



## SEC Loosens “Quiet Period” Rules

### *Certain “Gun Jumping” Restrictions Eliminated*

#### ***New Communication Opportunities Available to Pre-IPO Companies***

On December 1, 2005 the Securities and Exchange Commission (SEC) significantly loosened restrictions on the Pre-IPO “Quiet Period” as part of a broader plan to ease regulations of new stock offerings. This allows companies entering into a registration process for an IPO or follow-on offering to disseminate more information to investors in the weeks before an offering using, for example, online updates to its prospectus. Company executives can also give interviews to the media and conduct “road shows” for a wide audience of prospective investors (including distributing through the internet), both of which were prohibited under previous regulations.

The “quiet period” or “gun jumping” rules of the SEC had always played a very significant role in the mechanics of a registration statement and, in particular, an IPO. The consequences for violating quiet period rules could be significant in that the SEC often chose to delay the effectiveness of a registration statement providing for a “cooling off” period. Some months ago, Google Inc.’s highly promoted IPO was delayed by virtue of a published interview by company executives in Playboy magazine. A similar enforcement of these rules occurred in Salesforce.com’s case when its CEO provided an interview which was published in the New York Times. In both cases, these high profile IPOs were delayed up to eight weeks from the initial offering date. For a less seasoned company this could spell the difference between success and failure.<sup>1</sup>

#### **Previous Rules**

The previous rules can be traced to the original enactment of the Securities Act of 1933 providing for full disclosure of a company’s operations,

financials, markets and risks. An important but secondary purpose was to provide for a deliberate process for the distribution of corporate securities, particularly IPOs, so that investment professionals and investors would have access to, and time to consider the disclosures contained within the prospectus and the registration statement.<sup>2</sup>

Therefore, companies planning to make a public offering of securities were not allowed to engage in any pre-offering publicity, or communication that could be seen as “conditioning the market” for the IPO or follow on offering, or otherwise promoting the company to potential investors. These restrictions began in advance of the offering, and concluded 25 days following the IPO.

Some of the changes to these ‘quiet period’ rules include:<sup>3</sup>

- “30 Day Safe Harbor”

Virtually all communications by a company more than 30 days prior to the time it files its registration statement with the SEC would be permitted if they do not reference a securities offering.

- “Well Known Seasoned Issuers”

Well known “seasoned issuers” or companies with a public float of at least \$700 million could make any written or oral communications prior to an offering of their securities.

- “All Public Companies”

All public companies would be allowed to continue publishing regularly released factual

business information, and *forward looking information*.

- “Private Companies”

Private companies and non reporting issuers would be permitted to continue publishing, in advance of an offering, factual business information that is regularly released to persons other than in their capacity as investors or potential investors.

### **Well Known Seasoned Issuers**

Acknowledging the role of technology, the SEC has noted that a broad range of large issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell side and buy side analysts that actively seek new information on a continual basis. Therefore the SEC has provided for a new category of issuer identified as “well known seasoned issuer” which would be permitted to benefit to the greatest degree from the current modifications. In this regard the issuer either:

- Must have outstanding a minimum \$700 million of common equity market capitalization held by non-affiliates; **or**
- Must have issued \$1 billion aggregate amount of debt securities in registered offerings during the past 3 years; and: neither the offering nor the issuer may be of a type that falls within the category of ineligible issuers or offerings.

### **Unseasoned Exchange Act Reporting Issuers**

An unseasoned issuer would be an issuer that is required to file reports pursuant to Sec. 13 or Sec. 15(d) of the Exchange Act but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities. Under the proposal an issuer that is filing Exchange Act reports voluntarily would be treated as a reporting unseasoned issuer.

Important new definitions incorporated into this proposal include “Written Communications” and “Graphic Communications”. Written communications are any communication that is written, printed, broadcast or a graphic communication such as live conference calls. Graphic communications include any form of

electronic media such as audio tapes, video tapes, facsimiles, CD-ROMs, electronic mail, internet web sites and computer networks and other forms of computer data compilation. Electronic road shows would be written communications within the scope of the definition due to its broadcast nature.

The permitted communications allowed during an offering would allow unseasoned reporting issuers to continue publication or dissemination of regularly released factual business and forward looking information at any time including around the time of the registered offering. A private company or a non reporting issuer would be able to publicize or disseminate factual business information that has been regularly released to persons other than in their capacity as investors or potential investors. Factual business information is defined as factual information about the issuer or some aspect about its businesses (advertisements or other information about the issuer’s products or services); factual information about business or financial developments with respect to the issuer; business notices; and factual information set forth in the Exchange Act reports.

In particular, the commission has noted that forward looking information should continue to be disseminated in the ordinary course of business in that “We do not believe that it is beneficial to investors or the markets to force reporting issuers to suspend their ordinary course communication of this information because they’re raising capital in a registered offering”. In this regard forward looking information is defined as:

- Projections of the issuer’s revenue, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;
- Statements about the issuer’s management plans and objectives for future operations, including plans or objectives related to the products or services of the issuer;
- Statements about the issuer’s future economic performance, including statements of the type contemplated by MD &A;
- Assumptions underlying or relating to any of the foregoing information.

Because non reporting issuers generally are not releasing information in connection with securities market activities in the regular course of business, such non reporting issuers would not have the ability to communicate forward looking information that is not contained within the prospectus.

### **30 Day Bright Line Exclusion**

An important definition with respect to the timing of permitted disclosures is the “30 day bright line exclusion from the prohibition on offers prior to filing a registration statement”.

This applies to all the issuers and provides a bright line time period ending 30 days prior to the filing of registration statement during which issuers may communicate a broad range of information without risk of violating any gun jumping provisions as long as it does not reference a securities offering.

It should be noted that the 30 day bright line exclusion does not apply to:

- Offerings by a blank check company;
- Offerings by a shell company; or
- Offerings of penny stock by an issuer.

### **Expansion of Rule 134**

Rule 134 was originally intended to provide an “identifying statement” which could be used to announce the filing of a registration statement. Such press releases were limited generally to the filing of the registration statement and the identification of the underwriters. The current rules broaden the ability of an issuer to include information about the company and the securities offered.

### **Free Writing Prospectuses and the Media**

A broad expansion of rules governing media relations is provided within the regulations. In particular, information released or disseminated to and by the media would be considered ‘*free writing prospectuses*’. “We recognize that the financial news media are a valuable source of information about issuers to the public at large. Issuers and offering participants use the media to disseminate

important information about themselves, such as through the use of press releases and interviews. The media plays an integral role, therefore, in providing information about issuers to the market. In general the commission would permit the continued use of media relations provided that it was not paid for.”

### **Electronic Road Shows**

The most common form of communication during the quiet period is the “road show” to market a pre-IPO’s offering to the public. Historically these presentations were conducted in person and limited to professional investors. Today due to advances in technology and media, road shows are being conducted or retransmitted over the internet. Under the new rules, such electronic communications would be considered a “free writing prospectus” and therefore be permitted in the case of all registered securities offerings, not just initial public offerings. These electronic road shows may be transmitted by the internet, videos, email, CD-ROM or any other media. In fact, “We believe broadly based electronic road shows treated as free writing prospectuses should be encouraged. Therefore, our proposals would provide that electronic road shows or its scripts would not be subject to filing except for material issuer information not previously included, if the issuer does the following:

- Make at least one version of a bona fide electronic road show readily available electronically to any potential investor at the same time as the electronic road show;
- Files any issuer free writing prospectus or material issuer information used at the electronic road show.”

### **Quiet Period Best Practices**

Under the new regulations, management and their advisors will have an expanded range of choices to make in connection with communication strategies preceding an IPO or follow-on offering. Impacted activities such as media relations, advertising and the use of the internet for product marketing and stock offering road shows will be opened up under the new regulations. These changes can significantly enhance the marketing of

a securities offering. Numerous studies confirm that consistent, high quality communications can increase demand for a pre IPO providing for pricing at the high range of the filing price and facilitating a robust trading aftermarket.

Important components of a communication plan reflective of the new rules include:

1. Design an Integrated Communication Platform:  
Create as early as possible a communication strategy and platform that integrates public relations, advertising, marketing, and information technology tools such as the internet. Define communications goals, objectives and timelines that provide clear guidelines to operating executives as to the new communication parameters. Balance in a fair way the competing challenges of continuous communications and the SEC's concern for market manipulation.

2. Implement a Corporate Disclosure Policy:  
As the company considers an equity offering, core communications principles should be put into place to support company objectives, and comply with securities laws. Limit the number of spokespersons talking to media and at conferences. Adapt a formal review and approval process for press releases, speeches and advertising. Review company web sites for inconsistent messages, or information in conflict with the new regulations. Maximize your communication opportunities under the new regulations.

3. Evaluate the Use of Internet Applications:  
Under the current rules, companies will be able to post road show presentations to their web site and/or broadcast such presentations to attract a broader range of investors. CD-ROM's can also be produced giving more dramatic visual demonstrations of products or services. Such technology can significantly expand the interest in an IPO, particularly in a lukewarm market.

4. Build Forward Looking and/or Outlook Sections into Communications for Follow-on Offerings:  
Increasingly, the SEC is encouraging forward looking information in the MD&A of 10-Q's and 10-K's. The rules encourage the continued use of such information during the registration and offering process. Carefully designed outlook

sections often have the effect of lowering the risk premium attached to under-followed small cap equities.

5. Build the Communication Team:  
The current rules place a premium on a sophisticated integration of communications, advertising, marketing and securities law. A team should be identified as early as possible including applicable management, outside investor relations experts and securities counsel so that all facets of the communications options are weighed for their ability to present the company in the strongest light.

**Conclusion**  
The new changes open up a broad range of new choices for management to consider in connection with an IPO or follow-on offering. The proper balance of communication strategies could significantly enhance the ability of a small cap IPO offering to be attractive to a broader range of investors, priced at the higher range of the filing, and transition into a more liquid aftermarket.



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<sup>1</sup> See Exchange Act Release No. 14, 699 (April 24, 1978) "Prohibition on Unnecessary Publicity" ("was designed

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to prevent an issuer from conditioning the market by arousing investor interest before a registration statement covering the securities proposed to be offered had been filed.”)

<sup>2</sup> In *r* Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843, 849 1959, (“one of the evils of a premature offer is its tendency to encourage the formation by the offeree of an opinion of the value of the securities before a registration statement and prospectus are filed”).

<sup>3</sup> Securities Offering Reform S.E.C. Release Nos. 33-8501;34-50624;IC-26645, 2005

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