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SECURITIES LAW

ALERT

MAY 29, 2007

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SEC Proposes Regulatory and Offering Relief for Smaller Companies

At its open meeting held on May 23, 2007, the Securities and Exchange Commission (SEC) proposed new rules for public comment that, if adopted, will bring about meaningful changes in reporting and offering requirements and exemptions for smaller companies. In addition, the proposed changes to Rule 144 under the Securities Act of 1933, as amended, would affect all reporting companies that issue restricted securities. SEC Commissioner Christopher Cox noted in his remarks at the open meeting that the SEC intends the proposed rules “to alleviate unnecessary burdens on smaller companies and to facilitate capital formation for those companies...given the historic importance of small businesses in the United States as drivers of economic activity, innovation and job creation.”

The proposals are outlined in a press release issued by the SEC ([available here](#)) and some of the more noteworthy proposals are described below.

Expanding Eligibility for Use of Forms S-3 and F-3

Under the proposed rules, companies with less than \$75 million in public float would be able to register primary offerings of their securities on Form S-3 or F-3, provided that they:

- do not sell more than the equivalent of 20% of their public float in primary offerings registered on Form S-3 or Form F-3, as applicable, over any one-year period;
- meet the other eligibility conditions for the use of Form S-3 or Form F-3; and
- are not “shell companies” and have not been shell

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companies for at least 12 months before filing the registration statement.

Currently, only companies with greater than \$75 million in public float are able to register primary offerings of their securities on Form S-3 or Form F-3.

Expanding Regulation D Offerings

The proposals provide for a new Regulation D offering exemption, under what would be new Rule 507, that would permit sales to a new category of qualified purchasers, and in which issuers could engage in limited amounts of advertising. The proposed rules would also:

- add an “investments-owned” standard to the current “total assets” and “net worth” standards under which investors can qualify as “accredited” in other Regulation D offerings;
- adjust the definition of “accredited investor” in Regulation D to account for inflation, with the first adjustments to occur in five years; and
- shorten the length of time for the integration safe harbor under Regulation D, which currently provides that two Regulation D offerings will not be integrated with one another if they occur more than 6 months apart, from 6 months to 90 days.

In addition, the SEC’s Form D, currently required to be filed in paper form to report Regulation D offerings, would be required to be filed electronically under the EDGAR system.

Reducing Rule 144 Holding Periods

Under the proposals, resales of restricted securities by non-affiliates of *reporting* companies would be permitted after a 6-month holding period (which would be extended to 12 months if the stockholder engaged in certain hedging transactions). Resales of restricted securities by non-affiliates of *non-reporting* companies would be permitted after a 12-month holding period, with no additional requirements.

Simplifying Smaller Company Reporting Requirements

The proposals would also eliminate Regulation S-B and all of the reporting and registration forms currently prescribed for small business issuers (such as the registration statement on Form SB-2,

the annual report on Form 10-KSB and the quarterly report on Form 10-QSB). Reporting companies that currently file as small business issuers and non-accelerated filers would be merged into a category of issuer called “smaller reporting companies” and would report instead using the disclosure requirements of Regulation S-K.

Exemption of Employee Stock Options Issued as Compensation from Exchange Act Registration

If adopted, the proposed rules would also create an exemption from registration under the Securities Exchange Act of 1934, as amended, for non-reporting issuers for stock options issued to employees as compensation under equity compensation plans. This exemption would allow a private company to avoid the concern that it would inadvertently become a reporting entity in the event that it issues stock options to more than 500 employees.

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When the text of the proposed rules is available, we will supplement this client alert with further details on the proposals. In the meantime, please contact Megan N. Gates (617.348.4443, MNGates@mintz.com) or the Mintz Levin attorney with whom you work if you have any questions regarding the proposals.

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