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Allen Matkins

Corporate Alert



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SEC Adopts New Rules to Assist Smaller Public Companies

The Securities and Exchange Commission (SEC) recently adopted several new rules to assist smaller public companies with accessing the capital markets and meeting public disclosure obligations. These rules could significantly reduce compliance costs to smaller public companies and allow for faster, more efficient public securities offerings.

This Alert affects public companies with public floats of less than \$75 million.

Changes to Eligibility for Form S-3

The SEC recently adopted revisions to the "Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3." These changes allow both domestic and foreign companies with public floats of less than \$75 million to register a primary offering using Form S-3, as long as the company meets certain requirements. The rules became effective on January 28, 2008.

Form S-3 requires substantially less disclosure than a comparative filing on Form S-1 or S-2. In addition, issuers that qualify to use Form S-3 can make use of the shelf-registration rules. This permits smaller public companies to register securities offerings prior to planning any specific offering and, once the registration statement is effective, offer securities in one or more tranches without waiting for further SEC action. This significantly increases a company's ability to raise capital quickly in the public markets without waiting to respond to SEC comments. In addition, the use of Form S-3 allows for "forward incorporation" which allows companies to automatically incorporate by reference future Exchange Act reports (i.e. 10-Ks and 10-Qs) into the registration statement. Companies which are ineligible to use Form S-3 must either file a post-effective amendment to the registration statement or file a new registration statement to update information contained in registration statements. These changes will enable smaller public companies to access the capital markets more quickly and more efficiently.

Several conditions would be imposed on the ability to use Form S-3 for smaller public companies. These include:

- **Must Meet Other Requirements of Form S-3.** A smaller public company will be eligible only if it meets the other requirements of Form S-3, including having timely filed all Exchange Act reports for the past twelve months.
- **Must Not Be a Shell Company.** The company must not be, or have been in the immediately preceding twelve months, a shell company. This proposed change does not affect the eligibility of shell companies with public floats of more than \$75 million.
- **Cannot Sell More than 1/3 of Public Float.** The final condition a small company must meet in order to register using Form S-3 is that it cannot sell more than one third of its public float in primary offerings over any twelve month period. If a company's public float has increased, then it will be permitted to sell more securities than it could have earlier.

For a detailed description of these revisions, please click here:

 [Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3](#)

Changes to Smaller Company Reporting

The SEC recently adopted a series of amendments to its existing rules that allow companies with a public float of less than \$75 million, up from the previous limit of \$25 million, or companies without a calculable float with revenues of less than \$50 million in the previous year to qualify for the smaller company disclosure requirements. The rules become effective on February 4, 2008.

The new rules combine for most purposes the "small business issuer" and "non-accelerated filer" categories of smaller companies into a single category of "smaller reporting companies." The reduced disclosure reporting requirements available to these smaller companies apply to companies filing registration statements covering offerings of securities under the Securities Act and companies required to file annual and other reports under the Exchange Act. In addition, these disclosure requirements will now be integrated into regulation S-K allowing for the use of regular "S" forms, in lieu of the current "SB" forms. This should eliminate much of the stigma certain companies feel attaches to the current small public company disclosure regime.

The highlights of the rule amendments are as follows:

- Moves 12 non-financial scaled disclosure item requirements from Regulation S-B into Regulation S-K. The remaining 24 item requirements of Regulation S-B are substantially the same as their corresponding Regulation S-K requirements.
- Moves the scaled and amended financial statement requirements in Item 310 of Regulation S-B into new Article 8 of Regulation S-X, requiring two years of comparative balance sheet data in annual financial statements.
- Permits smaller public reporting companies to elect to comply with scaled financial and non-financial disclosure on an item-by-item or "a-la-carte" basis.
- Eliminates current SB forms.
- Permits all foreign companies to qualify as "smaller public companies" if they otherwise qualify, choose to file on domestic company forms and provide financial statements prepared in accordance with U.S. GAAP.

Please click here for a detailed description of these amendments:



[Smaller Reporting Company Regulatory Relief and Simplification](#)

If you would like more information regarding this Alert or desire assistance in complying with the SEC's public disclosure requirements, please contact one of Allen Matkins' Securities Group attorneys.

Allen Matkins Leck Gamble Mallory & Natsis LLP has substantial experience in securities laws matters, especially in representing public companies with regard to their public disclosure requirements, and we would be pleased to assist you with any of your questions or filing needs.

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