17 CFR Parts 228, 229, 230

[Release No. 33–7393; S7–9–97]

RIN 3235–AG86

Delayed Pricing for Certain Registrants

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission (''Commission'') is publishing for comment proposed amendments to Rule 430A under the Securities Act to permit certain smaller reporting companies to price securities on a delayed basis after effectiveness of a registration statement, if they meet specified conditions. These proposals are intended to enhance flexibility and efficiency for qualified companies, consistent with investor protection, by enabling them more easily to time their offerings to advantageous market conditions.

DATES: Comments should be submitted on or before April 29, 1997.

ADDRESSES: All comments concerning the rule proposals should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6–9, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7–9–97; this file number should be included on the subject line if e-mail is used. Comment letters will be available for inspection and copying in the public reference room at the same address. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Barbara C. Jacobs, Office of Small Business, Division of Corporation Finance, at (202) 942–2950.

SUPPLEMENTARY INFORMATION: The Commission today is proposing amendments to Rules 415,[1] 424,[2] 430A,[3] and 434[4] under the Securities Act of 1933 (''Securities Act'').[5] In addition, amendments are being proposed to Items 512 and 601(b) of Regulations S–B[6] and S–K.[7]

I. Executive Summary

The Commission today is publishing for comment proposals to permit certain smaller companies, including small business issuers, to delay pricing of primary offerings after the registration statement becomes effective in order to provide them enhanced flexibility in the marketplace. By having more control over the timing of their offerings, these companies could take advantage of desired market conditions. Such flexibility could enable such companies to raise equity capital on more favorable terms or to obtain lower interest rates on debt. The proposals also would permit a company to vary certain terms of the securities being offered upon short notice,[8] in order to meet the requirements of the public securities markets. This increased flexibility could result in smaller companies raising more capital through the public markets rather than through exempt offerings conducted in the domestic and offshore markets.

There are significant regulatory constraints on the flexibility of smaller companies to time their primary offerings to avail themselves of advantageous market conditions. Under the current rules, smaller companies must coordinate the effectiveness of their registration statements with the time that they would like to offer and sell securities. They then must price the securities promptly after effectiveness, subject to the limited flexibility provided by current Rule 430A. Smaller companies may face risks associated with changing market conditions during the pendency of possible Commission staff review. Larger companies have much more flexibility because they are allowed to use ''shelf'' registration, which permits them to register in advance of offerings and take the securities ''off the shelf'' either in one offering or in segments (*i.e.*, tranches) without further staff review when market conditions are right.[9]

The Commission understands that the timing concerns of smaller companies have led some of these companies to forego registered offerings. The Commission is considering whether additional flexibility could be given to smaller companies without sacrificing investor protection. The proposals would not go so far as to extend full shelf registration to smaller companies. They would, however, permit certain smaller companies to price on a delayed basis after effectiveness, subject to important registrant and offering requirements designed to ensure that adequate company disclosure is available to the public securities markets. There would be no reduction in the information required to be disclosed or delivered to investors or in the issuer's liabilities under the federal securities laws. There would, however, be a change in the timing of delivery of information to investors, namely, information would have to be delivered to investors at least 48 hours before delivery of the confirmation of sale. This would be analogous to the preliminary prospectus delivery requirement for initial public offerings.[10]

This delayed pricing proposal is one of four Commission initiatives being issued today. Two of these releases relate to Rule 144,[11] the non-exclusive safe harbor for resales of ''restricted'' securities and securities held by affiliates of the issuer. The Commission is shortening the holding period requirements in Rule 144 to reduce the costs of private capital formation.[12] In addition, the Commission proposes to amend Rule 144 to simplify and clarify the rule and to codify staff interpretations.[13] Finally, the Commission is proposing amendments

[1] 17 CFR 230.415.

[2] 17 CFR 230.424.

[3] 17 CFR 230.430A. In the release adopting the Phase One Recommendations of the Task Force on Disclosure Simplification, the Commission rescinded the special filing rules for competitive bidding, recognizing that Rule 430A could be used for these purposes in accordance with staff interpretation. Release No. 33–7300 (May 31, 1996) [61 FR 30397]. Technical changes also are being proposed today to remove references to competitive bidding in paragraph (d) of current Rule 430A and to remove Item 512(c) of Regulation S–B [17 CFR 228.512(c)] and Item 512(d) of Regulation S–K [17 CFR 229.512(d)].

[4] 17 CFR 230.434.

[5] 15 U.S.C. 77a *et seq.*

[6] 17 CFR 228.601(b).

[7] 17 CFR 229.601(b).

[8] The securities would have to be described in the registration statement, but certain price-related and other terms could be omitted until the price was determined. See n. 16, below.

[9] Rule 415, the shelf registration rule, enumerates the types of offerings that may be offered on a delayed or continuous basis. Unless the securities fall within one of the provisions of Rule 415 detailing the various traditional shelf offerings, for example, securities to be offered and sold pursuant to a dividend or interest reinvestment plan, a company must be eligible to use short form registration statement Form S–3 [17 CFR 239.13] or F–3 [17 CFR 239.33].

For primary offerings on Form S–3, a company must: (1) be subject to the reporting requirements of Section 13 [15 U.S.C. 78m] or 15(d) [15 U.S.C. 78o(d)] of the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78a *et seq.*]; (2) have filed all material required to be filed pursuant to Section 13, 14 [15 U.S.C. 77j(a)] or 15(d) for 12 calendar months immediately preceding the filing of the registration statement; (3) have filed in a timely manner all required reports; (4) have satisfied certain fixed obligations; and (5) have $75 million or more in public float. General Instruction I to Form S–3.

[10] Exchange Act Rule 15c2–8 [17 CFR 240.15c2–8].

[11] 17 CFR 230.144.

[12] Release No. 33–7390 (February 20, 1997). Under the amendments, the holding period for resales of limited amounts of securities by any person is reduced from two years to one year, and the holding period for resales by non-affiliates is reduced from three to two years.

[13] Release No. 33–7391 (February 20, 1997).

to Regulation S, [14] the Securities Act safe harbor for offshore offerings or resales, in order to curtail Regulation S abuses.[15]

II. Proposals

A. Proposed Rule 430A(e)

1. Overview and General Considerations

Current Rule 430A permits companies, if specified conditions are satisfied, to omit information concerning the public offering price, other price-related information and the underwriting syndicate from the prospectus contained in the registration statement at the time that the registration statement is declared effective.[16] Typically, this information is provided in a supplemented prospectus within fifteen business days after the effectiveness of the registration statement.[17]

The purpose of today's proposal is to provide pricing flexibility beyond that permitted by current Rule 430A. The rule would be amended to add a new paragraph providing an alternative procedure—a ''delayed pricing'' procedure with no fifteen day requirement.[18] To be eligible to use the new procedure, a company would have to satisfy the requirements of current Rule 430A, [19] and could omit the same information from the prospectus before pricing.[20] In addition, expanded Rule 430A would permit the company to omit the name of the managing underwriter, if any, from the registration statement that is declared effective.[21] The company ultimately would provide all omitted information in a supplemented prospectus, but would not be required to do so within any specified time period—only when it decided to price and offer the securities.[22]

To be eligible for this flexibility in timing, the company would have to satisfy the following registrant and offering requirements:

- Registrant requirements.
- The company would have to have been subject to the reporting provisions of the Exchange Act during the most recent 12 months preceding the filing of the registration statement and have filed all required reports for this period. In addition, the company would have to have filed all required reports at the time of offering and sale.
- The company would have to be a domestic issuer, except that a foreign private issuer could rely upon the rule if it had filed the same Exchange Act reports as domestic issuers.
- The company could not be an investment company registered under, or a business development company regulated under, the Investment Company Act of 1940.[23]
- The company could not be a blank check company or a company that issues penny stock.
- The company would have to have satisfied specified electronic filing provisions under the Commission's electronic filing rules.[24]
- Offering requirements
- The company would be required to file a post-effective amendment to its registration statement to: provide annual audited financial statements; furnish financial statements for probable acquisitions over the 50% materiality level and pro forma financial information; and satisfy the undertakings for updating a registration statement as required by Item 512(a) of Regulation S–K or Regulation S–B, as applicable.[25]
- Each time a prospectus was delivered, it would be accompanied by the most recent Form 10–Q [26] or 10–QSB [27] and Forms 8–K [28] (or a supplement would provide the information included in those reports). All forms of the prospectus filed with the Commission pursuant to Securities Act Rule 424 in connection with the offering as well as the Exchange Act information would be deemed part of the registration statement for liability purposes as of the date of first use. In addition, the Exchange Act information would be deemed to be a part of the prospectus as of the date of first use.
- The supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, together with any quarterly and Form 8–K information, would be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. Further, the supplemented prospectus containing any updating information and all the omitted information, along with any quarterly and Form 8–K information, would accompany or precede any confirmation of sale.

These requirements are designed to assure that investors have adequate and current disclosure available to them to be able to make informed investment decisions at the time the securities are offered and sold.

The proposed new procedure would not reduce the level of liability under the Securities Act that applies to the information on which the investment decision is based; all information delivered would be deemed to be part of the registration statement for liability purposes and a part of the prospectus as of the date of first use. Informational requirements of a final prospectus meeting the requirements of Section 10(a) of the Securities Act [29] would remain the same. [30] Further, the rule

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[14] 17 CFR 230.901–904.

[15] Release No. 33–7392 (February 20, 1997).

[16] Current Rule 430A eliminates the need for pre-effective amendments to registration statements filed solely to provide this information. This information consists of information with respect to the public offering price (*e.g.*, interest rate, dividend rate, day of month of redemption), underwriting syndicate, underwriting discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date.

As with a current Rule 430A prospectus, under the proposal a prospectus used after effectiveness but prior to pricing would have to be clearly marked on the cover page to indicate that it is subject to completion or amendment. Items 501(a)(8) of Regulation S–K [17 CFR 229.501(a)(8)] and Regulation S–B [17 CFR 228.501(a)(8)].

[17] Rule 430A(a)(3). When a supplemented prospectus is not filed within the prescribed time, a post-effective amendment to the registration statement is filed. This post-effective amendment either restarts the 15-day pricing period or contains the omitted information.

[18] Proposed Rule 430A(e). For purposes of this release, Rule 430A as it stands today is referred to as ''current Rule 430A'' while this proposal is referred to as ''expanded Rule 430A'' or ''delayed pricing.'' Registrants not eligible to use expanded Rule 430A could continue to use current Rule 430A.

The genesis for this delayed pricing proposal is a recommendation from the Report of the Task Force on Disclosure Simplification, which was published on March 5, 1996.

[19] For example, current Rule 430A is limited to offerings of securities for cash and to registration statements that are declared effective.

[20] As with current Rule 430A, a complete description of securities would be required to be set forth in the prospectus contained in the registration statement declared effective. Item 202 of Regulation S–K [17 CFR 229.202].

Only S–3 eligible companies are permitted to register aggregate amounts of securities without allocation among classes. (General Instruction II.D of Form S–3 pertains to unallocated shelf registration statements.)

[21] Current Rule 430A permits a registration statement to be declared effective that contains a prospectus that omits information on the underwriting syndicate. Information on the managing underwriter must be disclosed. See Rule 430A(a) and Release No. 33–6714 (May 27, 1987) [52 FR 21252] at Section II.A.2. See Section II.A.2.b.1, below, for further information regarding identifying managing underwriters. Expanded Rule 430A could be used for self-underwritten offerings.

[22] In addition to supplying the omitted information, the supplemented prospectus would be updated as needed. In addition to the information expressly required in any federal securities law document, there must be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they were made, not misleading. See Securities Act Rule 408 [17 CFR 230.408] and Exchange Act Rule 12b–20 [17 CFR 240.12b–20].

[23] 15 U.S.C. 80a–1 *et seq.*

[24] These rules are generally found in Regulation S–T [17 CFR Part 232].

[25] 17 CFR 229.512(a) and 228.512(a). For purposes of this release, references to specific items of Regulation S–K [17 CFR 229.10 *et seq.*] also pertain to analogous provisions of Regulation S–B [17 CFR 228.10 *et seq.*].

[26] 17 CFR 249.308a.

[27] 17 CFR 249.308b.

[28] 17 CFR 249.308.

[29] 15 U.S.C. 77j(a).

[30] The proposal would not affect requirements concerning the age of financial statements contained in the registration statement at the time of effectiveness or the exhibits required to be filed as part of the registration statement before effectiveness. Rule 3–12 of Regulation S–X [17 CFR

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proposal is not intended to permit ''generic'' registration statements that contain only minimum information about a proposed offering.

The due diligence efforts performed by underwriters, accounting professionals and others play a critical role in the integrity of our disclosure system. Under the current offering process for smaller companies, ample time exists for these ''gatekeepers'' to carry out due diligence activities. Concerns have been raised that the expedited access to the markets that would be provided by these proposals could make it difficult for gatekeepers, particularly underwriters, to perform adequate due diligence for the smaller companies that would be eligible to use expanded Rule 430A. [31] This may be particularly true if a company is able to seek aggressive competitive bids from several underwriters in a very short time frame immediately before offering its securities. While the nature of the due diligence investigation will vary considerably from one company to another because of the nature of the company, the underwriter's or other gatekeeper's involvement with the company over time, and the type of security being offered, is due diligence practical for offerings under these proposals? Could an underwriter perform the same quality of due diligence in a much shorter period of time? If not, should reliance on underwriters' due diligence continue if it would slow down the rapid access to the capital markets for smaller companies contemplated by these proposals? Has there been a change in the role other parties play concerning smaller companies, such as analysts or rating agencies, that should be considered? Should a waiting period between the company's determination to sell its securities and the commencement of the offering be imposed to permit greater time for due diligence? The rule proposal includes a number of safeguards and comment is solicited on whether additional safeguards should be included. Commenters should address whether these safeguards would adequately address the due diligence issues.

In addition, comment is solicited as to whether all the items of information that are permitted to be omitted under current Rule 430A(a) are appropriate for an offering under expanded Rule 430A. Is additional flexibility to omit information needed? In this regard, should certain terms of preferred or debt securities, such as financial covenants, be permitted to be omitted, or would this flexibility be inappropriate for smaller issuers? [32] Is it likely that expanded Rule 430A would be used for such securities, or is it likely that only common equity would be sold under this rule? Should the new provision be limited to common equity?

2. Conditions for Use of Expanded Rule 430A

Today's proposal would permit smaller companies to delay pricing their offerings so long as they otherwise met the requirements of current Rule 430A, other than the requirement to identify the managing underwriter(s) at the time the registration statement is declared effective, and they satisfied certain registrant and offering requirements. These latter requirements would assure that investors receive accurate and current information and the liabilities of the parties remain the same.

a. Registrant Requirements

First, expanded Rule 430A would be available only to a company that has been subject to the reporting provisions of Section 13(a) or 15(d) of the Exchange Act during the most recent twelve calendar months immediately preceding the filing of the registration statement and has filed all the material required to be filed pursuant to Section 13(a), 14 or 15(d) for this period.[33] In addition, the company must have filed all such required material at the time of offering and sale.[34] This proposed condition should help assure adequate and current public information concerning these companies. Comment is solicited as to whether a shorter (*e.g.*, six months) or longer (*e.g.*, two years) reporting period would be preferable. Should expanded Rule 430A be available in initial public offerings?

Comment also is solicited as to whether there should be qualitative conditions on the use of expanded Rule 430A. For example, to use Form S–2 or Form S–3, a company must be timely as well as current in its reporting obligations.[35] In addition, a company must not have failed to pay any dividend or sinking fund installment on preferred stock or defaulted on any installment or installments of indebtedness or on any rental on one or more long-term leases.[36] Should a company using the rule be required to satisfy any of these conditions, any combination of these conditions, or all of these conditions? Are such conditions necessary, given the other protections of expanded Rule 430A?

In addition, comment is solicited as to whether there are certain significant events (*e.g.*, a company, a majority shareholder, director, or executive officer found by a court or administrative body to have violated the federal securities laws) that should disqualify a company from using delayed pricing even though the expanded Rule 430A registration statement had been declared effective? Should a company be precluded from using expanded Rule 430A if it chooses a managing underwriter that was the underwriter of securities covered by any registration statement that is the subject of any pending proceeding or examination under Section 8 of the Securities Act,[37] or was the subject of any refusal order or stop order entered thereunder within 5 years? Should a company be permitted to use expanded Rule 430A where it names a managing underwriter that is, or was, subject to a permanent injunction for federal securities law violations? Comment also is solicited as to whether a company should be precluded from using the rule if its audited financial statements contain a ''going concern'' opinion from its accountants.

Second, the proposal would be available to foreign private issuers only if they file the same reports under Section 13(a) or 15(d) of the Exchange Act and meet the same disclosure requirements as domestic companies.[38] This limitation appears appropriate, given that foreign private issuers can file

210.3–12] and Item 601 of Regulation S–K [17 CFR 229.601].

As with current Rule 430A, trust indentures would not have to be filed in executed form at the time of effectiveness of the registration statement. The filing requirement may be satisfied by submission of the final form of the document to be used; the form must be complete, except that signatures and related matters could be omitted.

[31] The Commission estimates that at least 3,200 companies would qualify to use these proposals that do not qualify to use shelf registration. The average eligible company has a market capitalization of $27.5 million, assets of $80.1 million, and annual sales of $57.8 million. The median eligible company has a market capitalization of $22.3 million, assets of $27.0 million, and annual sales of $20.9 million.

[32] Under the proposal, as under current Rule 430A, the pricing terms of preferred stock that may be set by the board of directors under state law, such as the timing of an interest rate reset, could be set forth at the time of pricing.

[33] Proposed Rule 430A(e)(1)(i). The provisions of this rule would be available to a successor registrant. Proposed Instruction to Rule 430A(e) uses the same definition as General Instruction I.A.7 of Form S–3 and General Instruction I.F. of Form S–2 [17 CFR 239.12].

[34] Proposed Rule 430A(e)(1)(i). This requirement would need to be met at the time of using both the 48-hour prospectus and the pricing prospectus discussed below.

[35] General Instruction I.C. to Form S–2 and General Instruction I.A.3 of Form S–3.

[36] General Instruction I.D. to Form S–2 and General Instruction I.A.5 to Form S–3.

[37] 15 U.S.C. 77h.

[38] Proposed Rule 430A(e)(1)(ii).

periodic reports less frequently than domestic companies.[39] To permit smaller companies to delay pricing, there must be sufficient and current public information available in the marketplace and delivered to investors to assure investor protection. Comment is solicited as to whether there are alternative conditions that could be placed on foreign private issuers not eligible to use Form F–3 so that they could rely upon the proposals.

Third, investment companies registered under, and business development companies regulated under, the Investment Company Act of 1940 would be excluded from the use of expanded Rule 430A since these companies have special flexibility and restrictions on their securities that make delayed pricing unnecessary.[40] Comment is solicited, however, as to whether there are circumstances under which the flexibility of delayed pricing would be a useful tool for certain types of registered investment companies and business development companies.

Fourth, blank check and penny stock issuers would be ineligible to use the proposed rule, given the substantial abuses that have arisen in such offerings.[41] Are there any additional classes of issuers that should be excluded from expanded Rule 430A either because of the nature of the investment vehicle (*e.g.*, partnership or other similar programs) or potential for abuse (*e.g.*, blind pools that will not commit a material portion of the net proceeds of the offering to specified assets)? Should the same securities law violation disqualification provisions that are used in the Private Securities Litigation Reform Act of 1995[42] preclude the use of this rule?

The final registrant condition would pertain to the Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system of the Commission. As of May 6, 1996, the Commission has required all domestic companies to file most of their documents electronically via EDGAR,[43] absent a hardship exemption. One of the advantages of EDGAR is that it facilitates the dissemination of time-sensitive information to the nation and the world in a matter of minutes, giving investors and financial markets the benefit of immediate access to the information. In September 1995, the Commission established its own Internet Web site and began to post EDGAR filings and other materials on a 24-hour delayed basis.[44]

Since the proposals would extend the flexibility of delayed pricing to companies not eligible for Form S–3, adequate and current information regarding these companies must be broadly disseminated and available to the public. As EDGAR filings help assure such dissemination, the proposals would require that the company satisfy the same two EDGAR-related eligibility requirements as for Forms S–2 and S–3.[45] First, the company must have filed all required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a hardship exemption.[46] Second, the company must have submitted all required financial data schedules.[47] In addition, to ensure that company-related information about these non-S–3 eligible companies is on the EDGAR database and thus widely disseminated, the proposals also would require that the company not have obtained a continuing hardship exemption under Rule 202(a) of Regulation S–T from the electronic filing requirements of the Commission during the 12 months immediately preceding the filing of the registration statement.[48] These EDGAR requirements would apply both at the time the registration statement is filed and the time of offer and sale.

Comment is solicited as to whether these EDGAR-related conditions are necessary to permit delayed pricing. The continuing hardship exemption condition would be limited to Rule 202(a) hardship exemptions since under this provision a registrant is not required to follow up the paper filing, which was the subject of the request, with an electronic confirming copy. If a registrant obtained a Rule 202(d) hardship exemption, however, then it would be required to file an electronic confirming copy of its paper filing within some agreed-upon period of time. Should this continuing hardship exemption condition be expanded to encompass Rule 202(d) hardship exemptions where the required electronic confirming copy was filed a significant period of time after the paper filing to which it relates? Is the one-year period for not having received a continuing hardship exemption under Rule 202(a) warranted? Or should a longer (*e.g.*, two years) or shorter (*e.g.*, six months) period be required?

b. Offering Requirements

(1) Post-Effective Amendments

In addition to the above registrant requirements, expanded Rule 430A would require the company to file a post-effective amendment to its registration statement under certain circumstances.[49] The purpose of this requirement is to assure that the staff has an opportunity to review the revised disclosure before the company proceeds with additional offerings.

Today's proposals would require the company to file a post-effective amendment to its registration statement in three circumstances. First, no later than 90 days after its fiscal year end, the company would have to file a post-effective amendment to its registration statement to update the document[50] and provide annual audited financial statements.[51] This requirement would

[39] Under the foreign integrated disclosure system, reporting foreign private issuers file an annual report on Form 20–F [17 CFR 249.220f]. All other interim financial information required to be made public is based upon home-country rules and practices. Consequently, foreign private issuers are not required to file quarterly reports on Form 10–Q or current reports on Form 8–K in accordance with U.S. disclosure practices. Rule 13a–16 [17 CFR 240.13a–16].

[40] Proposed Rule 430A(e)(1)(iii).

[41] Proposed Rule 430A(e)(1)(iv). A ''blank check'' company is defined at Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)], while ''penny stock'' is defined at Exchange Act Rule 3a51–1 [17 CFR 240.3a51–1].

[42] Pub. L. No. 104–67, 109 Stat. 737 (December 22, 1995). As part of the Act, Section 27A was added to the Securities Act [15 U.S.C. 77z–2] and Section 21E was added to the Exchange Act [15 U.S.C. 78u–5] to create a statutory safe harbor from private liability for certain forward-looking statements. Among other matters, the 1995 Act excludes from the safe harbor statements made by the issuer and certain persons if the statements were made within three years after the maker of the statement had been found responsible for certain securities law or related violations. See Section 27A(b)(1)(A) of the Securities Act and Section 21E(b)(1)(A) of the Exchange Act.

[43] Forms SB–1 [17 CFR 239.9] and SB–2 [17 CFR 239.10] relating only to initial public offerings may be filed in paper at the Commission's Headquarters until May 5, 1997. Release No. 33–7373 (December 16, 1996) [61 FR 67200].

[44] The Commission's Internet Web site address is http://www.sec.gov.

[45] General Instructions I.H to Form S–2 and I.A.8 to Form S–3.

[46] Proposed Rule 430A(e)(1)(v).

[47] Proposed Rule 430A(e)(1)(v). Financial data schedules are required to be submitted as exhibits to filings containing updated annual or interim financial information, other than by incorporation by reference. Item 601(c) of Regulation S–K [17 CFR 229.601(c)].

[48] Proposed Rule 430A(e)(1)(v).

[49] In contrast, Form S–3 (and F–3) registrants may incorporate by reference certain information rather than filing a post-effective amendment. These registrants do not have a requirement to file post-effective amendments in the same set of circumstances.

[50] Each post-effective amendment would contain a completely updated prospectus, which would supersede all prior prospectuses. Proposed Rule 430A(e)(2)(i).

[51] Proposed Rule 430A(e)(2)(i). This requirement would be in addition to its requirement under Section 13(a) or 15(d) to file its 10–K or 10–KSB with the Commission.

If a company changes its fiscal year end, it must file a transition report on Form 10–K where the transition period is six months or more. For transition periods of less than six months,

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assure that Commission staff has the opportunity to review information regarding the company and the offering on an annual basis and that prospectus information distributed to investors is current. Comment is solicited as to whether this safeguard is needed, and if so, whether the time frame for filing the post-effective amendment should be tied to the filing of the Form 10–K (or Form 10–KSB) so that if the registrant determines to file its Form 10–K before its due date, the post-effective amendment would be required at the same time.

Second, a company would be required to file a post-effective amendment when it was required to file audited financial statements for significant probable business acquisitions pursuant to Rule 3–05 of Regulation S–X[52] and Item 310(c) of Regulation S–B[53] and pro forma financial information.[54] Under recent amendments, this would occur where the pending acquisition exceeds the 50% significance level.[55] The post-effective amendment would be filed as soon as the acquisition was probable.[56] Again, this requirement would assure that Commission staff has the opportunity to review the information.

To the extent that the pending acquisition falls below the 50% threshold level, the company would be required by Form 8–K to file audited financial statements of each significant acquired business within 75 days of consummation of the acquisition.[57] Comment is solicited as to whether under the proposed delayed pricing procedure, a company should be required to file a post-effective amendment in addition to a Form 8–K, where the acquisition falls below the 50% significance criterion. For example, should a 20% significance test be used?

Finally, since the proposal would permit delayed pricing, the rule would require the company to furnish the undertakings for updating registration statements required by Item 512(a) of Regulation S–K or Regulation S–B, as applicable. These undertakings require a post-effective amendment to be filed in specific circumstances, and would be in lieu of the similar undertakings required by Item 512(i) of Regulation S–K for other Rule 430A offerings. These undertakings would be as follows:

- The company must file a post-effective amendment to: (1) include any updated prospectus required by Section 10(a)(3) of the Securities Act; [58] (2) reflect any facts or events that represent a fundamental change in the information set forth in the registration statement; and (3) include any new or changed material information with respect to the plan of distribution.[59]
- The company must state that each post-effective amendment ''shall be deemed to be a new registration statement relating to the securities offered therein and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.'' [60]
- Finally, the company must deregister by means of a post-effective amendment any securities that remain unsold at the termination of the offering.[61]

Comment is solicited as to whether these undertakings, coupled with the other conditions of the proposed rule, would assure that investors receive adequate and current information. Are there any other circumstances that should require a post-effective amendment to be filed?

As noted above, under the proposal, a company would not need to name the managing underwriter(s) in its expanded Rule 430A registration statement. Given the important role of underwriters in an offering, should a company be required to identify the underwriter in the registration statement if it is known? Should a company be required to file a post-effective amendment to its registration statement when a managing underwriter has been selected?[62] A requirement to file a post-effective amendment could help assure that underwriters have necessary time to conduct a due diligence investigation before the securities are sold. Alternatively, when a managing underwriter was selected, would a supplemented prospectus be sufficient, as proposed?[63] If only a supplemented prospectus is required, should the form of underwriting agreement be filed in a post-effective amendment that becomes effective automatically or should it be filed in a required Form 8–K?

If a change in the managing underwriter(s) occurs from that initially disclosed in the registration statement that had been declared effective, should the company be required to file a post-effective amendment, or would a supplement suffice? If only a supplement is needed either to add the managing underwriter or reflect a change in the managing underwriter, should there be a waiting period before the company can sell its securities? Should a change in the managing underwriter solely to add or delete a co-manager necessitate a post-effective

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companies have the option to file transition reports on either Form 10–Q or Form 10–K. See Exchange Act Rules 13a–10 [17 CFR 240.13a–10] and 15d–10 [17 CFR 240.15d–10]. With respect to expanded Rule 430A, a post-effective amendment would have to be filed by the due date of the transition report on Form 10–K, namely, within 90 days of the close of the transition period or the date of the determination to change the fiscal year end, whichever is later.

[52] 17 CFR 210.3–05.

[53] 17 CFR 228.310(c). Proposed Rule 430A(e)(2)(i).

[54] Article 11 of Regulation S–X [17 CFR 210.11–01 *et seq.*] and Item 310(d) of Regulation S–B [17 CFR 228.310(d)].

[55] Rule 210.01–02(w) of Regulation S–X and Rule 310(c)(2) of Regulation S–B [17 CFR 210.1–02(w) and 228.310(c)(2)]. In October 1996, the Commission adopted amendments to streamline financial statement requirements of significant acquisitions to facilitate the Securities Act registration process. Release No. 33–7355 (October 10, 1996) [61 FR 203].

[56] Within 15 days of consummation of the significant acquisition, a company must file a Form 8–K reporting the event. Pursuant to staff position, the Form 8–K need not include more recent financial statements of the acquired business if no more than two interim periods have passed since the latest balance sheet date of the previously filed financial statements. However, audited financial statements must be updated in the Form 8–K to the company's most recently completed fiscal year pursuant to Item 310(g) of Regulation S-B [17 CFR 228.310(g)] and Rule 3–12(b) of Regulation S–X [17 CFR 210.3–12(b)].

[57] Items 2 and 7 of Form 8–K. The Form 8–K would contain: an accountant's report as required by Rule 2–02 of Regulation S–X [17 CFR 210.2–02]; and an accountant's consent to having his or her opinion deemed to be a part of the expanded Rule 430A registration statement. Section II.B, below, sets forth proposed amendments to the exhibit requirements of Regulations S–K and S–B to facilitate the filing of consents.

[58] Under Section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)], where a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein must be of a date not more than sixteen months old. The nine-month period is calculated from the effective date of the registration statement, not of any later post-effective amendment.

[59] Item 512(a)(1) of Regulation S–K [17 CFR 229.512(a)(1)].

[60] Item 512(a)(2) of Regulation S–K [17 CFR 229.512(a)(2)].

[61] Item 512(a)(3) of Regulation S–K. Foreign issuers would be ineligible to use the proposed delayed pricing procedure unless they filed the same forms as domestic issuers, as discussed in Section II.A.2.a. As a result, paragraph (a)(4) of Item 512, which relates to foreign private issuers, would generally be inapplicable.

[62] Rule 415 at one time required a post-effective amendment to the registration statement to be filed when a managing underwriter was added or deleted. The Commission removed this requirement in Release No. 33–6423 (September 2, 1982) [47 FR 39799].

As with delayed shelf filings, a company using expanded Rule 430A could (but would not be required to) name a group of possible underwriters in the preliminary prospectus. (See n. 63, below, for when a company must identify any managing underwriter.) All of the other information required by Item 508 of Regulation S-K [17 CFR 229.508] regarding the plan of distribution would be included in the preliminary prospectus before requesting acceleration of the registration statement.

[63] As discussed below, at least 48 hours before sending any confirmation of sale, the supplemented prospectus containing any updating information along with the Exchange Act information would be required to be delivered. This supplement would have to name any managing underwriter. Proposed Rule 430A(e)(2)(iii).

amendment or a supplement? Is the term ''managing underwriter'' sufficiently clear based upon industry practice or should a definition be developed for delayed pricing?

(2) Delivery of Information

The final proposed delayed pricing conditions would pertain to delivery of updated company-related information. The company would be required to deliver a supplemented prospectus containing the omitted information and/or any updating information, together with its Form 10–Q or Form 10–QSB as of the end of the most recent fiscal quarter not included in the registration statement. The company also would be required to deliver all Forms 8–K filed since effectiveness of the registration statement, other than those solely relating to Item 5 of that form that are voluntary filings.[64] Instead of delivering such Exchange Act reports as separate documents at no charge, the company could elect to integrate all Exchange Act information into a single supplement to the prospectus that would include pricing and/or updated company information.[65]

This information delivery condition, which is substantially similar to that required in Form S–2,[66] would assure that potential investors receive adequate and current information about the registrant and its offering.[67] The delivered information would be deemed a part of the registration statement and the prospectus as of the date that the information is first used in the offering of securities, and thus have liability under Sections 11 and 12(a)(2) of the Securities Act.[68]

To assure that investors have time to review the information in connection with making the investment decision, a supplemented prospectus containing any updating information and the name of the managing underwriter, if any (but not necessarily the other omitted information), would have to be delivered with the Exchange Act information referenced above to potential investors at least 48 hours before sending the confirmation of sale.[69] The quarterly and Form 8–K information would be a part of the package. This would be analogous to the preliminary prospectus delivery requirement in Rule 15c2–8 for initial public offerings. Comment is solicited on whether this condition would be practicable for issuers and whether it would afford advantages to the investing public. Would these potential benefits justify the possible reduction in flexibility provided by the new procedure? If such a requirement is justified, should a longer period be required, such as five or ten business days?

Comment is solicited as to whether voluntary Item 5 Forms 8–K should be required to be delivered to each person who receives a prospectus and the other information specified by the rule. Alternatively, are there specified matters that should be required to be included in the supplemented prospectus itself rather than in the other delivered materials? Should the quarterly report to shareholders be permitted to be delivered in lieu of the Form 10–Q or Form 10–QSB if it includes the information required by those forms? If voluntary Forms 8–K are not required to be delivered, should they still be incorporated by reference into the registration statement in order to maintain liability, as would be true for Form S–3 offerings?

In this regard, companies are reminded that in addition to the information expressly required to be included in any federal securities law document, there must be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they were made, not misleading.[70] Comment is solicited as to whether there should be an express requirement for a company using delayed pricing to describe any and all material changes in the company's affairs that were not described in the updated information delivered with the prospectus.[71]

c. Additional or Alternative Conditions

Comment is solicited as to whether other conditions to delayed pricing are needed. For example, should a company be required to file a supplemented prospectus with the omitted information within a certain period of time after effectiveness of the registration statement? If the company did not price and offer its securities within this period, then a post-effective amendment could be required, as in current Rule 430A.[72] If a definite period for filing an expanded Rule 430A supplemented prospectus is needed, would three months be sufficient? Or, would a shorter (*e.g.*, one month) or longer period (*e.g.*, six months) be sufficient?

Should a minimum time period be imposed between the filing of Exchange Act reports, such as a Form 10–Q or 10–QSB or other updating information with material developments, and the offering of securities even though this information would be delivered to investors? If such a waiting period between the filing of an Exchange Act report and the offering of securities is warranted in order to assure dissemination of information to the marketplace, would a sufficient time be five business days? Alternatively, should a shorter (*e.g.*, three business days) or longer period of time (*e.g.*,

[64] Rule 430A(e)(2)(ii). Exhibits that had been filed with the Commission with these reports would not have to be delivered to security holders.

A registrant using delayed pricing would not need to deliver its Form 10–K [17 CFR 249.310] or Form 10–KSB [17 CFR 249.310b], since it would be required to file a post-effective amendment to the registration statement to include a new prospectus with the new annual audited financial statements each fiscal year. Proposed Rule 430A(e)(2)(i).

[65] The complete package would have to be delivered any time the prospectus was delivered.

[66] Form S–2 does not require the delivery of Forms 8–K; it does, however, require a company to describe any and all material changes to its affairs that have occurred since the end of the fiscal year for which certified financial statements were included in the information delivered to security holders and not described in the Form 10–Q, 10–QSB or quarterly report to security holders delivered to investors. Item 11 of Form S–2.

One of the recommendations of the Commission's Task Force on Disclosure Simplification was to eliminate Form S–2/F–2, and permit smaller companies that have been timely reporting for 12 months, to deliver, along with their prospectuses, periodic reports in lieu of restating information regarding themselves in the prospectuses contained in registration statements filed on Form S–1/F–1 [17 CFR 239.31]. This recommendation may be considered at a later time. If it were implemented, it could operate together with delayed pricing to reduce the costs of registration by eliminating printing and other costs associated with the preparation of the traditional prospectus and give even greater flexibility to registrants to time their offerings with favorable market conditions.

[67] Electronic media may be used as a means of delivering this information to security holders in certain circumstances. See Release Nos. 33–7233 (October 6, 1995) [60 FR 53458] and 33–7288 (May 9, 1996) [61 FR 24644], in which the Commission expressed its views with respect to the use of electronic media for information delivery under the federal securities laws.

[68] Proposed Rule 430A(e)(3). Proposed Rule 430A(e)(3) would maintain liability on all forms of prospectus filed with the Commission pursuant to Rule 424 in connection with the offering by deeming them to be part of the registration statement at the date of first use. This would be true for the delivered Exchange Act information as well. The rule also would provide that the Exchange Act reports that are deemed to be a part of the registration statement would be a part of the prospectus as of the date of first use.

The documents also would be subject to anti-fraud liability under Securities Act Section 17(a) [15 U.S.C. 77q(a)], Exchange Act Section 10(b) [15 U.S.C. 78j(b)] and Rule 10b–5 [17 CFR 240.10b–5] thereunder.

[69] Proposed Rule 430A(e)(2)(iii). Of course, the supplemented prospectus containing any updating information and all the omitted information, including the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K information, would accompany or precede any confirmation of sale. Proposed Rule 430A(e)(2)(iv).

[70] Securities Act Rule 408 and Exchange Act Rule 12b–20.

[71] This would be analogous to the Item 11 line item requirement in Form S–2, discussed above.

[72] Rule 430A(a)(3).

seven business days) be imposed? Or would any required delay significantly reduce the flexibility that the rule is designed to provide?

Another condition to assure that adequate and current information regarding the company is widely available could be to require a waiting period between the company's determination to sell its securities and the commencement of the offering. For example, a company could be required to file a Form 8–K announcing its intent to offer its securities within a specified period of time. Since the trading market for certain smaller issuers may be relatively illiquid, this condition could give the market time to respond to this news. If such a period were to be imposed, would five business days be sufficient? Or would a shorter (*e.g.*, two business days) or longer (*e.g.*, seven business days) period of time be needed? Should the length of any waiting period be tied to the average daily trading volume of the company so that a longer waiting period could be required if the company has a low average daily trading volume, and thus less liquidity? Should average daily trading volume for such a test be determined in a manner consistent with recently adopted Regulation M?[73] If an average daily trading volume test is incorporated into expanded Rule 430A, should a public float component also be used as in Regulation M?[74] Actively-traded companies could be excluded from any waiting period. If a waiting period is desirable, should it be structured so that an announcement of the offering could not be made more than a certain period of time before the commencement of the offering?

As proposed, the rule would not limit the number of offerings that could be done from the registration statement. Like Form S–3, the delayed offering may be done as one offering or in several tranches. Should the rule be limited to a single delayed offering? Or should some other limit be placed on the number of offerings?

The Commission recently adopted Regulation M to prevent manipulative conduct by persons interested in a securities offering. At that time, the Commission modified the application of anti-manipulation regulation to shelf-registered distributions. The Commission explained that, for purposes of Regulation M, each takedown off a shelf is to be individually examined to determine whether the offering of that tranche constitutes a distribution (*i.e.*, whether it satisfies the ''magnitude'' and ''special selling efforts and selling methods'' criteria of a distribution).[75] This position is intended to provide greater flexibility to participants in shelf-registered distributions, which for primary offerings are now limited to larger issuers.[76]

The Commission has considered the appropriate application of anti-manipulation regulation to offerings with delayed pricing under proposed Rule 430A(e). Because the proposed rule is expected to be used principally by smaller issuers, many of which are less-seasoned and can have relatively illiquid markets for their securities, the Commission proposes to require compliance with the full applicable restricted period of Regulation M prior to pricing of each offering relying on proposed Rule 430A(e). Thus, issuers and underwriters participating in an offering using delayed pricing would be subject to a restricted period of one or five business days before pricing of each tranche. Commenters are invited to provide their views on this interpretation. Is it necessary to expressly amend Rules 101 and 102 of Regulation M to incorporate this position?

Additionally, Rule 105 of Regulation M is intended to preclude manipulative short selling in anticipation of a public offering.[77] The rule prohibits the covering of a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if the short sale occurred during the period commencing five business days before pricing the offering. The rule excludes offerings filed under Rule 415. It is uncertain whether offerings relying on proposed Rule 430A(e) and the accompanying amendment to Rule 415 will be conducted similarly to primary offerings off the shelf by larger issuers. Accordingly, the Commission seeks comment on whether to revise Rule 105 of Regulation M to exclude offerings filed under Rule 415, other than those filed pursuant to proposed Rule 415(a)(1)(xii).

Finally, comment is solicited as to whether a company should have the market flexibility to proceed under either expanded Rule 430A or current Rule 430A so long as it includes both sets of undertakings[78] in the initial filing or in a pre-effective amendment. At the time of requesting acceleration of the registration statement, the company could advise the staff as to which rule it would use.

The conditions discussed above are intended to strike a balance between the needs of certain smaller companies to price their securities on a primary delayed basis and the needs of investors to have adequate and current information regarding these registrants available to them to be able to make informed investment decisions. Comment is solicited as to whether the foregoing conditions, taken together, accomplish this objective or whether only certain combinations of these conditions are needed. If the latter, commenters are requested to specify the combinations that would be desirable and the reasons for their views.

B. Other Proposed Amendments

Corresponding amendments to Securities Act Rules 415, 424 and 434[79] and Item 601(b) of Regulations S–K and S–B[80] also are being proposed. Securities Act Rule 415 would be amended to add a new paragraph permitting delayed pricing under Rule 430A(e).[81]

Securities Act Rule 424, which pertains to the filing of prospectuses, would be revised to add two new paragraphs (8) and (9) relating to the filing of delayed pricing prospectuses so as to facilitate access and use of the

[73] 17 CFR 242.100 *et seq.* Release No. 34–38067 (December 20, 1996) [62 FR 520].

[74] See 17 CFR 242.101 and 102.

[75] Release No. 34–38067, 62 FR at 526.

[76] Under prior Commission interpretation, if the aggregate amount of securities registered on the shelf and the possibility of using special selling efforts existed, each takedown was deemed to be part of a single distribution, regardless of the amount of the securities sold or the manner of their sale. See Release No. 34–23611, 51 FR 33242.

[77] 17 CFR 242.105.

[78] Items 512(a) and 512(i) of Regulation S–K, respectively.

[79] One minor conforming change is being proposed to Rule 434. Paragraph (b)(2) would be amended to add a reference to Rule 430A(e) to the existing reference to Rule 430A(b).

[80] Item 601 of Regulations S–K and S–B would be amended to state that where the filing of a written consent is required with respect to material deemed to be a part of an expanded Rule 430A registration statement, the consent may be filed as an exhibit to the material that is deemed to be a part of the registration statement (*e.g.*, a Form 8–K containing financial statements for acquisitions below the 50% threshold). See Section II.A.2.b, above.

[81] Proposed paragraph (a)(1)(xii) to Rule 415. Paragraph (a)(2) of Rule 415, which provides that securities may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the date of the registration, would be amended to add a reference to Rule 430A(e) offerings. Finally, paragraph (a)(3) of Rule 415 would be revised to add a reference to Item 512(a) of Regulation S–B, which relates to the Rule 415 undertakings. This reference was inadvertently omitted from this paragraph when Regulation S–B was adopted in 1992. Release No. 33–6949 (July 30, 1992) [57 FR 36442].

Since Rule 430A(e) would be a type of Rule 415 offering, a registrant relying on the rule would have to check the Rule 415 box on the facing page of the registration statement.

information. If a company elected to use delayed pricing, supplemented prospectuses would be filed under Rule 424(b)(8) or (b)(9). Any prospectus filed under paragraph (b)(8) would reflect information, facts, or events that would constitute a substantive change from, or addition to, the information set forth in the last form of prospectus filed with the Commission under Rule 424 or as part of the expanded Rule 430A registration statement.[82] ''Substantive,'' as in current Securities Rule 424, refers to additions or modifications that supplement, update or correct the content and substance of the information contained in a prospectus, except for typographical, grammatical, format, and clarifying changes that do not affect an investor's understanding of the information.[83]

Also under paragraph (b)(8), a company would file any supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, that it delivers to any person, with quarterly information and Forms 8–K, who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. Any prospectus filed under Rule 424(b)(8) would be required to be filed no later than the second business day following the date it is first used after effectiveness in connection with a public offering or sale, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.[84] Comment is solicited as to whether a shorter period is needed—either one business day after first use, or on the day of first use in order for the market to have this information.

The supplemented prospectus containing any updating information and all omitted price and price-related information that was omitted from the registration statement at the time of effectiveness would be required to be filed with the Commission under Rule 424(b)(9) no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.[85] This short period, which is the same as for current Rule 430A, coupled with the fact that the filing would be made via EDGAR, would facilitate prompt availability of the information to the investing public and the Commission. Comment is solicited as to whether this time frame should be shorter (*e.g.*, one business day) or longer (*e.g.*, three business days).

Comment is solicited as to whether expanded Rule 430A prospectuses, like current Rule 430A prospectuses, warrant separate classification for purposes of Rule 424. Alternatively, existing paragraphs of Rule 424 could be revised to reflect the filing of expanded Rule 430A prospectuses; however, ready identification by the Commission staff and public of these prospectuses could be hampered.

With respect to the tracking or monitoring of new delayed pricing offerings in general, would separate EDGAR submission form types for these registration statements be warranted? Currently, Rule 430A registration statements are not separately identified for purposes of EDGAR.

III. General Request for Comment

Any interested persons wishing to submit comment on any of the proposals set forth in this release are invited to do so by submitting them in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7–9–97; this file number should be included on the subject line if e-mail is used. Comments received will be available for public inspection and copying in the Commission's public reference room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov). Comments are solicited from the point of view of issuers, underwriters and the investing public.

IV. Cost-Benefit Analysis

To assist the Commission in evaluating the costs and benefits that may result from these proposals, commenters are requested to submit their views and empirical data relating to any costs and benefits associated with these proposals. It is anticipated that expanded Rule 430A, if adopted, could facilitate the capital-raising efforts of smaller companies that meet certain conditions by permitting them to delay pricing their offerings after the registration statement becomes effective so as to take advantage of favorable market conditions. Such flexibility could enable such companies to raise equity capital on more advantageous terms or to obtain lower interest rates on debt. In addition, issuers would be able to vary certain terms of the securities being offered upon short notice, enabling them to more efficiently meet the competitive requirements of the public securities markets.

There would be certain costs associated with expanded Rule 430A, but they should be more than offset by its benefits. A company would be required to file a post-effective amendment to its registration statement at least annually until the offering is terminated. In addition, a company would be required to deliver its most recent Form 10–Q and non-voluntary Forms 8–K to investors along with its supplemented prospectus. This updated information could either be included in the supplemented prospectus itself or be set forth in separate documents that are delivered along with the prospectus. As noted in the release, the supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K information, would be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. These costs are necessary safeguards to the use of the rule in order to assure investor protection. The benefits of pricing flexibility should outweigh these costs.

The Commission is aware that many companies that may want to use delayed pricing may also be subject to state regulation. It is possible that the full benefits of this rule may not be available unless some modifications to state regulation are made.

Over 1,700 companies filed registration statements for securities offerings on Forms S–1, SB–2, and S–11 in 1996. Approximately half of these companies would have qualified for expanded Rule 430A if the rule had been in effect at that time. Of those companies that would not have qualified under the rule, 99% were disqualified because they were making their initial public offering (''IPO'').

Based on an analysis of 100 non-IPO securities offerings, the Commission estimates that 860 companies would have met the proposed eligibility criteria for expanded Rule 430A in

[82] Proposed paragraph (b)(8) to Rule 424. For example, where a company determined to update its prospectus supplement to include a recent developments section, it would file such supplement under proposed paragraph (b)(8) of Rule 424.

[83] Release No. 33–6714 (May 27, 1987) [52 FR 21252] at Section II.B.

[84] Proposed paragraph (b)(8) to Rule 424.

[85] Proposed paragraph (b)(9) to Rule 424. This time frame would mirror that of current Rule 430A offerings. Rule 424(b)(1).

1996. The 860 companies registered securities with an estimated offering value of $52 billion. The Commission estimates that approximately 11% of these offerings might have availed themselves of the expanded Rule 430A had it been available. This estimate is based upon the Commission's experience with the number of registrants that file Form S–3 for shelf offerings.

Expanded Rule 430A should not result in a major increase in costs or prices for consumers or individual industries; likewise, it should not have significant adverse effects on competition, investment, or innovation. However, comment is requested on these preliminary views. Commenters are asked to provide empirical data or other facts to support their views.

Comment is requested on whether the proposed rules are likely to have a $100 million or greater annual effect on the economy. Commenters should provide empirical data or other facts to support their views.

The Commission requests comment on the foregoing analysis and its preliminary views. Commenters are encouraged to provide their own analysis and views on these issues and any empirical data that would help the Commission assess the costs and benefits of these proposals. Commenters also are encouraged to suggest alternative or additional ways of providing more pricing flexibility to smaller companies, consistent with investor protection.

V. Summary of Initial Regulatory Flexibility Analysis

An Initial Regulatory Flexibility Analysis (''IRFA'') has been prepared in accordance with 5 U.S.C. 603 concerning expanded Rule 430A and other amendments discussed in this release. The analysis notes that expanded Rule 430A, if adopted, would benefit certain smaller companies, including small entities, in connection with their needs to raise capital. This goal would be accomplished by giving these companies flexibility to delay pricing after their registration statement becomes effective, thus permitting them to time their offerings to advantageous market conditions.

As discussed more fully in the IRFA, the Commission is aware of approximately 1019 Exchange Act reporting companies that currently satisfy the definition of ''small entity'' under Securities Act Rule 157. These Exchange Act reporting companies could potentially avail themselves of expanded Rule 430A assuming that the other conditions of the rule are satisfied (*e.g.*, having reported under the Exchange Act for at least a year, not being a blank check company or penny stock issuer, etc.). It is estimated that approximately 734 of these 1019 companies would be eligible to use the rule, if adopted. There is no reliable way to determine how many of these entities will want to use expanded Rule 430A or how many businesses may become subject to reporting obligations in the future.

As noted in the IRFA, it is not anticipated that increased recordkeeping burdens would result from expanded Rule 430A. To the extent that a small entity uses expanded Rule 430A, there would be an increase in its reporting obligations since it would be required to file a post-effective amendment to its registration statement at least annually until the offering is terminated. Compliance burdens also would increase since the company would be required to deliver updated company-related information along with the supplemented prospectus. This Exchange Act information could be included in a supplement to the prospectus or delivered in separate documents along with the prospectus. In addition, the supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K information would be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. The IRFA also indicates that there are no current federal rules that duplicate, overlap or conflict with the rules to be amended.

As more fully discussed in the IRFA, other possible significant alternatives to the proposals were considered, including establishing different compliance or reporting requirements for small entities. These alternatives are not appropriate since they would be inconsistent with the goals of the Securities Act as they relate to the protection of investors. Another alternative would be to exempt small entities from all, or a part, of expanded Rule 430A. Small entities would benefit from the pricing flexibility from the rule so they would not want to be exempt from its coverage. To exempt small entities from certain conditions of expanded Rule 430A, for example, the requirement to file post-effective amendments under specified circumstances would be contrary to the goals of the Securities Act since investors in small entities should have the same protections as investors in larger companies. The opportunity for staff review of these post-effective amendment filings is considered to be an important safeguard to the use of the rule.

Written comments are encouraged with respect to any aspect of the IRFA. In particular, comment is solicited on the number of small entities that would be affected by the proposed rules and the determination that the proposed rules would not increase recordkeeping but would increase reporting and other compliance requirements. If commenters believe that the proposals would significantly impact a substantial number of small entities, the nature of the impact and an estimate of the extent of the impact should be provided. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission also is requesting information regarding the potential impact of the proposed rules on the economy on an annual basis. Commenters should provide empirical data to support their views. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed amendments are adopted. A copy of the IRFA may be obtained by contacting Barbara C. Jacobs, Division of Corporation Finance, Mail Stop 7–8, 450 Fifth Street, N.W., Washington, D.C. 20549.

VI. Paperwork Reduction Act

The staff has consulted with the Office of Management and Budget (''OMB'') and has submitted the proposals for review in accordance with the Paperwork Reduction Act of 1995 (''the Act'') (44 U.S.C. 3501 *et seq.*). The titles to the affected information collections are: ''Form S–1,'' ''Form SB–2,'' ''Form S–11,'' ''Form SB–1,'' ''Regulation S–K,'' and ''Regulation S–B.'' The specific information that must be included is explained in the forms themselves, and generally relates to the issuer and the securities being offered. The information is needed for prospective investors to make informed investment decisions.

The proposals, if adopted, would permit certain smaller companies to delay pricing of primary offerings after the registration statement becomes effective in order to provide them flexibility in the marketplace. By having more control over the timing of their offerings, these companies could take advantage of desired market conditions, thus enabling them to raise equity capital on more favorable terms or to obtain lower interest rates on debt. This increased flexibility could result in smaller issuers raising more capital through the public markets rather than through exempt offerings conducted in

the domestic and offshore markets. Consequently, it is anticipated that the proposals, if adopted, would result in companies filing Forms S–1, SB–2, S–11, and SB–1 rather than making exempt offerings.

The collections of information in the four forms and two regulations are required for the registration of various securities for sale to the public. The likely respondents to each form are: (i) for Form S–1, generally all issuers registering offerings of securities under the Securities Act that are not eligible to use other forms; (ii) for Form SB–2, generally small business issuers, as defined in Rule 405 of the Securities Act, registering securities offerings under the Securities Act; (iii) for Form S–11, generally real estate companies registering offerings of securities under the Securities Act; and (iv) and for Form SB–1, generally small business issuers registering up to $10 million of securities under the Securities Act in a continuous 12-month period. While the Commission cannot estimate the number of respondents that may use expanded Rule 430A, there are approximately 1,210 Forms S–1, 471 Forms SB–2, 58 Forms S–11, and 8 Forms SB–1 filed each year.[86] If expanded Rule 430A is adopted, the estimated burden for responding to the collections of information in each form is expected to increase given the requirement to file post-effective amendments to the registration statements under the three circumstances specified. The former estimates per respondent were as follows: (i) for Form S–1, 1,267 burden hours; (ii) for Form SB–2, 877 burden hours; (iii) for Form S–11, 858 burden hours; and (iv) for Form SB–1, 711 burden hours. The new estimates per respondent are as follows: (i) for Form S–1, 1,290 burden hours; (ii) for Form SB–2, 894 burden hours; (iii) for Form S–11, 873 burden hours; and (iv) for Form SB–1, 740 burden hours. For Form S–1, this would result in an estimated per year increase burden of 27,426 hours in the aggregate. For Form SB–2, this would result in an estimated per year increase burden of 8,242 hours in the aggregate. For Form S–11, this would result in an estimated per year increase burden of 10,309 hours in the aggregate. For Form SB–1, this would result in an estimated per year increase of 236 in the aggregate. Regulations S–K and S–B will continue to show an estimated burden hour of one. The information collection requirements imposed by the forms and regulations are mandatory to the extent that a company elects to do a registered offering. The information is made publicly available. The Commission may not require a response to the collection of information if the forms and regulations do not display a currently valid OMB control number.

In accordance with 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment on the following: whether the proposed changes in the collection of information is necessary; on the accuracy of the Commission's estimate of the burden of the proposed changes to the collection of information; on the quality, utility and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, with reference to File No. S7–9–97. The Office of Management and Budget is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Statutory Basis for the Proposals

The foregoing amendments are proposed pursuant to Sections 6, 7, 8, 10 and 19(a) of the Securities Act.

List of Subjects in 17 CFR Parts 228, 229, and 230

Registration requirements, Reporting and recordkeeping requirements, Securities.

Text of the Proposals

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for Part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

2. In § 228.512 (Item 512 of Regulation S–B), remove paragraph (c) and redesignate paragraphs (d) through (f) as paragraphs (c) through (e).

3. In § 228.601, revise the second note to the Exhibit Table of Item 601(a) under paragraph (a) and amend paragraph (b)(23)(ii) by revising the heading and first sentence to read as follows:

§ 228.601 (Item 601) Exhibits.

* * * * *

Exhibit Table

* * * * *

* * * Where the opinion of the expert or counsel has been incorporated by reference or has been deemed to be a part of a previously filed Securities Act registration statement.

* * * * *

(b) * * *

(23) Consent of experts and counsel. * * *

(ii) *Exchange Act reports.* If required to file a consent for material incorporated by reference into or deemed to be a part of a previously filed registration statement under the Securities Act, the dated and manually signed consent to the material incorporated by reference or deemed to be a part of. * * *

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

4. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78w, 78*ll* (d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

§ 229.512 [Amended]

5. In § 229.512 (Item 512 of Regulation S–K), remove paragraph (d) and redesignate paragraphs (e) through (j) as paragraphs (d) through (i).

6. In § 229.601, revise footnote 2 to the Exhibit Table of Item 601 and amend paragraph (b)(23)(ii) by revising the first sentence to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

Exhibit Table

* * * * *

[86] These estimates are based on the number of such filings made in calendar year 1996 and assume that there are no increases or decreases each year.

2. Where the opinion of the expert or counsel has been incorporated by reference or has been deemed to be a part of a previously filed Securities Act registration statement.

* * * * *

(b) * * *

(23) * * *

(ii) *Exchange Act reports.* Where the filing of a written consent is required with respect to material incorporated by reference in or deemed to be a part of a previously filed registration statement under the Securities Act, such consent may be filed as an exhibit to the material incorporated by reference or deemed to be a part of. * * *

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

7. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

8. By amending § 230.415 by adding paragraph (a)(1)(xii) and revising (a)(2) and (a)(3) to read as follows:

§ 230.415 Delayed or continuous offering and sale of securities.

(a) * * *

(1) * * *

(xii) Securities registered (or qualified to be registered) that are to be offered and sold on a delayed basis pursuant to § 230.430A(e) by or on behalf of the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary.

(2) Securities in paragraphs (a)(1)(viii) through (x) and (xii) of this section may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S–K (§ 229.512 of this chapter) or Regulation S–B (§ 228.512 of this chapter) as applicable.

* * * * *

9. By amending § 230.424 by adding paragraphs (b)(8) and (b)(9) before Instructions 1 and 2 to read as follows:

§ 230.424 Filing of prospectuses, number of copies.

* * * * *

(b) * * *

(8) A form of prospectus used in connection with a primary offering of securities on a delayed basis pursuant to § 230.415(a)(1)(xii) that discloses information, facts, or events that constitute a substantive change other than those covered in paragraph (b)(9) of this section shall be filed with the Commission no later than the second business day following the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(9) A form of prospectus used in connection with a primary offering of securities on a delayed basis pursuant to § 230.415(a)(1)(xii) that discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon § 230.430A(a) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

* * * * *

10. By amending § 230.430A by removing paragraph (d) and redesignating paragraph (e) as paragraph (d) and adding paragraph (e) before the Note to read as follows:

§ 230.430A Prospectus in a registration statement at the time of effectiveness.

* * * * *

(e) A registrant that complies with all the requirements of this section other than the requirements to identify the managing underwriter(s) in the registration statement that is declared effective pursuant to paragraph (a) of this section and the fifteen business day period of paragraph (a)(3) of this section may offer and sell securities on a delayed basis if the following registrant and offering requirements are satisfied.

(1) *Registrant requirements.* (i) The registrant has been subject to the reporting provisions of Section 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act during the most recent twelve calendar months immediately preceding the filing of the registration statement and has filed all the material required to be filed pursuant to Sections 13(a), 14 (15 U.S.C. 77j(a)) or 15(d) for this period. The registrant also must have filed all material required to be filed by Sections 13(a), 14 or 15(d) at the time of first use of the prospectus supplements required by paragraphs (e)(2)(iii) and (e)(2)(iv) of this section.

(ii) The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories, except that a foreign issuer, other than a foreign government, that satisfies all of the provisions of this section except for this one shall be deemed to have met the eligibility requirements of this section if such foreign issuer files the same reports with the Commission under Section 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act as domestic registrants pursuant to paragraph (e)(1)(i) of this section.

(iii) The registrant is not an investment company registered under, or a business development company regulated under, the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

(iv) The registrant is not a blank check company as defined in § 230.419 or a company that issues penny stock as defined in Section 3(a)(51) (15 U.S.C. 78(c)(a)(51)) of the Exchange Act and § 240.3a51–1 of this chapter.

(v) The registrant has: filed with the Commission all required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a hardship exemption; not obtained a continuing hardship exemption from electronic filing pursuant to § 232.202(a) of this chapter during the twelve months immediately preceding the filing of the registration statement; and submitted all Financial Data Schedules required by Item 601(c) of Regulation S–K or S–B (§ 229.601(c) or § 228.601(c) of this chapter), as appropriate. These requirements must be met at the time of filing the registration statement and at the time of first use of the prospectus supplements required by paragraphs (e)(2)(iii) and (e)(2)(iv) of this section.

(2) *Offering requirements.* (i) A registrant shall file a post-effective amendment to its registration statement to: provide annual audited financial statements for its latest fiscal year as required by §§ 210.3–01, 210.3–02, and 210.3–04 of this chapter no later than 90 days after the fiscal year end of the registrant; provide financial statements and pro forma information for probable acquisitions over the 50% materiality level as required by § 210.3–05 of this chapter and § 228.310 of this chapter as soon as the acquisition is probable; and satisfy any of the undertakings of Item 512(a) of Regulations S–K or S–B (§ 229.512(a) or § 228.512(a) of this chapter). Each post-effective amendment shall be deemed to be a new registration statement relating to the

securities offered therein and the offering of such securities at the time shall be deemed to be the initial bona fide offering thereof. Each such post-effective amendment shall contain a completely updated prospectus that supersedes all prior prospectuses.

(ii) To each person to whom the registrant delivers its supplemented prospectus containing the omitted information and/or any updating information, the registrant also shall deliver: its Form 10–Q (§ 249.308a of this chapter) or Form 10–QSB (§ 249.308b of this chapter) for the end of the most recent fiscal quarter not reflected in the registration statement; and Forms 8–K (§ 249.308 of this chapter) filed after the effectiveness of the registration statement, other than those solely relating to Item 5 of that form that are voluntary filings. Exhibits to such forms need not be provided except upon request. In lieu of delivering the quarterly or Form 8–K information as separate documents at no charge, the registrant may elect to include this information in any prospectus supplement delivered.

(iii) The supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K (§ 249.308 of this chapter) information set forth in paragraph (e)(2)(ii) of this section, shall be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale.

(iv) The supplemented prospectus containing any updating information and all the omitted information, including the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K (§ 249.308 of this chapter) information set forth in paragraph (e)(2)(ii) of this section, shall accompany or precede any confirmation of sale.

(3) For purposes of determining liability under the Act, the following shall be deemed to be a part of the registration statement as of the date of first use in connection with an offering of securities: all forms of prospectus filed with the Commission pursuant to § 230.424(b) in connection with the offering; and all Forms 10–Q (17 CFR 249.308a), 10–QSB (17 CFR 249.308b), and 8–K (17 CFR 249.308) (other than those solely relating to Item 5 of Form 8–K that are voluntary filings) filed before the date the offering is terminated. In addition, the Forms 10–Q, 10–QSB, and Forms 8–K that are deemed to be a part of the registration statement shall also be a part of the prospectus as of the date of first use.

Instructions to Paragraph (e)

1. If the registrant is a successor registrant, it shall be deemed to have met the conditions of paragraph (e)(1) if: (a) its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of the succession were substantially the same as those of the predecessor, or (b) all predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

2. Registrants who use Rule 430A(e) shall provide the undertakings of Item 512(a) of Regulation S-K or S-B (§§ 229.512(a) or 228.512(a) of this chapter) in lieu of those specified in Item 512(i) of Regulation S-K or S-B (§ 229.512(i) or § 228.512(i) of this chapter).

11. By amending § 230.434 by revising paragraph (b)(2) to read as follows:

§ 230.434 Prospectus delivery requirements in firm commitment underwritten offerings of securities for cash.

* * * * *

(b) * * *

(2) Such prospectus subject to completion and term sheet, together, are not materially different from the prospectus in the registration statement at the time of its effectiveness or an effective post-effective amendment thereto (including, in both instances, information deemed to be a part of the registration statement at the time of effectiveness pursuant to § 230.430A(b) or (e)); and

* * * * *

By the Commission.

Dated: February 20, 1997.

Margaret H. McFarland,

Deputy Secretary.

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