CLASS I QUESTIONS

Increasingly, the 1933 Act can be understood only by understanding its rules. The 2005 Reform, in particular, has rewritten the Act through rulemaking. We will be working through key aspects of the 2005 Reform Rules in this class, Class II, Class III and Class XII. For the first class, the point of these questions is to begin to get you into the very complex 2005 Reform Rules.

A principal aspect of the 2005 Reform is to divide issuers up into four categories: “well-known seasoned issuers,” seasoned issuers, reporting issuers and non-reporting issuers for the purpose of stipulating how freely these different categories of issuers can communicate with the public when they are in the process of registering securities for sale to the public under the 1933 Act.

Rule 405 is a workhorse Securities and Exchange Commission Rule that contains a welter of definitions added to the 1933 Act over time. It newly includes definitions added to make the 2005 Reform work. One of these new definitions serves to define a super class of issuers known as WKSIs.

Rule 405 Definition of a “Well-Known Seasoned Issuer” (or WKSI)

1. Which of the following issuers is a “well-known seasoned issue?”

   • A corporation organized in Delaware that has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of $700 million or more.

   • Would it make a difference if the corporation were organized under French law?

   • Must the issuer already have a class of securities registered under the 1934 Act? Why? See Form S-3 General Instruction IA. Why is this important? See Tab 3 discussion. (Note that Form F-3 is a companion form to Form S-3 made available for foreign issuers who wish to sell securities in the United States.)

   • A corporation organized in Delaware that has a worldwide market value of its outstanding voting and non-voting common stock of $1 billion with $500 million of that total owned by the family of the founder of the corporation.

   • What is the reason for requiring a “public float” of at least $700 million. See Tab 3 discussion.

   • In addition to WKSI, other 2005 Reform rules divide issuers into those that are already required to file reports under the 1934 Act, i.e., “reporting issuers,” (see Rule 168) and “seasoned issuers,” i.e., issuers that have made 1934 Act filings for at least three years (see Rule 433(b)(1)). Finally, by default, when the new rules simply refer to “issuers,” it picks up issuers not yet reporting under the 1934 Act; i.e., “non-reporting issuers,” as well as all other categories. Why do the new Rules make these distinctions?
Rule 163A: The 30 Day “Bright Line” Rule

A number of new rules ameliorate the prior strict limitations on what an issuer can disseminate to the public once it is planning to make a public offering. Rule 163 is one such Rule.

- Can this Rule be used by a non-reporting issuer to accept an invitation to meet with the press so long as the meeting occurs more than 30 days before a registration statement is issued?

- Can the issuer tell the reporter it is planning a public offering?

- Can a prospective underwriter or dealer use this Rule?

- What is the purpose of the Rule with its 30 day cut off? See Tab 3 discussion.

- Could an issuer use this Rule to break with its prior routine and announce that it projects it will have record high earnings in fiscal 2006?

- How important in practice is this Rule?

Rule 168: Regularly Released Factual Business Information and Forward Looking Information

This Rule is intended to codify and rationalize prior Securities and Exchange Commission interpretations as to what an issuer can otherwise say to the public when it is in the process of registering securities for sale to the public. In Class II, we will look at just how it has sought to codify earlier interpretations of what constitutes communications deemed to be offers to sell securities.

- Can this Rule be used by a non-reporting issuer?

- Can it be used if the issuer has not previously released similar information? or if the issuer has released the information only to its customers?

- Can the issuer make public its plans for future operation? projections of earnings or losses?

- Can the issuer’s underwriter make use of this Rule?

- Why do the new Rules permit dissemination of “forward looking information?” See Tab 3 discussion.

- How important in practice is this Rule?
Rules 405 and 433: The “Free Writing Prospectus”

For many years, issuers were sharply limited to what they could disseminate in writing other than the statutory prospectus filed as part of the registration statement with the Securities and Exchange Commission. Now issuers can disseminate additional selling material through the use of a “free writing prospectus.” Except in the case of WKSIs, free writing prospectuses can be used only after a registration statement is filed. One major purpose of the Rule is to clear up confusion about what can be put in writing during the “road show” marketing period. That is the time between the initial filing of a registration statement and the time it becomes effective. This time period for a new issuer may be ninety days or more. During this period, company executives and the underwriters cover the country, meeting with major prospective institutional buyers. The meetings are “oral” and in that sense, not subject to the prohibitions of Section 5(c), since a registration statement has by now been filed. However, graphic and other visual aids are used, and sometimes the road show is videotaped for later distribution or is made available by webcast. See the discussion in Tab 3 on “Road Shows and Rule 433(h)(5)” defining a “bona fide electronic road show.”

So, the question arose, are the visuals or the taped or electronically available road shows writings that could not, prior to the 2005 Reform, be distributed UNLESS, they were made a formal part of the registration statement?

The point of the freewriting prospectus is to ease up on the prohibitions providing supplemental information by permitting issuers and underwriters to provide additional information provided they accept responsibility for its accuracy. See, in this regard, the discussion in Tab 3 entitled “Liability Issues Affecting Free Writing Prospectuses.” See also, Rule 405 and the definition of “graphic communication.”

- Why doesn’t Section 11 strict liability for misstatements apply to a “free writing prospectus”?

- Why, however, does Section 12(a)(2) liability apply to these prospectuses?

- If, a registration statement has been filed, can an issuer and its underwriter hold a live road show meeting to orally explain the proposed offering of securities to potential investors? See Section 5(c) and Section 2(a)(3).

- What if the issuer and underwriter permit access to the live road show via the Internet? Is this now a written offer? Is this now a written communication subject to Section 5(c)? See Tab 3 discussion of road shows and the definition of graphic communications in Rule 405.

- What if the issuer and underwriter simply prepare a presentation for dissemination to potential investors via CD-ROM, webcasts or otherwise? Is this now a written communication subject to Section 5(c)?
Under Rule 433, an issuer's free writing prospectus often must be filed with the Securities and Exchange Commission (but not as a part of the registration statement). Why does Rule 433(d)(8)(ii) permit non-reporting issuers to not file a copy of an electronic road show so long as they make at least one version available to any potential investor. See Tab 3, “Treatment of Electronic Road Shows” and “Comments on Electronic Road Shows.”