using short-form registration, physical delivery of most issuer-specific information is not required for offerings by such persons.<sup>57</sup> Instead, such information is incorporated by reference into the prospectus from the issuer's Exchange Act reports. Delivery of such information is therefore accomplished by publication of such information through filing with the Commission. Thus, the traditional final prospectus that is physically delivered by shortform issuers contains primarily "offering-specific" information as to which the efficient market theory generally has not been applied, including a description of: the terms of the securities offered, risk factors specific to the registered transaction, the intended use of offering proceeds, and the plan of distribution for the securities. The balance between information physically delivered to investors and information published would be altered by the proposed rule.

a. Short-Form, Non-Shelf Registration. The proposed rule would permit participants in non-shelf offerings using short-form registration to comply with their delivery obligations by distributing a preliminary prospectus and an abbreviated supplementing memorandum. The abbreviated supplementing memorandum would be required to contain: (i) a fair and accurate summary of the description of securities; <sup>58</sup> and (ii) Item 11 information, to the extent not disclosed in the preliminary prospectus or the registrant's Exchange Act reports. <sup>59</sup>

Under the proposed rule, it is likely that the preliminary prospectus would contain the bulk of offering-specific disclosure that would have been physically delivered in a traditional final prospectus.<sup>60</sup> Thus, offering-

specific information physically delivered would continue to surpass offering-specific information published in those offerings. Where Rule 430A is relied upon, certain price-related information that may be excluded at effectiveness also would not be in the preliminary prospectus. Such information generally would not be included in the abbreviated supplementing memorandum, but it would be on file with the Commission prior to the time confirmations are sent. The price itself will be set forth in the confirmation.

b. Short-Form Delayed Shelf Registration. The proposed rule would permit participants in delayed shelf offerings using short-form registration to comply with their delivery obligations by distributing a base prospectus and an abbreviated supplementing memorandum. As in the case of nonshelf offerings, the abbreviated supplementing memorandum would be required to contain: (i) a fair and accurate summary of the description of securities; and (ii) Item 11 information, to the extent not disclosed in the base prospectus or the registrant's Exchange Act reports. 61

Traditionally, the final prospectus delivered to investors in delayed shelf offerings would include information set forth in both the base prospectus and a prospectus supplement.62 Information in the prospectus supplement would no longer be delivered physically to investors, except to the extent it is disclosed pursuant to the abbreviated supplementing memorandum. For example, use of proceeds, syndicate and plan of distribution information and a full description of securities need not be included in the abbreviated supplementing memorandum. The proposal would require, however, that the prospectus supplement in such

offerings be filed with the Commission by the time any confirmation is sent or given to investors.<sup>63</sup> In addition, such prospectus supplement would be deemed a part of the registration statement upon filing with the Commission.

As proposed, Rule 434 would not apply to offerings pursuant to the Commission's shelf registration rules other than delayed shelf offerings made by persons using short-form registration.<sup>64</sup> It appears that other types of shelf offerings would not be contemplated within the parameters of firm commitment underwritten offerings for cash. Comment is requested, however, with respect to whether any other type of shelf offerings, including secondary offerings,65 could take place in connection with a firm commitment underwritten offering for cash. If so, should the proposed rule be extended to such offerings?

c. Variations from the SIA Proposal. Under the SIA Proposal, in the case of short-form delayed shelf offerings, publication of prospectus information would only occur after the time confirmations had been sent, since the prospectus supplement would not be required to be filed with the Commission until two business days after the earlier of pricing or first use. The proposed rule does not incorporate this aspect of the SIA Proposal because delaying the availability of disclosure to a time after delivery of the confirmation appears inconsistent with Sections 5(b) and 2(10)(a) of the Securities Act and may not be particularly useful to investors.

For non-shelf offerings using shortform registration, the proposed rule also
diverges from the SIA Proposal in that
it would require delivery of a
preliminary prospectus, rather than just
an abbreviated supplementing
memorandum. Under the SIA Proposal,
the abbreviated supplementing
memorandum would include only a
summary of Item 11 information. Thus,
the SIA Proposal essentially would not
require physical delivery of offeringspecific information. The proposed rule
would require physical delivery of
certain offering-specific disclosure.

Comment is requested with respect to whether the proposed rule strikes the

<sup>&</sup>lt;sup>57</sup>To be eligible to use short-form registration for a primary offering, an issuer must have a public float of \$75 million and must have been reporting with the Commission for one year. See General Instructions I.A.3. and I.B.1. to Form S–3 and General Instructions I.A.1. and I.B.1. to Form F–3.

<sup>&</sup>lt;sup>58</sup> This disclosure would be a fair and accurate summary of that which is required under Item 202 of Regulation S–K, 17 CFR 229.202.

<sup>59</sup> The abbreviated supplementing memorandum would be required to be filed with the Commission pursuant to Rule 424(b)(1) under the Securities Act, 17 CFR 230.424(b)(1) (or, if the disclosure represents a fundamental change in the information contained in the registration statement, in a post-effective amendment declared effective prior to the time a confirmation is sent or given). Pursuant to Rule 430A, the abbreviated supplementing memorandum would be deemed to be a part of the registration statement at the time it became effective.

<sup>&</sup>lt;sup>60</sup>The information currently required to be physically delivered in a short-form final prospectus would consist of disclosure required by Items 501–510 and 202 of Regulation S–K, 17 CFR 229.502–229.510 and 229.202, as well as Item 11 information.

Section 5(b)(1) of the Securities Act, 15 U.S.C. § 77e(b)(1), prohibits transmission of any prospectus relating to any security with respect to which a registration statement has been filed unless the prospectus meets the requirements of Section 10 of the Securities Act, 15 U.S.C. 77j.

<sup>&</sup>lt;sup>61</sup> As proposed, an abbreviated supplementing memorandum would be filed with the Commission in accordance with Rule 424(b)(1), 17 CFR 230.424(b)(1), and would be deemed a part of the registration statement pursuant to Rule 430A. If the disclosure represents a fundamental change in the information contained in the registration statement, however, a post-effective amendment rather than a filling pursuant to Rule 424(b)(1) would be required. See proposed Rule 434(c)(3), 17 CFR 230.434(c)(3).

<sup>62</sup> The base prospectus omits information that is not yet known with respect to the terms of a specific securities offering. The omitted information is included in the prospectus supplement filed after the effective date of the registration statement. The base prospectus and prospectus supplement, which are physically delivered together, comprise the final prospectus.

<sup>&</sup>lt;sup>63</sup> See proposed Rule 424(e), 17 CFR 230.424(e). Prospectus supplements for shelf offerings generally are required to be filed with the Commission two or more business days after the earlier of pricing or first use. See Rule 424(b)(2), 17 CFR 230.424(b)(2).

<sup>&</sup>lt;sup>64</sup> See proposed Rule 434(b) and (c), 17 CFR 230.434(b) and (c).

<sup>&</sup>lt;sup>65</sup> These offerings are described in Rule 415(a)(1)(i) under the Securities Act, 17 CFR 230.415(a)(1)(i).