

## Securities and Exchange Commission

## § 230.433

first use or publication thereof, 5 additional copies shall be filed in the exact form in which it was used or published.

(Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37; secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 6, 78 Stat. 565-568, 569, 570-574; secs. 1, 2, 82 Stat. 454; sec. 28(c), 84 Stat. 1435; secs. 1, 2, 84 Stat. 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; secs. 8 30, 31(c), 38(a), 54 Stat. 803, 836, 838, 841; 74 Stat. 201; 84 Stat. 1415; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78o(d), 78w(a), 80a-8, 80a-29, 80a-30(c), 80a-37(a))

[47 FR 11440, Mar. 16, 1982, as amended at 47 FR 54770, Dec. 6, 1982; 63 FR 13984, Mar. 23, 1998]

### § 230.432 Additional information required to be included in prospectuses relating to tender offers.

Notwithstanding the provisions of any form for the registration of securities under the Act, any prospectus relating to securities to be offered in connection with a tender offer for, or a request or invitation for tenders of, securities subject to either §240.13e-4 or section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)) must include the information required by §240.13e-4(d)(1) or §240.14d-6(d)(1) of this chapter, as applicable, in all tender offers, requests or invitations that are published, sent or given to security holders.

[64 FR 61451, Nov. 10, 1999]

### § 230.433 Conditions to permissible post-filing free writing prospectuses.

(a) *Scope of section.* This section applies to any free writing prospectus with respect to securities of any issuer (except as set forth in Rule 164 (§230.164)) that are the subject of a registration statement that has been filed under the Act. Such a free writing prospectus that satisfies the conditions of this section may include information the substance of which is not included in the registration statement. Such a free writing prospectus that satisfies the conditions of this section will be a prospectus permitted under section 10(b) of the Act for purposes of sections 2(a)(10), 5(b)(1), and 5(b)(2) of the Act and will, for purposes of considering it a prospectus, be deemed to be public, without regard to its method of use or distribution, because it is related to the public offering of securities that are the subject of a filed registration statement.

(b) *Permitted use of free writing prospectus.* Subject to the conditions of this paragraph (b) and satisfaction of the conditions set forth in paragraphs (c) through (g) of this section, a free writing prospectus may be used under this section and Rule 164 in connection with a registered offering of securities:

(1) *Eligibility and prospectus conditions for seasoned issuers and well-known seasoned issuers.* Subject to the provisions of Rule 164(e), (f), and (g), the issuer or any other offering participant may use a free writing prospectus in the following offerings after a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act:

(i) Offerings of securities registered on Form S-3 (§239.33 of this chapter) pursuant to General Instruction I.B.1, I.B.2, I.B.5, I.C., or I.D. thereof;

(ii) Offerings of securities registered on Form F-3 (§239.13 of this chapter) pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C. thereof;

(iii) Any other offering not excluded from reliance on this section and Rule 164 of securities of a well-known seasoned issuer; and

(iv) Any other offering not excluded from reliance on this section and Rule 164 of securities of an issuer eligible to use Form S-3 or Form F-3 for primary offerings pursuant to General Instruction I.B.1 of such Forms.

(2) *Eligibility and prospectus conditions for non-reporting and unseasoned issuers.* If the issuer does not fall within the provisions of paragraph (b)(1) of this section, then, subject to the provisions of Rule 164(e), (f), and (g), any person participating in the offer or sale of the securities may use a free writing prospectus as follows:

(i) If the free writing prospectus is or was prepared by or on behalf of or used or referred to by an issuer or any other offering participant, if consideration has been or will be given by the issuer or other offering participant for the dissemination (in any format) of any free writing prospectus (including any published article, publication, or advertisement), or if section 17(b) of the Act requires disclosure that consideration has been or will be given by the issuer or other offering participant for any activity described therein in connection with the free writing prospectus, then a registration statement relating to the offering must have been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act, including a price range where required by rule, and the free writing prospectus shall be accompanied or preceded by the most recent such prospectus; *provided, however*, that use of the free writing prospectus is not conditioned on providing the most recent such prospectus if a prior such prospectus has been provided and there is no material change from the prior prospectus reflected in the most recent prospectus; *provided further*, that after effectiveness and availability of a final prospectus meeting the requirements of section 10(a) of the Act, no such earlier prospectus may be provided in satisfaction of this condition, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier prospectus had been previously provided.

NOTES TO PARAGRAPH (b)(2)(i) OF RULE 433.  
1. The condition that a free writing pro-

spectus shall be accompanied or preceded by the most recent prospectus satisfying the requirements of section 10 of the Act would be satisfied if a free writing prospectus that is an electronic communication contained an active hyperlink to such most recent prospectus; and

2. A communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer or other offering participant is an offer by the issuer or such other offering participant as the case may be and is, if written, a free writing prospectus of the issuer or other offering participant.

(ii) Where paragraph (b)(2)(i) of this section does not apply, a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431 satisfies the requirements of section 10 of the Act, including a price range where required by rule. For purposes of paragraph (f) of this section, the prospectus included in the registration statement relating to the offering that has been filed does not have to include a price range otherwise required by rule.

(3) *Successors.* A successor issuer will be considered to satisfy the applicable provisions of this paragraph (b) if:

(i) Its predecessor and it, taken together, satisfy the conditions, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or

(ii) All predecessors met the conditions at the time of succession and the issuer has continued to do so since the succession.

(c) *Information in a free writing prospectus.* (1) A free writing prospectus used in reliance on this section may include information the substance of which is not included in the registration statement but such information shall not conflict with:

(i) Information contained in the filed registration statement, including any prospectus or prospectus supplement that is part of the registration statement (including pursuant to Rule 430B or Rule 430C) (§ 230.430B or § 230.430C) and not superseded or modified; or

(ii) Information contained in the issuer's periodic and current reports filed or furnished to the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated by reference into the registration statement and not superseded or modified.

(2)(i) A free writing prospectus used in reliance on this section shall contain substantially the following legend:

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

(ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site and provide the Internet address and the particular location of the documents on the Web site.

(d) *Filing conditions.* (1) Except as provided in paragraphs (d)(3), (d)(4), (d)(5), (d)(6), (d)(7), (d)(8), and (f) of this section, the following shall be filed with the Commission under this section by a means reasonably calculated to result in filing no later than the date of first use. The free writing prospectus filed for purposes of this section will not be filed as part of the registration statement:

(i) The issuer shall file:

(A) Any issuer free writing prospectus, as defined in paragraph (h) of this section;

(B) Any issuer information that is contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant (but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from that issuer information); and

(C) A description of the final terms of the issuer's securities in the offering or

of the offering contained in a free writing prospectus or portion thereof prepared by or on behalf of the issuer or any offering participant, after such terms have been established for all classes in the offering; and

(ii) Any offering participant, other than the issuer, shall file any free writing prospectus that is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

(2) Each free writing prospectus or issuer information contained in a free writing prospectus filed under this section shall identify in the filing the Commission file number for the related registration statement or, if that file number is unknown, a description sufficient to identify the related registration statement.

(3) The condition to file a free writing prospectus under paragraph (d)(1) of this section shall not apply if the free writing prospectus does not contain substantive changes from or additions to a free writing prospectus previously filed with the Commission.

(4) The condition to file issuer information contained in a free writing prospectus of an offering participant other than the issuer shall not apply if such information is included (including through incorporation by reference) in a prospectus or free writing prospectus previously filed that relates to the offering.

(5) Notwithstanding the provisions of paragraph (d)(1) of this section:

(i) To the extent a free writing prospectus or portion thereof otherwise required to be filed contains a description of terms of the issuer's securities in the offering or of the offering that does not reflect the final terms, such free writing prospectus or portion thereof is not required to be filed; and

(ii) A free writing prospectus or portion thereof that contains only a description of the final terms of the issuer's securities in the offering or of the offerings shall be filed by the issuer within two days of the later of the date such final terms have been established for all classes of the offering and the date of first use.

(6)(i) Notwithstanding the provisions of paragraph (d) of this section, in an offering of asset-backed securities, a free writing prospectus or portion thereof required to be filed that contains only ABS informational and computational materials as defined in Item 1101(a) of Regulation AB (§ 229.1101 of this chapter), may be filed under this section within the timeframe permitted by Rule 426(b) (§ 230.426(b)) and such filing will satisfy the filing conditions under this section.

(ii) In the event that a free writing prospectus is used in reliance on this section and Rule 164 and the conditions of this section and Rule 164 (which may include the conditions of paragraph (d)(6)(i) of this section) are satisfied with respect thereto, then the use of that free writing prospectus shall not be conditioned on satisfaction of the provisions, including without limitation the filing conditions, of Rule 167 and Rule 426 (§ 230.167 and § 230.426). In the event that ABS informational and computational materials are used in reliance on Rule 167 and Rule 426 and the conditions of those rules are satisfied with respect thereto, then the use of those materials shall not be conditioned on the satisfaction of the conditions of Rule 164 and this section.

(iii) If a free writing prospectus used in an offering of asset-backed securities in reliance on this section and Rule 164 includes the specific address of or a hyperlink to an Internet Web site containing static pool information and is filed in accordance with this paragraph (d), the static pool information relating to the asset-backed securities offering at that specific address is included in the free writing prospectus, and the filing including such address or hyperlink satisfies the filing conditions under this section.

(7) The condition to file a free writing prospectus or issuer information pursuant to this paragraph (d) for a free writing prospectus used at the same time as a communication in a business combination transaction subject to Rule 425 (§ 230.425) shall be satisfied if:

(i) The free writing prospectus or issuer information is filed in accordance with the provisions of Rule 425,

including the filing timeframe of Rule 425;

(ii) The filed material pursuant to Rule 425 indicates on the cover page that it also is being filed pursuant to Rule 433; and

(iii) The filed material pursuant to Rule 425 contains the information specified in paragraph (c)(2) of this section.

(8) Notwithstanding any other provision of this paragraph (d):

(i) A road show for an offering that is a written communication is a free writing prospectus, provided that, except as provided in paragraph (d)(8)(ii) of this section, a written communication that is a road show shall not be required to be filed; and

(ii) In the case of a road show that is a written communication for an offering of common equity or convertible equity securities by an issuer that is, at the time of the filing of the registration statement for the offering, not required to file reports with the Commission pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934, such a road show is required to be filed pursuant to this section unless the issuer of the securities makes at least one version of a *bona fide* electronic road show available without restriction by means of graphic communication to any person, including any potential investor in the securities (and if there is more than one version of a road show for the offering that is a written communication, the version available without restriction is made available no later than the other versions).

NOTE TO PARAGRAPH (d)(8): A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written. If the road show is written and not required to be filed, such a simultaneous communication is also not required to be filed. Otherwise, a written communication that is an offer contained in a separate file from a road show, whether or not the road show is a written communication, or otherwise transmitted separately

from a road show, will be a free writing prospectus subject to any applicable filing conditions of paragraph (d) of this section.

(e) *Treatment of information on, or hyperlinked from, an issuer's Web site.* (1) An offer of an issuer's securities that is contained on an issuer's Web site or hyperlinked by the issuer from the issuer's Web site to a third party's Web site is a written offer of such securities by the issuer and, unless otherwise exempt or excluded from the requirements of section 5(b)(1) of the Act, the filing conditions of paragraph (d) of this section apply to such offer.

(2) Notwithstanding paragraph (e)(1) of this section, historical issuer information that is identified as such and located in a separate section of the issuer's Web site containing historical issuer information, that has not been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering and that has not otherwise been used or referred to in connection with the offering, will not be considered a current offer of the issuer's securities and therefore will not be a free writing prospectus.

(f) *Free writing prospectuses published or distributed by media.* Any written offer for which an issuer or any other offering participant or any person acting on its behalf provided, authorized, or approved information that is prepared and published or disseminated by a person unaffiliated with the issuer or any other offering participant that is in the business of publishing, radio or television broadcasting or otherwise disseminating written communications would be considered at the time of publication or dissemination to be a free writing prospectus prepared by or on behalf of the issuer or such other offering participant for purposes of this section subject to the following:

(1) The conditions of paragraph (b)(2)(i) of this section will not apply and the conditions of paragraphs (c)(2) and (d) of this section will be deemed to be satisfied if:

(i) No payment is made or consideration given by or on behalf of the issuer or other offering participant for the written communication or its dissemination; and

(ii) The issuer or other offering participant in question files the written communication with the Commission,

and includes in the filing the legend required by paragraph (c)(2) of this section, within four business days after the issuer or other offering participant becomes aware of the publication, radio or television broadcast, or other dissemination of the written communication.

(2) The filing obligation under paragraph (f)(1)(ii) of this section shall be subject to the following:

(i) The issuer or other offering participant shall not be required to file a free writing prospectus if the substance of that free writing prospectus has previously been filed with the Commission;

(ii) Any filing made pursuant to paragraph (f)(1)(ii) of this section may include information that the issuer or offering participant in question reasonably believes is necessary or appropriate to correct information included in the communication; and

(iii) In lieu of filing the actual written communication as published or disseminated as required by paragraph (f)(1)(ii) of this section, the issuer or offering participant in question may file a copy of the materials provided to the media, including transcripts of interviews or similar materials, provided the copy or transcripts contain all the information provided to the media.

(3) For purposes of this paragraph (f) of this section, an issuer that is in the business of publishing or radio or television broadcasting may rely on this paragraph (f) as to any publication or radio or television broadcast that is a free writing prospectus in respect of an offering of securities of the issuer if the issuer or an affiliate:

(i) Is the publisher of a *bona fide* newspaper, magazine, or business or financial publication of general and regular circulation or *bona fide* broadcaster of news including business and financial news;

(ii) Has established policies and procedures for the independence of the content of the publications or broadcasts from the offering activities of the issuer; and

(iii) Publishes or broadcasts the communication in the ordinary course.

(g) *Record retention.* Issuers and offering participants shall retain all free writing prospectuses they have used,

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and that have not been filed pursuant to paragraph (d) or (f) of this section, for 3 years following the initial *bona fide* offering of the securities in question.

NOTE TO PARAGRAPH (g) OF § 230.433. To the extent that the record retention requirements of Rule 17a-4 of the Securities Exchange Act of 1934 (§ 240.17a-4 of this chapter) apply to free writing prospectuses required to be retained by a broker-dealer under this section, such free writing prospectuses are required to be retained in accordance with such requirements.

(h) *Definitions.* For purposes of this section:

(1) An *issuer free writing prospectus* means a free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an asset-backed issuer, prepared by or on behalf of a depositor, sponsor, or servicer (as defined in Item 1101 of Regulation AB) or affiliated depositor or used or referred to by any such person.

(2) *Issuer information* means material information about the issuer or its securities that has been provided by or on behalf of the issuer.

(3) A written communication or information is prepared or provided by or on behalf of a person if the person or an agent or representative of the person authorizes the communication or information or approves the communication or information before it is used. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.

(4) A *road show* means an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and includes discussion of one or more of the issuer, such management, and the securities being offered; and

(5) A *bona fide electronic road show* means a road show that is a written

communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications.

NOTE TO § 230.433. This section does not affect the operation of the provisions of clause (a) of section 2(a)(10) of the Act providing an exception from the definition of "prospectus."

[70 FR 44815, Aug. 3, 2005, as amended at 71 FR 7413, Feb. 13, 2006]

### WRITTEN CONSENTS

#### § 230.436 Consents required in special cases.

(a) If any portion of the report or opinion of an expert or counsel is quoted or summarized as such in the registration statement or in a prospectus, the written consent of the expert or counsel shall be filed as an exhibit to the registration statement and shall expressly state that the expert or counsel consents to such quotation or summarization.

(b) If it is stated that any information contained in the registration statement has been reviewed or passed upon by any persons and that such information is set forth in the registration statement upon the authority of or in reliance upon such persons as experts, the written consents of such persons shall be filed as exhibits to the registration statement.

(c) Notwithstanding the provisions of paragraph (b) of this section, a report on unaudited interim financial information (as defined in paragraph (d) of this section) by an independent accountant who has conducted a review of such interim financial information