seven day delivery requirement for preliminary prospectuses in an IPO may force the circle date back to seven or more days before pricing, so that there is a reasonable basis to believe investors will be sent the preliminary prospectus at least a week before pricing. |
| PRICING, EFFECTIVENESS AND FINAL PROSPECTUS DELIVERY | | |
| <i>Acceleration</i> . Currently dependent on delivery of preliminary prospectus and underwriter consent. | Preliminary prospectus now required by rule. Otherwise little change. | |
| <i>Pricing and preparation of definitive prospectus.</i> <ul style="list-style-type: none">• Pricing done | <ul style="list-style-type: none">• Constructive delivery of the final prospectus filed with the Commission. The confirmation of | |

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| <p>evening before effectiveness. Definitive prospectus with pricing information prepared immediately thereafter and filed within 48 hours under Rule 424(b). Prospectus must be delivered with confirmation. Alternative under Rule 434 of delivering a term sheet to persons receiving a preliminary prospectus is rarely used.</p> <ul style="list-style-type: none"> • Arguable whether 424(b) prospectus is subject to Section 11 liability. | <p>sale or a prior document must state where investors may promptly obtain the prospectus information free of charge. Rule 173.</p> <ul style="list-style-type: none"> • Brokers and dealers still must provide hard copies on request to any person during aftermarket period. Rule 15c2-8. • Final prospectus is clearly subject to Section 11. | |
| <p><i>Aftermarket delivery by dealers.</i> All dealers are required to deliver prospectuses for any transaction in a registered security if the issuer was not previously a reporting company, as are most IPO's. Under Rule 174, the period is 25 days from effectiveness for a non reporting listed or quoted company (most IPO's), except for blank check companies (90 days)</p> | <p>Proposed Rule 174 provides for constructive delivery for all distributions except for those of blank check companies. The dealer in the confirmation or an earlier-delivered document must state where the purchaser may obtain the information free of charge.</p> | <p>The formalism of constructive delivery responds to the courts' decision that a distribution and investors' rights under Sections 11 and 12(a)(2) end when the prospectus delivery obligation ends. <i>See Gustafson v. Alloyd Co.</i>, 513 U.S. 561 (1995).</p> |

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| SMALL BUSINESS INITIATIVES | | |
| <i>Eligibility for small business disclosure system.</i> Small business issuers must have no more than \$25 million of average annual revenues and a public float of \$25 million. | The public float requirement is removed and the limit is increased to \$50 million in annual revenues, computed under existing procedures. | The staff estimates that an additional 1,100 issuers will become eligible for the small business system. |
| <i>Timing of filing fee payment.</i> Pay fee on filing. | Small business issuers may wait to pay the filing fee until they make their acceleration request or withdraw a delaying amendment. Proposed Rule 456. | |
| <i>Incorporation of Exchange Act filings by reference into 1933 Act SB registration statements.</i> Not permitted. | Permitted on Form SB-2 for seasoned small business issuers (24 months of reporting history, two Forms 10-KSB, and timely for at least 12 months) who meet other requirements for incorporation by reference. Proposed Form SB-2. | S.E.C. experience with Form S-2 indicates that few issuers will elect this approach. Delivery of a batch of Exchange Act reports with a prospectus is cumbersome, off-putting to investors and raises serious disclosure coordination problems. |
| <i>Privately placed convertible securities.</i> Convertible securities issued under Rule 504, which create an ongoing offer of underlying securities, lose their Rule 504 exemption for the continuing offer when the issuer begins Exchange Act | Rule 504 remains available even after Exchange Act reporting begins solely for purposes of offer of securities underlying convertible securities, if securities were immediately convertible or convertible within one year at time reporting begins. | Rare event. |

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| reporting. Rule 504. Nor can the underlying securities be registered for initial sale because they were offered before filing of the registration statement. | | |
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